Michaelmas Term
[2012] UKSC 52
On appeal from: [2011] EWHC 472

JUDGMENT

R (on the application of Gujra) (FC) (Appellant) *v* Crown Prosecution Service (Respondent)

before

Lord Neuberger, President
Lady Hale
Lord Mance
Lord Kerr
Lord Wilson

JUDGMENT GIVEN ON

14 November 2012

Heard on 4 October 2012

Appellant	*Respondent*
Edward Fitzgerald QC Stephen Field (Instructed by Wells Burcombe LLP)	Clare Montgomery QC Rachel Barnes (Instructed by CPS Appeals Unit)

LORD WILSON

INTRODUCTION

1. The Director of Public Prosecutions ("the Director") has power to take over a private prosecution and thereupon to discontinue it. In determining whether to do so, it is his policy to apply certain criteria. This appeal concerns his first criterion, which relates to the strength of the evidence in support of the prosecution. Prior to 2009 the Director asked himself whether the evidence clearly failed to disclose a case sufficient for the defendant to be called upon to answer it. If his conclusion was that it clearly failed to do so, he took over the prosecution and discontinued it; otherwise, and subject to the application of further criteria, he declined to take it over. But in 2009 he changed his policy in relation to the evidential criterion. It became his policy to take over a private prosecution and to discontinue it unless the evidence was such as to render the prosecution more likely to result in a conviction than not to do so. Although one could refer to it as the "51% chance test" or the "greater than even chance test", I will refer to the current criterion as the "reasonable prospect test".

2. The central issue in this appeal surrounds the lawfulness of the Director's current policy.

3. Mr Gujra, the appellant, instituted two private prosecutions. The Director, acting by the Crown Prosecution Service ("the CPS"), concluded that the evidence in support of them was not such as to satisfy the reasonable prospect test. So, applying his current policy, he took them over and thereupon discontinued them. It is agreed that, had he applied his previous policy, he would not have done so. The appellant applied for judicial review of his decision to do so and, specifically, for an order that it be quashed. On 9 March 2011 the Divisional Court of the Queen's Bench Division (Richards LJ and Edwards-Stuart J) dismissed the application: [2011] EWHC 472 (Admin), [2012] 1 WLR 254. In this appeal the appellant's central contention is that the Director's current policy is unlawful because it improperly restricts the statutory right of a citizen to bring a private prosecution.

FACTS

4. The first of the appellant's private prosecutions was instituted by his laying an information before the Southampton Magistrates' Court against two brothers, Mr Imran Mirza and Mr Tamoor Mirza, which led, on 18 August 2010, to the

court's issue of a summons against them. By his information, the appellant alleged that on 17 May 2010 the brothers had jointly perpetrated a common assault upon him. His case was and is that he was sitting outside a café with two friends; that the brothers drove up and got out of the car; that one of them punched him, as a result of which he fell to the ground; and that both of them kicked him. There is no doubt that the police were called; that he complained to them that the brothers had assaulted him; and that the police noticed that he had sustained injuries, albeit that they considered them to be very minor.

5. The second of the appellant's private prosecutions was instituted in the same way, before the same court and on the same day, against a third brother, Mr Wajeed Mirza. By his information, the appellant alleged that on 24 May 2010 the third brother had, with intent, used threatening words towards him, thereby causing him alarm, contrary to section 4A of the Public Order Act 1986. His case was and is that the brother approached him while he was sitting in his car; called him "a dirty grass" and, in reference to his caste, "a dirty patra"; and threatened to kill him.

6. The appellant promptly consulted solicitors about a possible private prosecution referable to both these alleged incidents; but the police also launched an investigation into the alleged assault. Late in May 2010 the appellant made statements both to his solicitors and to the police. Although to the officer at the scene they had denied having witnessed the alleged assault, his two friends also made statements to his solicitors and to the police, in which they claimed to have witnessed it and, broadly, confirmed the accuracy of his account of it. The appellant referred to the later incident in his statement to his solicitors but not in his statement to the police, who learnt of it only when they received a copy of the former statement. He did not suggest that anyone had witnessed the later incident. In his statements the appellant explained that he had sworn an affidavit in support of a claim in civil proceedings brought by a third party against Mr Imran Mirza and Mr Wajeed Mirza; and he suggested that the incidents had been by way of revenge.

7. Late in July 2010 the police arrested and interviewed the brothers who had allegedly assaulted the appellant. They made no comment and were bailed. Then the police sent the file to the CPS for a decision whether to institute prosecutions.

8. When, on 18 August 2010, the appellant instituted the prosecutions, he and his solicitors were aware that the CPS was still in the course of considering whether itself to institute them. When the CPS learnt of their institution, the focus of its review became whether to take over their conduct in order either to continue or to discontinue them. The review was entrusted to Mr Massey, a senior officer in the Complex Casework Unit of the Wessex CPS.

9. On 22 October 2010 Mr Massey signed a 15-page review of the appellant's allegations, together with a further allegation made against all three defendants by one of the appellant's two witnesses. In his review Mr Massey set out in detail his reasons for concluding that the evidence in support of each of the two private prosecutions failed to satisfy the reasonable prospect test. In accordance with the current policy of the CPS when taking over a private prosecution, Mr Massey's review was submitted to Miss Levitt QC, its Principal Legal Adviser, who, on 9 November 2010, endorsed his conclusion. The Chief Crown Prosecutor for Hampshire thereupon directed that conduct of the prosecutions should be taken over in order that they should be discontinued. On 16 November 2010 the CPS duly notified the magistrates' court pursuant to section 23(3) of the Prosecution of Offences Act 1985 ("the 1985 Act") that the Director did not want the prosecutions to continue; and they were thereby discontinued. It also notified the appellant and the three defendants, by their respective solicitors, of the discontinuance.

HISTORY

10. The manner in which, over the centuries, public authorities have come to assume responsibility for the vast majority of criminal prosecutions in England and Wales has been characteristically haphazard.

11. Until late in the 19th century prosecutions were brought almost entirely by the victims of the alleged crimes or, if they were dead, by their kinsmen. Local parish constables, not organised on any national or even regional basis and not even paid, sometimes helped the victims to prosecute. By about 1730, if they could afford it, prosecutors and defendants sometimes engaged lawyers to represent them. At around the same time associations of people with a common, sectional, interest in prosecuting particular felonies sprang up in order to conduct prosecutions on behalf of their members. But, as late as 1816, Chitty, in *A Practical Treatise on The Criminal Law* 1st ed (1816), vol 1, p1 wrote:

> "Criminal Prosecutions are carried on in the name of the King, and have for their principal object the security and happiness of the people in general, and not mere private redress. But as offences, for the most part, more immediately affect a particular individual, it is not usual for any other person to interfere."

The Attorney-General intervened to conduct only a few prosecutions in very serious or notorious cases. He also had a long-standing prerogative power to halt any prosecution in a court of record by entering a nolle prosequi, of which, in

modern times, he makes rare use, indeed usually only when he considers that the defendant is unfit to plead.

12. In 1829 came the first step towards putting the police on a statutory, albeit only regional, footing. It was the Metropolitan Police Act of that year (10 Geo 4, c 44) and it established the London Metropolitan Police. It was followed in 1856 by the County and Borough Police Act (19 & 20 Vict, c 69), which required every county and borough to have its own constabulary. This improvement in the organisation of the police seems to have been the spur to their assumption of responsibility for most prosecutions. Technically, however, the prosecuting police officer was just another private prosecutor.

13. From about 1830 onwards there were calls for the introduction of a system of public prosecutions in England and Wales such as had long been established in Scotland and elsewhere. But the Prosecution of Offences Act 1879 (42 & 43 Vict c 22) went only a small way towards it. It established the role of the Director, under the direction of the Attorney General, but in effect it provided for him to institute prosecutions only in cases of importance or difficulty. Part of section 7 provided:

> "Nothing in this Act shall interfere with the right of any person to institute, undertake, or carry on any criminal proceeding."

14. But the Prosecution of Offences Act 1908 (8 Edw 7, c 3) repealed that part of section 7 and, by section 2(3), instead provided:

> "Nothing in the Prosecution of Offences Acts 1879 and 1884, or in this Act, shall preclude any person from instituting or carrying on any criminal proceedings, but the Director of Public Prosecutions may undertake at any stage the conduct of those proceedings if he thinks fit."

15. It is well-established, and unchallenged in this appeal, that the power of the Director, first conferred in 1908, to undertake the conduct of a prosecution instituted by a private prosecutor comprises a power to undertake its conduct in order not only to continue it but also to discontinue it. In *Gouriet v Attorney-General* [1978] AC 435, 487, 521 both Viscount Dilhorne and Lord Fraser of Tullybelton referred to his power to discontinue it; and it was formally held to exist in two cases decided shortly thereafter, namely in *Turner v Director of Public Prosecutions* (1978) 68 Cr App R 70 and in *Raymond v Attorney General* [1982] QB 839.

16. In January 1981 a Royal Commission on Criminal Procedure, of which the chairman was Sir Cyril Philips, produced a report (Cmnd 8092). Its central recommendation was that there should be a statutory prosecution service for all 43 police force areas in England and Wales, based locally but with national co-ordinating features; and that the police should conduct the prosecution (and its preliminaries) only to the point of charge or of the issue of the summons, whereafter the prosecution service should decide whether to proceed and, if so, should assume conduct of the prosecution. There was, so the Commission observed at paras 6.5 and 6.6 of the report, a lack of pattern in the existing prosecuting system in that it was not uniformly organised and administered across the 43 areas, with the result that the arrangements were characterised by variety and haphazardness.

17. Two further recommendations of the Royal Commission deserve note.

18. The first is its recommendation about the minimum strength of the evidence which should justify a prosecution. It noted, at para 8.8, that, where it fell to the Director to decide whether to prosecute, he applied the test "whether or not there is a reasonable prospect of conviction; in other words, whether it seems more likely that there will be a conviction than an acquittal". It approved this test and, at para 8.9, recommended that it "should be extended to all cases, and applied by all who make the decisions that bring a case to court". "Someone should not be put on trial", observed the Commission, "if it can be predicted, with some confidence, that he is more likely than not to be acquitted, since it is both unfair to the accused and a waste of the restricted resources of the criminal justice system."

19. The second is the Commission's recommendation for reform of the arrangements for private prosecutions realistically so called, ie prosecutions by private citizens. It recorded at para 7.47, albeit without any clear endorsement of the argument on its part, that "the great majority of our witnesses... argue in one way or another that the private prosecution is one of the fundamental rights of the citizen in this country and that it is the ultimate safeguard for the citizen against inaction on the part of the authorities". It recommended, at para 7.50, that:

(a) before even instituting a prosecution, a private citizen should ask the prosecution service to undertake it and that, by application of the criteria which it would apply to any other prosecution, the service should decide whether to do so;

(b) were it to decline to do so, the citizen should be able to apply to a magistrates' court for leave to prosecute it himself; and

(c) were the court to grant leave (the criteria for the determination of which the Commission did not identify), the costs of the private prosecution should be paid out of public funds.

