



Neutral Citation Number: [2024] EWHC 1941 (Admin)

Case No: AC-2022-LON 000523

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 July 2024

Before :

THE HONOURABLE MRS JUSTICE McGOWAN DBE

Between :

R (on the application of Jessica Rooks)

Claimant

- and -

Crown Prosecution Service

Defendant

Gwawr Thomas (instructed by Gold Jennings) for the Claimant
Denis Barry (instructed by CPS) for the Defendant

Hearing date: 23 March 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 29 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

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Mrs Justice McGowan:

1. Jessica Rooks brings a claim for judicial review to challenge the decision taken to discontinue a prosecution against her former partner. During the course of those proceedings Ms Rooks was herself arrested on suspicion of sending malicious communications and stalking against that same man. Additionally police seized a stun gun and a CS gas canister. Since the hearing of this claim a decision has been taken to discontinue the prosecution against her.
2. The Defendant is the Crown Prosecution Service (“**CPS**”). Ms Rooks’ former partner, Patrick Flaherty, has not been joined as an interested party.
3. Permission to bring this claim was refused on the papers but, in the absence of an Acknowledgement of Service or attendance by the Defendant, permission was granted at an oral renewal hearing.
4. The issue in these proceedings is whether the decision not to continue the prosecute is legally flawed, by virtue of an error of law in public law terms, in circumstances which would permit this court, notwithstanding the respective constitutional roles of the court and the CPS in the administration of justice, to interfere.

Decision Under Challenge

5. The decision under challenge, (“**DUC**”), was set out in a letter dated 1 February 2022, in which the CPS upheld its earlier decision to offer no evidence against Patrick Flaherty. That decision was taken following consideration of the case at the evidential stage of the test under the CPS Code for Crown Prosecutors, (“**the Code**”). The decision to offer no evidence resulted in a not guilty verdict being recorded against Patrick Flaherty.
6. On 4 January 2022 Ms Rooks, (“**the Claimant**”) had sought a review of the original decision under the Victims’ Right to Review scheme, (“**VRR**”).
7. The Claimant seeks a declaration that the decision of 1 February 2022 is unlawful and an order quashing that decision and consequential orders as to costs.
8. The Claimant asserts that the DUC was based on an error, namely that the Defendant misdirected itself as to the elements of self-defence by failing to consider the objective limb of the test and, as a consequence failed to ask itself the right question. The Claimant submits that this was an error of law. The Defendant answers that contention by asserting that this case involved making an assessment of, and a decision about the primary facts, which is squarely within the remit of the decision maker.
9. It is accepted by the Claimant that the Defendant was entitled to make an assessment of her credibility in reaching its decision but she argues that even if her credibility could not be relied upon, there were other objective factors that meant the DUC is flawed.

History

Incident of 22 August 2020

10. The Claimant and Patrick Flaherty had been in a relationship for some time. Mr Flaherty had a cottage in Burton Bradstock in Dorset and the couple were there on the evening of 22 August 2020, both had been drinking. An altercation occurred. The Claimant telephoned the police and they came to the property, as they approached they heard the Claimant shouting “get off me”. The officers were using body worn cameras and the footage shows that the Claimant was distressed. She was later photographed and found to have bruising and swelling to her face and head, her fingernails were damaged including injuries to the nail bed as the acrylic nails she was wearing had been damaged. Further bruising developed over the next few days to her left ear, her left elbow, wrist and arm and her right foot and knee.
11. The police called an ambulance. Her injuries were documented at the hospital as multiple bruises to the right side of her face, abrasions to the right forehead and cheek, further bruising inside the right ear, bruising to the left elbow, soreness and bruising to the upper limbs, neck pain, shoulder pain, blurred vision and haemorrhage to the right eye. There is no dispute that the injuries would amount to actual bodily harm as defined in **s.47 of the Offences Against the Person Act 1861**.
12. Mr Flaherty was arrested, taken to the police station and interviewed under caution. He gave an account of an argument beginning on their arrival at the property. He said that the Claimant had kicked and thrown domestic items around the property; a bin, an empty container, a sponge pad and a dishcloth. He said that she had thrown a chopping board which had caught his head in a glancing blow causing a graze and swelling to his forehead. He told the police that he “had grabbed her” by the arms “to calm her down”. His account was that there had been “a bit of a wrestling session in the kitchen”. He claimed not to remember how or why a number of things happened including whether he had hit or punched her and why he had followed her upstairs. In essence he claimed that she had been aggressive and that he had acted in reasonable self-defence.
13. The Claimant was invited to make a witness statement in support of a prosecution but refused.
14. Mr Flaherty had no criminal convictions.
15. At that stage it was considered that no prosecution could be brought in the absence of a statement from the Claimant.

Incident of 18 November 2020

16. On 18 November 2020 the Claimant made an emergency call to the police again alleging acts of violence against her by Mr Flaherty. She also gave the police a recording she had made of a telephone call between her and Mr Flaherty on 2 October 2020 (the transcript shows the date as 2 December 2021). In a redacted transcript of the recording, available to the court, Mr Flaherty acknowledges causing injury to the Claimant and she says that she put considerable effort into persuading the authorities not to prosecute him.
17. She provided two witness statements, alleging a number of acts of violence by Mr Flaherty on different occasions, this time she gave evidence in a statement about the incident on 22 August 2020.

