Neutral Citation Number: [2025] EWHC 1653 (Admin)

Case No: AC-2024-LON-001120

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2025

Before :

LORD JUSTICE STUART-SMITH
and
MR JUSTICE CHAMBERLAIN

- -

Between :

THE KING
on the application of
MATTHEW CAMPBELL — **Claimant**

- and -

HIS MAJESTY'S ATTORNEY GENERAL FOR ENGLAND AND WALES — **Defendant**

- -

Nicholas Bowen KC and Nick Stanage (Direct Access) for the **Claimant**
Sir James Eadie KC and Daniel Cashman (instructed by the **Government Legal Department**) for the **Defendant**

Hearing dates: 18 June 2025

- -

Approved Judgment

This judgment was handed down remotely at 10am on Tuesday 1 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Chamberlain and Lord Justice Stuart-Smith:

Introduction

1. This judgment explains our conclusion on a preliminary issue arising in judicial review proceedings. It concerns the justiciability of a decision of the Attorney General under s. 13(1)(b) of the Coroners Act 1988 to refuse his authority (or fiat) for an application to the High Court to quash a finding made at an inquest and order a fresh investigation.

Background

2. Geoffrey Campbell was unlawfully killed in the North Tower of the World Trade Centre in New York City on 11 September 2001. On 29 January 2013, HM Senior Coroner for West London held an inquest. She completed the inquisition form, recording the time, place and circumstances of the death as follows:

> "At 8.46am on 11 September 2001 the deceased was on the 106th floor of the North Tower of the World Trade Centre when an aircraft (AA11) was deliberately flown into the building, causing its collapse at 10.28am. This event was part of a coordinated attack by the Islamist militant group Al-Qaeda."

3. The claimant is Mr Campbell's brother. He does not accept that the building collapsed because of the impact of the aircraft. His alternative hypothesis is that the collapse was caused by the detonation of pre-planted explosives or incendiaries. He relies on fresh evidence not available to the Senior Coroner.

4. On 26 August 2021, the claimant, together with his family and his late brother's fiancée, applied to the Attorney General for authority to apply to the High Court under s. 13(1)(b) of the Coroners Act 1988 ("the 1988 Act") for an order quashing the inquisition and directing an investigation. The application was supported by a large volume of documentary evidence. It was considered by the Solicitor General, who is entitled under s. 1(1) of the Law Officers Act 1997 to exercise any function of the Attorney General. For reasons given in a letter dated 27 June 2023, it was refused.

5. On 11 September 2023, the claimant's barrister wrote to the Attorney General's Office enclosing draft grounds for judicial review. On 22 September 2023, the Attorney General's Office replied that the decision had been withdrawn and a new decision would be made.

6. The new decision was communicated by letter of 4 January 2024. The application was again refused. The Solicitor General considered that the cause of the collapse of the buildings had already been adequately investigated in the United States. The clear consensus view was that there was no realistic possibility of any cause other than the impact of the aircraft. The claimant's hypothesis was "fanciful" and "simply not credible". Reference was also made to the "long-standing principle outlined in *Gouriet v Union of Post Office Workers* [1978] AC 435 that the exercise of the Law Officers' discretion in public interest functions is absolute, and non-reviewable".

7. The present claim was filed on 3 April 2024. The papers were initially not in the proper form. They were refiled on 3 October 2024. Five grounds were advanced: first, that the Solicitor General erred in law as to the test to be applied to the question whether a new investigation was in the interests of justice; secondly, that the decision was irrational in light of the fresh evidence; thirdly, that there was a failure to give adequate reasons; fourthly, that the finding of a "clear consensus view" about what happened on 11 September 2001 was unreasonable; and fifthly, that it was unreasonable to categorise the claimant's hypothesis as "fanciful".

8. The Acknowledgement of Service and Summary Grounds of Defence were filed on 18 October 2024. These asserted that the challenged decision was not justiciable at all or, alternatively, was challengeable only on exceptional grounds, such as fraud, corruption or bad faith. The grounds were also said to be substantively unarguable.

9. On 5 December 2024, Chamberlain J considered the application for permission on the papers. He noted that, given the size of the bundle, substantial judicial resources would be involved in considering whether any of the grounds was arguable. The justiciability point was likely to be of relevance in other cases. In those circumstances, he ordered that, prior to the determination of permission to apply for judicial review, there was to be a hearing of a preliminary issue as to whether the challenged decision was justiciable.

