

**IN THE SUPREME COURT
UKSC 2025/0162
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Sitting as a DIVISIONAL COURT
(STUART-SMITH LJ & CHAMBERLAIN J)
[2025] EWHC 1653 (Admin), [2026] KB 289
BETWEEN:**

**THE KING
(on the application of MATTHEW CAMPBELL)**

Appellant

- and -

HIS MAJESTY'S ATTORNEY GENERAL FOR ENGLAND AND WALES

Respondent

**WRITTEN CASE FOR THE APPELLANT
(HEARING 14-15 OCTOBER 2026)**

A. INTRODUCTION

1. Is a decision by the Attorney General (AG) to refuse or alternatively grant his “authority” for an application to the High Court under s.13(1)(b) Coroners Act 1988 immune from any form of judicial review? The correct question, lying at the heart of this appeal, is not whether the AG occupies a unique constitutional position¹, which she does, but what level of independent scrutiny the rule of law requires in respect of the particular decision².

2. The Divisional Court (DC) held that the AG was immune, finding at §J54 that such a decision was within “a category of functions of the (AG) which are immune from review on any ground ... 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”. The Appellant submits that this Court should correct the anomaly identified by this frank acknowledgment.

¹ §J55 at 313D.

² See §78 below.

3. The agreed issues are (a) whether the exercise of the AG's power to allow or refuse to allow an application is amenable to judicial review and (b) if so, on what grounds that power may be reviewed. They correspond to Grounds 1&2 and to the distinction between justiciability and the standard of review explained at §14 below. The Appellant's answer to the first issue, in so far as it concerns a decision to allow the request, is at §110 below.

4. The Appellant invites this Court to hold: **(A)** that *Gouriet v Union of Post Office Workers* [1978] AC 435 is not binding in respect of the AG's exercise of power under s.13(1)(b) because the case was concerned exclusively with relator actions brought under the prerogative, whereas s.13(1)(b) is a statutory gateway to a judicial remedy that is not a relator action (Ground 1A); **(B)** alternatively, if binding, this Court should depart from it, given the transformation of judicial review since 1978³. (Ground 1B); **(C)** the correct standard of review is the ordinary (flexible) public law principles (illegality, irrationality, and procedural unfairness) not “dishonesty or mala fides or an exceptional circumstance” (Ground 2).

5. **Special attention** is drawn to the Appellant's invitation, under Ground 1B and at §§87-102 below, to depart from the decision of the House of Lords in *Gouriet* to the extent that it establishes that the AG's exercise of the power conferred by s.13(1)(b) is immune from judicial review⁴.

6. The Appellant will apply at the hearing⁵ for permission to advance the argument in support of Ground 1 at §52 below, that *Gouriet* itself identifies the legal criterion governing the exercise of the power for the court to intervene. That contention was not argued below, submissions on *Gouriet* were directed to its ratio, its confinement to relator actions and to the statutory source under s.13 (§§J37-38). It raises no new issue, requires no evidence, only the speeches in *Gouriet*.

7. The Appellant no longer advances the contention, recorded in the last two lines of §J37 that an application under s.13(1)(b) involves the assertion of a private right. Amenability does not turn upon the private or public character of the interest engaged, but upon the nature of the decision which s.13(1)(b) requires the AG to make (§§J43-44).

³ (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (“CCSU”); *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453; *R (Evans) v AG* [2015] AC 1787; *Shergill v Khaira* [2015] AC 359 and *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491.

⁴ Statement required by Practice Direction 5.12.

⁵ Statement required by Practice Direction 5.10.

8. The implications of the DC's reasoning (§§J43-58) may extend beyond this case as the precise boundary of the non-justiciable category (§J57, 313G) was not identified, save that it could not extend to functions other than those conferred specifically on the AG, “justified by the unique constitutional position of the AG” §J55, 313D. The only limiting principle was the identity of the officeholder, with no connection to the nature of the function (cf. §§J43-44, *CCSU* and *Shergill* (see §§45-53) and §§71-76 below, where the correct test was recorded). The controlling factor is not the source of the power but the subject matter of its exercise (*CCSU*). *Shergill*⁶ defines two non-justiciable categories by reference to the question raised. Neither by reference to the office of the decision-maker. If the source of a power cannot determine its amenability, neither should the identity of the office. *Evans* was distinguished at §J55 because s.53 Freedom of Information Act 2000 confers the power on a range of office holders; but issuing the certificate was a public interest judgment. No other principle explains why the AG's public interest decisions should be immune from review when the AG alone takes them and reviewable when the power is shared. If the reasoning is correct, the AG, uniquely among public officers, is beyond the reach of the supervisory jurisdiction across (potentially) an extensive range of statutory and prerogative functions⁷. If that is the law, it cannot be reconciled with the rule of law or well-known constitutional principles⁸ and *Evans* where this Court reviewed and quashed the exercise by the AG personally of a statutory discretion.

9. If the Court is attracted by the Appellant's arguments and requires submissions on the implications of allowing the appeal, his position is as follows. He seeks relief confined to establishing the justiciability of the s.13(1)(b) process. Confining the relief does not undermine the principles on which it rests. The Appellant maintains, as Grounds 1A and 1B require, that the AG holds no immunity from review by virtue of office (see §§16, 71 & 76 below). Beyond the principles necessarily emerging from s.13(1)(b) itself, the Appellant does not invite a ruling on the reviewability of the AG's other functions, the amenability of each function and the intensity of any review turning on its own subject matter and facts.

10. The interventions by Global Legal Action Network (“GLAN”) and REDRESS differ in scope from the Appellant as they advance the wider proposition that the AG's public

⁶ *Shergill* at §§40-43.

⁷ See 'House of Commons Constitutional Affairs Committee; ‘Constitutional Role of the Attorney General’ (17 July 2007)’. The list of functions set out in Lord Goldsmith’s written evidence is [here](#).

⁸ *R (UNISON) v Lord Chancellor* [2020] AC 869, §§66-68 (896D); *R (Miller) v The Prime Minister* [2020] AC 373 (“*Miller (No 2)*” §§33-34 (402F-G)).

interest functions are in general justiciable and amenable to review, restraint secured by intensity of review rather than by restricting the grounds available (see §14 below). The Appellant's primary case is narrower. The Court need not go that far for the appeal to succeed as the decision to refuse approval under s.13(1)(b) involves no assessment of policy, no allocation of public resources and no polycentric or political judgment. It requires the AG to assess the prospects of an application by reference to the statutory criterion which the High Court itself applies (§§18-20 below) and is accordingly amenable to review on ordinary public law grounds. In the alternative, the Appellant contends that the grounds upon which such a decision may be challenged cannot properly be fixed in advance and in the abstract across a category of case; and on that more modest footing too the formulation adopted at §J57 cannot stand.

THE STATUTORY FRAMEWORK

11. Section 13 is set out at §5 of the SFI. Four points: firstly, the power is statutory. Nothing in this appeal concerns the exercise of a prerogative power. Secondly, Parliament has prescribed the criteria to be applied by the High Court: whether it is “necessary or desirable in the interests of justice that .. another investigation should be held” to be judged by reference to the enumerated matters⁹. Thirdly, the AG does not decide the substantive question. It is the High Court which must be satisfied that the criteria are met and the High Court alone which may order an investigation or quash an inquisition¹⁰ under s.13(2)(c). The AG’s function is to permit or to prevent the making of an application to that Court. Fourthly, the section contains no exclusionary language of any kind, and no provision purporting to remove or restrict the jurisdiction of the court.

12. That silence is deliberate, where Parliament wished to limit the reach of s.13(2) it did so expressly: s.13(5) states that the section does not apply to a death resulting directly from the Troubles. Conversely, where Parliament addressed the supervisory jurisdiction of the High Court over coroners in the same Act, it preserved that jurisdiction expressly via s.33(2)(b). S.13(5) was inserted by the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, Sch.11 para 2(1), with effect from 1 May 2024, and s.33(2)(b) was repealed with the remainder of the 1988 Act on 25 July 2013 by Sch.23 to the Coroners and

⁹ “.. by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, the discovery of new facts or otherwise ..”

¹⁰ Now labelled “record of inquest”.

Justice Act 2009, s.13(1) and (2) alone being retained. Parliament has thus twice legislated by reference to s.13 and has on neither occasion enacted anything excluding review of the fiat.¹¹

B. FACTS [See SFI.]

13. Three matters bear directly upon the issues on this appeal. Firstly, the application relied not only upon the discovery of new evidence but upon insufficiency of inquiry, contending that the inquest had not investigated the cause of the collapse of the building and therefore of the death. Whether that contention was well founded is not a matter for this appeal. What matters is that it engaged one of the matters enumerated in s.13(1)(b), so that the question for the AG was whether the statutory criterion was arguably met. Secondly, the operative decision of 4 January 2024 referred to “the long-standing principle outlined in *Gouriet* ... that the exercise of the Law Officers’ discretion in public interest functions is absolute, and non-reviewable”, and gave no other reason for treating the matter as beyond review. Neither that decision nor its withdrawn predecessor identified any consideration of public interest or of policy as a ground of refusal: the refusal turned entirely upon the Solicitor General’s assessment of the evidence and of the credibility of the material relied upon. The AG thus claimed an immunity attaching to “public interest functions” in a decision which disclosed no public interest reasoning at all. Thirdly, the first of the five grounds of challenge set out at §12 SFI is that the Solicitor General erred in law as to the test to be applied. That is a complaint of illegality, not of political misjudgment, and one that only requires the court to perform the familiar task of statutory construction.

C. THE TWO QUESTIONS AND THEIR RELATIONSHIP

14. The appeal raises two distinct questions. Ground 1 asks whether an entire class of decision is excluded from the supervisory jurisdiction by reason of the office of the decision-maker and before any ground of review is examined. Ground 2 asks, if the jurisdiction exists, how it is to be exercised. The second question has two limbs, which the DC ran together (contrast §J44 with §J57): which grounds of review are available, and how searchingly each available ground is applied. Restraint in intensity leaves every ground available and calibrates the level of scrutiny; the withdrawal of a ground removes a category of unlawfulness from correction altogether. The DC’s error under Ground 1 was to accept an exclusion defined by the office of the decision-maker rather than by the nature of the issue (§§J54-55). Its error

¹¹ The Northern Ireland Troubles Bill 2024-26, if it became law would restore legacy inquests.

under Ground 2 was the formulation it adopted (§J57) does not restrain the intensity of review, but removes the grounds of legality, rationality and procedural unfairness, taking the lead from case law concerned with a different function (*Kebilene* at 371F: §103ff below & *Corner House*¹² at §31).

15. A class-based exclusion is necessarily indiscriminate and must be justified in respect of every potential decision falling within the class, including those where the justification plainly fails. The view formerly taken of the prerogative of mercy is the closest analogue (§76 below), and it was departed from once the consequences of the exclusion were examined in individual cases. The proper course, as the modern authorities require (§J44), is to determine amenability by reference to the nature and subject matter of the decision and the grounds on which review is sought, calibrating intensity at the second stage via a margin of discretion and weight rather than closing the door at the first.

16. The AG contended below that the Appellant had made a significant concession in accepting that certain decisions of the AG fall outside the supervisory jurisdiction, and that no legitimate reason why the function under s.13(1)(b) should be treated differently had been identified¹³. The Appellant maintains his position and disputes the inference. What is accepted is not that any class of decision is immune by reason of the office of the decision-maker or its constitutional uniqueness; it is that particular exercises of particular functions may, by reason of their subject matter and the nature of the judgment they require, fall within the categories identified in *Shergill*.¹⁴ That acceptance concedes nothing categorical, because on the *Shergill* analysis the question is asked of each decision and answered by the question raised, not by the office holder. The functions relied upon below¹⁵ share a feature which explains why the courts have in the past withheld review of them, or restrained it to the narrowest of grounds: in each, the AG makes a broad judgment of the public interest in enforcing the law, and retains control of the resulting proceedings, bringing criminal proceedings, stopping them, taking them over, or controlling their conduct in his name, or, at the core of *Gouriet*, decides whether civil process may be used to enforce the criminal law. A decision under s.13(1)(b) is of a different character. It is the gateway to an application to the

¹² *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756.

¹³ AG's skeleton below, §46.1

¹⁴ *Shergill* at §§40-43.

¹⁵ E.g. entering a nolle prosequi, instituting a prosecution, directing the DPP to take over a prosecution, and giving or withholding consent to a relator action brought by a person to enforce the law.

High Court, turning upon the statutory criterion which the High Court itself applies, in proceedings which are not the AG's and over which he has no control.

17. The Appellant's hypothesis as to the cause of the collapse of the North Tower is not, and cannot be, an issue on this appeal. What the Appellant seeks is not whether to order a fresh inquest or even authority for a fresh inquest but the opportunity, available to every other litigant affected by the exercise of a statutory discretion, a chance to ask a court whether the AG's decision was lawfully made.

The criterion applied by the High Court

18. The criterion which the High Court applies is settled and has been elaborated in detail. The single question is whether the interests of justice make a further inquest necessary or desirable; the emergence of fresh evidence which may reasonably lead to the conclusion that the substantial truth about how the deceased met his death was not revealed at the first inquest will normally make a fresh inquest both necessary and desirable; it is not a precondition that the court anticipate a different conclusion, since even evidence tending to confirm the original conclusion may make it desirable that the full extent of that evidence be publicly revealed.¹⁶ The considerations of central importance are the possibility, as distinct from the probability, of a different conclusion and the need to investigate matters raised by new evidence which were not investigated, and the lapse of time since the death.¹⁷ Desirability is more readily established than necessity, and is influenced by the extent to which the family seek a further investigation.¹⁸ Where the possibility of a different conclusion exists, it militates in favour of a fresh inquest even where no criticism can be made of the coroner; its absence is a powerful but not conclusive factor against and may be displaced where the death occurred in custody, where Article 2 is engaged, or where a fresh investigation is desirable to allay the concerns of affected parties.¹⁹ Insufficiency of inquiry may arise through no fault of the coroner, where the evidence heard was insufficient to provide the full picture now available.²⁰ “New” evidence means evidence not available at the

¹⁶ (*HM AG v HM Coroner of South Yorkshire (West)* [2012] EWHC 3783 (Admin) at §10).

