Neutral Citation Number: [2016] EWCA Civ 21

Case No: C1/2014/2614

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr Justice Mitting
[2014] EWHC 2438 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2016

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE RICHARDS
and
LORD JUSTICE UNDERHILL

- -

Between :

The Queen (on the application of The Project Management Institute)	**Appellant**
- and -	
(1) The Minister for the Cabinet Office **(2) The Privy Council Office** **(3) The Attorney General**	**Respondent**
- and -	
The Association for Project Management	**Interested Party**

- -
- -

Jonathan Crow QC and **Amy Rogers** (instructed by **White & Case LLP**) for the **Appellant**
Karen Steyn QC and **Tom Cross** (instructed by **Government Legal Department**) for the **Respondents**
Michael Fordham QC and **Paul Luckhurst** (instructed by **Allen & Overy LLP**) for the **Interested Party**

Hearing dates : 17-18 November, 2015

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Approved Judgment

Lord Justice Richards :

1. In these proceedings the Project Management Institute ("PMI") challenges a decision by a committee of the Privy Council to recommend to The Queen in Council that a Royal Charter should be granted to the Association for Project Management ("APM"). PMI was granted permission to apply for judicial review of the decision on two grounds, relating broadly to failure to follow the Privy Council's published policy and to apparent bias, but was refused permission on three further grounds. In his judgment on the substantive claim for judicial review, handed down in July 2014 (see [2014] EWHC 2438 (Admin)), Mitting J found against PMI on both grounds for which permission had been granted. Permission to appeal was granted by Laws LJ, having regard to the fact that this was the first time that the grant or refusal of a Royal Charter had been challenged in the courts.

2. The first ground of appeal relates to the amenability of the committee's decision to judicial review. Mitting J held that PMI's challenge based on breach of the published policy could not be brought within the established framework of judicial review, and he would have been prepared to dismiss the claim on that ground alone (though he went on to consider the merits of the claim in case he was wrong on that issue). PMI submits that the judge was wrong so to hold. The respondents do not seek to support the judge's judgment on this point. They have accepted throughout the proceedings that the decision is amenable to judicial review and they have taken no point on PMI's standing to bring the claim.

3. The second ground is that the judge was wrong to hold that the decision was consistent with the published policy.

4. The third ground is that the judge was wrong to reject PMI's case of apparent bias and in particular that he was wrong to hold that a fair-minded and informed observer, having considered all the relevant facts, would not conclude that there was a real possibility that the committee was biased.

The relevant policy

5. An account of the history and nature of Royal Charters is to be found at paragraph 2 of Mitting J's judgment, which I will not repeat. At paragraph 3 the judge summarised the general nature of the application process as follows:

> "3. An organisation seeking the grant of a Royal Charter must petition Her Majesty the Queen in Council. On its website, the Privy Council Office invites informal approaches before a petition is lodged, to afford that office the opportunity of giving advice about the chances of success. Petitioners are advised to take soundings among bodies which may have an interest in the outcome. Once a formal petition has been lodged, it is advertised in the London Gazette. Any objector is entitled within six weeks to lodge a counter-petition. The petition is considered by a sub-committee of the Privy Council, comprising Ministers of the departments most closely connected with the activities of the petitioner. Unanimity

> amongst the members of the committee is required before a recommendation for the grant of a Royal Charter is made."

6. The information published on the Privy Council Office's website gives greater detail. I need to set it out because it forms the background to the whole case and the basis of the ground of appeal relating to departure from the published policy.

7. A web page headed "Chartered bodies" states:

> "… New grants of Royal Charters are these days reserved for eminent professional bodies or charities which have a solid record of achievement and are financially sound. In the case of professional bodies they should represent a field of activity which is unique and not covered by other professional bodies.
>
> At least 75% of the corporate members should be qualified to first degree level standard. Finally, both in the case of charities and professional bodies, incorporation by Charter should be in the public interest.
>
> The last consideration is important, since once incorporated by Royal Charter a body surrenders significant aspects of the control of its internal affairs to the Privy Council. Amendments to Charters can be made only with the agreement of The Queen in Council, and amendments to the body's by-laws require the approval of the Council (though not normally of Her Majesty). This effectively means a significant degree of Government regulation of the affairs of the body, and the Privy Council will therefore wish to be satisfied that such regulation accords with public policy."

8. In similar vein, a web page headed "Royal Charters" states that "new Charters are normally reserved for bodies that work in the public interest (such as professional institutions and charities) and which can demonstrate pre-eminence, stability and permanence in their particular field".

9. Under the heading "Applying for a Royal Charter", another web page states:

> "Introduction
>
> An application for a Royal Charter takes the form of a Petition to The Sovereign in Council. Charters are granted rarely these days, and a body applying for a Charter would normally be expected to meet a number of criteria. Each application is dealt with on its merits, but in the case of a professional institution the main criteria are:
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> (a) the institution concerned should comprise members of a unique profession, and should have as members most of the eligible field for membership, without significant overlap with other bodies;

(b) corporate members of the institution should be qualified to at least first degree level in a relevant discipline;

(c) the institution should be financially sound and able to demonstrate a track record of achievement over a number of years;

(d) incorporation by Charter is a form of Government regulation as future amendments to the Charter and by-laws of the body require Privy Council (i.e. Government) approval. There therefore needs to be a convincing case that it would be in the public interest to regulate the body in this way;

(e) the institution is normally expected to be of substantial size (5,000 members or more).

It should be stressed that appearing to meet these criteria does not mean that a body will automatically be granted a Charter.

Preliminary Steps

The fact of a formal Charter application will be published by this office, to allow other interested individuals or organisations to comment or to lodge counter-petitions. Because the process of Petitioning for a Charter is thus a public one, and can also be expensive in terms of the preparation of the formal documents, the Office encourages institutions to have taken soundings among other bodies who may have an interest, in order to minimise the risk of a counter-petition. Any proposal which is rendered controversial by a counter-petition is unlikely to succeed.

The Privy Council Office should be approached informally at an early stage so that we can give advice on the likely chances of success of a formal petition. What is required for this purpose is a memorandum covering:

(a) the history of the body concerned;

(b) the body's role;

(c) details of number of members, grades, management organisation and finance;

(d) the academic and other qualifications required for membership of the various grades;

(e) the body's achievements;

(f) the body's educational role within its membership and more widely;

> (g) an indication of the body's dealings with Government (including details of the Government Department(s) with the main policy interest, or which sponsor(s) the body, together with contact details of officials who deal with the body), and any wider international links;
>
> (h) evidence of the extent to which the body is pre-eminent in its field and in what respects;
>
> (i) why it is considered that the body should be accorded Chartered status, the reasons why a grant would be regarded as in the public interest and, in particular, what is the case for bringing the body under Government control as described above.
>
> At this stage if the draft Charter and by-laws are available they should be emailed to … along with the memorandum."

10. There follows guidance about the form and content of the formal petition, including that the information contained in it should always include, in addition to various details, "generally the grounds on which it is submitted that the grant of a Charter is desirable and justified".

APM and PMI

11. Mitting J gave the following summary of the status and activities of APM and PMI respectively:

> "5. APM is a company limited by guarantee and a registered charity. In May 2008, it claimed to have 16,340 individual members in the United Kingdom. It puts its individual membership now at about 20,000. In addition, it has about 500 corporate members, including several Government departments. Its object, set out in its Articles of Association and in paragraph 2 of its draft Charter, is 'To advance the science, theory and practice of project and programme management for the public benefit'. In its petition, it claims that its work 'in leading, developing and regulating the profession of project management is of significant public benefit' and that the public interest would be enhanced if a Charter of incorporation were to be granted. Its activities are mainly conducted in the United Kingdom.
>
> 6. PMI is a not-for-profit company incorporated under the laws of Pennsylvania. It claims an individual membership of nearly 800,000 worldwide. It has a little over 6,000 members in the United Kingdom, of whom 3,300 belong to its UK chapter. It is by far the world's largest project management membership association.