20. Subject to its preference for a strong national direction of the proposed new service, the government accepted the central recommendation of the Royal Commission. The result was Parliament's enactment of the 1985 Act, section 1 of which established the CPS under the overall leadership of the Director and the regional leadership of Crown Prosecutors. Section 10 provided that:

> "(1) The Director shall issue a Code for Crown Prosecutors giving guidance on general principles to be applied by them –
>
> (a) in determining, in any case –
> (i) whether proceedings for an offence should be instituted or, where proceedings have been instituted, whether they should be discontinued;..."

21. But the government did not accept the Commission's recommendation for reform of the arrangements for private prosecutions. By then section 2(3) of the 1908 Act had been replaced, in almost identical terms, by section 4 of the Prosecution of Offences Act 1979. The latter was replaced by section 6 of the 1985 Act, being the section central to this appeal and still in force today. It provides as follows:

> "(1) Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply.
>
> (2) Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage."

The references to the Director's duty to take over the conduct of proceedings are to section 3(2) of the Act, in which the various types of proceedings to which his duty applies are identified. In particular they include almost all criminal proceedings instituted on behalf of a police force. In July 1998 the Law Commission, under the chairmanship of Dame Mary Arden, published a paper entitled "Consents to Prosecution" (Law Com No 255), in which, at para 5.8, it analysed section 6 as giving the private prosecutor in effect an unlimited right to *institute* a prosecution but as limiting his right to *continue* it by reference both to the Director's duty to take it over in the circumstances identified in section 3(2) and to his power to do so

in all other circumstances, conferred by subsection (2) of section 6 itself. I agree with the analysis.

22. Pursuant to section 10 of the 1985 Act the Director issued a Code for Crown Prosecutors ("the Code"). The first edition was published in 1986. The current edition is the sixth, published in February 2010. Importantly, it provides, at para 2.3:

> "Although each case must be considered on its own facts and on its own merits, there are general principles that apply to the way in which prosecutors must approach every case."

As in all earlier editions, the Code then provides, at para 3.4, that, subject to an irrelevant exception, prosecutors should start or continue a prosecution only when the case has passed both stages of the Full Code Test, which, at para 4.1, are identified as the evidential stage and the public interest stage. Paras 4.5 and 4.6 provide that the evidential stage is passed if the evidence is sufficient to provide a realistic prospect of conviction, namely that the court is more likely than not to convict the defendant. In relation to the public interest stage, para 4.12 provides that a prosecution will usually take place unless the prosecutor is sure that public interest factors tending against prosecution outweigh those tending in favour; and examples of factors which tend in each direction are given at paras 4.16 and 4.17.

23. The appellant submits that the terms of section 10 of the 1985 Act are not wide enough to entitle the Director to include in the Code reference to the principles which he himself will apply in deciding whether to exercise his power under section 6(2) to take over the conduct of a private prosecution in order to discontinue it. Strictly speaking, the submission may be valid; but there is no point in dwelling on it because the Director has not included any such reference in the Code. His policy in this respect has been articulated separately.

24. The best exposition of the policy of the Director in this respect, as it stood prior to 23 June 2009, is contained in a letter written on his behalf dated 27 July 1998 which was quoted by Laws LJ in giving judgment in the Divisional Court of the Queen's Bench Division, in *R v Director of Public Prosecutions Ex p Duckenfield* [2000] 1 WLR 55, 63:

> "[W]here we have been asked ... to take over the prosecution in order to discontinue it, we would do so if one (or more) of the following circumstances applies: *there is clearly no case to answer*. A private prosecution commenced in these circumstances would be unfounded,

and would therefore be an abuse of the right to bring a prosecution; *the public interest factors tending against prosecution clearly outweigh those factors tending in favour; the prosecution is clearly likely to damage the interests of justice.* The CPS would then regard itself as having to act in accordance with our policy. If none of the above apply there would be no need for the CPS to become involved and we would not interfere with the private prosecution. Clearly there is a distinction between the 'realistic prospect of conviction' test in the Code ... and the 'clearly no case to answer' test mentioned above. Accordingly we recognise that there will be some cases which do not meet the CPS Code tests where nevertheless we will not intervene. It has been considered that to apply the Code tests to private prosecutions would unfairly limit the right of individuals to bring their own cases."

25. But on 23 June 2009 the Director performed a volte-face. He introduced the very policy which, in the letter quoted, he had described as unfairly limiting the rights of private prosecutors. In guidance issued on his behalf to CPS prosecutors entitled "Private Prosecutions", published on that date, he wrote:

> "You should take over and continue with the prosecution if the papers clearly show that:
>
> - the evidential sufficiency stage of the Full Code Test is met; and
> - the public interest stage of the Full Code Test is met; and
> - there is a particular need for the CPS to take over the prosecution.
>
> ...
>
> A private prosecution should be taken over and stopped if, upon review of the case papers, either the evidential sufficiency stage or the public interest stage of the Full Code Test is not met.
>
> However, even if the Full Code Test is met, it may be necessary to take over and stop the prosecution on behalf of the public where there is a particular need to do so, such as where the prosecution is likely to damage the interests of justice.
>
> ...

> You should not take over a private prosecution if the papers clearly show that:
>
> - the evidential sufficiency stage of the Full Code Test is met; and
> - the public interest stage of the Full Code Test is met; and
> - there is no particular need for the CPS to take over the prosecution (either to stop or continue with the prosecution)."

DISCUSSION

26. The value to our modern society of the right to bring a private prosecution is the subject of lively debate.

27. The *Gouriet* case [1978] AC 435 concerned the ability of a private citizen to secure an injunction restraining a threatened refusal by post office workers to handle mail to South Africa in breach of the criminal law. Members of the appellate committee of the House of Lords considered, in passing, his right to bring a private prosecution in the hypothetical event that the workers had proceeded to commit such an offence. Lord Wilberforce said, at p 477:

> "This historical right which goes right back to the earliest days of our legal system, though rarely exercised in relation to indictable offences, and though ultimately liable to be controlled by the Attorney General (by taking over the prosecution and, if he thinks fit, entering a nolle prosequi) remains a valuable constitutional safeguard against inertia or partiality on the part of authority."

Lord Diplock observed, at p 498, that the need for private prosecutions to be undertaken had largely disappeared but that the right to undertake them still existed and was "a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law". Can one confidently say that the later advent of the CPS has banished all the concerns articulated in the *Gouriet* case, particularly in relation to "inertia", or (to adopt what may be the fairer word used by the witnesses to the Royal Commission: see para 19 above) "inaction", on the part of the public authority?

28. In *Jones v Whalley* [2007] 1 AC 63 the police administered a formal caution to the perpetrator of an assault and explained to him that, as a result, he would not be brought before a criminal court in respect of it. Thereupon his victim instituted a private prosecution against him in respect of it. The House of Lords held that the magistrates had been correct to stay the proceedings as an abuse of their process. General observations were made about the value of the right of private prosecution. Lord Bingham said, at para 9:

> "There are ... respected commentators who are of opinion that with the establishment of an independent, professional prosecuting service, with consent required to prosecute in some more serious classes of case, with the prosecution of some cases reserved to the Director, and with power in the Director to take over and discontinue private prosecutions, the surviving right is one of little, or even no, value...
>
> [Counsel for the victim] is entitled to insist that the right of private prosecution continues to exist in England and Wales, and may have a continuing role. But it is hard to regard it as an important constitutional safeguard when, as I understand, private prosecutions are all but unknown in Scotland."

Lord Bingham added, at para 16, that the surviving right of private prosecution was of questionable value and could be exercised in a way damaging to the public interest. By contrast, Lord Mance suggested, at para 39, that the rarity of a private prosecution in Scotland did not undermine the traditional English view that the right to institute it was an important safeguard; and, at para 43, that, as Lord Wilberforce and Lord Diplock had suggested in the *Gouriet* case, it was a safeguard against the wrongful refusal or failure by prosecuting authorities to institute proceedings.

29. With respect, I consider that there is much to be said in favour of the views thus expressed by Lord Mance. In any event, however, the fact is, that, by section 6 of the 1985 Act, Parliament chose, albeit in qualified terms, to reaffirm the right of private prosecution; and the conduct of the CPS must conform to its reaffirmation. In *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 Parliament had invested the Minister with a discretion to refer to a committee any complaint made to him about the operation of any scheme which he administered. Farmers in the South-East of England complained to him about the price paid to them for milk which they were required to sell to the Milk Marketing Board. The House of Lords held that, in refusing to refer their complaint to the committee, the Minister had exercised his discretion unlawfully. Lord Reid explained, at p1030, that "Parliament must have conferred the discretion with the

intention that it should be used to promote the policy and objects of the Act" and, at pp1032-1033, that "it is the Minister's duty not to act so as to frustrate the policy and objects of the Act".

30. So the question becomes: in applying the reasonable prospect test, as well as the two other tests, to his decision whether to intervene in a private prosecution in order to discontinue it, does the Director frustrate the policy and objects which underpin section 6 of the 1985 Act? Such is a focussed question; and, in my view, energetic, albeit (as I have indicated) controversial, assertions about the continuing constitutional importance of the right of private prosecution make little contribution to its answer.

31. No greater contribution to an answer to the focussed question is made by the decision in *Scopelight Ltd v Chief Constable of Northumbria Police Force* [2009] EWCA Civ 1156, [2010] QB 438. There the Court of Appeal addressed the right of the police to continue to retain seized property under section 22 of the Police and Criminal Evidence Act 1984 once the CPS had decided, on grounds of public interest, not to prosecute the claimants for infringement of copyright but while a trade body formed to counter such infringements was determining whether to prosecute them. Although the relevant events took place prior to 23 June 2009, no change was then made to the Director's approach to the public interest in determining whether to intervene in a private prosecution in order to discontinue it. There was no suggestion in that case that, pursuant to his policy, the Director should intervene in the private prosecution, which the trade body had proceeded to institute, in order to discontinue it. That was because the CPS had decided not that it would be contrary to the public interest for the claimants to be prosecuted at all but only that it would be contrary to the public interest for a prosecution to be conducted by itself: see the judgment of Leveson LJ (with which Ward LJ and I agreed) at paras 12, 39 and 51.

32. In suggesting a negative answer to the focussed question the CPS contends that both the earlier and the current tests which it was and is the policy of the Director to apply to the evidence in support of a private prosecution represent lawful approaches to the exercise of his discretion under section 6(2) of the Act; but that the current test is preferable for reasons to which, in part, I will refer in paras 34 to 38 below.

33. The appellant does not go so far as to contend that the Director's current policy eliminates the private prosecution. Such prosecutions are still frequently instituted. The great majority survive his three current tests for intervention and discontinuance; they therefore proceed as private prosecutions or, occasionally, as prosecutions which he takes over and continues. Other public bodies, such as the Office of Fair Trading which prosecutes those who practise wrongful forms of

selling, and Transport for London which prosecutes evaders of fares, apply the reasonable prospect test. So does the Royal Society for the Prevention of Cruelty to Animals, a private registered charity, the target of whose prosecutions is self-evident. Retail companies often prosecute shop-lifters and, although there is no firm evidence before this court as to the evidential test which they apply in determining whether to do so, the CPS seems not to intervene and, indeed, to be more than content thus to be spared entry into that sphere of prosecution. Other private bodies who sometimes conduct private prosecutions are identified in an illuminating article by Dr LH Leigh entitled *Private prosecutions and diversionary justice* in the Criminal Law Review: [2007] Crim LR 289, 293-294. Then there is the residue of prosecutions brought by individual citizens, often (as in this case) for alleged assaults upon them, which survive the CPS tests or of which, indeed, the CPS never comes to learn.