¹⁷ *R (Sutovic) v HM Coroner for the Northern District of Greater London* [2006] EWHC 1095 (Admin) at [54]-[55] per Moses LJ.

¹⁸ *Re the Inquest into the Death of Michael Vaughan* [2020] EWHC 3670 (Admin) per Coulson LJ.

¹⁹ *Farrell v HM Coroner for North East Hampshire* [2021] EWHC 778 (Admin) at [31] per Popplewell LJ, citing *R v West Sussex Coroner Ex p Homberg* (1994) 158 JP 357 and *Ex p Edwards* (1992) 156 JP 186.

²⁰ *HM Senior Coroner for the Eastern Area of Greater London v Whitworth and Kovari* [2017] EWHC 3201 (Admin) at [23] per Holroyde LJ.

inquest which would have been admissible, is credible, is relevant to an issue of significance, and might have made a material difference.²¹

19. That body of authority answers any suggestion that s.13(1)(b) confers a power in “broad and un-prescriptive terms”. Parliament supplied the criterion, and the High Court has over more than fifty years given it detailed and stable content, in a line of decisions.²²

The nature of the decision under s.13(1)(b)

20. The test which the AG applies is not the substantive question but its prospects. His function is to decide whether the statutory criterion is arguably satisfied, such that there is a reasonable prospect that the High Court would order a further investigation. He does not decide the question himself. The test is said not to be formally defined, that is how the AG’s own Office has described the function: in announcing fiat decisions it has stated on successive occasions that they are taken independently of Government and strictly on the basis of the evidence, and that the AG must first be satisfied that there is a reasonable prospect that the High Court would be persuaded to order a fresh inquest.²³ The Chief Coroner’s Bench Book describes the function in the same way. There can be no suggestion that the public interest to which the AG may have regard is at large: he has defined it himself, and defined it by reference to the criterion which the Court applies²⁴. The leading practitioner text records the understanding that the AG applies a test similar to that applied on an application for permission to apply for judicial review, does the memorial disclose an

²¹ *Re Fletcher* (1992) 156 JP 522; *R v Cardiff Coroner Ex p Thomas* [1970] 1 WLR 1475, 1478G per Lord Parker CJ; *Jervis on Coroners* (15th ed.) §19-14. On insufficiency of inquiry, *R v HM Coroner for Coventry Ex p O'Reilly* (1996) 35 BMLR 48, 53.

²² *Ex p Thomas* (above); *Fletcher* (above); *Ex p Edwards* (above); *Sutovic* (above); *HM AG v HM Coroner of South Yorkshire (West)* [2012] EWHC 3783 (Admin); *Whitworth and Kovari* (above); *Frost v HM Coroner for West Yorkshire (Eastern District)* [2019] EWHC 1100 (Admin); *Vaughan* (above); *Farrell* (above); *Dove v HM Assistant Coroner for Teesside and Hartlepool* [2021] EWHC 2511 (Admin); and *R (Roome) v Senior Coroner for Gloucestershire* [2026] EWHC 1808 (Admin).

²³ AG's Office, “Family of Elsie Frost can apply for fresh inquest” (20 December 2018), <https://www.gov.uk/government/news/family-of-elsie-frost-can-apply-for-fresh-inquest>; AG's Office, “Family of Ella Kissi-Debrah can apply for fresh inquest” (11 January 2019), <https://www.gov.uk/government/news/family-of-ella-kissi-debrah-can-apply-for-fresh-inquest>. The Frost application then succeeded before the Divisional Court: *Frost v HM Coroner for West Yorkshire (Eastern District)* [2019] EWHC 1100 (Admin) at [29]-[31].

²⁴ Chief Coroner’s Bench Book, Chapter 17 (“Overturning inquests”, 1 January 2025, PDF version 14 May 2025), §32. The statement of the AG’s Office is sourced there to a letter to a Senior Coroner of November 2020. The same footnote records that the Court of Appeal in *R v Attorney General, Ex p Ferrante* held that in considering whether to give his authority the AG was entitled to have regard to the prospects of success of the application.

arguable case?²⁵ The Court of Appeal in *Ferrante* nonetheless held that in considering whether to give his authority the AG was entitled to have regard to the prospects of success of the application. The AG is to assess the legal merits of a proposed application by reference to a criterion supplied by statute and elaborated by a consistent line of authority in the High Court²⁶.

21. The comparison with the permission stage is with the content of the question and not with the position of the decision-maker. A refusal of permission to apply for judicial review is reasoned, may be renewed at an oral hearing and is appealable. The refusal of a fiat is made on the papers, without reasons, and on the DC's holding is beyond review altogether. The filter to which the leading text likens the fiat is one which is at every stage subject to judicial control; the AG's is not.

22. The contrast with the prosecutorial authorities upon which the DC relied is supplied by Lord Bingham's own reasons in *Corner House* at §31, 841B-C: the courts are slow to disturb prosecutorial decisions because they are polycentric, involving policy and public interest considerations whose merits are within neither the constitutional function nor the practical competence of the courts to assess, and because the powers are conferred in very broad and un-prescriptive terms. Neither reason touches s.13(1)(b), for the reasons developed at §§111 to 114 below. That sits ill with the assertion in the refusal letter that the discretion is absolute, and non-reviewable.

23. The DC in the instant case did not hold that review of a decision under s.13(1)(b) should be restrained as in the prosecutorial challenges. It held that such a decision is immune from review on any ground (§J54, §J58). An immunity of that character cannot be justified by the identity of the decision-maker. The rule of law requires that those exercising public power should do so lawfully (*Bobb v Manning* [2006] UKPC 22 at §14 per Lord Bingham), and it is the principles of judicial review which give effect to the rule of law (*Corner House* at §41 per Lord Bingham). To withdraw a category of decision from review on every ground is therefore to withdraw not a remedy but the mechanism by which lawfulness is secured. The DC recognised the difficulty: describing the category as anomalous, accepting that the constitutional reasons given in *Gouriet* would apply with equal or greater force to national

²⁵ *Jervis on Coroners* (15th ed.), §19-27. The proposition is unfootnoted in the text and no authority is cited for it.

²⁶ See the authorities at footnotes 16-22 above.

security and foreign affairs which are reviewable, and doubted that parliamentary accountability could justify treating the AG differently from the DPP (§J47)

D. GROUND 1A: GOURIET IS NOT BINDING

24. The DC held at §J50 that the justiciability observations in *Gouriet* were “not obiter” because the non-justiciability of the AG’s refusal of consent “played an important part in the reasoning on the question in issue ..” It further relied, at §J48 at §J16-19, upon three nineteenth century authorities, and at §J51-52 upon the subsequent decisions in *Edey*²⁷ and *Ex p. Taylor*²⁸. It concluded at §J56 that the s.13(1) function “seems to us indistinguishable” from *Ex p. Taylor* and “seems to us to fall squarely within” a non-justiciable category.

25. Nothing in *Gouriet* binds this Court, and the Appellant does not need to establish that the observations were obiter to invite the Court to depart from them (Ground 1B). The characterisation matters for a narrower reason: observations volunteered upon an abandoned contention, resting upon nineteenth century authority since overtaken, carry little weight, and the Court may decline to follow them without more.

26. ***The nineteenth century authorities do not support a blanket immunity:*** The two nineteenth-century authorities upon which this part of the judgment rests were produced by the Respondent after the close of argument, and the DC did not have the benefit of oral submissions upon them. The DC set out three such authorities at §J16-19 and concluded at §J48 that by the end of the nineteenth century there was a class of the AG’s discretionary functions categorically immune from review. *Ex p. Newton* does not support that conclusion. Its headnote records the holding to be that the fiat was due *ex debito justitiae* in a proper case, but that the AG was to determine on his own responsibility whether each case was proper, and that the Court could not review his decision. That is a legally governed duty with a remedy gap, not a category immune by reason of office. The Appellant does not seek to distinguish the case upon the form of relief, which the DC held at §J48 was not a true distinguishing feature. Lord Campbell CJ held the fiat due upon probable cause, the AG exercising what was in the nature of a judicial function, and that if he refused to hear and consider the application the Court would compel him by mandamus to do so, but that once he had heard, considered and refused, the Court could not interfere (871). The discretion was

²⁷ *R v AG, Ex p. Edey* [1992] Lexis Citation 2159, CA.

²⁸ *R v Solicitor General, Ex p. Taylor* (1996) 8 Admin LR 206.

thus legally constrained and its exercise compellable; what the Court lacked was jurisdiction to review the outcome, mandamus not lying to compel the result and the declaration not yet existing. Having disclaimed jurisdiction, the members of the Court each assessed the exercise and found it sound: a court which says that it cannot review, and then reviews, is not describing an immunity. Nor was the reasoning secure. Lord Mansfield's contrary view in *R v Wilkes* (4 Burr 2527, 2551) was disregarded only as possibly inaccurate reporting, Crompton J acknowledging that the true basis was the complete absence of precedents (872-873). Lord Campbell's stated ground for non-interference was the AG's accountability to Parliament and to the Crown (871) — the political-accountability rationale later given by Lord Fraser in *Gouriet*, answered at §51 below. *Ex p. Newton* establishes the limits of the nineteenth-century remedies, not a category of decision beyond review; and Lord Wilberforce's description of it at 479A is accurate as to the remedy and silent as to the grounds.²⁹

27. The observations in the *Comptroller General* case³⁰ and in *LCC v AG*³¹ were obiter and were recognised as such within *Gouriet* itself. In the former the application was against the Comptroller, not the AG. In the latter the reviewability of the AG's conduct was expressly “not directly in dispute”, as the DC noted at §J19. Lawton LJ observed at 768B that Lord Halsbury's statement was obiter because Lord Halsbury had said at p.169 that “the thing has not been urged here at all”; and Viscount Dilhorne accepted at 488F that the observations were obiter while attributing to them “great authority”.

28. Each concerned the prerogative, and none concerned the statutory power now in s.13(1)(b), which did not exist before 1887. More importantly, the premise upon which they rest has no traction here. Lord Halsbury's proposition in *LCC v AG*, that “the determination of the question whether it is a proper case for the Attorney-General to proceed in the initiation of the litigation ... is a matter entirely beyond the jurisdiction of this or any other Court” (at 169), has no application to a process that is not “litigation” in any meaningful sense. Under s.13(1)(b) the AG initiates nothing: he opens a gate to an application which another makes to the High Court, which then makes its own judicial determination.

29. ***Gouriet in the Court of Appeal:*** The DC held at §J49 that it was part of the ratio of the Court of Appeal in *Gouriet* [1977] QB 729 that granting or refusing authority to bring a

²⁹ 4 El & Bl 869; 119 ER 323 (870, 871, 872-873) with the LJQB parallel at 24 LJQB 246. 246, 248

³⁰ *R v Comptroller General of Patents, Designs and Trade Marks, Ex p. Tomlinson* [1899] 1 QB 909, CA.

³¹ *London County Council v AG* [1902] AC 165.

relator action fell within a class of decisions immune from review, Lawton LJ defining the class as decisions “when, and when not, he should seek to enforce the law having public consequences” (768D) and Ormrod LJ referring without differentiation to “the AG’s discretion” (772C). That ratio binds the courts below; it does not bind this Court, and Ground 1B is advanced on the footing that if it is binding it should no longer be followed. In any event the Court of Appeal stands upon the same footing as the House. Lord Wilberforce records at 473-474 that after substantial argument the plaintiff conceded on 18 January that he was not entitled to the declaration sought against the AG, and that the Court of Appeal nevertheless gave judgment on 27 January holding by a majority that it had no power to review; Lord Edmund-Davies at 505 records the concession, and that Lawton and Ormrod LJ held there was no right to inquire. The majority therefore ruled upon a claim which had by then been withdrawn. Further, the class as Lawton LJ defined it is a class of decisions whether the AG should himself seek to enforce the law. Under s.13(1)(b) he enforces nothing, and the relief is sought by another from the High Court (§§11 and 16 above). That limitation is Lawton LJ’s own. Having accepted at 768D that the court has no jurisdiction over the AG’s discretion as to when he should seek to enforce the law having public consequences, he went on at 768E to accept that the court could not proceed in relation to the AG’s law enforcement function on the same basis as where ministers were alleged to have acted in excess of powers, and cited *Padfield*³² as the contrasting case. The judge from whom the DC took its class thus defined that class by reference to law enforcement and placed *Padfield* review expressly outside it. A decision whether to permit another to invite the High Court to apply a statutory criterion is not the enforcement of the law by the AG, and the *Padfield* line from which Lawton LJ distinguished it is the line upon which this appeal is brought. Nor does Ormrod LJ’s formulation assist the Respondent when his reason is examined: at 772C he answered the first question shortly, on the footing that the AG, like anyone else, cannot be compelled to act as a plaintiff against his wish. Under s.13(1)(b), proceedings brought with the Attorney General’s authority are not relator proceedings, because the applicant brings them in his own name; the Attorney General need not, and ordinarily does not: *R v HM Coroner for North Northumberland, Ex p. Armstrong* (1987) 151 JP 773 at 774G-775A. Lord Fraser recorded at 518H that the view of the majority of the Court of Appeal was not challenged in the House, which is a reason for treating those passages with care rather than as the settled foundation of a general immunity.

³² *Padfield v Ministry of Agriculture, Fisheries and Food* [1968] AC 997.

30. ***Gouriet in the House of Lords: the observations were obiter:*** The ratio decidendi of the House of Lords in *Gouriet* was authoritatively identified by the House itself in *R v Inland Revenue Commissioners, Ex p. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 per Lord Diplock at 638H-639E and Lord Scarman at 649E-G, that a private individual, with no special damage and no personal right at stake, cannot bring proceedings to enforce a public right without the AG's consent. That is a proposition about standing, not about reviewability. It was sufficient, as between Mr Gouriet and the Union, that the refusal left him without standing; it was not necessary to hold the refusal unreviewable, and whether a different applicant, with a different claim (for example, judicial review of the AG's decision itself), could succeed was not before the House. The Appellant is not a stranger asserting a public right: he is the brother of the deceased and an interested person within s.47 of the Coroners and Justice Act 2009, upon whom Parliament has conferred formal rights of participation in the very process whose adequacy is in question.

