

IN THE SUPREME COURT

ON LEAPFROG APPEAL FROM
THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
(DIVISIONAL COURT)

(Stuart-Smith LJ and Chamberlain J)

B E T W E E N

R (on the application of MATTHEW CAMPBELL)

Appellant

- and -

HIS MAJESTY'S ATTORNEY GENERAL FOR ENGLAND AND WALES

Respondent

GLOBAL LEGAL ACTION NETWORK

REDRESS TRUST LIMITED

Interveners (written submissions only)

RESPONDENT'S WRITTEN CASE

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References to the Appellant’s Written Case dated 1 September 2026 (as corrected on 6 September 2026 and as further corrected on 21 September 2026) are in the form “A§”.

A. INTRODUCTION

1. Section 13 of the Coroners Act 1988 (the “**1988 Act**”) provides a power for the Attorney General (directly, or under her¹ authority) to make an application to the High Court in connection with a coroner’s inquest.² Such a power is long-standing; a materially identical power was conferred on the Attorney General by s. 6 of the Coroners Act 1887 (the “**1887 Act**”). Where an application is made, the High Court will consider whether the coroner is refusing to hold an inquest which ought to be held, or whether (notwithstanding an inquest having been held) it is necessary or desirable in the interests of justice that another inquest should be held. Where the High Court is so satisfied, it may exercise remedial powers, including to order an inquest to be carried out.
2. The issue in this appeal is whether this court should overturn long-standing House of Lords authority, the effect of which is that the courts will not entertain challenges to the Attorney General’s decision-making in the public interest on whether to bring (or permit to be made) an application under s. 13 of the 1988 Act. If this court does intend to overturn that authority, a separate question would then arise as to the standard of review that would apply to such challenges.
3. In the present case, having considered the Appellant’s request, the Attorney General (albeit here, the function was exercised by the Solicitor General on her behalf) decided that she would not grant the Appellant authority to bring an application to the High Court under s. 13 of the 1988 Act for reasons explained in a decision on 4 January 2024. The purpose of the Appellant’s application is to reopen the UK inquest into the causes of his brother’s death in the attack on the World Trade Center in New York City on 11 September 2001. The Appellant wishes to do so because of his hypothesis that it was not the impact of the aircraft that caused the North Tower of the World Trade Center to collapse but instead the detonation of pre-planted explosives or incendiaries. The Appellant now seeks permission to bring JR proceedings of the Attorney General’s refusal to grant authority to bring such an application. The grounds of review as articulated in the Statement of Facts and Grounds allege: first, that the decision “*failed*

¹ References to ‘she’ and ‘her’ should equally be taken to be references to ‘he’ and ‘him’.

² The statutory language has now been altered to ‘investigation’ but for the sake of simplicity this Case will refer throughout to an ‘inquest’, being the relevant term used in the Appellant’s Statement of Facts and Grounds.

to apply jurisprudence arising from the statutory ‘interests of justice’ test”; second, that the decision was irrational because “[n]o Court or decision-maker could reasonably reject the [Appellant’s] submissions as to insufficiency of inquiry”; third, that there was a failure to give adequate reasons; fourth, that the finding of a “clear consensus view” about what happened on 11 September 2001 was unreasonable; and fifth, that it was unreasonable to categorise the Appellant’s hypothesis as “fanciful”.

4. The Divisional Court held that permission to bring JR proceedings should be refused. This was because there was binding authority of the House of Lords in Gouriet v. Union of Post Office Workers [1978] AC 435 (“Gouriet”) that the Attorney General’s decision was not reviewable; and the Divisional Court also held that, even insofar as the matter was justiciable, it was not open to challenge on any of the pleaded grounds.
5. This court is invited to uphold the decision of the Divisional Court that permission for JR falls to be refused in the circumstances of this case. The Attorney General advances her argument on the basis of three propositions:
 - 5.1. The Divisional Court was right to conclude that Gouriet stands as authority for the proposition that the decision not to grant *fiat* under s. 13 of the 1988 Act is non-justiciable.
 - 5.2. The fact of non-justiciability under s. 13 reflects the nature of the particular function exercised by the Attorney General, making ‘gatekeeping’ judgements (*i.e.* as to whether proceedings should be commenced) in the public interest, in circumstances where that function has been specifically conferred on the Attorney General by Parliament.
 - 5.3. Insofar as this court considers it right to depart from such precedent, the basis upon which any JR might hereafter be allowed to proceed in any given case should reflect the specific nature of the function the Attorney General is discharging in exercise of the power under s. 13. In particular, since the Attorney General is exercising a specially-conferred public interest function (“PIF”), the courts should in practice adopt a highly restrained and deferential approach in reviewing any decisions taken in exercise of that power. Applying that approach to the present case would inevitably result in permission for JR being refused.
6. There is no dispute between the parties on three key matters:

- 6.1. The parties agree that at least some of the Attorney General's PIFs are non-justiciable and thereby "*fall outside the court's supervisory jurisdiction*": A§§16, 79. The parties agree that the question for this court is confined to the justiciability of the refusal to grant *fiat* under s. 13 of the 1988 Act, *i.e.* whether that is one of the functions falling within that non-justiciable category.
- 6.2. These appeal proceedings are not about other PIFs which fall to be exercised by the Attorney General, none of which is engaged in this appeal and in relation to which there may be a wide range of particular considerations which are not before the court for consideration: A§§9 – 10.
- 6.3. The parties agree that, insofar as the court finds (contrary to the Attorney General's primary case) that the refusal to grant *fiat* under s. 13 of the 1988 Act is justiciable, the principled approach would be to articulate a test involving a high degree of deference and a 'sparing approach' or a 'high threshold of intervention', rather than seeking to enunciate specific available grounds of review (and the Attorney General to this extent alters her position from that adopted before the Divisional Court):³ A§115.
7. The Appellant's argument is, however, built on two incorrect premises:
 - 7.1. First, the Appellant's written case is advanced on the erroneous premise that the Attorney General's submissions, and the Divisional Court's judgment, derive non-justiciability merely from the "*office of the decision-maker*" / "*the identity of the officeholder, with no connection to the nature of the function*": see A§§8, 14, 16, 23, 50, 68, 76, 79, and 123. The Attorney General advanced, and advances, no such argument, nor was that the basis of the Divisional Court's judgment. On the contrary, it is beyond argument that numerous functions of the Attorney General are justiciable. For example, the Attorney General has never suggested that the function under s. 53 of the Freedom of Information Act 2000 is non-justiciable (being the function conferred upon those individuals identified in s. 53(8) of that Act to grant a certificate with the effect of overriding a decision notice or enforcement notice). The Appellant's repeated reliance on *R (Evans) v. Attorney*

³ The Attorney General invited the Divisional Court in the alternative to find that the grounds of available review, and/or the standard of review, should be modified in light of the nature of the decision-making involved (Attorney General's Divisional Court skeleton argument §§47 – 51). The Attorney General now agrees that the question would correctly be framed as going to the standard of review.

General [2015] AC 1787 (at A§§4, 8, 64, 67, 93, 133(a) and 135) is thus of no relevance at all. Furthermore, the Attorney General has always accepted that compliance with the Human Rights Act 1998 is justiciable: that follows from the clear effect of ss. 6 & 7. These points are not (contrary to A§81) “*fatal*” to the proposition that a different and specific PIF – here, the decision whether to bring an application under s. 13 of the 1988 Act, or the decision to grant or refuse *fiat* for another to do so under the Attorney General’s authority – is non-justiciable.

- 7.2. Second, the Appellant’s case is advanced on the erroneous understanding that the test the Attorney General must apply, when considering whether to grant or refuse *fiat* for a third party to bring an application in her name under s.13 of the 1988 Act, is limited by statute to the very question that the High Court would ask if the application were made: see A§§10, 13, 16, 19 – 22, 48, 52, 70, 75, 79, 84, 91, 112, 118, and 123.⁴ The Appellant’s case appears to be that the PIF under s. 13 of the 1988 Act is distinguishable from those PIFs requiring true public interest assessments by the Attorney General, because s. 13 limits the Attorney General’s role to assessing “*whether the statutory criterion is arguably satisfied*” (A§20), such that the High Court must be able to sit in judgment on the application of a (necessarily) justiciable test. As the Appellant frames it: “*Parliament has supplied the standard in the section itself, and the courts have applied that same standard, and continue to do so. 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*” (A§75, see also A§112). But that is wrong; it is too narrow an approach to the function entrusted to the Attorney General in the public interest under s. 13, and it is a misreading of the statutory words. While the Attorney General is entitled to have regard to the prospects of success of the application (and as a matter of fact would not grant her *fiat* unless satisfied that there is a reasonable prospect that the Court will order a new inquest⁵),

⁴ For example, the Appellant states (incorrectly) at A§10: “*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*”.

⁵ Sir Thomas Bingham MR in *R v. Attorney General, ex parte Ferrante* [1995] Lexis Citation 3540: “*It is quite clear that the Attorney General is in no sense the judge of whether condition 13(1)(b) is satisfied. That is a question for the High Court. But he does have to decide whether he should give his authority for an application*

the Attorney General's assessment of the public interest can and, where necessary, does extend beyond this question. As Sir Thomas Bingham MR held in *R v. Attorney General, ex parte Ferrante* [1995] Lexis Citation 3540 (CA), "*It seems to me to be the purest judicial legislation to attempt to read into s. 13(1) any specific test*". That is precisely the error committed by the Appellant.

8. These two errors are foundational to the Appellant's argument. The court is asked to determine the appeal in accordance with the Attorney General's propositions summarised in paragraphs 5 above and 101 below.

B. THE ATTORNEY GENERAL AND HER FUNCTIONS

B.1 Introduction

9. The Attorney General is one of the Law Officers of the Crown tasked with multiple roles, including legal advisor to the Sovereign as well as to the executive and legislature.⁶ The role can be traced to the 13th century. The title has been in use at least since 1461. Many of her functions require her to articulate and serve the interests of the general public. Her hybrid legal/political nature is emphasised by the fact that she is the nominal head of the Bar, yet also by convention a member of Parliament, appointed and dismissed by the Prime Minister on behalf of the Crown. Her political character is emphasised by the fact that she takes the ruling party's whip and is a salaried Minister,⁷ responsible to Parliament for her ministerial duties. Although not a voting member of the Cabinet, she has been recognised as having "*Cabinet level membership of the Government*".⁸ The Attorney General is invited to attend meetings of the Cabinet and to participate in deliberations in connection with her duties, when her attendance is thought necessary or desirable.

to be made under s 13(1)(b), and in my judgment it is clear that in making that decision he is entitled to have regard to the prospects of success. If he concludes that there is no reasonable prospect of the applicant satisfying the High Court that the conditions of s 13(1)(b) are satisfied, and accordingly that there is no reasonable prospect of persuading the court to make an order under s 13(2), in my judgment that is a good ground for withholding his authority."