34. In the *Duckenfield* case [2000] 1 WLR 55 police officers who had been made defendants to private prosecutions for manslaughter and other offences in connection with the Hillsborough disaster applied for judicial review of the Director's decision to decline to take over conduct of the prosecutions in order to discontinue them. By way of application of his old policy, the Director had declined to conclude that there was clearly no case for the officers to answer. Save in one irrelevant respect, their applications for judicial review failed. The Divisional Court rejected their contention that, in determining whether to intervene, the Director had appraised the evidence by reference to criteria which were insufficiently stringent or had applied them too rigidly. The officers did not go so far as to submit that the only lawful course open to the Director would have been to apply the criteria in the Code. But in his judgment, with which the other members of the court agreed, Laws LJ made observations about any such submission, upon which, in support of the present appeal, the strongest reliance is placed. Laws LJ said, at p 68:

> "In truth, however, it could not be right for the DPP to apply across the board the same tests, in particular the 'reasonable prospect of conviction' test..., in considering whether to take over and discontinue a private prosecution as the Code enjoins Crown Prosecutors to follow in deciding whether to institute or proceed with a prosecution themselves; the consequence would be that the DPP would stop a private prosecution merely on the ground that the case is not one which he would himself proceed with. But that, in my judgment, would amount to an emasculation of section 6(1) and itself be an unlawful policy; and in fairness [counsel for the officers] made it clear that he did not submit so much. The very premise of section 6(1) must be that some cases will go to trial which the DPP himself chooses not to prosecute."

If, as the last sentence suggests, it was the preliminary view of Laws LJ in relation to this unargued point that the effect of applying the reasonable prospect test would be to eliminate private prosecutions, he was, as will be apparent from what I have said above, much mistaken. But there is another interesting feature of his judgment. For, at p 69 (reiterated in slightly different terms at p 71), he said:

> "I see no reason why quite aside from the evidential test of no case to answer the DPP should not within his policy as presently formulated, have in mind the likelihood or otherwise of conviction when considering where the public interest lies."

Therein lies, in my view, some dilution of the force of the judge's earlier remarks. But, with respect to him, I have no appetite for thus blurring the distinction between the evidential test and the public interest test.

35. The appellant argues that, within the policy previously applied by the Director to his determination whether to intervene and discontinue, there was a logical coherence wholly lacking within the current policy. The coherence lay, so it is said, in the fact that, subject of course to the difference between a survey of the written evidence and that of the oral evidence, the Director formerly asked himself in effect precisely the same question as the court would ask itself in ruling on a submission at the close of the prosecution case: is there a case for the defendant to answer? This argument, which finds favour in the judgment of Lord Mance at paras 98, 99 and 114 below, makes limited appeal to me. Much more relevant to the aptness of a prosecution than whether it is likely to survive a submission of no case to answer is whether it is likely to result in a conviction. In focussing, as his current policy does, on the prospects of a private prosecution in that regard, the Director in my view poses to himself a much more relevant question.

36. I discern four additional reasons which help to justify the Director's current policy and which make it extremely difficult for the appellant to contend that it must be taken to frustrate the policy and objects which underpin Parliament's reaffirmation of the right of private prosecution in section 6(1) of the 1985 Act. They are as follows:

(a) Parliament did not choose expressly to confine the discretion which, by subsection (2), it conferred upon the Director to take over the conduct of a private prosecution.

(b) The object behind the main innovation of the 1985 Act, namely the establishment of the CPS, reflected the conclusion of the Royal Commission referred to above that there was a lack of consistency between local decisions whether to prosecute and, if so, how to conduct them. In moving the second reading of the Bill in the House of Lords Lord Elton, Minister of State at the Home Office, said (Hansard (HL Debates) 29 November 1984, cols 1014-1015) that what was needed was a prosecution service that avoided rigid uniformity yet applied consistent standards throughout the country. He was not there speaking of interventions in private prosecutions but it is hard to imagine that this central thread in the policy behind the Act was not long enough to extend to them.

(c) A prosecution which lacks a reasonable prospect of success draws inappropriately upon the resources of the court.

(d) A defendant would have a legitimate grievance about subjection to criminal prosecution at the instance of a private prosecutor in circumstances in which, by application of lawful criteria to the strength of the evidence against him, there would be no public prosecution.

37. Furthermore, as in general terms he acknowledges in para 2.3 of the Code set out at para 22 above, the Director would act unlawfully if he were to adopt a rigid approach to the application of his policy in determining whether to institute prosecutions (and, by necessary extension, whether to intervene in order to discontinue them): *British Oxygen Co Ltd v Board of Trade* [1971] AC 610, 625 (Lord Reid). Indeed, as this case and the *Duckenfield* case [2000] 1 WLR 55 demonstrate, the lawfulness both of a determination to intervene in order to discontinue and of a determination not to do so is amenable to judicial review in which the determination will be scrutinised for compliance with, among others, the principle enunciated in the *British Oxygen* case.

38. In Australia the Director of Public Prosecutions decides whether to institute a prosecution by applying, among others, a policy that "a prosecution should not proceed if there is no reasonable prospect of a conviction being secured": Prosecution Policy of the Commonwealth, November 2008, para 2.5. His policy is to intervene in a private prosecution in order to discontinue it if, similarly, "there is no reasonable prospect of a conviction being secured on the available evidence": para 4.10(a). It may be that the negative formulation in Australia of the reasonable prospect test renders it marginally less demanding than its positive formulation in England and Wales. But, for present purposes, the point is that the Director of Public Prosecutions in Australia applies the evidential test used in relation to all

other prosecutions in determining whether to intervene in order to discontinue a private prosecution; and that, so far as this court is aware, there has been no challenge to the lawfulness of his so doing.

39. In summary I find myself wholly unable to subscribe to the view that, in reaffirming, in qualified terms, the right to maintain a private prosecution in section 6 of the 1985 Act, Parliament must be taken to have intended that the Director should decline to exercise his discretion so as to intervene and discontinue it even if it lacks a reasonable prospect of success. In other words I discern nothing in the policy and objects underpinning the section to justify a conclusion that, by application of his current policy towards intervention and discontinuance, the Director frustrates them.

40. Accordingly I would reject the appellant's central contention in this appeal.

41. In these circumstances the appellant falls back on two further, alternative, contentions.

42. His first further contention is founded on a concession made on behalf of the CPS before the Divisional Court, namely that, although the Director had (so it was said) reasonably concluded that the prosecutions stood no reasonable prospect of resulting in convictions, the contrary conclusion would also be reasonable. From the foot of this concession the appellant contends that the only lawful application of a reasonable prospect test would be for the Director to ask not whether *he* concludes that there is a reasonable prospect of conviction but whether *a reasonable prosecutor* might so conclude. Efficacy, so the appellant argues, should in that way be given to such reasonable conclusion about the strength of the evidence as the private prosecutor may have reached. The CPS itself reminds the court that "in deciding whether a prosecution is required in the public interest, prosecutors should take into account any views expressed by the victim regarding the impact that the offence has had": the Code, para 4.18; and the appellant thus argues for loosely analogous consideration of the views of the victim in relation to the evidential stage of the Director's inquiry.

43. I discern nothing inherent in section 6 of the 1985 Act to mandate the Director's adoption of this different approach to the evidential test, being a type of approach the like of which I cannot readily recall in any other area of executive decision-making. I regard the approach suggested by the appellant as unfounded in law and pregnant with intricate dispute. It is the CPS which contributes the expert, impartial, appraisal of the strength of the evidence; and, as Lord Neuberger explains in para 69 below, most victims are ill-equipped to make a different contribution of significant value in this particular respect.

44. The appellant's second further contention is that, even if the Director was entitled to decide for himself whether there was a reasonable prospect of convictions, his negative conclusion was irrational. In an effort to substantiate this bold contention, the appellant makes detailed reference to aspects of the evidence. Like the first further contention, it was rejected by the Divisional Court and, had it been free-standing, it would not have been permitted to be the subject of an appeal to this court. It would be wrong to prolong this judgment by descent into the detail of the evidence. I trust that my treatment of the second further contention will not be considered inappropriately high-handed if I say only – as I do – that I reject it for the reasons given in paras 31 to 42 of the judgment of Richards LJ in the Divisional Court [2012] 1 WLR 245.

RESULT

45. So I would dismiss the appeal.

LORD NEUBERGER

46. The principal issue on this appeal is whether the current policy of the Director of Public Prosecutions ('the Director') relating to taking over and discontinuing private prosecutions is, as the Divisional Court held, lawful. I agree with that conclusion for the reasons given by Lord Wilson, but, in the light of the division of opinion in this court, I propose to set out my thinking.

47. The validity of the 2009 policy must be assessed in accordance with normal legal principles applicable to any policy promulgated by the Executive. In particular, it must be assessed against the current relevant statutory provisions, which are to be found in the Prosecution of Offences Act 1985 ("the 1985 Act"), of which the most important is section 6 ("section 6").

48. Ignoring classes of proceedings which the Director was obliged to take over by the 1985 Act, two relevant points emerge clearly from section 6. First, subsection (1) demonstrates that the long established right of individuals to institute and to conduct private prosecutions is, subject to subsection (2), to remain intact. Secondly, subsection (2) gives the Director the right, which is, at least in terms of the language of the subsection, wholly unfettered, to take over any prosecution initiated privately.

49. As Lord Wilson says, the central issue on this appeal is whether the 2009 policy can fairly be said to frustrate the policy and objects which underpin section

6. Mr Fitzgerald put the issue slightly differently, namely, as reflected in Lord Mance's judgment, whether the 2009 policy emasculated (or, to use Mr Fitzgerald's words, unlawfully attenuated, restricted or diminished) the right to conduct private prosecutions. In my view, a policy which emasculated the right would indeed frustrate the policy and objects of section 6, so I consider that there is, in principle and in practice, no real difference between the approach of Lord Wilson and that of Lord Mance.

50. The Director's policy with regard to prosecutions which he is contemplating bringing and continuing is set out in his current Code for Crown Prosecutors ("the Code"), which is described by Lord Wilson in para 22 and by Lord Mance in paras 97 and 98.

51. It is right to record that, when asked, Mr Fitzgerald QC, for the appellant, did not accept that that policy was necessarily lawful, even with regard to prosecutions which the Director is considering or conducting. However, I consider that, in the absence of any argument in this court or below to the contrary, we must proceed on the basis that the policy is lawful. Quite apart from the presumption of legality, it seems to me hard to quarrel with a policy that a prosecution will not be initiated or conducted by the Director unless the two requirements, set out and explained in the Code, are met, namely (i) there is a better than evens prospect of securing a conviction, and (ii) it would be in the public interest to proceed with the prosecution.

