THE STATE

v.

DIRECTOR OF PUBLIC PROSECUTIONS

ex parte

LIVAI LILA MATALULU & NAVITALAI EDURA RASOLOSOLO

[HIGH COURT, 1998 (Fatiaki J) 16 July]

Revisional Jurisdiction

Crime: procedure- whether DPP's decision to enter nolle prosequi reviewable- Criminal Procedure Code (Cap. 21) Section 71- Constitution (1990) Sections 96 (4) (c) and 96 (7).

The Applicants commenced a private prosecution in the Magistrates' Court. Exercising the powers conferred on her, the Director of Public Prosecutions entered a nolle prosequi terminating the prosecution. The Applicants were aggrieved and sought judicial review of the DPP's decision. The DPP opposed the application. Granting leave, the High Court HELD: neither the constitutional protection given to the DPP nor the administrative nature of the decision ousts the jurisdiction of the High Court judicially to review the propriety of the decision taken.

Cases cited:

Attorney-General v. Director of Public Prosecutions (1982) F.L.R. 20
Breen v. Amalgamated Engineering Union [1971] 2 Q.B. 175
Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 All E.R. 935
Gallick v. West Norfolk Health Authority [1985] 3 All E.R.402
Gouriet v. U.P.W. [1978] A.C. 435
Kostuch v. Attorney General of Alberta (1995) 128 D.L.R. (4th) 440
O'Reilly v. Mackman [1982] 3 All E.R. 680
Padfield v. Minister of Agriculture [1968] A.C. 997
R. v. Gaming Board ex-parte Benaim and Khaida [1970] 2 Q.B.417
R. v. IRC ex parte Federation of Self-Employed [1982] A.C. 617
R. v. I.R.C. ex parte Mead [1993] 1 All E.R. 772
R. v. Panel on Take-Overs ex parte Datafin [1987] 1 All E.R. 564
Ratu Nacanieli Nava v. N.L.C. & Anr Civil Appeal No. 55 of 1993.
Re Kings Application (1991) 40 West Indian Reports 15
Reg. v. Bar Council ex parte Percival [1990] 3 W.L.R. 323
Reg. v. Chief Constable ex parte L [1993] 1 All E.R. 756
Reg. v. Commissioner of Police of the Metropolis ex parte Blackburn [1968] 2 Q.B. 118
Ridge v. Baldwin [1964] A.C. 40

Tappin v. Lucas (1973) 20 West Indian Reports 229

Application in the High Court to move for judicial review.

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I. Fa for the Applicants
K. Wilkinson for the Director of Public Prosecutions

Fatiaki J:

This is an application for leave to issue judicial review proceedings against the decision of the Director of Public Prosecutions (DPP) taken on or about the 3rd of December 1997 in taking over and entering a *nolle prosequi* in a private prosecution commenced by the applicants in the Magistrates' Court at Suva, the reasons for which were later reduced into writing and are contained in a letter dated 10th December 1997 and signed by the Assistant Director of Public Prosecutions.

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The amended grounds upon which leave is sought are as follows :

"(a) That the decision by the 1st and 2nd Respondent to enter a *nolle prosequi* against the private prosecutions commenced by the Applicants is unreasonable in law and as such *ultra vires* as the 1st and 2nd Respondent had failed to take into account relevant considerations, took into account extraneous considerations, had failed to exercise good faith and is abitrary.

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(b) That the 1st and 2nd Respondent acted in breach of the Rules of Natural Justice as it had made a predetermination in arriving at its decision to enter a *nolle prosequi* and that its decision is tainted with bias.

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(c) The 1st and 2nd Respondent in deciding to enter a *nolle prosequi* had failed to exercise a discretion in accordance to law as required under section 96 4(c) of the Constitution of Fiji.

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(d) That the decision of the 1st and 2nd Respondent to enter a *nolle prosequi* was arrived at unfairly and without good and legitimate reasons."

The application is supported by an affidavit deposed by the first applicant which discloses that on or about the 22nd of April 1997 the applicant commenced in the Magistrates' Court, Suva a private prosecution against three named defendants charging each with various offences of Perjury contrary to Sections 117(1) & (3) of the Penal Code (Cap. 17). The particulars of the charges (as amended) refer to various affidavits deposed by each defendant which allegedly contained material falsehoods and which were filed in judicial review proceedings before the High Court. The defendants were

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summoned before the Magistrates' Court, Suva and all appeared and pleaded not guilty to the charges.

