REVIEW FOR ERROR OF LAW – SOME COMMENTS

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Introduction

Mike Taggart has made an important contribution to the development of a coherent and practically workable analysis of the role of proportionality in judicial review, in his paper for this intensive. I agree wholeheartedly with the view he expresses that proportionality (and its counterpart, deference as respect for the decision-maker's reasoning) has an important role to play in rights-based review, but that outside this sphere – where we are concerned with what he terms "public wrongs" – these concepts are unhelpful and confusing. In particular, I agree that outside the sphere of rights-focused review, proportionality loses its purchase, and is more apt to confuse than to illuminate.

I also agree with Mike Taggart's helpful discussion of the role of proportionality in the context of rights-focused review, and the residual role of (*Wednesbury*) unreasonableness in the context of public wrongs.

In the brief time available to me, I want to make a few comments about review in the more familiar, and much more commonly encountered, sphere of "public wrongs". My focus is review on the grounds of error of law. Although one might have thought there was not much left to say in this well-trodden field, over the last year or so I have been asked a series of questions by judges, some thought-provoking and some disconcerting, which suggest that it may be useful to review a few key principles and examine their implications. Recent caselaw on intensity of review and deference has bred some uncertainty about whether, and how, those concepts should be applied in the context of review for error of law. I hope to dispel that uncertainty.

The questions discussed in this paper are especially relevant in the context of decisions supported by detailed written reasons prepared by the decision-maker. Decisions supported by detailed written reasons are increasingly common, as the "culture of justification" referred to by Mike Taggart becomes firmly established. Where detailed reasons are provided, they shed important light on how the decision-maker has understood and approached its task. What, though, if they suggest that the decision-maker has misunderstood that task?

The questions that I propose to discuss, all of which I have been asked recently, are:

- what is the standard of review, where it is alleged that the decision-maker has incorrectly interpreted the statute under which it is acting?
- what is the standard of review, where it is alleged that the decision-maker has misunderstood the purpose for which the power it is exercising was conferred/has misdirected itself in law/has asked itself the wrong question?
- when you are asking whether the decision-maker has exercised its power for a proper purpose, what is the relevance of a purpose provision in the legislation?

- is asking if the decision-maker has asked itself the right question just another (currently fashionable) way of asking if the decision-maker has had regard to relevant considerations/disregarded irrelevant considerations, or is there a difference in these tests?
- if the court considers that the decision-maker "got it right", or that its answer was one which was open to it, does it matter that it misdirected itself in law/asked itself the wrong question?

Error of law as a ground of review

Before turning to these questions, it is helpful to review some basic principles.

Administrative decisions must be made in accordance with the law. Where a decision-making power is conferred by legislation, the decision–maker must correctly understand and exercise that decision–making power.

The interpretation of legislation is the constitutional responsibility of the courts: this function is squarely within the courts' core expertise and institutional competence. The courts no longer distinguish between jurisdictional and non-jurisdictional errors of law: if an administrative decision-maker errs in law, then their decision is unlawful and liable to be set aside. Put another way, administrative decision-makers do not have any discretion in interpreting the law, or any jurisdiction to interpret the law incorrectly.

Where a decision-maker explicitly engages in statutory interpretation, it is well established that the courts will apply a correctness standard in reviewing that aspect of the decision.

The process of ascertaining the purpose of legislation is also an exercise in statutory interpretation. The court will itself interpret the relevant legislation to form a view on the purpose for which the power in question has been conferred. The decision-maker must correctly direct itself as to the purpose for which the power is conferred, and exercise the power for that purpose and for no other purpose.

If a decision-maker misdirects itself in law, and asks itself the wrong question, it has failed to perform the task entrusted to it by Parliament, and its decision is unlawful.

A few passages from leading decisions which convey the flavour of these core principles are set out in the appendix to this paper (in chronological order, to illustrate the evolution of the courts' approach). [312]

Standard of review – interpretation of legislation

These preliminary observations, and the authorities quoted, provide the answer to the first two questions. There can be no question of deference to a decision-maker when asking what a statute means, or what the purpose is for which a power has been conferred, or

[312] For further relevant authorities, see Fordham, *Judicial Review Handbook* (4th ed, 2004) paras 39.2.1, 53.1; Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) paras 21.2.1; Wade & Forsyth, *Administrative Law* (9th ed, 2004) pp 264-267, 356-359.

whether the decision-maker has correctly directed itself in law. It is very clear that in these contexts, review is "hard-edged". A correctness standard should be applied.[313]

Nor is there any scope for agonising over intensity of review in this context: the question is simply whether the decision-maker got the law right.