⁶ The most authoritative account of the Attorney General up to 1964 is J.L.J. Edwards, *The Law Officers of the Crown* (1964) ("**Edwards**").

⁷ See Edwards at pp. 117 – 118.

⁸ See Cabinet Office, List of Ministerial Responsibilities including Executive Agencies and Non-Ministerial Departments (October 2019), p. 7.

10. The Attorney General's functions may be divided into (i) executive functions; (ii) advisory functions; and (iii) PIFs. She fulfils executive functions, in particular in overseeing the Attorney General's Office and superintending several non-ministerial departments and executive agencies (such as the Government Legal Department and the Serious Fraud Office). The Attorney General's advisory functions include the provision of legal advice to the Sovereign, the Cabinet, Government departments, individual Ministers, and Parliament. The Attorney General's PIFs are considered further below.

B.2 PIFs

11. The Divisional Court at §§13-14 summarised the Attorney General's PIFs by reference to a House of Commons Library Research Briefing by Dr Conor McCormick and Graeme Cowie "*Law Officers: A Constitutional and Functional Overview*" (14 February 2025). Many of her functions arose historically from prerogative power, but most these days are now conferred under, or at least codified in, statute. They include functions that pertain to the criminal law and the civil law.
12. The Attorney General's criminal law PIFs include:
 - 12.1. providing consent where it is a pre-requisite for commencing prosecution of certain offences (*e.g.* most offences under the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006);
 - 12.2. initiating certain criminal proceedings for the purposes of protecting the administration of justice, under the Contempt of Court Act 1981 (against publishers of material that risks damaging an unfinished trial (ss. 1 – 7) or, in Northern Ireland only, against a juror who discloses jury deliberations while the trial is ongoing (s. 8)) or under the Senior Courts Act 1981 s. 42(1) (by a 'criminal proceedings order' against vexatious litigants);
 - 12.3. initiating certain appellate proceedings, under the Criminal Justice Act 1988 s. 35 (for "*unduly lenient*" sentences in the Crown Court) or the Criminal Justice Act 1972 s. 36 (for references on points of law where the Crown Court has acquitted a person tried on indictment); and
 - 12.4. discontinuing certain criminal trials in exercise of prerogative power (by entering a *nolle prosequi*).

13. The Attorney General's civil law PIFs include:
 - 13.1. protecting against vexatious litigation by a 'civil proceedings order' under the Senior Courts Act 1981 s.42(1);
 - 13.2. intervening in family law cases on applications for declarations as to marital status, overseas adoptions, parentage, legitimacy and legitimation (under the Family Law Act 1986 s. 59);
 - 13.3. appointing special advocates (e.g. under the Justice and Security Act 2013 s. 9) and *amici curiae* (by prerogative, but recognised by CPR PD3F);
 - 13.4. fulfilling the Crown's role as *parens patriae* to protect property held on trust for charitable purposes, in exercise of both statutory and common law powers: see *Children's Investment Fund (UK) v Attorney General* [2020] UKSC 33, [2022] AC 155 at [4]; the Charities Act 2011 ss. 106, 318;
 - 13.5. seeking a High Court injunction to enforce public rights or the prevention of public nuisances (also in exercise of the *parens patriae* jurisdiction), either of her own motion or on her behalf via relator proceedings brought by others;
 - 13.6. initiating civil contempt proceedings;
 - 13.7. as per the issue in the present appeal, making, or permitting to be made under her authority, an application to the High Court seeking an order that the High Court requires and/or quashes an inquest under s. 13 of the 1988 Act.
14. In England, the independence of the Attorney General is guided by the 'Shawcross principles', set out by Sir Hartley Shawcross in 1951 in the House of Commons.⁹ These principles include, in particular, that:

"In order so to inform himself, [the Attorney General] may, although I do not think he is obliged to, consult with any of his colleagues in the Government ... On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter. Nor, of course, can the Attorney-

⁹ Hansard HC Deb 29 January 1951, vol. 483, col. 683-684. For discussion of the constitutional conventions governing the exercise of the Attorney General's discretion, see C. Casey, *The Attorney's Bridle: The Constitutional Convention Disciplining the Attorney General's Discretionary Powers*, U.K. Const. L. Blog (20th October 2025).

General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which, in the broad sense that I have indicated, affect government in the abstract arise, it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those considerations.”

B.3 Coroners

15. Part 1 of the Coroners and Justice Act 2009 (the “**2009 Act**”) introduced the concept of the coroner’s ‘investigation’ into a death. An inquest may form part of an investigation. Section 1 of the 2009 Act imposes a duty on a coroner to investigate a death where he is made aware that the body is within that coroner’s area, and the coroner has reason to suspect that the deceased died a violent or unnatural death, the cause of death is unknown, or the deceased died while in custody or otherwise in State detention. Section 5(1) of the 2009 Act provides that the purpose of an investigation under Part 1 is to ascertain (a) who the deceased was; (b) how, when and where the deceased came by his death; and (c) the particulars (if any) required by the Births and Deaths Registration Act 1953 to be registered concerning the death. Section 5(2) provides:

“Where necessary in order to avoid a breach of any Convention rights (within the meaning of the Human Rights Act 1998 (c. 42)), the purpose mentioned in subsection (1)(b) is to be read as including the purpose of ascertaining in what circumstances the deceased came by his or her death.”

16. Article 2 ECHR enshrines the right to life and imposes on the State both negative obligations not to take life intentionally, and also positive obligations to protect life. The positive obligation implies a duty to investigate unnatural deaths, including, but not limited to, deaths in which State agents may be implicated.

B.4 Section 13 of the 1988 Act (and its predecessor)

17. Section 6 of the 1887 Act provided:

“(1) Where Her Majesty’s High Court of Justice, upon application made by or under the authority of the Attorney General, is satisfied either –

(a) that a coroner refuses or neglects to hold an inquest which ought to be held; or

(b) where an inquest has been held by a coroner that by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, or otherwise, it is necessary or desirable, in the interests of justice, that another inquest should be held,

the court may order an inquest to be held touching the said death, and may, if the court think it just, order the said coroner to pay such costs of and incidental to the application as to the court may seem just, and where an inquest has been already held may quash the inquisition on that inquest.”

18. By the Coroners (Amendment) Act 1926, section 19, Parliament provided:

“For the removal of doubts it is hereby declared, without prejudice to the generality of the provisions of section six of the Coroners Act, 1887, that the powers of the High Court under that section extend to and may be exercised in any case where the Court is satisfied that by reason of the discovery of new facts or evidence it is necessary or desirable in the interests of justice that an inquisition on an inquest previously held concerning a death should be quashed, and that another inquest should be held.”

19. Section 13 of the 1988 Act re-enacted s. 6 of the 1887 Act in materially similar form. Section 13, as amended, provides (emphasis added):

“Order to hold investigation

(1) This section applies where, on an application by or under the authority of the Attorney-General, the High Court is satisfied as respects a coroner (“the coroner concerned”) either—

(a) that he refuses or neglects to hold an inquest or an investigation which ought to be held; or

(b) where an inquest or an investigation has been held by him, that (whether by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, the discovery of new facts or evidence or otherwise) it is necessary or desirable in the interests of justice that an investigation (or as the case may be, another investigation) should be held.

(2) The High Court may—

(a) order an investigation under Part 1 of the Coroners and Justice Act 2009 to be held into the death either—

(i) by the coroner concerned; or

(ii) by a senior coroner, area coroner or assistant coroner in the same coroner area;

(b) order the coroner concerned to pay such costs of and incidental to the application as to the court may appear just; and

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

20. Section 13(5) provides that s. 13 of the 1988 Act does not apply in relation to a death that resulted directly from the Troubles (as defined in Schedule 1A to the 2009 Act). It was

inserted by the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, Sch 11, para 2. Draft legislation has been introduced to repeal and replace that Act.

21. Part 1 of Schedule 23 to the 2009 Act provided that the 1988 Act would be repealed in its entirety. However, the repeal as it related to s. 13 of the 1988 Act was not brought into force.¹⁰ In the Public Bodies Act 2011, Parliament repealed s. 40 of the 2009 Act, which would have created new rights of appeal to the Chief Coroner. The Government decided to “*retain the existing means for redress, so that decisions can still be contested by way of judicial review or by application by, or under the authority of, the Attorney General to the High Court under section 13 of the 1988 Act*”.¹¹ By the Coroners and Justice Act 2009 (Consequential Provisions) Order SI 2013 No. 1874, s. 13 of the 1988 Act was retained in an amended form to reflect the terminology of the 2009 Act.
22. In respect of those deaths to which it applies, where the Attorney General makes or permits to be made an application under s. 13, it is then a matter for the High Court to decide whether the threshold test for the order is satisfied, and (if so) any remedy under s. 13(4).
23. At A§§82 – 86, the Appellant contends that “*Parliament’s intention supports reviewability*”. In fact, the Act is silent on the question. As to the Appellant’s reasoning:
 - 23.1. The provision in s. 33(2)(b) that the 1988 Act was not to prejudice or affect the jurisdiction of the High Court in relation to or over a coroner or his duties is irrelevant to the question of the justiciability of the Attorney General’s function under s. 13 (and hence the provision was not preserved when s. 13 was saved from repeal).
 - 23.2. The Appellant’s reasoning at A§84, suggesting that Parliament cannot have anticipated a “*parallel body of s.13 law*”, is premised on the mistaken assumption addressed at paragraph 7.2 above.
 - 23.3. The fact that the 1988 Act is a consolidating Act is likewise irrelevant. The principle relied upon by the Appellant at A§85 is that, if the primary approaches to

¹⁰ See Article 2(p) of The Coroners and Justice Act 2009 (Commencement No. 15, Consequential and Transitory Provisions) Order SI 2013 No. 1869.

¹¹ Ministry of Justice, Consultation Paper CP2/2013, *Implementing the coroner reforms in Part 1 of the Coroners and Justice Act 2009: Consultation on rules, regulations, coroner areas and statutory guidance* (March 2013), p. 21, §30.

statutory construction fail, the fact that an Act is consolidating legislation permits a secondary canon of construction “*namely, a presumption that a consolidation Act (in so far as it merely re-enacts) does not change the law*” (per Lord Simon in *Farrell v. Alexander* [1977] AC 59, at 84E). But this is irrelevant, because there is no issue of construing the meaning of s. 13.