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Subsequently, on 5th August 1997, counsel for the defendants wrote to the DPP seeking her intervention in the matter "... to stop (the) proceedings, either by entering *nolle prosequi* or in other manner deemed appropriate ..." Thereafter, over several months, an exchange of correspondence ensued between the DPP's office and the solicitors acting for the applicants which culminated with the DPP taking over the applicant's private prosecution and

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entering a *nolle prosequi*.

The DPP's amended notice of opposition dated 3rd April 1998 sets out various grounds on which it is argued leave ought not to be granted to the applicants. These are :

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"1. That no allegation whatsoever having been made against the third Respondent, that the application against that Respondent be dismissed with costs *ab initio*.

2. That the Application should be dismissed with costs as it is not properly before this Honourable Court because the Respondents have failed to join the Attorney as a

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Respondent as is required by the Crown Proceedings Act (Cap 24), sections 2, 9 and 12.

3. That the application for Judicial Review is wrong in law as the applicant has not exhausted other available remedies.

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4. That an application for Judicial Review does not lie against the decision of the Director of Public Prosecutions to enter a *nolle prosequi* pursuant to section 78 of the Criminal Procedure Code (Cap 21) and section 96 of the 1990 constitution of the Republic of Fiji.

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5. That an Order for Certiorari and Declarations as sought in the amended Application for leave to apply for Judicial review are inappropriate in the circumstances."

I do not propose at this stage to deal in any detail with the first three grounds of objection which are, in my view, satisfactorily answered in the oral and

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written submissions of counsel for the applicants.

In this latter regard counsel writes, and I agree, that there are at this preliminary stage, two issues before the court for determination:

> The first being whether or not the applicants have satisifed the requirement for the grant of leave, and secondly, whether or not the decision of the DPP is reviewable by the Court.

Order 53 r.5 of the High Court Rules 1988 provides that the Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

In this regard, in the leading case of R. v. IRC ex parte Federation of Self-Employed [1982] A.C. 617, Lord Wilberforce said at p.630 :

> "There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application: then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies being harrassed by irresponsible applications. But in other cases this will not be so. In these, it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed."

In this case the applicants are the complainants upon whose complaints the private prosecution was initiated. It was this private prosecution which the DPP took over and "nolled" thereby effectively preventing the applicants from pursuing their complaints before the Magistrates' Court. They are undoubtedly directly affected by and in my opinion, have a sufficient interest in the entry of the *nolle prosequi* which is the (subject) matter to which the (present) application relates.

As was said by Watkins L.J. in Reg. v. Bar Council ex parte Percival [1990] 3 W.L.R. 323 in holding that the applicant in that case had the necessary *locus standi*, at p.337 :

> "Mr. Beloff's concluding argument was to this effect : granted that there are circumstances where a decision not to proceed with ... the initiation of a prosecution should be challengeable, who is to mount the challenge? He submitted that the obvious person was the victim. Again, in our view this submission is correct. Unless the disappointed complainant is regarded as having sufficient *locus standi* to challenge the decision it is difficult to see who else could be expected to do it."

At the hearing of the leave application Counsel for the DPP, very properly in my view, accepted that the applicants have a sufficient interest to bring this application but counsel disputes that there is an arguable case in so far as it is his submission that the decision of the DPP in taking over the applicant's private prosecution and entering a *nolle prosequi* is not reviewable by the Court.

I turn then to consider the relevant powers of the DPP. The Office of the DPP was first created under Section 85 of the 1970 Constitution and was continued

in Section 96 of the 1990 Constitution. Under both sections the powers of the DPP remained the same and in the latter Constitution, are expressly conferred under Section 96 which provides, so far as relevant for present purposes, as follows :

> "(4) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do -
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> (a) to institute and undertake criminal proceedings before any court of law (not being a court established by a disciplinary law);
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> (b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority ; and
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> (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.
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> (5) The powers of the Director of Public Prosecutions under the preceding subsection may be exercised by him in person or through other persons acting in accordance with his general or specific instructions.
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> (6) The powers conferred upon the Director of Public Prosecutions by paragraphs (b) and (c) of Subsection (4) of this section 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.
>
> (7) 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."

It is implicit in paragraphs 4(b) and 4(c) above, that the power to institute criminal proceedings is not exclusively vested in the DPP and indeed Section 78(2) of the Criminal Procedure Code (Cap. 21) clearly recognises that : any person who believes from a reasonable and probable cause that an offence has been committed by any person may make a complaint thereof to a

magistrate having jurisdiction to cause such person to be brought before him.