Some confusion can arise where a decision-maker has not explicitly directed itself as to the meaning of the legislation under which it is acting, or has not expressly identified the question it is asking. Where a decision-maker launches into the task of making a decision without first expressly addressing these matters, it is necessary to infer how it understood its task, and how it understood the legislation, from its decision and from the reasons it has given. Judges are sometimes concerned, in this context, that there is no express interpretation exercise or self-direction to which a correctness standard can be applied. And decision-makers sometimes argue that they should be given the benefit of the doubt on whether they correctly understood and directed themselves as to the legislation, where they have not pinned their colours to the mast on this point in their reasons.

In these cases, the court must undertake a two-step analysis. First, it must ask what the meaning and purpose of the power is. On this it must reach its own view. Second, it must ask whether it appears from the decision that the decision-maker correctly understood the meaning of the legislation or the purpose for which the power was conferred, as identified by the court. If these issues are not expressly addressed, then the court needs to look at the reasoning employed and the result reached. It may be clear from a statement of the issue which the decision-maker says it is deciding that it has misunderstood its task. Or its reasoning may betray a misunderstanding of the task it is required to perform. In some cases, the decision itself will be a decision that could not have been reached by a decision-maker that correctly understood the task it was undertaking: this is usually indicative of a misdirection on the part of the decision-maker. It is rare for a decision-maker to ask itself the right question as a matter of law, but then give an absurd or hare-brained answer to that question: experience suggests that extraordinary answers outside the sphere reasonably open to the decision-maker are usually the product of asking the wrong question/applying the wrong test.

It is thus legitimate to reason backwards from a failure to take relevant matters into account, or taking irrelevant matters into account, to a misdirection on the part of the decision-maker. Similarly, it is legitimate to reason backwards from an extraordinary and impermissible decision to a failure to ask the right question/apply the right test.

This sort of reasoning backwards from a decision, or from the factors considered by a decision-maker, can raise difficult issues for a court. Although statutory interpretation is squarely within the court's expertise, understanding why a decision on a technical matter (eg telecommunications regulation) could not have been reached by a decision-maker that correctly understood its task may require a more detailed examination of the issues and reasons given, including expert evidence.

The court must be persuaded that there was a misunderstanding of the legislation, and the burden of showing this lies on the applicant for review. Where the applicant seeks to reason backwards from a decision or approach to show misdirection, the court will be slow to assume error if the approach is equally consistent with a correct approach to the task in hand. But this does not mean that the standard of review is not a correctness

[313] See Fordham para 16.4

standard, or that any deference is shown to the decision-maker's understanding of the law.

Relevance of statutory purpose provision

One thought-provoking question I was recently asked was what the relevance is of a statutory purpose provision of the kind commonly found in modern statutes, when a decision is challenged on the grounds that the power has been exercised other than for the purpose for which it was conferred.

The answer to this question has three parts.

First, the purpose for which the power was exercised must be consistent with the purpose of the legislation as a whole. (Where the legislation sets out specific purposes for different parts of the legislation, the purpose for which the power is exercised must be consistent with the purpose of the part under which the power is conferred.) If a power is exercised for a purpose which is inconsistent with, or outside, the purpose of the legislation as set out in an overarching purpose provision, then it will be unlawful.

Second, the converse is not true: it is necessary **but not sufficient** that the power has been exercised consistently with an overarching purpose provision . Within a statutory scheme, different actors are given different powers for specific purposes. The purpose of the minister's power to appoint a committee of investigation considered in *Padfield* was narrower than the purpose of the milk price legislation as a whole. The minister's decision was unlawful because he did not understand the specific purpose within the statutory scheme for which he had been given the power to refer an issue to a committee of investigation, and did not exercise his power with a view to serving that more specific purpose.

Thus – the third point – it is necessary to look at the purpose of the legislation as a whole, as set out in the purpose provision, and the scheme of the legislation, in order to understand how the power in question fits into that scheme, and what its purpose is in that broader scheme. This will generally be a more specific purpose than the overarching purpose of the legislation. Put another way, the decision-maker cannot defeat an application for review merely by saying "I recited the purpose provision of the legislation, and acted consistently with that purpose". Further inquiry is needed, to understand the purpose of the particular power that is being challenged, and whether the decision-maker correctly understood that purpose and exercised the power consistently with it.

