A human rights perspective on the evidential test for bringing prosecutions

The European Court of Human Rights in Armani da Silva v United Kingdom has held that the evidential test for bringing prosecutions does not violate any rights of victims to have their crimes effectively prosecuted. This is right, but the true reasons for this are that the standard of the evidential test is not as high as might be supposed, and that decisions not to prosecute are now reviewable as of right. By contrast, other reasons relied on in da Silva and in many domestic sources are quite unconvincing.

Concern over decisions not to prosecute will always be with us. For a victim[1] who has been raped and insists that the encounter was non-consensual, a decision that there is insufficient evidence to prosecute may cause further trauma. At the same time, some allegations are undoubtedly very likely not to be proven at trial, even assuming a fair-minded jury. The difficulty lies in assessing the exact prospects of many cases. In the English system much depends on oral evidence at trial. So, with many rape complaints for example, the Crown Prosecution Service (CPS) will have to rely upon statements given to the police and then speculate about the inferences that might properly be drawn from the apparent circumstances leading up to the encounter. With these sometimes slender materials, they must second-guess the relative credibility at trial of two people whom, quite probably, no one has cross-examined in a way which will likely compare with cross-examination in court. In such an imperfect world, some truly guilty offenders are always likely to evade prosecution; but can it be said that the explanation and application of the evidential test at least minimises the risk of inappropriate decisions to discontinue a prosecution?

We should start by reminding ourselves of the threshold of the evidential test, ie, the first stage of the CPS decision-making at which the prospects of proving guilt at trial are assessed. The key question is whether there is a "realistic prospect of conviction". Thus the latest Code for Crown Prosecutors (the seventh Code, 2013[2]) starts to define the evidential test as follows:

> 4.4 Prosecutors must be satisfied that there is sufficient evidence to provide a *realistic prospect of conviction* against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be (emphasis added)

But then, as with other Codes since 1994, this phrase is itself defined in terms of success being perceived as "more likely than not". So, the very next paragraph states:

> 4.5 The finding *that there is a realistic prospect of conviction* is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which he or she might rely. *It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged.* This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty. (emphasis added)

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[1] It is fair to suggest that the word "victims" is often overused, in such a way as to assume that all complaints are necessarily true. In this article, the word "victim" is only used in contexts where the correctness of their account is to be assumed, and otherwise the word "complainant" is preferred.

[2] Published in 2013 and accessible at http://cps.gov.uk/publications/docs/code_2013_accessible_english.pdf

It is certainly possible to think that a "realistic" prospect may ordinarily be said to include one that is readily conceivable but still not quite "more likely than not"; and if that is ones interpretation of the phrase, then para 4.5 of the Code poses considerable problems. Some might be attracted to an argument that such ambiguity may indeed have contributed to some perfectly viable prosecutions (of truly guilty offenders) being abandoned.

We shall suggest the correct interpretation in due course,[3] but it is odd that scholars have paid relatively little attention to this apparent ambiguity in the evidential test.[4] Similarly there is little in depth discussion about why we have an evidential test at all. Now, it is submitted that the answer to this can be simply stated: it serves the purpose of saving resources in cases where it is quite inconceivable that a jury will be convinced of guilt, and it may also reassure the public in so far as it requires the input of detached legal professionals into decision-making. But as we shall see, elsewhere, in the literature[5] as much as in the case law, some additional explanations creep in; especially, that defendants might have a *right* not to be prosecuted where the chances of proving their guilt are perhaps improbable, or that having a demanding evidential test may play a valuable role in preventing miscarriages of justice. We shall argue that these additional explanations should be discarded. Defendants do indeed have some rights as to how prosecutors should consider their cases, and we shall say more of what they are, but they do not have a "right" not to be prosecuted where the prospects of success are somewhat uncertain.

Discussing both what the proper interpretation of the evidential test is, and the extent to which a demanding application of the test might nonetheless be justified by reference to a defendant's rights, is essential to an examination of the test. Such examination may in turn be needed to ensure that the test can be relied upon when it is the subject of a human rights challenge. In *Armani da Silva v United Kingdom*[6] last year, the Grand Chamber of the European Court of Human Rights (ECtHR), held that the standard of a "realistic prospect of conviction" is compatible with any arising rights of complainants that their cases be effectively prosecuted. But the reasoning is not so convincing, not least because the Grand Chamber was prepared to accept the aforementioned arguments that the evidential test may recognise various rights for defendants. Rather, on closer examination, there may well have been a time in the recent past during which the application of the somewhat ambiguously phrased evidential test *did* violate the rights of complainants of rape and other serious offences.[7] Given this possibly bold claim, we shall start by clarifying that the key question from the human rights perspective is whether the standard of the evidential test is "arbitrary". Presently, it is not "arbitrary" because it is not intended to set an unduly high standard *and* (crucially) because there is now the possibility of review on the merits of serious cases, under the Victim's Right to Review. But before the Victims Right to Review, the test did allow some potential for arbitrary

[3] Text accompanying n33-38

[4] For example, Ashworth and Redmayne discuss at length the point that the evidence should be assessed objectively, on its "intrinsic merits", and that an adapted version of the test may need to be applied when a suspect has been arrested and ought not to be bailed but where further evidence is yet to be gathered: *The Criminal Process* (4th edn 2010) OUP at 201-204. But nothing is said of the complications arising from the "more likely than not" formulation.

[5] Both points are made briefly in one paragraph in Ashworth and Redmayne, *op.cit* at 199.

[6] [2016] ECHR 314

[7] Text accompanying n69-76

decisions to discontinue, and in such cases its application cannot properly be defended on the basis that it recognised conflicting rights of defendants.

Positive obligations and the importance of "arbitrariness"

We should first consider the legal framework under which the evidential test fell to be considered in *da Silva*, and we will then discuss the decision itself in the next section.