52. The justification for the second requirement is self-evident. While I am far from suggesting that the "better than evens" standard is the only one which the Director could adopt, there are several reasons for the first requirement. (i) It could be said to be oppressive on potential defendants to require them to face criminal proceedings unless there was a good chance of securing a conviction. (ii) Court time should not normally be taken up dealing with speculative prosecutions. (iii) Public money on prosecuting, and defending, criminal proceedings should generally be devoted to cases which are likely to be successful. And, perhaps more arguably, (iv) a low conviction rate may undermine confidence in the criminal justice system.

53. I also note that the Royal Commission on Criminal Procedure (Cmnd 8092), chaired by Sir Cyril Philips in 1981 and the Law Commission in 1998 ("Consents to Prosecution" (Law Com No 255)) both considered the "better than evens" standard applied by the Director, and did not express any concerns about it.

54. However, the mere fact that the "better than evens" standard is lawfully adopted by the Director for prosecutions which he is considering initiating and

then conducts, does not ineluctably mean that it is a lawful standard for him to adopt when deciding whether to take over private prosecutions for the purpose of discontinuing them. However, there are four factors which seem to me to provide support for the contention that the Director is justified in adopting the same "better than evens" standard for private prosecutions as he applies under the Code to his own prosecutions.

55. First, one of the primary purposes of the 1985 Act in expanding the Director's functions and duties was to introduce a degree of consistency in the approach to instituting and conducting prosecutions throughout England and Wales. Accordingly, at least on the face of it, it would seem hard to say that for him to adopt a consistent approach to public and private prosecutions was contrary to what was contemplated by the 1985 Act.

56. Secondly, it is worth considering a case where the Director has taken over a private prosecution without the intention of discontinuing at the time, but subsequently decides (eg because of new evidence, or a change in the law) that the prospect of securing a conviction is less than evens. In such a case, it seems to me that he would be entitled to apply the Code to the case, and discontinue, particularly given that there is a continuing obligation on the Director under the Code to review any prosecution. If that is right, there is obvious logic in his applying the same standard when considering a private prosecution, given his power to take over its conduct in order to discontinue it.

57. Thirdly, many of the factors which can be said to justify the "better than evens" standard in public prosecutions apply to private prosecutions. (i) Unfairness to defendants and (ii) use of court time apply to the same extent. (iii) Costs implications substantially apply to a similar extent, although unsuccessful private prosecutors will not always be reimbursed out of public funds. (iv) Confidence in the justice system may be rather less relevant, because the Director's record will not be affected, but, given the applicability of the other three factors, it still applies to a significant extent.

58. Fourthly, as Lord Wilson has explained, the "better than evens" standard was approved in para 8.9 of the 1981 report of the Royal Commission, chaired by Sir Cyril Philips, not merely for prosecutions brought by the Director, but for all prosecutions.

59. As mentioned above, Mr Fitzgerald's grounds for attacking the 2009 policy are based more on the contention that the 2009 policy emasculates the right of an individual to conduct a private prosecution. His case in this connection is that, while private prosecutions would not be wiped out by the 2009 policy, the right to

conduct such prosecutions would be so substantially reduced as to be emasculated. He reinforced that argument by pointing out that it has to be judged bearing in mind that the right to bring a private prosecution is an aspect of a fundamental common law right, namely the right of every citizen to enjoy access to the courts.

60. I have some sympathy with that argument, but in the end, I would reject it. The 1985 Act and the 2009 policy leave untouched the right of an individual to institute a private prosecution. Accordingly, in any case where the Director has not got round to deciding whether to prosecute, or has considered the facts and has decided not to prosecute, a private prosecution could be initiated. If that prosecution comes to the Director's attention, he will then have to assess, or, if he has already done so, to reassess, whether there is a better than evens prospect of the prosecution succeeding, and whether it is in the public interest that it proceed: if both those tests are satisfied, the prosecution will be permitted to proceed (either because the Director takes it over or as a private prosecution). That, of itself, gives the right to initiate private prosecutions an undoubted, indeed a virtually unlimited, function.

61. As to the conduct of private prosecutions, it is clear that there will be some prosecutions which the Director will take over in order to discontinue, and some which he will take over in order to conduct them himself. However, it is also apparent from the 2009 policy that there will be prosecutions which the Director will not take over, and will allow to proceed as private prosecutions, even if one ignores the prosecutions which the Director effectively leaves to large concerns – as described by Lord Wilson at para 33.

62. After explaining that the Director has to be satisfied that the "better than evens" and public policy requirements are met if he is not to take over a private prosecution in order to discontinue it, the 2009 policy goes on to state that he should only "take over and continue with the prosecution if the papers clearly show that … there is a particular need for the CPS to take over the prosecution". Thus, any private prosecution which is found to have a better than evens chance of success and is not contrary to the public interest, will be permitted to continue as a private prosecution save where there is "a particular need" for it to be taken over by the Director.

63. The examples of types of case where the private prosecution should be taken over in order to be pursued by the CPS suggest that there will be a significant proportion of private prosecutions which, if they satisfy the "better than evens" standard and the public policy requirement, will be allowed to proceed as private prosecutions. Albeit by way of non-exhaustive, and non-conclusive, examples, the 2009 policy suggests that private prosecutions should normally be taken over by the Director if "the offence is serious", if "there are detailed

disclosure issues to resolve", or if the prosecution would involve "the disclosure of highly sensitive material" or "applications for special measures or for witness anonymity".

64. I unhesitatingly accept that no court should be relaxed about a code, or other set of rules or guidelines promulgated by any branch of the Executive, which has the effect of cutting down individuals' rights of access to the courts. However, the right to institute and conduct a private prosecution is not in quite the same category of rights as a right to seek a remedy or compensation for a wrong by bringing a claim in the civil courts. The right to conduct a private prosecution has always been subject to being curtailed by the power of the Attorney General to stop the prosecution through issuing a nolle prosequi – an executive power which, unsurprisingly, has no equivalent in the civil jurisdiction.

65. Further, the most recent observations in the House of Lords about the right to bring private prosecutions are not universally enthusiastic – contrast Lord Bingham of Cornhill (who described it as being "of questionable value" in a speech with which Lord Rodger of Earlsferry, Lord Carswell, and Lord Brown of Eaton-under-Heywood agreed), with Lord Mance (who described it as "a safeguard against wrongful refusal or failure by public prosecuting authorities"), in *Jones v Whalley* [2006] UKHL 41, [2007] 1 AC 63, paras 16 and 43 respectively. It is true that more enthusiasm was expressed about the right by Lord Wilberforce and Lord Diplock in *Gouriet v Union of Post Office Workers* [1978] AC 435, 477 and 498 respectively. However, that decision predated the 1985 Act; furthermore, both Lord Wilberforce and Lord Diplock accepted that "the need for prosecutions to be undertaken (and paid for) by private individuals has largely disappeared" (to quote Lord Diplock, at p 498), and Lord Wilberforce emphasised, at p 477, that the right was subject to the Attorney General's power to enter a *nolle prosequi* – a point also made by Lord Fraser of Tullybelton, at pp 520-521.

66. It is also plain that the ability to bring private prosecutions does not rank as some sort of internationally recognised right, as Mr Fitzgerald fairly conceded. Lord Bingham pointed out in *Jones* [2007] 1 AC 63, at para 16, that it is primarily for the public authorities to prosecute criminals, and, according to Ms Montgomery QC, it is essentially for this reason that private prosecutions are not permitted in most courts of the United States.

67. It is also true that, as Lord Mance says in para 105, a former Director and a former Attorney General, have spoken about the importance of retaining the right of individuals to bring private prosecutions. However, given my conclusion that the right to bring private prosecutions is not emasculated by the 2009 policy, it seems to me that such statements do not take matters much further. In any event, the fact that, in 1980, many informed people would have thought that a policy such

as the 2009 policy was too restrictive does not mean that it would have been unlawful then, let alone that it is unlawful now, particularly following the passing of the 1985 Act.

68. There is no doubt that the right to bring private prosecutions is still firmly part of English law, and that the right can fairly be seen as a valuable protection against an oversight (or worse) on the part of the public prosecution authorities, as Lord Wilson acknowledges at paras 28 and 29, and Lord Mance says at para 115. However, that does not really impinge on the lawfulness of the Director applying a "better than evens" test to private prosecutions. Once one accepts that the Director is entitled to apply that test to his own prosecutions, it is hard, as a matter of logic, to see how applying the same test to private prosecutions inhibits the valuable protection afforded by the right to bring such prosecutions.

69. I am also not impressed by the point that an individual who was in some way directly involved in, or who witnessed, the commission of the alleged crime, is in a better position than the Director to assess the prospects of obtaining a conviction. An objective, expert, and experienced assessment of the prospects appears to me to be generally more reliable than the assessment of a person who will normally be (probably wholly) inexperienced in the criminal justice system, and (often, as in this case) involved, frequently as a victim, and therefore far from dispassionate.

70. Given that the Director has been given statutory power to take over and discontinue a private prosecution, it seems to me hard therefore to say that the 2009 policy undermines the principle that the right to conduct private prosecutions should in principle survive. The interests of private prosecutors and of potential defendants, as the two groups with the greatest interest in the policy, should be taken into account, as should the public interest, which includes the efficient use of court time and public money, and confidence in the criminal justice system. I find it hard to see what is wrong with a policy that a private prosecution should be allowed to proceed as such, only if (i) it has a greater than evens chance of success, (ii) it is not contrary to the public interest, and (iii) there is no special reason why it should be conducted by the Director.

71. I have no difficulty in accepting that many people might reasonably think that the 2009 policy is too restrictive of the rights of those individuals who wish to bring and conduct private prosecutions. However, that is a long way from saying that the policy is unacceptably restrictive as a matter of law. In my view, the arguments mounted by Mr Fitzgerald fall some way short of establishing such a proposition.

72. Lord Wilson in para 34, and Lord Mance in paras 103 and 104 have referred to the observations of Laws LJ in *R v Director of Public Prosecutions, Ex p Duckenfield* [2000] 1 WLR 55, 68-69, which were understandably relied on by Mr Fitzgerald. There is no doubt that, in those observations, Laws LJ was addressing the very question which we have to decide, and that he answered that question, in characteristically trenchant terms, by indicating that a policy such as that contained in the 2009 policy would in his view be unlawful. Particularly coming from that source, the observations are entitled to great respect. However, they were not merely obiter: the issue had not been argued; indeed, it had actually been conceded on behalf of the then-Director. There is a considerable difference in the weight to be attached to judicial observations in relation to a point which has been fully argued, as against those in relation to a point which has been conceded, often, no doubt, for good forensic reasons.

73. Now that the point has been fully argued, I am satisfied, for the reasons given by Lord Wilson, that the 2009 policy, so far as it concerns the Director's approach to taking over private prosecutions with a view to discontinuing them, is lawful. As to the other issues, there is nothing which I can usefully add to what Lord Wilson has said at paras 42-44.

