Mohit v. The Director of Public Prosecutions of Mauritius (Mauritius) [2006] UKPC 20 (25 April 2006)

*Privy Council Appeal No 31 of 2005*

**Jeewan Mohit** *Appellant*

*v.*

**The Director of Public Prosecutions of Mauritius** *Respondent*

FROM

## THE SUPREME COURT OF MAURITIUS

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 25th April 2006

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*Present at the hearing:-*

Lord Bingham of Cornhill
Lord Hoffmann
Lord Hope of Craighead
Lord Carswell
Lord Brown of Eaton-under-Heywood

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*[Delivered by Lord Bingham of Cornhill]*

1. The issue in this appeal is whether a decision by the Director of Public Prosecutions of Mauritius to discontinue a private prosecution, in exercise of his powers under section 72(3)(c) of the 1968 Constitution, is in principle susceptible to review by the courts. In a judgment given on 30 September 2003 the Supreme Court (YKJ Yeung Sik Yuen and P Lam Shang Leen JJ) held that it was not, and on a repeat application by the appellant this decision was applied by K P Matadeen and P Balgobin JJ on 14 September 2004. The appellant challenges the correctness of these rulings.

2. The appellant is a private citizen of Mauritius. He has expressed concern at what he has called "the rising tide of crimes and the breakdown in law and order" in Mauritius, and in particular at what he sees as the failure of successive governments to address a rash of violent crimes committed by a gang of criminals in 1996, culminating in a notorious triple murder. Implicated in at least some of these crimes was one Mahmad Bissessur, who was arrested in December 2000 and in that month confessed to committing a number of very serious crimes in April and May 1996. In October 2001 Bissessur was charged with five criminal offences to which, in the following month, he pleaded guilty. He was sentenced to 6 years' penal servitude and a fine of Rs 3,000.

3. The Hon Paul Berenger has at all material times been a very senior political figure in Mauritius, holding office at different times as Deputy Prime Minister and Minister of External Affairs, Leader of the Opposition and, currently, Prime Minister and Minister of Finance. In February 2001 Bissessur gave a statement to the police in which he said that Mr Berenger had given him money (cheques for Rs 20,000 and Rs 10,000 and Rs 5,000 in cash) during the first week of August 1997 to buy air tickets from Mauritius to Madagascar; that he had flown with his family to Madagascar on 10 August 1997; that Mr Berenger had sent him more money by bank transfer on 13 August 1997; that he had received a further fax from Mr Berenger on 19 August 1997; that he had returned to Mauritius on 21 December 1997; and that he had met Mr Berenger the following day. In answer to questions put to him by journalists and at public meetings Mr Berenger acknowledged that he had given financial assistance to Bissessur to enable him to leave Mauritius and fly to Madagascar.

4. On 23 May 2001 the widow of one of the victims of the triple murder mentioned above initiated a private prosecution of Mr Berenger in the District Court of Curepipe, charging him with harbouring a criminal, namely Bissessur, contrary to section 172(1) of the Criminal Code. The case was heard on 7 and 27 June 2001, but on 19 July 2001, the third day of the case, the Director of Public Prosecutions entered a nolle prosequi and brought the proceedings to an end. The DPP gave written reasons for this decision, which were that

> "(a) the present case is inextricably linked with the main case: that is *the 'Escadron de la Mort' 1996 Gorah Issaac Street Triple Murder Case;*

(b) both cases involve as they do one crucial and common element: that is Mahmad Toorab Bissessur;

(c) the main case is in the process of being lodged; and

(d) the continuance of this case will no doubt impede on [sic] the smooth-running of and may prejudicially affect the conduct of the main case."

At this stage, as is apparent from the history summarised above, Bissessur had not yet been brought to trial.

5. In October 2001 the appellant initiated a private prosecution of Mr Berenger under the same section of the Criminal Code and in reliance on the same facts in the Intermediary Court, but this was set aside for lack of jurisdiction. In June 2002, with another, he again initiated a prosecution of Mr Berenger under the same section in the District Court of Curepipe. This was heard for some days before, on 12 December 2002, the DPP entered a nolle prosequi, giving no reasons.