There is no freestanding Convention right, neither in the original text nor in any of the subsequent Protocols, for complainants to enjoy effective investigations or prosecutions of alleged perpetrators of crimes alleged to have been committed against them. Indeed, it is the European Parliament who has decided that member states should offer further specified rights to complainants of serious offences.[8] However, by invoking the doctrine of positive obligations, the ECtHR have read broad duties of effective investigations and prosecutions into the text of Articles 2, 3 and 4 of the European Convention on Human Rights (ECHR).[9] Consequently crimes which threaten the enjoyment of these rights must be effectively prosecuted, just as they must be effectively investigated and indeed sought to be prevented in the first place, where reasonably possible.[10] As with other positive obligations in criminal law, the duties do not depend upon whether the alleged perpetrators of the offences are state agents or private citizens.[11] It should be emphasised that efficacy of prosecution is not the only consideration. No one suggests that positive obligations should take precedence over a defendant's basic rights under Article 6 ECHR or under Article 7 ECHR. Indeed Strasbourg has only permitted Article 6 rights to be watered down in the name of efficient criminal law enforcement where the measures are thought *not* to undermine the essence of the defendant's right to a fair trial.[12] But it seems clear that states may, albeit exceptionally, be liable for failings in individual cases, as when a prosecutor handles a case "irrationally" as a result of which the accused is acquitted and cannot be retried.[13] Violations may also arise from rule-based failings, where domestic policies or rules of law apply which make it unduly difficult for certain serious allegations to be effectively prosecuted. We will be concerned with the latter type of case when considering the evidential test in England.

The doctrine of positive obligations is not uncontroversial and to some extent has been shaped by the objections that can be made to it. The first objection is that it is more coercive to require states

[8] Directive 2012/29/EU established "minimum standards on the rights, support and protection of victims of crime" and came into force on 16 November 2015. In particular, Article 11 of the Directive provides a right to a review of a decision not to prosecute, and the Victims Right to Review, established in 2013 (and discussed below) was framed with reference to its contents.

[9] *M. C. v Bulgaria* (2005) 40 EHRR 20, *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1

[10] We are not concerned with the *prevention* of offences here, but the leading case *Osman v United Kingdom* (1998) 29 EHRR 245 has been adopted in English law: *Van Colle v Chief Constable of the Hertfordshire Police and Smith v Chief Constable of Sussex Police* [2009] AC 225.

[11] *Edwards v United Kingdom* (2002) 35 EHRR 487 at [69], *Menson v United Kingdom* (2003) EHRR CD220

[12] *Doorson v Netherlands* (1996) 22 EHRR 330. On the interplay between positive obligations and qualifying Article 6 rights, see P Londono "Positive obligations, criminal procedure and rape cases" [2007] EHRLR 158.

[13] *See R (on the application of B) v DPP* [2009] EWHC 106 (Admin). We say little more of this possibility in this article, but it should be emphasised that a finding that a prosecutor acted "irrationally" (rather than merely ill-advisedly) should be extremely rare. *B* was duly distinguished in *NBX v CPS* [2015] EWHC 631 (QB). See too *Waxman*, *infra* n15.

to change laws and practices in respect of wrongdoing by others rather than following their own alleged illegal acts.[14] But the doctrine is not of such wide application. As noted above, only crimes which involve the central harms in Articles 2, 3 and 4 ECHR – threats to life, inhuman or degrading treatment or slavery – clearly attract the doctrine of positive obligations. The author has found just three cases where liability has necessarily been found under Article 8 (there being no question of Article 3 also being engaged on the facts) and in all these cases the alleged crimes involved at least a well-founded fear for the victim's safety on an ongoing basis.[15] If member states can be criticised only for serious failures in effectively prosecuting murder, rape domestic violence, slavery and serious cases of continual harassment, then it seems hard to accept that the potential application of the doctrine interferes unduly with their autonomy. Where such cases do arise, one might hope that there will in any event be some political interest in addressing the problem, either by law or by investment of more resources, and that the finding of a human rights violation will act only as a catalyst for reform.[16]

The second objection focuses less on the institutional competence of the Strasbourg Court to read positive obligations into the text and more on the concern that in applying the doctrine, one may easily overlook domestic legal traditions and domestic rights of defendants, including some rights which are not incorporated in the ECHR. This objection is stronger. It derives from the point that we should not expect human rights law to be a source of the best possible rules of criminal law or procedure in each member state.[17] It is primarily for member states to consider revising its rules in the light of their experiences and in consultation with their wider communities. Thus, prosecutors in this country cannot be blamed for not meeting alleged rape victims in person in order to better ascertain their likely credibility, because of the inevitable concerns in a largely adversarial system about coaching witnesses, and this distance was accepted as being a legitimate part of our system in *da Silva*.[18]

The ECtHR seems to recognise these constraints and perhaps as a result has not sought to identify a clear legal test for determining when a domestic rule which arguably impedes prosecution for a serious offence goes so far as to violate a Convention right under any of Articles 2-4 ECHR. Sometimes the question might be put in terms whether the offending rule is "arbitrary", whilst at other times the focus is on whether the law offers "practical and effective protection". For the sake of promoting consistent terminology, it is submitted that the question is whether an offending rule is

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[14] This line, arguing that positive obligations are coercive in nature, is taken by L Lazarus "Positive Obligations and Criminal Justice: Duties to Protect or Coerce?" in *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (eds. L Zedner & J Roberts), OUP 2012, at 135-155.

[15] *KU v Finland* application no. 2872/02, 2 December 2008, *R (Waxman) v CPS* [2012] EWHC 133 (Admin), and *Jankovic v Croatia* (Appn 38478/05). By way of contrast, it was later held in Northern Ireland that no positive obligation under Article 8 arose following an allegation of an isolated attack in the street by one adult male against another, in *An Application by Cormac Clarke for Judicial Review* [2016] NIQB 6.

[16] Lazarus, *supra* n14 at 143, seems to reserve special criticism for *A v United Kingdom* (1998) 27 EHRR 611, where the UK was found in violation of Article 3 for not doing enough to condemn and deter physical child abuse in the home (by virtue of permitting a wide defence of parental chastisement). But it is worth noting that *A v UK* did not in fact "force" change. The UK government took the view that no legislative change was required by virtue of the decision, and the defence was only restricted years later in Children Act 2004, s.58, on a free vote in Parliament.

[17] Cp. J Rogers "Applying the Doctrine of Positive Obligations in the European Convention of Human Rights to Domestic Substantive Criminal Law in Domestic Proceedings" [2003] Crim LR 690-712.