31. The narrowness of the true ratio is unsurprising, because the question had been abandoned. See Lord Wilberforce at 475E-F; Viscount Dilhorne at 487F & 488G. Observations volunteered upon an abandoned contention, so that a contrary view should not go unanswered, cannot be anything other than obiter. Lord Diplock did not address the question at all: [496G & 500D-E.]. Lawton LJ had recorded at 768C that Lord Halsbury's statement in *London County Council* was itself obiter, having said at 169 that the point had not been urged at all and followed it only because *Attorney-General v Westminster City Council* [1924] 2 Ch 416 bound the Court of Appeal unless distinguished. The foundation of the "immunity" is therefore an obiter dictum of 1902, applied below out of deference to precedent binding at that level alone, and volunteered in this House upon a contention already abandoned. Four members of the House relied upon that dictum, and two upon *Ex p. Newton*.

32. The AG relies upon Lord Edmund-Davies, who accepted at 512E-F that the AG's discretion is absolute and non-reviewable in support of his conclusion that no final injunction should have been granted. That does not assist him. First, he too recorded the concession, observing at 505E that the topic "can, despite its basic importance, be disposed of with comparative brevity", Mr Gouriet having "later revoked" the declaration originally sought and "at some stage ... conceded this". Secondly, his observation rested on the same obiter foundations as those of the other members of the House who addressed the general

immunity³³ (see §§30-31 above). Thirdly, he introduced *Ex p. Newton* as concerning "the closely analogous topic of the refusal of the Attorney-General's fiat to prosecute in criminal matters", an acknowledgement that it was not the same power. Fourthly, the reason he gave was the political accountability rationale (512E) where he concluded that the divergence between the Court of Appeal and Viscount Dilhorne "highlights the undesirability of making the matter one of disputation in the courts, instead of in Parliament" (cf. Lord Fraser's reasoning in another form, answered at §51 below). Fifthly, the observation was unnecessary to his decision; the relief Mr Gouriet sought was a final injunction against the Union, and his conclusion at 517G-H was that no such relief was available to him. His reasoning disposed of the injunction claim whether or not the refusal was reviewable.

33. The concession was in any event made against the background of the then prevailing law that prerogative powers were unreviewable, a premise reversed by *CCSU*³⁴. An obiter observation relying upon a concession obviously cannot bind the Supreme Court.

34. ***Section 13(1)(b) is not a relator action:*** Even if the *Gouriet* observations relied upon were part of the ratio in relation to consent to relator actions, they cannot be ratio in relation to a different power, the statutory power under s.13(1)(b), which was not before the House. A s.13(1)(b) application is not a relator action: *Ex p. Armstrong* (§ 29 *supra*), where Woolf LJ held at 774G-775A: "In my view it would be wrong to regard proceedings which are brought with leave of the Attorney General under the statutory provisions as relator proceedings...". A reading of four of the five speeches confirms that *Gouriet* was concerned only with relator proceedings: Lord Wilberforce (477-481); Viscount Dilhorne (487G-495); Lord Edmund-Davies (505-506, 511E-512E) and Lord Fraser (518F-524) addressed the Attorney General's functions. Lord Diplock decided the appeal on the distinction between private and public rights (496B-C, referring to relator proceedings only in passing (499C)).

35. An application under s.13(1)(b) is fundamentally different: (a) it is *sui generis*, governed by statute and specific coronial law, not reliant upon the prerogative; (b) it is not a form of civil proceedings but a statutory application for judicial relief; (c) the AG is not a party to the application but merely authorises it; (d) it asserts no public right, an inquest being an

³³ The same dictum was relied upon by Lord Wilberforce at 478G, Viscount Dilhorne at 488A, Lord Edmund-Davies at 505H and Lord Fraser at 518F; *Ex p. Newton* by Lord Wilberforce at 479A and Lord Edmund-Davies at 506D.

³⁴ See pp. 399A-H, 400C per Lord Fraser of Tullybelton, 406G-407A-F per Lord Scarman, 410C-411H per Lord Diplock, per Lord Roskill at 417G-H, 418C-D, 419B-C, 423G-424B.

inquisitorial process which determines no rights and must avoid appearing to do so (s.10(2), Coroners and Justice Act 2009; (e) if a fresh inquest is ordered the AG has no control over the proceedings, which are conducted by the coroner; and (f) the applicant asks only that the AG open the gate to an application to the High Court for an order directing a neutral fact-finding hearing which itself determines no rights.

36. The AG's answer is that s.13(1)(b) resembles *Gouriet* in structure, each being a consent which controls access to the court. The resemblance is superficial, and the reasoning in *Gouriet* itself shows why. Viscount Dilhorne explained at 494G-495C that when the AG refuses consent to a relator action he denies no right and bars no access to the courts, because the courts have no jurisdiction to entertain a claim of that kind brought by a private individual at all: the refusal takes nothing away, because there was nothing there to take. Section 13(1)(b) is the mirror image. Parliament has conferred the jurisdiction upon the High Court, has defined justiciable criteria for its exercise, and has made the AG's authority the only thing standing between an interested person and the invocation of that jurisdiction. On Viscount Dilhorne's own reasoning the two situations are not alike; they are opposites. The feature which made the refusal in *Gouriet* unreviewable is the feature whose absence makes a refusal under s.13(1)(b) reviewable. That is confirmed by Lord Fraser at 518G-H where he held that the courts have no jurisdiction over the discretion of the AG in relator proceedings.

37. The DC's second reason at §J50 was that the speeches show the immunity to have been understood as applying to the wider class of public interest functions mentioned in the nineteenth century cases, relying upon Viscount Dilhorne at 488A: "If the court can review his refusal of consent to a relator action, it is an exception to the general rule." Read in its place, that sentence will not bear the weight put upon it. First, the general rule is identified in the lines immediately preceding, at 487G-488A, where he listed the powers he had in mind: entering a nolle prosequi, directing the institution of a prosecution, directing the Director of Public Prosecutions to take over the conduct of criminal proceedings, and telling him to offer no evidence - each a power to enforce, or to stop the enforcement of, the criminal law by the AG himself, of which he observed that the AG is subject neither to direction by ministerial colleagues nor to control by the courts. A statutory gateway to a civil application made by another to the High Court, conferred by Parliament a century later, is not a member of that class. Secondly, the sentence is not a definition of a class but an observation upon the state of the authorities, as the words which follow show: it reasons from the absence of precedent -

the foundation the DC itself described as anomalous at §J47. Thirdly, the authority Viscount Dilhorne then cited was *LCC v AG*, as authority on consent to relator proceedings (§J23): the context he was addressing was the relator context.

38. Accordingly, nothing in *Gouriet*, at either level, is authority preventing this Court from considering whether the underlying challenge is arguable.

39. De Smith's *Judicial Review* (9th ed, § 3-019) concludes that there is no inherent objection to the courts reviewing the AG's exercise of statutory consent powers: "There is no inherent objection to the court's jurisdiction being invoked where the AG is exercising a statutory power."

40. Wade & Forsyth, *Administrative Law* (12th ed, 2022, p.467): "The above-mentioned decision [*Gouriet*] should, therefore, be confined to its peculiar subject matter, which is the use of civil proceedings for the purpose of enforcing the criminal law. ...This is a highly abnormal procedure and there are good reasons for allowing only the Attorney-General to employ it."

41. **Section 13(1)(b) operates as a bar on access to the High Court:** Under s.13(1)(b) the applicant's object is an order of the High Court quashing an inquisition and directing a fresh investigation; and the power in s.13 extends to matters that are not public law errors, such as new evidence. That is a judicial remedy and the AG's refusal is a final bar to obtaining it. There is no alternative route, no appeal (see §105 below).

42. The AG suggests that if a coroner errs in law the coroner may in any event be judicially reviewed. That is no answer. The Appellant makes no complaint of the coroner; s.13 exists precisely because judicial review of an inquest is not the route by which a further investigation may be directed. The jurisdictions differ in subject matter, not merely in procedure. Section 13(1)(b) is engaged without the need for any error of law. The 1988 Act as enacted recognised the distinction: s.33(2)(b) expressly saved the judicial powers of the High Court alongside the statutory jurisdiction conferred by s.13. See the fourth point at §11 above.

43. The constitutional consequence follows directly. As Lord Reed JSC held in *UNISON* [2020] AC 869 at §66, 896D, "the constitutional right of access to the courts is inherent in the rule of law"; and at §78-80 / 899H-900G that a measure impeding that access must be justified and is unlawful unless authorised in clear terms. A statutory scheme in which a

member of the executive holds an unreviewable veto over a citizen's access to the High Court is the paradigm case for the application of that principle. In *Tinnelly & Sons Ltd v United Kingdom* (1999) 27 EHRR 249 the Strasbourg Court held that a conclusive ministerial certificate which barred a court from determining a claim was incompatible with the right of access to a court, because the executive's consent was substituted for judicial determination³⁵. The DC addressed none of this. The Appellant relies for this purpose upon the common law right of access to the courts and not upon article 6, which is not engaged by an inquest. *Tinnelly* is relied upon for the reasoning by which a conclusive executive certificate was held to displace judicial determination, and not as a Convention claim. That the common law limb stands independently is confirmed by *Shergill* at §42 [2015] AC 59 at 377E, which contemplates a denial of justice justified “either at common law or under article 6”.

44. **Ex p. Edey does not bind this Court:** *Ex p. Edey* [1992] Lexis Citation 2159 requires separate treatment, because the DC held at §J51 that it removes any doubt that the immunity extends beyond relator actions, that it precludes judicial review in its modern form, and that it binds the court below. The Appellant makes three points: (i) First, *Edey* was the refusal of a renewed application for leave to apply for judicial review, delivered ex tempore; it is not a considered judgment upon the scope of the immunity, and the reasoning occupies a single paragraph. (ii) Secondly, what was challenged was the AG’s refusal to enforce the Sunday trading legislation of his own motion, a decision whether he should himself take action to enforce the criminal law, which is the paradigm case falling within *Gouriet* and is the antithesis of a statutory gateway to a judicial remedy sought by another. Parker LJ said as much: the position must apply equally where the relief sought is not a fiat for a relator action but that the AG “himself should take action”. (iii) Thirdly, the reasoning is expressly founded upon the *Gouriet* dicta and upon their being “powerful persuasive authority”; if those dicta are obiter, or are no longer sound, *Edey* falls with them. It cannot bind this Court in any event.

45. **The "unique constitutional position" does not support non-justiciability:** The DC at §J22 relied upon Lord Wilberforce's characterisation of the AG's exclusive role as constitutional and wise (481A). That cannot support the non-justiciability of the decision challenged here.

³⁵ (1999) 27 EHRR 249 at 278 §95.

46. First, the observation was directed to the AG's exclusive right to represent the public interest by bringing relator actions, a different function from deciding whether to permit a fresh inquest.

47. Secondly, that a decision is constitutional cannot mean that it is non-justiciable. The prorogation of Parliament was constitutional but justiciable (*Miller (No 2)*); the exercise of prerogative powers in the field of national security is constitutional but justiciable (*CCSU*). As Lord Scarman said in *CCSU* at 406G-407G, the controlling factor is not the source of the power but the subject matter of its exercise.

48. *Miller (No 2)* must be read accurately. In the case of prerogative powers the Court distinguished two issues. Whether the power exists, what its extent is, and whether a purported exercise was beyond its legal limits all lie, as all parties accepted, within the jurisdiction of the courts. Only whether an exercise within those limits is challengeable upon a recognised ground may raise a question of justiciability, and that depends, following *CCSU*, upon the nature and subject matter of the power. The Court neither adopted Lord Roskill's list at p.418 nor suggested that the status of the office holder was material. The enquiry preserved at §35, 402H-403C is accordingly directed to the character of the power and not to the identity of the person exercising it; and the exclusion, where it operates, does so because the question admits of no objective criterion or judicially manageable standard (*Shergill* at §§41-43), criteria which s.13(1)(b) supplies expressly.

49. That is not the Appellant's characterisation of the modern law but the DC's own. At §J46 the Court held that the invocation of national security no longer operates as a complete bar to reviewability, though great weight and appropriate respect are accorded to the executive's assessments³⁶, and that 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 at §106]. Each of those authorities was produced by the AG and show that where institutional competence is at its weakest the response of the law has been to calibrate the intensity of review, not to withdraw legal control, and that the forbidden areas are defined by subject matter and never by the identity of the office holder.

³⁶ citing *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 at §31, *R (Begum) v Special Immigration Appeals Commission* [2021] AC 765 at §70 and *R (U3) v Secretary of State for the Home Department* [2025] 2 WLR 1041 at §§65-68

50. Thirdly, even taken at its highest, the constitutional standing of a decision-maker cannot supply an exclusion of the supervisory jurisdiction which Parliament has not enacted: *Privacy International* at §167, 558E-F (§97 below). The point does not depend upon how the office has evolved, though it has: modern practice recognises the AG equally as guardian of the rule of law³⁷ (*The Governance of Britain*, Cm 7170, 2007), and the Law Commission has described immunity from judicial review as now anomalous (Law Com No 423, HC 1433, 2025, § 8.104), as the DC accepted at §J54. If the AG is guardian of the rule of law, the proposition that his decisions must be immunised even when unlawful is self-defeating.