18. Mr Flaherty was arrested again and the allegation of 22 August 2020 was put to him again, the recorded telephone call was played to him. He gave no answer to the majority of questions but said that the injuries caused to the Claimant on that date had occurred as he had tried to “pacify” her. In other words he accepted causing the injuries but did not accept that he had assaulted her.
19. The police referred the incident of 22 August 2020 to the Defendant and on the evidence at that stage a charge of Assault Occasioning Actual Bodily Harm, (“ABH”), contrary to **s.47 of the Offences Against the Person Act 1861**, was authorised. Mr Flaherty pleaded not guilty and the matter was set down for trial by jury in February 2022. The police decided not to take any further action in relation to any other allegations made against him by the Claimant.

Allegations Against the Claimant

20. On 28 July 2021 the Claimant was arrested on suspicion of stalking and sending malicious communications. A number of Mr. Flaherty’s friends and family had received photographs of the Claimant showing injuries and annotated to describe the fact that he had caused them. Additionally, women with whom he had been in contact online received anonymous messages telling them that he had been arrested for an assault.
21. When the Claimant was arrested, police seized a telephone, a number of SIM cards, a CS gas cannister and a stun gun. When she was interviewed she gave an account in which she accepted possession of the stun gun and gas canister, she said that the seized telephone and SIM cards had been posted through her letter box by an unknown third party and she accepted that she had shown the photographs of her injuries to others in a local public house.
22. She was not charged at that stage and the police continued to investigate and referred the matter to the Defendant.

Decision Not to Proceed with Prosecution

First Review

23. On 15 June 2021 Natalie Cheesman reviewed the position in the case against Mr Flaherty in the light of all the material then available to her. She identified further material that she would require before reaching a final decision. She had been asked to make a decision about charging: in particular what charge should be brought against Mr Flaherty. It was described as a “Full Code Test”. She identified the case as being one involving allegations of domestic violence and set out that she had applied the Domestic Violence Policy and legal guidance on domestic violence cases.
24. In that first review Natalie Cheesman set out the inconsistencies in the Claimant’s account of the incident of 22 August 2020, she considered the independent evidence of her injuries in detail. She considered the internal inconsistencies in the Claimant’s account, such as the length of time that the incident had taken and the nature of her injuries given the violence she described. These inconsistencies were not considered fatal to bringing a successful prosecution but they were recognised as significant in the assessment of the strength of the case.

25. More importantly, in the context of this hearing, she did consider the question of whether the force used was excessive. *“I am of the view that even if this was the case (Mr Flaherty’s account that he simply acted to defend himself and restrain the Complainant) the force used in the circumstances, when looking at the injuries was excessive.”*

Second Review

26. In her second review on 13 July 2021 Natalie Cheesman listed the additional material provided to her. She recommended that a charge of assault occasioning ABH should be brought against Mr Flaherty. She said, relying on the evidence of injury, *“In relation to the incident itself I find on balance the evidence of the victim to be reliable”*. She reached that view despite her findings about “issues with the V’s credibility” about the number of blows, the time the incident lasted and other matters relating directly to her account of the incident.
27. Again, importantly, she considered the question of whether the force used was excessive. She found that, in all the circumstances, “the force used in the circumstances, when looking at the injuries was excessive”.

Claimant’s Arrest

28. The Claimant was arrested on 28 July 2021. She admitted possession of a gas cannister and a stun gun and gave an explanation about forgetting she had them after a trip to the USA. She gave an account of an unknown third person posting the telephone and SIM cards, which had been used to send messages about Mr Flaherty, through her letter box. She also gave inconsistent accounts of where she had been when some of those messages were sent. Her account was believed to be in direct conflict with the evidence in her case.

Third Review

29. On 14 September 2021 another review of the case against Mr Flaherty was carried out by Dan O’Neill, he considered the other allegations that the Claimant had made against him. He did not have the information arising from the Claimant’s arrest and interview on 28 July 2021.
30. He discussed the case with the Police Officer in charge of the case and his manager. He said, *“This is a difficult case due to undermining features that surround the 22/8/20 (sic). The question is how far these features impact upon the credibility of the complaint made?”* This is a reference to the point raised in the earlier reviews about the internal inconsistencies in her account.
31. He also considered the support provided for the complaint in the evidence of the injuries.

Fourth Review

32. Another review took place on 22 November 2021, again carried out by Dan O’Neill, who had received the information about the Claimant’s arrest on 28 July 2021. He

said he was carrying out another review in light of that material which he described as having two aspects. The first was a concern about an apparent breach of bail, that seems to have been incorrect and irrelevant. The second is the issue of the Claimant’s arrest, in particular her account in interview which was said to be inconsistent with the evidence. Her “denial now goes directly to the credibility of the complainant”. The CPS had received an opinion from Counsel setting out the view that there was no longer a realistic prospect of conviction.

Letters to the Claimant

- 33. On 22 November 2021 the Defendant informed the Claimant in a telephone call that a decision had been taken not to proceed with the prosecution against Mr Flaherty in light of all the information available. That was followed by a letter dated 22 November 2021 (and/or another in the almost exactly the same terms on 23 November 2021 signed by Dan O’Neill) from the CPS to her.

.....I am the prosecutor in the case of I am writing to tell you I have taken the decision to stop the case. The prosecution at the next court hearing will offer no evidence and the court will formally find the defendant not guilty.