This historical right to institute a private prosecution, Lord Wilberforce says in Gouriet v. U.P.W. [1978] A.C. 435 at p.477 : A

> "... dates back to the earliest days of our legal system ... and though ultimately liable to be controlled by the Attorney-General (by taking over the prosecution and, if he thinks fit, entering a *nolle prosequi*) remains a valuable constitutional safeguard against inertia or partiality on the part of authority." B

For the sake of completeness it is necessary to set out the power of the DPP to enter a *nolle prosequi* which is the particular form of discontinuance adopted by the DPP in this case. That power is set out in Section 71 of the Criminal Procedure Code (Cap. 21) in the following terms :

> "In any criminal case and at any stage before verdict or judgment, as the case may be, the Director of Public Prosecutions may enter a *nolle prosequi*, either by stating in court or by informing the court in writing that the Crown intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the *nolle prosequi* is entered ... ; ... but such discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts." C D

In this case Mr. Wilkinson relies upon Section 96(7) of the Constitution as a cornerstone for his submission that the exercise by the DPP of her constitutional powers is not reviewable by the Court. E

As to that subsection the Privy Council said in Attorney-General v. D.P.P. (1982) F.L.R. 20 concerning the identically-worded predecessor to Section 96(7) at p.25 :

> "Their Lordships agree with the (Fiji) Court of Appeal that this subsection amounts to a constitutional guarantee of independence from the direction or control of any person in the exercise by the DPP of his powers under the preceding subsections of Section 85." F

It is noteworthy that the Privy Council in so agreeing with the Fiji Court of Appeal did not disagree or disapprove of the Court of Appeal's additional observation that the constitutional guarantee does not: G

> "... say that the DPP is not accountable to anyone. He is accountable to the Courts in the performance or non performance of his functions (Section 136), he is accountable to the J.L.S.C. in respect of his professional conduct (Section 102) and he is accountable to the Auditor-General for his financial

administration (Section 126)."

A The reference to Section 136 is important, because, in the 1990 Constitution, it is re-enacted in identical terms as Section 158 which reads :

> "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 function under this Constitution shall be construed as precluding a court of law from exercising
B 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."

The effect of this Section, counsel writes :

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> "... clearly limits the application of Section 96(6) (sic) in that it does not bar the jurisdiction of the court to determine the lawfulness of the exercise by the DPP of its powers under Section 96(4)(b) and (c)."

I agree entirely with the above submission and would only add that the section
D by its tense and wording, in mirroring the material words of Section 96(7), clearly intended to deprive those words of any privative effect and, in the context of the 1990 Constitution, may be compared and contrasted with the wording adopted in Section 100(4) as interpreted by the Fiji Court of Appeal in Ratu Nacanieli Nava v. N.L.C. and N.L.T.B. Civil Appeal No. 55 of 1993.

E I am fortified in my view by the judgment of Sir Denys Williams C.J. in Re Kings Application (1991) 40 West Indian Reports 15 where although dismissing the application for judicial review relief in the case, his lordship :

> "Held : (2) That the exercise of the powers of the Director (of Public Prosecutions) conferred by Section 79 of the Constitution of Barbados was subject to review by the Courts under Section
F 117(10) of the Constitution ..."

In his judgment the learned Chief Justice, after setting over the provisions of S.79(2) to (5) of the Constitution of Barbados (which is in all material respects identical to our Section 96(4) to (7)) and Section 117(10) which is in terms identical to our Section 158, said at p.33 :

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> "By virtue of Section 117(11) [which is identical to our Section 149(2)] ... and Section 46 [which is Section 2 of our Interpretation Act (Cap.7)], functions in Section 117(10) of the Constitution includes jurisdictions powers and duties.
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> S.79 sets out the constitutional powers of the director ..."

and later, in words that apply equally to the present case with slight

amendments, the Chief Justice said at p.34 :

> "It seems to me that the provisions of Section 117(10) of the Constitution necessarily lead to the conclusion that the court is meant to have jurisdiction to review the exercise by the Director of his functions under Section 79 of the Constitution.
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> I am fortified in this conclusion by Tappin v. Lucas (1973) 20 West Indian Reports 229 where Bollers C.J. delivering the judgment of the Court of Appeal of Guyana said in respect of provisions of the Constitution of Guyana that were in identical terms to Section 79(5) and Section 117(10) of the Barbados Constitution (at pages 235 and 236:-
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> "We are mindful that privative clauses of the kind referred to cannot oust the jurisdiction of the court to declare an administrative act to be a nullity where it is void *ab initio*. If the decision of the DPP to discontinue could be said to be *ultra vires*, and therefore null and void, the existence of an exclusionary or privative provision would not preclude the court from saying so ... In the exercise of his powers under Art 47 of discontinuing a prosecution the DPP is in effect performing an administrative act in nature akin to the exercise of a quasi-judicial function, which it must be presumed will be exercised fairly and honestly within the ambit of the wide discretion bestowed on him by the Constitution, but he must keep within the legal limits of the exercise of his powers as laid down by the Constitution."

