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**ADMINISTRATIVE LAW AND
ADMINISTRATIVE COURTS IN THE
UNITED KINGDOM: AN OVERVIEW**

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I INTRODUCTION

[1] Firstly, some nomenclature:

- (a) Administrative law is roughly synonymous with public law and the latter is the most frequently used term nowadays.
- (b) There is a very wide body of public [administrative] law, covering a broad range of fields of public administration (immigration, town planning, education, environment, police, prisons ... to name but some).
- (c) The High Court is the most senior court in the field of public law. It has a series of divisions (civil, commercial, chancery, family ...). Formerly, one of these divisions, or arms, of the High Court was known as the Administrative Court [or the "Crown Side"]. More recently, this has been renamed the "Judicial Review Court".
- (d) The **Judicial Review** jurisdiction of the High Court has strong common law origins and continues to entail the application of common law principles. Increasingly, of course, it also involves the interpretation and application of **legislation** in a number of fields - prisons, education, environment, social security, mental health, constitutional law, immigration and so forth.

[2] The enormous growth of public law, coupled with the judge made development and expansion of judicial review, during recent decades, is placed in perspective by the following quotation:

"Until August 1914, a sensible law abiding Englishman could pass through life and hardly notice the existence of the state, beyond the post office and the policeman".¹

What is administrative law? The following definition has been offered:

"It is the law relating to the control of governmental power ...

The governmental power in question is not that of Parliament: Parliament as the legislature is sovereign and, subject to one exception,² is beyond legal control. The powers of all other public authorities are subordinated to the law ...

¹ A J P Taylor, English History 1914 -1945 Volume 1.

² EU Law.

*All such subordinate powers have two inherent characteristics. First, they are all subject to legal limitations; there is no such thing as absolute or unfettered administrative power. Secondly, and consequentially, it is always possible for any power to be abused”.*³

[3] Thus it may be said that the primary purpose of administrative law is to confine the exercise of governmental power within the boundaries established by the law, thereby protecting citizens against the abuse (or misuse) of such power. Administrative law exists to ensure that the legal duties of governmental agencies are duly observed, while the corresponding rights and interests of citizens are duly protected.

[4] It is impossible to explain the meaning, scope and evolution of modern administrative law in the United Kingdom without reflecting on three things in particular:

- (a) The common law.
- (b) The separation of powers.
- (c) The rule of law.

None of these is a freestanding island, however. Rather, all are inextricably linked and the unifying force is administrative law.

II THE COMMON LAW

[5] Although appointed by the King, judges became increasingly independent. Their independence was underwritten by Parliament in an important piece of legislation, the Act of Settlement 1700. Pursuant to this statute, judges held tenure of appointment for as long as they were of good behaviour and could be removed from office only pursuant to a resolution of both Houses of Parliament. In the whole of English history, *no High Court has been removed from office*. It is worth recalling the long title of the Act of Settlement:

“An Act for the further limitation of the Crown and better securing the rights and liberties of the subject”.

[6] The central and essential feature of the common law is that it is judge made. The common law is established and developed through the medium of judicial decisions, which apply or adapt or extend principles contained in earlier decisions to contemporary cases. The doctrine of precedent (in Latin

³ Wade and Forsyth, Administrative Law (10th Edition), p. 4.

stare decisis) is an important feature of the common law. This promotes coherence, predictability and consistency. It also subscribes to the subordination of inferior courts to superior courts. Thus, in a hierarchical court system, the decisions of superior courts are binding on inferior courts. They are bound by the essential legal reasoning (or *ratio decidendi*) **in the decisions of** the superior court.

[7] The superior courts are, in descending order, the Supreme Court, the Court of Appeal and the High Court. As a general rule, all of these courts are bound by their own earlier decisions. However, there are certain important and judge made exceptions to this general rule. These ensure that the common law retains the necessary flexibility and adaptability to react to new and changing circumstances and to deliver fairness to citizens.

III THE SEPARATION OF POWERS

[8] The absence of a written constitution is a singular feature of the government of the United Kingdom. This has been explained on the basis that the laws and political institutions evolved peacefully, with the result that, historically, there was no revolution and, hence, the typical product of a revolution i.e. a constitution did not materialise. Because, in a monarchical setting, the King was all powerful (“Rex is lex”), the distribution of governmental power was centralised and the separation of powers unclear. This is illustrated in the office of Lord Chancellor. On the one hand, the Lord Chancellor was the King’s most senior adviser, his highest minister. On the other hand, he was also the most senior judge, the head of the judiciary. Thus the Lord Chancellor was the very antithesis of the separation of powers. This is one of the anomalies which precipitated the recent creation of the new Supreme Court in the United Kingdom, the extinction of the Judicial Committee of the House of Lords and the abolition of the office of Lord Chancellor.

[9] The unwritten British constitution is firmly based on the separation of powers i.e. the separate of judicial power from executive power. The courts are the interface between the citizen and government. While many such disputes are now determined by specialised tribunals, these are subject to the control of the superior courts. Thus every citizen in dispute with the government has a constitutional right to bring such dispute before a court, where it will be determined by judges of the highest independence.

[10] The third element of the separation of powers is the doctrine of parliamentary sovereignty. Judicial review and parliamentary sovereignty have in common the oversight of executive (governmental) conduct. Thus the courts and Parliament have constitutional roles which are distinct but complementary.

IV THE RULE OF LAW

[11] The primary meaning of the rule of law is that everything must be done according to law. Thus every Government Minister who, or Government agency which, purports to act in any given field must justify the action in question as authorised by law – which will normally (though not invariably) mean authorised by parliamentary legislation. Acts of governmental power routinely affect the legal rights, duties and liberties of the individual. All such acts must be shown to have a strict legal pedigree. The courts are the arbiters of whether the necessary legal pedigree exists. Thus the rule of law is founded on the principle of legality.