In making my decision I have carefully reviewed the case by applying the Code for Crown Prosecutors. This guides me when I make decisions about prosecutions. The Crown Prosecution Service does not decide whether a person is guilty of a criminal offence, but makes a fair, independent assessments about whether the case should be considered by a criminal court.

The code requires me to consider a two-stage test, firstly whether there is sufficient evidence to provide for a realistic prospect of conviction and secondly whether it is in the public interest to proceed.

I have previously reviewed the evidence in relation to the allegation of assault upon you on 22/8/2020 and came to the decision that there was sufficient evidence to provide for a realistic prospect of conviction.

.....(redacted information relating to the allegation against the Complainant)

I am duty bound to disclose the details of the investigation because they potentially undermine the prosecution case.

.....I am aware that you denied the allegation during interview. I have reviewed the evidence provided to me by the police and have come -to the conclusion that your interview was inconsistent with the evidence. The defence in this case are likely to come to the same conclusion and will be entitled to ask the Jury to consider that your denial interview was not truthful.

..... you on 22/8/2020 in the manner you described. It is a high standard and..... The evidence in support of the incident on 22/8/2020 is finely balanced, because there is no independent witness evidence to corroborate either side. Therefore, it is critical that a jury consider your account to be truthful..... I have concluded that a jury in possession of this information

could not be sure who is telling the truth and in doing so could not find the case proved to the required standard. I have therefore concluded that there is no longer a realistic prospect of conviction and the prosecution has been stopped.

Under the CPS' Victims' Right to Review Scheme you can ask for a review of my decision. Any review would be completed by a prosecutor you has not been involved with the case and would only take place once the case has been formally stopped at court. It is important that you know that a review cannot affect the outcome of the court case, nor will any court hearing been delayed or adjourned while a request for a review is being considered. The review is an opportunity to ask for my decision to be checked and to receive a more detailed explanation, if needed.....

34. In response to the decision communicated by the CPS, the Claimant instructed her present solicitors, Gold Jennings, and they wrote to the CPS on her behalf on 4 January 2022 requesting a review of the decision not to proceed under the VRR.
35. A complaint was also made that the case had been stopped on 23 November 2020 which meant that the Claimant was unable to request a review before the case was concluded, as she had not received the letter by then. It was further stated that the decision was unreasonable in light of the evidence of the injuries and the contents of the recorded telephone call, which it was suggested amounted to an admission of assault by Mr Flaherty. It also suggested that there was bad character evidence which should have been taken into account. Mr Flaherty had no convictions recorded against him. It dealt with the question of the Claimant's credibility in the following way,

"Ms Rooks' reliability as a witness

29. Ms Rooks has provided a consistent and credible account of having been assaulted by Mr Flaherty. As far as we are aware, no concerns whatsoever have been raised as to inconsistencies or discrepancies in respect of the August assault itself. We therefore consider that Ms Rooks should have been treated as a reliable witness.

30. As regards the claim that Ms Rooks' account at interview was not consistent with the evidence, we do not consider that this in light of the corroborative evidence outlined above, can reasonably lead to the conclusion that there was no realistic prospect that Mr Flaherty would be convicted.

31. Moreover, even in the absence of supporting evidence, we still do not consider that this interview alone should lead to the conclusion that there was no realistic prospect of Mr Flaherty being convicted. Ms Rooks has not as yet even been charged with any offence, much less convicted. Ms Rooks continues to deny that she is guilty of the offences for which she is being investigated.

32. In these circumstances, we consider that limited, if any, weight should be given to alleged inconsistencies in Ms Rooks' account in relation to the allegations that she sent malicious communication and stalked Mr Flaherty by allegedly telling people about the fact he had abused her."

Decision Under Challenge

36. On 1 February 2022 the CPS responded to the Claimant and her solicitors, it is a lengthy and detailed letter from Sophie Stevens, the Deputy Chief Crown Prosecutor in Wessex. She had carried out a review of the decision as requested. She conceded that the earlier letter did not “adequately explain” how the decision was reached, she apologised for that and explained that she has considered all the material in the case and was of the view that the decision taken was correct. She set out her reasoning as follows. As this is the DUC, I have included almost the entire letter,

“On 22 August at about 00:38 hours the police were called to the property by the complainant using the 999-emergency service, reporting an assault by the defendant. On the police arrival the complainant described a prolonged assault over two hours with injuries to her face and body requiring hospital treatment. Both complainant and defendant had been drinking. The complainant alleged that the defendant punched her repeatedly to the face and body causing multiple injuries including bruising to the right eye socket and cheek to jaw, bruising behind the right ear and into the head, bruising and swelling to the left side of the forehead, and bruising to the knee, elbow, wrist and upper arm. Also, her false nails were ripped from her fingers causing damage and bleeding to the nails underneath.

The complainant was taken to hospital by ambulance and was referred for further treatment to a local hospital and Bristol eye clinic.

The doctors note from the hospital reports that your client “had argument after few drinks, partner attacked (sic) her over course of an hour, multiple punches, doesn’t think she lost consciousness, no vomiting, managed to drag herself downstairs to phone 999.”

The injuries recorded were “multiple bruises on right side of face, around zygoma & maxilla to side of lower and jaw line, abrasion to right side of forehead & lateral cheek, bruising inside right ear, bruising to left elbow, upper limbs sore and feel bruised, neck painful, no boney tenderness, right eye blurred vision, haemorrhage, CT scan of head and facial bones, negative for fractures.

