



Neutral Citation Number: [2024] EWHC 688 (Admin)

Case No: AC-2024-LON-000986

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/03/2024

Before :

THE HON. MRS JUSTICE STEYN DBE

Between :

DEAN FRANCIS	<u>Claimant</u>
- and -	
DIRECTOR OF PUBLIC PROSECUTIONS	<u>Defendant</u>
- and -	
MICHAEL HARDING	<u>Interested Party</u>

Jesse Nicholls (instructed by Bhatt Murphy Solicitors) for the Claimant
Louis Mably KC (instructed by Crown Prosecution Service) for the Defendant
The Interested Party did not appear and was not represented

Hearing date: 22 March 2024

Approved Judgment

This judgment was handed down remotely at 10.00am on 25 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....
THE HON. MRS JUSTICE STEYN DBE

Mrs Justice Steyn DBE :

Introduction

1. The claimant, Dean Francis, was seriously injured by the interested party, Michael Harding, a serving police officer, in an incident on 15 May 2018. The defendant is the Director of Public Prosecutions, against whom a claim for judicial review is brought seeking to challenge a decision of the Crown Prosecution Service (‘the CPS’) to “*offer no evidence*” against the interested party in the Crown Court, in respect of an indictment charging him with one count of inflicting grievous bodily harm, contrary to s.20 of the Offences Against the Person Act 1861 (‘s.20 GBH’) and one count of causing serious injury by dangerous driving, contrary to s.1A of the Road Traffic Act 1988 (‘s.1A dangerous driving’), and related decisions. Both counts concerned the incident on 15 May 2018.
2. This is the claimant’s application to maintain an interim injunction granted by Linden J at an out of hours (without notice) hearing on Monday 18 March 2024. The injunction imposed provides:

“Until further order, the Defendant shall be prohibited from communicating to the Crown Court any decision to stop the case/offer no evidence against the Interested Party in case number CPS 01CC1048018 (‘the decision’).”
3. At this return date hearing, the claimant seeks an order maintaining that injunction,

“until the exhaustion by the Applicant, of (a) the Applicant’s entitlement to seek a review (under the Respondent’s Victims’ Right to Review scheme) of the decision (made by Mr Robert Hutchinson) dated 18 March 2024; and (b) any subsequent application for judicial review (including related appeals) by the Applicant against any further decision of the Respondent made under the Victims’ Right to Review scheme.”
4. At this hearing, the claimant has been represented by Mr Jesse Nicholls and Mr Louis Mably KC represents the defendant. I am most grateful to them, and those instructing them, for the admirable presentation of the case, both in writing and orally, on short notice. The interested party has not taken part in these proceedings.

The facts and procedural history

5. Mr Michael Oswald, the claimant’s solicitor, has given a statement dated 18 March 2024, and Mr Robert Hutchinson, an employed barrister employed in the Complex Casework Unit (CCU) of the CPS has given a statement dated 20 March 2024. I have taken the facts and procedural history from those statements.
6. Mr Hutchinson states at paragraph 5:

“The charges against Mr Harding arise out of an incident on 15 May 2018. Mr Harding was a serving police officer who, at the material time, was acting in the exercise of his duties. Whilst driving an unmarked police car, he acted in an operation to

conduct a stop of [a] minicab in which the Claimant was travelling, the Claimant being a suspect in connection with serious offending. During the operation, the Claimant got out of the minicab and ran across the road in front of, and diagonally towards, Mr Harding's oncoming car. Mr Harding swerved slightly to the left and then hard to the right without braking. The result was that Mr Harding's car collided with the Claimant at a speed of 12mph, as the Claimant reached the pavement. The Claimant was knocked over a set of railings and dropped into a basement void. He sustained injuries including fractures to the spine and a collapsed lung."

7. Mr Oswald has given more details of the injuries suffered by the claimant, explaining that they include "*fractures to his vertebrae, a subgaleal haematoma, a collapsed lung, and an injury to his right knee*". Mr Oswald states that CPS decided to charge Mr Harding with the two offences I have identified, that is s.20 GBH and s.1A dangerous driving, in December 2022. Mr Harding's first appearance before Westminster Magistrates' Court took place on 13 December 2022, at which point he pleaded not guilty. He was due to stand trial at Southwark Crown Court in May 2024.
8. Mr Hutchinson states that he became the reviewing lawyer in the case of *R v Harding* on 24 November 2023. He says:

"On 16 February 2024, having reviewed the case in light of evidence that was not available at the time of the original charging decision, I decided that the evidential test in the Code for Crown Prosecutors was no longer satisfied in respect of either charge, and that accordingly the appropriate course was to offer no evidence. That decision was approved at Deputy Chief Crown Prosecutor level on 22 February 2024. The decision was communicated to the Claimant in a letter dated 18 March 2024."
9. Mr Oswald's statement explains that he received a call at around 1.30pm on 18 March 2024 from Mr Steve Foxley of the Independent Office for Police Conduct ('the IOPC'). Mr Foxley informed Mr Oswald that he had been given notice by the CPS that they intended to offer no evidence against DS Harding in light of expert evidence that had been served by him in his defence. Mr Foxley stated that a hearing at which the CPS would offer no evidence was due to take place the following day. Mr Foxley explained that he had a letter from the CPS addressed to the claimant, which Mr Oswald asked him to send immediately. By 2.17pm Mr Oswald had still not received the letter, so he sent an urgent email to Mr Foxley requesting it. Mr Foxley responded at 3.41pm attaching a copy of the letter from Mr Hutchinson of the CPS to the claimant dated 18 March 2024. Mr Foxley's email said, "*Apologies for not sending immediately. I was asked to hold off while a change was made.*" Mr Oswald first saw the email and letter shortly after 4pm on 18 March when he returned to his desk following a meeting.

