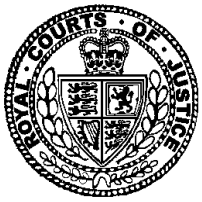

Neutral Citation Number: [2018] EWCA 2092 (Civ)

Case No: C1/2016/4506

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE, DIVISIONAL COURT
LORD JUSTICE GROSS & MR JUSTICE NICOL
[2016] EWHC 2447 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/09/2018

Before:

LADY JUSTICE RAFFERTY
LORD JUSTICE KITCHIN
and
MR JUSTICE BIRSS

- -

Between :

The Queen on the application of AC	**Appellant**
- and -	
The Director of Public Prosecutions	**Respondent**

- -
- -

Mr Dan Squires QC (instructed by **Bhatt Murphy Solicitors**) for the **Appellant**
Mr Duncan Penny QC & Mr William Hays (instructed by **CPS Appeals and Review Unit**) for the **Respondent**

Hearing dates: 19th June 2018

- -

Approved Judgment

Lady Justice Rafferty :

1. The Appellant challenges the 11th October 2016 order of the Divisional Court dismissing her claim for judicial review.

2. Her Grounds of appeal are:

   i) Article 11 of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 bestows on victims of crime an entitlement to a review of any decision not to prosecute. Read with *R v Killick* [2011] EWCA Civ 1608 and *R(L) v DPP* [2013] EWHC 1752 it requires that victims have a right to a review when one suspect has been charged, consistent with the underlying purpose of the Victim Right to Review scheme ("VRR").

   ii) Alternatively the VRR is unlawful.

3. The Divisional Court held that the VRR is lawful, that victims have no right to a review in any specific case pursuant to the Directive or at common law and that it is open to the Crown Prosecution Service ("CPS") to refuse to review in some cases or categories of case.

4. The Divisional Court's conclusion the Appellant submits was flawed for three reasons:

   i) The Court's reliance on 'carve-outs' within the Directive supports rather than undermines the Appellant's argument. That there are carve-outs demonstrates a general entitlement to review subject to specific exceptions.

   ii) The language of Article 11 is consistent with an obligation on Member States to afford a right to review, in contrast to other language in the Directive, such as in Article 12, which merely requires Member States to take measures to support and protect victims.

   iii) That the Directive permits Member States to set procedural rules does not authorise Member States to limit the substantive right to review.

Facts

5. In 1998 the Appellant's estranged husband, Mohammed Chaudhry ("MC"), abducted two of her children whom she did not see for the next 14 years. She believes MC's sister, Farkhanda Chaudhry ("FC") encouraged and financed the abduction. In 2013 MC was charged with child abduction and on 4 September 2014 sentenced to 7 years in prison. The Appellant was told on 7 October 2014 of a November 2013 decision confirming that FC would not be charged.

6. On 11th October 2014 the Appellant sought from the CPS a review of that decision. On 15th June 2015, shortly before she was due to issue proceedings, the CPS agreed to what it described as the exceptional course of an *ad hoc* review outside the VRR in an attempt to avoid litigation. That review, by an independent prosecutor, was completed on 24th August 2015. On the 17th November 2015 the CPS Appeals and Review Unit considered the matter and confirmed by letter that there was no reasonable prospect of a conviction. The Appellant does not challenge that decision.

7. After correspondence the CPS agreed to add to the VRR a footnote which read that "There may be very exceptional circumstances in which cases that fall within the exception to paragraph 11 may nevertheless be considered for inclusion in the VRR scheme on the advice of the Appeals Review Unit ("ARU") manager or other senior manager" and on 21st July 2016, after the Divisional Court hearing but before the judgement, added it.

Material provisions

The Victims' Directive

8. The Directive expresses its aims as "to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings" (Art 1). Art 2(1)(a) defines "victim" as "a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence".

9. The preamble to the Directive in its Recitals includes:

> *43.The right to a review of a decision not to prosecute should be understood as referring to decisions taken by prosecutors and investigative judges or law enforcement authorities such as police officers, but not to the decisions taken by courts. Any review of a decision not to prosecute should be carried out by a different person or authority to that which made the original decision, unless the initial*

decision not to prosecute was taken by the highest prosecuting authority, against whose decision no review can be made, in which case the review may be carried out by that same authority. The right to a review of a decision not to prosecute does not concern special procedures, such as proceedings against members of parliament or government, in relation to the exercise of their official position.
44. A decision ending criminal proceedings should include situations where a prosecutor decides to withdraw charges or discontinue proceedings.
45. A decision of the prosecutor resulting in an out-of-court settlement and thus ending criminal proceedings, excludes victims from the right to a review of a decision of the prosecutor not to prosecute, only if the settlement imposes a warning or an obligation.