6. The appellant tried again. On 27 January 2003 he initiated a further private prosecution of Mr Berenger in the District Court of Curepipe, on a charge of harbouring a criminal, namely Bissessur, this time under section 39 of the Criminal Code. This prosecution was brought to an end on 4 March 2003 when the DPP again entered a nolle prosequi, again giving no reasons. On 7 March 2003 the appellant applied to the Supreme Court for leave to apply for judicial review of the DPP's decision to enter the nolle prosequi entered on 12 December 2002. This application was heard on 10 June 2003 and was dismissed for reasons given in a detailed judgment delivered on 30 September 2003. This is the first, and the substantial, judgment now under appeal.

7. But the appellant was undeterred. On 11 November 2003, with a brother of one of the victims of the triple murder mentioned above, he initiated a further prosecution of Mr Berenger in the District Court of Curepipe on the same charge as before under section 39 of the Criminal Code. On 13 February 2004 the DPP entered a nolle prosequi, and thereby brought the prosecution to an end, without giving reasons. The appellant applied to the Supreme Court for leave to apply for judicial review of the DPP's decision to enter this nolle prosequi. His application was heard by the Supreme Court on 10 May 2004, but was dismissed as an abuse on 14 September 2004, the Supreme Court having already held

the DPP's decision to discontinue the private prosecution of Mr Berenger by the appellant and another to be unreviewable. This is the second judgment now under appeal, but its correctness turns on the correctness of the first.

The Constitution

8. Before 1964 there was in Mauritius an office of Procureur General which has no precise analogue within the British legal system. Under article XXXVII of Ordinance No 29 (1853) and article 48 of Chapter 169 of the Laws of Mauritius in force in 1945 the Procureur General was expressly empowered to enter a nolle prosequi. With the advent of the 1964 Constitution that office came to an end, and in its place there were created two new offices, that of Attorney-General and Director of Public Prosecutions. This arrangement was retained in the 1968 Constitution, which remains in force. Neither of these Constitutions conferred an express power to enter a nolle prosequi and the power of the Procureur General lapsed with the demise of his office.

9. By section 69 of the 1968 Constitution there is to be an Attorney-General, who is the principal legal adviser to the Government of Mauritius. His office is not a public office within the meaning of the Constitution, and he is not a public officer. He is, instead, a Minister. He may or may not be a member of the Assembly. But he is not qualified for appointment as Attorney-General if he is not a member of the Assembly and is for any cause disqualified from membership of it, and if he is not a member of the Assembly he may take part in the proceedings of the Assembly and is to be treated as if he were a member of it, save that he may not vote. The Attorney-General may not at the same time hold the office of DPP.

10. The office of DPP is governed by section 72 of the 1968 Constitution, on which these appeals largely turn. It provides (so far as material):

> "72 **Director of Public Prosecutions**
>
> (1) There shall be a Director of Public Prosecutions whose office shall be a public office and who shall be appointed by the Judicial and Legal Service Commission.
>
> (2) No person shall be qualified to hold or act in the office of Director of Public Prosecutions unless he is qualified for appointment as a Judge of the Supreme Court.

(3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do –

(a) to institute and undertake criminal proceedings before any court of law (not being a court established by a disciplinary law);

(b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

(4) The powers of the Director of Public Prosecutions under subsection (3) may be exercised by him in person or through other persons acting in accordance with his general or specific instructions.

(5) The powers conferred upon the Director of Public Prosecutions by subsection (3)(b) and (c) shall be vested in him to the exclusion of any other person or authority.

Provided that, where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority at any stage before the person against whom the proceedings have been instituted has been charged before the court.

(6) In the exercise of the powers conferred upon him by this section, the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority."