Statutory framework

10. Section 13 of the 1988 Act provides as follows:

> "(1) This section applies where, on an application by or under the authority of the Attorney-General, the High Court is satisfied as respects a coroner ("the coroner concerned")...
>
> > (b) where an inquest or an investigation has been held by him, that (whether by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, the discovery of new facts or evidence or otherwise) it is necessary or desirable in the interests of justice that an investigation (or as the case may by, another investigation) should be held.
>
> (2) The High Court may—
>
> > (a) order an investigation under Part 1 of the Coroners and Justice Act 2009 to be held into the death either—
> >
> > > (i) by the coroner concerned; or
> >
> > > (ii) by a senior coroner, area coroner or assistant coroner in the same coroner area;
> >
> > > … and

> (c) where an inquest has been held, quash any inquisition on, or determination or finding made at that inquest."

11. This replicates in substantially similar form s. 6(1) and (2) of the Coroners Act 1887.

Functions of the Attorney General

12. A useful summary of the role and functions of the Attorney General can be found in a House of Commons Library Research Briefing by Dr Conor McCormick and Graeme Cowie, *Law officers: a constitutional and functional overview* (14 February 2025). The role can be traced to the thirteenth century. The title has been in use at least since 1461. In modern times, the Attorney General has executive functions superintending the Government Legal Department, the Crown Prosecution Service and the Serious Fraud Office. He shares with the Ministry of Justice and Home Office ministerial responsibility for criminal justice. Separately, he is the principal legal advisor to the Crown. In this capacity, he advises the Sovereign, the Cabinet, Government departments, individual ministers and Parliament, and may act in legal proceedings on their behalf. In addition, he has what are termed "public interest functions", some arising under the Royal prerogative, others conferred by statute.

13. There are public interest functions in relation to both criminal and civil law. As to the former, the Research Briefing identifies "(at least) four notable functions beyond superintending prosecutorial authorities". First, the Attorney General's consent is required for certain prosecutions. Secondly, he has functions in relation to interferences with the administration of justice. By s. 7 of the Contempt of Court Act 1981, his authority is required for proceedings for contempt of court under the strict liability rule. By s. 42(1) of the Senior Courts Act 1981, he (and only he) can apply for orders preventing vexatious litigants from bringing proceedings. Thirdly, he may apply under s. 35 of the Criminal Justice Act 1988 for leave to appeal a sentence on the ground that it is unduly lenient and upon acquittal may refer a point of law to the Court of Appeal under s. 36 of the Criminal Justice Act 1972. Fourthly, under the prerogative, he may enter a nolle prosequi, which has the effect of staying criminal proceedings.

14. As to civil law, there are powers in relation to vexatious litigants (s. 42 of the Senior Courts Act 1981), powers under s. 59 of the Family Law Act 1986 to intervene in family cases about marital status, overseas adoptions and parentage and legitimacy and powers to appoint special advocates (under a variety of statutes) and advocates to the court (under the prerogative, but recognised by CPR 3F PD). There are also statutory and common law powers in relation to charities. Finally, there is the function of applying to the High Court to enforce public rights either of his own motion (ex officio) or on behalf of others (ex relatione). We shall have to consider this function in greater detail, because it forms the backdrop to the decision of the Court of Appeal and House of Lords in *Gouriet*, which became the focus of much of the argument before us.

15. The Research Briefing does not refer to the power now conferred by s. 13(1) of the 1988 Act in relation to inquests, but that power naturally falls within the category of the Attorney General's public interest functions in the sphere of civil law.

Key case law

Reviewability of decisions of the Attorney General

16. In the nineteenth century, the Attorney General had different functions, including functions that fell into the same "public interest" category as the current functions mentioned above. The authority we have seen appears to indicate a clear position that decisions taken in the exercise of these functions were not justiciable in proceedings seeking the prerogative writ of mandamus.

17. In *ex p. Newton* (1855) 24 LJQB 247, the Attorney General had refused his fiat for a writ of error in a criminal case tried on indictment. The applicant applied for a writ of mandamus to compel the Attorney General to grant the writ. Lord Campbell CJ held that the Attorney might be responsible in Parliament "but we cannot review his decision". Wightman J agreed, saying that the decision whether to grant the writ was "a judicial act" which the court could not review. Erle J also agreed, saying that the Attorney General's decision was "supreme and final" and that the court had "no authority to review it and substitute our discretion for his". Compton J explained: "I think it clear that by the law the exercise of this branch of the prerogative is confided to [the Attorney General], and that we should trench upon his duty if we interfered with the exercise of his discretion".