[18] (2016) ECHR 314 at [263]

"arbitrary", and a rule can be said to be "arbitrary" where (i) it imposes a serious obstacle to bringing what would otherwise seem to be a viable prosecution (even if only in rare cases) and (ii) where this rule cannot be said to serve another legitimate end or to protect a competing right. The best known example of a human rights violation following such an approach is the former rule in the Netherlands which required all rape victims to initiate a complaint in person. It was held in *X and Y v Netherlands*[19] that this amounted to a violation of Article 8 ECHR[20] because it meant that Y, by virtue of her mental disability, was unable to have her case prosecuted, and it was hard to find any rational justification for such a restriction. In this case no thought had been given to the consequences of the rule in certain difficult cases.[21] In cases where there *has* been continual domestic consideration given to the possible restrictive effects of certain rules, or of their justifications, then it should be correspondingly harder, though not impossible, to impugn the rules. It is not surprising that we find references to the margin of appreciation in *da Silva v United Kingdom*, in conjunction with the finding that the evidential test was not arbitrary. [22]

We now turn to consider in more detail why the Grand Chamber of the ECtHR in *da Silva* did not think the English evidential test for bringing prosecutions to be "arbitrary".

The facts and decision in *da Silva*

In *Armani da Silva v United Kingdom*, the applicant complained that the police officer who shot dead her cousin, Jean Charles de Menezes, should have been prosecuted for murder. It may be recalled that de Menezes had apparently been mistaken for a terrorist who was thought to be a suicide-bomber about to self-detonate on the London Underground. The CPS decided that that there was no realistic prospect that it would disprove that the officer acted reasonably to save the lives of others in the circumstances as he believed them to be[23], and so no prosecution against the officer was brought. The applicant argued before the High Court that the Article 2 rights of the victims of fatal incidents would only be fully respected if a much less exacting standard were employed, specifically that prosecutions should be brought in cases of murder or manslaughter where a jury would be lawfully entitled to find the case proven. The High Court rejected this argument, both on the basis that such a low threshold could hardly be mandatory and that there should not be different thresholds of the evidential test depending on whether Article 2 or other Convention rights were engaged.[24] The House of Lords declined to hear an appeal, and the applicant's case in Strasbourg was communicated to the UK in September 2010. In December 2014 a Chamber of the Fourth section relinquished jurisdiction to the Grand Chamber, without objection from either party. Thus a case which was thought quite devoid of merit in the UK made its unusual journey directly, if also rather slowly, from our High Court to the Grand Chamber of the ECtHR.

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[19] (1986) 8 EHRR 235

[20] But importantly, on the facts, Article 3 was also engaged: cf text accompanying n15.

[21] As the Court put it in *X and Y*: "in the situation of Miss Y … this system meets a procedural obstacle which the Netherlands legislature had apparently not foreseen", *op.cit* at [27].

[22] *da Silva* [2016] ECHR 314 at [268] – [271].

[23] As the common law stood at the time of the shooting, the use of force had to be judged on the circumstances as the officer believed them to be, no matter how unreasonable his mistake might have been: *Beckford v R* [1988] AC 130 (PC). Its effect is decisive in a case such as *da Silva*, since inevitably it would be regarded as reasonable to shoot a suicide bomber who was about to self-detonate.

[24] *Da silva v DPP* [2006] EWHC 3204 (Admin)

Certainly, the facts of *da Silva* were far from ideal for the purposes of exploring the evidential test. One might well doubt whether the case would even have met the lowest possible threshold for prosecution, as urged by the applicant, that there would be a case to answer.[25] Nor is there any indication that the ECtHR took this argument very seriously: one can easily cite resources and the precious time of courts in explaining why quite unbelievable cases should not have to go to full trial. But the Grand Chamber considered this to be the first occasion on which it had to consider whether the domestic evidential threshold for bringing a prosecution might constitute a violation in itself,[26] and was prepared to consider the objections to the "realistic prospect of conviction" case in an abstract sense, looking beyond the facts of the case. It decided that the English threshold was not "arbitrary" and that the United Kingdom was entitled to apply it to all criminal offences, including those where Convention rights are engaged.[27]

However, the Court only gave passing consideration to the first point in the proposed test for arbitrariness, namely whether the evidential test actually *does* present a serious obstacle for getting some quite provable cases to go to court. Wary of the value of comparisons with other jurisdictions, it said only that

> In any case, it is impossible to state with any certainty that the test in England and Wales is higher than those employed in the four Member States which also have a threshold focusing on the prospect of conviction"[28]

Rather, it proceeded on the basis that the evidential test *might* set a standard higher than strictly necessary, and might thus be in need of some justification. Here, two possible arguments were mentioned and accepted.

The first argument was that it might be unfair to the defendant to require him to stand trial, with the associated personal costs, on charges which (it is thought) will probably not be proven. In so doing, the Court referred[29] to its previous dicta in *Gurtekin v Cyprus*[30] that prosecution has profound effects on individuals and that even an acquitted person may remain tainted by suspicion.

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[25] Doubt on this point is expressed briefly in *da Silva, supra* n6 at [275]. For one previous instance where a submission of no case to answer was accepted on analogous facts, see the prequel to *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25. In a separate incident, an inquest verdict of unlawful killing against a police officer was quashed on the ground there was no evidence that the officer had not simply made a terrible mistake: *Sharman v HM Coroner for Inner North London & Anor* [2005] EWHC 857 (Admin) at [39]-[40], [55]. This may lead one to wonder whether English law on self-defence is itself compatible with positive obligations under Article 2. The Grand Chamber in *da Silva* thought that it was. Analysis of this point is not possible here, albeit that the author's view is that here too the Grand Chamber reached the right outcome for the wrong reasons. For a detailed consideration of the compatibility of the law on self-defence (including the inquest verdict in the *de Menezes* case), see J Rogers "Culpability in Self-Defence and Crime Prevention" in *Seeking Security*, Hart 2012 (eds. G R Sullivan & I H Dennis) 265-292.

[26] [2016] ECHR 314 at [259]: most previous Strasbourg cases have concerned complaints about police investigations combined with prosecutorial inaction, and so the evidential test has usually not been so clearly in focus.

[27] *Ibid* at [268]

[28] *Ibid* at [271]

[29] *Ibid* at [266]

The second reason can be found in this passage:

> In any event, the threshold evidential test has to be viewed in the context of the criminal justice system taken as a whole. While the threshold adopted in England and Wales may be higher than that adopted in certain other countries, this reflects the jury system that operates there. Once a prosecution has been brought, the judge must leave the case to the jury as long as there is "some evidence" on which a jury properly directed could convict, even if that evidence is "of a tenuous nature" (this being the so-called *Galbraith* test - see paragraph 166 above). As weak or unmeritorious cases cannot be filtered out by the trial judge, the threshold evidential test for bringing a prosecution may have to be a more stringent one. In this regard, it is significant that other common law countries appear to have adopted a similar threshold to the one applied by prosecutors in England and Wales.[31]

This second reason then can be summarised in the terms that a relatively high threshold may be desirable to prevent miscarriages of justice at trial, since judges may be obliged to leave relatively weak cases to the jury; and, it might be added, juries do not have to give reasons for their decisions.