[12] The rule of law has an important *secondary* meaning in all well developed systems of administrative law: it is that government should be conducted within a framework of recognised rules and principles which restrict the exercise of discretionary power and are designed to prevent its abuse. Once again, it is the courts which are the arbiters of the legitimate use – and misuse– of governmental power.

[13] Thus the rule of law and the independence of the judiciary are inseparable elements of a modern constitutional democracy. Plainly, the rule of law cannot function properly and effectively unless adjudication upon the legality of governmental acts is carried out by judges who are independent of the executive. Judicial independence is, therefore, a cornerstone of the rule of law. Properly appreciated, it explains and illuminates the doctrine of the separation of powers. In the context of the United Kingdom, it has been observed that “... *the British Constitution, though largely unwritten, is firmly based upon the separation of powers*”⁴. This is also captured in the following statement:

“The right to carry a dispute with the Government before the ordinary courts, manned by judges of the highest independence, is an important element in the Anglo-American concept of the rule of law”.⁵

[14] The doctrine of the rule of law is also identifiable in the following profound words:

“[The court] has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power. While the court must

⁴ Duport Steel –v- SIRS [1990] 1 WLR 142, p. 157 (per Lord Diplock). And see Lord Hoffmann’s lecture “Separation of Powers” [2002] JR 137.

⁵ “Administrative Law” (Wade and Forsyth, 10th Edition, p. 19).

*properly defer to the expertise of responsible decision makers, it must not shrink from its fundamental duty to do right to all manner of people”.*⁶

Furthermore, it is no coincidence that the rule of law occupies a prominent position in the EU Treaty. Article 6/1 provides:

*“The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and **the rule of law**, principles which are common to the Member States.”*

[My emphasis].

As this cornerstone provision of the Treaty recognizes, the rule of law is one of the values which binds and unifies the diverse and disparate Member States of the European Union.

V ADMINISTRATIVE TRIBUNALS

[15] During the past century, there has been an ever-increasing number of administrative tribunals, making decisions in specialised fields – such as immigration, tax, social security, pensions and education. Administrative Tribunals are established by an Act of Parliament, which regulates their function and jurisdiction. In broad terms, they are concerned with the legality of the exercise of governmental power in defined fields. Government has allocated to administrative tribunals the task of determining a large number of disputes.

[16] One of the conspicuous features of tribunals is that their decisions can be the subject of appeal to a superior court on a question of law *or* judicial review by the High Court. Tribunals are mainly a twentieth century phenomenon. They represent a departure from the previous norm that the determination of questions of law in disputes between citizen and government belonged exclusively to the realm of the courts. Interestingly, the first exception occurred in the sphere of revenue collection. The Commissioners of Customs and Excise have been exercising judicial powers pursuant to statute since 1660. The tribunal known as the General Commissioners of Income Tax was established in 1799 and still exists. Since 1908, there has been a tribunal which determines pension disputes and since 1911 there has been a tribunal determining social security payment disputes. Many modern tribunals are a product of the intensive social legislation which followed the Second World War.

⁶ The Queen –v- Ministry of Defence, ex parte Smith [1996] QB 517, p. 556 (per Sir Thomas Bingham MR).

[17] For some decades, there was much variation and inconsistency, giving rise to anomalies. Some tribunals conducted their business in public, others in private. Some allowed unrestricted legal representation, others prohibited this. Some tribunals adhered to the legal rules of evidence, while others disregarded them. In some tribunals there was full examination and cross-examination of witnesses, while in others this was non-existent. In certain tribunals, evidence had to be received under oath, while this did not occur in others. Thus there was an obvious gulf between the tribunal system and the court system. Many of these problems were remedied by the Tribunals and Inquiries Act 1958.

[18] Tribunals can offer speedier, cheaper and more accessible justice. Admittedly, the process of the courts is more elaborate, slower and more expensive. This is the price to be paid in providing the highest standard of justice. A second advantage in the tribunal system is that of expertise – particularly in fields such as income tax, mental health, immigration, education and social security. The quality of independence is the same in both tribunals and courts. In most instances, the tribunal chairman must be legally qualified [by statute].

[19] The most recent legislative intervention is contained in the Tribunals, Courts and Enforcement Act 2007. In short, the effect of this legislation is an unequivocal recognition that tribunals do not form part of the administration of government; they belong to the machinery of adjudication; they must be entirely separate from the relevant “sponsoring” Government Department; and they are an integral part of the judicial system. Importantly, they are also under the aegis of the Judicial Appointments Commission, an independent agency.

VI APPLICATIONS FOR JUDICIAL REVIEW

[20] In the United Kingdom, administrative law judges are judges of the High Court and their main task is to determine applications for judicial review. Every application for judicial review must be initiated promptly and in any event within three months of the date when the grounds for applying first arose. However, the court has a discretion to extend time. The existence of these time limits is based on the view that, in most cases, the subject matter of a judicial review application requires a swift hearing and adjudication by the court. This is consistent with the public interest in good administration. Delay is antithetical to this interest. In the same vein, it is incumbent on the Applicant to comply with a pre-action protocol: this is designed to bring to the attention of the public authority concerned the Applicant’s grievance and to afford an opportunity for consensual resolution, without court proceedings.

[21] Every application for judicial review has two stages. At the initial stage, the court must be persuaded that the Applicant enjoys *an arguable case*. If the case appears hopeless or frivolous or if the court considers that the Applicant does not have a sufficient interest in the matter i.e. has no *locus standi*, the application will be dismissed at this initial stage. But if the court is satisfied that the case is arguable i.e. fit for further consideration and comprehensive argument, permission (or “leave”) to apply for judicial review is granted.

[22] In every judicial review application, the Applicant must compile a pleading containing particulars of:

- (a) The Applicant.
- (b) The public authority or Government Department or Minister who is the proposed Respondent.
- (c) The act or decision which the Applicant is challenging.
- (d) The grounds of the Applicant’s challenge.
- (e) The remedy sought by the Applicant.