> 7. Both APM and PMI further their objectives by means that are broadly similar: setting examinations in project management; publishing a corpus of knowledge gleaned from experience; maintaining a register of members; laying down and maintaining a good standard of professional conduct among their members; encouraging public confidence in project management as an activity; and thereby enabling their members to further their professional careers. Each respects the other. There is a difference of opinion about whether or not they are commercial rivals: PMI claims that they are; but APM claims that, as not-for-profit companies, they are not. This debate is sterile. Both provide a similar service in the same field of enterprise. Both seek to recruit members. A perceived benefit conferred on one may make that company more attractive to potential members than the other."

12. Mr Crow QC opened PMI's case on the appeal by expanding at some length on the nature of project management, the relative importance of PMI and APM internationally and the nature of competition between the two organisations. He submitted that APM wants chartered status in order to obtain a competitive advantage over PMI and that there is a fundamental flaw in the government's thinking that the grant of a Charter would lead to an improvement in project management in the United Kingdom. These are matters to which I will come when looking at the public interest considerations relied on for the decision to recommend the grant of a Charter to APM.

The relevant history

13. The history of APM's petition is set out in paragraphs 8-28 of Mitting J's judgment. Again, however, I need to deal with it in some detail, because it is central to a proper assessment of the main grounds of appeal.

14. The early history is set out as follows by the judge:

> "8. In 2007, APM decided that it wished to apply for a Royal Charter. It set about doing so in the manner advised by the Privy Council Office. First of all it canvassed support within government. It received it. By letters dated 18 December 2007, 28 January 2008 (x 2), 27 February 2008, 28 February 2008 and 17 March 2008, senior officials in the Ministry of Defence, the Department for Children, Schools and Families, the Department of Health, the Office of Government Commerce, the Department for Business Enterprise and Regulatory Reform, the Department for Transport and the Cabinet Office respectively, gave their support to the proposal. By a six page document dated 17 April 2008, APM notified the Privy Council Office of its wish to petition for a Royal Charter. It stated that it proposed to establish a register of Chartered practitioners for whom it would set rigorous entry requirements and establish a code of conduct and a complaints and disciplinary procedure. This prompted an immediate response from PMI: by a 13 page letter dated 18 April 2008 to the Privy

> Council Office White & Case set out detailed informal grounds of opposition.
>
> 9. On 1 October 2008 APM lodged its formal petition and draft Charter and by-laws with the Privy Council Office. Notice of the presentation of the petition was given in the London Gazette on 16 October 2008. The notice specified the time by which counter-petitions should be delivered as 4 December 2008. PMI and their advisers missed the deadline. By a letter dated 22 December 2008 written, it seems, in ignorance of the fact that a formal petition had been lodged, White & Case set out PMI's continuing objection to the grant of a Royal Charter. A copy of APM's petition was not supplied to White & Case until 27 April 2009. This prompted a detailed response on 27 May 2009, in a 32 page submission with eight annexes. No point is taken by any party against PMI that, because they missed the deadline, they were disentitled to raise objections to the grant of a Royal Charter to APM. All parties have rightly treated the submission of 27 May 2009 as if it were a counter-petition lodged in time."

15. On 9 June 2009, in response to a complaint made in the course of PMI's submission of 27 May 2009, the Privy Council Office sent PMI copies of the letters of support for APM's application, with an apology for the oversight in not sending them earlier. The letters included one dated 8 February 2008 from the Office of Government Commerce ("OGC"). Disclosure of that letter prompted the expression of concerns by PMI, in a letter from White & Case dated 23 July 2009, about the relationship between OGC and APM. Responses from OGC and APM, by letters dated respectively 31 July 2009 and 3 August 2009, were received by the Privy Council Office and sent on to PMI.

16. By this time the Department for Business Enterprise and Regulatory Reform had been renamed the Department for Business Innovation and Skills ("BIS"). The Secretary of State for Business Innovation and Skills was the lead Minister on the committee of the Privy Council designated to consider APM's petition. By letter 30 September 2009, BIS confirmed its support for the petition. But following an email from the Privy Council Office requesting that various specific points raised by PMI be answered, BIS changed its mind. In a letter dated 23 November 2009 it stated:

> "Having now considered the Privy Council's published criteria for the grant of Charter status and all of the submissions made by APM and its competitor, the Project Management Institute (PMI), the department does not recommend the grant of Charter status to APM. The decision has been reached on the basis that we do not consider that APM has satisfied the Privy Council's published criteria (in particular criteria (a) which provides that the applicant should have as its members most of the eligible field for membership)."

17. APM's immediate reaction was to request the Privy Council Office to put its petition "on hold" and, by letter dated 1 January 2010, to seek clarification from the Office

about the criteria for the grant of a Charter. The Office replied to that letter on 27 January 2010, stating that principles of administrative law would require an advisor "not to follow the published criteria too strictly where other principles were at stake, for example if there were an overriding public interest in a particular case", and suggesting that APM raise direct with BIS the reasons for the department's recommendation. APM then lobbied BIS, and the government in general, in support of its petition. Details of this are given in paragraph 11 of Mitting J's judgment. It led to an email from BIS dated 8 April 2010 indicating that BIS was willing to review its decision not to support the petition. This prompted a letter from APM, dated 17 May 2010, arguing in support of the petition. As the judge notes, "PMI were not invited to join in this exchange and plausibly claim that they knew nothing about it".

18. By letter dated 5 July 2010, BIS informed the Privy Council Office that it would not object to chartered status being awarded to APM in the event that the Privy Council reached the view that this was in the public interest, but that BIS itself had not formed a view as to whether it would be in the public interest to award that status, as it was "not best placed to do so". The letter referred to the transfer of lead responsibility to OGC, which had transferred to the Cabinet Office on 15 June 2010 as part of government reorganisation following the May 2010 general election.

19. An account of the relevant transfers and related matters is given in the witness statement of Ms Susan Powell, a senior official within the Cabinet Office. She explains that on its transfer to the Cabinet Office, OGC was subsumed within the newly established Efficiency and Reform Group. Prior to the transfer, Ms Powell had been Business Manager for the Major Projects Directorate of OGC, and Mr David Pitchford had been Head of the Directorate. It appears that they retained those positions following the transfer. In addition, at or about the time of the transfer Mr Pitchford was appointed Head of Profession for Programme and Project Management, a role he retained upon becoming Executive Director of the Major Projects Authority when it was established within the Cabinet Office in April 2011.

20. Following the transfer of OGC to the Cabinet Office, Ms Powell was copied in on email exchanges between BIS and the Privy Council Office regarding APM's application for a Charter. On 14 October 2010 she attended a meeting at BIS at which there was discussion about the possibility of the policy lead in respect of the application passing from BIS to the Cabinet Office. She states:

> "16. At the meeting, I agreed that I would talk to David Pitchford to see whether he agreed that it would be sensible for the Minister, and in particular for David and his unit in the Cabinet Office, to act as the lead in considering APM's Petition. I spoke to David shortly after the meeting on 14 October and he agreed that it would be sensible for him to take the lead given the recent machinery of government changes and his role as Head of the Profession for PPM.
>
> 17. One of the reasons it was felt that it would be beneficial if the Charter application were to pass to David and me was that neither of us had had any previous involvement in APM's Charter application. We were able to consider the application from an entirely independent and fresh perspective.

> …
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> 22. As I have said, the lead official was David Pitchford. David was not, and never had been, a member of APM. He had no personal connections with APM. Prior to the transfer of the lead role in this matter to the Minister, David had had no involvement at all in considering or responding to it. Indeed, to the best of my knowledge and belief, he had not had any exposure at that time to APM, or the UK project management profession more generally, other than through speaking at a conference organised by APM in October 2010 ….
>
> 23. I worked with David on this matter as I, too, had (and have) no links to APM. I am not, and never have been, a member of APM. In October 2010 I had attended the APM conference at which David spoke, but I had no personal connections with APM, no business engagements with them and to the best of my recollection no exposure to APM or to UK project management profession generally."