18. In *R v Comptroller General of Patents, Designs and Trade Marks* (1899) 1 QB 909, a member of the public objected to a patent. Section 95 of the Patents Designs and Trade Marks Act 1883 gave the Comptroller General power to apply to the law officers "in any case of doubt or difficulty arising in the administration of any of the provisions of this Act". Although the application was for mandamus against the Comptroller General, A.L. Smith LJ said this (obiter) about the position of the Attorney General (at pp. 913-4):

> "Everybody knows that he is the head of the English Bar. We know that he has had from the earliest times to perform high judicial functions which are left to his discretion to decide. For example, where a man who is tried for his life and convicted alleges that there is error on the record, he cannot take advantage of that error unless he obtains the fiat of the Attorney-General, and no Court in the kingdom has any controlling jurisdiction over him. That perhaps is the strongest case that can be put as to the position of the Attorney-General in exercising judicial functions. Another case in which the Attorney-General is pre-eminent is the power to enter a nolle prosequi in a criminal case. I do not say that when a case is before a judge a prosecutor may not ask the judge to allow the case to be withdrawn, and the judge may do so if he is satisfied that there is no case; but the Attorney-General alone has power to enter a nolle prosequi, and that power is not subject to any control. Another case is that of a criminal information at the suit of the Attorney-General—a practice which has, I am sorry to say, fallen into disuse. The issue of such an information is entirely in the discretion of the Attorney-General, and no one can set such an information aside. There are other cases to which I could refer to be found in old and in recent statutes, but I have said enough to shew the high judicial functions which the Attorney-General performs. There is one other matter to which I will refer before I come to the facts of this case. In

> *Van Gelder's Patent* [6 Rep Pat Cas 22] the position of the Attorney-General in these matters is stated in the judgments in the Divisional Court and in the Court of Appeal. I will read a passage from the judgment of Bowen LJ: 'At common law, the Attorney-General is, when he is exercising his functions as an officer of the Crown, in no case that I know of a court in the ordinary sense.' It follows that his decisions, when exercising such functions, were not subject to review by the Court of Queen's Bench, and are not now subject to review by the Queen's Bench Division or this Court."

19. A further example of the approach to decisions of the Attorney General can be seen in *London County Council v Attorney General* [1902] AC 165. There, the Attorney General had brought relator proceedings on behalf of omnibus operators. The proceedings resulted in an injunction restraining the Council from running its own omnibus service. In the House of Lords, the reviewability of the conduct of the Attorney General was not directly in dispute. Again, however, the issue prompted comment. The Earl of Halsbury LC said this (at pp. 168-9):

> "It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first law officer of the Crown in order to bring into Court some trifling matter. But if he did, it would not go to his jurisdiction; it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a Court of law to intervene? If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General and not for the-Courts to determine whether he ought to initiate litigation in that respect or not… the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other Court."

Lord Macnaghten agreed, both in the result of the appeal and specifically with these remarks about the position and duties of the Attorney General. The other members of the Appellate Committee concurred generally.

20. Against this background, the courts had to consider in *Gouriet* whether a private citizen could bring proceedings against a union for an injunction to restrain a threatened breach of the criminal law in circumstances where the Attorney General had refused to consent to bring relator proceedings on his behalf. Mr Gouriet sought an injunction against the union and a declaration against the Attorney General that he had acted improperly in refusing his consent. The question whether the Attorney General's refusal was reviewable was in issue before the Court of Appeal: [1977] QB 729. The majority answered in the negative, Lord Denning MR dissenting. Lawton LJ, citing the *London County Council* case, accepted at p. 768C that "the courts have no jurisdiction over the discretion of the Attorney-General as to when, and when not, he should seek to enforce the law having public consequences". For Ormrod LJ, the question whether the Attorney General was answerable to the court, or only to Parliament, could be answered "shortly and unequivocally" (see at p. 772C):

> "The Attorney-General's discretion is not subject to review by the court, he is not answerable to the court in this respect, and like everyone else, he cannot

> be compelled to act as a plaintiff against his wish. There is, therefore, no clash or conflict in this respect between Parliament and the court or between the court and the Attorney-General."

21. By the time the case went to the House of Lords, Mr Gouriet was no longer contending that the court could review Attorney General's refusal of consent. The sole issue was therefore whether Mr Gouriet could bring proceedings for an injunction in his own name, in circumstances where the threatened breach of the law would not affect his private rights. The answer was "No". Some of the members of the Appellate Committee regarded the status of the Attorney General's refusal of consent as relevant to that answer.

22. Lord Wilberforce cited part of the passage we have quoted from the *London County Council* case and said that the principle could not be limited to the case where the Attorney General had given consent. It also applied where he had refused consent. He went on to refer to *ex p. Newton* as authority for the proposition that the refusal of consent is "binding". Citing the opinion of Lord Westbury LC in *Stockport District Waterworks Co. v Manchester Corporation* (1862) 9 Jur NS 266, at p. 267, he said this at p. 481A:

> "That it is the exclusive right of the Attorney-General to represent the public interest—even where individuals might be interested in a larger view of the matter—is not technical, not procedural, not fictional. It is constitutional. I agree with Lord Westbury L.C. that it is also wise."