The CPS's letter of 18 March 2024

10. The letter from Mr Hutchinson stated:

“Regrettably, I must inform you that I have had to take the decision that the case both for causing you injury by dangerous driving, subject to section 1A of the Road Traffic Act 1988 and causing you grievous bodily harm, subject to section 20 of the Offences Against the Person Act 1961 cannot go any further and must be stopped.

The reason for this is due to the nature of the legal test I must apply when deciding whether I can bring the case, namely whether or not there is a realistic prospect of conviction, and in this case, that test is no longer met.

...

Why I have stopped the case:

When the case was originally reviewed the evidence suggested that the defendant had deliberately hit you with his car, which the reviewing lawyer decided amounted to dangerous driving and assault. However, the defence obtained an expert report which concluded, due to the split second that the defendant had to react, together with the angle and location you ran from, that the defendant swerved away from where you initially came and could have been trying to avoid hitting you. In response to the defence expert report, we asked the Independent Office for Police Conduct (IOPC) to obtain expert opinion on the defence report.

The IOPC instructed two experienced police collision investigators to review the report and provide statements of their conclusions. When we received their statements, they agreed with the defence report. We reviewed the case again and concluded we could no longer prove that the defendant had deliberately tried to hit you with his car. This meant that there was no longer a realistic prospect of conviction and we had to stop the case.

The decision to stop the case will be told to the court by a CPS lawyer at a hearing on a date to be confirmed this week and the court will then formally find the defendant not guilty. This is legally called ‘offering no evidence’.

... If you are unhappy with the decision to stop the case, you can have my decision reviewed by another CPS lawyer. This is called the Victims’ Right to Review scheme (VRR). More information on this scheme is available in the attached leaflet. You can also contact the VLU team, who will explain the scheme to you. Please note that if you request a review and the other lawyer disagrees with my decision, we will be unable to restart the case, but we will share and adopt any learning from it.”

11. On receipt of the letter, Mr Oswald made urgent arrangements to take instructions from the claimant which resulted in an urgent out of hours application being made for an interim injunction. The claimant submitted an application for urgent consideration (Form N463), a draft order, and the statement of Mr Oswald to which I have referred, exhibiting the letter of 18 March 2024 and the emails exchanged by Mr Oswald and Mr Foxley the same day. Although the claimant's solicitor tried to contact the CPS, he was unable to make contact.

Linden J's Order

12. The application was determined by Linden J at 10.25pm on 18 March 2024 having heard Counsel for the claimant. Linden J granted an interim injunction in the terms identified in paragraph above and he gave directions for the return date hearing on Friday 22 March 2024.
13. His reasons, upon which the claimant relies, were given in the following terms:

“It is understood that the Defendant intends to offer no evidence in the prosecution of the Interested Party at a hearing in the Crown Court tomorrow. The Claimant's application to prevent the Defendant from doing so comes very late in the day but apparently through no fault of his and largely, if not entirely, as a result of the Defendant's (surprisingly hasty) approach to giving him notice of this decision.

On the information currently available it seems to me that there is a triable issue as to whether correct and/or adequate consideration has been given to prosecuting the Interested Party for causing serious injury by dangerous driving contrary to section 1A of the Road Traffic Act 1988. Moreover, it is not clear why so little notice was given to the Claimant of the decision to offer no evidence, especially when his rights as a victim (VRR) are taken into account. There may be other grounds for complaint but at this stage the Claimant has not seen the evidence to which the Defendant refers in the CPS letter of 18 March 2024 or had an opportunity to understand what has happened better.

In any event, as I understand it the investigation and proceedings in this matter have been ongoing for some time. The trial is not due to take place until May and consideration is still being given to prosecution of the Interested Party for offences in connection with the same incident including for perverting the course of justice. I am not aware of any prejudice at all to the Defendant if the proposed notification of the decision to the Crown Court is delayed for a short period of time and any prejudice to the Interested Party appears negligible. On the other hand the effect will be irreversible so far as the Claimant is concerned and the prejudice to him and to the public interest may therefore be significant if relief is refused.”

Documents filed since Linden J's Order

14. The Claim Form is dated 20 March 2024 and was issued on 21 March 2024. The details of the decisions the claimant seeks to have judicially reviewed are identified in section 3.1 and the Appendix to the Claim Form as:

“1. The decision dated 18 March 2024 to stop the prosecution against DS Michael Harding in case number CPS 01CC1048018 for offences of causing injury by dangerous driving subject to section 1A of the Road Traffic Act 1988, and causing grievous bodily harm subject to section 20 of the Offences Against the Person Act 1961.

2. The decision dated 18 March 2024 that the Claimant is entitled to seek a review under the Victims' Right of Review (VRR) scheme which will not be capable of affecting the outcome/resulting in the prosecution at (1) above continuing.

3. The content, operation, practice and/or application of the VRR scheme in identifying a VRR review in the Claimant's case that will not be capable of affecting the outcome/resulting in the prosecution at (1) above continuing.”

15. Sections 5 and 6 of the Claim Form state that the claimant is not yet in a position to set out the statement of facts or grounds on which he relies in support of his claim for judicial review. Section 6 of the Claim Form continues:

“... This claim has been issued in order to obtain urgent interim relief. An application for interim relief was issued on 18 March 2024 as an application for interim relief before starting proceedings. That was done in circumstances where – as recorded in the ‘reasons’ set out in the order of Mr Justice Linden dated 18 March 2024 – the Claimant was not in a position to issue a claim for judicial review, and considered it premature to do so. The ‘pre-action’ interim application has yet to be determined and a hearing has been listed to take place on Friday 22 March 2024, which is the return date for the application. Given the terms of the relief sought the Claimant considered it appropriate to await the determination of that application prior to the issue of any claim. However, the Claimant has today been requested by the Court to file a claim form and these proceedings are being issued accordingly.”

16. In accordance with the directions given by Linden J, the defendant filed and served, on 20 March 2024, (i) a written response to the claimant's application for an injunction, and (ii) Mr Hutchinson's statement, indicating the grounds on which the CPS opposes the application. The claimant and the defendant exchanged skeleton arguments at 4pm on 21 March 2024.