21. Following the transfer of lead responsibility to the Cabinet Office, Mr Pitchford arranged for the compilation of a table detailing any links that officials in the Major Projects Directorate (or in the Skills and Capability Directorate) had or were likely to have with APM. The purpose was twofold: first, to assist in identifying a senior colleague to undertake an independent assessment of APM's application; and secondly, to ensure that information about the application was tightly held. In the light of that exercise, on 7 December 2010 Mr Pitchford appointed Ms Anne Turner, a senior official who had no relevant links with APM and no previous involvement in APM's application, to produce an independent assessment. The briefing note to Ms Turner set out a summary of the history and was accompanied by a folder of the documents believed to be relevant to the assessment. In paragraphs 3.1 and 3.2 it contained advice about maintaining the independence of the assessment in order to ensure that the decision was free from the risk of bias. In paragraph 6.1 it stated:

> "As the independent assessor your role is to assess APM's application for a Royal Charter against the criteria published by the PCO. You must consider the evidence afresh …."

It then set out criteria (a) to (e) from the Introduction to the Privy Council Office's web page headed "Applying for a Royal Charter" (see paragraph 9 above).

22. Ms Turner's independent assessment was produced in March 2011. Its effect was summarised by the judge as follows:

> "15. Ms Turner conducted a detailed and careful analysis of 'the strength of APM's case against the guidance on the five criteria'. Her conclusions were as follows:
>
> a) It was uncontentious that project management is a unique profession, which had emerged as a separate profession within the past 40 to 50 years. Her conclusion was

supported by a consensus amongst the range of respondents, including PMI. She noted that APM's figures showed that it did not have as members 'most' of the eligible field of membership; and that there was some overlap between the membership of APM and PMI, but no relevant overlap between them and members of other bodies. She noted the strong support from nearly all respondents for APM's petition. Her assessment was that 'a reasonable conclusion is that the first criterion, taken in the round, is satisfied by APM'.

b) The Privy Council's second criterion was expanded in an earlier statement on its website: 'At least 75% of the corporate members should be qualified to first degree level standard'. 'Corporate membership' is not a reference to corporate members, which would be a nonsense, but to full members of the incorporated body. She noted that APM claimed in its initial application that 65% of its membership held a first degree, a figure which it estimated would have reached 75% by April 2011. On the basis of those figures and the steady increase which they demonstrated, she concluded that APM fulfilled this criterion.

c) She concluded, uncontroversially, that APM was financially sound and able to demonstrate a track record of achievement over a number of years.

d) She began her analysis of the fourth criterion by defining the sense in which 'regulation' was used in the criterion and concluded that it meant not the enforcement of particular standards, but the development of a set of standards and good practice which are independently recognised and valued by practitioners and clients. She noted that, with the exception of PMI, there was a consensus that the grant of Chartered status to APM and its maintenance of a register of practitioners with a proven level of expertise would provide a new and welcome resource for them. She noted the weight of opinion amongst respondents that there was 'a plausible argument' that a Chartered title awarded by a respected professional body would increase the number of well qualified practitioners. She concluded that there was strong evidence that the fourth criterion was met.

e) She concluded, uncontroversially, that the fifth criterion was met.

16. She then addressed what she described as the 'public interest test'. She discerned a consensus amongst respondents that demand for well qualified project managers exceeded supply and that raising the profile of project management as a profession via Chartered status would attract more graduates to

> select it as their career of choice. She also noted that there was evidence for the argument that professionalism in project management was an important factor in the successful delivery of major projects. She addressed PMI's claim that the grant of Chartered status to APM would attract practitioners to it and concluded that the claim was 'objectively plausible and well supported by respondents'. However, she rejected PMI's contention that this would create a competitive advantage for APM, because neither APM nor PMI were trading commercially. Further, because APM's proposed 'Chartered Project Professional' title would not be limited to members of APM, there was no objective basis for PMI's claim that Chartered status could be a direct cause of loss of membership of PMI or affect the quality and standing of its qualifications.
>
> 17. She also dismissed summarily the argument no longer pursued by PMI that the grant of a Charter would infringe EU law. Her overall conclusion was that the Privy Council Office's five published criteria 'measured in the round' were met, as was the wider public interest test. Her recommendation was that APM's petition should be approved."

23. On 10 October 2011, Mr Pitchford submitted a nine page document to the Minister for the Cabinet Office setting out, with reasons, his recommendation that a Charter be granted to APM. Ms Turner's assessment was attached as an annex to that submission. Mr Pitchford noted that although Ms Turner clearly found in favour of the grant of a Charter, there were a number of areas where assumptions had been made. He said that although the criteria were not all fully satisfied, it was open to the Minister to decide that it was nonetheless in the public interest for a Charter to be granted. His reasoning as regards the public interest differed in detail from that of Ms Turner. He noted the critical importance of good project management to central and local government, and the public perception that government projects were badly run and mismanaged, and a general consensus that the ability to deliver projects successfully was hampered by a shortage of skilled and experienced project professionals. His view was that the development of a cadre of professional project managers was integral to the development of the UK economically, socially and environmentally. The grant of chartered status would help to promote project management as a distinct professional discipline and to attract more people to join the profession; and it would produce other, related benefits.

24. Mr Pitchford's submission to the Minister then considered whether it was in the public interest for APM to fulfil this role. He examined APM's status, activities, membership and qualifications. He noted the support for APM's application from government departments, commercial companies and other bodies, and observed that PMI represented the only dissenting voice. He examined PMI's concern that the grant of chartered status to APM would put PMI at a competitive disadvantage to the detriment of the profession and the public interest generally. He accepted that PMI and APM competed for members and for membership fees but he noted that "(i) it is possible to be a member of both organisations, and currently some people choose to be members of both, (ii) APM is, by a considerable margin, the largest project

management professionals body in the UK, whereas PMI's presence is predominantly abroad, and (iii) that the 'Chartered Project Professional' title would not be limited to members of APM may be regarded as lessening the degree to which PMI would be prejudiced i.e. you will not have to be a member of APM to become a Chartered Project Manager". He considered APM to be "clearly well placed to fulfil the role of a chartered project management profession".

25. Mr Pitchford summarised matters as follows in the concluding paragraph of the submission:

> "The application of the public interest consideration in this case is crucial. My view, based on experience so far in dealing with the UK Government's Major Projects, is that the demand for well-qualified project managers most definitely exceeds supply and that having a body with chartered status would raise the profile of Project Management and make a substantial difference. There is no doubt in my mind that APM is the appropriate body. My recommendation is, therefore, that the public interest is compelling enough to recommend that APM are granted a Royal Charter despite the other criteria not being fully met."

26. Following receipt of the submission, the Minister for the Cabinet Office indicated that he was in favour of the grant of a Charter to APM.

27. On 26 October 2011, APM asked the Privy Council Office to take its application "off hold". There was a substantial delay before the Privy Council Office wrote to PMI, on 30 January 2012, to inform it that APM had requested the application to be progressed and that the Office would soon be contacting the relevant Privy Counsellors to ascertain their current recommendation as to the grant of a Charter. On 3 February 2012 the Office wrote to the relevant departments, on behalf of their respective Secretaries of State as Privy Counsellors, asking them to re-confirm whether they were still content to recommend the grant of a Charter. Before responses were received from the departments, however, PMI requested the opportunity to submit further representations and was given until 23 April 2012 to make such representations. It did so by way of a letter before claim dated 26 April 2012, followed by further representations in September, October and November 2012. Emails in support of PMI were also received from PMI members and members' organisations. Ms Powell explains in her witness statement that during autumn 2012 to February 2013 she, Mr Pitchford and one other official, Mr Jonathan Shebioba, considered all the representations received:

> "We carefully considered all the points and representations they had made. Once we had done so, we assessed that the position was the same as it had been when David had submitted to the Minister on 10 October 2011. Accordingly, on 24 October 2012, we re-submitted to the Minister's Private Office the October 2011 submission and advised him to recommend in favour of granting a Royal Charter to APM …. This submission however was not formally sent to the Minister until the 4 February 2013 …, as further correspondence was received

> from PMI and had to be considered. Our recommendation remained the same."