This pleading must be accompanied by an affidavit sworn by the Applicant, together with such further affidavits as the Applicant chooses to submit. The Applicant is under a duty of the utmost good candour. In his affidavit he must make full and true disclosure of all material facts and circumstances. The affidavit typically exhibits all material documents: sometimes these are of slender dimensions, but a symptom of modern public administration is that the documentation is becoming increasingly voluminous.

[23] The Respondent’s case is presented in precisely the same way – by an affidavit or affidavits sworn by the appropriate official/s, exhibiting all relevant documents. The Respondent is also subject to the same duty of candour. Both parties owe this duty to the court.

[24] As soon as the Respondent’s affidavit evidence has been served, the case is ready for hearing. Normally, there is no sworn evidence from the parties or any witnesses. Rather, the hearing proceeds on the basis of the Applicant’s pleading, both parties’ affidavits and all the documents exhibited. Before the hearing, both parties’ legal representatives submit their arguments in writing. At the hearing, they elaborate on their written submissions and deal with questions raised by the court. *Exceptionally*, the court can accede to a request that the author/s of the Respondent’s affidavits be cross-examined. Also exceptionally, the Applicant can apply to the court in advance for an

order compelling the Respondent to disclose additional documents – this will arise only if the court is satisfied that the Respondent has not already done so.

[25] The length of the hearing depends upon the volume and complexity of the case. Most hearings are completed within one day. However, cumbersome and more complex cases can last several days. At the conclusion of the hearing, the judge normally reserves judgment. The written judgment is usually produced within three months – and in many cases, sooner. Before producing the final judgment, the judge is entitled to convene a further hearing, to consider additional argument.

[26] The losing party has a right of appeal to the Court of Appeal. In the vast majority of cases, this is the highest court in the United Kingdom. Appeals to the Supreme Court are extremely rare, since that court considers less than one hundred cases per annum *of all kinds* [civil, commercial, family, criminal ... etc].

[27] It is worth noting that applications for judicial review in the United Kingdom increasingly involve consideration of human rights issues. In the United Kingdom, the only international human rights instrument which has been transposed into domestic law is the European Convention on Human Rights and Fundamental Freedoms – through the Human Rights Act 1998. In a substantial proportion of appeals, the House of Lords and, latterly, the Supreme Court (only in existence since October 2009) have considered human rights issues: thus there has been a large number of administrative law appeals to the highest court.

[28] **Remedies.** If the Applicant succeeds, the most frequent remedy is an order *quashing* the impugned act or decision (*certiorari*). The effect of this is to require the Respondent public authority/Minster/Government Department to *reconsider* the challenged act or decision, in accordance with the ruling of the court. Other possible remedies are:

- (a) A declaration, pronouncing on the legal relationship and stage of affairs vis-à-vis Applicant and Respondent.
- (b) An Order of *Mandamus* compelling the Respondent to do something – typically, to make a decision or perform a particular legal duty.
- (c) An award of damages.

The remedy of a declaration is increasingly commonplace. However, the remedies of mandamus and damages are comparatively rare.

[29] A large number of applications for judicial review are brought by citizens of limited financial resources, who qualify for legal aid. Thus, where the Respondent is successful, there is usually no prospect of recovering the legal costs and both parties' costs are borne by the taxpayer. This is increasingly controversial in the present economic era.

[30] Annexed to this paper is a judgment of the court in a typical application for judicial review. This should assist European colleagues in understanding both the procedure and the substance.

APPENDIX

The judgment attached to this Appendix is *Re Hamill's Application for Judicial Review* [2009] NI 103 and [2008] NIQB 73.

In this case, the legal challenge arose out of a public inquiry ordered by the relevant Government Minister and being conducted in accordance with the governing legislation, the Inquiries Act 2005. In brief compass:

- The Applicant/Plaintiff was a member of the family of the deceased, whose death was the subject matter of the public inquiry.
- The family of the deceased sought to have the Inquiry's terms of reference broadened.
- Following consultations, the Minister refused this request.
- This refusal was challenged by the family by an application for judicial review.
- The hearing was conducted in the conventional manner. The parties were legally represented and the evidence took the form of sworn affidavits and exhibited documents.
- Ultimately, the court found that in making the impugned decision, the Minister had committed an error of law. He had failed to correctly apply the statutory test and had permitted extra-statutory considerations to intrude. This gave rise to the conclusion that his decision was unlawful.
- As regards **remedy**, the court did not substitute its own decision. Rather, having identified the illegality in the Minister's decision, in its judgment, the High Court remitted the case to the Minister for further consideration and a new decision, in the light of the court's judgment.

Re Hamill's Application for Judicial Review

[2008] NIQB 73
QUEEN'S BENCH DIVISION
WEATHERUP J

11 APRIL, 10-12, 25 JUNE, 1 JULY 2008

Inquiries – Extension of terms of reference – Statutory test – Public interest – Inquiry into police investigation of death – Applicant seeking extension of terms of reference to include investigation into decisions made by Department of Public Prosecutions – Secretary of State requesting applicant provide statement of 'exceptional circumstances' which warranted review of prosecutorial decisions – Whether reference to 'exceptional circumstances' was test applied by Secretary of State or whether it was part of statutory 'public interest' test – Whether Secretary of State's consultation with Attorney General as to whether to extend terms of reference gave rise to apparent bias – Inquiries Act 2005, s 15.