Asking the right question – just another way of asking about relevant/irrelevant considerations?

The requirement that a decision-maker ask itself the right question (or, put another way, that it direct itself correctly on the law, and apply the correct test) is closely connected with the requirement that the decision-maker take into account relevant considerations,

and disregard irrelevant considerations. As the courts have observed on numerous occasions, the grounds for judicial review overlap.[314]

And as I noted above, one can sometimes infer from a decision-maker's failure to consider relevant factors, or its focus on irrelevant factors, that it has asked itself the wrong question.

But these grounds of review are not co-extensive. If it is clear from the reasons given by a decision-maker that it has misunderstood the meaning or purpose of the legislation which governs its decision, that is enough for the decision to be set aside. It is not necessary to go on and ask whether mandatory relevant considerations have been ignored, or impermissible considerations taken into account. Indeed even if neither of these types of error has occurred, the decision must be set aside – an exercise of power based on a misdirection is unlawful even though it does not entail disregard of mandatory relevant considerations, or reference to impermissible ones. Looking at the right factors, but misunderstanding the question that must be answered by reference to those factors, is still unlawful and unauthorised by the legislature.

Asking whether the decision-maker has asked the right question is another way of asking if the decision-maker has correctly directed itself in law as to its powers: these are the same ground, put differently.[315] But this point, however expressed, is a more fundamental and far-reaching point than the relevant/irrelevant considerations inquiry.

Nor can the "right question" formulation fairly be seen as a recent (perhaps, passing) fashion. Lord Diplock put the issue in this way in *Tameside* in 1977, some 30 years ago, in a passage that has since been much cited in England and in New Zealand. If this is a recent fad, then so is most of modern administrative law!

Asking the wrong question, but giving a permissible answer

It is not good enough that a decision-maker that properly directed itself in law could have reached the impugned decision, if in fact the decision-maker did not approach its task correctly, and might have reached a different decision if it had done so.

Where a decision-maker reaches a decision that was not reasonably open to it, one can often infer that the decision-maker asked itself the wrong question. But the converse is not true.

The reason for this is that it is not the role of the court, in the judicial review context, to ask if the challenged decision is right or wrong. For the same reason that the court cannot intervene if it thinks the decision is wrong, namely the allocation of responsibility by the legislature and relative institutional expertise and competence, it also cannot normally second-guess what the decision-maker would have done if it asked itself the right question. The broader the discretion exercised by the decision-maker, and the broader the range of permissible decisions, the more important it is that the matter be referred back to

[314] See *CREEDNZ v Governor–General* [1981] 1 NZLR 172 182-183, 179, 196 – 197 (CA); Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) pp 793-797.

[315] The "right question/wrong question" terminology once had undertones of jurisdictional/non-jurisdictional error. But as used today, it is best understood as a synonym for asking whether the decision-maker correctly directed itself as to the law, and so undertook the task prescribed by the legislation, rather than embarking on some other, different, and unauthorised, task.

the person with the responsibility for exercising that discretion, to do so again with the benefit of the court's guidance on the meaning of the legislation and the purpose of the power. The fact that the decision made was somewhere on the permissible spectrum does not mean that a different decision might not be made, somewhere else on that spectrum, if the right question is asked.

I was asked by one judge if there was not an analogy with sentencing in this context. Often, the judge said, an appellate court considers that the reasoning of a sentencing judge is flawed, but the result is about right, so the appeal is dismissed – shouldn't the same be true in the judicial review context? I think this analogy is fundamentally flawed. It is flawed because forming a view on the appropriate sentence is a matter for the judge (not the jury) at first instance, and for the appellate court on appeal. The appellate court can and does regularly substitute its own view for that of the sentencing judge. The appropriate sentence is an issue squarely within the competence and expertise of the appellate court – hence the existence of a right of appeal. But in the judicial review context, the court is not asking if the decision is correct, and will not normally substitute its own decision for that of the primary decision-maker.

A much better analogy is in fact with an appellate court reviewing a direction given to a jury by the trial judge, in a criminal case. If the judge has misdirected the jury, it is not relevant that a properly directed jury could have reached the same result – the matter must be tried again, and a decision made by the competent body (a jury, not a judge) based on a correct direction as to the law.