Construing the language of subsection (6), found in identical terms in the 1970 Constitution of Fiji, the Board held in *Attorney General of Fiji v Director of Public Prosecutions* [1983] 2 AC 672, 679, that this

amounted to a constitutional guarantee of independence from the direction or control of any person. A "public office" is defined in section 111 of the Constitution, for present purposes, as "an office of emolument in the public service", meaning "the service of the State in a civil capacity in respect of the Government of Mauritius". By section 93 the DPP may be removed from office before reaching retirement age "only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be so removed except in accordance with this section". The section requires that a tribunal appointed by the President shall have recommended removal. Finally, reference should be made to the saving for the jurisdiction of the courts contained in section 119 of the Constitution, which has reference to section 72(6) already quoted:

> "No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court of law from exercising jurisdiction in relation to any question, whether that person or authority has performed those functions in accordance with this Constitution or any other law or should not perform those functions."

11. Provisions to the same or very similar effect as those quoted were included in a number of Constitutions of Commonwealth States. They have been the subject of judicial consideration in Guyana (*Tappin v Lucas* (1973) 20 WIR 229), Barbados (*Re King's Application* (1988) 40 WIR 15), Jamaica (*Tapper v Director of Public Prosecutions* (Supreme Court of Jamaica in the Constitutional Court, 8 February 1999, unreported)) and Fiji (*Matalulu v DPP* [2003] 4 LRC 712) as well as in Mauritius. While the reasoning of these judgments varies, in none (save in Mauritius) has the DPP's statutory power to discontinue proceedings been held to be immune from judicial review.

The Supreme Court judgment of 30 September 2003

12. In its judgment of 30 September 2003 the Supreme Court conducted a detailed and wide-ranging review of Mauritian and international authority. It considered the position of the Attorney General and the DPP in England and Wales, distinguishing these from the position of the DPP in Mauritius, and echoed warnings in earlier authority (such as *Edath-Tally v M J K Glover* [1994] MR 200) against over-ready identification of the Mauritian DPP with the English Attorney General. In finally concluding that decisions of the DPP in Mauritius to prosecute

or not to prosecute or to stop a prosecution were not subject to judicial review, the Supreme Court based itself in particular on its earlier decision in *Lagesse v Director of Public Prosecutions* [1990] MR 194, on the House of Lords' decision in *Gouriet v Union of Post Office Workers* [1978] AC 435, on observations in the High Court of Australia in *Maxwell v R* [1996] 1 LRC 299 and on the decision of the Hong Kong Court of Appeal in *Keung Siu Wah v Attorney General* [1991] LRC (Cons) 744. It did not adopt the decision of the Supreme Court of Fiji in *Matalulu*, above. Rejecting the appellant's claim, the Supreme Court noted that a person who considered that his constitutional rights had been, were being or would be likely to be contravened had a right to redress under the Constitution, but that is not a claim which the appellant makes or has ever made. It added that nothing prevented a victim bringing a civil claim for compensation against the wrongdoer, and that the DPP might be removed for inability to discharge the functions of his office.

13. In *Lagesse*, above, the plaintiff claimed damages against the DPP for malicious prosecution and the question arose whether a plaintiff could, through an action in tort or otherwise, in effect ask a court to determine whether the DPP had acted in breach of the Constitution or any other law. Addressing this issue, the court said, with reference to section 119 of the Constitution quoted above, at p 200:

> "Section 119 is not a substantive provision of the Constitution which confers, or rather creates, jurisdiction upon or for the courts. It is, in our judgment, a clause inserted ex abundanti cautela to spell out that the various provisions of the Constitution which protect various public officers and authorities from other kinds of interference should not be taken to mean that the Courts are thereby precluded from exercising such jurisdiction as is or may be conferred on them by the Constitution or any other law."