23. Viscount Dilhorne (who himself had served as Attorney General) said this at pp. 487F-488A:

> "The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a nolle prosequi. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers he is not subject to direction by his ministerial colleagues or to control and supervision by the courts. If the court can review his refusal of consent to a relator action, it is an exception to the general rule. No authority was cited which supports the conclusion that the courts can do so. Indeed such authority as there is points strongly in the opposite direction."

He went on to cite the *London County Council* case as authority for the non-justiciability of the Attorney General's refusal of consent to the bringing of relator proceedings. At p. 133C, he added:

> "The courts cannot review the Attorney-General's decision and they have no jurisdiction to entertain an application by a member of the public which he alone can make, either ex officio or in a relator action."

24. Lord Edmund-Davies cited the *London County Council* case and *ex p. Newton* for the proposition that "the courts have no jurisdiction to review the Attorney General's decision" in either a civil or criminal case. At 511E, he used this as the basis for his

conclusion that the Court of Appeal had erred in granting interim relief. At p. 512E, he said this:

> "Accepting as I do that the Attorney-General's discretion is absolute and non-reviewable, there was accordingly, in my judgment, no basis upon which the plaintiff should have been granted the final injunction he sought."

The use of "accordingly" in this passage makes clear that the earlier conclusion about the non-justiciability of the Attorney General's refusal of consent was the basis for his decision on the central issue in the case.

25. Lord Fraser noted at pp. 518F-519A that there was "high authority to the effect that the Attorney General's decision whether or not to give his consent to relator proceedings in matters concerning the public is not subject to review by the courts". If the court were to entertain the application for an injunction or declaration after the Attorney General had refused consent, it would be "overruling his decision at least by implication". If it were to grant the application, "the overruling would be even plainer". He endorsed as correct the view that the courts have no jurisdiction over the discretion of the Attorney General whether to give or withhold consent to relator proceedings. This view provided strong support for the contention that "he alone is entitled to represent the public interest" (the issue in the case). At p. 524C, he added:

> "If the Attorney-General were to commit a serious error of judgment by withholding consent to relator proceedings in a case where he ought to have given it, the remedy must in my opinion lie in the political field by enforcing his responsibility to Parliament and not in the legal field through the courts. That is appropriate because his error would not be an error of law but would be one of political judgment, using the expression of course not in a party sense but in the sense of weighing the relative importance of different aspects of the public interest. Such matters are not appropriate for decision in the courts."

26. The implications of *Gouriet* for the justiciability of other public interest functions of the Attorney General has been decided in at least three different contexts. In *R v HM Attorney General ex p. Edey*, unreported, 26 February 1992, the Court of Appeal refused a renewed application for leave to apply for judicial review of the Attorney General's refusal to enforce the Sunday trading legislation. Refusing leave, Parker LJ (with whom McCowan LJ and Sir David Croom-Johnson agreed) said this:

> "In *[Gouriet],* two members of the court made it perfectly plain that it was not possible for this court to attempt to control the Attorney-General either in giving or refusing a fiat in a relator action. That position must apply equally well where the relief sought is not that there should be a fiat given for the relator action but that the Attorney-General himself should take action."

In addition, observations in two of the speeches in the House of Lords, while obiter, provided "powerful persuasive authority" that the Attorney General's refusal was not justiciable.

27. In *R v Attorney General ex p. Ferrante* (unreported, 1 July 1994), as in the present case, the decision challenged was a refusal of authority under s. 13(1) of the 1988 Act. Counsel for the applicant sought to distinguish *Gouriet,* relying on a passage from Sir William Wade's *Administrative Law* (6th edition) that *Gouriet* "ought to be confined to its particular subject matter which is the use of civil proceedings for the purpose of enforcing the criminal law", a "highly abnormal procedure", and on the speeches in the House of Lords in *R v Inland Revenue Commissioners ex p. National Federation of Self-Employed and Small Businesses* [1982] AC 617, where *Gouriet* was distinguished. Reliance was also placed on *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 and later cases holding that prerogative powers may in principle be subject to review and on *Stoke on Trent City Council v B&Q Retail Ltd* [1984] 1 AC 754, in which it was said that the Attorney General's discretion to authorise relator proceedings was "absolute" (see Lord Templeman at p. 770).