74. Accordingly, I would dismiss this appeal.

LORD KERR

75. For the reasons given by Lord Neuberger and Lord Wilson, with which I agree, I too would dismiss this appeal.

76. Section 6(2) of the Prosecution of Offenders Act 1985 gives the Director of Public Prosecutions ("the Director") the power to take over the conduct of a private prosecution. Ancillary to this is the power to discontinue such a prosecution. The use of these powers involves the exercise of discretion. A person or agency who is exercising discretion as to how to use a statutory power may devise a policy to guide him in its use. He may formulate a policy or make a limiting rule as to the future exercise of his discretion, if he thinks that good administration requires it, provided that he listens to any applicant who has something new to say: *British Oxygen Co Ltd v Board of Trade* [1971] AC 610, 624G-625E. He must also ensure that the terms of the policy are readily available to those who are likely to be affected by its application. Beyond this, however, the only constraint on the exercise of his discretion is that it must not defeat or frustrate the policy of the Act from which it is derived: *Padfield v Minister of*

Agriculture, Fisheries and Food [1968] AC 997. The policy should be used "to promote the policy and objects of the Act": per Lord Reid, at p 1030.

77. It has not been suggested that the Director's current policy is applied too rigidly in the *British Oxygen* sense or that its terms have not been sufficiently publicised. It has not been argued – nor could it have been – that the Director is not entitled to change his policy. The central plank of the appellant's challenge has been – as it had to be – on its incompatibility with the policy and the objects of the Act.

78. There is nothing in the language of section 6(2) (nor of the Act generally) to suggest that the policy of the enactment was to permit private prosecutions to continue unless they failed to meet a standard of raising a prima facie case against the proposed defendant. Nothing in the 1985 Act could be said to indicate a policy that the availability of the right to privately prosecute should continue as it had previously existed. There was, for instance, no provision such as is found in section 7 of the Prosecution of Offenders Act 1879 to the effect that nothing in the 1985 Act "shall interfere with the right of any person to institute, undertake, or carry on any criminal proceeding". Indeed section 6(1) is expressly stated to be subject to the Director's power to take over the conduct of a private prosecution "at any stage": section 6(2). If one is to find that the underlying policy objective of the 1985 Act was to preserve the right not to have one's private prosecution taken over and discontinued by the Director unless it did not disclose a case for a defendant to answer, one must look elsewhere.

79. Lord Mance has said (in para 93) that the original stated purpose for which the Director was given the right to take over the conduct of proceedings in the enactments that preceded the 1985 Act was to ensure that cases which ought in the public interest to be pursued were not abandoned or inefficiently conducted because of lack of means on the part of the prosecutor or inertia. That may well be so. But, by the time that the 1985 Act came to be enacted, it was clear, not least because of the decision in *Raymond v Attorney General* [1982] QB 839, that the power of the Director to take over a prosecution with the object of aborting it in the public interest was not considered to be inimical to the purpose of the earlier enactments.

80. If not in the language of the 1985 Act itself, where is the mooted right to be permitted to continue a private prosecution (provided it surmounts the prima facie case hurdle) to be found? Lord Mance suggests that it derives from an access to justice principle, rooted in fundamental constitutional theory. Lady Hale says that this is a "centuries-old … right of access to a court to prosecute an alleged offender": para 123. But it is clear that the right, however venerable, has been modified by successive enactments. The very institution of the office of Director

of Public Prosecutions impinged on the right. Prosecution of offenders was no longer exclusively in the domain of private individuals. Adjustment to the content of the right was therefore inevitable. The Director was given the power to stop private prosecutions. On whatever basis that power was exercised previously, the right to privately prosecute was affected.

81. Moreover, access to justice is not, in any event, always an unqualified right of the citizen. In judicial review, for instance, the leave of the court to take proceedings is required. And it is undeniable that private prosecutions may still be – and are regularly – taken. As Lord Neuberger has pointed out, Mr Fitzgerald QC for the appellant accepted that for the Director to stop a private prosecution on the ground that the case is not one which he would himself proceed with would not, in the words of Laws LJ in *R v Director of Public Prosecutions Ex p Duckenfield* [2000] 1 WLR 55, 68, amount to an emasculation of section 6(1) of the 1985 Act, in the sense of extinguishing it. The change of policy has, of course, attenuated the right that had previously existed, as Mr Fitzgerald correctly contended. But this would not be the first instance of its attenuation. Access of the citizen to justice in the field of private prosecution is therefore not denied by the Director's change of policy. It is adjusted certainly. The essential question, however, is whether this adjustment is out of keeping with the underlying policy and objects of the 1985 Act.

82. Various policy considerations have been examined in the judgments of the other members of the court. I do not consider it necessary for me to say anything about those beyond observing that the question whether it is lawful for the Director to change his policy is not necessarily answered by asking whether Parliament intended, by the 1985 Act, to curtail the right of the citizen to institute private prosecutions. It is clear that Parliament intended that the Director should have power to take over a private prosecution with a view to discontinuing it. Parliament's intention must be viewed against the background of the historical adjustment to the right to privately prosecute. That adjustment occurred because the Director was given the power to take over private prosecutions and because of the way in which he decided to exercise that power. Parliament's intention in 1985 was clearly to preserve the power and, it seems to me, its intention must also have contemplated that the policy by which the power might be exercised could be subject to change. Parliament may not have intended positively to restrict the right of citizens to institute private prosecutions but that does not mean that it had reached a settled intention that that right should remain precisely in the condition that, as a result of the then current policy of the Director, it then was.

83. The conferring of a power on the Director to take over the conduct of a private prosecution, without prescription as to when and in what circumstances that power might be exercised, can only be regarded as consistent with a Parliamentary intention that the power *could* be exercised so as to assimilate the

test for private prosecutions with that which the Director applied to the conduct of public prosecutions. After all, Parliament leaves to the Director the choice of the test as to when a public prosecution should proceed or be discontinued. Why should it be thought that the 1985 Act intended to preserve in aspic the test that had been in use at that particular time in respect of private prosecutions? There was, at least, lively debate about the value of the right to privately prosecute at the time of the passing of the 1985 Act. If Parliament had intended that the right to conduct private prosecutions – or, more accurately, the right to prevent their being taken over by the Director in order to discontinue them – should be maintained in the condition that it was permitted to exist by the then current policy of the Director, it would surely have been necessary to make this unequivocally clear. The right to instigate and continue private prosecutions had been subject to change before the 1985 Act. Most importantly, it had been subject to the policy of the Director that the prosecution evidence be sufficient to sustain a prima facie case. There was no reason to suppose that this policy would remain in an inviolate and immutable condition.

84. I find it impossible to conclude therefore that there is anything about the discernible policy and object of the 1985 Act which would be undermined by the change to the policy in relation to private prosecutions which the Director has adopted.

85. I have nothing to say on the subsidiary arguments advanced by the appellant beyond that I agree with Lord Wilson's and Lord Neuberger's observations on them.

LORD MANCE

86. This appeal concerns the legitimacy, under section 6(2) of the Prosecution of Offences Act 1985, of a policy adopted by the Director of Public Prosecutions in 2009. The policy was to take over and discontinue any private prosecution coming to his notice which did not in his assessment meet an evidential test that it was more likely than not to lead to a conviction.

87. Section 6(1) of the 1985 Act recognises the right to institute private prosecutions, but section 6(2) provides that the Director may take over their conduct. Lord Wilson has set out the section in para 21.

88. Traditionally, all prosecutions in England and Wales could be described as private, even though brought in the name of the Crown. James Fitzjames Stephen said in his *History of the Criminal Law of England*, Vol I (1883), p 493: "In

England … the prosecution of offences is left entirely to private persons, or to public officers who act in their capacity of private persons and who have hardly any legal powers beyond those which belong to private persons". In a lively and educative study, *The Law Officers of the Crown* (1964), by Professor J Edwards of the Middle Temple and University of Toronto, the then Director of Public Prosecutions, Sir Theobald Mathew, is quoted (p 335) as stating in 1950 that "there are no public prosecutions in the ordinary sense of that term." Professor Edwards noted (p 401) the unreality of this analysis in relation to prosecutions by the Director or Treasury Counsel. The Director's office went back to the 1870s, but the Director had very few staff and undertook very few prosecutions prior to 1985. The vast majority of cases were prosecuted by the police, acting, Sir Theobald Mathew also said, as "in effect, private citizens paid by their fellow citizens to carry out these duties on their behalf." (p 335).

89. Quite apart from police prosecutions, however, a not inconsiderable number of bodies and some individuals have to this day continued to institute and pursue truly private prosecutions, as noted by Associate Professor Douglas Hay in "Controlling the English Prosecutor" (1983) 21 Osgoode Hall L J 165, 180-182, by Watkins LJ in *R v Stafford Justices, Ex p Customs and Excise Comrs* [1991] 2 QB 339, 350-351, by myself in *Jones v Whalley* [2006] UKHL 41, [2007] 1 AC 63, para 38 and by Dr L H Leigh, formerly Professor of Criminal Law at the London School of Economics, in *Private prosecutions and diversionary justice* [2007] Crim LR 289, 293-294. A research study for the Royal Commission on Criminal Procedure (Cmnd 8092) whose Report in 1981 preceded the 1985 Act is quoted by Hay (pp 180-181) as recording that less than 3% of all prosecutions were purely private, with about 9% of other prosecutions being for shoplifting by retail stores; roughly one quarter of adult prosecutions for non-traffic offences were being brought by the police, more than one half of these originating with other official bodies.

90. In *The Law Officers of the Crown*, Professor Edwards noted that the English and Welsh system had not been copied elsewhere, although describing it as a "fundamental principle" which was "basic …. in our constitution" (p 336). Lord Simon of Glaisdale, speaking extra-judicially on the second reading of the bill leading to the 1985 Act (Hansard (HL Debates), 29 November 1984, col 1068) described the right of private prosecution as founded on the "fundamental constitutional principle of individual liberty based on the rule of law", and in *Gouriet v Attorney General* [1978] AC 435, 477, 498 Lord Wilberforce said that the right remained "a valuable constitutional safeguard against inertia or partiality on the part of authority", and Lord Diplock spoke of "a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of … authorities to prosecute offenders".

91. Prior to the 1985 Act, the Director's office existed under and was governed by Prosecution of Offences Acts passed in successively 1879, 1884, 1908 and 1979. Section 7 of the 1879 Act (42 & 43 Vict c 22) stated that

> "Nothing in this Act shall interfere with the right of any person to institute, undertake, or carry on any criminal proceeding."

Under section 2 of the Act, regulations were to provide for the Director to institute, undertake or carry on proceedings in "cases which appear to be of importance or difficulty, or in which special circumstances, or the refusal or failure of a person to proceed with a prosecution, appear to render the action of such Director necessary to secure the due prosecution of an offender"; and regulations were duly made to that effect (see Edwards, p 379). Under section 6, where the Director had instituted or undertaken any proceeding, private persons might apply to a High Court judge for leave to continue such proceedings, if the Director had abandoned them or neglected to carry them on.