Mr. Wilkinson sought however to confine the jurisdiction of the court under Section 158 to an enquiry as to whether or not the power exercised by the DPP is granted under the Constitution and, if it is, then that would be the end of the matter and the Court could not go behind it and enquire into the merits or the reasons for the exercise of the power. With all due regard to the submission I cannot agree.

The submission not only comes perilously close to saying that the DPP is answerable to no-one in the exercise of her constitutional powers, but it flies in the face of the clear wording of the section that the DPP's power be exercised 'in accordance with the Constitution or any other law', which latter expression includes the common law as developed and expounded in judicial decisions and is not to be confined to legislation as appears to have been suggested in counsel's submissions.

Of even greater concern however was the reply of Mr. Wilkinson to the court's hypothetical question, that the remedy for abuse by the DPP of his or her constitutional powers lay in his or her removal from office pursuant to Section 131 of the Constitution, or alternatively, by seeking to persuade the DPP to re-lay charges on the basis of fresh evidence, since a nolle prosequi does not

bar subsequent proceedings.

A Even accepting that the DPP has a wide and seemingly unfettered discretion in the exercise of her constitutional powers, I cannot accept, even hypothetically, that this Court would be powerless to intervene in the face of a flagrant abuse of that power. No one is above the law.

In Reg. v. Commissioner of Police of the Metropolis ex parte Blackburn [1968] 2 Q.B. 118 where the Commissioner of Police took a policy decision
B not to enforce a gaming law, the Court of Appeal (E & W) on the application of a concerned citizen:-

> "Held : that the respondent owed a duty to the public to enforce the law which he could be compelled to perform ; that while he had a discretion not to prosecute, his discretion to make policy
C decisions was not absolute ..."

Furthermore in Reg. v. Chief Constable ex parte L [1993] 1 All E.R. 756 the Court of Appeal:

> "Held : The discretion of the Crown Prosecution Service to continue or to discontinue criminal proceedings against a juvenile
D was subject to judicial review by the High Court but only where it could be demonstrated that the decision had been made regardless of or clearly contrary to a settled policy of the DPP which had been formulated in the public interest ..."

More relevantly for present purposes, Watkins L.J. in considering ex parte
E Blackburn said at p.768:-

> "It seems to me that a decision to discontinue proceedings ... can be equated with a decision by the police not to prosecute and is, therefore, open to judicial review only upon the restricted basis available to someone, assuming he has *locus standi*, seeking to challenge a decision of the police."
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In Kostuch v. Attorney General of Alberta (1995) 128 D.L.R. (4th) 440 the Alberta Court of Appeal of Alberta whilst dismissing the appeal in that case:

> "Held (inter alia): assuming that the court had the power to review
G prosecutorial discretion, that power will be exercised only in cases where there has been flagrant impropriety in the exercise of the prosecutorial discretion, which can only be established by proof of misconduct bordering on corruption, violation of the law, or bias against or for a particular individual or offence."

In this latter regard it is noteworthy that the grounds upon which judicial review is sought by the applicants includes claims that the DPP failed to

exercise good faith and (the decision) is arbitrary and also, is tainted with bias.

Mr. Wilkinson then argued that considering the width of the DPP's discretion ... "in any case in which he considers it desireable so to do", and given the large policy content in the DPP's decision whether or not to exercise her constitutional powers, and the desireability that the criminal process should not be unnecessarily delayed by applications for review, the court ought not to intervene.

Again I cannot agree. Lloyd L.J. in rejecting a not dissimilar argument in R. v. Panel on Take-Overs ex parte Datafin [1987] 1 All E.R. 564 said at p.582

> "Counsel for the panel urged on us the importance of speed and finality in these matters. I accept that submission. I accept also the possibility that unmeritorious applications will be made from time to time as a harrassing or delaying tactic. It would be up to the court to ensure that this does not happen. These considerations are all very relevant to the exercise of the court's discretion in particular cases. They mean that a successful application for judicial review is likely to be very rare. But they do not mean that we should decline jurisdiction altogether.
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> So long as there is a possibility, however remote, of the panel abusing its great powers, then it would be wrong for the courts to abdicate responsibility. The courts must remain ready, willing and able to hear a legitimate complaint in this as in any other field of our national life. I am not persuaded that this particular field is one in which the courts do not belong, or from which they should retire, on grounds of policy."