Finally, recalling the relevance of continued review of the justifications for restrictive rules, it should be noted that the Court was entirely satisfied with how the United Kingdom has monitored the evidential test. It said:

> …it is clear that the threshold applied by prosecutors in England and Wales is not an arbitrary one. On the contrary, it has been the subject of frequent reviews, public consultations and political scrutiny. In particular, detailed reviews of the Code were carried out in 2003, 2010 and 2012. It is also a threshold that applies across the board, that is, in respect of all offences and by whomsoever they were potentially committed.[32]

Why the evidential test is <u>not</u> "arbitrary": flexibility and review

The simplest way to defend the evidential test is to argue that it does *not* substantially impede prosecutors from taking provable cases to court, even when regard is had to the words "more likely than not". Prosecutors are not expected to think in terms of percentages at any stage of the decision-making process, let alone when assessing overall likelihood of success at the very end. This point was made clear as soon as the "more likely than not" test qualified the phrase "realistic prospect of success" in 1994.[33] It seems likely that the following comment made by a prosecutor in 1994, shortly after the new threshold was introduced, remains applicable today:

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[30] [2014] ECHR 519. This concerned the resources to be put in an investigation into killings over fifty years ago, and not the threshold for prosecution.
[31] *Op.cit* at [270]
[32] At [268].
[33] An explanatory memorandum which accompanied the Code insisted that "this should not be represented as "a 51 per cent rule", since that gives the impression of scientific precision when the weighing of evidence involves taking account of the reliability of witnesses and other matters", A Ashworth and J Fionda "The New Code for Crown Prosecutors: Prosecution, Accountability and the Public Interest" [1994] Crim LR 894 at 895. In response R Daw (then Head of Criminal Justice Policy Division, CPS) accepted that the process "is not a precise science": "The new Code for Crown Prosecutors: a Response" [1997] Crim LR 904, at 905.

> "I don't actually think it's made a tremendous amount of difference to the decisions which I have reached, because I think it's so imprecise. I mean you can say 'I think it's more likely than not that the court will convict', and no one can really disagree with you … unless it's totally outrageous …"[34]

To be sure, it seems odd that the Code recycles the phrase "more likely than not" as a qualifier to the phrase "reasonable prospect of success" if prosecutors are not expected to put any particular meaning on those qualifying words. But, we should recall that in the earliest years of the Crown Prosecution Service, the "reasonable prospect of success" test stood alone, unqualified other than to say that it meant more than there being a case to answer.[35] Possibly a number of early prosecutors had set the bar only slightly higher than that; in any event the number of judge-directed acquittals was especially high, especially in serious cases[36] and this later attracted criticism in the Glidewell Report in 1998[37]. The injection of the "more likely than not" test in the third Code in 1994 and its retention thereafter surely reflected a concern to move away from this troubled start and to ensure that prosecutors set the bar considerably higher than establishing a bare case to answer. The test was not meant to be reset at a higher level, but was rather rephrased in the light of experience. In practice, prosecutors appear to have their own ways of paraphrasing what they take the evidential test to be, for example "whether the factual dispute ought to be resolved by a jury",[38] and such formulations seem to assume that deciding that a case has a "realistic prospect of conviction" does not also require a conclusion that conviction is "more likely than not".

One might still worry that *some* prosecutors will take the "more likely than not" formulation at face value and thus decline to prosecute cases which would be prosecuted if the words "realistic prospect of conviction" had stood alone. It can hardly be discounted that this could explain a number of discontinuances over the years. In addition to finding that the prosecutor overlooked various considerations in the leading case *R v DPP, ex parte Manning*, Lord Bingham CJ (as he then was) concluded "It also appears to us that Mr Western (inadvertently, we feel sure) applied a test higher than that laid down in the Code".[39] In *Gujra v DPP*, Lord Mance noted the lack of clarity that resulted from a decision not to prosecute which used both formulations:

> I should add that I am not entirely convinced that the CPS applied even its own test correctly …; 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

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[34] Quoted in research by A Hoyano "A study of the impact of the revised Code for Crown Prosecutors" [1997] Crim LR 556-564 at 559, who found that "very few prosecutors believed that the "more likely than not" clarification had made any difference to their actual decisions".

[35] See para 4 of the first Code, in Annex B of the *Crown Prosecution Service Annual Report* 1986-1987, accessible at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235835/0014.pdf

[36] See B. Block, C. Corbett and J. Peay, "Ordered and Directed Acquittals in the Crown Court: a Time of Change?" [1993] Crim LR 95 at 105, J Baldwin "Understanding Judge Ordered and Directed Acquittals in the Crown Court" [1997] Crim LR 536.

[37] In the Summary of "*The Review of the Crown Prosecution Service: A Report*" (Cm. 3972 of 1998) at 20, Sir Glidewell said that the high rate of judge ordered acquittals "is a cause for concern…. We conclude that the performance of some parts of the CPS in this respect is not as good as it should be, and improvement is needed".

[38] As in *S v CPS*, *infra* n48.

[39] [2001] QB 330 at [42].

whether there is "a realistic prospect of conviction" and to the court being "unlikely [to] be satisfied of guilt"[40]

Such criticism surely applies to an untold number of CPS decisions not to prosecute. With due respect to those who continue to defend the drafting of the Code, the potential for confusion between paragraphs 4.4 and 4.5 seems clear.

However, this potential for confusion alone does not mean that the evidential test creates a serious obstacle to effective prosecuting. It is first necessary to consider the availability of judicial review of individual decisions. As is well known, the remedy is limited to irrational decisions or those based on errors of law or other familiar public law remedies,[41] albeit that in some cases judges have proven willing to quash decisions on the basis that no reasons were offered for important conclusions or that certain apparently telling points of evidence were not mentioned and thus possibly overlooked.[42] But since *ex p Manning*, there has been considerable judicial reserve about second-guessing the overall likelihood of success and it is extremely difficult to impugn as "irrational" any reasoned decision reached on the perceived strength of the evidence. One notices that most of the few successful cases seem to have involved rather a misunderstanding of the applicable substantive law.[43] So a decision not to prosecute which mentions the relevant considerations, but which may have been unduly influenced by the "more likely than not" wording of paragraph 4.5, is unlikely to be quashed on review. It is tempting to explain the ready acceptance of judicial review as a safeguard in *da Silva*[44] by the context of the rather hopeless facts in *da Silva* itself, for no imaginable standard of review could have availed the applicant in that case.