92. The 1908 and 1979 Acts contained precursors to section 6 of the 1985 Act, which Lord Wilson has set out in para 14. However, these Acts contained no equivalent of section 6 of the 1879 Act.

93. The original stated purpose for which the Director was given this right to take over the conduct of proceedings was thus to ensure that cases which ought in the public interest to be pursued were not abandoned or inefficiently conducted, whether through lack of means, inertia or any other reason. The Report of the Select Committee appointed to inquire into the Office of Public Prosecutor, 1884 (The Harcourt Committee) advocated that, in order to fulfil this aim, the police in every borough should transmit to the Director a list of all indictable offences committed in their district (see Edwards, p 376). However, this necessary adjunct to any comprehensive approach was and never has been implemented.

94. While this was the original stated purpose, in practice, and modelling himself no doubt on the Attorney General's right to enter a nolle prosequi (rarely exercised though that is, and then usually when he considers the defendant unfit to plead), the Director used also to take over cases with a view to discontinuing their prosecution. This practice was challenged but upheld at first instance in *Turner v DPP* (1978) 68 Cr App R 70 and on appeal in *Raymond v Attorney General* [1982] QB 839, where Sir Sebag Shaw said, at pp 846-847:

> "The word 'conduct' appears to us to be wider than the phrase 'carry on' and suggests to our minds that when the Director intervenes in a

> prosecution which has been privately instituted he may do so not exclusively for the purpose of pursuing it by carrying it on, but also with the object of aborting it; that is to say, he may 'conduct' the proceedings in whatever manner may appear expedient in the public interest. The Director will thus intervene in a private prosecution where the issues in the public interest are so grave that the expertise and the resources of the Director's office should be brought to bear in order to ensure that the proceedings are properly conducted from the point of view of the prosecution.
>
> On the other hand there may be what appear to the Director substantial reasons in the public interest for not pursuing a prosecution privately commenced. What may emerge from those proceedings might have an adverse effect upon a pending prosecution involving far more serious issues. The Director, in such a case, is called upon to make a value judgment. Unless his decision is manifestly such that it could not be honestly and reasonably arrived at it cannot, in our opinion, be impugned."

Both *Turner* and *Raymond* were classic cases of abuse of process by private prosecutors, who had laid charges against persons who were Crown witnesses against them in separate proceedings.

95. Our modern professionalised public prosecution system at the national level dates from the Prosecution of Offences Act 1985. This introduced for the first time a professional prosecuting service, of which the Director of Public Prosecutions was made head. He was given the duty under section 3(2):

> "(a) to take over the conduct of all criminal proceedings … instituted on behalf of a police force …;
>
> (b) to institute and have the conduct of criminal proceedings in any case where it appears to him that –
>
> (i) the importance or difficulty of the case makes it appropriate that proceedings should be instituted by him; or
>
> (ii) it is otherwise appropriate for proceedings to be instituted by him; …"

96. Under section 10, he was also bound to

> "issue a Code for Crown Prosecutors giving guidance on general principles to be applied by them—
>
> (a) in determining, in any case—
>
> (i) whether proceedings for an offence should be instituted or, where proceedings have been instituted, whether they should be discontinued; or
>
> (ii) what charges should be preferred; and
>
> (b) in considering, in any case, representations to be made by them to any magistrates' court about the mode of trial suitable for that case."

97. Section 10 did not require the Code to give guidance with regard to the situations in which the Director might under section 6(2) take over the conduct of a private prosecution. As Miss Clare Montgomery QC for the CPS accepted, the relevant version of the Code, issued in February 2010, therefore confines itself to addressing situations in which Crown prosecutors are faced with a decision whether to institute a prosecution; and, further, the Code imposes in this regard a "Full Code Test" with two limbs or stages: the first the evidential stage, the second the public interest stage.

98. The first stage, derived from the Royal Commission Report 1981 which preceded the 1985 Act, involves considering whether there is a realistic prospect of success. That is a phrase familiar in other areas of the law and it sounds as if it should be beyond controversy until one appreciates that it is defined in this area to require a conclusion, before any prosecution, 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" (Code, para 4.6). This stage therefore imposes a substantially higher threshold for public prosecution than any criminal court would apply. This is mitigated only to some extent if the CPS eschews "a purely predictive approach based on past experience of similar cases (the bookmaker's approach)" – see *R (B) v Director of Public Prosecutions (Equality and Human Rights Commission intervening)* [2009] EWHC 106, [2009] 1 WLR 2072, para 50, per Toulson LJ - and recognises the force of the reference to a "reasonable" jury, bench or judge, either by asking whether it itself (as a reasonable authority) considers the evidence to be on balance sufficient to merit a conviction by a

reasonable jury, bench or judge or (putting the same point in a different way) by recognising explicitly that in certain areas actual statistics regarding convictions may not be a reliable guide to what ought reasonably to happen. Lady Hale makes this point compellingly in her paras 126 and 128 to 129, with which I agree.

99. A criminal court would only refuse to allow a charge to proceed if it was one on which no jury, bench or judge properly directed could properly convict or was otherwise an abuse of process. In the leading authority, *R v Galbraith* [1981] 1 WLR 1039, 1041 Lord Lane CJ endorsed the earlier decision in *R v Barker* (Note) (1975) 65 Cr App R 287, 288, where Lord Widgery CJ said:

> "It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence…to do that is to usurp the function of the jury."

In essence the same principle was endorsed in *R v Galbraith*:

> "Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts *there is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury" (emphasis added).

100. A similar caution about any interference with the right of access to court applies in civil proceedings, In *Raymond* [1982] QB 839, 846 Sir Sebag Shaw quoted a passage from the judgment of Fletcher Moulton LJ in *Dyson v Attorney General* [1911] 1 KB 410, 418, which stressed, in relation to the power to strike out as disclosing no reasonable cause of action, the gulf that lies between the summary dismissal of actions as, on the one hand, baseless and, on the other, "because the judge … does not think they will be successful in the end" and said that:

> "the courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure". (p 418)

101. The second stage of the Full Code Test involves identification, analysis and weighing of a potentially wide variety of factors which may count in favour of or against prosecution being in the public interest in any particular case. The Code is careful to stress that, at the second stage, each case must be considered on its own facts and merits (para 4.15).

102. Until 2009 the taking over of a private prosecution with a view to discontinuance was governed by a policy which, as confirmed by the CPS's evidence in this case, identified "the evidential threshold at which the CPS would intervene in a private prosecution to take it over and stop it" in these terms:

> "You should take over and discontinue the prosecution if one (or more) of the following circumstances applies:
>
> • There is clearly no case to answer. A private prosecution commenced in these circumstances would be unfounded, and would, therefore, be an abuse of the right to bring a prosecution. Note that this is a more rigorous test than the evidential sufficiency stage of the Full Code Test".

The policy, although not apparently published as such, was well-known. In *R v Director of Public Prosecutions, Ex p Duckenfield* [2000] 1 WLR 55, it was explained on behalf of the DPP in the passage set out by Lord Wilson in para 24.

103. Giving the lead judgment in *Duckenfield* Laws LJ endorsed this approach, saying (p 68C-E), in a passage cited by Lord Wilson in para 34, that, for the Director to "stop a private prosecution merely on the ground that the case is not one which he would himself proceed with ….would amount to an emasculation of section 6(1) and itself be an unlawful policy".

104. Laws LJ adopted a parallel view of the Director's power to intervene in the light of public interest factors, saying (p 69C-E):

> "I see no reason why quite aside from the evidential test of no case to answer the DPP should not within his policy as presently formulated, have in mind the likelihood or otherwise of conviction when considering where the public interest lies. And I see no basis for the suggestion that the law should compel the DPP to reverse the effect of the public interest factors so as to favour discontinuance *unless* in his judgment they clearly point in the other direction. The test as presently formulated seems to me designed to allow proper scope for

> the operation of the right of private prosecution. The private prosecutor is very likely to take a different view as to where the public interest lies than does the DPP, and section 6(1), I think, implies that he is entitled to do so. The approach urged by Mr Harrison would in effect require the private prosecutor to persuade the DPP that his view of the public interest is plainly right. I consider it strongly arguable that that would place an illegitimate constraint upon the right of private prosecution; but it is enough to hold, as I would, that the present public interest policy is perfectly consistent with the objects of the statute and thus well within the proper discretion of the DPP."

105. The approach taken by the Director and Laws LJ in *Duckenfield* was firmly based in history. The 1985 Act followed upon the work of the Royal Commission on Criminal Procedure 1981 to which the then Director gave evidence that:

> "I and my predecessors have always considered that taking over a private prosecution with a view to offering no evidence would be an improper exercise of the power to intervene, save in the exceptional circumstances of a case like *Turner v Director of Public Prosecutions* (1978) 68 Cr App R 70. The protection against unjustified prosecution lies, in my view, with the courts. …. If process is granted to a private prosecutor, the case should, in my view, be allowed to proceed subject to the normal rules of evidence and procedure".

The then Attorney General, Sir Michael Havers, also stated to the Commission that he did

> "not think it right that any attempt to control generally the private prosecutor should be made through the Directors' powers to take over a case and offer no evidence or my power to enter a nolle prosequi. Both would smack of interference by the Executive in the citizen's right of free access to the Courts; it is better that the control be by judicial process." (21 Osgoode Hall LJ 181)

106. I note in parenthesis that the Commission itself, at para 7.47, had noted "the position of the great majority of our witnesses who argue … that the private prosecution is one of the fundamental rights of the citizen in this country and that it is the ultimate safeguard for the citizen against inaction on the part of the authorities", although questioning whether the "very rare" incidence of prosecutions by private citizens seemed a sufficient basis for this position. It had

recommended that a private prosecution should only be brought after application to a Crown prosecutor, who would apply the same criteria as he would apply to any other prosecution in deciding whether to take the case on, and that, if the Crown prosecutor decided not to take it on, the private person should be able to apply to a magistrate's court for leave to commence proceedings. This recommendation for automatic notification was not adopted, either then or when effectively repeated by the Law Commission in paragraph 13 of its 1998 report, *Consents to Prosecution*, Instead, the basic right to institute a private prosecution was re-enacted and remains in section 6(1).

107. The views expressed to the Commission and by the Director and by Laws LJ in *Duckenfield*, on the inter-relationship between private prosecution and the power to intervene and take over the conduct of proceedings, have a sound basis in constitutional principle. That is the right of access to justice, a right which is granted by section 6(1) and which section 6(2) cannot have been intended to make ineffective or subvert. It is well-recognised that a right of access to a court can, as Mr Fitzgerald QC submitted, only be removed by clear and specific words. In *R v Lord Chancellor, ex p Witham* [1998] QB 575, Laws J rightly identified access to a court as a right given special weight by the common law, and continued, at p 585:

> "It has been described as a constitutional right, though the cases do not explain what that means. In this whole argument, nothing to my mind has been shown to displace the proposition that the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right."