In similar vein and in rejecting what he termed the floodgates argument in ex parte Percival's case (op.cit) Watkins L.J. was convinced by counsel's submission at p.342 :

> "... that excessive applications whether tactical or merely optomistic could properly be contained by the filtering process of obtaining leave and by the penalty of costs for the unsuccessful (applicant)."

Finally Mr. Wilkinson submitted that *certiorari* was not an appropriate remedy since the decision-making process by the DPP envisaged under Section 96 of the Constitution was neither judicial or quasi-judicial but entirely administrative in nature so as not to be amenable to judicial review.

In my considered opinion this submission is plainly misconceived. Mr. Wilkinson, in seeking to draw a distinction between purely administrative processes and quasi-judicial and judicial proceedings ignores the great advances and developments that have occurred in this area of the law since

the seminal judgment of Lord Reid in the leading case of Ridge v. Baldwin [1964] A.C. 40.

A Lord Hodson in his judgment in the case exposes the inherent fallacy in the submission when he said in his judgment ibid at p.130 :

> "... the answer in a given case is not provided by the statement that the giver of the decision is acting in an executive or administrative capacity as if that were the antithesis of a
B judicial capacity. The cases seem to me to show that persons acting in a capacity which is not on the face of it judicial but rather executive or administrative have been held by the courts to be subject to the principles of natural justice."

In more trenchant language Lord Denning M.R. said of the distinction in R.
C v. Gaming Board ex parte Benaim and Khaida [1970] 2 Q.B.417 :

> "At one time it was said that the principle (of natural justice) only applies to judicial proceedings and not to administrative proceedings. That heresy was scotched in Ridge v. Baldwin [1964] A.C.40.

D Then later, in considering the reviewability of the exercise of a discretion by a statutory body in Breen v. Amalgamated Engineering Union [1971] 2 Q.B. 175, Lord Denning M.R. said :

> "It is now well settled that a statutory body, which is entrusted by statute with a discretion, must act fairly. It does not matter
E whether its functions are described as judicial or quasi-judicial on the one hand, or as administrative on the other hand, or what you will. Still it must act fairly ... The discretion of a statutory body is never unfettered. It is a discretion which is be exercised according to law. That means at least this : The statutory body must be guided by relevant considerations and not by irrelevant.
F If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith ; nevertheless the decision will be set aside. That is established by Padfield v. Minister of Agriculture [1968] A.C. 997 which is a landmark in modern administrative law."

G The extent of the development and availability of judicial review is conveniently summarised in the judgment of Sir John Donaldson M.R. in R. v. Panel on Takeovers (op.cit) when the learned Master of the Rolls said at p.576 :

> "The process has been taken further in O'Reilly v. Mackman [1982] 3 All E.R. 680 by deleting any requirement that the body should have a duty to act judicially, in Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 All E.R. 935

> by extending it to a person exercising purely perogative powers, and in Gallick v. West Norfolk Health Authority [1985] 3 All E.R.402 where Lord Frazer and Lord Scarman expressed the view *obiter* that judicial review would extend to guidance circulars issued by a department of state without any specific authority." [cf : The DPP's Prosecution Policy Guidelines referred to in counsels oral submissions]

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Finally reference may be made to the judgment of the Court of Appeal (E & W) in R. v. I.R.C. ex parte Mead [1993] 1 All E.R. 772 where it was :

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> "Held : As a matter of principle, a decision to prosecute an adult in the courts by a prosecuting authority was in theory susceptible to judicial review, although the circumstances in which such jurisdiction could be successfully invoked would be rare in the extreme. Furthermore, the fact that there were alternative remedies ... did not prevent direct access to the High Court if those remedies did not cover the whole ambit of the jurisdiction in judicial review."

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It is noteworthy that in his judgment in the case, Popplewell J., confessed to having even "... greater doubts ... about the courts jurisdiction ..." than Stuart-Smith L.J, nevertheless accepted at p.784 :

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> "(that) the only way to challenge a failure to prosecute is by judicial review."

For the foregoing reasons the application for leave to issue an application for judicial review is granted.

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(Application granted.)