Mr Hutchinson's statement

17. In his statement, Mr Hutchinson states:

“6. The prosecution evidence initially included CCTV footage, eye-witness accounts and, importantly, expert evidence from two police collision investigation officers, Duncan Swallow and Stephen Perrett, who considered the dynamics of Mr Harding’s driving. In relation to Mr Harding’s claim that he had swerved right in an attempt to avoid the Claimant, the conclusion was that Mr Harding was not telling the truth and had steered to the right in order to block off Mr Francis’ escape. On this basis, the prosecution case was that Mr Harding had deliberately driven at the Claimant, and that deliberate act founded the charges on the indictment.

7. On 8 November 2023, an expert report prepared by Jonathan Webb, a forensic collision investigator, was served by the defence. The essence of Mr Webb’s opinion was that on a proper analysis of the accident dynamics, in particular having regard to a frame-by-frame analysis of the CCTV evidence, Mr Harding had not driven at the Claimant but had swerved to avoid him – it was in fact the Claimant who, as he continued to run, ran into the path of Mr Harding’s avoidance manoeuvre. Mr Harding reacted to the perceived hazard posed by Dean Francis in 0.44 seconds, and the whole period between the Claimant first emerging into Mr Harding’s sight and being struck was only 1.2 seconds. Having swerved to avoid the Claimant, Mr Harding had no reasonable time (having regard to the limits of human perception) to undertake another avoidance manoeuvre. The effect of Mr Webb’s report was that it provided an entirely new factual basis in relation to the dynamics of Mr Harding’s driving which was inconsistent with the prosecution’s primary case, that he had driven deliberately at the Claimant.

8. In light of this opinion, the prosecution sought further evidence from Mr Swallow and Mr Perrett. In summary, both experts agreed with Mr Webb’s factual analysis. Mr Swallow, having reviewed the matter, prepared a statement in which he agreed with the report of Mr Webb, and in particular stated that Mr Harding’s swerve to the right was a reasonable option to avoid hitting the Claimant, and thereafter Mr Harding had insufficient time to carry out a further avoidance manoeuvre. The swerve was one of three reasonable possible manoeuvres, and it was for others to determine whether it was acceptable in the context of an allegation of dangerous driving.

Code Review

9. In light of the new evidence, I reviewed the case in accordance with my continuing duty under the Code.

10. I concluded that there was no longer a realistic prospect of conviction for either of the offences for which Mr Harding was indicted for. The reason for this decision was that the CCTV of the events of 15 May 2018 had been subjected to a forensic frame-by-frame analysis in the report submitted by Jonathan Webb, and that report had in turn been carefully scrutinised by two police collision investigators instructed by the Independent Office for Police Conduct (IOPC), who looked into the circumstances of the collision. The experts agreed that Michael Harding reacted in a split second to seeing the Claimant emerge from behind a bus by promptly turning sharply away from him, which in the circumstances was a reasonable reaction to the perceived hazard. I concluded therefore that his driving did not fall far below the standard of the reasonably careful and competent driver in those circumstances, nor was it obvious that his driving was dangerous, despite the subsequent collision and the resulting serious injury. Nor, I concluded, was there now any case that Michael Harding had driven deliberately at the Claimant.

11. Although the decision letter sent to the Claimant did not refer to consideration of dangerous driving on a non-deliberate basis, I can confirm, as stated above, that it did form part of my review.

12. As noted above, the decision to offer no evidence was approved at a senior level within the CPS.”

The legal principles applicable on an application for interim relief

18. The applicable legal principles are common ground. They are summarised at §16.6.1 of the Administrative Court Judicial Review Guide 2023, by reference to *R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1425 (Admin) [6]-[13], applying *American Cyanamid Company v Ethicon Ltd* [1975] AC 396, in the following terms:

“When considering whether to grant interim relief while a judicial review claim is pending, the judge will consider whether there is a real issue to be tried and whether the balance of convenience lies in favour of granting the interim order. This involves balancing the harm to the claimant that would be caused if interim relief is not granted and the claim later succeeds against the harm to the defendant, any third parties and the public interest that would be caused if interim relief is granted and the claim later fails.”

19. At 16.6.2 the Guide notes that the strength of the public interest in permitting a public authority’s decision to remain in force will depend on all the circumstances.

Case law and the Victims’ Right to Review Scheme

20. The defendant's Victims' Right to Review Scheme ('VRR') states that the scheme was launched in 2013 and "gives effect to the principles set out in the case of *Killick*" (§5). In *R v Killick* [2011] EWCA Crim 1608, [2012] 1 Cr App R 10, the Court of Appeal (Criminal Division) dismissed an appeal against conviction based on a contention that the Crown Court had erred in rejecting an abuse of process argument. The fact that, in reviewing a decision not to prosecute, the CPS had been responding to the exercise by the complainants of their rights to a review, was a relevant factor in determining that the decision to bring proceedings following that review was not an abuse of process.

21. In the course of his judgment, Thomas LJ observed:

"47. The CPS, as the independent prosecutor, in our view had to respond to the request made by the complainants for a review of the decision not to prosecute, just as the CPS had done in *R v Burke*. As we have set out, the request was made as 'a complaint', as that is what the procedure of the CPS requires as we have described at paragraphs 23 to 26 above. This procedure applied until April 2010. The new procedure appears still to treat requests for review of a decision not to prosecute as 'a complaint' about a 'level of service', though as appears from the document to which we referred at paragraph 26, a threat of judicial review brings about a re-review more in the nature of a re-review of the prosecutorial discretion.