28. From these authorities, Popplewell J derived nine propositions:

> "(1) *Gouriet* is of general application and is not limited to relator actions.
>
> (2) The decision whether the power of the Attorney General is immune from review does not depend upon the source of those powers but on their character. Arguments relating to the prerogative and statutory duties are sterile.
>
> (3) The Attorney General is acting as guardian of the public interest in applications under s 13 of the Coroners' Act.
>
> (4) The fact that he is no longer the exclusive guardian of the public interest is irrelevant. His continued inclusion as a necessary element in the re-hearing of an inquest makes that clear.
>
> (5) The fact that a local authority exercising similar powers is subject to judicial review though logically compelling is not a reason for making the Attorney General so subject.
>
> (6) The question of whether the decision is amenable to judicial process depends on the nature and subject matter.
>
> (7) It is for the Courts to decide on a case by case basis whether the matter in question is reviewable or not.
>
> (8) The Attorney General's consent is required for a wide variety of litigation. Thus in the criminal law in relation to corruption, explosive substances, official secrets, Public Order Act offences, racial hatred offences, proceeding under the Contempt of Court Act 1981 s 7 power to enter a nolle prosequi in civil law the power to make a litigant a vexatious litigant.
>
> (9) These are only some of the situations in which Parliament has imposed upon the Attorney General, the right as guardian of the public interest either himself to bring the proceedings or to give authority for proceedings to be brought. These examples are of a similar nature; which involve or may

> involve questions of policy which it is for Parliament and not for the Courts to assess."

29. Popplewell J's conclusion was as follows:

> "It seems to me that if the principle in *Gouriet* is now to be treated as no longer good law in relation to the Attorney Generals' powers it must be for a higher court than me so to say."

30. On appeal, the Court of Appeal (unreported, 8 February 1995) found it unnecessary to decide whether the Attorney General was immune from judicial review. The appeal failed for other reasons.

31. In *R v Solicitor General ex p. Taylor* (1996) 8 Admin LR 206, the applicants challenged a decision not to consent to proceedings for contempt of court under the strict liability rule. Section 7 of the Contempt of Court Act 1981 provides that such proceedings "shall not be instituted except by or with the consent of the Attorney General or on the motion of a court having jurisdiction to deal with it". Stuart-Smith LJ (with whom Butterfield J agreed) referred to *ex p. Newton*, the *Comptroller General's* and *London County Council* cases, *Gouriet* and *Ferrante*. He concluded as follows:

> "The authorities to which I have referred which lay down the rules in relation to the Attorney-General, point to his unique constitutional position…
>
> Parliament must be taken to know the law as stated in *Gouriet* and the previous authorities; and if it had intended the Attorney-General's discretion to be reviewable by this court in this instance, in my view it would have said so.
>
> …
>
> Although the scope of the actual decision of the House of Lords in *Gouriet* has been much restricted by the introduction of judicial review, which now enables an individual with a specific interest to challenge unlawfulness directly, so that it is no longer necessary to have recourse to a relator action, what the members of the House of Lords said about his constitutional position of the Attorney-General's vis-a-vis the Court is not affected by this change.
>
> The fact that the source of this power is statutory and not the prerogative is also not in point. It is now well established that the source of power is immaterial, it is the nature of it is that it is important, see the *[CCSU]* case.
>
> In my judgment *Ex parte Edey* is indistinguishable from the present case and is binding upon us.
>
> …I also respectfully agree with Mr Justice Popplewell's decision in *ex parte* Ferrante and adopt the nine propositions which are set out…

> In my judgment, the court has no jurisdiction to review the Solicitor General's decision in this case."

32. The Privy Council considered an argument for non-reviewability based on *Gouriet* in *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20, [2006] 1 WLR 3343. At [14], Lord Bingham set out Viscount Dilhorne's expansive statement about the non-reviewability of the Attorney General's discretionary decisions and observed:

> "Unless reviewed or modified in the light of the later decision of the House in the GCHQ case (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374), this remains a binding statement of English law on cases covered by it. It must, however, be borne in mind that the power in question was a non-statutory power deriving from the royal prerogative. It was moreover a power exercised by a minister answerable to Parliament… Where the Attorney General's power derives from a statutory source, as in giving his consent to prosecutions requiring such consent, Professor Edwards has noted (*The Attorney General, Politics and the Public Interest* (1984), p. 29), and the Law Commission has tacitly accepted (Law Commission Consultation Paper No 149, *Criminal Law: Consents to Prosecution,* September 1997, para 3.30), that 'Since the source of the discretionary power [to grant or refuse consent] rests in statute law there are no inherent constitutional objections to the jurisdiction of the courts being invoked'. Much more closely analogous to the position of the Mauritian DPP than the English Attorney General is the English DPP, and his prosecuting decisions have not been held to be immune from review, as mentioned below."

33. In *R (Halpin) v Attorney General* [2011] EWHC 3759 (Admin), Nicol J refused permission to apply for judicial review of a decision to refuse consent under s. 13 of the 1988 Act for a new inquest into the death of Dr David Kelly. The Attorney General relied on *Ferrante* and *ex p. Taylor*. Nicol J said this, before going on to refuse permission on other grounds:

> "If, hypothetically, there were substantial grounds for considering that the Attorney had acted unlawfully in refusing his consent, it would be an unattractive position, to put it neutrally, if that illegality was beyond the power of the courts to judicially review. I was grateful therefore for [counsel for the Attorney General] turning to the merits of the case."