An inquiry began in relation to the death of the applicant's son. An application was sent to the Secretary of State requesting the extension of the inquiry's terms of reference to include the role of and decisions made by the Department of Public Prosecutions in relation to prosecutions arising out of the death. A meeting was held between members of the family, their legal representatives, the Secretary of State and NIO officials to discuss the application for extension of the terms of reference. At that meeting a request was made by the Secretary of State that the family provide a written statement of the 'exceptional circumstances' which it was said would have to be established in order to warrant the extension of the terms of reference. As a result of that meeting the applicant's solicitors sent to the Secretary of State a letter setting out a statement of exceptional circumstances. The Secretary of State consulted the Attorney General on the issue of the extension of the terms of reference and the Attorney General instructed English counsel to advise on certain matters in relation to the prosecution's decisions arising out of the events connected to the Inquiry. The Secretary of State issued his decision refusing to extend the terms of reference. Accompanying the letter of the decision were three separate advices which the letter indicated were a critical factor in informing the Secretary of State's decision. The applicant's challenge to the refusal of the Secretary of State to amend the terms of reference related to three grounds. (1) The test which the Secretary of State applied in making his decision, which was a statutory test based on the public interest. Under s 15^a of the Inquiries Act 2005 the test was whether the Secretary of State considered that it was in the public interest to extend the terms of reference. The applicant contended that the Secretary of State applied an exceptional circumstances test and was wrong to do so. (2) The applicant contended that the decision made by the Secretary of State was so

[2009] NI 103 at 2

unreasonable that it had to be set aside. (3) The applicant contended that there had been apparent bias as a result of the conflict of interest that arose between different roles of the Attorney General.

Held – (1) The context of an extension of the terms of reference in a public inquiry under the 2005 Act was to address, as the statute provided, matters of public concern and to consider an extension of the terms of reference as was required in the public interest. That was a different context to judicial review of DPP decision making. The kinds of constraints in relation to the judicial review courts were not necessarily the restraints that had to be imposed upon a public inquiry addressing a matter of public concern. The contexts were different and the tests were different. The decision in the instant case had been taken by importing a requirement to fulfil a subsidiary test of exceptional circumstances when that had not properly reflected the statutory requirement. The matter would be referred back to the Secretary of State to reach a determination in accordance with the statutory test of public interest (see [20]–[21], below); *Marshall v DPP of Jamaica* [2007] 4 LRC 557 considered.

(2) The fair-minded and informed observer required the Secretary of State to be aware that the Attorney General had been opposing the extension of the terms of reference to the DPP in circumstances where the prosecution decisions of the Attorney General could have been called into question if there was to be an extension of the terms of reference to the DPP. To the fair-minded and informed observer it was apparent that the Attorney General had been informing the Secretary of State that her office and her predecessor shared the reasoning and conclusions in relation to the prosecution decisions and that an extension of the terms of reference would reach into the office of the Attorney General. In the instant case, the fair minded and informed observer would not have concluded that there had been a real possibility that the Secretary of State had been biased (see [34]–[35] below).

Cases referred to in judgment

Gillies v Secretary of State for Work and Pensions (Scotland) [2006] UKHL 2, [2006] 1 All ER 731, [2006] 1 WLR 781.

Marshall v DPP of Jamaica [2007] UKPC 4, [2007] 4 LRC 557.

Matalulu v DPP [2003] 4 LRC 712, Fiji SC.

Mohit v DPP of Mauritius [2006] UKPC 20, [2006] 5 LRC 234, [2006] 1 WLR 3343.

Porter v Magill [2001] UKHL 67, [2002] 1 All ER 465, [2002] 2 AC 357, [2002] 2 WLR 37.

R v DPP, ex p C [1995] 1 Cr App R 136, DC.

R v DPP, ex p Manning [2001] QB 330, [2000] 3 WLR 463, DC.

Sharma v Antoine [2006] UKPC 57, [2007] 4 LRC 10, [2007] 1 WLR 780.

Application

The applicant, the mother of the deceased Robert Hamill, applied for judicial review of a decision of the Secretary of State, dated 20 March 2008, whereby he decided not to extend the terms of reference of the Hamill Inquiry to include the decisions made by and on behalf of the Director of Public Prosecutions. The facts are set out in the judgment.

[2009] NI 103 at 3

Mr McCollum QC and Ms F Doherty (instructed by *P J McGrory & Co*) for the applicant.

Mr B McCloskey QC and Ms N Murnaghan (instructed by *CSO*) for the respondent.

Judgment was reserved.

1 July 2008. The following judgment was delivered.

WEATHERUP J.

[1] This is an application for judicial review of a decision of the Secretary of State of 20 March 2008 not to extend the terms of reference of the Hamill Inquiry to include the decisions made by and on behalf of the Director of Public Prosecutions. Mr McCollum QC and Ms Doherty appeared for the applicant, Mr McCloskey QC and Ms Murnaghan for the respondent and Mr Underwood QC and Ms Anderson for the Inquiry.

[2] The applicant is the mother of Robert Hamill who was killed on 8 May 1997 as a result of injuries sustained in an incident in Portadown on 27 April 1997. The applicant states that since Robert's death her family has campaigned tirelessly for a comprehensive public inquiry into the circumstances surrounding the murder and the failure of the authorities to bring anyone to justice.

[3] Judge Cory was commissioned to report on the events surrounding the death of Robert Hamill and in October 2003 he delivered to the Secretary of State a report of his findings, which was published on 1 April 2004. Judge Cory concluded that there was sufficient evidence of police collusion to warrant the holding of a public inquiry. On 1 April 2004 the Secretary of State announced that an inquiry would be established into the death. The Inquiry's terms of reference were announced by the Secretary of State as being –

'To inquire into the death of Robert Hamill with a view to determining whether any wrongful act or omission by or within the Royal Ulster Constabulary facilitated his death or obstructed the investigation of it, or

whether attempts were made to do so; whether any such act or omission was intentional or negligent; whether the investigation of his death was carried out with due diligence; and to make recommendations.'

[4] The Inquiry was initially established under s 44 of the Police (Northern Ireland) Act 1998. Following a request from the chairman, the Secretary of State announced on 29 March 2006 that the Inquiry would be converted to an Inquiry under of the Inquiries Act 2005 by virtue of s 15 of that Act. On 3 January 2007 an application was sent to the Secretary of State, on behalf of the Hamill family, requesting the extension of the Inquiry's terms of reference to include the role of and decisions made by the Department of Public Prosecutions in relation to prosecutions arising out of the death.