10. A victim's right and any limitations sit within Art 11:

Art 11 Rights in the event of a decision not to prosecute

1. Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.

2. Where, in accordance with national law, the role of the victim in the relevant criminal justice system will be established only after a decision to prosecute the offender has been taken, Member States shall ensure that at least the victims of serious crimes have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.

3. Member States shall ensure that victims are notified without unnecessary delay of their right to receive, and that they receive sufficient information to decide whether to request a review of any decision not to prosecute upon request.

4. Where the decision not to prosecute is taken by the highest prosecuting authority against whose decision no review may be carried out under national law, the review may be carried out by the same authority.

5. Paragraphs 1, 3 and 4 shall not apply to a decision of the prosecutor not to prosecute, if such a decision results in an out- of-court settlement, in so far as national law makes such provision.

11. The VRR at paragraph 6 reads that:

> "*the scheme gives effect to the principles laid down in Killick and in Article 11….the right to review ... arises from the finality of the decision not to prosecute and is co-extensive with the right of a victim to seek judicial review of such a decision*"

12. The VRR sets out a two-stage process. First, local resolution sees a different prosecutor reconsider the decision. Should it be upheld the reviewer must ensure the victim has an explanation. Should it be overturned the suspect might be prosecuted, or if that be neither possible nor in the public interest, an explanation, and, if appropriate, an apology, offered. If dissatisfied with the local consideration victims may seek a second stage review by the ARU. Paragraph 34 sets out that a decision not to prosecute should be overturned only if the earlier decision maker wrongly applied the evidential or public interest test and maintenance of public confidence requires reversal of the decision.

13. The VRR at paragraphs 9-11 identifies decisions subject to the scheme and where relevant reads:

9. The right to request a review arises where the CPS:

(i) makes the decision not to bring proceedings (i.e. at the pre-charge stage);
(ii) discontinues (or withdraws in the Magistrates' Court) all charges involving the victim, thereby entirely ending all proceedings relating to them;
(iii) offers no evidence in all proceedings relating to the victim; or
(iv) asks the court to leave all charges in the proceedings to 'lie on file'

10. These are known as 'qualifying decisions'.

*11. The following cases **DO NOT** fall within the scope of the VRR:*

...;
(iii) cases where charges are brought in respect of some (but not all) allegations made or against some (but not all) possible suspects,

> *where the evidence of the victim in question has been considered by a Crown Prosecutor;*
> *(iv) cases where a single charge or charges are terminated but another charge or charges relating to that victim do continue;*
> *(v) cases where proceedings against one (or more) defendants are terminated but proceedings (relating to that victim) against other defendants continue;*
> ……

14. The footnote reads:

> *As Lord Judge C.J. explained in A v R [2012] EWCA Crim 434 at paragraph 84 there may be instances in which "it remains open to the prosecution in an individual case, for good reason, to disapply its own policy or guidance". It follows that there may be very exceptional circumstances in which cases that fall within the exceptions of paragraph 11 may nevertheless be considered for inclusion in the VRR scheme on the advice of the ARU manager or other senior manager.*

Ground 1: exclusion of a right to a review

15. The Appellant submits that the Directive (Art 11(1) and (3)) adjures a Member State to ensure that victims' right to a review of a decision not to prosecute is a right to review *"any decision not to prosecute*". She posed the question: given a decision not to prosecute one suspect once another has been charged, does there endure the right to review pursuant to Art 11(1) or is it sufficient for Member States to afford prosecutors a discretion to decide when to review?

16. The Divisional Court held that a literal approach to "*right*", as used in the Directive, was not warranted. The Directive, expressed at a high level of generality, was not to be read as according entitlement to review of any decision not to prosecute. Member States were entitled to decide the scope of the right and to afford a discretion not to review in any particular case or category of cases since the Directive includes carve-outs in Recital 43, and Art 11(5), and Art 11(1) reads that procedural rules for a review are set by national law.

17. The Court added that extending the VRR to cases where one suspect is not charged but another is would raise proportionality concerns and significantly undermine operational prosecutorial discretion with potentially serious resource implications.