The defendant was arrested and interviewed. His version of events was that on their arrival at the holiday home, a disagreement quickly ensued, and tensions flared. He described the complainant as getting more and more wound up and reaching such a state of anger she was in a rage and completely unreasonable. His account was that he tried to pacify this situation but was unable to. At one point he was standing in the kitchen at the island unit and the complainant was throwing items about the kitchen when he had a chopping board thrown directly towards him which struck him to the left side of his forehead.

He had a graze and swollen injury to his forehead which He pointed out to the police during the interview. The defendant did not consider this to be an intentional act, rather an uncontrolled act of anger. He said because of her increased rage he had cause to approach her and take control of her upper arms, to calm her. This had the opposite effect and increased her anger. He recalled ending up on the kitchen floor wrestling with her. He remembered

falling on top of the sofa and in turn landing on the floor. He denied punching or assaulting your client.

In evidence at this time was the 999 call and statements of attending officers and photographs of the complainant's injuries. I understand that your client did not agree to make a statement of complaint in relation to this incident. She later confirmed to the police that she did not support a prosecution and would not provide a statement on the basis I believe that the defendant would have been released with no further action being taken.

*The 999-call stated that the complainant has been abused by her partner who has hurt her and tried to rip off her nails. She reported that he hit her on the **head twice** using his hands and that he passed out in the bedroom.*

The complainant made her first statement in relation to the August incident on 18 November 2020 following a further report to the police for a different incident. Two further statements were given in December 2020 in which the complainant exhibited photographs of her injuries and also a recording of a phone call that you have made reference to in your letter which is said to have taken place about six weeks after the August incident and where the defendant admits the assault.

The investigation was completed, and the case was submitted to the CPS for a charging decision. The initial review of the case took place in June 2021.

The defendant was arrested again and interviewed further about the incident on 22 August 2020. He maintained his defence of self-defence stating that the complainant's injuries were sustained as a result of them wrestling. In relation to the contents of the phone call he stated that he was trying to pacify the complainant. He did not admit assaulting her. There was no evidence presented to suggest that the defendant had any previous convictions.

*As I think can be shown from the few matters I have highlighted in bold above, there were inconsistencies in the evidence surrounding the nature of the assault and the number of blows suffered. The initial 999 call made by the complainant stated that she has been hit on the **head twice by the defendant**, who has also tried to rip her nails off. In the complainant's statement of the 21 December 20, she describes a **two-hour** assault where her nails have been ripped off, and states that her face and head have been beaten up. Despite this the prosecutor considered that the case could be built and directed the police to undertake further work. The file was re-submitted for a charging decision and the evidence further considered.*

In this further review the prosecutor satisfied themselves that the appropriate charge would be one of assault occasioning actual bodily harm. The evidence of the complainant was considered to be reliable and notwithstanding some issues in relation to her credibility given the inconsistencies which would no doubt be highlighted by the defence during cross examination, there was a realistic prospect of conviction and that a jury would be more likely than not to convict.

As a result, the defendant was charged and first appeared before Weymouth Magistrates Court on 18 August 2021. The Magistrates declined jurisdiction and the matter was sent to the Crown Court for a plea and trial (sic) preparation hearing on 20 September 2021.

The matter was transferred to a Crown Court lawyer to review and manage. In his first review he noted that the complainant had made a number of allegations against this defendant and the only incident that had been charged was the matter that he was now dealing with. He summarised the other allegations as:

- 1. Between 22 July 2020 and 5 August 2020 - Common Assault. The allegation being that a bottle of wine had been thrown in the direction of the complainant. The allegation was supported by a witness who was present. The complainant also disclosed a "threat to kill", however this was not heard by the witness. The common assault allegation was out of time and the police concluded that there should be no further action ("NFA") in relation to the threat. The omission of the witness to recollect the threat undermined the allegation.*
- 2. Assault occasioning actual bodily harm on 26 September 2020 - a burn to the hand after the complainant alleged the defendant deliberately pushed her hand up into a grill when she was cooking. Guests were present, the complainant said they were in the dining room. The guests did not support the allegation and said the defendant and complainant were loving together all evening. This appears to have undermined the complainants account and no further action was taken by the police.*
- 3. Assault occasioning actual bodily harm on 31 October 2020 – the complainant alleged she had been chased around the kitchen and pushed by the defendant causing her to fall into a door jamb causing bruises. It appeared that this in actual fact was a battery and time barred. It appears to have been NFA by police on evidential grounds. The complainant provided injury photo's depicting bruising to lower back consistent with her account.*
- 4. Rape and threats to kill on 18 November 2020- The complainant hid in the house having been pushed in a similar manner as complained of on 31 October. The complainant heard the defendant repeatedly express that he was going to kill her. Believing he had gone to bed and passed out due to the amount of alcohol he had drunk, the complainant went to the bedroom. The defendant was not asleep and became angry. He took hold of a lamp that she believed he was going to throw at her. He then stripped naked, had an erection and said, 'come and sit on my cock and make yourself useful'. The complainant says she complied, had sex with him in order to avoid any further violence. The defendant denied the allegations and says they had consensual sex the day before. As you indicate in your letter you have asked the police to review this.*

As I have already indicated we are under a duty to continually review our cases. The prosecutor undertook a thorough review at this stage and as he was obliged to do, considered whether this new material undermined the prosecution case or

would be of assistance to the defence. He concluded that while the material may be of assistance to the defence in the fact that they were likely to cross examine the complainant about it and suggest that the jury could not be sure how credible she is given that other matters were not charged due to insufficient evidence or undermining other evidence, there was other evidence that supported her account and the case should continue. That other evidence clearly included the call between the defendant and complainant, the photos of injury that demonstrate that the complainant had been hurt and that there was no question the injuries were occasioned on 22 August 2020 because the defendant himself accepted in interview that the complainant was not injured before the incident and her injuries were sustained during the incident.