This analogy also points the way to the one limit in this area. In criminal appeals on questions of law, an appellate court can "apply the proviso" under s 382 of the Crimes Act [1961], where the error did not result in a substantial wrong or miscarriage of justice – a key element of which is that the court is satisfied that the jury could not reasonably have reached a different result. Likewise, in judicial review proceedings if it is clear that a properly directed decision-maker could not have reached any other result, it will generally be appropriate to decline relief as a matter of discretion. The grounds for review are made out, but there is no practical purpose in intervening.[316] Such cases will be rare, especially where the decision to be made is not a simple binary "yes or no" choice, and the ground of review is not merely procedural.

Relevant material, when asking if the right question was asked

I do not have time to explore two other important practical issues that arise in this field:

- how far is it proper to look back in the process, behind the reasons given by the decision-maker, to show that the decision-maker was at an earlier stage asking the right question? Or the wrong one?
- can the decision-maker file affidavits that expand on the reasons given, and put forward a different, or broader, account of the task that it understood itself to be undertaking?

In principle it seems to me that the corollary of the culture of justification is that the reasons given by the decision-maker for its final decision, at the time of that final decision, should be respected as just that. It should be irrelevant that the decision-maker

[316] See eg *R v Monopolies Commission ex p Argyll plc* [1986] 1 WLR 763 (CA).

appears to have misunderstood its task at an earlier stage of its inquiry, if it subsequently got back on the right track – and provided this has not resulted in serious defects in the process followed, along the way, for example by mis-focusing the consultation that has occurred. Conversely, if the wrong question was asked and answered at the time the final decision was made, it is no comfort that the right question had been identified earlier. The concern may be that for some reason, the process went off the rails; it is no answer to this concern that it was once on them.[317]

The same should, it seems to me, be true of later attempts by a decision-maker to supplement or rewrite its decision in affidavits, in response to an application for review. But that topic is to be addressed by others today.

Final comments

Reasons given by a decision-maker serve a number of important purposes. Not least of these is that it enables the court to ascertain whether the decision-maker understood, and correctly directed itself as to, the legislation under which it was acting and the purpose for which the relevant power was conferred. This includes, but is not limited to, the purpose of the statute as a whole: the purpose of the specific power, and the function it serves within the statutory scheme, must also be understood, and the decision-maker must act consistently with that purpose.

The court will apply a correctness standard when determining the meaning and purpose of legislation, and the purpose for which a power is conferred. There is no scope for deference to administrative decision-makers on questions of statutory interpretation, which fall within the core constitutional responsibility of the court.

These are basic principles, the importance of which cannot be overstated: they are an integral element of the rule of law, ensuring the exercise of statutory powers within lawful bounds. Because they are so basic they are sometimes overlooked; because they are so important, I have taken a few minutes to review them here today.

[317] The need for a decision-maker to address itself to the statutory criteria and to form the view that they are satisfied *at the time the decision is made* was emphasised by Cooke J (as he then was) in *CREEDNZ* at 179.

Appendix: Selected extracts from leading cases

Padfield v Minister Of Agriculture, Fisheries And Food [1968] AC 997

> Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act, the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act. (Lord Reid at 1030)

Secretary of State for Education and Science v Tameside MBC [1977] AC 1014

> It was for the Secretary of State to decide that. It is not for any court of law to substitute its own opinion for his; but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, *per* Lord Greene M.R., at p. 229. Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly? (Lord Diplock at 1065)

CREEDNZ v Governor–General [1981] 1 NZLR 172 (CA)

> The discretion reposed in the Governor-General in Council under s 3(3) is to be exercised within the powers conferred on him and so in terms of the criteria laid down in the legislation. No less than any other authority entrusted with statutory powers of decision, he must act according to the law. As is true of anyone exercising a statutory discretion, the Ministers in reaching a decision at Cabinet and in tendering the advice of the Executive Council under s 3(3) must direct themselves properly in law. They must call their attention to the matters they are bound by statute expressly or impliedly to consider and they must exclude considerations which are on the same test extraneous. (Richardson J at 196-197)

Re Racal Communications Ltd [1981] AC 374

> In *Anisminic* [1969] 2 A.C. 147 this House was concerned only with decisions of administrative tribunals. Nothing I say is intended to detract from the breadth of the scope of application to administrative tribunals of the principles laid down in that case. It is a legal landmark; it has made possible the rapid development in England of a rational and comprehensive system of administrative law on the foundation of the concept of ultra