But the advent of the Victims' Right to Review (VRR), as originally heralded in this journal,[45] seems to change the position. Under the VRR, any complainant may ask for a decision not to prosecute "their" case to be reviewed. Save where the original decision was taken by the Area Chief Crown Prosecutor, a review is first undertaken locally by examining again the reasons why the evidential test or (if still relevant) the public interest test was thought not be satisfied. If still dissatisfied, the complainant can further appeal and then the case is sent for independent review, usually to the CPS' Appeal and Review Unit.[46] Most importantly, at the level of independent review, the case will be reviewed by a senior prosecutor who will not have worked closely with the original decision-maker, and who assesses the case in its entirety, including, for example, viewing any video recordings of the complainant's evidence for him or herself. One notable example of the VRR in operation is *S v CPS*[47]. Here, there had clearly been an internal disagreement about the strength of the evidence and a judicial review application by the complainant would likely have failed. But the senior prosecutor nonetheless reversed the original decision (on the basis that the case was strong enough to merit

[40] *Gujra v CPS* [2012] UKSC 52 at [121]
[41] *R v Director of Public Prosecutions, ex p Manning and Melbourne* [2001] QB 330 at [23].
[42] This occurred in *Manning*, and *R v DPP, ex p Jones* [2000] IRLR 373.
[43] *R (F) v DPP* [2013] EWHC 945 (Admin), *Webster v CPS* [2014] EWHC 2516 (Admin), *ex p Jones*, *op.cit*.
[44] *Op.cit* n6 at [277] –[280].
[45] See K Starmer "Finality in Criminal Justice: When should the CPS reopen a Case?" [2012] Crim LR 526-534. There is now a parallel scheme in relation to police inaction, where the police do not refer a case to the CPS.
[46] With the exception of certain offences which were originally dealt with in the Serious Casework Divisions,, eg corporate manslaughter and terrorism case, which are reviewed within geographically separate offices within the same divisions.
[47] [2015] EWHC 2868

consideration by a jury) and the defendant in turn unsuccessfully sought judicial review of that decision.

So there should be little danger now that a prosecution will not be brought because just the one prosecutor might wrongly so decide, possibly due to applying an unduly high interpretation of the evidential test. With up to four prosecutors, including one senior one, being involved, and only one of them needing to decide that the case should proceed, one might expect that today a case with genuine merit should be selected for prosecution somewhere along the line.[48] Judicial review remains available if the final result can be impugned as "irrational" or based on a muddled application of the law. It follows that, notwithstanding the less than ideal drafting of the Code, interpreting and applying the evidential test should not make prosecuting serious crime unduly difficult.

The weakness of the justificatory arguments in *da Silva*

But, as noted above, the Court in *da Silva* relied more strongly on justificatory reasons for having what *might* be a higher than normal threshold. On closer inspection however, neither of these reasons is satisfactory; and the reliance on regular consultations seems to be similarly exaggerated.

a) A right not to be prosecuted where conviction is not thought likely?

The Grand Chamber in *da Silva* is not alone in considering that the evidential test might recognise some kind of *right*, based on fairness to the accused, that he not to be asked to face a prosecution that is thought unlikely to succeed. Indeed, the Royal Commission on Criminal Justice, which recommended setting up the CPS and had itself proposed the "more likely than not" formulation, took this view.[49] When the words "more likely than not" were introduced in 1994, one justification given was that "prosecution below "more likely than not" would … involve the defendant in inappropriate worry and possibly social, economic, and domestic upheaval and prejudice".[50] Lord Neuberger in *Gujra v CPS* thought (but without committing himself to this viewpoint) that "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".[51]

However, it is rather extreme to say that the defendant has his own *right* not to face a relatively weak case (that is, a right which exists independently as a matter of fairness or justice and thus *requires* a high threshold in the evidential test, rather than one which only arises *because* the high threshold has been decided upon for other reasons). Most awkwardly such a "right" assumes that the defendant who "probably" won't be convicted *is* in fact innocent, or at least *would not* be

[48] Thus, Thomas PQBD (as he then was) commented "As it is of the essence of the decision to prosecute that there is a significant margin of discretion given to the prosecutor, it can be well understood why two prosecutors might differ. That, therefore, underlines the great importance and essential contribution that the Director has made by putting in place this system of review": *L v DPP* [2013] EWHC 1752 Admin
[49] Royal Commission on Criminal Procedure ("the Philips Commission"), Cmnd 8092, at para 8.9
[50] R Daw, *supra* n33 at 905.
[51] [2012] UKSC 52 at [52]

convicted. When one accepts that quite a few defendants in such cases surely *are* guilty, *and would* be (rightly) convicted if only the trial process were to start and their explanations be put under full scrutiny, then speaking of their having a "*right* not to be prosecuted to face what appears to be a relatively weak case" suddenly seems quite unpersuasive.[52]

Notably, a "right" not to be prosecuted in an uncertain case has nowhere been recognised in law. Thus, the defendant in *R v Golding*[53] argued on appeal that he should not have been prosecuted because the prosecutor had not considered the applicable CPS policy on assessing the strength of evidence in a case of inflicting a sexually transmitted disease. But the Court of Appeal decided that this did not affect the safety of the conviction. All that mattered was that, when properly apprised of the prosecution case, the jury did in fact accept it. Similarly, the limited grounds of judicial review of decisions *to* prosecute do not include any argument that the prosecution should be reconsidered because it fails the evidential test, as opposed to being improperly motivated.[54] One might note also that no such right arises when the acquitted defendant wishes to reclaim his legal costs, for he must show "an unnecessary or improper act or omission"[55] against the prosecutor, and this will only rarely include the ill-advised exercise of prosecutorial discretion.[56] It is telling that those who hint casually about the rights of defendants say nothing about quite how groundless any such claims of rights actually appear to be, both in law as well as in moral argument.