28. On 6 February 2013 the Minister for the Cabinet Office, as the lead Privy Counsellor in the matter, decided to recommend that a Charter be granted. At the same time, however, he decided that in light of the passage of time and the quantity of representations received, the other Privy Counsellors with an interest should each consider APM's application afresh. PMI was informed of those decisions in a letter from the Treasury Solicitor dated 20 February 2013. On the following day, 21 February 2013, the Privy Council Office wrote to each of the relevant Secretaries of State, referring to the published criteria, summarising the history, and referring to the position taken by the Minister for the Cabinet Office. The letter concluded:

> "Accordingly, we are now writing to all Departments which make up the Privy Council sub-committee again, providing you with copies of all the representations made by both PMI and APM. I also attach a copy of the digest prepared by officials in the MPA [Major Projects Authority] which summarises the arguments in favour of the grant of a Royal Charter to APM and the objections, also their assessment of the public interest in this case.
>
> I am now therefore writing to ask that you consider all the information provided to you with this letter, and make a fresh recommendation, in both your capacity as a Minister with a policy interest and as a Privy Counsellor, whether you recommend that Her Majesty grant a Charter to APM. I would like you to bear in mind that we consider that there is a real risk of a judicial review application being made, whatever your recommendation" (emphasis in the original).

29. The digest referred to in the letter was an eight page document drafted by Mr Pitchford, Ms Powell and Mr Shebioba. The section in it headed "Cabinet Office Conclusions" included the following:

> "24. Turning to the substance: having considered this matter – and all the representations - afresh, the Minister for the Cabinet Office is of the view that in all the circumstances (in particular, taking into account the substantial degree to which APM meets or exceeds the five criteria, whilst acknowledging that it does not meet every aspect in full), there is a compelling public interest in favour of granting APM a Royal Charter.
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> 25. It is recognised that PMI, like APM, is a charitable organisation which charges membership fees and some project management professionals may choose between APM and PMI's UK Chapter. PMI notified its UK members and encouraged them to object to the proposed Charter application. To date 113 letters from PMI members or members organisations have been received (104 against, 1 neutral, and 8 for). However:

a. there is no restriction on being a member of both organisations. It is quite possible to join both, and currently some people choose to be members of both;

b. APM is, by a considerable margin, the largest project management professionals body in the UK, whereas PMI's presence is predominantly abroad;

c. The 'Chartered Project Professional' title would not be limited to members of APM. In other words, project professionals will not have to be a member of APM to become a Chartered Project Manager. They may choose not to be members of a professional body, or they may choose to be members of PMI, and still obtain Chartered status.

26. Given the overwhelming support for the APM's applications from a large number of respondents and the variety of sectors represented, it is clear that the APM is well placed to fulfil the role of a chartered project management profession and that it would be in the public interest if APM were to be awarded chartered status.

27. The Minister for the Cabinet Office having considered all the representations, therefore, believes the public interest is compelling enough to recommend that APM are granted a Royal Charter despite the other criteria not being fully met."

30. Each of the Secretaries of State subsequently confirmed support for APM's application. The letter from the Secretary of State for Defence, dated 10 April 2013, stated:

"The Ministry of Defence has supported APM becoming a Chartered body since its preliminary application in April 2008. To this end, MOD officials, including the then Permanent Under Secretary, on behalf of the then Secretary of State, and representatives from our Defence Academy in Shrivenham, have written on no fewer than four occasions to state support for the initiative.

Having been asked to make a fresh recommendation, I would reconfirm support for the APM's application for Royal Charter. We in Defence continue to work in close conjunction with APM to raise professional standards in project management and we see the benefit of this training and education in defence acquisition and the national industrial base. A Chartered body will support our endeavours to raise professional standards in the management of defence projects."

31. The letter from the Secretary of State for Business Innovation and Skills, dated 17 April 2013, referred to the fact that in November 2009 BIS had declined to support APM's application on the basis that not all the published criteria were met, but that it

had subsequently withdrawn its objection after being informed by the Privy Council Office that an application did not need to satisfy all of the published criteria to succeed and that in cases where the applicant had not met the criteria there was scope for the grant of chartered status where this was deemed to be in the public interest. The letter continued:

> "The application submitted by APM for Royal Charter has been comprehensively reviewed by this Department and this review has concluded that a number of the PCO's published criteria are met. In addition, the Major Projects Authority within the Cabinet Office, who lead on PPM issues across government, has also reviewed APM's application and has concluded that the grant of a Charter to APM is in the public interest. Therefore, I can confirm that BIS continues to support APM's application for a grant of a Royal Charter …."

32. The letter from the Secretary of State for Health, dated 30 April 2013, stated:

> "After considering the application, the points put forward by the Project Management Institute, and the recommendations and supporting information provided by the Minister for the Cabinet Office, I am content to support the recommendation.
>
> In doing so I have taken into account the nature of the organisation, the points made by parties involved in paragraphs 6-22 of the Digest provided by the Privy Council Office, that not every aspect has to be satisfied in order to put this application forward and the conclusions. These particularly set out that the grant of a Royal Charter does not preclude members of the Project Management Institute from gaining 'Chartered Project Professional' title."

33. The letter from the Secretary of State for Transport, dated 13 June 2013, stated:

> "I have considered the representations made by both PMI and APM from 2008-2013. I have also considered the MPA's recent digest that set out: their endorsement of APM's application, an outline of the arguments in favour of the grant of a Royal Charter to APM and the objections, and an assessment of the public interest in the case. I can now confirm that the Department for Transport continues to recommend that Her Majesty grant a Charter to APM."

34. The letters from those Secretaries of State, together with the confirmation from the Minister for the Cabinet Office, constitute the "decision" in this case. They provided the basis on which the Privy Council Office would put the recommendation to grant a Charter to APM on the list of business for a meeting of the Privy Council. PMI was notified of the decision by letter from the Treasury Solicitor dated 4 July 2013. The letter also provided a detailed further response to PMI's letter before claim, drawing for that purpose on the documentation to which I have already referred. The judge

refers in places to the reasoning in the letter but I will concentrate on the source documentation.

Ground one: amenability to judicial review

35. Mitting J accepted that the exercise of the Royal Prerogative to grant or not to grant a Royal Charter is in principle amenable to judicial review, but he held that the decision to recommend the grant of a Charter in this case was not amenable to review on the substantive grounds relied on before him by PMI, which he summarised as being that "the decision was irrational and contrary to the Privy Council's published policy so as to give rise to a breach of PMI's substantive legitimate expectation that the policy would be followed" (paragraph 36 of his judgment). He referred to the test formulated by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, 408F-409C, that to qualify as a subject for judicial review a decision must affect some person other than the decision-maker "either (a) by altering rights or obligations of that person which are enforceable by or against him in private law, or (b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment, or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons contending that they should not be withdrawn". The judge said that the High Court had in recent years entertained what can be called "public interest" claims but that in a case in which a claimant is seeking to protect a perceived economic interest of his own, he knew of no authority which cast doubt on Lord Diplock's statement.

36. The judge concluded:

> "39. The consequences for PMI of the grant of a Royal Charter to APM do not satisfy Lord Diplock's tests. It will not alter any right or obligation of PMI enforceable by or against them in private law. It will not deprive them of some benefit or advantage which they had in the past been permitted by the decision-maker to enjoy: they are as free to set standards for the project and programme management profession and to recruit members as they would be if no Charter were granted. Further, they have received no assurance from the Committee of the Privy Council that any benefit or advantage which they now enjoy will not be withdrawn. PMI's claim, when stripped to essentials, goes significantly beyond any set of circumstances in which a judicial review claim of this kind has been entertained, still less succeeded. PMI's claim is that they have a legitimate expectation that the Privy Council will not adopt a recommendation to confer a benefit on APM when no right or obligation enforceable in private law or benefit or advantage which they have been permitted to enjoy by the decision-maker would be affected by the decision. The highest at which their claim can be put is that, until now, they have competed for the recruitment of members in a market place in which their principal competitor, like them, has been a not-for-

> profit company, whereas, if a Royal Charter is granted to their competitor, it will enjoy greater prestige in the market place so that its competitive position will be enhanced. In the absence of any possible infringement of competition law – and none is alleged – I cannot see how PMI's challenge can be brought within the established framework of judicial review and I would be prepared to dismiss its claim on that ground alone."