> vires. It proceeds on the presumption that where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined: and if there has been any doubt as to what that question is, this is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity. So if the administrative tribunal or authority have asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their decision is a nullity. Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy, but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so. The break-through made by *Anisminic* [1969] 2 A.C. 147 was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or of administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity. (Lord Diplock at 382-383)

Bulk Gas Users Group v Attorney-General [1983] NZLR 129 (CA)

> There are some statements in the course of the judgment under appeal which seem to indicate that even if the Secretary had interpreted the words "direct interest in the matter" wrongly in law, a decision actually taken by him would be immune from judicial review because of the privative clause. If that was the Chief Justice's view I must respectfully differ from it. It is generally accepted in New Zealand that an Act may empower an authority to decide a question of law conclusively and that a privative clause of this kind will then protect the authority's decision even though an error of law (in the opinion of the Court) may be apparent on the record: *Attorney-General v Car Haulaways (NZ) Ltd* [1974] 2 NZLR 331.
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> But it is clear that such a clause does not apply if the decision results from an error on a question of law which the authority is not empowered to decide conclusively, even though in carrying out its functions it will have to form a working opinion on the question. *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 is the leading modern case and more recently the judgment of the Privy Council in *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363 is to the same effect.
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> It is further clear that the Courts of general jurisdiction will be slow to conclude that power to decide a question of law conclusively has been conferred on a statutory authority or tribunal. Those Courts may rather more readily accept such a result if the body concerned is one of the ordinary Courts, albeit of limited and "inferior" jurisdiction. In *Re Racal*

Communications Ltd [1981] AC 374, 382-383, Lord Diplock put it that there is a "presumption that where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined: and if there has been any doubt as to what that question is, this is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity.

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In the present case the Secretary of Energy in performing price-fixing functions is, almost par excellence, an administrative authority or tribunal rather than a Court. There can be no good reason why, in the light of the authorities already mentioned, he should be treated as having power to determine conclusively any question of law involved in the expression "a direct interest in the matter". That is to say, if as a matter of interpreting the Act the Court can see that a definite test is laid down by Parliament, a decision by the Secretary will be invalid if he has not applied that test but some other. It would then be a simple case of an authority, which happens to be bound to act judicially but is nevertheless basically an administrative authority or tribunal, applying a wrong and inadmissible test and so not exercising his or its true powers – just as in the Privy Council cases of *Estate and Trust Agencies (1927) Ltd v Singapore Improvement Trust* [1937] AC 898, 917, and *Maradana Mosque Trustees v Mahmud* [1967] 1 AC 13, 25. The privative clause would not apply, because there would be a lack of jurisdiction in the sense recognised in *Anisminic*.

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In making the foregoing references to Lord Diplock's approach I have not overlooked the belief quite widely held among lawyers that even in the case of an administrative tribunal (rather than an inferior Court) there may be a rather elusive thing called "jurisdiction" or "area" within which there is power to determine questions of law conclusively. Those who hold to this concept often think as well that even within the umbrella the tribunal's decision on law will not be conclusive if its reasoning is apparent on the face of the record, unless protected by a privative clause.

While impressive support can be cited for that way of looking at the matter, including *Anisminic* itself, I doubt whether it can long survive the analysis made by Lord Diplock (whose own former adherence to a radically different approach was overruled by the House of Lords in *Anisminic*). It is generally accepted under our constitutional system that Parliament can empower an administrative tribunal to determine some questions of law, typically questions of statutory interpretation, conclusively. I will assume that to be so – at least within limits that need not here be explored. The consequence must be that such power may be given either expressly or by necessary implication. But it must at least be given clearly – as Lord Diplock says, there is a presumption against it. One of the major advantages of his analysis is that it enables one to consider whether or not such power has been given with attention unclouded by a vague and probably undefinable concept of "jurisdiction".