[5] On 19 September 2007 a meeting was held between members of the family, their legal representatives, the Secretary of State and NIO officials to discuss the application for extension of the terms of reference. At that meeting a request was made by the Secretary of State that the family provide a written statement of the 'exceptional circumstances' which it was said would have to be established in order to warrant the extension of the terms

[2009] NI 103 at 4

of reference. As a result of that meeting the applicant's solicitors sent to the Secretary of State on 25 September 2007 a letter setting out a statement of exceptional circumstances. The Secretary of State consulted the Attorney General on the issue of the extension of the terms of reference and the Attorney General instructed English counsel, David Perry QC, to advise on certain matters in relation to the prosecution's decisions arising out of the events connected to the Hamill Inquiry. The Secretary of State issued his decision on 20 March 2008 by which he refused to extend the terms of reference. Accompanying the letter of the decision were three separate advices by Mr Perry, which the letter indicated were a critical factor in informing the Secretary of State's decision.

[6] The terms of reference of a public inquiry converted under s 15 of the Inquiries Act 2005 may be extended by the Secretary of State. The power to convert applies where it appears that '(a) particular events have caused, or are capable of causing, public concern, or (b) there is public concern that particular events may have occurred'. A notice to convert an inquiry must set out the terms of reference of the inquiry and:

'(6) The Minister may at any time after setting out the terms of reference under this section amend them if he considers that the public interest so requires.

(7) The Minister must consult the chairman before – (a) *[not applicable]* (b) amending the terms of reference under subsection (6).'

The operative provision in relation to the exercise of the power to extend the terms of reference is therefore s 15(6) where the Secretary of State 'considers that the public interest so requires'.

[7] The applicant's challenge to the refusal of the Secretary of State to amend the terms of reference relates in essence to three grounds. The first ground concerns the test which the Secretary of State applies in making his decision, which is a statutory test based on the public interest. The applicant contends that the Secretary of State applied an exceptional circumstances test and was wrong to do so. The second ground is irrationality, in that the applicant contends that the decision made by the Secretary of State was so unreasonable that it ought to be set aside. The third ground concerns procedural fairness and the applicant contends that there was apparent bias as a result of the conflict of interest that arises between different roles of the Attorney General.

[8] In addition to those three broad grounds the Tribunal, as a notice party, raised further points which I will treat as part of the applicant's second ground, the irrationality challenge. The additional points are that insufficient weight was accorded to the views of the chairman of the Inquiry in relation to the extension of the terms of reference and further that there were a number of factual errors made in the Inquiry's decision.

[9] First of all, the application of the test of public interest to the decision to extend the terms of reference. Under s 15 of the 2005 Act the test is whether the Secretary of State considers that it is in the public interest to extend the terms of reference. The applicant contends that the statutory test was not applied and that an exceptional circumstances test was applied. On the other hand the respondent says that exceptional circumstances were but

[2009] NI 103 at 5

one aspect of the test of public interest that was applied by the Secretary of State.

[10] This consideration of exceptional circumstances emerged from the consultation process with the Attorney General. The background is summarised in the affidavit of Katie Louise Pettifer, the deputy director of Rights, Elections and Legacy Division of the Northern Ireland Office. In June 2005 the chairman of the Inquiry wrote to the Permanent Secretary of the Northern Ireland Office to ask that consideration be given to extending the terms of reference of the Inquiry to include investigations of the role of the Director of Public Prosecutions. Counsel to the Inquiry had provided an opinion that addressed various areas of concern that had emerged from the investigations. The Attorney General was consulted and stressed his opposition to the request for essentially two reasons. The first was that extension of the terms of reference would amount to a major extension of the ambit of the Inquiry's work and provide a new focus quite different from the original focus, which had been upon allegations

of collusion on the part of the security forces. The view was expressed that if inquiries were ordered other than in exceptional circumstances that would give rise to a perception that prosecutors were under threat from government and answerable to government for their decisions. The second ground of opposition was that there was nothing in the opinion of counsel to the Inquiry which justified inquiring into prosecutorial decisions.

[11] The Permanent Secretary wrote to the Inquiry on 3 August 2005 summarising the views of the Attorney General and the Inquiry chairman responded to the views that had been expressed. There followed an attempt to achieve resolution between the competing views and to meet the concerns of the Inquiry within its existing terms of reference. The Attorney General did not consider that it would be appropriate for the Inquiry to review and comment on prosecutorial decisions per se, but he understood and accepted that it may be necessary for the Inquiry to seek information about prosecutorial decisions where that might shed light on the actions or reasoning of the police. However, attempts to reach an accommodation on how that might be achieved, without changing the existing terms of reference, did not result in any agreement and the matter remained unresolved in 2005.

[12] The Inquiry Chairman re-opened discussions on the Inquiry's terms of reference in a letter to the Permanent Secretary at the NIO in November 2006. At that stage he explained that the Hamill family's solicitor had signalled an intention to seek an amendment of the Inquiry's terms of reference. On 3 January 2007 a formal request was made by Mr McGrory, on behalf of the family, for the extension of the terms of reference to embrace the actions of the Director of Public Prosecutions. The refusal of that request on 28 March 2008 is the subject of this application for judicial review.

[13] The respondent contends that the exceptional character of judicial intervention in prosecutorial decisions is an aspect of the public interest and should inform the decision of the Secretary of State. The respondent refers to the intertwining of the exceptional circumstances principle, the public interest dimension in prosecutorial decisions and the constitutional role of independent prosecutors as factors emerging from the authorities. In particular, the initial response of the Permanent Secretary in 2005 referred to

[2009] NI 103 at 6

the statement of Lord Bingham of Cornhill in *R v DPP, ex p Manning* [2001] QB 330, [2000] 3 WLR 463 where it was stated at para 23 that:

'... the power of review [of prosecutorial decisions] is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as

head of an independent, professional prosecuting service answerable to the Attorney General in his role as guardian of the public interest, and to no-one else.'