37. The conclusion reached by the judge was not one contended for by any of the parties before him and it is not supported by any of the parties on the appeal. It is common ground that a decision may in principle be amenable to judicial review on grounds of departure from a published policy: see, for example, *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, at paragraph 26, where Lord Dyson stated that "a decision-maker must follow his published policy (and not some different unpublished policy) unless there are good reasons for not doing so". In the course of his reasoning, Mitting J referred to that passage but distinguished it on the basis that Lord Dyson was not addressing the issue "who can hold the Government to a published policy and in what circumstances, by judicial review proceedings" (paragraph 40 of his judgment). He said that that person must have some interest in the application of the policy, and it was evidently his view that PMI had no such interest. It seems to me, however, that PMI does have a "sufficient interest", within the meaning of section 31(3) of the Senior Courts Act 1981, in the matter to which the judicial review application relates. As a competitor claiming that it would be adversely affected by the grant of a Charter to APM, it has a sufficient interest to challenge the lawfulness of the decision to recommend such a grant, applying what was said about standing in *R v Attorney General, ex p. ICI plc* [1987] CMLR 72, paragraphs 104-109 (see also *R (Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1370, [2003] 1 P&CR 19). Neither the respondents nor APM have at any time contended otherwise or taken any point on PMI's standing to bring the claim for judicial review.

38. In those circumstances the judge was in my view wrong to hold that the claim could be dismissed on the basis that it did not fall within the established framework of judicial review. Nothing turns on this error, however, since the judge went on to deal fully with the substantive merits of the claim.

Ground two: departure from the published policy

Mitting J's judgment

39. Mitting J's judgment indicates that PMI's case was advanced before him on the basis of breach of legitimate expectation. In rejecting that case, he said that the published policy makes it plain that the five main criteria are not rigid standards by reference to which a petition will necessarily be granted or refused, and that the published guidance emphasises the importance of the public interest and the wide discretion available to the Privy Council. He held that there was no clear, unambiguous and unqualified representation capable of founding a legitimate expectation on the principles laid down in *R v IRC, ex p. MFK (Underwriting Agencies Limited)* [1990] 1 WLR 1545, and that:

> "42. … What the Privy Council's statement does is to provide no more than guidance on the factors to which it will have regard when exercising the wide discretion which it enjoys when entertaining a petition for the grant of a Royal Charter."

40. He said that he would dismiss this part of PMI's claim on that ground alone but that he would, in deference to the arguments of counsel, go on to examine PMI's detailed claims that three of the five main criteria were not fulfilled. Before doing so, he said that the published guidance makes it clear that the Privy Council will treat the public interest generally as an important consideration; and he held that the published statement that "Any proposal which is rendered controversial by a counter-petition is unlikely to succeed" is advice, not a criterion or statement of policy. He then went on to consider and reject PMI's submissions that the reasoning of the committee on three of the criteria (namely, criteria (a), (b) and (d)) and on the public interest was so flawed that the decision should be quashed.

Overview of PMI's case on the appeal

41. Mr Crow made clear that PMI's appeal was not put on the basis of breach of legitimate expectation but on the straightforward basis that there was an unlawful failure to apply the Privy Council's published policy. He relied for this purpose on the statement of principle by Lord Dyson in *Lumba*, quoted above, that a decision-maker must follow his published policy unless there are good reasons for not doing so. He submitted that the interpretation of a policy is a matter of law for the court and that, on the proper interpretation of this policy, criteria (a), (b) and (d) were not met, and that there was insufficient consideration of the extent to which the application fell short of meeting them; that the statement that any proposal which is rendered controversial by a counter-petition is unlikely to succeed was itself an important statement of policy yet the committee failed to consider it; and that the consideration of the public interest was flawed, and there was no compelling reason to depart from the published policy. He took issue with the judge's findings in so far as they were inconsistent with those propositions.

Discussion

42. It is common ground that the information published on the Privy Council Office website constitutes a policy to be applied by the Privy Council in deciding whether to grant or refuse an application for a Charter. It is also common ground that the construction of the policy is a matter for the court (we were referred, for example, to *R (LE (Jamaica)) v Secretary of State for the Home Department* [2012] EWCA Civ 597, at paragraph 29(i) and (viii)). But a policy is not to be construed as if it were a statute or a contract (see *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983, paragraph 19), and in my view the context and the terms in which this policy is expressed favour a broad construction, allowing a considerable degree of flexibility in the application of the policy:

    i) The policy states that a body applying for a Charter would "normally" be expected to meet a number of criteria. Mr Crow submitted that this does no more than reflect the ordinary principle of public law that policies must not be rigidly applied so as to constitute a fetter on discretion, but I would attach

some significance to the fact that the policy itself contemplates the possibility that a Charter may be granted without the main criteria being met.

ii) The policy states that the main criteria in the case of a professional institution are the five criteria (a) to (e); but it is clear from a reading of the website as a whole, and is wholly unsurprising, that the question whether it is in the public interest to grant a Charter is also an important part of the policy, not limited by the particular terms of criterion (d) (which I consider below). The web page headed "Chartered bodies" states that "incorporation by Charter should be in the public interest"; a later web page states that the initial informal memorandum should include "the reasons why a grant would be regarded as in the public interest"; and advice is given that the information in a petition should include "generally the grounds on which it is submitted that the grant of a Charter is desirable and justified".

iii) The policy states that appearing to meet the five main criteria does not mean that a body will automatically be granted a Charter, no doubt in part because of the need to factor in the public interest. Correspondingly, I think it implicit that failing to meet the five main criteria, or at least failing to meet them in full, will not lead automatically to the refusal of a Charter, again because of the role that the public interest has to play in the overall assessment. This fits comfortably with the statement that a body will "normally" be expected to meet the criteria.

iv) In summary, it is tolerably clear that the policy does not prescribe a tick-box exercise based on the meeting of five hard-edged criteria but requires an overall judgment to be made, having regard to the extent to which the main criteria are met and to consideration of the public interest. I do not think that that approach gives rise to any problems in terms of arbitrariness or inconsistency.

43. A point raised in submissions, but one which I think it unnecessary to decide, is whether it is permissible in a context such as this to take into account the decision-maker's own past practice when considering how the policy should be interpreted.

44. In so far as a decision involves a departure from a policy rather than an application of the policy, the statement of principle in *Lumba* on which PMI relies is that there must be "good reasons" for not following the policy (see also the summary of principles in *R v Secretary of State for the Home Department, ex p. Urmaza* [1996] COD 479 at 484). Mr Crow overstated the position when he submitted that only a "compelling reason" could justify a departure from a policy; though, as explained below, nothing turns on that difference in this case.

45. It is clear that the decision in issue was made on the basis that APM met the five main criteria to a substantial degree but did not meet every aspect in full: it is sufficient to refer in that respect to the terms of the Cabinet Office's digest and the letters from the relevant Secretaries of State, as quoted at paragraphs 29-33 above. It is not in dispute that APM met criteria (c) and (e). The arguments relate to the other three criteria.

46. As to criterion (a), Mr Crow submitted that APM failed to satisfy any of the three elements: that the institution should comprise members of a "unique profession", that

it should have as members "most of the eligible field", and that this should be "without significant overlap with other bodies". He argued first that project management is not something practised by independent project managers in stand-alone firms but is a set of skills deployed in-house across a broad range of sectors, by individuals who may belong to various professional bodies; and that it is therefore not a unique profession. In my view, however, Mitting J was correct to dismiss that argument on the basis that it was a matter of judgment for the committee to decide whether project management is a unique profession, and the decision so made was securely founded on the material before it. Indeed, that material included PMI's submission dated 27 May 2009 in which PMI's own view was stated to be that "project management is a modern and emerging profession that is becoming increasingly fundamental to the day-to-day running of businesses and professions worldwide" (paragraph 39), albeit that "unlike members of traditional professions …, project managers do not habitually practice through dedicated project management partnerships or companies" (paragraph 41).