That is not to say that defendants do not have "rights" at all when it comes to taking decisions whether to prosecute them. Leaving aside exceptional cases where a prosecutor's main concern may be to test the law, we can suggest that defendants have a "right" not to be prosecuted for reasons *other than* to seek his punishment or restraint on account of what he is proven in court to have done. This may mean that the late Lord Janner had a right not to be prosecuted, since his trial was not sought either to seek his punishment (since he was unfit to plead) nor his restraint (since he was by then incapable of offending).[57] Similarly, defendants might also enjoy a "right" not to be charged with a serious offence which the prosecutor does not expect to prove if the prosecutor's motive is to coerce him into entering a plea bargain for a lesser offence. [58] Duties to minimise the harshness of being prosecuted can also be imagined.[59] But such prosecutions are not unfair or wrong simply because the chances of conviction might be relatively low; rather it is because the prosecutor is improperly motivated.

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[52] The point seems to have been first made in J Rogers "Restructuring the Exercise of Prosecutorial Discretion in England" (2006) 26 OJLS 775 at 788-789.

[53] [2014] EWCA Crim 889

[54] *R v DPP, ex p Kebilene* [1999] 3 WLR 972

[55] Prosecution of Offences Act 1985, s.19

[56] See *Evans v SFO* [2015] EWHC 263 (QB) at [143] – [145], *R v Cornish (Errol)* [2016] EWHC 779 (QB) (emphasising that the test is one of "impropriety" and not mere "unreasonableness").

[57] Rather unfortunately, the decision to prosecute was only taken after independent counsel was instructed under the VRR scheme.

[58] See Code for Crown Prosecutors (2013), at para 6.3

[59] In particular, prompt action should be taken to secure the release of the defendant from custody awaiting trial when a charge is later discontinued, and Lord Kerr thought that a failure to do so might be a violation of Article 5 or Article 8 of the ECHR in *SXH v CPS* [2017] UKSC 30. Similarly, one might argue for a duty to attempt to publicise a person's acquittal to an appropriate extent, as well as the Crown's acceptance of such a verdict, so as to minimise the taint of being tried.

b) A safeguard against miscarriages of justice?

Can it be said instead, then, that since trial judges are not permitted to withdraw relatively weak cases from the jury, prosecutors, as ministers of justice, might be required to the reduce risks of miscarriages of justice by discontinuing relatively weak cases rather than leave them to juries? We can immediately see one problem with this reasoning; it is the familiar premise that these defendants, whom on balance we do not expect to be found guilty, actually *are* not guilty, which is surely not so. Moreover, the notion introduces inconsistency. The main reason why, following *R v Galbraith*[60], trial judges have to leave relatively weak cases to the jury is that we ostensibly trust juries as finders of fact. But, if we think that a jury may know better than a trial judge who has also heard the prosecution witnesses, we can hardly expect them to need the wisdom of a prosecutor, who will not have heard the witnesses in person at all, to prevent them from making a blunder.

Again, there are better ways for prosecutors to safeguard defendants from wrong convictions. The best known safeguards are to be found in our law of evidence, much of which is itself influenced by the knowledge that lay juries try serious criminal cases. Thus, defendants are protected from convictions which lawyers recognise are more likely to be factually unsafe by such rules as those relating to identification procedures, or to hearsay evidence which is unreliable and yet potentially decisive, or to confessions brought about by means likely to render them unreliable, and so on; and further such rules might develop in litigation.[61] The existence of these rules will steer diligent prosecutors towards discontinuing weak cases by the application of any standard of the evidential test.

We can also identify points of principle for the prosecutor which may safeguard against miscarriages of justice. First, prosecutors have to assess the prospects of success on what is called the "intrinsic merits" test; that is, they assess the weight they consider the evidence ought to have in the minds of a fair minded jury, free from irrational prejudices.[62] This is often discussed as a safeguard for complainants who, for whatever reason, may face some kind of prejudice from a jury; but it might protect defendants too. If the strength of a case relies much upon factors that are non-probative but merely prejudicial to the defendant, then it would be wrong to decide that the evidential test is met on account of the likelihood that a jury would be minded to convict by taking them into account. Examples might include reasoning that D would not likely receive a good character direction from the judge, *and* that this would strengthen the case by planting seeds of suspicion in the minds of well-informed jurors. Also, it is submitted, the prosecutor should not consider, when applying the evidential test, the possibility that D will plead guilty because he cannot afford to contest the case or will be unduly anxious to receive a discount for a guilty plea. Instead, the prospects of success in court should be assessed on the basis that D would be defended vigorously in court by an experienced advocate. In that way, prosecutors would be clearly reminded to treat cases involving poor defendants – including poorly advised defendants - equally to cases

[60] [1981] 1 WLR 1039

[61] Eg, that statistical evidence of the improbability of sudden infant death syndrome is by itself insufficient evidence of murder: *R v Cannings* [2004] EWCA Crim 1; but the presence of the defendant's DNA on an article left at the scene of a crime can be sufficient without more to raise a case to answer where the match probability is 1:1 billion: *R v Tsekiri* [2017] EWCA Crim 40.

[62] *R (on the application of B) v DPP* [2009] EWHC 106 (Admin) at 50

involving well-resourced defendants; and that might be one of the most potent safeguards against miscarriages of justice of all.

Querying the extent of consultation

Finally, we should query the reliance placed in *da Silva* on the actual scale of consultation in England.

First, neither the legal profession nor the public at large (including complainants) has been invited to engage with any *justifications* for a relatively high threshold precisely because the test has never been presented as demanding a relatively high threshold. Successive Codes have always used the phrase "realistic prospect of conviction" and the only question has been whether the qualifying words "more likely than not" invite confusion. In the last consultation exercise in 2012, however, there seemed to be markedly little interest in hearing that it *does* cause confusion, and the official response to one such suggestion seemed to be that "the current language has withstood the test of time as well as the scrutiny of the courts".[63] The writer of this response did not acknowledge the (then) recent remarks of Lord Mance on the subject in *Gujra*.[64]

The content of the evidential test came up more directly for consideration in the *Attorney-General's Review of the Role and Practices of the Crown Prosecution Service in cases arising from a Death in Custody* in 2003[65] where consideration was given to a suggestion that a different test might apply in cases of deaths in custody. This was rejected as being "incompatible with a consistent application of the principles of justice".[66] But we should recall, as argued above, that there is no true "right" of a defendant not to be prosecuted in cases where evidence is less than compelling, provided that the prosecution is a genuine attempt to seek justice for an offence that may have been committed. Until any consultation exercise seeks to explain squarely why potentially guilty defendants have "rights" not to be prosecuted (or why it would not be "just" to prosecute them) in cases where it is hard to guess how compelling the evidence will be, it is hard to accept that such purported justifications do meet with wider approval.