> Perhaps an implication might be established a little more readily in the case of a tribunal whose functions and status closely resembled those of a Court. For there is a grey area where a line between administrative tribunals and inferior Courts may be hard to draw. No doubt, too, there are cases in which an error of law by an administrative tribunal is not significant enough in the context of the tribunal's reasoning as a whole to lead a reviewing Court to intervene. Again a Court of general jurisdiction may be unwilling to entertain judicial review proceedings when there is statutory provision for appeal on questions of law from the tribunal concerned. In general remedies in this field are discretionary. Be all that as it may, at the present day it would be surprising if the legislature were to give a quintessentially administrative officer, however senior, such as the Secretary of Industries and Commerce or the Secretary of Energy, power to determine material questions of law conclusively; and s 97 of the Commerce Act does not exhibit any such intention.
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> The principle that the Courts of general jurisdiction have ultimately the function of interpreting Acts of Parliament will prevail only in so far as the material expression used in the Act in question – here "direct interest in the matter" – is to be interpreted as posing an ascertainable test. To the extent that there remains legitimate room for judgment in applying the test, the Secretary's opinion is made the statutory criterion. If he addresses himself to the correct test and the relevant facts (see on this *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130) his decision will stand unless it can be put in the extreme category of a decision at which no reasonable authority in his position could have arrived. By the use of the words "in his opinion" the legislature has indicated that there may be a grey area where there is truly room for discretion as to whether or not the direct interest test is satisfied. In that area the Secretary's opinion will prevail.
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> What I have said amounts to substantial acceptance of the argument presented for the appellants on this part of the case. For the respondents Mr White argued initially that if the Secretary misconstrued (or misapplied) s 97, it was an error of law within jurisdiction and not reviewable by the Court. He submitted quite extensive argument on this point. In the end, however, he accepted that if (contrary to his submission) a pure question of statutory interpretation arose as to the meaning of "direct interest in the matter", the Secretary's opinion on it would not be conclusive: in other words the Secretary must apply the right test. As already indicated, I agree with this. There are passages in the judgment under appeal which may suggest the contrary, but I respectfully think that the Chief Justice did not go into the question of the scope of judicial review in any depth because he did not regard the Secretary's interpretation as wrong. (Cooke J at 133 - 136)

R v Secretary of State for the Home Dept ex p Launder [1997] 1 WLR 839 (HL)

> The real question in the case, as I see it, is whether in taking his decision the Secretary of State asked himself the right question or whether, to put it another way, he fettered his discretion by asking himself the wrong one. This issue has been obscured by the way in which the case was argued on his behalf in the Divisional Court. There can be no doubt that if, as was

> being suggested, the Secretary of State regarded himself as bound by the Cabinet's judgment on this matter to assume that the P.R.C. would comply with its treaty obligations and on this ground gave no further consideration to the applicant's arguments, he would have failed to direct himself properly to his responsibilities under section 12 of the Act. But, for the reasons already given, I am satisfied that that is not what he did. The evidence shows that he took his own decision after considering all the representations which had been made to him.
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> But what was the question to which he addressed his mind? If, as was suggested by Mr. Parker at one stage in the argument, he addressed his mind only to the question whether the P.R.C. had repudiated, or was likely to repudiate, its obligations under the treaty, he would have failed to ask himself the right question. The right question, in the light of the representations which had been made to him, was a narrower and more precise one. It goes to the heart of the issue as to whether it would be unjust or oppressive for the applicant to be extradited. It is whether this particular individual would be exposed to the risk of injustice or oppression if he were to be returned to Hong Kong to face trial there after 1 July 1997. If he asked himself the wrong question his decision would be flawed on the ground of illegality. If he asked himself the right one and answered it negatively in the light of all relevant evidence, then, as Lord Bridge said in *Ex parte Bugdaycay* [1987] A.C. 514, the court cannot interfere. (Lord Hope at 858)

R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd [2001] 2 AC 349

> Mr Bonney for Spath Holme rightly reminded us that no statute confers an unfettered discretion on any minister. Such a discretion must be exercised so as to promote and not to defeat or frustrate the object of the legislation in question. Counsel relied on *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030 where Lord Reid said …
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> … The soundness of these principles is not in doubt. The object is to ascertain the statutory purpose or object which the draftsman had in mind when conferring on ministers the powers set out in section 31. (Lord Bingham at 281)
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> I go back to first principles. The present appeal raises a point of statutory interpretation: what is the ambit of the power conferred on the minister by section 31(1) of the Landlord and Tenant Act 1985? No statutory power is of unlimited scope. The discretion given by Parliament is never absolute or unfettered. Powers are conferred by Parliament for a purpose, and they may be lawfully exercised only in furtherance of that purpose: "the policy and objects of the Act", in the oft-quoted words of Lord Reid in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030. The purpose for which a power is conferred, and hence its ambit, may be stated expressly in the statute. Or it may be implicit. Then the purpose has to be inferred from the language used, read in its statutory context and having regard to any aid to interpretation which assists in the particular case. In either event, whether the purpose is stated expressly or has to be inferred, the exercise is one of statutory interpretation. (Lord Nicholls at 396)