51. Fourthly and fundamentally, Lord Fraser at 524D justified non-reviewability on the footing that a serious error of judgment by the AG in withholding consent to relator proceedings would not be an error of law but one of political judgment, for which the remedy lies in Parliament. That reasoning fails at two levels. It fails as a matter of authority, because political and legal accountability are not alternatives: a Minister is accountable to Parliament for the efficiency and policy of his department but responsible to a court of justice for the lawfulness of what he does, of which the court is the only judge (*Ex p. National Federation of Self-Employed* at 644F-G per Lord Diplock, adopted in *Miller (No 2)* at §33, 402F-G, and reinforced at §31, 401G-H). And it fails as a matter of institutional reality, because political accountability presupposes a mechanism capable of operating upon the decision in question, and here there is none. The Constitutional Affairs Committee found in 2007 that the accountability of the Law Officers to Parliament is heavily circumscribed: questions relating to legal advice are not normally answered, the select committee may inquire only into the administration and expenditure of the office, individual cases are specifically excluded, and the sub judice rule restricts what may be examined. A refusal under s.13(1)(b) is an

³⁷ HL Constitution Committee, *The Lord Chancellor and the Law Officers* (2023) at §§128-134: <https://committees.parliament.uk/publications/33487/documents/182015/default/>. To the same effect earlier: Report §§23, 90-91. The Government's response, *The Government's Response to the Constitutional Affairs Select Committee Report on the Constitutional Role of the Attorney General*, Cm 7355 (April 2008), is silent upon the mechanisms of parliamentary accountability in individual cases. The preceding consultation paper, *The Governance of Britain: A Consultation on the Role of the Attorney General*, Cm 7192 (2007), had said at §1.36 that the AG "is accountable to Parliament for the exercise of his or her functions", including by answering oral and written questions, being "occasionally called upon to explain decisions of the prosecuting authorities, as well as wider questions of prosecution policy", and appearing before committees of both Houses. The Appellant has found no example of the AG being called upon to explain his own refusal of authority in a s.13 application.

individual case. An immunity justified upon the availability of Parliamentary censure cannot stand where Parliament does not in practice intervene.³⁸

52. The answer to Lord Fraser does not rest upon the Appellant's characterisation of the decision. It is supplied by *Gouriet* itself, which identifies the legal criterion governing the exercise of the power. Four of their Lordships stated the duty. Viscount Dilhorne, adopting Sir Hartley Shawcross, held that the AG must acquaint himself with all relevant considerations, and that this was the approach he should have brought to the decision then in issue (489C-E). Lord Wilberforce held that a failure to take steps to enforce the law without good cause is a breach of duty (477A-B). Lord Fraser endorsed the same statement and added that the AG must not act for party political advantage (524A-B) - immediately before the passage at 524C-D upon which the DC relied at §J25. Viscount Dilhorne went further and identified a consideration altogether excluded - the repercussions of the decision upon the AG's personal, his party's or the Government's fortunes - accepting in terms that an AG who acted upon such reasons would abuse his powers (489F). Lord Diplock reasoned to the same effect. Having set out the anomalies attending the use of civil process to restrain crime, he described those matters at 499C as juristic considerations proper to be taken into account, with others of a less juristic character, in determining whether the public interest would best be served by resorting to that exceptional and anomalous procedure. The considerations they identified are peculiar to the procedure with which they were concerned. A power governed by a duty to take account of all relevant considerations, and by an identified prohibition upon an irrelevant one, is subject to a legal standard. Their Lordships' reluctance was directed not to the absence of a standard but to the difficulty of drawing inferences where no reasons are given. Where Parliament has enacted the standard and the complaint is that the wrong legal test was applied, that difficulty does not arise: Lord Fraser's premise fails on its own terms.

53. **The analogy with *Ex p. Taylor* is false:** The DC at §J56 held that s.13(1) is "indistinguishable" from *Ex p. Taylor* and that "the filter promotes the public interest in legal certainty." The DC followed *Taylor* because it considered itself "obliged by judicial comity" to do so unless convinced that it was wrong, §J52, *R v Greater Manchester Coroner, Ex p. Tal* [1985] QB 67, 81C. That has no application in this Court, and the deference which the

³⁸ House of Commons Constitutional Affairs Committee, *Constitutional Role of the Attorney General*, Fifth Report of Session 2006-07, HC 306 (published 19 July 2007). Report p.36, para 90; p.37, para 91.

DC properly paid to *Taylor* is no reason for according it weight here beyond the persuasiveness of its reasoning.

54. In *Taylor*, the statutory provision (s.7 Contempt of Court Act 1981) bars proceedings "except by or with the consent of the AG"; the AG's role being to protect the administration of justice by preventing inappropriate contempt proceedings. Contra, s.13(1)(b) does not concern the criminal law, prosecution, or the enforcement of public rights. It concerns an application for a fresh inquest, an inquisitorial fact-finding exercise. The Law Commission has since recommended that the very function considered in *Taylor* should be amenable to judicial review.

55. The Law Commission of England and Wales, *Contempt of Court: Report (Part 1) on Liability*, Law Com No 423, HC 1433 (18 November 2025), concluded that there were strong reasons why decisions of the AG in relation to contempt should be judicially reviewable (§8.102). The recommendation was necessarily confined to contempt, the Commission's terms of reference extending no further, and it recorded that it made the recommendation "despite the narrow context in which this issue arose" (§8.112). Its reasoning was not so confined. In the earlier Consultation Paper at §§7.76-7.77³⁹ the Commission had observed that immunity from judicial review exacerbates the constitutional concerns surrounding the AG's role, that review is an important constitutional safeguard which would mitigate the risk of politicised decision-making, and that susceptibility to review enhances administrative decision-making, ensures good governance by holding the Executive to account, and improves public confidence in Executive power. None of those propositions is peculiar to contempt.

56. At §8.94 the Commission recorded that two-thirds of consultees who responded on the question said the AG should be subject to judicial review in all circumstances: (fn 134): [accountability check]. At §8.95 the Family Division of the High Court responded via the President of the Family Division, a working group comprising members of the judiciary at all levels within the Family Court, and the senior judge of the Court of Protection (§1.34): "The Attorney General's decision to consent or not to bring contempt proceedings should be subject to judicial review. The decision is made by a Minister and should be subject to safeguards" ... The law (and society) has moved on since the cases cited from the House of Lords. Challenging the Attorney General's decision in relation to whether or not to bring contempt pro-

³⁹ (Contempt of Court (2024) Law Commission Consultation Paper No 262, 9 July 2024).

ceedings ...is really no different from any other administrative law challenge to a Ministerial decision. Judicial review is an important example of the separation of powers in action."

57. The Bar Council agreed describing the current position at §8.96 as "somewhat anomalous" given that decisions not to prosecute made by the DPP, or by the AG where the prosecution decision is reserved, are in principle subject to review.

58. At §8.104, the Commission concluded: "The proposition that the AG is, or should be, immune from review by the courts was seen as outdated and certainly did not find purchase with consultees". The Commission also approved the observation of Nicol J in *Halpin* (§8.104), [see §101 below].

59. At §§8.105-8.106 the Commission recorded that the literature since the decision under appeal treats the immunity as anomalous in the light of the modern law, citing in particular Dane Luo's five pronged analysis of the claims which have underpinned non-reviewability; [1] courts should not review the weighing of the public interest; [2] AG's unique position; [3] inconsistency with the constitution; [4] AG accountable only to Parliament; and [5] Parliamentary intention. Luo and the Commission drew the parallels with the authorities showing that decisions of the DPP not to prosecute, and of the Serious Fraud Office not to investigate, may be judicially reviewed (§§103ff below). Those are the propositions upon which the Respondent AG's case depends, and the Commission accepted that they do not withstand examination.

60. The weight of that conclusion is increased by the circumstances in which it was reached. The Attorney General's Office, in a response sent with the agreement of the Law Officers, resisted the possibility of judicial review⁴⁰ arguing that the public interest functions as a single class needed to be governed by a single answer, because of the constitutional role of the office rather than upon the nature or subject matter of any particular function.⁴¹ The Commission advised that contempt decisions should be judicially reviewable accepting that this might give rise to inconsistency between the AG's various public interest functions, but

⁴⁰ Report §1.37.

⁴¹ Report §§8.99 and 8.108.

concluding that statutory reform rendering one category of decisions reviewable need not affect decision-making or reviewability in relation to any other category.⁴²

61. The significance of the Commission's analysis for this appeal is clear. It was directed to the very function considered in *Ex p. Taylor*, from which the DC held the present function to be indistinguishable. If the analogy is sound, it is an analogy with a function which the Law Commission has recommended should be reviewable. All the more so given the Commission's own view, expressed before the decision under appeal, was not a general aspiration but a conclusion reached upon the statutory/prerogative distinction which arises here. At §§8.80-8.81 it reasoned that, notwithstanding *Gouriet* and *Ex p. Taylor*, other authority holds statutory powers reviewable: *R v Panel on Take-overs and Mergers, Ex p. Datafin Plc* [1987] QB 815, 847, that if the source of power is a statute "then clearly the body in question will be subject to judicial review", and *Mohit* at §14, that since the source of the discretionary power rests in statute law "there are no inherent constitutional objections to the jurisdiction of the courts being invoked". Those authorities establish the presumption upon which the Appellant relies (§94 below). The Law Commission concluded that this "would suggest that consent decisions made by the AG under s.7 of the CCA 1981 are already judicially reviewable" - that course being constitutionally acceptable because the courts would be doing no more than enforcing the powers conferred by Parliament⁴³. Also see §8.89, recording that the practical effect of §J54 was to foreclose reviewability across the class and to be remedied only by Parliament.

62. The DC's second premise, that "the filter promotes the public interest in legal certainty" is misconceived. Inquests do not determine legal rights. Where an inquest has proceeded on insufficient inquiry or without relevant evidence, the public interest in accurate findings about death is undermined, not served, by immunising a refusal to permit reconsideration.

63. Non-justiciability does not "promote" legal certainty, it defeats it. If the AG has applied the wrong legal test, the filter operates to obstruct justice. Judicial review of the AG's decision is the mechanism by which legal certainty is secured, not threatened.

⁴² Report §8.108.

⁴³ Report §§8.80-8.81 & footnote 105, citing CP 262 §7.73 citing M Elliott and R Thomas, *Public Law* (4th ed 2020) p 501.

64. ***Evans***: even accepting that s.13(1)(b) is a "gatekeeping" function, the DC itself recognised at §J55 that not all gatekeeping functions are immune: the power under s.53 of the Freedom of Information Act 2000 is justiciable, as the AG has himself accepted through counsel. In *R (Evans) v AG* [2015] AC 1787 it was submitted on his behalf, in argument at 1793, that the exercise of the veto was accountable not only to Parliament but also to the courts by way of judicial review (see §133(a) below); and this Court reviewed, and by a majority quashed, a certificate issued by the AG personally under that section (Lord Neuberger PSC at §51-59; Lord Mance JSC at §127-130). The dissenters proceeded on the same footing: Lord Hughes JSC at §153(ii), 1849H, and Lord Wilson JSC at §172(h), 1854. *Evans* is decisive on the point of principle: the AG's exercise of a statutory discretion is not immune from review by reason of who he is.

65. The DC's limiting principle at §J55, 313D does not answer the point. Section 53 of the Freedom of Information Act 2000 is not conferred upon the AG alone: by s.53(8) he is one of a class of accountable persons including any Cabinet Minister. To that extent the amenability of the s.53 veto is not inconsistent with §J55. But the distinction assists the AG less than it appears to. It makes the availability of judicial review depend upon whether Parliament conferred the function upon the AG alone or upon a class of which he is one - a fact about the drafting of the empowering provision, saying nothing about the nature of the power, the subject matter of the decision, or the character of the judgment required. Under each section the office holder must form and act upon an evaluative view of where the public interest lies, and under each he does so in displacement of a judicial determination of the same question: under s.53 by overriding the Upper Tribunal, and under s.13(1)(b) by deciding, in advance and without reasons, whether the High Court is to be invited to apply the statutory test at all. If justiciability depends upon the nature and subject matter of the power, as CCSU holds, a criterion turning upon how many office holders Parliament happened to name cannot support the total exclusion of the supervisory jurisdiction.

66. ***Ex p. Ferrante does not assist the AG***: The AG's Notice of Objection at §§ 10 relies upon *R v AG, Ex p. Ferrante* (Popplewell J, 1 July 1994: [1994] Lexis Citation 4482) as "a case on the precise issue that arises here", and the DC referred to it at §J28. Properly analysed, it assists the Appellant.

67. Popplewell J held that the court had no jurisdiction to review a refusal of authority under s.13. That was a decision at first instance which did not bind the DC, and the judge himself

said that if the principle in *Gouriet* was “no longer good law in relation to the AG’s powers it must be for a higher court than me so to say.” It was delivered in 1994, before *Mohit, Bancoult (No 2), Evans, Shergill* and *Privacy International*, and before the Human Rights Act 1998. It does not appear that *Armstrong* was cited, which is important because Popplewell J’s first proposition (that *Gouriet* is of general application and not limited to relator actions) cannot stand with the reasoning of Woolf LJ at 774G-775A (§§34 to 35 above).

68. More significantly, two of the nine propositions which Popplewell J derived from the authorities mirror the Appellant's case on this appeal. His sixth and seventh propositions are derived from the *CCSU* and *Shergill* approach, and they are irreconcilable with a categorical immunity attaching to an office. The authority on which the AG principally relies thus affirms the analysis which the DC declined to apply. His fourth and fifth propositions point the same way but he treated both as irrelevant without giving any reason.

69. Most importantly of all, *Ferrante* went to the Court of Appeal, and the constitution declined to decide the question: *R v AG, Ex p. Ferrante* [1995] Lexis Citation 3540, [1995] CA Transcript 135 (Sir Thomas Bingham MR, Kennedy and Millett LJ, 8 February 1995). The MR recorded that the Court had heard no argument upon justiciability because it was unnecessary to resolve it, assumed in the appellant's favour that a decision under s.13 is subject to judicial review, and stated in terms that in making that assumption he should not “now or hereafter be taken as expressing any view one way or the other on what is clearly an extremely complex question.” *Ferrante* is therefore not authority for the proposition for which it is being cited. The last occasion on which an appellate court considered the justiciability of a refusal of fiat under s.13, it treated the question as complex and left it open. That is difficult to reconcile with the conclusion that the matter is settled below the level of this Court, and it is a complete answer to the suggestion that the appeal raises no arguable point of law.

70. What the Court of Appeal did decide is addressed under Ground 2 at §129 below. Two further points arise. First, Sir Thomas Bingham MR characterised the function under s.13 in terms which are inconsistent with the AG's case: “It is quite clear that the AG is in no sense the judge of whether condition 13(1)(b) is satisfied. That is a question for the High Court.” The AG's task is to assess the prospects of the High Court being satisfied of a matter which the High Court alone determines: an assessment of the legal merits of a proposed application, not an at-large evaluation of the public interest. Secondly, the Court of Appeal proceeded to

examine the substance of the decision on ordinary public law grounds, without any suggestion that a threshold of dishonesty or bad faith applied.