<u>Case law recognising judicial review on limited grounds</u>

34. The reviewability of decisions of the Director of Public Prosecutions was considered in *R v Director of Public Prosecutions ex p. Kebilene* [2000] 2 AC 326. Lord Steyn held at p. 371F that "absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review". Lord Slynn agreed (p. 362A). Lord Cooke agreed generally (see p. 372C). Lord Hope expressed the same view (see p. 376B). Lord Hobhouse's reasoning was consistent Lord Steyn's proposition (see p. 394C-D).

35. In *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756, Lord Bingham (with whom Lord Hoffmann, Lord Rodger and Lord

Brown agreed) said at [30] that there was an obvious analogy between decisions of the Director of Public Prosecutions and those of the Director of the Serious Fraud Office. It was "accepted that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator". At [31] he added:

> "The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised (as it was described in the cited passage from *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712, 735-6)
>
> > 'the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.'
>
> Thirdly, the powers are conferred in very broad and unprescriptive terms."

36. More recently, in *Mauritius v CT Power Ltd* [2019] UKPC 27, at [66], Lord Sales (giving the opinion of the Privy Council) affirmed earlier authority that, in a challenge to a contractual decision by a state enterprise, "[i]t does not seem likely that a decision… will ever be the subject of judicial review in the absence of fraud, corruption or bad faith". It was said that this passage "reflects the width of the relevant discretion enjoyed".

Submissions

37. Mr Nicholas Bowen KC for the claimant submitted that *Gouriet* is not a bar to the intervention of the court. Whether the courts could review a decision of the AG was not in issue before the House of Lords. The observations on that point were therefore obiter. In any event, those observations were confined to the reviewability of a refusal to consent to a relator action. Section 13(1)(b) of the 1988 Act does not concern relator actions, is derived from statute rather than the prerogative and asserts a private rather than a public right. *Gouriet* is therefore distinguishable.

38. Mr Bowen submitted that the decision in *Gouriet* is confined to relator actions and that is confirmed by subsequent case law. Reliance was placed on the court of Appeal's decision in *Ferrante*, the decision of the Privy Council in *Mohit* and of Nicol J in *Halpin.* Mr Bowen also submitted that the question of justiciability could not be divorced from the merits of the challenge.

39. In a note filed with our permission after the hearing, Mr Bowen submitted that *ex p. Newton* was distinguishable because the application was for mandamus, which is not sought here and because it was based on the proposition that discretionary decisions were generally unreviewable (which is inconsistent with modern public law). The *Comptroller General's* case was also distinguishable because that too was an application for mandamus and because the applicant had no locus standi.

40. Sir James Eadie KC for the Attorney General submitted that *Gouriet* is authority for the proposition that decisions in the exercise of the Attorney General's public functions are not justiciable. Although the issue was not live before the House of Lords, the point was integral to the decision on the issue that was live. The reasoning cannot be confined to relator actions, as confirmed by Popplewell J's decision in *Ferrante* and by *ex p. Taylor*. Parliament can be taken to have known and therefore intended that the AG's decision whether to grant his fiat under s. 13(1)(b) would be non-justiciable.

41. Sir James submitted that this position is constitutionally justified. Decisions as to the public interest carry political repercussions and are often multi-faceted and polycentric, involving the balancing of competing political considerations. Courts will not readily interfere with these decisions. The Attorney General remains accountable to Parliament.

42. In the alternative, Sir James submitted that the Attorney General's decision whether to grant his fiat under s. 13(1)(b) is reviewable only on the ground of fraud, bad faith, or in other exceptional circumstances.

Discussion

43. The decision of the House of Lords in *CCSU* established that the justiciability of a decision taken in the exercise of a public power depends on the nature and subject matter of the power, rather than its source. Thus, decisions taken in the exercise of prerogative powers cannot be said, for that reason alone, to be non-justiciable. For Lord Scarman, the question whether the exercise of a power is justiciable depended on whether its subject matter is one "on which the court can adjudicate" (p. 407B). Lord Roskill gave some examples of non-justiciable powers: those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours and the dissolution of Parliament (p. 418B-C).

44. Since *CCSU*, the aptness or otherwise of a particular subject matter for judicial decision has remained a central preoccupation in the case law. The courts have continued to regard certain subject matters as inappropriate for judicial determination for institutional and constitutional reasons, but they have tended to give effect to these conclusions by limiting or modifying the grounds on which the decision can be challenged or by according a broad margin of discretion or ascribing particular weight to the view of the decision-maker, rather than by categorising the decision as non-justiciable simpliciter.