C. AUTHORITIES CONSIDERING JUSTICIABILITY OF THE ATTORNEY GENERAL’S PIFs

C.1 Authorities prior to *Gouriet*

24. In *Ex parte Newton* (1855) 4 El & Bl 869, 119 ER 323, an application was made to the Attorney General to grant his *fiat* for a writ of error relating to a defendant’s conviction and imprisonment for unlawful wounding. The application was made because the location of the offence had wrongly been understood to be within the jurisdiction of the Central Criminal Court. The Attorney General refused the application. The applicant sought an order of mandamus requiring the Attorney General to grant his *fiat*. The court held that it had no jurisdiction to grant a writ of mandamus, and also (without basing its judgment on this point) agreed with the decision to refuse *fiat*. Lord Campbell CJ held (870 – 871; 323):

“I am clearly of opinion that this Court has no jurisdiction, in any case, to review the decision of the Attorney General.

I completely agree in thinking that, a probable cause being shewn, the Attorney General, ex debito justitiæ, ought to grant his fiat; but he is to exercise what is in the nature of a judicial function. If he refused to hear and consider the application for a fiat, we should compel him by mandamus to hear and consider it,^[12] but, when he has heard and considered, and refused, we cannot interfere. The Attorney General may be made responsible in Parliament. If he has made an improper decision the Crown may and, if properly advised, will dismiss him; but we cannot review his decision. No authority has been cited nor does any exist. ... ”

25. The other members of the court, Wightman, Erle, and Crompton JJ, agreed (at 871 – 873; 323 – 324). The Appellant submits that, because the court *obiter* agreed with the Attorney General’s decision to refuse *fiat*, therefore it was “*not describing an immunity*” (A§26); but this argument ignores the expressly *obiter* nature of that part of the judgment: the

¹² Neither this sentence, nor any equivalent, is found in the report of the judgment at (1855) 24 LJQB 246.

court explained that it was not basing its judgment on that point, in circumstances where it had made clear that “*we cannot review his decision*”.

26. In *R v. Comptroller General of Patents, Designs and Trade Marks, ex parte Tomlinson* [1899] 1 QB 909, the Comptroller-General had applied to the Attorney General under s. 95 of the Patents, Designs, and Trade Marks Act 1883, for directions as to whether it should hear the prosecutor in opposition to the grant of a patent. Section 95 provided that: “*The comptroller may, in any case of doubt or difficulty arising in the administration of any of the provisions of this Act, apply to either of the law officers for directions in the matter*”. The Attorney General directed that the prosecutor, who it was accepted “*had no interest in the subject-matter of the patent which was applied for*”, should not be heard. The prosecutor sought a writ of mandamus requiring the Comptroller to hear the prosecutor. The Divisional Court discharged a rule nisi obtained by the prosecutor asking for mandamus against the Comptroller. In upholding the Divisional Court’s judgment, AL Smith LJ held (at 913 – 915):

“We know that [the Attorney General] has had from the earliest times to perform high judicial functions which are left to his discretion to decide. For example, where a man who is tried for his life and convicted alleges that there is error on the record, he cannot take advantage of that error unless he obtains the fiat of the Attorney-General, and no Court in the kingdom has any controlling jurisdiction over him ... [T]he Attorney-General alone has power to enter a nolle prosequi, and that power is not subject to any control ...

In these circumstances an application for a prerogative writ of mandamus is made to compel the comptroller to do that which the Attorney-General has said he ought not to do. That alone is a sufficient ground on which the rule for the issue of this discretionary writ should be discharged.”

27. Shortly after *ex parte Tomlinson*, the House of Lords addressed the non-justiciability of the Attorney General’s PIFs in *London County Council v. Attorney General* [1902] AC 165 (“***LCC v. AG***”). In that case, the Attorney General had granted *fiat* for the commencement of proceedings, on the relation of omnibus proprietors, against the London County Council, contending that it was acting outside its powers in the way it had combined the running of tram and bus services and using ratepayer funds for the purpose. The action succeeded at first instance and on appeal; the further appeal to the House of Lords was dismissed. Lord Halsbury LC addressed *obiter* the court’s jurisdiction over the Attorney General’s decision to grant *fiat* for relator proceedings (recognising that the issue had not been raised before the House of Lords, but addressing

it because “*it seems to me to be very undesirable to throw any doubt upon the jurisdiction, or the independent exercise of it by the first law officer of the Crown*”, at 169). He held (with the agreement of Lords Macnaghten, Shand, Brampton, Robertson and Lindley) that the court could not inquire, when the Attorney General had granted *fiat* to the bringing of relator proceedings, into whether the public had a material interest in the subject matter of the suit (at 169):

“If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney General and not for the courts to determine whether he ought to initiate litigation in that respect or not ... the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other court. It is a question which the law of this country has made to reside exclusively in the Attorney-General”.

28. A§28 contends that *LCC v. AG* is distinguishable from the present facts because that case concerned the initiation of “*litigation*”, whereas commencing an application under s.13 of the 1988 Act “*is not “litigation” in any meaningful sense*”. That is, with respect, wrong. The Attorney General bringing an application under s.13 (or allowing someone to bring such an application under the Attorney General’s authority) is the commencement of court proceedings. The particular type of court proceedings is not a principled basis to distinguish the PIF under s. 13.

C.2 Gouriet

29. The House of Lords considered the matter again in *Gouriet*. The facts can be stated shortly, but for the purpose of this appeal it is important to trace the course of the legal argument carefully.
30. The dispute arose because, in January 1977, the Post Office Union had indicated their intention to boycott all mail to and from South Africa as a protest against apartheid. Mr Gouriet wished to bring proceedings asserting the unlawfulness of this action but, in those days, he could only do so as the relator of the Attorney General.
31. Mr Gouriet applied to the Attorney General for consent to act as plaintiff in relator proceedings for an injunction to restrain two named post office unions from soliciting or endeavouring to procure any person wilfully to detain or delay postal packets to South Africa. The Attorney General, having considered all the circumstances (including the

public interest), refused his consent. The plaintiff was refused an injunction at first instance on the basis that there was no jurisdiction to grant an injunction in circumstances where the Attorney General had refused to consent to a relator action. However, the Court of Appeal granted an interim injunction and adjourned the hearing to allow the Attorney General to be joined. Thereafter, the plaintiff amended his claim to seek a declaration that the Attorney General had, by refusing consent, acted improperly and wrongfully exercised his discretion. The Attorney General applied for that declaration to be struck out on the grounds that his discretion to consent or refuse consent to a person acting as plaintiff in relator proceedings was absolute and could not be reviewed by the courts.

32. There are two sets of judgments in the Court of Appeal [1977] QB 729 – the first relating to the interim injunction hearing before the Attorney General was joined (at 733), and the second thereafter (at 752). In the first set of judgments, the Court of Appeal expressed serious concern that an impending breach of the law would go unremedied if they did not grant an interim injunction (*per* Lord Denning MR, at 737E), but that it was a point of such importance that it could not be finally decided in the absence of the Attorney General (at 738E – F, *per* Lord Denning, at 739H, *per* Lawton LJ). The court therefore granted an interim injunction until the hearing could be resumed.
33. Following the renewed hearing, the Court of Appeal held, by a majority (Lawton and Ormrod LJJ, Lord Denning dissenting), that the court had no power (directly or indirectly) to review the decision of the Attorney General in refusing consent to relator proceedings. Nevertheless, the plaintiff could pursue his own claim for a declaratory judgment (supported where necessary by an interim injunction), but (again *per* the majority, Lord Denning dissenting) there was no jurisdiction to grant a final injunction in circumstances where the plaintiff was unable to bring relator proceedings.
34. Lawton LJ, having considered *LCC v. AG*, held at 768D: “*I accept the Courts have no jurisdiction over the discretion of the Attorney General as to when and when not he should seek to enforce the law having public consequences. The Courts cannot make him act if he does not wish to do so nor can they as of right call upon him to explain why he has not acted*”. However, Lawton LJ was keen to preserve a role for the court in rare cases to allow an individual to proceed where the Attorney General’s consent had been refused (at 771D – F):

“I accept the Attorney-General’s submissions, first, that considerations of public interest have to be taken into account in the discharge of his duties of law enforcement; secondly, that he has access to sources of information which are not, and could not, be available to the courts; and thirdly, that he may be in a better position to weigh the factors affecting public interest than the judges. What I cannot, and do not, accept is that he and he alone, in relation to law enforcement through the civil courts, is the sole arbiter of what is in the public interest ... I envisage that it will only be in the rare case in which, so far as the court can see, there is no discernible reason why threatened breaches of the criminal law should not be declared illegal and possibly restrained that the court will allow a plaintiff to proceed”.

35. Ormrod LJ held (at 772C):

“The Attorney General’s discretion is not subject to review by the Court; he is not answerable to the Court in this respect and like everyone else he cannot be compelled to act as a Plaintiff against his wish. There is therefore no clash or conflict in this respect between Parliament and the Court or between the Court and the Attorney General”.

36. Lord Denning in his dissenting judgment held (at 758E – F) that, when granting his consent, the Attorney General exercised an absolute discretion into which the courts would not enquire; but that when he refused consent, the court had the power to intervene indirectly by permitting an individual’s application to circumvent the relator regime. Lord Denning considered that the inability to challenge indirectly the Attorney General’s discretion would be “a direct challenge to the rule of law” (at 758G – H). He held (at 761H – 762A):

“Confronted with a powerful subject whom he feared to offend, [the Attorney General] could refuse his consent time and time again. Then that subject could disregard the law with impunity. It would indeed be above the law. This cannot be permitted.”

37. Having considered hypothetical examples of the Attorney General acting in a way that was corrupt, in bad faith, or taking the decision for partisan political reasons, Lord Denning directly addressed the issue of the reviewability of the Attorney General’s decision and held (at 759B):

“These instances are, of course, entirely hypothetical. I would not suggest for one moment that they existed here. But the possibility of them convinces me that his discretion to refuse is not absolute or unfettered. It can be reviewed by the courts. If he takes into account matters which he ought not to take into account, or fails to take into account matters which he ought to take into account, then his decision can be overridden by the courts. Not directly, but indirectly. If he misdirects himself in coming to his decision, the

court can say: "Very well then. If you do not give your consent, or your reasons, we will hear the complaint of this citizen without it"."

38. The Court of Appeal gave leave for the plaintiff to (re)amend his claim to seek declarations. He also amended his claim against the Attorney General to seek a declaration that, notwithstanding the Attorney General's refusal to allow relator proceedings, the plaintiff was entitled to proceed with his claim against the unions for declarations and interim relief. The unions and the Attorney General were then treated as having applied to the court to strike out the plaintiff's claims and such putative applications were dismissed, and leave was granted to appeal to the House of Lords.¹³
39. Before the House of Lords, the central question was whether the plaintiff had *locus standi* to apply for declarations in his private capacity, in circumstances where the Attorney General had refused consent to bring a relator action. In other words, the question was whether the plaintiff could employ the civil law to enforce the criminal law in the circumstances of that case. The plaintiff had, during the course of the proceedings before the Court of Appeal and "[a]fter substantial argument", conceded that he was not entitled to a declaration that the Attorney General had acted improperly and wrongfully exercised his discretion (473G-474A). Lord Wilberforce described the scope of the issues before the House of Lords as follows (at 475E – G):
- "There is now no longer a claim that the Attorney-General's refusal of consent to relator proceedings was improper or that it can be reviewed by the court. This issue, originally presented as one of great constitutional importance, has disappeared from the case. The importance remains, but the issue has vanished. The Attorney-General's decision is accepted as, in the courts, unassailable. The prerogatives of his office are no longer attacked. All that Mr. Gouriet now claims is that the refusal of the Attorney-General to act does not bar him from acting. The Attorney-General and the unions contend that it does."*
40. The House of Lords allowed the appeal of the unions and the Attorney General, and dismissed the plaintiff's appeal, reiterating that: only the Attorney General could sue on behalf of the public for the purpose of preventing public wrongs; the court's jurisdiction to declare public rights was only at the suit of the Attorney General; and there was accordingly no power to have granted interim injunctions in that case.