48. Although in form the request was made as 'a complaint', what was sought was a reconsideration by an interested person of the decision. Far from the CPS being able to refuse to do this, it was bound to do it. In the first place, the CPS has made clear that it will review decisions (as set out in paragraph 25 above) if a 'complaint' is made. Second, it has for some time been established that there is a right by an interested person to seek judicial review of the decision not to prosecute (see *R v DPP ex p C* [1995] 1 Cr App 136); it would therefore be disproportionate for a public authority not to have a system of review without recourse to court proceedings. Third, it is clear that in considering whether to prosecute the prosecutor has to take into account the interests of the State, the defendant and the victim – the three interests in a criminal proceeding as identified for example by Lord Woolf CJ in *R v B* [2003] 2 Cr App R 197 at paragraph 27. As a decision not to prosecute is in reality a final decision for a victim, there must be a right to seek a review of such a decision, particularly as the police have such a right under the charging guidance.

49. Thus, although it was contended by the Crown that complainants had no right to request a review of a decision not to prosecute in contradistinction to the ability to make 'a complaint', we can discern no reason why what these complainants were doing was other than exercising their right to seek a review about the prosecutor's decision. That right

under the law and procedure of England and Wales is in essence the same as the right expressed in Article 10 of the Draft EU Directive on establishing minimum standards on the rights, support and protection of victims of crime dated 18 May 2011 which provides:

‘Member States shall ensure that victims have the right to have any decision not to prosecute reviewed.’

See also the Explanatory Memorandum of the Ministry of Justice dated 2 June 2011.

50. Thus in determining whether in the circumstances there was an abuse of process, regard must be had to the rights of the complainants to have the decision reviewed. ...” (Emphasis added.)

22. Thomas LJ described the right of a complainant to a review as “*inherent in the prosecution process*” ([53]) and “*an integral part of the exercise of a prosecutorial discretion*” ([57]).

23. The VRR states:

“4. Victims of crime and the public have a legitimate expectation that those who commit offences will be brought to justice. ... It is also important that victims have a right to seek a review of a decision not to prosecute, without having to seek recourse to judicial review proceedings in the first instance.

5. The Victims’ Right to Review (VRR) scheme enables victims to seek a review of certain CPS decisions not to start a prosecution or to stop a prosecution. It is an important safeguard in England and Wales in relation to the rule of law. ...”

24. Paragraph 18 of the VRR identifies the types of decisions in respect of which there is a right to request a review:

“The right to request a review under the VRR scheme arises where the CPS:

- makes a final decision not to bring proceedings (i.e. at the pre-charge stage);
- discontinues or withdraws all charges (footnote 5) involving the victim, thereby entirely ending all proceedings relating to them;
- has offered no evidence in all proceedings relating to the victim; or

- asks the court to leave all charges in the proceedings to ‘lie on the file’.

These are known as ‘**qualifying decisions**’ and are decisions that have the effect of being final.” (Emphasis added.)

25. Paragraph 19 lists decisions that are “*not eligible for VRR*”. They include:

“(iv) where charges are brought in respect of some (but not all) allegations made or against some (but not all) possible suspects;

(v) where a single charge or charges are terminated (footnote 6) but another charge or charges relating to that victim continue;

(vi) where proceedings against one (or more) defendants are terminated but proceedings (relating to that victim) against other defendants continue;

(vii) where a single charge or charges are substantially altered but proceedings involving that victim continue;

(viii) cases where some (but not all) charges are left to lie on the file”.

26. I agree with Mr Mably KC that these examples illustrate the way in which the scheme is drafted to give a right to review in respect of decisions which are final and conclusive of any live criminal proceedings, and to avoid giving any right to a review which would operate to delay a live criminal case.

27. Under the heading “*Potential review outcomes*”, the VRR states at paragraph 14:

“Some qualifying decisions cannot be instituted or reinstated, such as ‘offer no evidence’ decisions and cases which become statute barred (footnote 3). This is because such decisions are final, and proceedings cannot be reinstated; again, redress in these circumstances is limited to an explanation and apology.”

28. In *R (L) v Director of Public Prosecutions* [2013] EWHC 1752 (Admin) the Divisional Court considered two renewed applications for judicial review in each of which the claimants sought to challenge a decision of the CPS not to prosecute. Although these were permission decisions, the court certified the judgment as one which it is permissible to cite as authority for the principles the court identified. Sir John Thomas PQBD observed at [4]-[6] that:

“the grounds upon which challenge can be made are very narrow: (1) because there has been some unlawful policy; (2) because the Director has failed to act in accordance with his own set policy; or (3) because the decision was perverse; that is to say it is a decision that no reasonable prosecutor could have reached.

In subsequent decisions ... the courts have indicated that these applications will succeed only in very rare cases.

That is for the good and sound constitutional reason that decisions to prosecute are entrusted under our constitution to the prosecuting authorities, in this case the Director of Public Prosecutions and those who work under him in the Crown Prosecution Service.”

29. When *L v DPP* was heard, the final version of the VRR, amended following *Killick*, was due to be “*published shortly*” ([8]). At [9], Sir John Thomas observed that the “*two cases before us illustrate the way in which the new process is likely to work*”. He continued:

“11. It is, I think, important in the light of this new procedure also to point out the following.

12. First, no judicial review should be brought until the CPS has had an opportunity of conducting a further review under their Victim right of review procedure. In the ordinary case, if a challenge is to be brought before that right of review has been taken up, a court should not entertain it.”

30. In *R (Hayes) v Crown Prosecution Service* [2018] EWHC 327 (Admin), [2018] 1 WLR 4106, the claimant, whose private prosecution had been taken over by the CPS, applied for judicial review of the decision of the CPS not to review its decision to offer no evidence against the accused until after the prosecution had concluded. The Divisional Court (Holroyde LJ and Nicola Davies J) dismissed the claim. Holroyde LJ (with whom Nicola Davies J agreed) considered *Killick*, Article 11 of Directive 2012/29/EU (which was based on draft Article 10, referred to in *Killick*) and *L*, as well as the Divisional Court’s judgment in *R (Chaudry v Director of Public Prosecutions* [2016] EWHC 2447 (Admin).
31. In determining that the challenge to the lawfulness of the CPS’s operation of the VRR failed, the Divisional Court’s analysis was as follows:

“39. *R v Killick* [2012] 1 Cr App R 10, especially at paras 48-49, identifies a common law right for a victim to seek review of a decision not to prosecute. The CPS is bound to conduct a review because judicial review would in principle be available of the decision not to prosecute (albeit that judicial review is to be ‘sparingly exercised’ in such circumstances: see *L*’s case [2013] EWHC 1752 (Admin) and see also *R v Director of Public Prosecutions, Ex p C* [1995] 1 Cr App R 136, 140A), and it would be disproportionate for the CPS not to provide a system of review which obviated the need for an aggrieved victim to resort to proceedings.