45. The cases referred to by the parties provide two examples of fields in which the grounds on which the courts will intervene are limited or modified. In challenges to decisions by the Director of Public Prosecutions or other equivalent prosecutorial authorities, *Kebilene* and *Corner House* show that there are strict limits on the grounds of review, though the inclusion of a saving for "highly exceptional cases" reflects a concern that, even outside these limits, the courts should never say never. In the Mauritian *CT Power* case, a similarly cautious formulation was used ("[i]t does not seem likely" that there could ever be judicial review of a commercial decision taken by a state enterprise on grounds other than fraud, corruption or bad faith).

46. The invocation of national security no longer operates as a complete bar to reviewability, though it is now well established that "great weight" and "appropriate respect" should be accorded to the national security assessments of the executive: see *Rehman v Secretary*

of State for the Home Department [2001] UKHL 47, [2003] 1 AC 153, [31]; *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, [2021] AC 765, [70]; *R (U3) v Secretary of State for the Home Department* [2025] UKSC 19, [2025] 2 WLR 1041, [65]-[68]. Similarly, decisions in relation to diplomatic protection are in principle reviewable, though care must be taken not to enter any "forbidden area": *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] UKHRR 76, [106].

47. Against this background, the identification of a category of decisions as immune from review on any ground appears anomalous. This was Nicol's reaction in *Halpin*. The constitutional reasons identified in *Gouriet* for the existence of such a category—that weighing public interest considerations is not appropriate for the courts—would apply equally (if not with greater force) to decisions in the field of national security or foreign affairs. If the latter are in principle reviewable, it may be said with justification that the former should be too. Likewise, the fact that the Attorney General is accountable for his decisions in Parliament hardly distinguishes those decisions from many others which today would certainly be justiciable. If the matter were not governed by authority, we doubt that this feature would be sufficient to justify a difference between the approaches to prosecutorial decisions of the Attorney General and those of the Director of Public Prosecutions.

48. Nonetheless, *ex p. Newton* and the *Comptroller General* case show that, by the end of the nineteenth century, there was a class of discretionary functions of the Attorney General whose exercise was categorically immune from review. The fact that the relief sought in those cases was mandamus is not a true distinguishing feature. Nothing in the reasoning in those cases provides any support for the suggestion that the result would have been different if the relief had been certiorari. There is no principled reason for any distinction. The proceedings in which these prerogative writs were available were the forerunner of modern judicial review.

49. The passage cited at [20] above shows that it was part of the ratio of the Court of Appeal's decision in *Gouriet* that the function of granting or refusing authority to bring a relator action was a member of the class of decisions that were immune from review. Lawton LJ defined the class in broad terms as encompassing decisions as to "when, and when not, he should seek to enforce the law having public consequences" (p. 768C). Ormrod LJ referred without differentiation to "[t]he Attorney General's discretion" (p. 772C).

50. It is true that the justiciability of the Attorney General's refusal of consent was not directly in issue in the House of Lords, but it was nonetheless squarely addressed. We do not consider it correct to categorise the observations on that question as obiter. The passages cited at [22]-[25] above demonstrate that the non-justiciability of the decisions to grant or refuse consent played an important part in the reasoning on the question in issue (whether Mr Gouriet had standing to seek injunctive relief without the Attorney General's consent). The linkage was explicit in the passage from Lord Edmund-Davies at [24] above, but can also be inferred from a fair reading of the whole speeches of Lord Wilberforce, Viscount Dilhorne and Lord Fraser. These speeches also show that the immunity was not understood as limited to relator actions, but as applying to a wider class of public interest functions mentioned in the nineteenth century cases. As Viscount Dilhorne said, "[i]f the court can review his refusal of consent to a relator action, it is an

exception to the general rule" (p. 488A). The jurisprudential basis for this "general rule" was the unique constitutional position of the Attorney General.

51. If there were any doubt that the rule of immunity applies beyond relator actions, it is removed by the judgments in *Edey* and *ex p. Taylor*. *Edey* was an application for judicial review in the post-*CCSU* era. The judgment shows that, in the cases to which the immunity applies, it precludes judicial review in its modern form. The case was not concerned with consent for relator actions, which shows that the class of cases in which the immunity applies is a broader one. As a decision of the Court of Appeal, it is binding on us.