¹³ As described in the judgment of Lord Wilberforce at 474C – D.

41. In his judgment, Lord Wilberforce cited (at 478E – H) the judgment in *LCC v. AG* at 168 – 169 to support his view that the principle in that case applied equally where the consent was granted as where it was withheld: “*To limit this passage to a case where the Attorney-General has given his consent (as opposed to a case where he refuses consent) goes beyond legitimate distinction ... It is the decision on the public interest that is binding whichever direction that takes*”. He rejected the suggestion that the Attorney General’s role in relator actions was only to “*filter out*” vexatious and frivolous proceedings”: “*there is no need for the Attorney-General to do what is well within the power of the court. On the contrary he has the right, and the duty, to consider the public interest generally and widely*”.

42. Lord Wilberforce focused on the constitutional allocation of the public interest decision-making to the Attorney General. He held (at 481A, F–G, 482E):

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

[T]o apply to the court for an injunction against the threat of a criminal offence, may involve a decision of policy with which conflicting considerations may enter. Will the law best be served by preventive action? Will the grant of an injunction exacerbate the situation? (Very relevant this in industrial disputes.) Is the injunction likely to be effective or may it be futile? Will it be better to make it clear that the law will be enforced by prosecution and to appeal to the law-abiding instincts, negotiations and moderate leadership, rather than provoke people on the road to martyrdom? All these matters ... point to the matter as one essentially for the Attorney-General’s preliminary discretion ...

The decisions to be made as to the public interest are not such as courts are fitted or equipped to make. The very fact that, as the present case very well shows, decisions are of the type to attract political criticism and controversy, shows that they are outside the range of discretionary problems which the courts can resolve. Judges are equipped to find legal rights and administer, on well-known principles, discretionary remedies. These matters are widely outside those areas.”

43. Viscount Dilhorne (himself a former Attorney General) held (at 487H):

“The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a nolle prosequi. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the

exercise of these powers he is not subject to direction by his ministerial colleagues or to control and supervision by the courts.”

44. Viscount Dilhorne noted support for this proposition in LCC v. AG, and held (at 488F): “*Although obiter, they nevertheless have great authority and in my opinion the view that refusal of consent to a relator action is an exception to the general rule and is subject to review by the courts must be rejected.*” Viscount Dilhorne also rejected the suggestion that the Attorney General could refuse consent to the institution of a relator action only if it is “*frivolous, vexatious or oppressive*”: 488H – 489E. He further held at 494H – 495B:

“[W]hen the Attorney-General gives his consent to a relator action, he is enabling an action to be brought which an individual alone could not bring. When he refuses his consent, he is not denying the right of any individual and barring his access to the courts for the courts have no jurisdiction to entertain a claim by an individual whose only interest is as a member of the public in relation to a public right. Consequently, any suggestions that his refusal constitutes a challenge to the rule of law appears to me to be entirely misconceived, and though views may differ as to where the balance of public interest lies, it should not be lightly assumed that his refusal of consent in a particular case was unjustified and not grounded on considerations of public interest.”

45. Lord Diplock, at 500D – E, said that he agreed with Lord Wilberforce and Viscount Dilhorne.
46. Lord Edmund-Davies noted the differences between the majority in the Court of Appeal and Lord Denning, and said this at 505E – 506D:

“it is difficult to understand what possible basis there can be for holding that the courts cannot investigate the propriety of the Attorney-General's saying “Yes,” but that they are free to scrutinise and adjudicate upon the propriety of his saying “No.” And the point was long ago authoritatively dealt with in London County Council v. Attorney-General [1902] A.C. 165 ...

Lord Denning M.R. was unfortunately mistaken in his view that Lord Halsbury L.C. had in mind only cases where the Attorney-General had granted consent ... Nor is this the only decision on the matter, for, in relation to the closely analogous topic of the refusal of the Attorney-General's fiat to prosecute in criminal matters Lord Campbell C.J. held in Ex parte Newton, 4 E. & B. 869 ... that the courts have no jurisdiction to review the Attorney-General's decision.”

47. Lord Edmund-Davies held that “*the Attorney-General's discretion is absolute and non-reviewable*” (512F) and noted multifarious reasons in the public interest which may have

motivated the Attorney General's decision as highlighting "*the undesirability of making the matter one of disputation in the courts, instead of in Parliament*" (512E). He considered that the Court of Appeal had thus paid mere "*lip-service ... to the proposition that the Attorney-General's exercise of his discretion cannot be reviewed by the courts*" (512E).

48. Lord Fraser affirmed the majority of the Court of Appeal's understanding that "*the courts have no jurisdiction over the discretion of the Attorney-General whether he exercises it by giving or by withholding consent to relator proceedings*" (518H). He explained (at 523G – 524E):

"It seems to me entirely appropriate that responsibility for deciding whether to initiate preventive proceedings for injunction or declaration in the public interest should be vested in a public officer, and for historical reasons that officer is the Attorney-General. It is well established that he is not bound to prosecute in every case where there is sufficient evidence, but that when a question of public policy may be involved the Attorney-General has the duty of deciding whether prosecution would be in the public interest, see the statement by Sir Hartley Shawcross in 1951 It seems even more necessary that similar consideration should be given to the public interest before initiating preventive procedure for injunction or declaration. Enforcement of the criminal law is of course a very important public interest, but it is not the only one, and may not always be the predominant one. There may be even more important reasons of public policy why such procedure should not be taken at a particular moment, and it must be proper for the Attorney-General (acting of course not for party political advantage) to have regard to them. He may have information that there is a good prospect of averting the threatened illegal conduct by negotiation. Or he may know that the time would be particularly inopportune for a confrontation. Or he may regard it as essential to leave the way clear for subsequent prosecution before a jury. The information before him may be confidential and, even if it is not, it may not be widely available to the public. For reasons of that sort I would be against stretching the law to allow a member of the public to launch preventive proceedings without the consent of the Attorney-General. If the Attorney-General were to commit a serious error of judgment by withholding consent to relator proceedings in a case where he ought to have given it, the remedy must in my opinion lie in the political field by enforcing his responsibility to Parliament and not in the legal field through the courts. That is appropriate because his error would not be an error of law but would be one of political judgment, using the expression of course not in a party sense but in the sense of weighing the relative importance of different aspects of the public interest. Such matters are not appropriate for decision in the courts."

C.3 Authorities subsequent to *Gouriet*

49. In *R v. Attorney General, ex parte Edey* (26 February 1992, unrep) (“*ex parte Edey*”), the Court of Appeal considered a renewed application for permission to bring JR proceedings of the Attorney General’s refusal to prosecute shops that were opening on Sunday in defiance of the Sunday trading prohibition then in force. The Attorney General had made an announcement in Parliament, recognising the burdens faced by local authorities which seek to enforce the law through civil injunctions, and acknowledging the uncertainty about the compliance with European Community law of the Sunday trading restriction. The Attorney General announced that he had “*decided not to intervene*”. The applicant sought JR of that decision, and sought to compel the Attorney General to commence proceedings prosecuting or applying for injunctions against those in breach. Having referred to the Court of Appeal’s decision in *Gouriet*, Parker LJ (with whom McCowan LJ and Sir David Croom-Johnson agreed) held:

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

Mr Edey submits that puts the Attorney-General above the law and that nobody in this country is above the law. With the second of those propositions I readily concur. With the first I find myself in total disagreement. The Attorney-General’s position is that he has a discretion. It is his discretion and this court cannot order him to exercise his discretion in any particular way.”

50. The question of whether there could be JR of the Attorney General’s refusal of *fiat* under s. 13 of the 1988 Act was considered at first instance by Popplewell J (as he then was) in *R v. Attorney General, ex parte Ferrante* [1994] Lexis Citation 4482 (“*Ferrante*”). The claimant sought to distinguish *Gouriet* and *LCC v. AG*, including on the grounds “*[f]irstly that they were concerned with the exercise of prerogative rather than statutory power and secondly that the modern judicial review jurisdiction has developed in such a way as to enable the Courts to review some prerogative powers. In any event *Gouriet* was not concerned with the exercise of a particular statutory power*”. Popplewell J also considered *Council of Civil Service Unions v. Minister for the Civil Service* [1985] 1 AC 374 (“*CCSU*”), in which Lord Scarman held (at 407):

“the law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which

prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power”.

51. Popplewell J noted that, in light of *R v. Greater Manchester Coroner, ex parte Tal* [1985] QB 67 (“*ex parte Tal*”), there could be JR of a coroner’s decision (without needing to show that there was an error of law within the jurisdiction on the face of the record). Popplewell J held in that regard that:

“It is accepted that the decision in Tal in no sense diminishes the important public function of the Attorney General under s 13 of the 1988 Act. But what it does do is to illustrate the Attorney General does not act under that section exclusively as guardian of the public interest. That does not seem to me however to be of any material assistance to the Court. Parliament must have intended the Attorney General to have a continued role by entrusting him with the authority to authorise the application. It is not without significance that although it is accepted that the Court has power judicially to review the decision of a Coroner in the light of Tal, nevertheless subsequent to that decision and with the effect of judicial review now being more widely understood it nevertheless reenacted s 13 in the same terms as s 6 of the Coroners Act 1887.”

52. Popplewell J identified nine propositions from the authorities:

- “(1) Gourié is of general application and is not limited to relator actions.*
- (2) The decision whether the power of the Attorney General is immune from review does not depend upon the source of those powers but on their character. Arguments relating to the prerogative and statutory duties are sterile.*
- (3) The Attorney General is acting as guardian of the public interest in applications under s 13 of the Coroners' Act.*
- (4) The fact that he is no longer the exclusive guardian of the public interest is irrelevant. His continued inclusion as a necessary element in the re-hearing of an inquest makes that clear.*
- (5) The fact that a local authority exercising similar powers is subject to judicial review though logically compelling is not a reason for making the Attorney General so subject.*
- (6) The question of whether the decision is amenable to judicial process depends on the nature and subject matter.*
- (7) It is for the Courts to decide on a case by case basis whether the matter in question is reviewable or not.*
- (8) The Attorney General's consent is required for a wide variety of litigation. Thus in the criminal law in relation to corruption, explosive substances, official secrets, Public order act offences, racial hatred offences, proceeding*

under the Contempt of Court Act 1981 s 7 power to enter a nolle prosequi in civil law the power to make a litigant a vexatious litigant.