40 The right to request a review is in essence the same as the right now guaranteed by article 11 of the Directive. As

indicated above, the Directive specifically leaves matters of procedure to the national law.

41 Neither *R v Killick* [2012] 1 Cr App R 10 nor the Directive says anything about the scope of the right to request a review, or about the time when it may be exercised. ...”

32. Holroyde LJ first rejected the CPS’s contention that the VRR is not an inflexible policy or a policy which the CPS operates in an inflexible manner (*Hayes*, [45]). He observed:

“46. The CPS has interpreted para 9(iii) as meaning that the qualifying decision is only taken when the prosecution actually offers no evidence, with the result that no request for a review can be made until after that point. It is in my judgment clear that the effect of that interpretation is that in every such case, any review will only take place after the proceedings have been concluded. The victim’s representations as to why the initial decision not to prosecute was wrong will therefore only be considered after the accused has been acquitted, and when it is accordingly too late for the representations to result in the prosecution being continued. In that important respect, the scope of the VRRG is restricted or limited.

47 I therefore accept the submission on behalf of the claimant that the VRRG is, or is operated as, an inflexible policy in a case falling within para 9(iii).”

33. However, whilst acknowledging that the claimant’s submission – which was remarkably similar to the argument put forward on behalf of the claimant in this case – was an “*attractive one*”, particularly having regard to *Killick* at [48] and [57], and that it had an “*instinctive appeal*”, the Divisional Court rejected the contention that it was unlawful for the CPS to operate an inflexible policy in this regard. Holroyde LJ explained that the following considerations combined to persuade him that the policy is not unlawful and is not operated in an unlawful manner:

- i) There was nothing in *Killick* or the Directive explicitly prohibiting the CPS from operating such a policy, and *Chaudry* made clear there is no all-embracing right to a review in all circumstances (*Hayes*, [50]).
- ii) Although the prospect of an admission of an error, coupled with an apology, is less than a victim in the claimant’s position would want or hope for, it is not nothing. The VRR cannot be said to fail to provide *any* effective remedy in a case where reinstatement of the prosecution is not an available outcome as the prosecution has offered no evidence. (*Hayes*, [51])
- iii) The restriction on the operation of the VRR, precluding a review of a decision to offer no evidence until that decision had been implemented, “*is both necessary and proportionate as a balance of competing interests*”, namely, on the one side, the interests of the victim, and on the other, the interests of the accused, “*who is entitled to have the proceedings terminated as soon as*

possible after the decision not to prosecute has been taken”, and “the importance of prosecutorial independence”. The latter interests carried “greater weight” (Hayes, [52]).

- iv) A particularly important factor justifying the operation of the policy was that “the operational effectiveness of the VRRG would be seriously harmed if there were a right for a victim to make representations before the prosecution acted upon a decision to offer no evidence. ... decisions to offer no evidence are properly taken in many cases. There is an obvious, and in my view insuperable, problem that the requirement of a review before the proceedings were concluded would cause serious and unjustifiable delay. In this regard, it is relevant to note that the importance of the victim’s views being considered has to be balanced against the importance of informing an accused as soon as possible if a decision has been taken to offer no evidence against him or her” (Hayes, [53], emphasis added).
 - v) Holroyde LJ identified a “further adverse effect on operational effectiveness” that would arise because of the impact on resources if there was a right to have a review conducted before the proceedings were ended, and therefore requiring to be undertaken as a matter of urgency (Hayes, [54]).
34. The Divisional Court rejected a contention that these concerns could be met by limiting a right to a review before the proceedings are concluded to narrow categories of cases, or exceptional cases, on principle and pragmatic grounds (Hayes, [55]).

The parties’ submissions

35. The claimant submits that there is a real issue to be tried. In respect of the first decision that is challenged, namely the decision to offer no evidence, the claimant submits it is a freestanding decision susceptible to judicial review: *Killick*, [17]. The context involves a serious issue of considerable importance to both the claimant and the wider public, as the case concerns a decision to stop the prosecution of a serving police officer for serious criminal offences arising from his use of force while performing his official duties, which caused serious injury to a member of the public.
36. The defendant’s contention that any judicial review claim can only be brought following a review under the VRR, in circumstances where the VRR review will not be undertaken until the prosecution has irreversibly offered no evidence, would have the effect of depriving the claimant of an effective remedy in judicial review proceedings, and the court is not compelled to reach that conclusion on the authorities. There is a real issue to be tried.
37. The claimant submits that the decision to offer no evidence may be flawed on the following grounds:
- i) **Error of law:** the claimant contends that the CPS appears to have wrongly reached the decision on the basis the further evidence means that “we could no longer prove that the defendant had deliberately tried to hit you with his car”, in circumstances where the s.1A dangerous driving offence does not require the prosecution to prove intention, merely that the driving was dangerous and caused injury. On this point, the claimant relies on the observations of Linden

J to which I have referred, in particular noting that on the information before him there appeared to be a triable issue as to whether correct and/or adequate consideration had been giving to prosecuting the interested party for the s.1A dangerous driving offence