71. **Justiciability in the modern law: *Shergill v Khaira*:** The modern law of justiciability was restated in *Shergill v Khaira* [2015] AC 359 at §41-43, 377E-378E. There are only two categories of non-justiciable issue: [1] those which the courts have no constitutional competence to determine, such as the conduct of foreign relations by act of state and proceedings in Parliament; and [2] claims or defences which are based neither on private legal rights or obligations, nor on reviewable matters of public law. Each category is defined by reference to the question raised and not to the identity of the party whose act is impugned, still less to the office of the person who did it. First category cases “are rare ... for they may result in a denial of justice which could only exceptionally be justified either at common law or under article 6” [§42, 377E]. A category capable of producing a denial of justice requires a stringent justification, and the identity of the decision-maker, irrespective of the constitutional weight of the office, is not sufficient.

72. That the enquiry is directed to the question is confirmed by *Miller (No 2)*, where this Court distinguished at §35, 403A between whether a prerogative power exists and what its extent may be, which is always justiciable, and whether the exercise of a power within its limits is open to challenge upon some other basis, which depends upon what is asked; and by the statement at §38, 404A that every prerogative power has its limits and that “it is the function of the court to determine, when necessary, where they lie.” If that is so of the prerogative, it must be so of a power conferred by statute which states the test to be applied.

73. The same analysis explains the authorities in which the courts have declined to adjudicate. In *Buttes Gas and Oil Co v Hammer* (No 3) [1982] AC 888, approved in *Shergill* at §40, the court was asked to determine the national boundaries of three states in a matter settled not by law but by diplomacy, pressure and force, and there was accordingly no standard by which to judge it. Where a standard exists, the courts adjudicate⁴⁴. Section 13(1)(b) supplies such a standard, and the High Court applies it many times a year. The same analysis has recently been applied to prosecutorial power in Australia: *Harkness v Banks* [2026] VSCA 178 at [60] where the Court of Appeal of Victoria adopted the explanation of

⁴⁴ *Rahmatullah v Ministry of Defence* [2014] EWHC 3846 (QB) at §§136-141 (Leggatt J distinguishing *Buttes Gas*); and *Belhaj v Straw* [2014] EWCA Civ 1394 at §§96-102, affirmed [2017] AC 964, approving *Habib v Commonwealth of Australia* (2010) 183 FCR 62 at §56.

Mason J in *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170. Amenability is thus determined by the nature and subject matter of the power, and never by the identity of the office holder. The Court of Appeal rejected the argument that prosecutorial decisions are unreviewable on any ground and in any circumstances: §19; see holding at §5 and §62 and §54 endorsing the observations of the Privy Council in *Mohit* at §18.

74. It follows that non-justiciability marks out the scope of judicial review and does not designate the standard or the intensity with which a review is conducted. A ruling of non-justiciability is a refusal to pronounce upon a question at all, positively or negatively; its consequence is that there exists no legal limit upon the power enforceable by a court, but only a political limit enforceable in Parliament. That is why Grounds 1 and 2 are distinct, and why the DC's reasoning should not be upheld: having recognised at §J44 that the modern practice is to give effect to institutional concerns by modifying the grounds or according a margin, rather than by declaring a decision non-justiciable, the Court proceeded to declare this decision non-justiciable, and did so for reasons of intensity which belong to the second question and not the first.

75. A refusal of fiat under s.13(1)(b) falls into neither category. It raises no question of policy, politics or constitutional competence: the court is not asked to adjudicate upon the internal proceedings of Parliament, or any other matter properly allocated by statute or the prerogative to the executive branch of government⁴⁵. Nor is it lacking in manageable standards. Parliament has supplied the standard in the section itself, and the courts have applied that same standard, and continue to do so⁴⁶. The AG cannot maintain that the question whether a fresh inquest is necessary or desirable in the interests of justice and whether or not to give his authority is beyond judicial competence when the High Court answers exactly that question every time a fiat is granted.

76. The immunity contended for is therefore not a species of non-justiciability known to the modern law at all (see §§65-66). It is an old-fashioned immunity, defined by the office of the

⁴⁵ See Lord Diplock in *CCSU* at 409H-410C for some examples: defence of the realm (national security), conduct of relations with foreign states, grant of pardons to condemned criminals, grant of honours, grant of corporate personality, to deserving bodies of persons, bounty from money made available to the executive by Parliament.

⁴⁶ See for example, *In re Rapier (deceased)* [1988] QB 26, *HM AG v HM Coroner of South Yorkshire (West)* [2012] EWHC 3783 (Admin), in which the inquisitions in 96 deaths were quashed, *HM Senior Coroner for Gwent re the Inquest into the Death of Michael Richard Vaughan* [2020] EWHC 3670 (Admin), and *The King (on the application of Roome) v Senior Coroner for Gloucestershire* [2026] EWHC 1808 (Admin).

decision-maker rather than by the nature of the issue, which cannot be reconciled with *Shergill* and which has survived when almost every other immunity recognised by the common law has been swept away by the courts.⁴⁷ Those immunities rested upon policy, and were dismantled not by statute but by ordinary common law reasoning, asking whether the policy reasons survived examination. The closest analogy is the prerogative of mercy: placed beyond review by Lord Roskill in *CCSU* at 418B and held unreviewable in *Reckley (No 2)* [1996] AC 527, it was brought within the supervisory jurisdiction in *Ex p. Bentley* and *Ex p. Lewis* upon full argument and is now treated as settled (*Pitman v State of Trinidad and Tobago* [2018] AC 35 at §50, 59C). The movement has not been in one direction only: the courts have since re-tightened the liability of public authorities, but by the same ordinary reasoning and not by restoring any immunity attaching to office. *Tindall v Chief Constable of Thames Valley Police* [2025] AC 1046 affirmed at §1 that public authority liability in negligence is governed by the same principles as apply to private individuals, and rejected at §86 the contention that the status of the police could of itself generate a duty of care.⁴⁸ The common law attaches consequences to what was done, not to who did it. Such immunities as survive are defined by what they protect and why - the functioning of a witness, the independence of Parliament, comity between states - not by the office of the person claiming them. The AG's absolute immunity is alone in being defined by office and in resting upon no rationale that survives examination.

77. *What unlawfulness would look like:* The method by which the common law dismantled those immunities is the method the Appellant invites this Court to apply to *Gouriet*. It is to posit the circumstances in which the power might be exercised unlawfully, and to ask whether it is defensible that the courts should be disabled from saying so. The interveners give examples and applied here the question answers itself. Suppose a refusal of authority under s.13(1)(b) issued upon the AG's notepaper but in fact taken by a person with no authority to take it; or a refusal expressed, on its face, to be made because the deceased's family had criticised the Government, or because the inquisition implicated a political ally. No court would have any difficulty in identifying the vice in such a decision, and none could

⁴⁷ The advocate's immunity was abolished in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 and the expert witness's in *Jones v Kaney* [2011] 2 AC 398; the exclusion of any duty of care in *X (Minors) v Bedfordshire CC* [1995] 2 AC 633 was cut down in *Barrett v Enfield LBC* [2001] 2 AC 550 and *Phelps v Hillingdon LBC* [2001] 2 AC 619; and witness immunity was confined in *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435.

⁴⁸ *N v Poole Borough Council* [2020] AC 780; *HXA v Surrey County Council* [2024] 1 WLR 335; *Tindall v Chief Constable of Thames Valley Police* [2025] AC 1046.

sensibly be immunised from correction. The category recognised below cannot be maintained in the absolute form in which it was expressed, and to that extent this disposes of Ground 1. It does not identify the standard of review, which is Ground 2 and is addressed at paragraphs 103ff below.

78. As stated at the outset, the correct question is not whether the AG occupies a position of constitutional distinction, but what level of independent scrutiny the rule of law requires in respect of the particular decision. That is how the inquiry was framed in *R (Cart) v Upper Tribunal* [2012] 1 AC 663, where Lady Hale JSC at §51, 687D (with whom Lord Phillips PSC agreed at §89, 698C-E) asked what level of independent scrutiny was required by the rule of law, and Lord Dyson JSC held at §122, 706D that the scope of judicial review should be no more, and no less, than is proportionate and necessary for the maintaining of the rule of law. The Appellant recognises that *Cart* was a case in which this Court upheld a restriction upon the availability of review. The question, however, is what scrutiny the rule of law demands, not who took the decision. Where, as here, no scrutiny of any other kind is available at all, the answer to Lady Hale's question cannot, as the Law Commission material⁴⁹ demonstrated, be none at all.

79. The AG relies upon⁵⁰ the Appellant's acceptance below that certain decisions of the AG, some sourced in the prerogative and some statutory, fall outside the court's supervisory jurisdiction, and asks why the s.13 fiat should be treated differently. The concession was rightly made and is consistent with the Appellant's case: on the *Shergill* analysis some of the AG's functions will fall within one or other of the two recognised categories, which follows from their being defined by the question raised rather than by the office of the decision-maker, and which is precisely why the Appellant does not invite this Court to abolish a category but to apply the correct test. The answer to the AG's question is given at §§20 to 22 and 70 above: a decision under s.13(1)(b) requires the application of the statutory criterion to evidence, upon a question which the High Court itself determines and upon which the AG is “in no sense the judge”; and, unlike the functions in respect of which the concession was made, its exercise is terminal, foreclosing any judicial process at all.

⁴⁹ See §§59-60 above.

⁵⁰ Notice of Objection, §11.1.

80. Further, the enactment of the Human Rights Act 1998 has independently narrowed the space within which a category-based immunity can survive. Section 6(1) makes it unlawful for a public authority to act incompatibly with a Convention right, and s.7 confers a corresponding right of civil action. The Act contains no justiciability restriction of any kind save the express carve-out for the proceedings of Parliament in s.6(3) and (6). As Lord Sumption JSC observed in *R (Lord Carlile) v Secretary of State for the Home Department* [2015] AC 945 at §29, 968E, any arguable allegation that a person's Convention rights have been infringed is necessarily justiciable. The AG is a public authority within s.6, and his functions can engage Convention rights: in England and Wales the coroner's inquest is the means by which the State ordinarily discharges the procedural obligation to investigate under Article 2 ECHR (*R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 at 206H).

81. The consequence is fatal to the claimed immunity. It must already yield wherever a Convention right is arguably in play, and a rule subject to that qualification is not a categorical exclusion from the supervisory jurisdiction but a proposition about the intensity of review, misdescribed.

82. ***Parliament's intention supports reviewability:*** The words relied upon below are at §J31, §J52 being the Court's own paraphrase of them. Sir Murray Stuart-Smith in *Taylor* at 219A held that “Parliament must be taken to know the law as stated in *Gouriet* ... and if it had intended the Attorney-General's discretion to be reviewable ... it would have said so.”

83. That reasoning inverts the presumption. In *Privacy International* this Court held that a statutory provision will not be construed as excluding the supervisory jurisdiction of the High Court in the absence of the clearest possible words (§37⁵¹ at 518F-G), and three members of the Court expressed the view, obiter, that the rule of law may preclude such exclusion even then (§144⁵² at 550D-E). The Appellant accepts that, unlike the instant challenge, *Privacy International* was concerned with an ouster clause, s.67(8) Regulation of Investigatory Powers Act 2000, but the argument is stronger still where Parliament has enacted no ouster at all. If the clearest possible language is required to displace the supervisory jurisdiction, silence cannot achieve it. Section 13(1)(b) contains no ouster clause and no exclusionary

⁵¹ Per Lord Carnwath.

⁵² Per Lord Carnwath.

language of any kind and does not purport to remove or restrict the jurisdiction of the court. The silence of the section supports the Appellant's case, not the AG's.

84. The justification advanced for that immunity was considered, in a stronger form, and rejected in *Privacy International*. It was said that the sensitivity of the Tribunal's functions in the field of national security required that it be free of the supervisory jurisdiction. Neither Lord Carnwath JSC (§112) nor Lord Lloyd-Jones JSC (§165) accepted it. Lord Carnwath attached importance to the potential overlap with legal issues falling to be considered by the ordinary courts, and to the undesirability of a body developing its own law without scope for further review. That objection applies directly here. The AG's function under s.13(1)(b) requires him to form a view upon whether the High Court would be likely to order a fresh investigation, that is, to apply in advance the very test which the High Court itself applies upon the substantive application. If his construction of that test is immune from correction, he develops a parallel body of s.13 law which the court whose test it is can never review.

85. There is a further and conclusive answer to the re-enactment argument (see §11.2 of the Notice of Objection), which Popplewell J considered in *Ferrante* (pp11-12). The Coroners Act 1988 is a consolidation Act. Section 13 re-enacts s.6 of the Coroners Act 1887 as extended by s.19 of the Coroners (Amendment) Act 1926, as Popplewell J acknowledged. Parliament is not taken, in a consolidating enactment, to have applied its mind to the substantive law or to have endorsed judicial decisions upon it: the governing presumption is that a consolidation Act does not alter the law (see *Farrell v Alexander* [1977] AC 59 at 84D-E and 90H-91C per Lord Simon of Glaisdale and 94C-E per Lord Edmund-Davies. See also 82F-83A for the parliamentary procedure for consolidation bills). No inference as to legislative intention upon a contested question of substance can be drawn from the reproduction of earlier language in that form⁵³. The AG's argument requires Parliament to be treated as having deliberately preserved a common law immunity by declining to legislate against it, in a statute whose declared purpose was to consolidate and not to change. That cannot be right, and the submission is bolstered by the express preservation of the High Court's supervisory jurisdiction over coroners in s.33(2)(b), which demonstrates that where Parliament addressed the supervisory jurisdiction in the 1988 Act it consciously preserved it, although that section has now been repealed.

⁵³ On consolidation Bills, which bring existing Acts together without changing the law and are normally passed with little or no debate, see <https://www.parliament.uk/site-information/glossary/consolidation-bill/>.

86. That conclusion is supported by Lord Steyn, writing extrajudicially in “*Deference: a Tangled Story*” [2005] PL 346 at 357. Where Parliament has spoken upon a matter there is no scope for judicial innovation; but where Parliament has not spoken the position is different, parliamentary inaction being explicable upon many different grounds and generally not a sure foundation for courts to refuse to decide cases in accordance with their constitutional duties. That is this case. Parliament did not address the amenability of the s.13(1)(b) power to review, either in 1887, in 1926 or in 1988. Its silence is not an enactment of immunity.