108. That approach follows from general principle. Parliament legislates against the background of rights which the common law treats as fundamental or constitutional. Legislation is to be construed as displacing such rights only so far as it contains clear and specific provision to this effect: see eg *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, 587C-G and 591E-F. The principle is very relevant when considering the extent to which the general power to "take over [the] conduct" of a private prosecution conferred by section 6(2) of the 1985 Act embraces the power to take over proceedings for which there is a proper evidential basis and to which no public policy objection can be raised, not in order to pursue them but in order to bring them to an end, simply because, in the Director's own paper assessment, the proceedings are more likely than not to fail, applying the test set out in para 106 above. Its relevance is heightened by (a) the inherent limitations of any evidential assessment on paper of the prospects of criminal conviction, (b) the fact that in another person's equally reasonable assessment the proceedings may well be more likely than not to succeed and (c) the role of private prosecutions, as a type of democratic long-stop or safety valve, in enabling complainants whose case is that they *know* that they have been victims

of serious offending to bring the matter before a criminal court, in circumstance where public prosecutors have on balance assessed their case as lacking sufficient evidential strength.

109. The new policy adopted for the first time in 2009 assimilates public and private prosecutions for the purposes of both limbs of the Full Code Test. First, when (and if) the CPS "finds out about a private prosecution", it "should take over and continue with the prosecution" if both limbs are clearly shown and "there is a particular need for the CPS to take over the prosecution". Secondly, a private prosecution "should be taken over and stopped if, upon review of the case papers, either the evidential sufficiency stage or the public interest stage of the Full Code Test is not met", and, even then, it may be necessary to do this "where there is a particular need to do so, such as where the prosecution is likely to damage the interests of justice". One would have thought that this last situation and the examples given (which include situations such as that where the prosecution interferes with the investigation or prosecution of another criminal charge or is vexatious) would all lead to failure at the second, public interest stage of the Full Code Test, but that is presently unimportant. Finally, a private prosecution should not be taken over "if the papers clearly show" that both stages of the Full Code Test are met, and there is no particular need for the CPS to take over the prosecution.

110. Under the language of the Code, as Miss Montgomery accepted, the CPS is obliged to prosecute all cases satisfying the two stages of the Full Code Test. The policy adopted in 2009 therefore leaves no room for private prosecutions, except in cases where a private prosecutor starts proceedings before the CPS does, and the CPS decides to allow the private prosecutor to continue. The only value in the right to institute a private prosecution would, on this basis, consist in the fact that it would avoid having to take other means (eg judicial review) to stimulate the CPS into action and would, perhaps, in a few specific situations prevent a time limit for bringing a criminal charge from passing, before the CPS could be stimulated into action. Further, a considerable number of statutes expressly require that the consent of the Director of Public Prosecutions to any prosecution brought under their provisions. The statutes range alphabetically from The Agricultural Land (Removal of Surface Soil) Act 1953, section 3 to the Wildlife and Countryside Act 1981, section 28. Such consent may be given by any Crown Prosecutor on the Director's behalf: Prosecution of Offenders Act 1985, section 1(7). Under para 3.7 of the Code, "the DPP or prosecutors acting on his behalf apply the Code in deciding whether to give consent to a prosecution". A justification traditionally advanced for such consent requirements is the prevention of inappropriate prosecutions: see The Law Commission Report on Consents to Prosecution 1998 (LC 255), paras 3.17 to 3.22. The Director's new policy relating to private prosecutions in effect equates all private prosecutions with prosecutions which are by statute specifically made subject to his consent. The difference is that consent

has to be given in advance where a statute specifically requires consent, whereas in relation to other private prosecutions it is given only retrospectively as and when the Director (or CPS) learns of such a prosecution and acquiesces in its continuation.

111. Miss Montgomery went so far as to submit that the suggested assimilation was a purpose of the 1985 Act. If so, it is particularly surprising that this went unnoticed by Directors of Public Prosecutions for the 24 years from 1985 to 2009. Further, on this analysis, not only Laws LJ's dicta in *Duckenfield* but also the Court of Appeal decision in *Scopelight Ltd v Chief Constable of Northumbria Police Force* [2009] EWCA Civ 1156, [2010] QB 438 must be wrong. The issue in *Scopelight* was whether the police could retain seized material required in the context of a private prosecution, in circumstances where the CPS had decided that the second stage of the Full Code Test was not satisfied. The court (Ward, Wilson and Leveson LJJ), in a judgment given by Leveson LJ, a highly experienced criminal judge, concluded that they could. In so doing, the Court held that the CPS's view of the public interest was not determinative:

> "there are, or at least may be, circumstances in which it is perfectly consistent for the DPP to decide not to prosecute, yet for him to decline to decide that a private prosecution is not in the public interest so as to justify his interference with it: in other words, he does not consider himself (or, in less significant cases, the CPS) the sole arbiter of the public interest and neither does the court." (para 36)

and

> "In my judgment, there is no basis either in the statutory framework, the authorities or policy to justify the proposition that a decision by the CPS not to prosecute conclusively determines that a prosecution is not in the public interest". (para 39)

112. In these circumstances, Miss Montgomery developed in her oral submissions an alternative (and inconsistent) case. This was that, while assimilation was intended and appropriate in relation to the evidential test, it was not called for in relation to public policy; and, on this basis, there could be circumstances in which a private prosecutor could institute and pursue proceedings which the CPS would not regard as being in the public interest. This alternative hybrid finds no support in the actual language of the Code and the 2009 policy. It is as regards public policy consistent with *Scopelight*, but as regards the evidential test inconsistent with *Duckenfield*. It involves the strange proposition that a private

prosecutor is free to take a different view from the Director and CPS on matters of public policy, but not free to take a different view on the effect of the available evidence. I note in parenthesis that it is also inconsistent with the Scottish position indicated in *X v Sweeney* 1982 JC 70, where the Lord Advocate had declined (and foregone the right) to prosecute on grounds of evidential weakness (the mental state of a claimed victim of rape), but a later date the victim, having recovered, petitioned for leave to bring a private prosecution. Lord Elmslie in the Inner House said:

> "The rights of a private prosecutor in our system of criminal jurisprudence have grown up alongside those of the Lord Advocate and indeed, historically, they bulked larger in earlier times than those of the King's Advocate. These rights still exist and there seems to be no good reason in principle for saying that they should not be available in any case in which the Lord Advocate has, for any reason, declined to prosecute an offender to a conclusion."

113. I do not accept that the scope of the right to institute, and by necessary implication once instituted pursue, a private prosecution preserved by section 6(1) can have been intended to be emasculated in the manner indicated by the Code and 2009 policy and by both of Miss Montgomery's primary and alternative cases. Laws LJ's words at pp 68-69 in *Duckenfield* is in my opinion appropriate. Emasculate does not mean eliminate. The 1985 Act must be construed in the light of the long-standing constitutional significance attaching to the right of private prosecution and the long-standing understanding of the scope of the Director's right to intervene stated by the then Director as well as the Attorney General to the Royal Commission which reported in 1981 and reflected in the subsequent practice which was explained in *Duckenfield* and continued up to 2009. Nowhere, until 2009, is there any suggestion that the Director could or should exercise the power to take over and discontinue on the simple basis of evidential weakness, and certainly not evidential weakness not amounting to abuse of process by the pursuit of a hopeless case on which no reasonable tribunal could convict. The fact that the discretion conferred by section 6(2) is in general words carries the matter nowhere. Parliament must, as Lord Reid put it in a parallel context in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030C "have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act". The policy and objects of the 1985 Act cannot have been intended to undermine the right, long-recognised as fundamental, of private prosecution in the manner which the Director's new policy would do.

114. The power to take over the conduct of cases came into existence to enable the Director to carry on privately instituted cases which called for public prosecution. Despite the unspecific nature of the words of section 6(2), this subsection was accepted as including a power to take over and discontinue cases

on general public policy grounds. The Director could be expected to be a good judge of these, which may (as where harm to national interests is involved or where the defendant has already suffered regulatory, civil or social consequences) be non-justiciable. But evidential weakness, without more, is a matter on which the courts have developed their own clear policy and is a quite different matter. Litigants are not to be shut out from access to justice to pursue cases which they are otherwise on the face of it entitled to pursue unless such cases cannot reasonably hope to succeed. That is the test which the Director, like all his predecessors, applied until 2009. In my opinion, he exceeded his properly interpreted power under section 6(2) when in 2009 he departed from that long-standing policy.

115. An evidential test of balance of likelihood may be very appropriate as a test which the Director applies to CPS prosecutions. It is quite a different thing to impose it on private prosecutions. The Law Commission in its 1998 report, *Consents to Prosecution*, noted that private prosecutions were likely to be instituted which failed one or other of the evidential and public interest tests applied by the CPS (para 5.19), but also noted that it was regarded as an important safeguard for some members of society who believed that an individual prosecutor had misjudged the evidence in a case (para 5.4). It did not regard the fundamental right to institute a private prosecution as undermined by the harm that might result from an unsuccessful prosecution of an innocent defendant or from any prosecution not in the public interest, for three reasons (para 5.22), which I set out in *Jones v Whalley* [2007] 1 AC 63, para 42. They were (1) "a risk that an individual Crown prosecutor will either misapply the Code or - more likely, given the width of the Code tests - apply a personal interpretation to the tests which, although not wrong, might differ from that of other prosecutors", (2) the perception in the eyes of some that the code may fail to achieve a proper balance and then this significant reason:

> "(3) It should not be assumed that if it is wrong to bring a public prosecution then it is also wrong to bring a private prosecution. If, for example, a case is turned down by the CPS because it fails the evidential sufficiency test, but only just; if the private prosecutor knows that the defendant is guilty (because, say, he or she was the victim and can identify the offender); and if the case is a serious one, then a private prosecution might be thought desirable."

116. These three reasons all inter-relate. Private prosecution is, and I think always has been, a safeguard against the feelings of injustice that can arise when, in the eyes of the public, public authorities do not pursue criminal investigations and proceedings in a manner which leads to culprits being brought before a criminal court. The impunity which offenders appear to enjoy can be socially detrimental. This is, as the Law Commission rightly said, particularly so in those

cases where a victim actually knows that the offence has been committed but finds that a CPS prosecutor does not think on a balance of likelihood that his evidence, if given orally in court, will be accepted. The feeling of injustice will be particularly acute, if (as is accepted, but is in any event clear, on the facts of the present case) the CPS prosecutor's decision was a fine one, and the alleged victims or another prosecutor might equally reasonably have concluded that the case was one in which the evidential test was satisfied.

117. All these considerations underline the sharp distinction between, on the one hand, the Director's power in the Code to set his own standards for publicly funded and pursued prosecutions and, on the other hand, his power to take over and discontinue a private prosecution. They underline the radical nature of the change purported to be introduced on a blanket basis by the policy issued in 2009. I am prepared to assume, though there is no evidence for this in the policy itself or the papers (and little support for it under the Code in the general words of clause 2.3 which Lord Wilson cites in para 22), that the CPS would recognise that it should be prepared to depart from that policy in particular exceptional cases (see *British Oxygen Co Ltd v Board of Trade* [1971] AC 610, 625C-F). Even so, I regard a pure evidential test as outside the scope of section 6(2).