- ii) **Irrelevant considerations/error of fact:** the claimant relies on the same matters as in (i) above as potentially giving rise to challenge on the basis that the defendant has not fully analysed the available offences against the totality of the evidence.
 - iii) **Failure to have any/sufficient regard to a relevant consideration:** First, the claimant relies on the final sentence of paragraph 8 of Mr Hutchinson's statement (cited in paragraph above) in support of the submission that there is a real issue as to whether the defendant properly considered whether the assessment identified by the expert was one for a jury to undertake. Second, the claimant contends there is no analysis of why a prosecution should be terminated in circumstances where DS Harding, a trained officer, swerved without braking.
 - iv) **Failure to satisfy the Tameside duty of sufficient enquiry:** the claimant submits that it is not clear whether the steps taken by the defendant on receipt of the Defence's expert report were sufficient.
38. The claimant further submits that Linden J's observation that there may be other grounds for complaint, of which the claimant is unaware, having not yet seen the expert evidence, also favours the continuation of an injunctive order.
39. In respect of the challenge to the second and third identified decisions (see paragraph above), the claimant contends that those decisions deny him an effective opportunity to exercise his VRR rights, i.e. a review which, if successful, could result in the prosecution continuing. The claimant submits that the defendant's approach would insulate its decisions to drop prosecutions from any effective challenge, with irreversible consequences for victims and the wider public. The claimant contends that there is a real issue to be tried as to whether it is permissible for the defendant to afford a right of review in this case which cannot affect the decision not to prosecute, particularly having regard to the fact that it involves allegations of serious offences against a state agent which engage the claimant's rights under article 3 of the European Convention on Human Rights (ECHR) and the State's investigative duty under that article.
40. The claimant contends that such a restricted right is contrary to *Killick*, and Article 11 of Directive 2012/29/EU. Further, he submits that the Court's conclusion in *L* that "*no judicial review should be brought until the CPS has had an opportunity of conducting a further review under their Victim right of review procedure*" ([11]) is only intelligible if the VRR review is capable of altering the underlying decision.
41. The claimant submits that there remain real issues to be tried notwithstanding the Divisional Court's judgment in *Hayes*. The claimant contends that *Hayes* is distinguishable as it was decided on very different facts, and in particular the state's investigative obligation under article 3 ECHR does not appear to have been engaged. Alternatively, the claimant submits that this court is not bound by *Hayes* and he

should have an opportunity to contend that *Hayes* was wrongly decided and/or should be considered at an appellate level.

42. In any event, if the court concludes that the effect of *Hayes* is that there is no real issue to be tried in respect of the VRR review issue, the judicial review challenge to the decision to stop the prosecution remains and is rendered all the more significant as it would be the only means by which the claimant can effectively challenge the decision.
43. As regards the balance of convenience, the claimant contends that it weighs conclusively in his favour given that the adverse impact of refusing an interim injunction will be irreversible. The defendant will offer no evidence at a hearing before the Crown Court to be held imminently, and even if a subsequent review by the defendant or the court were to conclude the decision to stop the prosecution was flawed, it would be impossible to reinstitute the prosecution. The claimant contends if the injunction is not maintained there will be harm to himself and to the public interest. By contrast, he submits there is no prejudice to the defendant, or to the public interest, and the impact on the interested party of maintaining the injunction is negligible. The interested party had the opportunity to draw attention to any impact on him of maintaining the injunction, and he has chosen not to make any submissions.
44. In respect of the challenge to the decision to offer no evidence, the defendant submits, first, that no challenge can be brought until after the VRR review has concluded, and that cannot begin until the criminal proceedings have ended with the offer of no evidence. In this regard, the defendant relies on *L* at [12] (see paragraph above) and the logic of *Hayes*. The defendant contends that the principled and pragmatic objections identified in *Hayes* to undertaking a VRR review prior to offering no evidence apply equally to allowing such a decision to be judicially reviewed before the criminal proceedings have concluded. In such a case, the VRR scheme would simply be circumvented if a claimant could review the original decision rather than being required to seek a review before bringing any judicial review claim.
45. In any event, the defendant contends that there is no arguable basis for contending that the decision to offer no evidence was unlawful or wrong, and in that regard there is no real issue to be tried. The claimant's application for interim relief is predicated on lack of proper consideration of whether the s.1A dangerous driving charge could be maintained, it being implicitly accepted (or at least not disputed) that sufficient consideration was given to dropping the prosecution in respect of the s.20 offence. The defendant submits the evidence of Mr Hutchinson shows that proper consideration was given to that separate issue. That evidence, which was not before Linden J, undermines the basis on which the interim injunction was granted.
46. Insofar as the claimant's contention is that it is unlawful to proceed to implement the decision without first giving the claimant an opportunity to exercise his right to a review in accordance with the VRR, the defendant submits that the authoritative decision of the Divisional Court in *Hayes* is decisively against the claimant's case. *Hayes* determined that the right of review does not require a review to be conducted in circumstances which would preserve the possibility of reinstatement. The attempt to distinguish *Hayes* must fail given the court's rejection of the submission that there could be any exceptional cases or categories.

47. With respect to the balance of convenience, the defendant acknowledges that when the prosecution offers no evidence against an accused in the Crown Court, and a judicially directed acquittal is ordered, the termination of the proceedings is irreversible. Nevertheless, the balance of convenience favours discharging the injunction. In *Hayes*, the Divisional Court held that timing the right of review so that it was incapable of resulting in the reinstatement of the prosecution represented a fair and proportionate balance between the interests of the victim, the state, and the defendant. The reasons for that conclusion apply equally in favour of finding that the balance of convenience weighs against preventing the CPS from offering no evidence for a lengthy period while the VRR review is undertaken and any subsequent judicial review and appeal proceedings are pursued.
48. The defendant contends that *Hayes* cannot be distinguished. The Divisional Court held that there was no reason in principle why different approaches should be taken in different cases and good reasons why a differentiated approach, requiring the CPS to conduct early reviews in some cases but not others, was impractical.
49. Maintaining the injunction would cause the kind of delay, and diversion of CPS resources, that the operation of the VRR scheme is properly and lawfully designed to avoid. The independent prosecutor has made its decision in accordance with the Code. The defendant submits that the public interest requires that decision to be put into effect, without any further delay to the Crown Court proceedings.

