The recent high-profile case of R (on the application of da Silva) v Director of Public Prosecutions and the Independent Police Complaints Commission concerned a challenge to the decision of the Crown Prosecution Service ('the CPS') not to prosecute any individual police officer in the fatal shooting of Jean Charles de Menezes. Mr de Menezes was a Brazilian man mistaken for a suicide bomber in Stockwell Underground station following the July 7 bombings.

The CPS' decision in refusing to prosecute an individual police officer was taken in accordance with the Code for Crown Prosecutors. The Code requires that decisions on whether or not to prosecute be based on whether there is enough evidence to provide a 'realistic prospect of conviction'. This is an objective test based on the likelihood of a jury convicting.

Decisions on prosecution are subject to judicial review: however, the courts have been in general reluctant to overturn them. Previous cases have noted that the decision to prosecute rests not on legal principles but rather on an informed judgement as to how the case would proceed if it went to trial. The standard for review by the courts is very high and previous cases have rejected lowering the standard for review in relation to deaths in custody or high-profile cases.

In this case it was argued that the right to life, which is protected under Article 2 of the European Convention on Human Rights ('the ECHR'), required a change to the current position. It was claimed that the decision not to prosecute any individual was a breach of the state's procedural obligations under Article 2. These obligations have been established by Strasbourg case law and include the obligation to carry out an effective investigation into death. The applicant in this case claimed that such an investigation should identify perpetrators and secure personal responsibility for the death, particularly here as the death was caused at the hands of agents of the state. It was also argued that in a case involving the right to life, the court should undertake a more intensive review of the decision on prosecution.

The High Court acknowledged that a prosecution to secure individual accountability must be brought where it was justified. However, it could not hold that a prosecution must be brought even where it is not justified; nothing in previous case law supported this notion and the Court did not believe that doing this would enhance the effectiveness of the legal system in England and Wales. Indeed, the Court considered it likely that bringing prosecutions that had been assessed as being likely to fail would only undermine public confidence in the system.
The Court also held that the Code for Crown Prosecutors was compatible with Article 2 and the obligations that Article entails. It was not considered that the ECHR required any particular evidential test in relation to decisions on prosecution. Therefore, even in a case where Article 2 is relevant, the Court was of the view that no change was required to the established position regarding judicial review of a decision not to prosecute.

The decision taken not to prosecute in this case was held to be lawful because it was taken in accordance with the CPS Code of Practice and because it was a decision reasonably open to the CPS based on the material available. The Court agreed that conviction based on the evidence was not likely.

In mid-January the path for appeal to the House of Lords was laid in relation to this judgment with three judges ruling that this case raised legal issues of general public importance and as such could be referred to the House of Lords. The questions to be answered on any appeal are: whether the Code of Crown Prosecutors is compatible with Article 2; and what legal tests should be applied when the High Court reviews a decision not to prosecute.