47. The committee proceeded on the basis that APM's membership did not cover "most of the eligible field", but I agree with Mitting J that the committee was nonetheless entitled to take the view that its membership covered a substantial percentage of the eligible field. The judge said this:

> "47. … [The] Committee had to make a judgment about differing estimates of the number of eligible professionals and of the proportion who were members of APM. In the letter of 4 July 2013 reporting and explaining the Committee's decision, the Treasury Solicitor identified the 'eligible field for membership' as having been estimated in the region of 69,000-77,000. I have already identified the basis for that estimate in paragraph 11 above. It was one on which the Committee was entitled to rely. There is some uncertainty about the qualifications and experience required to fall within the 'eligible field for membership'. Mr Crow accurately states that of the total membership claimed by APM in their informal petition on 17 April 2008 (16,330) only 11,303 were full members; and that APM were asserting to the Privy Council that the standards for a Chartered professional would exceed those for full membership of APM. This suggests that, by 2013, the number of APM's individual members within the 'eligible field' may have been somewhat less than 20,000; but the difference is not so great as to displace the Committee's conclusion …."

48. I also agree with Mitting J that the committee was entitled to conclude that the overlap of between 9% and 11% between the membership of APM and the membership of PMI (the judge referred to the detail at the end of paragraph 47 of his judgment) was not significant. As to the overlap in membership between APM and bodies regulating *other professions*, I doubt whether that is the kind of overlap at which criterion (a) is directed, but in any event it is something to which the committee was in my view entitled to attach no significance. It may be noted, though it is not essential to my reasoning, that there are in practice numerous instances of overlaps of

that kind in relation to existing chartered bodies, for example in the engineering professions.

49. Criterion (b) requires that "corporate members of the institution should be qualified to at least first degree level in a relevant discipline". It is amplified by the earlier statement on the website that "[at] least 75% of the corporate members should be qualified to first degree level standard". Mr Crow submitted that there was no basis for concluding that the criterion was satisfied. He criticised the figures put forward and the absence of any consideration of what constituted a "relevant" degree. Mitting J dealt with the issue as follows:

> "48. … APM had told the Privy Council Office in support of its petition that 65% of its membership held a first degree, 33% held a post-graduate degree and 10% belonged [to] another relevant Chartered body. Its own estimate was that, allowing for double counting, 88% of its members held a first degree. Mr Crow makes the reasonable observation that most of those who hold post-graduate degrees will have graduated beforehand, so that the double counting must be greater than that allowed. APM's answer is that its figures were based upon a survey and that many respondents only gave their highest ranking degree. It is impossible to get to the bottom of these differences and would have been impossible for the Committee to have done so. Its conclusion that 75% of APM members had a relevant first degree was broad-brush but not outlandish and it is certainly insufficient to justify quashing a decision on that account."

50. The evidence referred to in that passage is by no means the only evidence on this issue. Ms Turner, for example, was satisfied that the criterion was met on the basis of APM's statement that 70% of its membership held a first degree as at April 2010 and its estimate that the figure would have reached 75% by April 2011 (see paragraph 15(b) of Mitting J's judgment, quoted earlier). It is unnecessary, however, to delve deeper into this. It is sufficient to state that as regards the actual figures, I am not persuaded by Mr Crow's submissions that the judge was wrong to reach the conclusion he did. As regards the question of "relevant" discipline, there was good reason in this case to take into account the generality of first degrees rather than focusing on particular subjects. In a submission of 25 June 2009 (responding to PMI's submission of 27 May 2009), APM made the point that until recently there had been limited availability of academic qualifications in project management and that, in the case of applicants whose degree did not focus exclusively on project management, "the emphasis by APM's assessment process on the relevant project management experience ensures that domain-specific knowledge complements the level of academic attainment represented by a good general degree education". Mr Crow did not succeed in undermining that point, and in my view it was reasonable for the committee, in applying criterion (b) in this case, to take into account figures relating to first degrees without limitation of subject.

51. Criterion (d) is oddly expressed. It focuses on the fact that, once a Charter is granted, future amendments to the Charter and by-laws require Privy Council approval, and it states that there therefore needs to be a convincing case that it would be in the public

interest to regulate the body in this way. Mr Crow focused on the narrowness of the point with which the criterion is concerned, and he submitted that the Cabinet Office documents relied on by the committee did not discuss that point at all but elided it with the separate question whether there was an overriding public interest in a Charter being granted. It seems to me, however, that criterion (d) must either be understood as bringing in the wider question whether it is in the public interest to grant a Charter in the first place or must at least be read alongside that wider question. It is the wider question, considered below, that is of importance in this case and on which the committee rightly concentrated.

52. Mr Crow submitted that the statement on the website that "Any proposal which is rendered controversial by a counter-petition is unlikely to succeed" is an important part of the policy and that there was an unlawful failure to take it into account in reaching the decision, in circumstances where it was accepted that PMI's objections were to be treated as if they were a counter-petition. In my view, however, that submission was rightly rejected by Mitting J, for the reasons he gave, as follows:

> "45. Mr Crow submits that this, too, is criterion or statement of policy which can be departed from only for compelling public interest reasons. I readily accept that the proposal is controversial; but I do not accept that this sentence amounts to a criterion or a statement of policy which can only be departed from for compelling public interest reasons. It is advice, not a statement of policy. It is in the same category as the advice given to petitioners to take soundings among interested bodies and to approach the Privy Council informally before a petition is presented. If APM had not taken such soundings or sought advice informally beforehand, PMI could not have founded any judicial review challenge on the fact that they had not done so. The statement that a proposal rendered controversial by a counter-petition is unlikely to succeed is no more a criterion or requirement than was Lord Bingham's observation in *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368 para 20, that a decision taken pursuant to the lawful operaton of immigration control would be proportionate in all save a small minority of exceptional cases, a legal test: see *Huang v Secretary of State for the Home Department* [2007] 1 AC 167 para 20. The fact that no reference was made to this statement by the Privy Council in the digest submitted to Ministers by the Cabinet Office in 2013 is immaterial. There was no need to refer to it."

53. As to the public interest, the assessment recorded in the digest was that "there is a compelling public interest in favour of granting APM a Royal Charter" (paragraph 25) and that "the Minister for the Cabinet Office … believes the public interest is compelling enough to recommend that APM are granted a Royal Charter despite the other criteria not being fully met" (paragraph 27). In support of that assessment, I can adopt what Mitting J said when considering criterion (d):

> "49. … The reasoning of Ms Turner and of Mr Pitchford as distilled into the digest submitted to members of the Committee

> was squarely founded on the premise that it was in the public interest that there should be a Chartered body of project and programme managers and that that body should be APM. I do not understand Mr Crow to have pressed the argument that it was wrong to break down the decision into two in this manner. If he had done so, I would have rejected it: approaching the issue in two stages is a rational and sensible means of deciding the question. Mr Crow submits that there was no evidential basis for the conclusion that the grant of a Royal Charter would produce the benefits perceived by Ms Turner, Mr Pitchford and the Committee. If he means by that that there was no statistical or other analysis of the effect on a profession of the grant of a Royal Charter to its leading body, he is right; but that was not required. What Mr Pitchford and the Ministers who took the decision were entitled to bring to bear was their own experience and understanding of the effect of having a body with Chartered status at the heart of a profession. I have set out in paragraphs 15, 16 and 19-22 above their own conclusions about it. As they noted, they were supported by the overwhelming majority of respondents who make use of the services of project and programme managers. It was plainly a judgement that they and the Committee were entitled to make.
>
> 50. No criticism is made of APM as professional body, beyond the fact that it does not comprise the great majority of professionals in the United Kingdom or elsewhere. The Committee were plainly entitled to conclude that it was fitted to the role of being a Chartered body."