Analysis

Real issue to be tried

50. In my judgment, the claimant's contention that he is entitled to seek judicial review of the decision to offer no evidence, without having to wait for the outcome of the VRR review, gives rise to a real issue to be tried. It is arguable that in circumstances such as these, where the VRR review would occur only after the criminal proceedings have been irreversibly ended, that review is not a suitable alternative remedy.
51. In *L* the Divisional Court suggested that in the ordinary case, if a challenge is to be brought before the VRR review has been taken up, a court should not entertain it. However, *L* concerned decisions not to prosecute, not decisions to offer no evidence, and so the irreversible impact of waiting for the review decision was not in issue. *L* was also decided before the VRR was published, and addressed the way in which it was *anticipated* that the new process was likely to work in the context of decisions not to prosecute.
52. There is force in the defendant's submission that if claimants are able to seek judicial review of decisions to offer no evidence, without being required to first seek a review in accordance with the VRR scheme, that scheme will be undermined in relation to that category of cases, resulting in the harm to the public interest that the Divisional Court identified in *Hayes*.
53. However, that is not sufficient to persuade me that there is no real issue as to whether the claimant is entitled to seek judicial review of the decision to offer no evidence. On the contrary, in *Killick* the Court of Appeal held at [48] that "*it has been established for some time that there is a right by an interested person to seek judicial review of*

the decision not to prosecute (see R v DPP ex p C [1995] 1 Cr App 136)”, which right extends to a decision to stop a prosecution. And none of the authorities to which I have been referred establish that a review should be treated as a suitable alternative remedy even if, unlike judicial review of a decision to offer no evidence, it is incapable of resulting in a prosecution being pursued in a case where the decision to offer no evidence is found to be unlawful.

54. But this conclusion is not sufficient for the claimant to pass the first stage of the test. It amounts to no more than a rejection of one of the bases on which the defendant contends there is no real issue to be tried, namely that *in principle* a judicial review of the decision to offer no evidence should not be entertained.
55. The claimant still has to show that he has grounds for challenging the decision to offer no evidence which have sufficient merit to give rise to a real issue to be tried. In my judgment, that test is not met. In granting an interim injunction until the return date, Linden J observed that on the material before him there appeared to be a triable issue as to whether correct and/or adequate consideration had been given to maintaining the prosecution in respect of the s.1A dangerous driving offence. However, I now have the evidence of Mr Hutchinson which was not before Linden J. It is now manifest that in undertaking his review he did consider whether the prosecution could be pursued for the offence of s.1A dangerous driving offence on a non-deliberate basis.
56. In my judgment, the proposed grounds identified in the claimant’s written and oral submissions do not give rise to any triable issue.
57. The incident occurred when the interested party, in the course of his duty as a police officer, was acting in an operation to stop a minicab in which the claimant was travelling, in circumstances where the claimant was a suspect in connection with serious offending. The interested party’s car was travelling at only 12mph when it hit the claimant, in circumstances where he got out of the minicab and ran across the road in front of, and diagonally towards, the interested party’s oncoming car.
58. Against that background, it is unsurprising that there was only a factual foundation for the prosecution case on either count in circumstances where the expert evidence was that the interested party had deliberately driven at the claimant. That foundation has collapsed, as explained by Mr Hutchinson, because all three experts now agree that the interested party swerved to avoid the claimant – which Mr Swallow described as a reasonable manoeuvre – but the claimant then ran into the path of the interested party’s avoidance manoeuvre, giving the interested party no reasonable time to undertake a further avoidance manoeuvre.
59. In these circumstances, the fact that the letter from the CPS did not state that the question whether the prosecution for s.1A dangerous driving could be maintained on a non-deliberate basis had been considered does not undermine Mr Hutchinson’s clear and unqualified evidence that he did so. The proposed error of law, irrelevant consideration or error of fact grounds are baseless in light of Mr Hutchinson’s evidence.
60. As regards the alleged failure to have any/sufficient regard to Mr Swallow’s reported statement that it was for others to determine whether the interested party’s swerve was acceptable in the context of an allegation of dangerous driving, that statement did not

relieve the CPS of the duty to determine whether there was sufficient evidence to provide a realistic prospect of conviction on each count. The conclusion that there was not, in the circumstances that I have described, and bearing in mind the importance of prosecutorial independence, is unassailable. Mr Swallow's caveat does not detract from his conclusion that the swerve manoeuvre was reasonable.

61. Section 2A of the Road Traffic Act 1988 provides:

“(1) For the purposes of sections 1, 1A and 2 above a person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if) —

(a) the way he drives falls far below what would be expected of a competent and careful driver, and

(b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.”

62. Given the three experts were agreed the interested party's reaction within a split second to the claimant running across the road in front of his car was designed to avoid the perceived hazard posed by the claimant, and his subsequent lack of reaction to the claimant then running into the path of his avoidance manoeuvre was due to the lack of any reasonable time (having regard to the limits of human perception) to undertake another avoidance manoeuvre, it is impossible to see how a jury could reasonably find that his driving fell “*far below*” the expected standard and that it would have been “*obvious*” to a competent and careful driver that such driving was dangerous. Still less is there any real triable judicial review ground for contending the CPS erred in concluding there was no realistic prospect of conviction on the evidence. The suggestion that combining *braking* with swerving would have been a safer manoeuvre is pure speculation on the claimant's part, and does not detract from the expert evidence that the interested party's avoidance manoeuvre was reasonable.

63. In this context, the *Tameside* duty does not add to the duty on the CPS to pursue all reasonable lines of enquiry. There is no basis for any allegation that they failed to do so.