(9) These are only some of the situations in which Parliament has imposed upon the Attorney General, the right as guardian of the public interest either himself to bring the proceedings or to give authority for proceedings to be brought. These examples are of a similar nature; which involve or may involve questions of policy which it is for Parliament and not for the Courts to assess.

It seems to me that if the principle in Gouriet is now to be treated as no longer good law in relation to the Attorney Generals' powers it must be for a higher court than me so to say. Accordingly I hold that the Court has no jurisdiction to judicially review the Attorney General's refusal to give authority under s 13 of the Coroners' Act 1988."

53. Popplewell J nevertheless proceeded *obiter* to consider the arguments raised by the claimant as pleaded (which were pursued on grounds of rationality, legal merits and absence of reasons), and held that: (i) the Attorney General had applied the proper test; (ii) he saw no reason to criticise the Attorney General's decision as irrational or perverse; and (iii) the absence of reasons no longer affected the issue, and he would not in any event have considered it appropriate to exercise a discretion to quash. Accordingly, Popplewell J dismissed the application for JR.
54. Popplewell J's judgment was appealed to the Court of Appeal, which held that it was unnecessary to decide the question of reviewability, in circumstances where the matter fell to be dismissed on its merits in any event: [1995] Lexis Citation 3540.
55. As to the Appellant's submissions on Ferrante (A§§66 – 70, §§130 – 132):
 - 55.1. The Appellant contends that the first proposition of Popplewell J's judgment was *per incuriam*, because R v. HM Coroner for North Northumberland, ex parte Armstrong (1987) 151 JP 773 ("ex parte Armstrong") was not cited to Popplewell J and Popplewell J's first proposition "*cannot stand with the reasoning of Woolf LJ*": A§67. However, that authority is of no relevance. Ex parte Armstrong, which preceded the 1988 Act, concerned a judicial review against a coroner. The Attorney General's *fiat* had not been requested because the applicant was legally aided, and the Legal Aid Area Office had suggested that legal aid might not be available for an application under the Coroners Act 1887 because it involved "*a Relator action for which Legal Aid is expressly excepted by Part II of sch 1 to the Legal Aid Act 1974*". It was in that context that Woolf LJ held that proceedings under the

Coroners Act 1887 “are not relator proceedings as that term is normally used” and encouraged the Law Society to grant legal aid for the application for *fiat* from the Attorney General if it were otherwise minded to provide legal aid for a judicial review. That conclusion has nothing to do with Popplewell J’s (correct) conclusion that the reasoning in *Gouriet* was not limited to relator actions such as were in issue on the facts of that case, but the reasoning would equally extend to an application under s. 13 of the 1988 Act.

- 55.2. The Appellant seeks to obtain support for his position on Ground 2 on the basis that the first instance and appeal decisions of *Ferrante* considered the claim on its merits as pleaded, rather than by some more restricted test of reviewability: A§§130 – 132. But this is uninformative. Neither the High Court nor the Court of Appeal sought to determine the test of reviewability if the matter were justiciable. The point made, both at first instance and on appeal, was that, even taken at its highest, the claim was unmeritorious. The same approach could have been taken by the High Court in a permission decision in the present case.
56. Subsequent to *Ferrante*, the courts have continued to recognise the non-justiciability of PIFs exercised by Law Officers. In *R v. Solicitor General, ex parte Taylor* (1996) 8 Admin LR 206 (“*ex parte Taylor*”), a challenge was made to the Attorney General’s decision not to initiate contempt proceedings. The claimant argued that the case was distinguishable from *Gouriet*, on the basis that it was a challenge to a decision not to prosecute on the basis of a perceived insufficiency of evidence, rather than broader policy considerations. Stuart-Smith LJ (with whom Butterfield J agreed on the question of jurisdiction) rejected that argument (at 218 – 219):

“I cannot accept these submissions. The authorities to which I have referred which lay down the rules in relation to the Attorney-General, point to his unique constitutional position. If his office was invented by statute tomorrow without the weight of precedent as to his position, there would be great force in Mr Robertson's submission, but they cannot override the clearly established position. Moreover, the fact that the reason for the non-reviewability of the decision relates to the policy considerations, does not mean that where such considerations do not arise in a particular case, that decision is exceptionally reviewable. There is no logic in that argument and it would be difficult, if not impossible, to apply in practice. ...

*Parliament must be taken to know the law as stated in *Gouriet* and the previous authorities; and if it had intended the Attorney-General's discretion to be reviewable by this court in this instance, in my view it would have said so ...*

Although the scope of the actual decision of the House of Lords in Gouriet has been much restricted by the introduction of judicial review, which now enables an individual with a specific interest to challenge unlawfulness directly, so that it is no longer necessary to have recourse to a relator action, what the members of the House of Lords said about this constitutional position of the Attorney-General's vis-à-vis the court is not affected by this change.

The fact that the source of this power is statutory and not the prerogative is also not in point. It is now well established that the source of power is immaterial, it is the nature of it is that it is important, see the CCSU case.

In my judgment ex parte Edey is indistinguishable from the present case and is binding upon us

... I also respectfully agree with Mr Justice Popplewell's decision in ex parte Ferrante and adopt the nine propositions which are set out ...

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

57. A§54 seeks to distinguish ex parte Taylor on the basis that "s.13(1)(b) does not concern the criminal law, prosecution, or the enforcement of public rights". But the Divisional Court's reasoning in ex parte Taylor was not tied to the criminal nature of contempt proceedings. And the Appellant's characterisation of 'public rights' is vague, and (even if it offered a principled dividing line, which it does not) it is unclear why it should not apply equally to the public interest in inquests – see e.g. the Appellant's own reference to "the public interest in accurate findings about death" (A§62).
58. The High Court in Northern Ireland has indicated a potential willingness to take a different route regarding the non-justiciability question as far as it concerns a different office-holder, the Attorney General of Northern Ireland ("AGNI"), and a different statutory power that the AGNI has to direct an inquest under s. 14 of the Coroners Act (Northern Ireland) 1959.¹⁴ The Appellant refers at A§134 to two JR permission decisions – Re Johnstone's (Dorothy) Application for Leave [2016] NIQB 56; and Mulhern's (Francis) Application [2016] NIQB 59.¹⁵ In the former case, the Court found the common law grounds of review to be unarguable; permission was granted only for the

¹⁴ The role of the AGNI is held concurrently by the Attorney General of England and Wales: Justice (Northern Ireland) Act 2002, s. 27(1). The AGNI is disqualified from being a member of the Northern Ireland Assembly (s. 23(7)), but may participate in a non-voting capacity in its proceedings to the extent permitted by its standing orders (s. 25(1)).

¹⁵ The Attorney General had drawn attention to these authorities at first instance, to ensure that the court was given a complete picture. The decisions (being JR permission decisions) cannot permissibly be cited under the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 §§6.1 and 6.2.

Convention ground. In the latter case, too, permission for JR was refused on the basis that no arguable ground for review had been identified. These decisions, being permission decisions, about a different statutory provision, and in respect of the AGNI (in respect of whom there are potentially different constitutional considerations), advance the present matter no further.

D. JUSTICIABILITY AND MODIFIED STANDARD OF REVIEW

59. As already noted in paragraph 50 above, in CCSU the House of Lords held that even the Crown's prerogative powers were amenable to review, provided that the particular "subject matter" before it is a matter "upon which the court can adjudicate" (*per* Lord Scarman at 407B). There will be some areas where decisions are not 'justiciable' because they are not "amenable to the judicial process" (at 418B *per* Lord Roskill). This is a matter which in turn depends on the nature and subject matter of the power, rather than its source (or the identity of the decision-maker) (at 407F).
60. In R v. DPP, ex parte Kebilene [2000] 2 AC 326, the House of Lords considered an appeal in relation to a decision of the Director of Public Prosecutions ("DPP"), who – having assessed the matter in the public interest – consented to prosecution of the applicants. A central issue was whether the DPP had erred in law in the decision, in the public interest, whether to consent to the prosecutions. The House of Lords considered the circumstances in which it would be appropriate to permit JR of prosecutorial decisions of the DPP (including in light of s. 29(3) of the Senior Courts Act 1981 providing that the High Court would not have jurisdiction in matters relating to trial on indictment in the Crown Court).
61. Lord Steyn held (371C – G, Lord Slynn and Lord Cooke agreeing):
- "Looking at the matter more broadly there is also an implausibility at the heart of the applicants' case. They seek judicial review on the ground that the Director's consent involves an error of law, namely that the prosecution is compatible with article 6(2) of the Convention. But the Director may sometimes not have a concluded view of any kind. But he may none the less be persuaded that, despite some uncertainty about the law, a prosecution is justified as being in the public interest. There could then be no question of reviewing his decision for error of law. So far as Laws L.J. held, at p. 352F-G, that the Director is at this stage legally bound to form a view on the issue of compatibility I would respectfully disagree. And, if he is not so bound, why should his decision to consent to a prosecution be amenable to judicial review if he arrives at a firm view? After all, such a matter ought not to*

depend on the degree of confidence in the legal position of the Director or his counsel. Moreover, it would be odd to allow the possibility of judicial review of the Director's decision to prosecute to depend on the error being blatant and obvious. That excludes the case where this threshold test is not met. It is difficult to see on what principle such a distinction rests. It gives the appearance of introducing into our public law categories of illegality.

My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review. And I would further rule that the present case falls on the wrong side of that line."

62. Lord Hope also agreed (at 376B) that:

"for all the reasons which my noble and learned friend, Lord Steyn has given, there are strong grounds for the view that, in the absence of dishonesty, bad faith or some other exceptional circumstance, the Director's decisions to consent or not to consent to a prosecution are not amenable to judicial review".

63. Lord Hobhouse's judgment on this point had a greater focus on the implications of the ouster in s. 29(3) (at 394C-D):

"If the substance of what it is sought to review is the answer to some issue between the prosecution and defence arising during a trial on indictment, that issue may not be made the subject of judicial review proceedings. The issue is within the jurisdiction of the Crown Court judge and (subject to appeal) it is for him to decide it. The argument is that the issue will also affect the assessment of the Director whether to continue the proceedings (and would have affected his decision whether to institute or give his consent to the institution of the proceedings in the first place). Obviously if the Director is acting in bad faith or irresponsibly (which is not alleged in the present case), a cavalier attitude to defects in the criminal proceedings might give rise to scope for such an argument. But all that can be said here is that, having taken competent independent advice upon an issue raised in the course of the trial in the Crown Court, the Director has advanced submissions with which both the Crown Court judge and the Divisional Court have disagreed. This is not infrequently the fate of litigants. It does not provide a basis for reviewing the decision of the litigator when one is precluded from reviewing the decision of the court."