E. GROUND 1B: DEPARTURE FROM *GOURIET*

87. In the alternative, if *Gouriet* is binding in respect of s.13(1)(b) decisions, the Appellant invites this Court to depart from it pursuant to the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234: *Austin v Southwark London Borough Council* [2011] 1 AC 355 at 24-25 at 369D-370A per Lord Hope DPSC.

88. The Practice Statement provides that the Court will depart from a previous decision “when it appears right to do so.” The criteria applied by this Court include whether: (a) the previous decision was based on a principle or assumption shown by subsequent developments to be incorrect or outdated⁵⁴; (b) adherence would cause injustice and impede the proper development of the law⁵⁵; (c) the decision has been the subject of significant criticism⁵⁶ (d) the issue is unlikely to be the subject of Parliamentary legislation⁵⁷.

89. All four criteria are satisfied: (a) *Outdated assumption*: *Gouriet* was decided on the assumption that prerogative powers were unreviewable. That assumption was overturned by *CCSU*. Its approach to justiciability has since been superseded by *Shergill*, and the constitutional setting in which it was decided has been altered by the Human Rights Act 1998 (§80 above). The DC itself said at §J47 that “the identification of a category of decisions as immune from review on any ground appears anomalous”; that the constitutional reasons identified in *Gouriet* for the existence of such a category would apply “equally (if not with greater force) to decisions in the field of national security or foreign affairs”, so that if the latter are in principle reviewable “it may be said with justification that the former should be too”; that the AG’s accountability in Parliament “hardly distinguishes those decisions from

⁵⁴ *Knauer v Ministry of Justice* [2016] AC 908 at §23, 921F.

⁵⁵ *Herrington v British Railways Board* [1972] AC 877 at 884E.

⁵⁶ (*R v Jagee* [2017] AC 387 at §79-85) 415G- 416E).

⁵⁷ Unlike in (*Jones v Secretary of State for Social Services* [1972] AC 944 at 966G).

many others which today would certainly be justiciable”; and that, were the matter not governed by authority, the Court doubted that accountability would suffice to justify a different approach to the prosecutorial decisions of the AG and those of the Director of Public Prosecutions. Those are the conclusions of the court below upon the merits of the immunity, reached after full argument, and they are unanswered in the judgment because the Court considered itself bound. (b) *Injustice*: the Appellant, whose brother was unlawfully killed, has no remedy in law if the AG applies the wrong legal test. The power under s.13 is the only means by which the Appellant can seek to have the circumstances of his brother's death further investigated, and the political accountability said to justify the immunity is, for the reasons at §50 above, unavailable to him. (c) *Sustained criticism*: Gouriet's application to statutory consent functions has been criticised by De Smith's *Judicial Review* (9th ed); Wade & Forsyth, *Administrative Law* (12th ed); Lewis, *Judicial Remedies in Public Law* (7th ed); Supperstone, Goudie & Walker, *Judicial Review* (7th ed); the Law Commission (Law Com No 423, 2025); Lord Bingham in *Mohit*; Nicol J in *Halpin*; and numerous other academic commentators. (d) *No Parliamentary intervention likely*: Parliament has not legislated on the point in nearly fifty years. Only this Court can resolve the question for s.13(1)(b).

90. This Court should depart from *Gouriet* insofar as it has been treated as establishing the non-justiciability of the AG's statutory decision-making under s.13(1)(b). The Appellant does not ask this Court to depart from the core holding in *Gouriet* (that a private individual cannot bring relator proceedings without the AG's consent), which remains good law on its own facts.

91. Conor McCormick, *The Constitutional Legitimacy of Law Officers in the United Kingdom* (Hart, 2022), at pp. 194-200 examines the *Gouriet* dicta and records that judicial opinion "appear[s] to have evolved somewhat since *Gouriet*, though the precedent set by it has never been definitively overruled" (p.197); relies on *Mohit*; quotes Mba's urging that the *Gouriet* line be overruled (p.198); and says that amenability should be considered "from first principles" for each office in the light of its accountability (p.201). His analysis does not rest upon an assertion that the law ought to be different. He identifies the two features which, upon the reasoning of the House itself, confined the immunity to its context: that the function under consideration was the AG's consent to proceedings brought in his own name under the prerogative, and that the objection to review was directed to the drawing of inferences from an unreasoned decision rather than to the existence of a legal criterion by which the decision falls to be judged. Neither feature is present where Parliament has conferred a statutory

power and prescribed the test to be applied. He addresses the same question directly, in relation to the statutory functions of the AG for Northern Ireland, in “*Reviewing the Reviewability of the AG for Northern Ireland*” [2018] PL 22.

92. **The post-CCSU trend toward reviewability**: The following decisions demonstrate that *Gouriet* would not be decided the same way today.

93. *R (Evans) v AG* [2015] AC 1787. This Court reviewed the AG's exercise of a statutory power to override a decision of the Upper Tribunal and quashed his certificate. No member of the Court suggested that the AG's constitutional position rendered the decision immune from scrutiny; the argument was not run. *Evans* is the modern answer to the proposition that the identity of the officeholder confers immunity, and it is a decision of this Court.

94. *Mohit v Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343. Lord Bingham, giving the judgment of the Board, held the Director's discretion to discontinue a private prosecution reviewable. He stated at §14, 3350F that *Gouriet* remains a binding statement of English law on cases covered by it, subject to review or modification in the light of *CCSU*, and cited with approval the view that where the source of the discretionary power rests in statute law there is no inherent constitutional objection to the jurisdiction of the courts being invoked.⁵⁸ Lord Bingham returned to the point at §20, 3354B. Citing Lloyd LJ in *R v Panel on Take-overs and Mergers, Ex p. Datafin Plc* [1987] QB 815, 847 - that if the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. He described that as "the ordinary if not the invariable rule", and held that the Board should approach the issue on the assumption that the statutory power was subject to review "unless there is some compelling reason to infer that such an assumption is excluded". The presumption therefore runs in the Appellant's favour, and it is for the Respondent to displace it. Neither *Gouriet*, which concerned no statutory power, nor *Ex p. Taylor*, which followed it, supplies a compelling reason. At §21, 3354D the phrase “at any rate in the past” demonstrates doubt that the immunity should continue. *Mohit* thus holds a statutory law officer's discretion reviewable, upon reasoning that turns on the statutory source in issue here. That *Mohit* at §17, read with *Sharma v Brown-Antoine* [2007] 1 WLR 780 at §14, has been understood as endorsing a restrained standard is a question going to Ground 2: the narrowness of the grounds presupposes the jurisdiction rather than

⁵⁸ See 3350H-3351A

denying it. The DC put *Mohit* aside at §J53 on the footing that *CCSU* makes reviewability turn upon nature and subject matter, not source. That does not meet the point. Lord Bingham made the narrower point that where Parliament has conferred the power there is no constitutional objection to the invocation of the court's jurisdiction. The immunity recognised below rests upon precisely such a constitutional objection, and *Mohit* denies it.⁵⁹

95. Sir Clive Lewis, *Judicial Remedies in Public Law* (7th ed, paragraphs 2-043 to 2-044) : "[I]t is difficult, in principle, to see why the exercise of statutory or prerogative powers to institute proceedings is not justiciable and open to review in appropriate circumstances."

96. *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453. Lord Hoffmann held at §35, 482H that once *CCSU* removed the assumption that prerogative powers were, as such, immune, even prerogative legislation is reviewable on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action.

97. *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491. This Court, allowing the appeal by a majority, held that s.67(8) of the Regulation of Investigatory Powers Act 2000, which provided that determinations of the Tribunal, including decisions as to whether it had jurisdiction, should not be subject to appeal or liable to be questioned in any court, did not exclude the supervisory jurisdiction of the High Court in respect of decisions vitiated by error of law, a decision so vitiated being no decision at all: §§99, 104–112, 145, 147. Three of the seven Justices went further, obiter; Lord Lloyd-Jones JSC, though in the majority, expressly declined to express any view upon the point (§168). Lord Carnwath JSC (with whom Lady Hale PSC and Lord Kerr JSC agreed) said at §144, 550D-E, while accepting that it was not necessary to decide the point: "I see a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law."

98. *R v Director of Public Prosecutions, Ex p. Manning* [2001] QB 330. A bereaved family successfully challenged the refusal of the Director to institute proceedings following a death in custody. Lord Bingham CJ held the decision reviewable and quashed it for failure to give adequate reasons. The case is the closest analogue to the present: a death, a bereaved

⁵⁹ See 3352B-3353B

family, a law officer's decision not to institute proceedings, and no alternative remedy. Critically for Ground 2, Lord Bingham held at §23, 343F that while the power of review is “one to be sparingly exercised”, at 344C “the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied.”

99. *R (World Uyghur Congress) v National Crime Agency* [2024] 1 WLR 4532. The Court of Appeal held that a decision not to investigate was reviewable and had been vitiated by a misdirection in law, applying *Corner House*. The NCA made a significant concession, accepting that it would be wrong in law to refuse to investigate because the property could not yet be identified (§11), and the decision was quashed for that misdirection (§§12&58) (see §131(e) below).

100. *R v Shayler* [2001] 1 WLR 2206 at 2216B. The Court of Appeal stated: “If the AG gave his consent in a case in which it was perverse to do so this decision, today, would probably be reviewable on an application for judicial review. This is notwithstanding the decision to the contrary by the House of Lords in *Gouriet*.”

101. *R (Halpin) v AG* [2011] EWHC 3759 (Admin). Nicol J stated at §22: “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.” That observation has since been approved by the Law Commission (Law Com No 423, §8.104).

102. *Wilson v Department of Health for Northern Ireland* [2023] NICA 54. The Court of Appeal cited *Bancoult* and noted §20 “the gradual erosion of outdated, rigid distinctions in the incremental development of the common law has brought about a corresponding enlargement of the supervisory competence of the High Court exercisable in judicial review proceedings.”

F. GROUND 2: STANDARD OF REVIEW

103. The DC held at §J57 that if the AG's decision is justiciable, “the grounds on which they are subject to review are limited to ‘dishonesty or mala fides or an exceptional circumstance’: see *Kebilene*, p.371F.” That was wrong in law. The Court took a formulation which Lord Steyn devised for one category of decision and applied it to a decision of a

materially different character, a category which Lord Steyn had already distinguished, and to which the reason for the formulation does not extend.

104. The formulation adopted at §J57 was not the formulation for which the AG contended. His alternative case below was that a decision under s.13 should be reviewable only in circumstances of fraud, bad faith or other exceptional circumstances⁶⁰. *Kebilene* was advanced not as the source of the applicable test but as one illustration, alongside *State of Mauritius v CT Power Ltd* [2019] UKPC 27, of the proposition that the grounds and intensity of review are sensitive to context (§§48-50). The AG accepted in reply that the difference from prosecutorial decision-making was acknowledged and recognised, and that his submission was one of analogy (§51). The report of the argument below⁶¹ records the AG's alternative case in those terms, and records *Kebilene* and *CT Power* as having been adduced by way of example of a modified standard imposed in other contexts. The DC did not adopt the analogy, only the words used. It took a deliberately high threshold for intervention devised by Lord Steyn for a decision to consent to a prosecution and confined by him in terms to that decision, the converse case having already been distinguished at 369F upon the ground that there is no other remedy and applied it as the governing test for a refusal under s.13(1)(b). A standard of that substance was contended for, what was not (by either party) was the importation of Lord Steyn's formulation itself. It was devised for a different decision, in a different statutory context, and premised upon an alternative remedy within the criminal process. The distinction is important because the reasons which restricted that formulation in *Kebilene* to a challenge to prosecute are the reasons why it cannot apply here.

105. **Kebilene concerned a decision to prosecute; Lord Steyn distinguished decisions not to institute proceedings, where there is no other remedy:** the passage at 371F on which the DC relied is directed, in terms, to “the decision of the Director to consent to the prosecution of the applicants.” Two pages earlier, at 369F, Lord Steyn drew an express and reasoned distinction between a decision *to* prosecute and a decision *not* to prosecute. Of the latter he said that judicial review is available, because it is “a wholly different situation”: in such a case “there is no other remedy.” The restraint articulated at 371F is therefore not a general principle governing the review of law officers' decisions. It is the corollary of a specific structural feature of a decision to prosecute, namely that the criminal trial itself

⁶⁰ AG's skeleton argument below; and see §2.

⁶¹ [2026] KB 289, 297-298.

supplies the safeguard, so that judicial review would be a premature and duplicative intervention in a process that has its own mechanisms for testing the decision.

106. In the same passage Lord Steyn identified the purpose of the restraint: challenges should take place in the criminal trial or on appeal, and satellite litigation should rarely be permitted in the criminal justice system⁶². Neither consideration has any application to a refusal of authority under s.13(1)(b), where there is no trial, no appeal, and no other process in which the decision can be tested. Having stated the test, Lord Steyn applied it immediately to the facts before him, holding that the present case fell upon the wrong side of that line. He was disposing of an application, not formulating a rule for a class of decision-maker.

107. The passage is in any event ill-suited to the use made of it below. The reasoning which led Lord Steyn to it was itself an objection to categorisation. He declined to allow reviewability to turn upon whether the error of law was blatant and obvious, observing that a distinction of that kind gives the appearance of introducing into our public law categories of illegality (371F). The DC has taken the sentence which immediately follows that objection and used it to create precisely such a category.

108. Lord Bingham CJ reasoned identically in *Manning* (§98 above): the standard is not to be set too high precisely because judicial review is the only means of redress, and an exacting test would deny an effective remedy. Two of the most authoritative modern statements on the review of law officers' decisions therefore make the availability of an alternative remedy the organising criterion.

109. A refusal of authority under s.13(1)(b) falls unambiguously on the other side of that line. It is terminal, nothing follows it. There is no trial, no hearing, and no forum in which the correctness of the AG's approach can be examined. Unlike a claim for judicial review, there is no time limit on a s.13 application, but that affords the Appellant no assistance where the AG has applied the wrong legal test, since a renewed application would be determined on the same erroneous basis. The Appellant is left, as Lord Steyn put it, with “no other remedy.” The DC did not address the distinction at 369F at all. Had it done so, it could not have transposed the 371F formulation as it did.