54. I do not accept Mr Crow's submission that the grant of a Charter to APM could not rationally be considered to promote the development of project management in the United Kingdom, that there was indeed no rational basis for the grant of *any* Charter in respect of project management. I agree with the judge that the committee was reasonably entitled to form the judgment it did.

55. The judge then turned to what he described as Mr Crow's underlying submission that the Committee and those who advised them did not pay proper regard to the impact of the grant of a Charter to APM on competition. Mr Crow placed particular stress on that aspect of the case in his submissions to us, arguing that the reason why APM wanted a Charter was to gain a competitive advantage over PMI and to attract members on the basis that chartered status would give them a competitive advantage in the employment market. He acknowledged that competition between APM and PMI for membership and for membership fees was considered in Mr Pitchford's submission to the Minister for the Cabinet Office, but he submitted that reference to it was omitted from the digest and that this showed that competition was disregarded in reaching the decision. Again, I do not accept the submission. Competition was not addressed as fully in the digest as in the underlying documents but it was touched on both in the summary of PMI's representations (at paragraph 9(a) of the digest) and in the conclusions (in the opening sentence of paragraph 25). Moreover, PMI's representations, in which the issue was dealt with at length, were sent by the Privy

Council Office to all the relevant Secretaries of State and were taken into account in reaching the decision on APM's application. The contention that there was a failure to take the issue of competition properly into account is unsustainable.

56. Mr Crow submitted further that there was a serious flaw in the reasoning in the digest, in stating at paragraph 25(c) that project professionals would not have to be members of APM to become a "Chartered Project Professional". His point, and Mitting J's answer to it, were explained by the judge as follows:

> "51. … Paragraph 9 of the proposed by-laws of APM provide,
>
> > 'Admission to the register shall be open to members of the Association and, in defined circumstances, those who are not members of the Association according to criteria agreed from time to time by the Board and published in the regulations.'
>
> Although the by-laws cannot be changed without Privy Council consent, the regulations can be. By-law 20 provides that no regulation shall be inconsistent with the Royal Charter and by-laws, but that is an imprecise safeguard for non-members of APM who wish to be Chartered project management professionals. Mr Crow submits that, accordingly, one of the threads which runs though the decision-making process – that the grant of a Royal Charter to APM would not be anti-competitive because Chartered status would be open to members of other organisations or none – is insecurely founded: it would be open to the Board to impose unjustifiably discriminatory requirements upon non-members. The answer was provided by Miss Steyn. Mr Crow did not require her answer to be supported by further evidence, so I am content to accept it as it stands. It is that it is not common for a Chartered body to have a register of Chartered individuals but when they do, the provision in paragraph 9 of APM's proposed by-laws is standard. On that basis, there was and is no reason to believe that APM has framed its by-laws and regulations in such as way as to permit it to act in an anti-competitive manner when Chartered. All that is done, is to follow standard practice. There being no evidence that it will misuse any powers granted by a Charter, the Committee were entitled to reach the conclusion which they did, that individuals could be Chartered who were not members of APM."

57. The judge's reasoning was criticised by Mr Crow, who submitted in his skeleton argument that it was a non-sequitur to conclude that because the draft by-laws were in standard terms there would *therefore* be no risk to PMI members of discriminatory treatment by APM. But as I read the relevant passage, the judge's point was that there was nothing sinister in the wording of regulation 9, which was in standard form; there was no *other* evidence that APM would misuse its powers under the Charter; and the committee was therefore entitled in the circumstances to reach the conclusion it did. I see nothing wrong with that reasoning. I note in addition that any regulations made

by the Board of APM would have to be consistent with the Charter, which in its draft form provides by Article 2 that the object of APM is to advance the science, theory and practice of project and programme management "for the public benefit", and that APM would also be vulnerable to challenge under competition law if it were to discriminate against PMI members as regards acquisition of the status of chartered project manager. Although Mr Crow expressed continuing concern that it would be open to APM to make regulations discriminating against members of PMI in relation to the acquisition of that status, and that APM had given PMI no assurance in the matter, there appears to me to be insufficient substance in the point to cast doubt on the lawfulness of the committee's decision.

58. Pulling the threads together, I am satisfied that the committee's decision was a proper application of the published policy taken as a whole. The committee was entitled to recommend the grant of a Charter to APM on the basis that each of the five main criteria was met either to a substantial degree or in full and that there was a compelling public interest in favour of such a grant. It was open to the committee, in the application of the policy, to take into account the public interest as outweighing any failure to meet the main criteria in full, so as to justify the overall decision to recommend the grant of a Charter.

59. If I were wrong on that, I would reach the same conclusion by another route. If the failure to meet the main criteria in full meant that a Charter could not be granted in accordance with the policy, the public interest in the grant of a Charter was a good reason for a departure from the policy in the circumstances of this case. The existence of a "good" reason for departure from the policy was sufficient; but even if there had to be a "compelling" reason, such a reason existed, given the reasonable assessment that there was a compelling public interest in the grant of a Charter.

60. In my judgment, therefore, PMI fails in its challenge to the lawfulness of the decision as a departure from the published policy.

Ground three: appearance of bias

Mitting J's judgment

61. Mitting J stated that PMI alleged apparent bias and predetermination; that the claim of apparent bias was founded on the claimed pecuniary interest of the government in the grant of a Charter to APM (essentially because of the government's interest in a qualification called "PRINCE 2" which would be promoted by the grant of a Charter to APM); and that the claim of predetermination was founded on the history of the government's dealings with APM, in particular those of OGC.

62. In rejecting the claim of apparent bias, the judge explained and rejected PMI's case as follows:

> "30. For several years, the Government has promoted a set of project management qualifications and services under the clumsy acronym PRINCE 2 ('PRojects IN Controlled Environments 2'). By a mis-named 'concordat' … of 2009 the Office of Government Commerce stated that it would continue to involve APM in the development of the Government Project

and Performance profession and would make available its products and services to the Government; and that as and when APM achieved its Royal Charter, the Office of Government Commerce would actively promote corporate and individual membership of the APM within Government. By a rather more concrete agreement struck in 2013 between the Government and Capita Plc, a joint venture was formed owned as to 49% by the Government and 51% by Capita to 'own and trade on the 'best management practice' portfolio of professional standards developed by the Civil Service'. The portfolio included PRINCE 2. Capita agreed to pay the Government £10 million up front for its stake and a further £9.4 million in each of the company's first three years. Thereafter, profits would be rateably divided. In a press release published on 26 April 2013 the Cabinet Office stated that it was expected 'to boost returns for taxpayers by £500 million over 10 years, and drive growth through exports projected to be worth £600 million over the period'. APM counts a PRINCE 2 qualification towards its principal qualification, APMP for Professional. Consequently, PMI contend that the grant of a Royal Charter will serve to promote AMP's own qualification; and so, one of the potential staging posts to attaining it – the PRINCE 2 qualification.

31. PMI's chain of reasoning is attenuated. No reasonable person could reasonably believe that Government support for the grant of a Royal Charter to APM could possibly be motivated by the desire to profit financially from the promotion of its own PRINCE 2 qualification. Further, even if such a motive could be inferred, it would not vitiate the decision. The Committee of the Privy Council was not sitting in a judicial capacity or exercising a judicial function. The standards which apply to a judge do not apply to the Committee. The fact that the Government may have a financial interest in the making of an executive decision does not inhibit it from making it. As Lord Slynn explained in *R (Alconbury Developments Limited) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at para 55,

> 'I do not consider that the financial interests of the Ministry of Defence automatically precludes a decision on planning grounds by the Secretary of State … If of course specific breaches of the administrative law rules are established, as for example if the financial interests of the Government were wrongly taken into account by the Secretary of State, then specific challenges on those grounds may be possible on judicial review.'

No such grounds were advanced. The bare proposition that the Government might profit from the decision does not mean that it must be set aside on the ground of apparent bias."