At this review it had also come to light that a further undermining feature may be the alleged behaviour of the complainant since 22 August 2020. It was apparent from a telephone call on 2 December 2020 that the defendant and his family had seen posts on Facebook, purportedly made by the complainant, depicting the complainant's injuries and saying the defendant is a domestic violence abuser. Whilst the alleged behaviour of the complainant post allegation is unhelpful, the lawyer concluded it would not assist the defence to show her account of the 22 August was a lie. It may well be used to suggest that her account is fabricated, and this alleged behaviour is proof of a desire to hurt the defendant. However, the complainant's account was supported by injuries consistent with her account, her account had remained consistent throughout and the defendant admitted assaulting her in the call. There remained therefore a realistic prospect of conviction.

By the 22 November 2021 the reviewing lawyer had received further unused material in the case. There were two aspects to the unused material provided. The first was in relation to the complainant breaching her bail conditionals and allegedly disclosing to residents' details of ongoing proceedings and matters for which the defendant was NFA'd. The second aspect was in relation to the arrest and interview of your client in respect of harassment allegations against this defendant and the impact of evidence that is inconsistent with the complainant's account in interview.

While it is perhaps understandable that your client has a level of hostility against the defendant given what she has been through, we have to take into account the impact this would have on the case. There is no doubt that the defence would speculate and attack the complainant under cross examination as to her motives for the disclosure about injuries sustained. It also provided the defence with an opportunity to present the complainant's behaviour as aggressive in support of the defendant's defence of self-defence.

The complainant was interviewed for alleged harassment of this defendant. Of importance is the complainant's position in interview during which she denied this allegation. The denial goes directly to the credibility of the complainant. There is good evidence that is inconsistent with the complainant's denial. It was in light of this that it was concluded that there was now no longer a realistic prospect of conviction and the proceedings should be stopped.

Offences of alleged domestic violence and assaults in a domestic context are amongst the most difficult and important to fairly prosecute. This case has been carefully and thoroughly reviewed and given the new evidence that would clearly have had to be disclosed to the defence I agree that there was no longer a realistic prospect of conviction.

I am very sorry that we have not been able to bring a prosecution in this case and I appreciate that this was perhaps not fully explained previously. However, I trust that my explanation will assist you and your client in understanding the reasoning behind my decision and why I do not consider that the decision to offer no evidence was wrong.”

37. The Claimant’s solicitors responded on her behalf on 1 April 2022 by sending a letter before action warning of a proposed claim for a Judicial Review of the CPS decision to offer no evidence against Mr Flaherty. The letter set out the factual basis to be advanced in any claim and summarised the evidence against Mr Flaherty as had been done previously, namely, the evidence of injury, the recorded telephone conversation and the alleged “bad character” evidence. In particular they repeated that the Claimant was capable of being a credible witness as said as follows,

“insofar as the August 2020 assault is concerned, Ms Rooks has provided a credible and consistent account, and the veracity of this account, has not as far as we are aware ever been disputed. As regards the investigation into Ms Rooks for malicious communication, for alleged informing third parties that Mr Flaherty was a domestic abuser, and the claim that her denial in interview was not consistent with an offence, it was asserted in the VRR that in light of the corroborative evidence, this could not reasonably lead to the conclusion that there was no reasonable chance of a successful prosecution.”

38. The letter criticised the DUC for failing to consider the “corroborative” material, for taking into account “immaterial” matters and for wrongly concluding that issues about the Claimant’s credibility would not be resolved by the presence of such corroborative material.
39. The Defendant did not accept the criticisms and maintained that it had considered all the relevant matters and reached a decision which was open to it as a prosecuting authority.

Legal Framework

The DPP and the Code for Crown Prosecutors

40. By s. 3(2)(a) of the **Prosecution of Offences Act 1985** the DPP is responsible for the conduct of all (non-exempted) prosecutions brought by the police following investigation.
- Under s. 10 of the 1985 Act the DPP is required to issue a Code for Crown Prosecutors giving guidance on the general principles to be applied in determining

whether, in any given case a prosecution should be instituted (“the Code”). The section of the code entitled “General Principles” includes the following:

“2.2 It is not the function of the CPS to decide whether a person is guilty of a criminal offence, but to make assessments about whether it is appropriate to present charges for the criminal court to consider..”

2.5 It is the duty of prosecutors to make sure that the right person is prosecuted for the right offence and to bring offenders to justice wherever possible..”

2.10 Prosecutors must apply the principles of the [ECHR] ..at every stage of a case. They must comply with any guidelines issued by the Attorney General and with the policies and guidance of the CPS issued on behalf of the DPP...CPS guidance contains further evidential and public interest factors for specific offences and offenders..”