118. The evidence filed on behalf of the Director in this case does not indicate that any investigation or analysis was undertaken of the actual incidence of, still less of any actual problems or unfairness created by, private prosecutions before the change of policy in 2009. It does however set out in general terms a number of considerations as the rationale for the change. These included the costs to society and those involved of a failed trial procedure and a suggested "obvious need" to ensure that cases were not brought where there is insufficient evidence and "little prospect of conviction" (witness statement of Alex Solomon, of the CPS's Strategy and Policy Directorate). But these are all considerations inherent in the right of access to a court, which the court controls only by eliminating cases that could not reasonably lead to conviction. The obvious need to eliminate cases where a reasonable jury, bench or judge could reasonably convict is not one which has ever occurred to courts, or which occurred to the Director, whose policy was the exact opposite until 2009.

119. The Director's evidence also suggests that it is axiomatically wrong to have different tests for, or for a defendant to be exposed differently, in the context of private and public prosecutions. As an assertion, this begs the question, particularly in the light of decades, if not centuries, during which the distinction has been accepted as natural. For the reasons I have given and as confirmed by the authorities to this day, there are significant differences between private and public prosecutions. The differences are of principle and they arise from the constitutional status of the right to institute a private prosecution and of the right of access to the courts for that purpose. Private prosecutions cannot axiomatically be submitted, or

taken over in order to be submitted, to whatever the Director may adopt as the appropriate evidential and public policy tests for the purposes of prosecutions which he himself initiates. It is not relevant on this appeal to consider the special case (probably very unusual) of a prosecution taken over by the Director on public policy grounds with the intention of pursuing it to trial, but in relation to which the CPS later concluded in the light of newly discovered material that the evidential test was no longer met. That special case does not arise here. Assuming that the Director would in such a case be entitled to apply his own evidential test, that does not throw any light on the scope of the Director's power to take over a private prosecution with a view to discontinuance. Finally, though as a lesser consideration, at a practical level there also appears to me to be a considerable difference between the pursuit by the CPS at public expense of a prosecution and the pursuit by a private person of a prosecution at his own cost in terms of time, as well as at his own expense subject to the court's power under section 17 of the 1985 Act to order reasonable compensation in respect of any expenses properly incurred in respect of proceedings for an indictable offence or in respect of a summary offence before a Divisional Court or the Supreme Court.

120. Mr Fitzgerald had as an alternative submission the proposition that, even if the Director could otherwise take over and discontinue cases which did not meet the evidential test, he could not do so in cases where the private prosecutor could and did, equally reasonably, conclude that the evidential test was met, eg because he firmly believed that his oral testimony, if allowed to be presented before a court, would be believed. In the light of what I have already said, the possibility of two reasonable views is a strong reason why the right of private prosecution remains a valuable constitutional right, which is not to be taken as affected by a heightened evidential test well in excess of any that a criminal court would apply, in the absence of specific statutory authority. But, if what I have already said is to be rejected (as is I understand the view of the majority in this court), then I would align myself emphatically with Lady Hale's further observations in her paras 131 to 133. Whatever else Parliament may be taken to have embraced by section 6(2), I see no reason at all to suppose that it included situations in which the alleged victim, who knows the facts, has commenced a private prosecution on the basis of his or her reasonably held conclusion that the test set out in para 98 above is met.

121. Mr Fitzgerald had a yet further string to his bow, in case he had failed in his first two submissions. That is that the judgment formed by the CPS prosecutor in this case was *Wednesbury* unreasonable (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). I have considerable sympathy with the view that the CPS's assessment in this case was a harsh judgment, picking up small points and supposed but barely significant discrepancies in relation to charges which would ultimately have depended on an overall judgment on credibility, and would have been supported to a large extent by hard evidence, including in some measure injuries difficult to attribute to anything other than

deliberate actions by the alleged offenders who were clearly identified by three persons as being at the scene and responsible for assault on 17 May 2010 and made no comment when interviewed under caution. I should add that I am not entirely convinced that the CPS applied even its own test correctly, in the sense which Lady Hale identifies in paras 126, 128 and 129 and which I have identified in para 98 above; although the relevant CPS review starts by setting out that test in full (para 6), it later describes it as a "more likely than not to convict" test (paras 7.1) and thereafter refers simply to the question as being whether there is "a realistic prospect of conviction" and to the court being "unlikely [to] be satisfied of guilt" (paras 7.4, 8 and 10). However, having regard to the views I have already expressed and which others hold, it is unnecessary for me to say more on these aspects.

122. I would allow the appeal.

LADY HALE

123. I agree entirely with the judgment of Lord Mance and, like him, I would allow this appeal. For the reasons he gives, I cannot accept that it was the intention of Parliament, when setting up the Crown Prosecution Service in 1985, to allow the Director to reduce the centuries-old right of private prosecution almost to vanishing point: in effect, to a right to pursue those prosecutions which the CPS are content to have pursued but would prefer to have pursued by some-one else. Like him, I consider that the right of access to a court to prosecute an alleged offender is as much a constitutional right as a right of access to a court to bring a civil claim. The power to cut down that right in such a drastic manner could only be conferred by clear words and not by the repetition of very general words, especially when those very general words had previously been thought by all concerned to do no such thing.

124. I add only a few words because the issue is of such fundamental importance for the protection of all victims of crime, but in particular of those most vulnerable victims, those who have traditionally had such difficulty in getting their voices heard or, if heard, believed. At the very least, in my view, this court should have acceded to the alternative case advanced by Mr Fitzgerald on the claimant's behalf.

125. The essential difference between the evidential tests applied by the courts and by the CPS relates to the likelihood of a witness being believed. The courts ask themselves: 'Is the evidence capable of being believed? If it is, and the jury or magistrates believe it, is it sufficient to prove the case? Is there, in other words, a

case to answer?' It is for the jury, judge or magistrates to decide whether they do in fact believe the witness. The CPS, on the other hand, ask themselves how likely it is that the witness will be believed. At least, that is what it looked as though the prosecutor was doing in this case.

126. However, it is not quite as straightforward as that. There is more than one view of how the evidential stage of the CPS test is supposed to work. As Lord Mance explains in paragraph 98 a 'realistic prospect of success' is defined in the Code as where 'an objective, impartial and reasonable jury, bench of magistrates or judge, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged'. Presumably, therefore, the reference to a 'reasonable' jury is designed to allow certain types of case to proceed even though it is well-known that juries find it difficult to convict. With all due respect to Lord Neuberger, it cannot be a simple 'better than evens' or 'is a conviction more likely than not?' test. As Toulson LJ pointed out in *R (B) v Director of Public Prosecutions (Equality and Human Rights Commission intervening)* [2009] EWHC 106 (Admin), [2009] 1 WLR 2072, para 50, if a prosecutor were to adopt this so-called 'bookmaker's approach' then few allegations of so-called 'date rape' would be allowed to proceed. The same could be said of complaints brought by children or mentally ill or disabled people. It was suggested in that case that the prosecutor 'should imagine himself to be the fact finder and ask himself whether, on balance, the evidence was sufficient to merit a conviction taking into account what he knew about the defence case': para 49. That suggests a test of 'is it more likely than not that I would convict, knowing what I do about the case'?

127. However, the reference to a 'reasonable' jury, judge or magistrate must contemplate that there are at least some cases in which different courts could reasonably take different views of the evidence in the same case. So the reasonable prosecutor should ask himself what a reasonable court might do, not necessarily what he himself would do. Due allowance should also be made for the fact that it is only when the matter actually comes on for trial that it will be possible to decide whom to believe. We all know that the evidence can come out very differently in court from how it comes over on the page: sometimes it is fatally undermined by cross-examination but sometimes it is strengthened.

128. But if the test does contemplate that different courts could reach different views, I have grave difficulty in understanding how the CPS could possibly have decided to stop the prosecution in this case on evidential grounds. It is admitted that there were two reasonable views of the evidence in this case, that a reasonable prosecutor could have formed the view that it was indeed more likely than not that a court would convict. That is scarcely surprising. The time when and place where the claimant suffered injuries are not in doubt. The injuries are consistent with an

assault having taken place. Nor is the presence of the accused at the scene seriously disputed. As yet they have offered no alternative explanation of events.

129. So if there are admittedly two reasonable views of the CPS-defined 'realistic prospect of success' in this case, I cannot understand how it was not allowed to proceed, unless the CPS test in fact means something rather different. Perhaps, in effect, it means, 'do I, as a reasonable prosecutor, think that it is more likely than not that, when this case gets to court, there will be a conviction?' But if that is the test, we are back to a simple 'better than evens' test, which contemplates that juries may indeed be unreasonable and prejudiced, and many cases which are in fact prosecuted now would not be taken forward.

130. These nuances may seem overly technical, but they matter hugely to the protection of vulnerable people from all forms of neglect and abuse, whether physical or sexual. The requirement of corroboration was abolished two decades ago. But one has only to listen to the radio or read the newspapers, especially at present, to know that apparently credible complaints have not been taken further because of so-called 'lack of evidence'. This was presumably not because of a formal requirement of corroboration but because of the difficulty of securing convictions without some independent evidence which confirms the complainant's account. Despite this reluctance, we have made great strides in recent years in understanding that vulnerable witnesses are capable of being believed and in helping them to give the best evidence that they can. A commendable willingness to prosecute in the face of considerable odds has been part of this advance.

131. For my part, therefore, I consider that Mr Fitzgerald's alternative case is unanswerable. How can it possibly have been Parliament's intention to allow the CPS to take over and prevent a private prosecution where a reasonable prosecutor could take the view that a reasonable court is likely to convict? This is to leave the victim (who, as Lord Mance points out, knows whether or not she is the victim of crime) to the chance of which among many no doubt entirely reasonable prosecutors handles her case. The fact that this is done on paper without any face to face contact with the witnesses only increases the possibility that reasonable prosecutors can take different views.

132. The possibility of judicial review of the prosecutor's decision is not a good enough safeguard, as this case demonstrates only too clearly. Just as a reasonable prosecutor could take the view that the case should proceed, a reasonable prosecutor could take the view that it should not. The possibility of bringing a private prosecution, however remote to most people, is a much more effective safeguard. Now that the new policy has effectively removed it, the victims of crime will have little prospect of challenging the prosecutor's decisions. This is likely to increase, rather than decrease, the risk of 'inertia or partiality on the part

of authority' (see *Gouriet v Union of Post Office Workers* [1978] AC 435, 477). That risk is already considerable in the sort of problematic cases about which I am most concerned.

133. Nor am I the only person to be concerned about such cases. They are likely to involve a violation of the victim's rights under article 8 or, in extreme cases, article 3 of the European Convention on Human Rights. Under both articles, the state has a positive obligation to provide an effective deterrent, in the shape of the criminal law: see, for example, *X and Y v The Netherlands* (1985) 8 EHRR 235. That obligation is not fulfilled if a private prosecution, which a reasonable prosecutor could consider more likely than not to succeed before a reasonable court, can be prevented because another prosecutor takes a different view.