64. I recognise that the claimant has not seen the underlying evidence. But I have to judge whether the first stage of the test for injunctive relief is met having regard to the facts and grounds relied on. In respect of the challenge to the decision to offer no evidence, for the reasons I have given, I would not reject the application for injunctive relief on the basis that such a claim prior to the VRR review is precluded, but the claimant has failed to satisfy me that any of the proposed grounds of challenge give rise to a real issue to be tried.

65. With respect to the challenge to the timing of the decision in respect of VRR review, and the VRR policy, *Hayes* has authoritatively determined the lawfulness of the policy in the context of decisions to offer no evidence. The Divisional Court did not make a decision limited to the facts before them, but addressed the question whether an inflexible rule was permissible. As I have said, they determined that the policy, although inflexible, was lawful and that for reasons of principle and pragmatism there should not be exceptions. That being so, *Hayes* is clearly not distinguishable.

66. In *Willers v Joyce (No 2)* [2016] UKSC 44 [2018] AC 843, Lord Neuberger observed at [9]:
- “So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so.”
67. Lord Neuberger did not specifically address the law of precedent in relation to decisions of a divisional court of the High Court. Even if, technically, a puisne judge is not bound by any High Court decision, including a decision made by a divisional court, the fact that a divisional court is constituted of two or more judges (s.66 Senior Courts Act 1981), usually (as in *Hayes*) including a member of the Court of Appeal, has the consequence that “*it is difficult to imagine that a single judge ... would ever depart from a decision of a divisional court*”: *R v Greater Manchester Coroner, ex parte Tal* [1985] AB 67, Robert Goff LJ, 81D. The very fact that a decision has been made by a divisional court must inevitably be a powerful reason for a puisne judge to follow it, and it is indeed hard to imagine circumstances in which a single High Court judge could conclude that there is a powerful reason *not* to follow a divisional court judgment.
68. I recognise that at this stage the claimant is only seeking to establish a triable issue – which if appropriate could be considered by another divisional court - not to persuade me to determine that *Hayes* was wrongly decided. Nevertheless, in my view, *Hayes* stands four square against the claimant’s challenge in respect of the VRR decision and policy. Holroyde LJ considered in detail the authorities, the Directive, and the arguments, that are relied upon before me. The claimant contends that *Hayes* gives rise to an anomaly that the VRR review is effective where a decision is made not to prosecute, but rendered ineffective where an initial decision to prosecute is followed by a decision to drop the prosecution. However, the Divisional Court was clearly aware of the differential impact which is created by the fact that in a case where the decision is to offer no evidence, by definition there are live criminal proceedings.
69. In my judgment, in light of *Hayes*, the challenge to the timing of the VRR, both in respect of the decision and the policy, is bound to fail and does not give rise to a triable issue.
70. The application to maintain the injunction fails on the ground that the first stage of the test for injunctive relief is not met.

The balance of convenience

71. Although the application has fallen at the first hurdle, I will briefly outline my conclusions as to where the balance of convenience falls. That short-hand legal term is better described as the balance of the risk of doing an injustice. It raises the question: “*which course carries the lower risk of injustice?*”: White Book, 15.12.
72. In respect of the challenge to the decision to offer no evidence, the risk of injustice if the injunction is discharged is that if the claim succeeds, and the court concludes the decision is flawed, the ability to reverse the decision and bring a prosecution will already have been lost. Once the prosecution offers no evidence, and a judicially

directed acquittal is ordered, that is the end of the matter. It will be impossible to prosecute the interested party on either of the counts, even if the prosecution ought never to have been dropped. That course carries a risk of harm to the public interest as, on this hypothesis, a police officer who ought to be prosecuted for serious criminal offences resulting in serious injury to a member of the public will have wrongly escaped prosecution. It also carries a risk of injustice to the claimant who was seriously injured by the interested party, and has an interest in seeing that he is prosecuted, if the defendant ought to have concluded that the full code test is met.

73. On the other hand, the risk of injustice if the injunction is maintained is that the implementation of a decision to offer no evidence, that is subsequently found to be unimpeachable, will be seriously delayed while a VRR review is undertaken, and judicial review proceedings are pursued (potentially including at an appellate level). Such delay to criminal proceedings, and the resultant diversion of CPS resources to deal urgently with reviews that would be rendered urgent, is contrary to the public interest, and contrary to the interests of the accused who is entitled to have the proceedings terminated as soon as possible after the decision not to prosecute has been taken, as the Divisional Court identified in *Hayes*.
74. There is no evidence before me as to the specific impact on the interested party, or any potential impact on the Metropolitan Police Service (and consequently the public). Nevertheless, it is obvious that such a significant delay to the criminal proceedings against him being brought to an end, resulting in the interested party remaining subject to bail, and living with continuing uncertainty as to whether he will be prosecuted on the serious counts in the indictment, is bound to have an adverse effect upon him.
75. These risks are much more finely balanced, in my view, than either party acknowledged. I note that in suggesting any harm to the interested party would be negligible, and that there would be no harm to the defendant or the public interest, the claimant relied on the observations of Linden J. However, he was concerned with the impact of an injunction set to last only a few days, until the return date hearing. That is a quite different proposition to the injunction now sought, until the VRR and any subsequent court proceedings having concluded.
76. Nonetheless, if I had been satisfied that there is a triable issue as to the lawfulness of the decision to offer no evidence, bearing in mind the public importance of ensuring that a police officer who is accused of the commission of serious criminal offences, and who has caused serious injury to a member of the public, is prosecuted if the full code test is met, I would have concluded that maintaining the interim injunction until the application for permission is determined would carry the lower risk of injustice in this case.
77. On the other hand, if I had concluded that there was a triable issue in respect of the decision or policy regarding the timing of the VRR (but not in respect of the decision to offer no evidence), I would have concluded that discharging the injunction carries the lower risk of injustice. That is because even if the claimant were to succeed in his challenge to those decisions, there appears to be, at best, a very low, speculative possibility of a review resulting in a decision that the evidential test is met.

Conclusion

78. For the reasons I have given, I conclude that the interim injunction should be discharged.