A following section of the Code, entitled “The Full Code Test” sets out the two-stage test which is required to be met before a prosecution may be initiated. The following provisions are material to the present case:

“4.1 Prosecutors must only start or continue a prosecution when the case has passed both stages of the Full Code Test..”

4.2 The Full Code Test has two stages: (i) the evidential stage; followed by (ii) the public interest stage.

..

4.4 In most cases prosecutors should only consider whether a prosecution is in the public interest after considering whether there is sufficient evidence to prosecute...

41. Domestic Abuse. Legal Guidance Evidential test

Under the next heading, “The Evidential Stage”, the guidance includes the following:

“4.6 Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

4.7 The finding that there is a realistic prospect of conviction is based on the prosecutor’s objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which they might

rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty.

4.8 *When asking themselves whether there is sufficient evidence to prosecute, prosecutors should ask themselves the following:*

Can the evidence be used in court

Is the evidence reliable?

Is the evidence credible?

Is there any other material that might affect the sufficiency of the evidence?

42. The key principles can be summarised as follows:

- The evidential stage of the Code test requires prosecutors to conduct an “objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which they might rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the suspect of the charge alleged.” This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty.
- Prosecutors must not allow DA (domestic abuse) misconceptions or assumptions to influence their evaluation of the evidence.
- These cases require a careful and balanced assessment of all relevant evidence, particularly those related to the suspect. A suspect-centric approach is an effective strategy for investigating and prosecuting DA offences. This might involve scrutiny of accounts given of the event, forensic examination and careful consideration of relevant digital material and CCTV coverage and advising on actions that can be taken to address weaknesses in the case. This approach to case building is aimed at building the strongest case possible whilst ensuring that the investigation is fair.
- Victims may not realise that they are in a relationship with a suspect of abuse as some abusive behaviours may not be violent or immediately obvious; prosecutors should therefore handle cases without any preconceptions.
- Victims will often adjust their behaviour to try and prevent any further abuse, especially where child victims or other dependents are present, or to simply have an ‘easier time’; such behaviour may as a result be ‘normalised’, with the

victim showing no obvious stereotypical behaviours. This does not mean that the victim has not been subject to abusive behaviour.

- A number of factors have been previously stereotyped as militating against some victims, including delay in reporting the matter; inconsistencies in accounts; the victim carrying on with their everyday life; voluntarily returning to their abuser; or victim's reliance on alcohol or other substances. Rather than undermining the credibility and reliability of the victim's account, these factors may in fact provide evidence that the victim has been, and/or continues to be abused. Victims of DA typically experience a number of abusive incidents before they feel able to report the matter.
- The Code requires prosecutors to consider what the defence may be and whether there is any material which may undermine the prosecution case. Prosecutors must assess each undermining feature objectively and then assess the cumulative effect in the overall context of the strengths of the case. Ultimately, a prosecutor must decide if the combined effect of such factors after an objective analysis is such that the evidential stage is not met. Prosecutors must not introduce a requirement for corroboration in the review process – one person's word can be enough (and often is) but the quality of the evidence must be assessed in the manner described above.
- Domestic abuse often involves a series of incidents or behaviours within a course of conduct, although one occurrence may create the impetus for a victim to report the offending. It is therefore important for prosecutors to satisfy themselves that they have all the available information including that which might support controlling or coercive behaviour and stalking, before deciding on the appropriate charge.
- Prosecutors must consider whether there is any material that may affect the assessment of the sufficiency of evidence, including examined and unexamined material in the possession of the police, and advise on any further reasonable lines of enquiry.
- Once it becomes clear that a case is not going to meet the Full Code Test, it is important to take a decision as soon as possible so that those impacted can be informed promptly.

Victims' Right to Review

43. The CPS website provides guidance for members of the public who seek a review of a decision taken to discontinue a prosecution. There is no right to have that decision over-turned. *"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. The scheme was launched in 2013 and gives effect to the principles set out in the case of Killick (R v Christopher Killick [2011]). It is also an entitlement included in the [Code of Practice for Victims of Crime](#)."*
44. In *R v DPP ex parte C [1995] 1 Cr App R 136*, Kennedy LJ at [138E], re-iterated the long established principle that this court will only use the power to interfere with such

decisions “sparingly”.

“The Code indicates that when considering whether to institute proceedings prosecutors should have regard first to the evidential sufficiency criteria and, if they are satisfied, to the public interest criteria. For present purposes the evidential sufficiency criteria can be said to be summarised in the question: is there a realistic prospect of a conviction bearing in mind the evidence available and those lines of defence which are plainly open to, or have been indicated by the accused?”

45. As Sir John Thomas PQBD said in ***L v DPP & Comm [2013] EWHC 1752 (Admin)*** at [5] the courts must apply a “self-denying ordinance” and not interfere unless a policy is unlawful or has not been followed, or the decision taken is perverse. The likelihood of success in cases such as this will be small, “given the constitutional position of the CPS”.

“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.”

46. The court again revisited the basic principles as part of a broader review in ***R (Monica) v DPP [2022] EWHC 3508 (Admin)*** at [46] Lord Burnett CJ said,

We distil the additional propositions from the authorities and the principles underlying them:

(1) particularly where a CPS review decision is exceptionally detailed, thorough, and in accordance with CPS policy, it cannot be considered perverse: L’s case 177 JP 502, para 32

(2) a significant margin of discretion is given to prosecutors: L’s case, para 43.

(3) Decision letters should be read in a broad and common sense way, without being subjected to excessive or overly punctilious textual analysis.