18. The Appellant argues that the Divisional Court was wrong. In the first of her three developed limbs of argument she relies on the carve-outs within the Directive identified by the Court. There is no right to review unless the crime in play is serious, nor when a negative decision results in an out of court settlement, and the role of the victim will be established only after a decision to prosecute has been taken: Art 11. The right to review does not concern special procedures such as against members of parliament or of government when acting as such; Recital 43.

19. Carve-outs she submits indicate that the Directive was not intended to operate at a high level of generality but to create a general right to a review. Member States enjoying a discretion to refuse to review in circumstances nowhere mentioned in the Directive would in her contention render the carve-outs without purpose.

20. In developing her second limb of argument she submits that the language in Art 11 contrasted with other provisions of the Directive does not support *"right*" as importing other than its ordinary meaning, nor validate departure from a literal approach to interpretation. Read as a whole, the Directive includes some provisions which accord rights, for example Art 11, and others obliging Member States to put in place more general measures to support and protect victims, for example Art 12(1) which reads in part:

Right to safeguards in the context of restorative justice services

> 1. *Member States shall take measures to safeguard the victim from secondary and repeat victimisation, from intimidation and from retaliation, to be applied when providing any restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions:*
> *a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time; b)before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes as well as information about the procedures for supervising the implementation of any agreement; ....*

21. Only two Articles, she submits, expressly require the conferment of a right as she seeks to define it, Art 11 (right to review) and Art 6 (right to information). She contends that "right" in the headings to a number of

articles (Art 10 – right to be heard, and Art 11) supports her argument that "right means right".

22. Her third and final developed limb is that the Divisional Court wrongly read the provisions permitting procedural rules as permitting limitation of the right. It emphasised the sentence:

> "*The procedural rules for such a review shall be determined by national law.*"

23. The Appellant seeks to meet that by arguing that the substantive right is to a review of any decision not to prosecute. The procedural rules permit, for example, time limits for requesting a review or a two-stage structure as set out within the VRR, but do not equate to permission to qualify the substantive right.

Common law

24. The Appellant submits that the VRR is inconsistent with the common law right to a review. She prays in aid the decision of this court in ***Killick*** that victims had a common law right to have reviewed any decision not to prosecute and argues that nowhere did the court suggest that some decisions attracted a right but others merely a discretion.

25. The Divisional Court held that ***Killick*** was not recognising a right to a review in the literal sense. It was sufficient that the CPS had a discretion to review.

26. The Appellant argues that this conclusion is inconsistent with the use of "*right*" in the VRR and with ***Killick*** where Thomas LJ set out three reasons precluding the CPS from refusing to review, the second and third relevant on these facts:

> *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 …; 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 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.*

27. Hence, she argues, the CPS cannot refuse to review where a decision is taken not to prosecute suspect A after suspect B has been charged. Procedural rules cannot qualify substantive rights.

28. Since she is obliged to concede that ***Killick*** did not consider "one suspect but not all" she relies on R*(L) v DPP [2013]* EWHC 1752 ("*L*") where, she contends, Sir John Thomas P considered there was a right to review in such a case. In *L* grandparents secured the CPS's agreement to review the decision not to prosecute the child's mother for his murder. The case preceded publication of the VRR but its advent had been announced. Sir John noted:

> "*there is a significant margin of discretion given to the prosecutor" and "it can be well understood why two prosecutors might differ….. there should be [a CPS] review of what are very difficult decisions…in conformity with the proper apportionment of powers under our constitution".*

29. The Appellant submits that in *Killick* paragraph 49 is key to understanding. It reads:

> *"Although it was contended by the Crown that the complainants had no right to request a review of the 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 May 18, 2011 which provides: member states shall ensure that victims have the right to have any decision not to prosecute reviewed."*

30. In *L* Sir John said at paragraph 10 *et seq:*

> *"It must of course be for the CPS to decide upon the type of review of the decision that is made some cases will call for very detailed review, others can be dealt with in short order. What is important to the future*

> *conduct of such cases is to recognise that the CPS now has this procedure in place. It has this consequence: It is highly likely that where a review has taken place and the review can be seen to be careful and thorough, proceedings for judicial review to challenge the decision will be the more difficult to advance. That is because the CPS will have independently reconsidered the position and unless it can be shown that that decision is within one of the three categories I have mentioned it will therefore be the more difficult to show that the decision is one that can be successfully challenged…."*.