[14] The concept of exceptional circumstances, taken from the judicial review jurisprudence, led the Secretary of State, at the meeting with the Hamill family, to request a statement of exceptional circumstances to be provided in relation to his decision on the request for an extension of the terms of reference.

[15] The decision letter was issued on 20 March 2008 on behalf of the Secretary of State. The decision contains several references to the public interest test being applied by the Secretary of State. At the beginning of the letter it is stated that the Secretary of State 'has concluded that the public interest does not require an extension to the terms of reference to the Robert Hamill Inquiry'. Further, in the discussion of the background it is stated, 'The question is whether the public interest requires an extension of the terms of reference'. The letter refers to the representations that the Secretary of State received from the Hamill family, from the Inquiry, from the Attorney General and from British Irish Rights Watch. The letter sets out factors which are said to favour an extension of the terms of reference, of which four points have been distilled from the representations made to the Secretary of State. The first ground in favour refers to the failure to secure convictions for offences arising out of the murder as being a matter falling within the circumstances in which an inquiry can be established. In considering that ground the letter states that 'the relevant test in this case is whether it is in the public interest for those events to be the subject of an inquiry under the Act'.

[16] The letter discusses how the Secretary of State approached the issue of the public interest. He attached weight to the point made by the Attorney General that the review of prosecutorial decisions is rare and that there should be a high threshold for the review of prosecutorial decisions. Reference is made to the earlier meeting with the family in which the view had been expressed by the Secretary of State that, in assessing whether the public interest required an extension, it would be necessary to consider whether there were exceptional circumstances to warrant the review of prosecutorial decisions. Having referred to the letter received from the Hamill family setting out such exceptional circumstances the decision letter states:

'The Secretary of State considered these representations, but came to the conclusion that it could not be said that the present case fell into the requisite exceptional category such that a public inquiry of the prosecutorial decisions taken was called for. In reaching that conclusion, he had particular regard to the specific concerns raised about the prosecutorial process and the independent legal advice given by

experienced Counsel with expertise in criminal law (David Perry QC) in relation to them ...'

[2009] NI 103 at 7

[17] There are three other factors stated in favour of extension. The decision letter then considers factors against extension of the terms of reference under the heading 'Concerns over the prosecutorial process'. In the conclusion to that section, at para 12, it is stated that –

'the Secretary of State concluded that the concerns raised by the Hamill family and the Inquiry in relation to the decisions taken by the DPP and his staff during the prosecutorial process were not of such weight as to allow the present case to be regarded, on any fair view, as exceptional and were not such as to merit an extension of the Inquiry's terms of reference as requested.'

[18] In the overall summary, at para 15, the decision letter states that the Secretary of State took the view –

'that, in assessing whether the public interest required an extension, it would be necessary to consider whether there were exceptional circumstances to warrant the review of prosecutorial decisions in this case. In the light of Mr Perry QC's advice, he [*the Secretary of State*] came to the conclusion that it could not be said that the present case fell into the requisite exceptional category such that a public inquiry of the prosecutorial decisions taken was called for.'

[19] I have come to the conclusion that the stated public interest test has been determined by whether the case involves exceptional circumstances that warrant a review of prosecutorial decisions. I am satisfied that the concept of exceptional circumstances has been treated, not as a factor in assessing the public interest, but as the very basis for measuring the public interest. This requirement for exceptional circumstances as a measure of the public interest in a public inquiry of prosecutorial decisions is not the statutory test. Public interest is a different matter to exceptional circumstances. The concept of exceptional circumstances is a judicial review approach to intervention in prosecution decisions. I am satisfied that the Secretary of State has not determined the issue of extension by reference to the statutory test of public interest, but by the judicial review approach as to whether the circumstances are exceptional.

[20] Judicial review of public authority decision-making will involve public interest and public law matters. Judicial review of the DPP relates to decisions to prosecute or not to prosecute and to the giving of reasons for such decisions. A judicial review remedy against the DPP is exceptional because of the context in which the High Court is asked to review such decision-making. In *Marshall v DPP of Jamaica* [2007] UKPC 4, [2007] 4 LRC 557 in the Privy Council, Lord Carswell set out the considerations that apply in judicial review cases:

[17] The position and functions of the DPP are such that judicial review of his decisions, though available in principle, is a “highly exceptional remedy” (*Sharma v Antoine* [2006] UKPC 57 at [14], [2007] 4 LRC 10 at [14]). Where policy considerations come into the decision it is particularly difficult for a court to review it, since it may depend on a range of factors on which the responsible prosecutor is best equipped to reach a sound conclusion. These factors were well expressed in the

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judgment of the Supreme Court of Fiji in *Matalulu v DPP* [2003] 4 LRC 712 at 735–736, which was cited with approval by the Board in *Mohit v DPP of Mauritius* [2006] UKPC 20, [2006] 5 LRC 234:

“It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion, in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and 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. This approach subsumes concerns about separation of powers.”

[18] Where the decision is based on an assessment of the evidence and the prospects of securing a conviction, the courts will still accord great weight to the judgment of experienced prosecutors on whether a jury is likely to convict: *R v DPP, ex p Manning* [2001] QB 330 at 349 (para 41) per Lord Bingham of Cornhill CJ. There are many examples of such statements by courts in the common law world relating to decisions to prosecute, as to which see *Sharma v Browne-Antoine* at [41]. In relation to decisions not to prosecute the considerations are slightly different and the threshold for review may be to some extent lower. The reasons are set out in para 23 of the judgment of Lord Bingham CJ in *Ex p Manning*:

“23. Authority makes clear that a decision by the director not to prosecute is susceptible to judicial review: see, for example, *R v DPP, ex p C* [1995] 1 Cr App R 136. But, as the decided cases also make clear, the power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no-one else.