But perhaps the strongest reason to query the notion that there has been active consultation on the evidential test arises from the failure of the then DPP to consult anyone on the revised policy to taking over private prosecutions, promulgated on 23 June 2009.[67] Previously, in cases where the CPS decided that the evidential test was not met, a private prosecution would nonetheless be allowed to continue, provided only that the evidence did not fall "far" below the test. But the policy in 2009 was to take over and discontinue any private prosecution which did not meet the CPS' own Code tests, and this was held by a 3-2 majority of the Supreme Court in *Gujra v CPS*[68] to be lawful. Since the VRR had not yet been set up, enabling him to ask for an internal review of the application of the evidential test in his case, Mr Gujra was left without recourse in the criminal courts. One assumes

[63] See *The Code for Crown Prosecutors Consultation: Summary of Responses*, accessible at http://www.cps.gov.uk/news/assets/uploads/files/code_summary_of_responses.pdf
[64] *Supra* n40
[65] This does not seem to be available on the Attorney-General's website, not in the national archives, but has been preserved at https://www.cps.gov.uk/publications/docs/agdeathscust.pdf
[66] *Op.cit* at para 8.124
[67] The updated policy can be found at https://www.cps.gov.uk/legal/p_to_r/private_prosecutions/
[68] [2012] UKSC 52

that his misfortune was shared by many others before the VRR was set up. Thus the policy in 2009 on overtaking private prosecutions had far-reaching consequences; but no one had been given the opportunity even to comment upon the importance of private prosecutions as a safeguard against inexplicable applications of the evidential test, before the policy already came into force.

Three implications of the above arguments

On the above analysis the evidential test is not arbitrary, because even the unhelpful phrase "more likely than not" allows some flexibility in its application and cases which do hold out a "realistic prospect of conviction" are likely to be identified, if necessary, via the VRR. But arguments relating to rights of defendants and the need to safeguard against miscarriages of justice are weak. Recognition of these arguments would seem to have at least three implications.

1) The evidential test may well have been an arbitrary barrier to justice between 2009 and 2013.

The availability of the VRR from 5 June 2013 probably assures from that time the compatibility of the "realistic prospect of conviction test" with any victim's rights that arise under the Convention. Before then, the position was less clear, because judicial review has always been a limited remedy, and the lack of a formal system for requesting internal review surely resulted in many complainants (at least, those who could not hire persistent lawyers) failing to ask the CPS informally for internal review. Indeed, it was the informality of the pre-VRR years which prompted a convicted defendant to argue on appeal that he should have been entitled to rely upon the original decision not to prosecute him,[69] which in turn prompted the institution of the VRR.[70]

The position seems particularly precarious however in the period between 23 June 2009 and 5 June 2013, because during these years the frustrated complainant, unable formally to demand an internal review, could not bring a private prosecution either, by virtue of the aforementioned 2009 policy.[71] We have already seen that Mr Gujra was one such complainant, and most unfortunate he was too, since there is every reason to suppose that had the VRR been available then, it would have availed him.[72]

Notably, in *Gujra*, Lady Hale thought the application of the policy on overtaking private prosecutions might in appropriate cases lead to violations of Article 3 or Article 8 of the ECHR.[73] Gujra's own case might not have been one of those cases, since it is doubtful on the facts whether the attack in the

[69] Albeit that the argument was unsuccessful: *R v Killick* [2011] EWCA Crim 1608.
[70] See Starmer, *supra* n42
[71] Assuming that the accused person would contact the relevant CPS area and ask for them to overtake and discontinue it, as would likely happen where the CPS had already decided not to prosecute the case.
[72] Lord Mance said that the initial decision not to prosecute could be said to be a "harsh" decision, "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": [2012] UKSC 52 at [121]. Lady Hale expressed "grave difficulty in understanding" the decision, at [128].
[73] *Op.cit* at [133].

street that was perpetrated upon him quite reached the level of severity required to engage the right under Article 3.[74] However, one imagines that there must have been several cases of rape which were also not prosecuted during this time period, which would likely have been reversed if only a second opinion could have been demanded, as later happened under the VRR in *S v CPS*[75]. An argument that there were Article 3 violations in such discontinued cases seems quite strong. To be sure, to succeed the applicant would still need to show some cogent evidence of rape, and an unexplained failure to explain the decision not to prosecute in the light of it. But if the absence of effective avenues of review were not persuasive enough, the unavailability of private prosecution might in addition prove decisive.[76] Drawing attention to the failure to consult on the policy of overtaking prosecutions might also assist; for then the Court might find it that much harder to say, as it did in *da Silva*, that the United Kingdom had at the relevant time continued to review the problems caused to some complainants by the operation of the evidential test.

2) The scope of the VRR should be kept under revision

It has been suggested above that the advent of the VRR might be instrumental in ensuring effective prosecution. If this is correct, then it is possible that any undue limitations on the VRR may mean that even today some dubious decisions not to prosecute (but which cannot realistically be remedied on judicial review) could be regarded as human rights violations.

Indeed, the VRR is not as wide as it might be. The resources allocated to it are limited and delays are inevitable while cases are sent for independent review.[77] Consequently its priority is to ensure that victims can get some justice, rather than perfect justice. Thus it does not apply when a prosecution for an offence has already started against some suspects, but not all possible suspects. This has been upheld on judicial review,[78] and most probably the decision is human-rights compliant; at any rate there is no clear authority that the doctrine of positive obligations requires *all* possible suspects to a grave crime to be prosecuted. More difficult is the point that decisions to offer no evidence at the last minute at trial also cannot be reviewed, with the result that the defendant is then formally acquitted. This was the situation in *B*[79], where an irrational decision following a misreading of expert testimony caused a trial needlessly to be abandoned. Admittedly, in such cases, it would undoubtedly be difficult to request an adjournment so that the proposed decision to offer no evidence can be internally reviewed by another prosecutor in time for the trial to proceed, if warranted. Such difficulties raised by unexpected events at the start of trial seem endemic to the English criminal justice system and it is tempting to think that human rights arguments should not have the result of aggravating them. Arguably however, a human rights court might consider the lack

[74] Nor indeed under Article 8: see *An Application by Cormac Clarke for Judicial Review, supra* n13.
[75] *Supra* n46 and accompanying text
[76] In *Jankovic v Croatia*, *supra* n15, it was also considered relevant that the national authorities had prevented the applicant from bringing a private prosecution as well as declining without good reason to start proceedings themselves.
[77] The author's understanding is that there are only 22 lawyers in the Appeals and Review Unit, and roughly one half of their activities relates to other matters (defending appeals brought by convicted defendants, etc).
[78] *R v DPP, ex p Chaudhry* [2016] EWHC 2447 (Admin).
[79] *Supra* n9

of review at this late stage to be tolerable but dependent upon the state instructing properly qualified counsel who can be expected to take reasonable decisions as trial is about to start; and with the important proviso that a remedy should be payable, as in *B*, in the event of an irrational decision leading to termination of the proceedings.