64. The principle established in Kebilene was reflected legislatively in the Justice and Security (Northern Ireland) Act 2007, s. 7, which provides that no court may entertain proceedings questioning any decision of the DPP for Northern Ireland in relation to the issue of certificates providing for trial on indictment without a jury, except on the grounds of "(a) dishonesty, (b) bad faith, or (c) other exceptional circumstances (including in particular exceptional circumstances relating to lack of jurisdiction or error of law)".

65. The availability of JR against the DPP of Mauritius came before the Privy Council in *Mohit v. DPP of Mauritius* [2006] UKPC 20, [2006] 1 WLR 3343 (“*Mohit*”). The appellant had sought to bring a private prosecution against a senior politician in Mauritius. On each occasion, the DPP filed a *nolle prosequi*. The Supreme Court of Mauritius held that the DPP’s decisions to file a *nolle prosequi*, or not to prosecute, were not amenable to JR.
66. The Board, recommending that the appeal be allowed, held that the DPP of Mauritius’s power to file a *nolle prosequi* was amenable to JR. Lord Bingham observed in his judgment for the Board that, where the DPP intervenes to stop a prosecution, the complainant may be left without a remedy, whether in tort or by a private prosecution. To protect against such a lacuna, it was proper for the court to have the jurisdiction to review whether the decision was made in a lawful, proper or rational manner, but not to substitute its own administrative decision for the DPP’s. However, Lord Bingham considered that the courts must be “very sparing” and that “*the threshold of a successful challenge is a high one*”. The Board held (emphasis added):

“13. ... But the Board is not persuaded by the court's reasons for holding that the DPP's decisions to file a *nolle prosequi* or not to prosecute are not amenable to judicial review. The complainant may, as in this case, have no remedy against any suspected tortfeasor. The alternative course of resort to private prosecution is not an available option where it is a private prosecution which the DPP has intervened to stop. Recognition of a right to challenge the DPP's decision does not involve the courts in substituting their own administrative decision for his: where grounds for challenging the DPP's decision are made out, it involves the courts in requiring the decision to be made again in (as the case may be) a lawful, proper or rational manner.

14. In the *Gouriet* case [1978] AC 435 the House of Lords unanimously held that only the Attorney General could sue on behalf of the public in civil proceedings and that his decision to withhold consent to the bringing of proceedings in his name was immune from challenge in the courts ... Unless reviewed or modified in the light of the later decision of the House in the *GCHQ* case ... this remains a binding statement of English law on cases covered by it. It must, however, be borne in mind that the power in question was a non-statutory power deriving from the royal prerogative. It was moreover a power exercised by a minister answerable to Parliament, a matter recognised as of significance by Lord Edmund-Davies (p 512) and Lord Fraser of Tullybelton (p 524), as it had been by Cockburn CJ in the leading case of *R v. Allen* (1862) 1 B & S 850 , 855, when he spoke of the Attorney General as “responsible for his acts before the great tribunal of this country, the High Court of Parliament”. Where the Attorney General's power derives from a statutory source, as in giving his consent to prosecutions requiring such consent, Professor Edwards has noted ... that

“Since the source of the discretionary power [to grant or refuse consent] rests in statute law there are no inherent constitutional objections to the jurisdiction of the courts being invoked”. Much more closely analogous to the position of the Mauritian DPP than the English Attorney General is the English DPP, and his prosecuting decisions have not been held to be immune from review, as mentioned below. ...

18. ... But the establishment in the Constitution of the office of DPP and the assignment to him and him alone of the powers listed in section 72(3) of the Constitution; the wide range of factors relating to available evidence, the public interest and perhaps other matters which he may properly take into account; and, in some cases, the difficulty or undesirability of explaining his decisions: these factors necessarily mean that the threshold of a successful challenge is a high one. It is, however, one thing to conclude that the courts must be very sparing in their grant of relief to those seeking to challenge the DPP's decisions not to prosecute or to discontinue a prosecution, and quite another to hold that such decisions are immune from any review at all, as a line of English authority relating to the DPP and other prosecuting authorities has shown. ...

21. The DPP cannot, in the opinion of the Board, rely on the immunity enjoyed, at any rate in the past, by the English Attorney General when exercising the prerogative power to enter a *nolle prosequi* since he is not the Attorney General, he is not (like the Attorney General) answerable to Parliament, he has no prerogative power, his power derives from the Constitution and the Constitution does not use the language of *nolle prosequi*.”

67. *R (Corner House) v. Director of the SFO* [2008] UKHL 60, [2009] 1 AC 756 (“**Corner House**”) concerned a challenge to the power of the Director of the Serious Fraud Office to abandon an investigation into bribery and corruption allegedly on the basis of a threat by the Kingdom of Saudi Arabia to cancel a contract for the purchase of British aircraft and to withdraw security cooperation with the UK. The reasons for adopting a restrictive approach to interfering with prosecutorial decisions were summarised by Lord Bingham at [30] – [32]:

“The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised ... “the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.” Thirdly, the powers are conferred in very broad and unprescriptive terms.

Of course, and this again is uncontroversial, the discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to

promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice. In the present case, the claimants have not sought to impugn the Director's good faith and honesty in any way."

68. In R (L) v. DPP [2013] EWHC 1752 (Admin), the Divisional Court (President of the QBD, with whom Simon J agreed) summarised the law as to challenges to the DPP in the following terms (at [3]-[6], emphasis added):

"it was made clear in [R v. DPP ex parte C [1995] 1 Cr App R 136 at 140-141] by Kennedy LJ that the grounds upon which challenge can be made are very narrow: (1) because there has been some unlawful policy; (2) because the Director has failed to act in accordance with his own set policy; or (3) because the decision was perverse; that is to say it is a decision that no reasonable prosecutor could have reached.

In subsequent decisions ... the courts have indicated that these applications will succeed only in very rare cases.

That is for the good and sound constitutional reason that decisions to prosecute are entrusted under our constitution to the prosecuting authorities, in this case the Director of Public Prosecutions and those who work under him in the Crown Prosecution Service.

It is very important that the constitutional position of the Crown Prosecution Service as an independent decision maker is respected and recognised. The courts have therefore adopted this very strict self denying ordinance. They will, of course, put right cases where an unlawful policy has been adopted or where there has been a failure to follow policy, or where the decisions are perverse. But each of those is likely to arise only in exceptionally rare circumstances and that must be born[e] in mind."

E. DEPARTING FROM HOUSE OF LORDS AUTHORITY

69. The Appellant did not ask the court to depart from a decision of the House of Lords in his application for permission to appeal, but he has raised the issue in his written case as Ground 1B. The Attorney General recognises that the court may wish to consider whether it is right to depart from Gouriet in the context of these proceedings.
70. The court will be familiar with the test laid down in the House of Lords Practice Statement (HL: Judicial Precedent) [1966] 1 WLR 1234, and its application in this court Austin v. Mayor and Burgesses of the London Borough of Southwark [2010] UKSC 28, [2011] 1 AC 355, at [25].

71. In *Knauer v. Ministry of Justice* [2016] UKSC 9, [2016] AC 908, the court (Lord Neuberger and Lady Hale) discussed the importance of certainty in the law and the role of precedent in the lower courts at [21], and then said this:

*“22. ... it is well established that this court should not refuse to follow an earlier decision of this court or the House of Lords merely because we would have decided it differently: see per Lord Bingham of Cornhill in *Horton v Sadler* [2007] 1 AC 307, para 29. More than that is required, not least because of the desirability of certainty in the law, as just discussed. However, as Lord Bingham said in the same passage, while “former decisions of the House are normally binding ... too rigid adherence to precedent may lead to injustice in a particular case and unduly restrict the development of the law”.*

*23. This court should be very circumspect before accepting an invitation to invoke the 1966 Practice Statement. However, we have no hesitation in concluding that we ought to do so in the present case. At least in the current legal climate, the application of the reasoning in the two House of Lords decisions on the point at issue is illogical and their application also results in unfair outcomes. Further, this has encouraged “courts ... to distinguish them on inadequate grounds” (to quote Lord Hoffmann in *A v Hoare* [2008] AC 844, para 25), which means that certainty and consistency are being undermined. Above all, the fact that there has been a material change in the relevant legal landscape since the earlier decisions, namely the decision in *Wells v Wells* [1999] 1 AC 345 and the adoption of the Ogden tables, when taken with the other factors just mentioned, gives rise to an overwhelming case for changing the law.”*

72. At A§§88 – 89, the Appellant sets out a four-part test, said to represent criteria applied by this court in determining whether to depart from a previous decision. The four factors on which the Appellant focuses are not an accurate or comprehensive statement of when this court will invoke the Practice Direction. For example, the Appellant cites *Knauer* at [23] for the proposition that this court will consider whether the earlier authority is “outdated”, but that word is not used in the judgment. These points are considered further in Section F.3 below in the context of Ground 1B.

F. THE ATTORNEY GENERAL’S SUBMISSIONS

F.1 Preliminary

73. The Attorney General offers two preliminary observations.
74. First, the starting point for any analysis is to recognise that, whether or not the court ultimately decides that the exercise of power under s. 13 of the 1988 Act is justiciable, the same answer must be given irrespective of whether one is dealing with a grant or a

refusal of consent by the Attorney General. For the reasons discussed in the case-law above, it would be unprincipled to hold that a decision refusing a third party authority to bring an application was reviewable, while holding that a decision granting a third party authority to bring an application to the High Court remains unreviewable. The relevant questions, in either case, are: whether it is constitutionally appropriate for the court to review the decision; whether the court has the appropriate tools to do so; and whether it is right to depart from precedent, if that is what the court's ruling would entail.

75. Second, this court is strongly urged to answer only the question in hand, and not to express any views on whether any of the Attorney General's other PIFs may be amenable to JR. As noted in points (6) and (7) of Popplewell's 9 propositions in *Ferrante*, quoted in paragraph 52 above, the question whether the exercise of any individual power is justiciable must always be answered by reference to the specific nature of the power and the purpose for which it was conferred. The powers exercisable by the Attorney General in the discharge of his PIFs are many and varied, ranging from criminal law to charities. The court is, with respect, not equipped in this appeal to express a properly informed view on the considerations that may come into play in other circumstances. Furthermore, there is always a risk of unintended consequences where the court expresses views on a matter that does not fall within the confines of the issue that needs to be decided in order to dispose of the appeal in hand. For that reason, the Attorney General has focused on the principles as they apply to s. 13 of the 1988 Act. As noted in paragraph 6.2 above, the Appellant and Respondent are *ad idem* on this point.
76. In determining the issues that arise, the Attorney General invites the court:
- 76.1. to hold that the Divisional Court was right to conclude that *Gouriet* is authority for the proposition that the exercise of the Attorney General's discretion under s. 13 of the 1988 Act was non-justiciable;
- 76.2. to conclude that it is not right to depart from that approach, in light of the good reasons why this PIF's exercise has been found not to be justiciable;
- 76.3. alternatively, insofar as the court decides that an exercise of the Attorney General's power under s. 13 of the 1988 Act is justiciable, to make clear that the courts must in practice approach any review in a highly deferential manner akin to that laid down in *Corner House*.