(4) It is not incumbent on decision makers to refer specifically to all the available evidence. And overall evaluation of the strength of the case falls to be made on the evidence as a whole, applying prosecutorial experience and expert judgement.

The court also reviewed the process in ***Campaign Against Antisemitism v DPP [2019] EWHC 9 (Admin)*** and said at [15],

“ The following propositions are relevant to this case.

i) A prosecutorial decision is amenable to challenge by judicial review but only on conventional public law grounds, e.g. if the policy upon which the decision was based was unlawful or if the decision-maker did not follow relevant lawful policy or if the decision is irrational in the sense that it was a decision not reasonably open to the decision-maker on the available material (R v Director of Public Prosecutions ex parte C [1995] 1 Cr App R 136 at page 141C-E; L at [4];

and *R (Purvis) v Director of Public Prosecutions* [2018] EWHC 1844 especially at [75]-[81]). "Irrationality", as used in *C and L*, includes the raft of conventional *Wednesbury* grounds for public law intervention, including where the decision-maker incorrectly applies the law (e.g. *R (F) v Director of Public Prosecutions* [2013] EWHC 945 (Admin)) or where his approach is wrong as a matter of law (*R (B) v Director of Public Prosecutions* [2009] EWHC 106 (Admin); [2009] 1 WLR 2072).

ii) *If the decision-maker asks the right questions and informs himself properly, challenges to prosecutorial decisions will succeed "only in very rare cases" or "only in exceptionally rare circumstances" (L at [5] and the cases there referred to, and at [7]; see also Monica at [44], "rare indeed"). This is because Parliament has given the relevant function to the DPP as an independent decision-maker with particular experience and expertise in making such decisions which involve the exercise of judgment in relation to (e.g.) how disputed evidence is likely to be received at trial and whether a prosecution is in the public interest (R v Director of Public Prosecutions ex parte Manning and Melbourne* [2000] EWHC 342 (Admin); [2001] QB 330 at [23] per Lord Bingham of Cornhill LCJ, citing *C*; and *R (Corner House Research) v Serious Fraud Office* [20018] UKHL 60; [2009] 1 AC 756 at [30]-[32] per Lord Bingham, cited with approval in *Monica* at [45]). Consequently, prosecutorial decision-makers have "a significant margin of discretion" (L at [43]; and *Monica* at [46(2)]). The result is that this court, whilst intervening if the decision is irrational or otherwise unlawful, has adopted a "very strict self-denying ordinance" (L at [7]).

iii) *However, as Mr Grodzinski submitted, the margin allowed to the decision-maker (and, hence, the deference this court gives to his decision) depends upon the issues with which he has to grapple and the circumstances of the case. The issues in this context often involve disputed evidence of primary fact, where the decision-maker's experience and expertise in considering how that evidence will be received at trial and predicting the verdict at trial will be a particularly powerful factor; and this court will be slow to hold that the decision-maker's assessment is irrational. Similarly, where the issue involves an assessment of the public interest. However, if the issue is essentially one of law, the decision-maker's experience and expertise are of less force, and this court will more readily be prepared to find that his conclusion was wrong in law.*

iv) *Whilst the exercise of the court's power to intervene will always be exceptional, because a decision not to prosecute is final subject only to judicial review, the exercise of the court's powers will be less rare in those circumstances than in the case of a decision to prosecute because the defendant is then free to challenge the prosecutor's case in the criminal court (B at [52]-[53] per Toulson LJ).*

v) *Prosecutorial "decision letters should be read in a broad and common-sense way, without being subjected to excessive or overly punctilious textual analysis" (Monica at [46(3)]).*"

It continued in conclusion at [70],

“But, as I have already emphasised, this is a public law challenge, and this court can only intervene if the decision to take over the CAA's private prosecution and discontinue it made by the decision maker was irrational, IE a decision to which no properly directed and informed CPS decision maker could have come. In my judgement, it cannot be said that it was irrational.”

47. The decision in **L V DPP** was handed down shortly before the introduction of the VRR scheme, which Sir John Thomas PQBD predicted would reduce such cases by clearly setting out the right to request such a review and the factors that would be applied.
48. Again the principles were comprehensively distilled by Dove J in **R (COL) v DPP [2022] EWHC 601 (Admin)** at [39], in applying them to the facts of that case he considered the test to be applied to the quality of the expression of the DUC in that case.

“The characterization of the defendants decision by the claimant, when it is read both in the original decision and further amplified in the pre action protocol letter, is appropriate and represents a fair and straightforward reading of the decision.”

49. On very many occasions the courts have emphasised that such decisions are taken by expert decision makers and due respect must be given to their experience and expertise. An illustration of this principle is to be found in **R (Baptiste) v DPP [2019] EWHC 1130 (Admin)** at [22] and [24]. Lord Burnett CJ, said,

“But the fact that different people with great expertise and experience came to different conclusions when considering all the evidence in this tragic case demonstrates, to my mind, that there was nothing irrational or perverse in the decision ultimately made by Ms XX. It confirms that more than one view could be taken on the evidence.”

50. At [24] the court highlighted the difficulties and uncertainties of seeking to rely on the possibility of bad character being admitted, the fundamental principle having been established in **R v Hanson [2005] 2 Cr App R 21**, that such evidence, even if admissible under the **Criminal Law Act 2003** will be excluded if the purpose of its admission is to bolster a weak case. In this case there are no previous convictions and so the question of proof and satellite litigation in the trial would have been another obstacle to the Claimant's assertion that this was material which “corroborated” her account.