31. The Divisional Court held that extending the VRR to cases where one suspect is not charged but another is would raise proportionality concerns and significantly undermine operational prosecutorial discretion with potentially serious resource implications. The Appellant argues that the language of the Directive and of the authorities nowhere suggests that the right to review can be lost as not proportionate and that nothing founds entitlement to refuse because of resource implications. She argues that operational prosecutorial discretion is no more undermined than is any other decision not to prosecute. That opinions as to whether a prosecution should be brought may legitimately differ between experienced prosecutors, thus making reviews unlikely to succeed, is she contends flawed reasoning. If independent prosecutors are more likely to reach different opinions, reviews are more rather than less likely to succeed.

32. If concerns about resources or undermining operational discretion permissibly limit the circumstances for review, the VRR she submits provides neither a proportionate nor a rational answer. It is not proportionate to offer no more than a hope of welcome discretion where one suspect is charged and another is not. Where it is not possible fairly or proportionately to review, an exceptional discretion should be in play irrespective of whether there be more than one suspect or more than one victim or the case is complex. Even were a review to throw up difficulties such as the Divisional Court identified, on the one hand a blanket removal of the right in all cases where there is more than one suspect and on the other affording an absolute right to a review in others is neither a proportionate nor rational response.

33. The Divisional Court accepted that once one suspect is charged a review is likely to await trial of the first and that separate trials carry disadvantages

and risk, including of repeated cross-examination and different juries. Whilst the risk is common to all reviews, the disadvantage, the Appellant points out, would bite only if a review were to trigger a trial.

34. The Respondent Crown supports the reasoning and conclusion of the Divisional Court that the Directive is expressed at a high level of generality and cannot conceivably be read as furnishing an unlimited across-the-board entitlement. The Court's reference to 'carve-outs' was in the context of flexibility for Member States as to how to put into practice the right. The carve-outs reflect concessions to particular circumstances, without prejudice to the general flexibility afforded by the Directive.

Discussion and conclusion.

35. In my view the Divisional Court's reasoning readily withstands scrutiny.

36. An useful starting point is the European Commission guidance document (*DG Justice Guidance Document related to the transposition and implementation of Directive 2012/29/EU and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime*). It describes Art 11 as "*limited to victims with a formal role in the criminal justice system and the procedural rules for carrying out such a review are governed by national law*". Albeit not a formal interpretation of EU law it is an example of the Directive interpreted as affording considerable flexibility to Member States.

37. The language of Art 11 does not justify the conclusion that victims are accorded a right of review in all cases. Rather it contemplates a right of review in accordance with victims' role in the relevant criminal justice system, similarly indicative of flexibility. The Divisional Court's reference to procedural variants – "*different views can be taken on the optimum scope of the scheme*" - was in the context of implementational flexibility and is in my view unassailable.

38. The Appellant contends that "right" in the headings to a number of Articles, including Arts 10 and 11, but appearing in the text only of Art 6, right to information, and of Art 11, right to a review, supports her argument that "right" achieves a strength when used in both heading and body which is lacking in any other Article.

39. She faces insurmountable hurdles. Were her submissions well-founded "right" when it sits within a heading and the body should establish greater strength than when it sits merely in the heading.

40. That approach does not withstand scrutiny. The right to be heard (Art 10) does not see "right" in the body of its narrative yet in Recitals (41) and (42) its subject matter is referred to as a "right". Recital (41) reads:

> *"The right of victims to be heard should be considered to have been fulfilled where victims are permitted to make statements or explanations in writing. Recital (42) reads: The right of child victims to be heard in criminal proceedings should not be precluded solely on the basis that the victim is a child or on the basis of that victim's age."*

41. Additionally Art 10 uses both "shall" and "may". It reads where relevant:

> *"Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence. The procedural rules under which victims may be heard and may provide evidence shall be determined by national law."*

42. The Directive thus does not seem to me a scheme in which the use of language upon which the Appellant concentrated mandates some rights in the sense that the Member States must provide that the victim is always afforded them regardless of circumstances, whereas others are a discretionary weaker class in which Member States enjoy a wide margin of appreciation. Rather the Directive read as a whole is a single scheme in which victims have various rights described in various ways, all part of the same overall structure, always subject to being given effect in the context of the Member States' criminal justice system.