⁶² *Hui Chi-ming v The Queen* [1992] 1 AC 34, 57; *AG of Trinidad and Tobago v Phillip* [1995] 1 AC 396, 417C-D) at 371G-H.

110. The same criterion answers the first agreed issue in so far as it extends to a decision to allow an application to be made. A grant of authority is justiciable for precisely the reasons a refusal is: the amenability issue turns upon the nature of the function not the special nature of the AG's office, which does not change according to the answer the AG reaches. But the intensity of review does change, and it changes for the reason Lord Steyn gave. Where authority is granted, the application proceeds to the High Court, which applies the criterion in s.13(1)(b) for itself and hears any interested person who wishes to resist it. The remedy is supplied by the process itself, and Lord Steyn's objection to satellite litigation by judicial review has its full force, since a challenge to the grant would delay the proceedings in which the question falls to be determined. The Appellant does not contend that a grant of authority attracts the same intensity of review as a refusal, a challenge produces different answers on the two sides of s.13(1)(b) for the same reason that it produced different answers on the two sides of the line in *Kebilene*. The error at §J57 is one of transposition: the DC took the formulation which Lord Steyn devised for the side of the line on which an alternative remedy exists (a grant under s13 / a decision to prosecute) and applied it to the side on which there is no alternative remedy (a refusal under s13 / a decision not to prosecute).

111. **Kebilene and Corner House are in any event inapplicable**: Both cases concern prosecutorial decisions: the Director's decision to consent to a prosecution (*R v Director of Public Prosecutions, Ex p. Kebilene* [2000] 2 AC 326) and the Director of the Serious Fraud Office's decision to discontinue a corruption investigation under intense political and national security pressure (*R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756). Neither establishes a general principle about all decisions by law officers. Each was decided by reference to specific features of prosecutorial discretion: (i) powers entrusted to a specific officer and to no one else; (ii) the polycentric character of prosecutorial decisions involving criminal policy and the public interest⁶³; and (iii) powers conferred in broad and unprescriptive terms (*Corner House* at §31 per Lord Bingham).

112. Section 13(1)(b) is not a prosecutorial decision, and it lacks the features which, in *Corner House*, justify restraint: (a) The first feature is present, and the Appellant does not suggest otherwise: s.13(1)(b) is conferred upon the AG and upon no one else. But exclusivity of conferral is a reason for supervision and not against it. It was equally true of the powers

⁶³ In deciding whether to instigate any prosecution the CPS expressly applies a public interest test set out in the CPS Code for Crown Prosecutors: <https://www.cps.gov.uk/publication/code-crown-prosecutors> and <https://www.cps.gov.uk/principles-we-follow>

considered in *Corner House*, which were held to be reviewable; and Lord Bingham's point at §31 was that the court will not substitute its own judgment for the officer's, not that the court is excluded. Where Parliament confers a gateway upon a single officer, there is no other officer to whom the applicant may go and no other route to the High Court, so that the sole conferral removes the very alternative which elsewhere justifies restraint. In any event the decision is not one to prosecute: no criminal or civil liability is determined, and no person is placed in jeopardy. (b) It is not, for the reasons given at §§10 and 22 above. The AG applies the statutory criterion. (c) It is not conferred in "broad and unprescriptive terms." The test is prescribed by statute and elaborated by a consistent line of authority in the High Court.

113. In *Sharma v Brown-Antoine* [2007] 1 WLR 780, the Board observed at 788B that a successful challenge to a decision to prosecute is "rare in the extreme." That observation, like the passage at 371F of *Kebilene*, is directed to decisions to prosecute and rests on the same rationale: the existence of the criminal trial as the appropriate forum for testing the decision. It has no application to a decision which forecloses any judicial process at all.

114. The AG further relied upon *The State of Mauritius v The (Mauritius) CT Power Ltd* [2019] UKPC 27 at §64. The Board there applied two different standards of review to two decisions, and the AG has focused on the wrong one. The narrow standard, under which review is unlikely absent fraud, corruption or bad faith (§64 & §66), applies to a Minister negotiating a commercial contract under the general power to conduct the business of Government, and was justified at §63 by the need not to cut down the Government's bargaining power in the market. That reasoning has no application to a statutory gateway to a judicial remedy. The other decision was a refusal by the Ministry of Finance to accept that a condition in a regulatory licence had been satisfied, which the Board held at §42 to be "plainly a matter falling within the scope of public law", the Ministry having "a function to perform in the public interest" and being "required to act in accordance with usual standards of public law"; it was reviewed for rationality at §48 and for procedural fairness at §53-61. That is the applicable comparator. The authority also tells against the AG on Ground 1: the Board rejected at §41-43 the submission that either decision lay outside the supervisory jurisdiction and held at §44 that not even a contract between a public authority and a private party can remove that jurisdiction, "which exists to safeguard the public interest".

115. **Even the restrictive authorities admit review for error of law:** In *Corner House* Lord Bingham recorded at §30 that 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”, and at §32 he addressed misdirection in law as an available ground. That is the modern position, applied by the Court of Appeal in *World Uyghur Congress* to quash a decision not to investigate for misdirection in law. The concession there was significant (see §99 above & §131(e) below). Prosecutorial decisions have likewise been held reviewable for failure to give reasons (*Manning* at 335D), for inconsistency with a promulgated policy and for perversity (*R v Director of Public Prosecutions, Ex p. C.* [1995] 1 Cr App R 136 at 145A)⁶⁴, and for irrationality (*Re Duddy's Application* [2022] NIQB 23 at §153⁶⁵). The same is true where a law officer refuses consent in the mistaken belief that a legal impediment exists. Whether the impediment exists is a pure question of law, and a refusal proceeding upon a mistaken answer to it is a failure by the law officer to direct himself correctly in law, which is the very obligation Lord Bingham identified (also see *Ferrante*, §128 below). The starting point, even in the most restrictive cases, is therefore amenability on ordinary grounds subject to a high threshold of intervention, not a closed list of vitiating factors from which error of law is absent.

116. Lord Steyn, “*Deference: a Tangled Story*” [2005] PL 346: see [350] a court may properly decline, as a matter of discretion and in the context of a specific issue in a particular case, to rule upon a question which another branch of government is institutionally better qualified to decide - the passive virtue, after Professor Bickel, and not a decision of law. What a court may not do is abdicate any part of its jurisdiction: not directly, and not indirectly by a self-denying ordinance in respect of particular classes of cases, under the cloak of some newly discovered constitutional principle or the doctrine of the separation of powers. He summarises the position at [351-352], saying that courts ought not to take jurisdiction decisions upon a priori grounds without scrutiny of the challenged decision, since nobody can know in advance whether it has been infected by manifest illegality.

117. That analysis identifies precisely what has gone wrong below. The DC did not decline to decide a particular issue in a particular case upon grounds of institutional competence. It

⁶⁴ The Court granted relief notwithstanding that the applicant’s counsel ‘did not suggest anything like improper motive or bad faith.’ (141D).

⁶⁵ ‘It was not suggested that there was any question of dishonesty or mala fides on the part of the PPS, so the case boils down to whether there has been an error sufficient to vitiate the decisions made.’ §42 ‘The fundamental question is whether the PPS has made an error...of such materiality to impugn the discontinuance decision.’ §137.

relinquished jurisdiction over a class of decisions, and it did so upon a constitutional ground, [§J55]. The formulation at §J57 then determined in advance, and without scrutiny of the decision under challenge, that nothing within the Appellant's grounds could suffice. Lord Steyn also endorses, at [357-358], the conclusion of Professor Jowell that in acknowledging their institutional limitations the courts must guard against a presumption that matters of public interest are outside their competence ("*Judicial Deference: Servility, Civility or Institutional Capacity?*" [2003] PL 592, 599). That is the presumption upon which the category of "public interest functions" rests.

118. **The formulation adopted at §J57 is an immunity in all but name:** The DC's conclusion on the standard of review is the Ground 1 immunity re-expressed. [1] it inverts the structure of the only principle which could justify a narrow standard at all. [2] it preserves dishonesty and mala fides as grounds of challenge while discarding irrationality, illegality and procedural unfairness (cf. *R v Tower Hamlets London Borough Council, Ex p Chetnik Developments Ltd* [1988] AC 858 per Lord Bridge at 873F-G. [3] The AG's power under s. 13(1) is not a wide discretion, its purpose is supplied by the provision to which it is the gateway: ordering a further investigation where the High Court is satisfied that it is "necessary or desirable in the interests of justice" that one be held. The fiat exists to permit that question to be put to the Court, and that is a criterion, not a blank page. The fiat may validly be withheld only for reasons relevant to that criterion: *Corner House* at §32, 841, per Lord Bingham, the Director's discretions, though wide, were not unfettered: he was required to seek to exercise his powers so as to promote the statutory purpose for which they were given, and to direct himself correctly in law. And at §38, 843, Lord Bingham, the remainder of the Committee agreeing, rejected the formulation which the DC had devised in that case - that submission to a threat is lawful only where no alternative course was open to the decision-maker. The right question was whether the decision-maker had acted outside the lawful bounds of the discretion entrusted to him by Parliament (cf. the vice of §J57) and had the AG directed himself correctly as to the criterion in s.13(1)(b) and reached a conclusion upon it reasonably open to him. §J57 does not answer that question more deferentially; it prevents the Court from reaching it at all unless dishonesty or mala fides is first established.

119. The Appellant acknowledges that particular grounds of review may be excluded by context: *R v Secretary of State for the Environment, Ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521. That case does not assist the AG. The restriction it

recognised was confined to the irrationality ground and operated only after the court had first satisfied itself that the minister had acted within the statute: Lord Bridge at 597E-F: a discretion exercised so as to frustrate the policy of the statute is condemned on the ground of illegality (597), and the same is true of regard to legally irrelevant matters and disregard of legally relevant ones. Illegality therefore survived intact even in a field which Lord Scarman had characterised as one of political judgment approved by the House of Commons: (*Ex p Nottinghamshire County Council* [1986] AC 240, 250-251, quoted at 596).

120. *Hammersmith* is accordingly an application of the principle in *Chetnik* described at §118 above, and not a departure from it. The formulation adopted at §J57 is of a different order, because it withholds review for error of law, which is the complaint made in this case.

121. The same structure is found where deference is at its highest. In *Rehman*, concerning the executive's assessment of a threat to national security, Lord Hoffmann held at §54 that the width of the area entrusted to the executive did not mean that the whole decision was surrendered to the Secretary of State, and that it was important neither to blur nor to exaggerate the area of responsibility entrusted to him §193C. Three functions survived: the factual basis for the opinion had to be established by evidence §193D; the opinion might be rejected as one which no reasonable minister could reasonably have held §193F; and there were issues which at no point lay within the exclusive province of the executive §193F. If irrationality and the requirement of a factual foundation survive in the field of national security, they cannot be excised in respect of a decision upon whether the interests of justice require a further inquest. *Rehman* concerned intensity, not amenability: it was never suggested that the decision lay beyond scrutiny altogether.⁶⁶

122. Nor does the width of the statutory language put the power beyond legal control. (*Commissioners of Customs and Excise v Cure & Deeley Ltd* [1962] 1 QB 340 per Sachs J at 360 and 369-370. The Commissioners contended that the enabling provision used "the widest words which Parliament can use to confer an unfettered discretion". Sachs J held the regulation ultra vires as it permitted the assumption of the powers of a High Court judge, thus excluding the subject from access to the courts upon the question whether tax was due, & substituting the rule of tax collectors for the rule of law; also see *R v Customs and Excise Commissioners, Ex p. Hedges & Butler Ltd* [1986] 2 All ER 164 at 171J-172B. This principle

⁶⁶ See CCSU per Lord Scarman at 406G-407A.

is constitutional and not merely one of construction: *R (Nicklinson) v Ministry of Justice* [2015] AC 657 per Lord Sumption at §238, 837C, "the problem about law whose application depends upon administrative discretion is that, unless the criteria for the exercise of that discretion are made clear in advance, it offers no protection against its inconsistent and arbitrary application." ⁶⁷ A consent function conferred upon a law officer is similarly not exercisable at large. If the widest statutory language a draftsman can employ does not exclude independent judicial determination, the constitutional standing of the office holder cannot do so; still less where Parliament has supplied the criterion.

123. A requirement of dishonesty or mala fides is in practical terms indistinguishable from a general immunity. Bad faith cannot properly be pleaded without an evidential foundation and detailed particulars, and it is difficult to conceive of circumstances in which such material would be available in the public domain in relation to a gatekeeping decision of this kind. The material which might supply it, disclosure and the duty of candour, becomes available only after permission has been granted, and on the DC's formulation permission cannot be obtained unless bad faith is pleaded first. The courts have repeatedly observed that the circumstances in which a decision-maker will be found not to have acted in good faith are "rare and extreme". A ground of review which cannot in practice be established does not qualify the immunity; it preserves it⁶⁸.

124. Further, the residual category of "exceptional circumstances" supplies no remedy for that defect, because it is not a legal criterion at all. Reference to exceptionality has been repeatedly deprecated in public law, precisely because it states a conclusion rather than a test.⁶⁹ The DC held at §J57 that nothing in the pleaded grounds, which include a misdirection as to the statutory test, could be described as an exceptional circumstance, without indicating what could. Nor could the deficiency have been cured by amendment, since dishonesty and mala fides cannot be pleaded against a decision for which no reasons need be given and from the withholding of which, on the AG's own authority, no adverse inference may be drawn

⁶⁷ Also see *R (Purdy) v Director of Public Prosecutions* [2010] 1 AC 345, per Lord Hope at §46, 392G & §56, 396A-B.

⁶⁸ *Webster v Lord Chancellor* [2015] EWCA Civ 742, [2016] QB 676 at §31), that an allegation of bad faith attracts "a heavy burden of proof" (*MSM v Secretary of State for the Home Department* [2015] UKUT 413 (IAC) at §16]), and that bad faith is accordingly "difficult to prove and is rarely encountered" (*R (Rydon) v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 3234 (Admin) at §60).

⁶⁹ See *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at §20; *Norris v Government of the United States of America (No 2)* [2010] 2 AC 487 at §56; and *Ali v Secretary of State for the Home Department* [2016] 1 WLR 4799 at §38 and §78.