But perhaps the most curious gap is that decisions by the police or prosecutors to offer conditional cautions to offenders, instead of prosecuting them, cannot be reviewed under the VRR. This is a matter which concerns the misapplication of the public interest test rather than the evidential test, but the VRR is supposed to address serious misapplications of both tests. As with simple cautions, police and prosecutors are only required to "take into account the interests of the victim" when offering a conditional caution;[80] and so there is apparently some scope for a wrong assessment of the public interest test which may leave some victims with a sense of grievance, as on the facts of the well-known case *(R) Guest v DPP* where the victim was brutally attacked in his own home.[81] To be sure, to belatedly prosecute offenders who have accepted conditional cautions may cause more dissatisfaction than in cases where no disposal has been accepted, not least since some offenders may have performed the conditions already by the time that it has been possible to review the disposal.[82] But the public interest reconsideration at the stage of internal review could take account of the completion of a condition, and so too could a sentencing judge if the offender is then prosecuted and convicted.

More to the point, since it was possible to quash the inappropriate conditional caution on judicial review in *Guest*, in order to facilitate prosecution of the offender, then it is hard to see why inappropriate conditional cautions should not be reviewable more readily under the VRR. It would seem that as things stand, the aggrieved victim who feels that his contrary views have been "considered" but not given much weight, must seek judicial review, which is expensive (perhaps unaffordable) and perhaps only likely to succeed if the decision could be said to be irrational; whilst using the VRR would have been free and more likely to lead to success on a review of the merits. One possible response is that internal review of the disposal may still be available informally or will likely in any event take place if judicial review proceedings are started. But this brings us back to the unsatisfactory time before the VRR where complainants needed to have lawyers who could informally access remedies which, publicly, are not said to be available. In such cases, complainants may reasonably consider it a waste of money to instruct a lawyer and perhaps even some lawyers themselves would underestimate the value of making informal representations, or the likely effect of seeking leave for judicial review. Another counter-argument is likely to be based on resources; that a reasonable choice has been made to prioritise the availability of review of cases where no action is taken against the offender at all. But one can just as easily argue that cases suitable for conditional cautions – where on even the prosecutor's view, the evidential test is met, and there would be some public interest in prosecuting – are especially suitable for review. At the very least, one might expect there to be greater interest in allowing internal review for disposals of indictable-only offences. Such disposals are said to be exceptional and they require the authorisation of a prosecutor at the Deputy Chief Crown Prosecutor level; so it should not be such a strain to allow them to be reviewed independently. It would also be an effective way to ensure compliance with

[80] https://www.cps.gov.uk/publications/directors_guidance/adult_conditional_cautions.html
[81] [2009] EWHC Admin 594
[82] But the effect of a condition to pay a financial penalty could later be undone.

human rights obligations (assuming an indicatable offence where on the facts, the victim's rights under Articles 2-4 ECHR, or exceptionally Article 8 ECHR, are engaged). Further, the vast majority of offenders who accept disposals could still be confident that the matter will not be reviewed.

3) The evidential test should be reworded

It was argued above that it can only cause confusion to say that a "realistic prospect of conviction" means that conviction must be "more likely than not" if we don't expect prosecutors to think in terms of probability, and indeed only want them to be sure that a case is considerably stronger than disclosing a mere case to answer. We suggested that the advent of the VRR probably resolves any problems caused by such confusion, but it is still hard to see why this confusion should persist. If, as surmised above, the words "more likely than not" were introduced in 1994 on account of contemporary misunderstandings, then we might hope that, over twenty years later, the lesson has been learnt. In the consultation exercise before the next Code for Crown Prosecutors, it would be better if the CPS were simply to give consultees the choice between using the phrase "realistic prospect of conviction" alone, or continuing with the two phrases that are currently used. It is submitted that it would be surprising if the former were not then preferred.

Indeed, it would be no bad thing if the Code went further and spelt out some particular rights which defendants surely do have. As suggested above, they can be said to have a right not to be prosecuted other than to seek punishment or restraint (including charges brought in order to induce guilty pleas to lesser charges), aright that the evidence against them be assessed on its objective merits and on the basis that the case would be vigorously defended in court. Possibly, if more were said about these rights, we would hear less elsewhere of the beguiling assertion that defendants might also have a right not to be prosecuted, even in good faith, where the strength of the evidence is somewhat uncertain.

Conclusions

It is unfortunate that the compatibility of the evidential test with complainants' rights under Articles 2-4 ECHR was first examined on the facts of such an inappropriate case as *da Silva*. Should the point arise for decision in the domestic courts, perhaps in the context of a more difficult rape allegation, it would be better to rely upon the availability of the VRR to show that decisions not to prosecute by virtue of the evidential test are not "arbitrary". We should also contemplate that *da Silva* should not be interpreted as deciding that the evidential test has always been compatible with all victims' rights in all cases. On the account given in this article, there must be scope, especially in relation to cases that were discontinued between 23 June 2009 and 5 June 2013, for the ambiguity of the test and the difficulties in challenging its application to have prompted human rights violations of some complainants under Articles 2-4 ECHR, and exceptionally too under Article 8 ECHR.

It is also fair to suggest that there has been some complacency regarding the evidential test. No doubt the disinclination to clarify the apparent conflict between the phrases "realistic prospect of conviction" and "more likely than not" has been fostered by the belief that it would in any event be quite justifiable to require a relatively high likelihood of success. But the justifications for a markedly

high test, that is, any test that exceeds a “realistic prospect of conviction”, turn out to be weak. We have suggested that the wording of the evidential test should be revised with an open mind at the next opportunity. Further, if the VRR does play such an important role in ensuring human rights compliance, attention must continue to be paid to its precise scope. Besides those cases where the application of the evidential test can still not be challenged, the unavailability of review for cases of indictable-only offences that are disposed of by way of conditional caution appears to merit further debate.