In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in

the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it.”¹

[21] The above considerations impose restraint on the judicial review courts in examining prosecutorial decisions. That is the context in which the judicial review of DPP decisions arises. The context of an extension of the terms of reference in a public inquiry under the 2005 Act is to address, as the statute provides, matters of public concern and to consider an extension of the terms of reference as required in the public interest. This is a different context to judicial review of DPP decision making. The kinds of constraints that are mentioned in the judgments referred to above in relation to the judicial review courts are not necessarily the restraints to be imposed upon a public inquiry addressing a matter of public concern. The contexts are

[2009] NI 103 at 9

different and the tests are different. The decision in this case has been taken by importing a requirement to fulfil a subsidiary test of exceptional circumstances when that does not properly reflect the statutory requirement. I propose to refer this matter back to the Secretary of State to reach a determination in accordance with the statutory test of public interest.

[22] The applicant's second ground is irrationality and the applicant makes the challenge in the alternative to the first ground. As I have found for the applicant on the first ground it is not necessary to conduct an examination of the second ground. The Tribunal did make two additional points that might also have been considered under this ground, but it is not necessary to conduct an examination of the additional points as the decision is being referred back to the Secretary of State in any event. The first point concerns the weight attached to the chairman's views on extension of the terms of reference and no doubt the Secretary of State will take this point into account in reconsidering the matter and will accord such weight as he considers to be appropriate. The second point concerns the alleged factual errors in the decision, about which there is much dispute. Again no doubt the Secretary of State will take into account the exchanges that have occurred in relation to what are said to be factual errors when reconsidering the decision and will reach a conclusion on those matters.

[23] The applicant's third ground concerns procedural unfairness and apparent bias. This relates to alleged conflict of interest in the roles of the Attorney General in relation to four factors. First of all, the Attorney General instructed Mr Perry to advise the Secretary of State. Secondly, the advice furnished by Counsel was forwarded in draft to the DPP. Thirdly,

the Attorney General attended a consultation with the Secretary of State and with counsel. Fourthly, the Attorney General was party to a decision not to prosecute an individual in relation to the events with which the Inquiry is concerned, being a matter on which the Inquiry had expressed concern in supporting the application for extension of the terms of reference.

[24] The test to be applied in relation to apparent bias has been modified by the House of Lords in *Porter v Magill* [2001] UKHL 67, [2002] 1 All ER 465. At [103] Lord Hope of Craighead states the test that is to be applied: 'The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.' The application of the test to the present case may be adapted from the wording in *Gillies v Secretary of State for Work and Pensions (Scotland)* [2006] UKHL 2 at [17], [2006] 1 All ER 731 at [17]:

'The critical issue is whether the fair-minded and informed observer would conclude, having considered the facts, that there was a real possibility that the [*Secretary of State and/or the Attorney General would not evaluate the material*] objectively and impartially against the other evidence.'

In relation to the concept of the 'informed' observer it is stated:

'The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny.'

[2009] NI 103 at 10

In relation to the 'fair-minded' observer it is stated:

'... that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant.'

[25] The Secretary of State consulted with the Attorney General as superintendent of the Prosecution Service. It is not in issue that the Attorney General should have been consulted, but it is the role undertaken by the Attorney General when consulted that has given rise to dispute. The overall approach of the Secretary of State is summarised by Ms Pettifer in the light of advice from counsel as being that there was no legal objection to the Secretary of State consulting the Attorney General as the minister responsible for the Prosecution Service; that the Secretary of State was to be consulted as a consultee and that the Secretary of State was the decision-maker; that the Inquiry was a statutory consultee; that the Hamill family were to make representations

in response to the views that had been furnished by the other parties who were consulted.

[26] Of the four factors relied on by the applicant in the complaint of apparent bias the first three can be treated together because they relate to aspects of a conflict of interest concerning the engagement of counsel, Mr Perry. In considering apparent bias it is necessary to consider all the facts, that is all those that are capable of being known by members of the public generally. That requires consideration of all the facts emerging from the papers in this application, which are now capable of being known by members of the public generally. There is a triangle of interests arising out of the engagement of Mr Perry involving the Secretary of State, the Attorney General and Mr Perry. The role of Mr Perry is described by Ms Pettifer at para 24 of her affidavit. It was decided to seek an expert prosecutorial view on whether the actions of the office of DPP might fairly be regarded as giving cause for concern. The Secretary of State asked the Attorney General for assistance in facilitating the obtaining by the Secretary of State of that expert view. It was considered appropriate to ask the Attorney General to facilitate this process because an assessment of prosecutorial conduct was a matter within that jurisdiction as overseer of the prosecutorial system, rather than being within the jurisdiction of the Secretary of State. It was also considered to be highly significant that the materials which would be included in counsel's instructions were held by the DPP and again within the jurisdiction of the Attorney General rather than being in the possession of the Secretary of State. Nevertheless, it is stated that it was clear to all concerned that the advice of counsel was being sought by and for the purposes of the Secretary of State.

[27] The applicant's first factor is that the Attorney General instructed Mr Perry. There would have been other ways of engaging Mr Perry and the Secretary of State could have obtained advice from Mr Perry through the Crown Solicitors Office. The exercise of engaging Mr Perry is described as *[2009] NI 103 at 11* facilitating the obtaining of advice by the Secretary of State. The DPP is under the remit of the Attorney General's superintendent jurisdiction and the relevant papers were with the DPP, although the papers may have been available through the Inquiry.

[28] A letter from Mr McGinty in the Attorney General's Office on 22 November 2007 summarises the position, as it was seen by the Attorney General's Office. The letter was to the Director asking him whether Mr Perry's draft advice contained any factual inaccuracies. Mr McGinty explained the context in which Mr Perry was giving his advice:

'Given the involvement of this office in the matter, the Attorney General has instructed David Perry QC, of the Bar of England and Wales, to carry out an independent review and to report to her with a view to his review informing the decision of the Secretary of State.'