(*Gouriet*, 489G per Viscount Dilhorne). A standard which a misdirection as to the statutory criterion cannot satisfy, and which no permissible amendment could enable a claimant to satisfy, is not a standard of review.

125. The Court was invited by the AG to note that the Appellant's grounds involved no allegation of fraud, corruption or bad faith (AG's skeleton below, §4.3). It was not invited to determine whether those grounds were arguable, and the AG expressly disclaimed any such exercise (§35). Chamberlain J's order of 5 December 2024 confined the hearing to justiciability, prior to the determination of permission. The Appellant submitted below that reviewability could not safely be determined as a preliminary issue without consideration of the evidence, relying upon *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p World Development Movement Ltd* [1995] 1 WLR 386. The Court was therefore asked by the AG to observe an absence and invited by the Appellant not to decide the question in the abstract at all. It did neither. It held at §J57 that the pleaded grounds involve no allegation of dishonesty or mala fides, and nothing that could be described as an exceptional circumstance, and that the decision is accordingly not open to challenge on any of the pleaded grounds. This was a conclusion reached without argument upon those grounds and without the evidence to which they relate.

126. A residual category of exceptional cases incapable of principled definition is not workable and is not applied. It was once thought the police owed no duty of care in the investigation and suppression of crime, a rule justified on grounds of policy and subject to an undefined residual category of exceptional cases. *Michael*⁷⁰ and *Robinson*⁷¹ replaced that reasoning with the general rule against liability for omissions and its defined exceptions; the residual category, carried over in Lord Reed's phrase "absent special circumstances", has never since been given content. In *Chief Constable of Northamptonshire Police v Woodcock* [2025] EWCA Civ 13⁷², which applied *Tindall* and was not cited below, the Court of Appeal declined either to widen the category or to find it satisfied: to treat that case as exceptional would render the general rule inapplicable in a substantial number of cases and produce uncertainty (§119), and there was no scope for such a finding (§127). The category was left formally intact and practically unusable. That is what §J57 produces.

⁷⁰ *Michael v Chief Constable of South Wales Police* [2015] AC 1732.

⁷¹ *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736

⁷² [2025] 3 All E.R. 120; [2025] 1 WLUK 100; [2025] P.I.Q.R. P8

127. Taken together, these matters mean that the DC's alternative holding does not soften its primary holding at all. A decision founded upon a self-evident misdirection in law would remain beyond correction. That cannot be right, and for the reasons at §110 above it is not what the authorities relied upon decide.

***Ferrante*: the only authority on s.13 applied ordinary grounds**

128. The point is put beyond argument by the authority on which the AG principally relies. In *Ferrante*, Popplewell J, having held against jurisdiction, turned to the remaining issues expressly “on the basis that his decision is judicially reviewable.” He did not apply, or refer to, a threshold of dishonesty or mala fides. He considered whether the AG had applied the correct legal test; whether the decision was “irrational or perverse”; and whether reasons were required, by reference to *R v Secretary of State for the Home Department, Ex p. Doody* [1994] 1 AC 531⁷³. Those are the ordinary grounds of judicial review.

129. The Court of Appeal did the same. Having assumed reviewability, Sir Thomas Bingham MR examined, first, whether the AG had erred in law in the test he applied⁷⁴; secondly, whether he had reached a decision that was “unsustainable or flawed or vulnerable”⁷⁵; and thirdly, reasons, holding that although there is no universal duty to give reasons, they are required wherever fairness demands it, that a failure to give them “may found an inference that the decision-maker had no good reasons or must have had bad reasons”⁷⁶, and that “cases will undoubtedly arise on the assumption that we are making where reasons in this form would not be sufficient.”⁷⁷ That last observation is significant: the Court of Appeal contemplated that, on the assumption of reviewability, a challenge on the ordinary ground of inadequate reasons would in an appropriate case succeed. No such challenge could ever succeed on the formulation adopted in the Court below.

130. The AG cannot rely upon *Ferrante* for the proposition that a refusal of fiat is non-justiciable while disregarding the standard which both courts applied when addressing the question on the contrary assumption. The only reasoned decision specific to s.13 is thus against the DC. The refusal on Ground 2 of permission by Lane J in *Lyttle v AG* on 25 May 2018, to which the Appellant referred below, is an unreasoned decision refusing permission

⁷³ [1994] Lexis Citation 4482 at page 20, citing *ex parte Doody* [1994] 1 AC 531 at 564E.

⁷⁴ [1995] Lexis Citation 3540 at page 4.

⁷⁵ [1995] Lexis Citation 3540 at page 6.

⁷⁶ [1995] Lexis Citation 3540 at page 6.

⁷⁷ [1995] Lexis Citation 3540 at page 6.

on the papers and certifying the claim as totally without merit; *Jervis* in a footnote asserts that a refusal of fiat is unreviewable⁷⁸ cites *R (Duggan) v Attorney General*, unreported 3 November 2009, in which Wyn Williams J granted permission for judicial review against the AG, and which led to *Duggan v Coroner for the Northern District of Greater London* [2010] EWHC 1263 (Admin): inquisition quashed and fresh inquest ordered.

131. **The correct standard is ordinary public law review**: where the AG exercises a statutory power by applying the statutory criterion to evidence, ordinary principles of judicial review apply, illegality, irrationality, and procedural unfairness. That is the approach taken to analogous decisions in the criminal justice field itself: in *R (SY) v DPP* [2018] EWHC 795 (Admin); [2018] 2 Cr App R 15 at §15 the DC held that a decision not to prosecute is in principle amenable to judicial review, to be conducted on orthodox principles of administrative review, namely irrationality, illegality and procedural impropriety. This Court has applied no lesser standard to the AG himself:

(a) *Evans* [2015] AC 1787. The AG's certificate was reviewed and quashed. The argument concerned how demanding the standard should be, not whether it should be relaxed. Mr Eadie QC accepted on his behalf that the correctness of the AG's view of the law could be tested by judicial review, contending for a test which Lord Mance recorded as close, if not exactly equivalent, to rationality (§128, 1836G). Lord Mance held that s.53(2) imposed a higher hurdle than mere rationality, and that the reasonable grounds relied upon "must be capable of scrutiny" (§129, 1837B). Lord Neuberger held that a certificate tainted by an error of law would be invalidated generally (§§109-110, 1832G). Lord Hughes, dissenting in the result, held that a material self-misdirection would justify setting the certificate aside and that an error of law could be corrected by the court (§§153(ii) and 161, 1849H, 1851G). The least intrusive standard contended for by anyone was rationality. No member of the Court suggested that dishonesty, mala fides or an exceptional circumstance was required.

(b) *Bancoult (No 2)* [2009] 1 AC 453: even a prerogative Order in Council was reviewable "on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action" (Lord Hoffmann at §35, 482H; and see §52, 486H and §53, 487G). Lord Bingham applied familiar judicial review principles at §71, 492C-D, and considered legitimate expectation at §73, 492H-493D; Lord Rodger agreed at §105, 502E that, post-*CCSU*, prerogative legislation should be reviewable on the same grounds; and Lord

⁷⁸ *Jervis on Coroners*, 15th ed, 2024, 19-27, footnote 110.

Mance at §141, 516B saw every reason why legislative Orders in Council should be reviewable in the same way as other executive steps, due weight being given to the subject matter.

(c) *Privacy International*: per Lord Lloyd-Jones §150 at 551G; and Lord Carnwath §37 at 518F-G.

(d) *Manning* [2001] QB 330: per Lord Bingham CJ at 344C: 'So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied. Also see at 350C: "There should have been regard to relevant facts and an 'objective appraisal of the prospects of success of a prosecution if brought, and the failure to take them into account vitiates the Director's decision'".

(e) *World Uyghur Congress* [2024] 1 WLR 4532, judgment of the Court (Carr LCJ, Bean and Andrews LJJ), at §§5-6⁷⁹, §§11-12⁸⁰ and 54-59⁸¹: review of a decision not to investigate for misdirection in law.

(f) *R (UNISON)* [2020] AC 869 per Lord Reed JSC at §66 / 896D: "the constitutional right of access to the courts is inherent in the rule of law".

(g) De Smith's *Judicial Review* (9th ed) at 1-035, stating that no power, whether statutory, at common law or under the prerogative, remains inherently unreviewable.

132. Section 13(1)(b) contains no exclusionary language. Parliament could have restricted or excluded judicial review. It did not. Considering *Privacy International*, the absence of exclusionary language is significant: Parliament legislates against the presumption of reviewability on ordinary grounds. Also see Lord Lloyd-Jones at §166 at 558D: 'For present purposes it is sufficient that the words employed in section 67(8) do not make provision with sufficient clarity for the exclusion of the review jurisdiction of the High Court in respect of errors of law.'

⁷⁹ 4535A-D

⁸⁰ 4537C-E

⁸¹ 4547C-4548C

133. The formulation adopted at §J57 is not a calibration of intensity. Three questions fall to be distinguished: Firstly: whether a decision is amenable to review at all; which grounds are available once it is; and how searchingly a given ground is applied on the facts. Margin of discretion and weight operate upon the third. The §J57 formulation operates upon the second, and it does not attenuate the ordinary grounds but removes them. On the DC's approach, a refusal of fiat which was irrational, or which took into account legally irrelevant considerations, or which proceeded upon a misdirection as to the statutory test, would stand unless the claimant could additionally establish dishonesty, mala fides or an exceptional circumstance. A rule which requires a claimant to prove bad faith before the court may correct an error of law is a partial ouster of the supervisory jurisdiction and not an expression of institutional respect for the decision-maker. It cannot be defended in the vocabulary of deference, because deference selects the weight to be given to a decision-maker's judgment within a ground of review; it does not delete the ground. Secondly: nor, if the AG's concern is intensity, does the adoption of ordinary principles entail intensive scrutiny. It is trite but crucial that in judicial review "context is everything" (*R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at §28 per Lord Steyn), and intensity is calibrated to context in the ordinary way through the familiar tools of margin of discretion and weight. Where the AG's assessment is genuinely evaluative, a substantial margin exists and the court will intervene only if the conclusion reached was not reasonably open to him. Those tools are sufficient to keep the supervisory jurisdiction within its proper bounds; an attenuated ground of review is not required. The point is illustrated by *Woodcock* itself (§126 above), where the Court of Appeal's stated reason for refusing to widen the exceptionality category was that ordinary doctrine, correctly applied, already supplies the necessary control. What ordinary principles secure, and what the formulation at §J57 denies, is that a misdirection as to the statutory test is corrected as an error of law rather than tolerated for want of bad faith. Thirdly: the threshold adopted below is, moreover, higher than the one this Court declined to accept in *Evans*, in a case concerning the same officeholder exercising a statutory power conditioned upon a legal standard. The AG there contended for an objective test of whether the certificate expressed a reasonable view, a submission which Lord Mance JSC characterised at §128 as being for a test close, if not exactly equivalent, to rationality. This Court rejected it. Reasonable grounds in s.53(2) was held at §129, 1837B, to impose a higher hurdle than mere rationality, and the certificate was quashed at §145, 1848C, because the disagreement it recorded had not been justified on reasonable grounds. The DC's formulation for the standard of review in a s.13(1)(b) challenge places the challenger under a burden

heavier still: not merely rationality, but dishonesty, mala fides or exceptional circumstance. The AG is therefore more fully protected in the context of allowing an individual to seek a new inquest than this Court was willing to allow him to be in the exercise of s.53 Freedom of Information Act 2000, and for no reason connected with the nature of either function. As to the stage at which a threshold of that character may properly be erected, see §§118 and 119 above.

134. **Northern Ireland cases:** The approach for which the Appellant contends is not hypothetical, and the AG himself relied below upon the decisions which demonstrate it. Section 14 of the Coroners Act (Northern Ireland) 1959 confers upon the AG for Northern Ireland the counterpart power to direct a fresh inquest and her exercise of that power is reviewable by the courts: *Shuker* [2004] NIQB 20 at [13], [2004] NI 367; *Forde* [2009] NICA 66; *Johnstone* [2017] NIQB 33 at [51]; *Bunting* [2023] NIKB 43. The AG's answer below adopted Dr McCormick's suggestion that the AG for Northern Ireland is distinguishable by reason of s.22(5) Justice (Northern Ireland) Act 2002 and his attenuated accountability to the Assembly. That distinction assumes the AG is, by contrast, effectively accountable for individual exercises of the s.13(1)(b) power; for the reasons at §50 above he is not.

135. In the further alternative, and only if the Court should uphold the formulation adopted at §J57, the Appellant contends that a decision reached upon a misdirection as to the statutory test is itself an "exceptional circumstance" within that formulation. A gatekeeper who forecloses access to the High Court by applying a test which Parliament did not enact has not exercised the statutory power at all, and it would be a remarkable construction of the residual category that excluded the one vice which the category exists to catch. The Appellant advances this contention as a fallback only; his case is that the formulation should not be adopted.

G. CONCLUSION

136. For the reasons set out above, the DC erred in law in holding that the AG's decision to refuse authority under s.13(1)(b) of the Coroners Act 1988 is non-justiciable. Accordingly, the Appellant respectfully invites the Court to allow the appeal; to set aside the order of the DC refusing permission to apply for judicial review; to declare that the AG's decision under s.13(1)(b) of the Coroners Act 1988 is amenable to judicial review

on ordinary public law grounds; and to remit the claim to the Administrative Court for determination of that application. The Appellant seeks his costs here and below.

Summary of the reasons on which this appeal is founded.

- (1) *Gouriet* is not binding as the DC misunderstood the ratio decidendi and an application under s.13(1)(b) is not a relator action.
- (2) The observations relied upon on justiciability in *Gouriet* were obiter.
- (3) *Gouriet* is in any event authority for the existence of the legal criterion which the AG failed to apply.
- (4) If *Gouriet* is nonetheless binding in respect of s.13(1)(b) this Court should depart from it.
- (5) The formulation adopted at §J57 is not a standard of review but the immunity restated. The correct standard is ordinary public law principles, illegality, irrationality and procedural unfairness, applied with an intensity calibrated to the nature of the decision in the ordinary way.

NICHOLAS BOWEN KC

NICK STANAGE

1 September 2026

(perfected 25 September 2026)