43. I am not persuaded that any linguistic distinction between Articles is intended to reflect a fundamental difference in how rights are implemented in national law. The linguistic sophistication necessary accurately and fully to describe the system in England and Wales does not find its echo in the Directive, where the degree of particularity contemplated by the VRR is nowhere reflected. Nowhere in the Directive do we read a statement that the victim's Art 11 right confers a right to reasons or to an apology, although the Appellant seemed to me to suggest that such was either the or at least a purpose of Art 11. Art 6 confers a right to be told what has happened but that contemplates no more than information. Receipt of

reasons or an apology is a function of the VRR and is not derived from the Directive.

44. Nothing to which this court was referred supports the argument that in contemplation was an unfettered right of a victim. The title of the Directive is "*Establishing minimum standards on the rights support and protection of victims of crime…*" Article 1, Objectives, reads in part:

> "*The purpose of this Directive is to ensure that victims of crime receive appropriate information support and protection and are able to participate in criminal proceedings*…"

45. In the Preamble Recital 11 reads:

> *"This Directive lays down minimum rules. Member States may extend the rights set out in this Directive in order to provide a higher level of protection."*

46. Art 11 does no more than set out procedural rules. The scheme read as a whole is designed to be sensitive to differing systems within Member States, as the Divisional Court found.

47. As to the Divisional Court's approach to carve-outs, the context of its conclusion is essential to an understanding of its reasoning. As I have set out, the Court considered that particular circumstances permitted a Member State to identify the scope of any right. Once that is understood it must follow, as the Divisional Court identified, that a discretion can be afforded not to review. No aspect of this reasoning seems to me inimical to the general flexibility evident within and afforded by the Directive. Further support for that conclusion lies in a reading of Art 11(1) which, as I have also set out above, reads (and the Divisional Court emphasised) that procedural rules for a review are set by national law.

48. My conclusions would without more prove fatal to the Appellant's submissions in support of Ground 1. *Killick* and *L* fall away as adding to the power of her arguments. I add simply that in neither was the point here in issue under consideration.

49. I would reject Ground 1.

Ground 2: The VRR is unlawful.

50. If unsuccessful on Ground 1 the appellant contends that the VRR is not a proportionate or rational way to meet concerns as to resources or operational discretion. She submits that there are likely to be numerous cases in which - in her contention - there exists currently an absolute right to review where such concerns will be greater when suspect A has been charged but not suspect B. Those concerns she suggests are not met by affording to the former an absolute right to review and upon the latter imposing a blanket removal of the right in the faint hope of a favourably applied discretion.

51. She seeks to make good her submissions in reliance on examples. Assume a number of complainants making allegations of child sex abuse against a number of suspects. The CPS might charge some suspects in respect of some complainants, who would then by reliance on the VRR enjoy a right to review. That review she argues throws up the same concerns as to resource, prosecutorial discretion, prejudice to ongoing trials and consequential prosecutions as were contemplated by the Divisional Court as I have set out above. She asserts that doubtless a sensible and proportionate way of proceeding would be found in her example.

Discussion and conclusion.

52. I can deal with this as economically as the Appellant advanced it. In the adversarial system of England and Wales the starting point is that offences alleged jointly to have been committed should jointly be tried. Selecting whom should become a defendant and drafting an indictment will often require review of stratified, complex, less than straightforward accounts. The Crown frequently makes decisions in multifactorial situations which are also time sensitive. They include for example an analysis of expert evidence, of computer records, and of voluminous social services logs. More and more often a prosecution involves gangs, not infrequently at odds. We must also remember how overburdened are the courts by allegations of sexual abuse said to have been committed years ago.

53. The Serious Fraud Office not uncommonly considers facts arising years before it is in a position to consider a charging decision. If a victim, who could be a part of the company, business or loser with a part in the investigation were entitled to a review in the terms the Appellant suggests, the delay to timely progress of the case would be difficult to exaggerate. Where prosecutions involve the security services a body of material is commonly reviewed before the evidence upon which the Crown decides to rely is settled. The volume of the former frequently vastly outweighs that

of the latter. Some of it is disclosed to leading Counsel for the Crown but not to junior counsel.

54. These examples underline the complexity of the task the Appellant suggests is easily accomplished. I do not agree with her. All these examples of quotidian trial practice and procedure in England and Wales, as opposed to those of other Member States, underline the sure foundation for the conclusions of the Divisional Court. To inject a requirement that the process should be halted whilst new eyes review the position of an individual or several individuals would pose a major risk to the administration of justice, just as the Divisional Court identified.

55. I would reject Ground 2 and would dismiss this appeal.

56. Lord Justice Kitchin: I agree.

57. Mr Justice Birss: I also agree.