With this observation the Board respectfully and wholly agrees, and it was accepted by the parties. The court then continued, at pp 200-201:

> "There is no doubt that the Director's decision to institute and undertake or take over criminal proceedings against any suspect, to discontinue any such proceedings by way of a nolle prosequi or indeed not to institute proceedings in any matter is an administrative decision and as such could be liable to be reviewed by the Courts. However, these administrative decisions fall broadly in two categories and

> the control exercisable by the Courts will differ depending on which category of decision is in issue.
>
> The first category of the Director's decisions concerns those cases where the decision is to file a nolle prosequi where a prosecution is already in process or where the decision is not to prosecute. The Courts will undoubtedly not interfere with such decisions for two main reasons. First, the complainant always has a remedy against the suspected tortfeasor and there is no fundamental right to see somebody else prosecuted and, in most cases, the complainant may additionally enter a prosecution himself though, even here, the Director can stop the prosecution except on appeal by the convicted person. Secondly, the Courts would find it inappropriate to substitute what would be their own administrative decision to prosecute, at the risk of jeopardising their inherent role to hear and try a case once it comes before them.
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> The second category of decision is where the Director decides to prosecute. By its very nature and in contradistinction from other administrative decisions, the matter automatically falls under the control of the Courts by virtue of sections 10, 76 and 82 of the Constitution."

With the concluding paragraph of this passage the Board again, respectfully, agrees: where proceedings initiated by the DPP are before the courts, they must ensure that the proceedings are fair and that a defendant enjoys the protection of the law even if that involves interference with the DPP's discretion as prosecutor. 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 *Gouriet*, above, 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. The Supreme Court relied in particular on a strong statement by Viscount Dilhorne at p 487:

> "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."

Unless reviewed or modified in the light of the later decision of the House in the *GCHQ* case (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374), this remains a binding statement of English law on cases covered by it. It must, however, be borne in mind that the power in question was a non-statutory power deriving from the royal prerogative. It was moreover a power exercised by a minister answerable to Parliament, 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 (*The Attorney-General, Politics and the Public Interest* (1984), p 29), and the Law Commission has tacitly accepted (LCCP 149 *Criminal Law*: *Consents to Prosecution*, September 1997, p 29), that "[s]ince 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.

15. In *Maxwell v R*, above, the central issue was whether, on the facts, the appellant had pleaded guilty and whether the trial judge could reject a plea which the prosecutor had accepted. In a passage quoted by the Supreme Court, Gaudron and Gummow JJ observed *obiter*, at pp 329-330:

"The power of the Attorney General and of the Director of Public Prosecutions to enter a nolle prosequi and that of a prosecutor to decline to offer evidence are aspects of what is commonly referred to as 'the prosecutorial discretion' (see *Barton v R* (1980) 147 CLR 75 at 91, 94 per Gibbs and Mason JJ, *R v McCready* (1985) 20 A Crim R 32, *R v von Einem* (1991) 55 SASR 199 and *Chow v DPP* (1992) 28 NSWLR 593 at 604-605 per Kirby P). In earlier times, the discretion was seen as part of the prerogative of the Crown and, thus, as unreviewable by the courts (see Wheeler 'Judicial Review of Prerogative Power in Australia: Issues & Prospects' (1992) 14 Sydney LR 432). That approach may not pay sufficient regard to the statutory office of Director of Public Prosecutions which now exists in all states and territories and in the Commonwealth. Similarly, it may pay insufficient regard to the fact that some discretions are conferred by statute (see *Newby v Moodie* (1988) 83 ALR 523; see also *R v Toohey, ex p Northern Land Council* (1981) 151 CLR 170 at 217, 220 per Mason J) such as that conferred on a prosecutor by s 394A of the Act.

It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute (see *Connelly v DPP* [1963] 3 All ER 510 at 519, [1964] AC 1254 at 1277, *DPP v Humphrys* [1976] 2 All ER 497 at 527-528, [1977] AC 1 at 46 and *Barton v R* (1980) 147 CLR 75 at 94-95, 110), to enter a nolle prosequi (see *R v Allen* (1862) 1 B & S 850, 121 ER 929 and *Barton v R* (1980) 147 CLR 75 at 90-91), to proceed ex officio (see *Barton v R* (1980) 147 CLR 75 at 92-93, 104, 107, 109), whether or not to present evidence (see, for example, *R v Apostilides* (1984) 154 CLR 563 at 575), and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted (see *R v McCready* (1985) 20 A Crim R 32 at 39 and *Chow v DPP* (1992) 28 NSWLR 593 at 604-605). The integrity of the judicial process— particularly, its independence and impartiality and the public perception thereof— would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what (*Barton v R* (1980)