52. *Ex p. Taylor* was also an application for judicial review. The decision challenged was a refusal of consent for proceedings under a statutory power with strong similarities to that conferred by s. 13(1) of the 1988 Act. Both statutory provisions were enacted after *Gouriet*. The passages we have set out at [31] above make clear that the immunity arises because of the unique constitutional position of the Attorney General, that the immunity extends to functions conferred by statute as well as ones arising under the prerogative and that the re-enactment of the power after *Gouriet* was significant, because Parliament could be assumed to have legislated on the basis of the principles set out there. *Ex p. Taylor* was a judgment of the Divisional Court. Although we are not bound by it, we are obliged by judicial comity to follow it unless we are "convinced" that it is wrong; and we bear in mind that it will be only be in "rare cases" that a divisional court will depart from a previous judgment of another divisional court: see *R v Greater Manchester Coroner ex p. Tal* [1985] 1 QB 67, 81C. We are not convinced that it is wrong. On the contrary, *ex p. Taylor* confirms our own view of the scope and effect of *Gouriet* under the law as it stands at present. Accordingly, we consider that we should follow it.

53. In reaching this view, we are conscious of the observations of Lord Bingham in *Mohit* that the power under consideration in *Gouriet* arose under the prerogative rather than statute. *CCSU*, however, establishes that the reviewability of a function depends on its nature and subject matter, rather than its source. Accordingly, like the Divisional Court in *ex p. Taylor,* we do not consider that it would be coherent to hold that the reasoning in *Gouriet* is inapplicable to functions simply because they are conferred by statute.

54. For all these reasons, we consider that, on the present state of the law, there is a category of functions of the Attorney General which are immune from review on any ground. We consider that Popplewell J was correct to say, in *Ferrante*, that "if the principle in *Gouriet* is now to be treated as no longer good law in relation to the Attorney Generals' powers it must be for a higher court than me so to say so". Indeed, in our judgment, the combined effect of *Gouriet*, *Edey* and *ex p. Taylor* is that it is not now open to any court below the Supreme Court to decide otherwise, however anomalous this may seem in the light of the rest of the modern law of judicial review.

55. A review of the authorities from *ex p. Newton* to *ex p. Taylor* shows that the category of functions whose exercise is non-justiciable includes powers to enforce the law by bringing criminal or civil proceedings in the public interest and powers to authorise or terminate such proceedings by others—i.e. powers which make the Attorney General a gatekeeper to the court and therefore (as some of the older authorities suggest) part of the administration of justice. Sir James conceded that the category does not include the function of issuing a certificate under s. 53 of the Freedom of Information Act 2000 ("the

2000 Act") overriding the decision of a tribunal to order disclosure of information (the power at issue in *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787). That power was conferred not only on the Attorney General, but also on a range of other office holders, including some in the devolved governments and any Minister of the Crown who is a member of the Cabinet. A rule of non-justiciability justified by the unique constitutional position of the Attorney General cannot apply to a function unless it is conferred specifically on the Attorney General and on no other person. In any event, it may be that the power in s. 53 of the 2000 Act—which involves overriding the decisions of independent tribunals rather than regulating access to them—is not sufficiently similar to the Attorney General's gatekeeping powers to bring it within the non-justiciable category.

56. The function conferred by s. 13(1) of the 1988 Act seems to us indistinguishable from that considered in *ex p. Taylor.* Both are conferred specifically and only on the Attorney General. Both are gatekeeping functions. In both cases, Parliament decided that a particular form of proceedings (in *ex p. Taylor* proceedings for contempt of court; in the present case, proceedings for a new inquest) should be available only with the consent of the Attorney General. In both cases, the evident reason was that the public interest might be damaged if the proceedings in question could be brought by private individuals without any filter. In the present case, the filter promotes the public interest in legal certainty. Thus, whatever might be said about the precise boundary of the non-justiciable category, the function of consenting to proceedings under s. 13(1) of the 1988 Act seems to us to fall squarely within it.

57. If, contrary to our view, decisions of the Attorney General to refuse consent under s. 13(1) of the 1988 Act are justiciable at all, they share the features identified by Lord Bingham in the passage from *Corner House* at [31] (set out at [35] above). In those circumstances, we would hold that the grounds on which they are subject to review are limited to "dishonesty or mala fides or an exceptional circumstance": see *Kebilene,* p. 371F (see [34] above). Although in this case we have not reached the stage of considering the merits of the claim for judicial review, we have set out the grounds of challenge at [7] above. They do not involve any allegation of dishonesty or mala fides. Nor, in our judgment, do the grounds allege anything that could be described as an "exceptional circumstance". Accordingly, even if we had reached a different view about the justiciability in principle of decisions of this kind, the decision is not open to challenge on any of the pleaded grounds.

Conclusion

58. For these reasons, we consider that, on current authority, the challenged decision is not justiciable. If, contrary to our view, it is justiciable, it is not open to challenge on any of the pleaded grounds. We accordingly refuse permission to apply for judicial review. Since we are determining the issue of justiciability as a preliminary issue and after full argument, we give permission for this judgment to be cited.