The engagement of Mr Perry is described as an independent review by Mr Perry for the Attorney General to be forwarded to the Secretary of State to inform his view on extension of the terms of reference. This formula does seem to be a reflection of the actual basis for engaging Mr Perry. It is not expressed in the formal terms of instructing Counsel but perhaps captures what was happening. What the Attorney General's office sought to do was to establish an independent review of the actions of the DPP so as to inform the decision of the Secretary of State. This is a matter, of course, which the applicant claims was an invalid exercise, but that a different matter to the point about the perception of bias.

[29] In addition the Attorney General, presumably with the approval of the Secretary of State, formed the questions that were asked of Mr Perry. The applicant objects that the questions were not addressing the public interest test. Rather it is said that Mr Perry was being instructed to gauge whether he had any cause for concern about the prosecution decisions, which the applicant says would not address issues of public concern and public interest. This is not a point going to the perception of bias. Instead it is a point going to the approach of the Secretary of State to the test for an extension of the terms of reference and that is a different issue. Taking account of the above facts in relation to the engagement of Mr Perry I do not accept that the fair minded and informed observer would conclude that there was a real possibility that the Secretary of State was biased.

[30] The applicant's second factor is that the draft of Mr Perry's advice was sent to the DPP. It is apparent that the draft was forwarded, as the covering letter indicates, for factual corrections. The replies indicate that various factual corrections were made. Taking account of the above facts in relation to the draft advice I do not accept that the fair minded and informed observer would conclude that there was a real possibility that the Secretary of State was biased.

[31] The applicant's third factor is that the Attorney General attended the conference between the Secretary of State and Mr Perry. If, as Ms Pettifer puts the matter, that the Attorney General was facilitating the advice to the Secretary of State by instructing counsel and liaising with Mr Perry on the advices given, or if, as Mr McGinty puts the matter, Mr Perry was conducting an independent review for the Attorney General with a view to informing the Secretary of State's decision, the Attorney General could be expected to

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attend the conference. Taking account of either basis for the involvement of the Attorney General I do not accept that the fair minded and informed observer would conclude that there was a real possibility that the Secretary of State was biased.

[32] It is also necessary to consider the applicant's three factors together. I believe that the fair-minded and fully informed observer would look at

all of these factors, the facts established, the explanations offered and the constitutional arrangements in place and would not conclude that there was a real possibility that the Secretary of State was biased.

[33] The applicant's fourth factor, however, is of a different character to the first three factors. The fourth factor is concerned with the role of the Attorney General as a consultee informing the Secretary of State's decision and with the additional role of the Attorney General in the actual decisions on prosecutions that are said to give rise to the applicant's concerns, that led to the application for an extension of the terms of reference. This arises because in March 2004 a decision was taken not to proceed with a particular prosecution and the Attorney General agreed with the DPP's decision not to proceed with the prosecution. The proposed decision not to prosecute was referred to the Attorney General before the decision was announced in court and the Attorney General, by not intervening, as might have been the case, must be taken to have agreed with the course of action and the reasons for it. The reason why there was no prosecution was because of doubts that had emerged about the credibility of the witness arising from an ancillary issue about attendance at court, rather than concern about the substance of the evidence. The decision not to proceed with the particular prosecution has given rise to concern on the part of the Inquiry and on the part of the family. It is the engagement of the Attorney General in the particular decision that gives rise to this aspect of the claim of apparent bias.

[34] I am satisfied that the Attorney General, with the statutory and constitutional role as superintendent of the DPP, should have been afforded the right to make representations on the proposed extension of the terms of reference to the DPP. It is apparent from the above description of the involvement of the Attorney General in prosecutions relevant to the request for extension of the terms of reference, that any such extension could reach into the office of the Attorney General in the role of superintendent of the prosecutions in question. The fair-minded and informed observer would require the Secretary of State to be aware that the Attorney General was opposing the extension of the terms of reference to the DPP in circumstances where the prosecution decisions of the Attorney General could be called into question if there were to be an extension of the terms of reference to the DPP.

[35] Was it the case that the Secretary of State, when making the decision on extension of the terms of reference and taking into account the views of the Attorney General in opposition to an extension, knew that the Attorney General was involved in the particular prosecution decisions that were said to give cause for concern? I am satisfied that the conflict that has been identified in relation to the Attorney General was brought to the attention of the Secretary of State. This appears from a letter sent by the Attorney General to the Secretary of State on 2 October 2007. Inquiry

counsel described this as a strong letter from the Attorney General giving reasons for no extension of the terms of reference and the letter ended by saying this:

[2009] NI 103 at 13

'Further, this office was closely engaged in these decisions by virtue of its role of superintendence and the Director shared with the Attorney General his reasoning and conclusions in some detail. I do not at this time see how an extension to include the role of the prosecutor can fail to draw in to the Inquiry the role of this office and my predecessors as Attorney General.'

[36] To the fair-minded and informed observer it would be apparent that the Attorney General was informing the Secretary of State that her office and her predecessor shared the reasoning and conclusions in relation to the prosecution decisions and that an extension of the terms of reference would reach into the office of the Attorney General. That disclosure seems to me to neutralise the concerns that might otherwise arise that the Secretary of State would have made his decision without being aware that the Attorney General had an undisclosed interest in the terms of reference not being extended. Taking account of the above facts I do not accept that the fair minded and informed observer would conclude that there was a real possibility that the Secretary of State was biased. Accordingly I have not been satisfied that the applicant has established any of the grounds of procedural unfairness and apparent bias.

[37] The result, therefore, is that the applicant succeeds on the first ground. I am satisfied that the test applied by the Secretary of State did not correspond with the statutory test of public interest. The decision is referred back to the Secretary of State for reconsideration by reference to the statutory test.

Order accordingly.