> 147 CLR 75 at 94-95, *Jago v District Court (NSW)* (1989) 168 CLR 23 at 38-39, 54, 77-78 per Brennan J, Gaudron J, *Williams v Spautz* [1993] 2 LRC 659 at 690, (1992) 174 CLR 509 at 548 per Deane J and *Ridgeway v R* [1995] 3 LRC 273 at 320, (1995) 129 ALR 41 at 82 per Gaudron J)."

This, plainly, is authority supportive of the Supreme Court's conclusion, although deriving from two members of the High Court only and relying strongly on Australian precedent.

16. The decision of the Hong Kong Court of Appeal in *Keung Siu Wah v Attorney General*, above, is again supportive of the Supreme Court's conclusion. Penlington JA (p 763) considered the authorities to be "overwhelming that the decision of the Attorney General whether or not to prosecute in any particular case is not subject to judicial review". The leading judgment of Fuad V-P was to like effect, and both Hunter and Penlington JJA agreed with it.

17. The decision of the Supreme Court of Fiji in *Matalulu v DPP*, above, which the Supreme Court chose not to adopt was given by Von Doussa, Keith and French JJ and was made (unlike *Maxwell* and *Keung Siu Wah*) with reference to constitutional provisions indistinguishable in substance from those in Mauritius. At pp 735-736 the court said:

> "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.
>
> The decisions of the DPP challenged in this case were made under powers conferred by the 1990 Constitution. Springing directly from a written constitution they are not to be treated as a modern formulation of ancient prerogative authority. They must be exercised within constitutional

limits. It is not necessary for present purpose to explore those limits in full under either the 1990 or 1997 Constitutions. It may be accepted, however, that a purported exercise of power would be reviewable if it were made:

1. In excess of the DPP's constitutional or statutory grants of power— such as an attempt to institute proceedings in a court established by a disciplinary law (see s 96(4)(a)).

2. When, contrary to the provisions of the Constitution, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion— if the DPP were to act upon a political instruction the decision could be amenable to review.

3. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.

4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.

5. Where the DPP has fettered his or her discretion by a rigid policy— eg one that precludes prosecution of a specific class of offences.

There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or without regard to relevant considerations or otherwise unreasonably, are unlikely to be vindicated because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice."

The court went on to question whether a mistaken view of the law by the DPP could ever found a successful challenge, save perhaps where it had prompted a decision not to prosecute.

The argument

18. The essence of the appellants' argument is encapsulated in the cited passage of the judgment of the Supreme Court of Fiji in *Matalulu*. Under the Constitution of Mauritius the DPP is a public officer. He has powers conferred on him by the Constitution and enjoys no powers derived from the royal prerogative. Like any other public officer he must exercise his powers in accordance with the Constitution and other relevant laws, doing so independently of any other person or authority. Again like any other public officer, he must exercise his powers lawfully, properly and rationally, and an exercise of power that does not meet those criteria is open to challenge and review in the courts. The grounds of potential challenge certainly include those listed in *Matalulu*, but need not necessarily be limited to those listed. 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: see, for example, *R v Commissioner of Police of the Metropolis, Ex p Blackburn* [1968] 2 QB 118; *R v General Council of the Bar, Ex p Percival* [1991] 1 QB 212, 234; *R v Chief Constable of the Kent County Constabulary, Ex p L (a minor)* [1993] 1 All ER 756; *R v Inland Revenue Commissioners, Ex p Mead* [1993] 1 All ER 772; *R v Director of Public Prosecutions, Ex p C* [1995] 1 Cr App R 136; *R v Crown Prosecution Service, Ex p Hitchins* (Queen's Bench Divisional Court, 13 June 1997, unreported); *R v Director of Public Prosecutions, Ex p Treadaway* Queen's Bench Divisional Court, 31 July 1997, unreported; and *R v Director of Public Prosecutions, Ex p Manning* [2001] QB 330.