F.2 Ground 1A: *Gouriet* is authority for the non-reviewability of s. 13 of the 1988 Act

77. The Divisional Court was right to conclude that *Gouriet* is authority that the Attorney General's refusal of *fiat* is non-justiciable. This conclusion is relevant for the present appeal because it means that the Supreme Court is required to consider the test for departing from House of Lords authority.
78. As appears from the summary of *Gouriet* above, the non-justiciability of the Attorney General's decision not to grant *fiat* to the bringing of a relator action was a lynchpin to the reasoning of various speeches in the House of Lords; indeed, it was considered necessary in their judgments to reject Lord Denning's dissenting opinion because of the encroachment it suggested upon that principle. Even though that question in its pure form had been conceded before the issue reached the House of Lords, its importance remained in the speeches given by the Law Lords. The Attorney General endorses the Divisional Court's analysis at [21] – [25] and [50] of its judgment in this case. The Appellant's argument (A§§29 – 30) that the *ratio* about reviewability of the Attorney General's public interest decision-making is found only in the Court of Appeal, and not the House of Lords, is wrong.¹⁶
79. The issue that arises under s. 13 of the 1988 Act is structurally the same as the issue that arose in *Gouriet*. In the present case, the question is whether the Attorney General will grant *fiat* to permit the Appellant to bring an application before the High Court seeking, in the (putative) public interest, to re-open an inquest. In *Gouriet*, the question was whether the Attorney General would grant *fiat* to permit Mr Gouriet to bring a relator action before the court seeking, in the (putative) public interest, to prevent a threatened breach of the law.
80. The Divisional Court in these proceedings at [56] rightly drew a parallel with *ex parte Taylor*, noting the core common features that: (i) the functions are conferred specifically

¹⁶ The Appellant's analysis of the Court of Appeal's judgment is at A§29. The Appellant contends that Lawton LJ distinguished the facts of *Gouriet* from *Padfield*, and then submits that "*this appeal is brought*" upon "*the Padfield line*". However: (i) the suggestion that it is necessary to focus on the Court of Appeal rather than the House of Lords is wrong; (ii) the Appellant appears to have misunderstood Lawton LJ's speech at 768D – G, where Lawton LJ was specifically saying that the court could not in this context entertain a challenge for acting in excess of powers such as was pursued in *Padfield*; and (iii) it is in any event wrong to say that the Appellant's challenge here is brought on *Padfield* grounds.

and only on the Attorney General; and (ii) the functions are ‘gatekeeping functions’: *i.e.* a particular form of proceedings are available only with the consent of the Attorney General. Those features apply equally to Gouriet, *ex parte Taylor*, and the present case.

81. The fact that the principle underlying Gouriet is not exclusively confined to relator actions has been recognised by a long line of authority:

81.1. Popplewell J’s judgment in Ferrante held that Gouriet was binding authority that the Attorney General’s refusal of fiat under s. 13 of the 1988 Act was not justiciable.

81.2. Lord Bingham in Mohit recognised the general application of Gouriet.

81.3. The Court of Appeal in *ex parte Edey* considered itself bound by Gouriet in respect of a challenge to the Attorney General not commencing prosecutorial proceedings.

82. As to the arguments raised by the Appellant in support of his contention that the authority of Gouriet is not applicable to the exercise of power under s. 13 of the 1988 Act:

82.1. A§§30 – 32 contends that the House of Lords’ decision was *obiter*. That is wrong for the reasons explained in paragraphs 78 – 79 above.

82.2. A§33 contends that the judgment was “*made against the background of the then prevailing law that prerogative powers were unreviewable*”. This is incorrect: it is answered in paragraphs 93 – 94 below.

82.3. A§§34 – 37 contends that s. 13(1)(b) is not a relator action, such that Gouriet does not apply in this context. The relevance of *ex parte Armstrong* has already been addressed in paragraph 55.1 above. The structural similarity between the Attorney General’s decision whether to consent to a member of the public bringing a relator action in the Attorney General’s name, and the decision whether to allow an application to be made under the Attorney General’s authority under s. 13, has been addressed at paragraph 79 above. There is no principled distinction to be drawn between this case and the matter that was being considered by the House of Lords in Gouriet. As acknowledged by the Appellant’s correction to A§29, the Appellant is in any event wrong to say that under s. 13(1) the Attorney General “*is not a party to the application*” – rather, the application is brought “*by or under the authority of*” the Attorney General: in the former case, the Attorney General is the applicant; and even where the Attorney General is not directly a party, the scope of the *fiat* granted constrains the grounds on which the applicant is permitted to bring the

application.¹⁷ At A§36, the Appellant contends that the similarity with *Gouriet* is “superficial” because “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” – but exactly the same reasoning applies here. Parliament has not conferred a general right to bring an application under s. 13, and the courts have no jurisdiction to entertain an application by a private individual without the Attorney General’s *fiat* at all.

83. For these reasons, allowing this appeal would involve a change in the law. The Appellant accordingly has to persuade this court that it is right to depart from existing House of Lords authority. That is the next topic.

F.3 Ground 1B: It is not right to depart from *Gouriet*

84. There are good reasons why the Attorney General’s decision whether to institute (or allow another to institute under her authority) an application under s. 13 of the 1988 Act should be non-justiciable.
85. **First**, Parliament has given the Attorney General a function to consider whether to commence proceedings under s. 13 of the 1988 Act (or to permit someone to commence proceedings under her authority). It might be thought to be surprising if the courts could mandate the Attorney General to exercise her discretion to initiate legal proceedings (or indeed to make an application, or permit an application to be made under her authority) – and to date the courts have held that they cannot do so.
86. **Second**, it is important to give appropriate weight to the unique position of the Attorney General. Parliament has decided that this public interest mandate should be bestowed specifically and only on the Attorney General. The function that falls to be exercised requires a conception of the public interest. Were this function not accorded to a person or body with a public interest mandate, it might risk a lacuna in enforcement and oversight – there will not always be a private interested party who seeks to enforce this concern before the courts. The Attorney General is in a “*unique constitutional position*” (*ex parte Taylor* at 218): her constitutional location, straddling politics and law, renders

¹⁷ E.g. in *Earl v. Her Majesty’s Senior Coroner for East Sussex* [2021] EWHC 3468 (Admin), at [84], the applicants’ allegation of bad faith, raised during the hearing of the s. 13 application, was held to be outside of the pleaded application which the Attorney General had authorised.

the Attorney General uniquely placed to interpret the public interest, and constraints on that decision have been found to lie in the area of political rather than legal accountability. This has been framed in the authorities in several ways:

- 86.1. The Attorney General is “*the appropriate public officer to represent the public interest in the administration of justice. In doing so he acts in constitutional theory on behalf of the Crown, as do Her Majesty's judges themselves; but he acts on behalf of the Crown as "the fountain of justice" and not in the exercise of its executive functions*”: Attorney General v. Times Newspapers [1974] AC 273 (HL) at 311 *per* Lord Diplock.
- 86.2. The Attorney General is best placed to understand and weigh the public interest considerations relevant to the discharge of her duties: Gouriet (CA) at 771C – G (Lawton LJ).
- 86.3. The Attorney General is entrusted with a role requiring an exercise of “*the right, and the duty, to consider the public interest generally and widely*”, which is her “*exclusive right*”: Gouriet (HL) at 478E – H, 481A (Lord Wilberforce); 500D, 502D (Lord Diplock); 519A (Lord Fraser).
- 86.4. The nature of an assessment of the public interest requires “*political judgment*” or “*questions of policy*”, which are properly for Parliament and not the court: Gouriet (HL) at 524C – D (Lord Fraser); Ferrante, point (9).
- 86.5. Albeit in the context of the DPP’s public interest decision-making, in Corner House the House of Lords referred with approval to the description given by the Supreme Court of Fiji in Matalulu v. Director of Public Prosecutions [2003] 4 LRC 712 of “*the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.*”
87. The Appellant’s rejection of this proposition is based on the flawed assumption that Parliament has specified the relevant justiciable standard in s. 13 itself, which the Attorney General is required to apply (see A§75). That is wrong for the reasons explained at paragraph 7.2 above.

88. **Third**, against the background of those factors, it would be surprising to allow the High Court (in exercise of its JR jurisdiction) to perform a supervisory function over the exercise by the Attorney General of his express statutory gatekeeper function (under s. 13) in relation to the High Court's statutory exercise of its supervisory function (also under s. 13) over coroners. Allowing JR challenges to the Attorney General's conception of the public interest would defeat the purpose of a gatekeeper power conferred specifically on the Attorney General under s. 13:
- 88.1. If the Attorney General brings the application or permits the application to be brought under his authority, then the High Court will consider that question for itself. It is then difficult to divine any constitutional purpose for the Attorney General's assessment of the public interest in permitting the application itself to be brought to be the subject of JR.
- 88.2. Likewise, where the Attorney General has considered the arguments the applicant would have wished to deploy before the High Court (or would have wished the Attorney General to deploy) in support of a substantive application to the reopen an inquest, and if the legislative purpose was to confer on the Attorney General that gatekeeper function by reference to his own assessment of the public interest, then it would serve only to defeat that purpose if judicial resources then had to be devoted to a challenge to the Attorney General's assessment that it was not in the public interest for the High Court to consider the application.
89. It is thus a critical aspect of the Attorney General's gatekeeper function that Parliament did not confer the ability to make a s. 13 application on any member of the public (*i.e.* any person who may have a sufficient interest in having an inquest being re-opened). Had Parliament wanted to create such a mechanism, it could and would have done so.
90. **Fourth**, while the Attorney General provides an important constitutional supervisory safeguard, her assessment of the public interest under s. 13 is not the only gateway to judicial supervision of coronial duties. The various other routes for judicial oversight are not directly relevant to the issue in the present case – but they are significant in demonstrating that upholding the Divisional Court's judgment would not result in any lacuna in judicial enforcement / supervision. For example, (i) if a coroner errs in law, then the coroner can be judicially reviewed: *ex parte Tal*; (ii) JR is also available for inquest-related decisions made in advance of the hearing and those relating to the actual

conduct of the proceedings: *De Smith's Judicial Review* (9th ed.) at §17-034, fn 120; and (iii) any alleged failure by the state to comply with the requirements of Article 2 ECHR, enforced domestically by virtue of the Human Rights Act 1998, can be challenged by proceedings against the relevant coroner or Secretary of State: see, for example, *Re Finucane* [2019] UKSC 7, [2019] HRLR 7, and *R (Maguire) v. HM Senior Coroner for Blackpool and Fylde* [2023] UKSC 20, [2025] AC 63.

