



14 November 2012

PRESS SUMMARY

R (on the application of Gujra) (FC) (Appellant) v Crown Prosecution Service (Respondent)
[2012] UKSC 52

On appeal from: [2011] EWHC (Admin) 472

JUSTICES: Lord Neuberger (President), Lady Hale, Lord Mance, Lord Kerr, Lord Wilson

BACKGROUND TO THE APPEAL

Section 6(1) of the Prosecution of Offences Act 1985 (“the 1985 Act”) recognises the right of a private person to institute and conduct a private prosecution where the duty of the Director of Public Prosecutions (“the DPP”) to take over them does not apply. But the right is subject to s.6(2) of the 1985 Act which confers upon the DPP a power, even when not under a duty to take over the proceedings, nevertheless to do so at any stage. In determining whether to do so, it is his policy to apply certain criteria, including in particular a criterion relating to the strength of the evidence in support of the prosecution. Prior to 23 June 2009, the DPP asked himself whether there was clearly no case for the defendant to answer. If such was his conclusion, he took over the prosecution and discontinued it; otherwise, subject to the application of further criteria, he declined to take it over. However, on 23 June 2009 he changed his policy in relation to the evidential criterion. In that regard it became his policy to take over and discontinue a private prosecution unless the prosecution was more likely than not to result in a conviction (“the reasonable prospect test”).

In August 2010 the Appellant instituted two private prosecutions. On 16 November 2010 the DPP, acting by the Crown Prosecution Service (“the CPS”), took over and discontinued the prosecutions. The Appellant applied for judicial review of the decision to do so. His case was that the reasonable prospect test, adopted by the DPP on 23 June 2009, is unlawful. It is common ground that the application of the DPP’s former evidential criterion would not have led to him to take over and discontinue the prosecutions. The Divisional Court of the Queen’s Bench Division of the High Court dismissed the application and the Appellant now appeals.

JUDGMENT

The Supreme Court, by a majority of 3:2 (Lord Mance and Lady Hale dissenting), dismisses the appeal. Lord Wilson gives the lead judgment for the majority.

REASONS FOR THE JUDGMENT

The critical question for Lord Wilson is not the constitutional importance of the right to private prosecutions, which he recognises [27-29]. It is whether, in applying the reasonable prospect test, the DPP frustrates the policy and objects which underpin s.6 of the 1985 Act. [30, 49] In reaffirming, in qualified terms, the right to maintain a private prosecution in s.6, Parliament could not be taken to have intended that the DPP should decline to exercise his discretion so as to intervene and discontinue a prosecution even if it lacks a reasonable prospect of success. [39] The new test’s focus on the likelihood of conviction was a more relevant question than the previous “no case to answer” test. [34] Lord Wilson gives illustrations of private prosecutions which survive the current test [33], and four further reasons to support his conclusions [36]: (1) Parliament did not expressly confine the discretion

in s.6(2). (2) The main object behind the 1985 Act, reflected in the report of the Royal Commission in 1981, was to establish a nationwide CPS and to achieve consistent standards in instituting and conducting prosecutions. The reasonable prospect standard was also approved in the Royal Commission report for all prosecutions. [58] (3) A prosecution lacking a reasonable prospect of success draws inappropriately on court resources. (4) A defendant would have a legitimate grievance about being subjected to private prosecution when, by the application of lawful criteria as to the strength of the evidence against him, there would be no public prosecution. Furthermore, as acknowledged in general terms in paragraph 2.3 of the 2009 Code for Crown Prosecutors, the DPP acts unlawfully if he adopts too rigid an approach in applying his policy towards interventions with a view to discontinuance, which would be amenable to judicial review. [37]

Lord Neuberger adds that many of the factors justifying the reasonable prospect test in public prosecutions - unfairness to a defendant, costs, use of court time and confidence in the justice system - apply to private prosecutions. [57] The right to *initiate* a private prosecution remains virtually unlimited and those meeting the evidential and public interest tests are allowed to continue save where there is a “particular need” for the DPP to take over. [60-1] Whilst mindful of cutting down individuals’ right of access to the courts, the right to conduct a private prosecution has always been subject to being curtailed by the Attorney General through issuing a *nolle prosequi* [64]. Lord Kerr observes that the right has been modified by successive enactments over time, including the establishment of the office of the DPP itself. [80] There is nothing to suggest that the policy prior to 2009 was immutable or inviolable. [84] The new policy might restrict private prosecutions, but it is not unacceptable as a matter of law. [71]

Lord Mance however emphasises the strong historical and constitutional basis for private prosecutions [88-90, 94, 99, 100, 105-6]. He approves the words of Laws LJ in *R v Director of Public Prosecutions, Ex Parte Duckenfield* [2000] 1 WLR 55, at 68-9, that a reasonable prospect test would emasculate the right afforded by s.6(1). [113] The right of access to justice granted in s.6(1) was not intended to be made ineffective or subverted by s.6(2), which can only be removed by clear words. [107] The unspecified nature of the words in s.6(2) were aimed at public policy not new evidential grounds [114]. The fundamental right in s.6(1) was not undermined by the potential harm resulting from an unsuccessful prosecution. It provides an important safeguard when an individual prosecutor might have misjudged the evidence. [115] There is no justification for such a radical change of policy. [117-118] Lady Hale expresses doubts over the reasonable prospect test as there could be, as in this case, two reasonable but different views on whether a reasonable court would convict. [126-131] This leaves a victim dependent on which prosecutor handles the case, exacerbated by the fact the exercise is done on the papers without examination of witnesses. [131] The possibility of judicial review is not a sufficient safeguard and the test could raise issues under the European Convention of Human Rights. [132-3]

References in square brackets are to paragraphs in the judgments

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html