19. In supporting the decision of the Supreme Court, the DPP relies less on the source of the power to enter a nolle prosequi as a prerogative power not thought to be subject to judicial review than on the nature of the decision to be made when a decision not to prosecute is made or a nolle prosequi entered. He relies on the observation of Lord Scarman in the *GCHQ* case, above, at p 407, that "Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter", and refers to authority showing that the power to enter a nolle prosequi cannot be subject to judicial review: see, for example, *Barton v The Queen* (1980) 32 ALR 449, 455, 457, 458; *Hanna v Director of Public Prosecutions of NSW* [2005] NSWSC 134, para 56; The *State v Ilori* [1983] 1 SCNLR 94, 106, 108. The DPP contends that a decision not to prosecute or to discontinue an existing prosecution, private or public, involves the assessment of factors which the courts cannot and should not seek to review.

Conclusion

20. In *R v Panel on Take-overs and Mergers, Ex p Datafin PLC* [1987] QB 815, 847, Lloyd LJ observed that "If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review". It is unnecessary to discuss what exceptions there may be to this rule, which now represents the ordinary if not the invariable rule. Thus the Board should approach the present issue on the assumption that the powers conferred on the DPP by section 72(3) of the Constitution are subject to judicial review, whatever the standard of review may be, unless there is some compelling reason to infer that such an assumption is excluded. What compelling reason is there in a case such as this?

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. The power expressly conferred on the Procureur General to enter a nolle prosequi has never, by that name, been conferred on the DPP. (The Attorney General of England and Wales in practice exercises his power very infrequently: twice in the past 5 years, in each case because of the defendant's ill health). It has been pointed out that the English DPP, unlike his Mauritian counterpart, discharges his functions

under the superintendence of the Attorney General (Prosecution of Offences Act 1985, s 3(1)), but this fact, if of any significance, would tend to weigh against rather than for the reviewability of his decisions, as providing a potential safeguard against abuse through the Attorney-General's answerability to Parliament. Yet it has been common ground for some years that decisions of the English DPP are in principle reviewable, and the same view has been taken, for very much the same reasons, under the Constitution of Ireland: see *McCormack v Curran* [1987] ILRM 225; *H v Director of Public Prosecutions* [1994] 2 IR 589; *Eviston v Director of Public Prosecutions* [2002] IESC 43. It cannot, in the Mauritian context, be accepted that the extreme possibility of removal under section 93 of the Constitution provides an adequate safeguard against unlawfulness, impropriety or irrationality. There is here nothing to displace the ordinary assumption that a public officer exercising statutory functions is amenable to judicial review on grounds such as those listed in *Matalulu*. The Board would respectfully endorse the cited passage from the Supreme Court of Fiji's judgment in that case as an accurate and helpful summary of the law as applicable in Mauritius.

22. It follows from that conclusion that the judgments of the Supreme Court of Mauritius of 30 September 2003 and 14 September 2004 should be set aside and the Supreme Court invited to reconsider the appellant's applications in the light of this judgment and any evidence there may then be. That evidence will include any reasons the DPP may choose to give. But it is for the DPP to decide whether reasons should be given and, if reasons are given, how full those reasons should be. The English authorities cited above show that there is in the ordinary way no legal obligation on the DPP to give reasons and no legal rule, if reasons are given, governing their form or content. This is a matter for the judgment of the DPP, to be exercised in the light of all relevant circumstances, which may include any reasons already given. The Supreme Court must then decide on all the material before it, drawing such inferences as it considers proper, whether the appellant has established his entitlement to relief.

23. The appeals will accordingly be allowed and the applications remitted to the Supreme Court. The DPP must pay the costs incurred by the appellant in the Supreme Court and before the Board in relation to his application of 7 March 2003. No order for costs is made in relation to his application of 23 April 2004, save that the order of the Supreme Court shall stand.