91. **Fifth**, an analogy can usefully be drawn with the point made in *Gouriet*, at 494H – 495B: “*When he refuses his consent, he is not denying the right of any individual and barring his access to the courts for the courts have no jurisdiction to entertain a claim by an individual whose only interest is as a member of the public in relation to a public right*”. No one has an *a priori* legal right to apply for an inquest to be reopened; the right is conferred only by statute, and it is subject to the statutory regime, one feature of which is the requirement for Attorney General action or consent under s. 13 of the 1988 Act. Accordingly, it does not offend against the rule of law to hold the Attorney General’s power under s. 13 immune from JR.
92. The Appellant’s reasoning at A§§41 – 43 and 78, suggesting that the non-reviewability of the Attorney General’s decision offends the common law “*constitutional right of access to the courts*”, is thus misplaced. Not every individual has access to every right – Parliament can and does decide on whom it confers rights. The ability to bring an application under s. 13 is not a ‘right’ that has been generally conferred, and thus not an application which every private individual has a right to access to a court to litigate. (The Appellant’s reliance on *Tinnelly & Sons Ltd v. United Kingdom* (1999) 27 EHRR 249 is irrelevant even on the Appellant’s own case, recognising that there is no Article 6 issue engaged by an inquest. More fundamentally, the analogy falls apart because the Appellant has no right to an application under s. 13 being determined by the High Court.)
93. **Finally**, the reasons why the Attorney General’s decisions under s. 13 of the 1988 Act are non-justiciable have not been overtaken by the development of law in *CCSU*. The earlier authorities did not seek to justify non-justiciability by reference to the source of the Attorney General’s power in the Royal prerogative. Rather, it was the nature of the power, not its source, that was the key consideration in *Gouriet*. Nor is there any particular significance for justiciability in the fact that the power is statutory. As was summarised by Stuart-Smith LJ in *ex parte Taylor*: “*The fact that the source of this power*

is statutory and not the prerogative is also not in point. It is now well established that the source of power is immaterial, it is the nature of it is that it is important". That statement was endorsed by the Divisional Court in the present case at [53].

94. As to the Appellant's submissions on the *Practice Statement (Judicial Precedent)* (A§§87 – 102), as identified in paragraph 72 above, the Appellant's written case does not comprehensively, or even accurately, set out the test for when the court will consider it right to depart from a previous decision. Turning to the four points on which the Appellant relies:

94.1. First, the Appellant contends that "*Gouriet* was decided on the assumption that prerogative powers were unreviewable", which has now been overturned by *CCSU*, such that the House of Lord's judgment was based on an "outdated assumption". That is wrong for the reasons identified in paragraph 93 above. No part of the House of Lords' speeches in *Gouriet* was premised on the non-reviewability of the prerogative. While it is true that the Attorney General had submitted in argument that "there is a great deal of authority to support the proposition that the courts cannot review the exercise of prerogative powers" (at 446A), the Respondent's position was that the Attorney General's role in relator proceedings "was not an emanation of the prerogative" but "a role developed by the courts as a result of an historical and procedural accident" (458E, see also 462A). The speeches of their Lordships did not base their reasoning on these arguments. The reasoning of *Gouriet* was thus not undermined by *CCSU*.

94.2. Second, the Appellant contends that there would be an 'injustice' because "*the Appellant, whose brother was unlawfully killed, has no remedy in law if the AG applies the wrong legal test*". However, there was already an ECHR-compliant inquest into the Appellant's brother's death, which is the remedy provided by law (and there would equally be an entitlement to any remedial step if that inquest were not ECHR-compliant). The Appellant's argument reasons as if the Appellant has an unqualified right to the High Court considering whether there should be a further inquest. But, as addressed in paragraphs 91 – 92 above, there is no general entitlement to the Attorney General making or authorising an application under s.13 of the 1988 Act.

- 94.3. Third, the Appellant contends that the “*decision has been the subject of significant criticism*”. This is not a relevant or useful test for determining whether to depart from established precedent. In any event, the authority the Appellant cites – R v. Jogee [2016] UKSC 8, [2017] AC 387 at [79] – [85] – in fact refers to a number of quite different, compelling factors which led the Supreme Court to alter the test for accessory liability in that case. Furthermore, and as has been recognised in part by the Appellant’s corrections to A§91, the list of supposed academic or judicial criticisms are generally not directed to the issue before the court in the present case: in particular, Lord Bingham’s speech in Mohit was not judicial criticism of Gouriet; rather, he distinguished the role of the Mauritian DPP, while expressly recognising that Gouriet remained a binding statement of English law on cases covered by it.
- 94.4. Fourth, the Appellant contends that no Parliamentary intervention is likely. Even if that were true, it would be a matter for this court to decide whether it is appropriate to assume a legislative function here. But, as it happens, there is no sound basis for the Appellant’s contention in any event. Parliament revisited the operation of s. 13 of the 1988 Act in the 2009 Act, and the Government subsequently amended the section in 2013 by secondary legislation, using powers conferred in the 2009 Act. As such, s. 13 has been the subject of active and recent legislative scrutiny. Furthermore, as mentioned in A§§55 – 59, the Law Commission has been asked by the Ministry of Justice and the Attorney General to look at a different PIF, in the context of the Law Commission’s ongoing work on contempt of court, and has recommended that Parliament legislate to render this function justiciable (§8.123 of HC1433, Law Com No 423). The Law Commission states that it intends to publish a draft Bill in spring 2027.¹⁸ In any legislative consideration given to this particular PIF, Parliament would be expected to pay careful regard to the wider policy implications of any such legislation, including the risk of the Attorney General’s Office becoming overwhelmed by applications for judicial review. That would be a constitutionally appropriate way to consider effecting a material change to the established non-justiciability of a particular PIF.

¹⁸ <https://lawcom.gov.uk/project/contempt-of-court/>

95. For the reasons above, there is no good reason for the court to depart from *Gouriet* on the present appeal.

F.4 Ground 2: Alternatively, any review must be 'light touch'

96. If, contrary to the Attorney General's submissions on Ground 1 above, this court considers that the s. 13 PIF should be justiciable, it would then be necessary to consider the applicable standard of review. Section D above identifies the key authorities where the courts have recognised the importance of being slow to interfere with public interest decisions, such as whether to prosecute or grant a *nolle prosequi*. That line of case-law reflects the need for significant deference to the assessment of the public interest by the individual specifically tasked by Parliament with making that assessment.
97. In relation to the question of prosecutorial discretion, the key factors justifying such an approach in *Corner House* were that: (i) the powers were entrusted to specific officers; (ii) the decision-making was polycentric, including policy and public interest considerations; and (iii) the individual was granted a wide discretion, with powers conferred in broad and non-prescriptive terms.
98. Such considerations apply equally, if not *a fortiori*, to the Attorney General's assessment under s. 13 of the 1988 Act. This was also the Divisional Court's *obiter* conclusion in the present proceedings at [57].
- 98.1. First, the power to make an application under s. 13 has been conferred by Parliament specifically on the Attorney General. Parliament has identified that the question whether these applications should or should not be brought falls with the Attorney General (or Solicitor General on her behalf) personally, in light of her own assessment of what the public interest requires. (The Appellant accepts this at A§112.)
- 98.2. Second, any exercise of the Attorney General's power under s. 13 involves polycentric decision-making, taking into account a combination of factual, legal, policy and public interest considerations. The present case is a perfect example. In considering whether it is right to bring (or authorise) an application that seeks to re-open an inquest into an international tragedy which occurred on foreign soil some 25 years ago, the Attorney General may weigh up competing concerns and considerations, which might include the deployment of public

resources, questions of foreign policy and international relations, the adequacy of an assessment carried out by friendly foreign nations, and the impact on family members of other victims, as against the strength of the evidence relied upon in support of the request for *fiat*. While the court may be in a position critically to interrogate aspects of that reasoning, it must be far more cautious about assuming that it can safely interpose its own view on all such factors, or indeed to conduct the sensitive balancing exercise that may be required.

- 98.3. Third, the nature of the discretion that has been granted to the Attorney General is broad and non-prescriptive. Indeed, Parliament has not sought to constrain the exercise of the discretion at all, the matter being fully entrusted to the Attorney General, as to which see paragraph 7.2 above.)
99. It follows that the court in this context should not lightly second-guess questions of public policy or the relevance of factors informing that assessment, or the weight to be attached to any relevant factors. In *Kebilene*, this same concern led the Lords to expressing the deferential test as effectively rendering JR unavailable in the absence of some particularly compelling ground for interfering, such as dishonesty, bad faith or other such exceptional circumstances. The appropriate constraint may be better conceived of as a requirement for a high degree of caution or deference, rather than as a limitation of the available grounds of review. But the principle underlying their Lordships' judgments in *Kebilene* and *Corner House* is clear, and it would apply equally to the present case. Any challenge to a decision made under s. 13 should be regarded as an exceptional form of review, which requires far greater justification for the court to interfere than that required in relation to other forms of administrative decision-making.
100. If this court is minded to depart from precedent and to find decisions under s. 13 to be reviewable, it is respectfully asked to give clear guidance to facilitate the summary resolution of applications for JR at the permission stage where that is justified. The Attorney General has well-founded concerns about the risk of 'opening the floodgates', with the real prospect of numerous claims being commenced that have to date not been pursued recognising their non-justiciable nature. The Administrative Court should not be being invited to review assessments of the public interest based on little more than disagreement with the Attorney General's assessment of what the public interest demands

– which, it is respectfully submitted, underlies each ground of challenge in the present case.

G. CONCLUSION

101. In summary:

- 101.1. The Divisional Court was right to conclude that *Gouriet* is binding authority that the decision not to grant authority to make an application under the name of the Attorney General under s. 13 of the 1988 Act is non-justiciable.
- 101.2. There are good reasons in principle why such a decision has been found to date to be non-justiciable. It is not right for this court to depart from *Gouriet*.
- 101.3. Insofar as this court intends to hold the decision justiciable, it is respectfully invited to make clear that the courts exercising any review jurisdiction should do so applying a highly deferential standard, such as that established against analogous decisions, *e.g.* challenges to prosecutorial discretion.
- 101.4. Either applying the present law of non-justiciability or rendering such decisions justiciable but with a cautious and deferential standard, the Divisional Court was right to find that permission for JR in the present case must be refused. This court is asked to uphold the decision to refuse permission for JR.

JONATHAN CROW CVO, KC
4 Stone Buildings

DANIEL CASHMAN
Blackstone Chambers

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