Submissions

51. In her oral submissions Ms Thomas distilled her argument into one crucial point, namely that the DUC is unlawful because Sophie Stevens failed to address or consider the second limb of self-defence. Having addressed the first limb, the “subjective test”, Sophie Stevens failed, in that she did not go on to consider the “objective test” and ask the question whether, notwithstanding all the issues about the Claimant's credibility, a jury could be sure that the force used was not proportionate to the perceived threat.

52. She accepts that the Defendant was entitled to have concerns about the Claimant's credibility, such concerns were not as straight forward as the Defendant had suggested but their view was certainly not unreasonable in terms of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223*.
53. She further acknowledges that evaluating potential evidence in considering a trial affords a generous margin of appreciation or latitude to the decision maker.
54. In her submission, the failure to articulate in the letter of 1 February 2022 that Sophie Stevens had undertaken a consideration of the second limb of the test of self-defence means that the DUC is unlawful in a public law sense. She points out that the letter of 23 November 2021 makes the same omission and Sophie Stevens' later review did not correct that omission.
55. She acknowledges that Natalie Cheesman had considered this point in the first and second reviews but re-iterates that Sophie Stevens' failure to consider it for herself is a public law error.
56. On behalf of the Defendant Mr Barry acknowledges that the decision making process is not well articulated but stresses that the duty to keep under review is a continuing one and that process has to be viewed as a whole, not every point considered has to be repeated in every review.
57. He contends that it is obvious that the lawyers with conduct of the case understood the necessary elements of an assault which the prosecution would have to prove to the required standard. It is equally obvious he submits that the lawyers concerned would know the elements of self-defence. That defence had been raised by Mr Flaherty in interview and the prosecution would have to demonstrate, on all the evidence, that he had not acted in reasonable self-defence.
58. He points out that this court should apply a "self-denying ordinance". It is not for this court to assess the merits, that is always within the remit of the Defendant. They were faced with a case in which they identified weaknesses in the prosecution evidence from the start but originally thought that a prosecution might well lead to a conviction. As further evidence came to light, they reviewed that decision and reached a conclusion properly available to them. In particular, given the nature of the allegation in this case, they reviewed it with the additional requirements of the domestic violence guidelines well in mind.
59. He argues that unlike *R(Torpey) v DPP [2019] EWHC 1804 (Admin)* there was no misunderstanding or misapplication of the law in this case. The fundamental elements of the offence were well-known to them and they reviewed that state of the evidence applying the law properly. The exercise of their judgment as to the quality of the prosecution evidence was entirely a matter for them.

Discussion and Conclusion

60. As was set out clearly in *Campaign Against Antisemitism v DPP* the CPS has both expertise and experience in making a judgement about how to present evidence and how disputed evidence is likely to be viewed by the tribunal of fact. That is particularly so when considering evidence of the primary facts.

61. The evidence relating to the incident on 22 August 2020 was reviewed four times before the decision to stop the prosecution was taken. It is accepted that the reviewing lawyers were bound to consider issues going to the Claimant's credibility and that they were entitled to find that her credibility was substantially damaged by the direct conflict between her account in interview on 28 July 2021 and the evidence in that case. There had already been concerns about her reliability on the principal facts of the original incident.
62. It is accepted that there were weaknesses in expression in the 22/23 November 2021 letter to the Claimant. Further, despite the length of the 1 February 2022 letter setting out the DUC, it did not cover every point previously considered in the earlier reviews. What has to be considered is the issue of the decision made, not the quality of its expression.
63. The process of review is a continuing one. Often a review is carried out in response to a new piece of evidence or information. The quality of decision making is not sensibly to be criticised because each such review does not recite every previous view expressed or decision reached.
64. The first and second reviews carried out by Natalie Cheesman dealt with the legal requirements of proof, they considered both parts of the element of self-defence as a defence to a charge of assault. They applied the correct law to an expert assessment of the strength of the evidence, despite weaknesses it was felt appropriate to continue.
65. Equally when Dan O'Neill carried out the third review he concluded that the case should continue at that stage, he reached that decision despite concerns and following discussion with his manager and the officer in the case.
66. What was already a concerning case was reviewed a fourth time in light of obvious concerns about the Claimant's credibility following the interview after she had been arrested. Counsel's advice was sought and a decision was taken that the prospect of achieving a conviction was so reduced that the case no longer passed the evidential test.
67. The earlier consideration of the nature of the injuries and whether the force used was or might be proportionate to the perceived threat remained part of the reasoning process, even if not articulated at every stage.
68. The constitutional role of the DPP and CPS to conduct prosecutions is essential to the proper administration of justice. They are independent of the courts when exercising that function. The court can only interfere with the exercise of that role in the narrowest of circumstances, where a policy is unlawful, where the CPS has failed to apply its own policy or where there has been an error of law in its decision making process so that the decision reached is perverse. It is entirely properly a very restricted list. This court cannot and must not intervene save in those very limited circumstances. None of those issues arise in this case. The decision under challenge was taken in following an adequate consideration of all the relevant and no irrelevant material.
69. There was no error of law or other justiciable failing in the decision of 1 February 2022. The claim for judicial review of that decision fails.