63. In rejecting the claim of predetermination, the judge stated that there could be no doubt that Government departments and APM had worked co-operatively together for many years and that in 2008 the collective view of the departments whose Ministers would form the Privy Council Committee was that APM should apply for and be granted a Charter. He referred to the transfer of the lead role for considering APM's petition from BIS to the Cabinet Office in late 2010, and to Mr Crow's submission that what happened thereafter would lead the reasonable observer to suspect that decision-making had been put in the hands of committed supporters. He continued:

> "34. I have no doubt that the weight of opinion, by a large margin, within the Government departments whose Ministers were ultimately responsible for the recommendation were strongly supportive of APM's petition. They were entitled to be. Executive decision-making does not normally start with a blank sheet of paper. Government is entitled to found its decision upon its experience of the field in which the decision is to be made. In the case of a recommendation perceived to be of benefit both to the Government and to the body likely to benefit from the decision, it is entitled to take into account, in favour of that body, that it has had extensive and satisfactory dealings with it; and to give effect to its view that a favourable decision would enhance the public interest.
>
> 35. In fact, officials acted on the assumption that judicial review was in the offing, whatever decision was made. The senior officials responsible for the handling of the issue after primary responsibility was transferred to the Cabinet Office, David Pitchford and Susan Powell, bent over backwards to ensure that the decision-making process was robust. Neither of them had had anything to do with APM. The more junior official who worked with them, Jonathan Shebioba, had ceased to be a member of APM several years before. David Pitchford directed that /an assessment and report be commissioned from a senior civil servant who had no prior dealings with the matter, Anne Turner. Only when she produced a report supporting APM's petition were wheels set in motion to revive it. His report did not agree precisely with hers – a fact which, by itself, suggests an absence of pre-determination. So does the change of mind by the Department for Business, Innovation and Skills, from opposition in 2009, to support in 2011. Finally, as the Privy Council Office and all relevant officials acknowledged, the decision was one for the Ministers who comprised the sub-committee. The digest supplied to them by the Cabinet Office – no doubt the principal document which the Ministers read – expressly invited them to consider the matter afresh and make an independent determination to grant or refuse APM's petition. Unless bad faith is to be inferred on the part of the Ministers – of which there is no suggestion, let alone evidence – they must be taken to have done what they were invited to do

> – reach a fresh decision independently. The allegation of predetermination is ill-founded."

PMI's case on the appeal

64. For the purposes of the appeal, Mr Crow wrapped all the issues together under the heading of apparent bias, submitting that the relevant test is that laid down in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 at paragraph 103, namely "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the [committee] was biased". He stressed that the question is what view the fair-minded observer would take, *not* whether the committee was in fact prejudiced or lacking an open mind: see *Mitchell v Georges* [2014] UKPC 43, paragraph 34.

65. He put his submissions under four heads: (1) the handling of APM's petition and of PMI's objections (looking for this purpose both at the handling of the petition within government and at the external behaviour of government departments); (2) the existence of significant links (operational and personal/personnel) between the government and APM; (3) pecuniary interest (the PRINCE 2 issue); and (4) predetermination. He relied on the cumulative effect of those matters, accepting that there was no single "killer point" but submitting that the individual elements added up to a real possibility of bias.

66. On the issue of handling, Mr Crow stressed the extent of lobbying of government departments by APM even before it presented its petition, and the string of letters of support it secured. He referred to the decision of BIS in 2009 not to recommend the grant of a Charter, to the extensive lobbying thereafter by APM and its members, and to the transfer of lead responsibility from BIS to the Cabinet Office in 2010. He suggested that the language used in various departmental communications, and the holding of various departmental meetings, were indicative of a body of opinion within government that was prepared to push BIS to change its mind and to procure the grant of a Charter. Further, when the Privy Council Office wrote to the departments in February 2012 following BIS's change of mind, it asked them to "reconfirm", not to "reconsider", whether they were still content to recommend the grant of a Charter. Other points made included reference to the detailed contents of Mr Pitchford's ministerial submission and of the later digest, and to the differences between them.

67. As to external behaviour, Mr Crow argued that there was a gross disparity between the treatment of APM and the stonewalling of PMI. For example, after BIS decided not to recommend the grant of a Charter, APM was allowed to put its application on hold, had an open line of communication with the Privy Council Office and engaged in further extensive lobbying which led to BIS withdrawing its objection. By contrast, it took a year for PMI to be given a copy of APM's informal application and six months for it to be given a copy of the petition. Departmental letters in support were not disclosed for a year; details of the Privy Council advisors were not disclosed for several years. PMI was told in 2010 that the application was on hold but was not told that BIS had objected to the grant of a Charter or that APM was actively lobbying for a change of mind. Requests to the Privy Council Office pursuant to the Freedom of Information Act were refused. There was a substantial delay before PMI was told in January 2012 that APM had requested its application to be progressed.

68. As regards operational links, Mr Crow referred to the Concordat in 2009 between OGC and APM relating to the development of project management, under which, *inter alia*, OGC agreed actively to promote corporate and individual membership of APM within government as and when APM achieved its Charter, and planned to be involved in APM's "Chartership Working Group". In a letter to the Privy Council Office dated 31 July 2009, OGC described the relationship between government and APM as "a partnering one, in support of the development of stronger Project and Programming Management (PPM) nationally". In a corresponding letter dated 3 August 2009, APM said that it and OGC were "working together at a strategic level in support of the UK Government's stated objective to increase the professionalism of its project and programme management community". An internal BIS memorandum dated 17 November 2009 said that OGC had been "working together with APM to make PPM a chartered profession".

69. Mr Crow also relied on what were described in his skeleton argument as "numerous personal connections between APM and officials within the relevant departments". The main examples given were that APM's Chairman had undertaken work as a member of the Department of Transport's Governance Panel for Crossrail; that OGC's former Executive Director of Major Projects was now Chair of APM's internal Remuneration Committee and Strategic Policy Committee; and that a member of APM's Audit Committee was at one time the Ministry of Defence's PPM skills champion, running the Ministry's PPM Centre of Excellence.

70. The point on pecuniary interest is the point concerning PRINCE 2 dealt with by Mitting J at paragraphs 30-31 of his judgment, quoted above.

71. The point on predetermination is little more than a sweep-up submission, referring to the letters of support from government departments dating back to 2007-2008, including a letter dated 8 February 2008 from OGC in which it said that it had encouraged APM to apply for a Charter; and making the point that when BIS notified its objection in 2009, the government, instead of saying that the application should then be rejected, allowed APM two years in which to lobby and produce a changed result.

72. As I have said, it is the combination of those factors upon which reliance is placed as establishing a real possibility of bias on the part of the committee that decided in favour of APM's application.

Discussion

73. Much of Mr Crow's focus was on the period prior to transfer of lead responsibility for APM's application from BIS to the Cabinet Office in the latter part of 2010. But whatever may be said about that earlier period, I take the view that most of Mr Crow's criticisms of the process are met by the transfer of lead responsibility to the Cabinet Office in the latter part of 2010 and the approach taken thereafter to the handling of the application. In particular:

    i) Following the transfer of OGC to the Cabinet Office in mid-2010, OGC lost its former separate identity, and responsibility for project management matters fell under the Head of Profession for Programme and Project Management, Mr Pitchford, who had no previous relevant involvement with APM (see

paragraphs 18-20 above). The transfer of lead responsibility for APM's application from BIS to the Cabinet Office followed on for entirely legitimate reasons, relating to Mr Pitchford's role as Head of Profession and his lack of previous relevant involvement with APM (*ibid.*). It had nothing to do with the fact that BIS, as the department formerly in the lead, had registered an objection to APM's application in November 2009. Indeed, BIS had indicated its willingness to review that decision and had withdrawn its objection before the transfer of lead responsibility to the Cabinet Office (see paragraphs 17-18).

ii) After the lead had been transferred to the Cabinet Office, steps were taken to subject APM's application to an independent assessment, carried out by Ms Turner (paragraphs 21-22). Mr Pitchford built on that assessment in his 10 October 2011 submission to the Minister for the Cabinet Office recommending the grant of a Charter (paragraphs 23-25), which was resubmitted in October 2012 following consideration of further representations by PMI (paragraph 27). Ms Turner's assessment and Mr Pitchford's submission formed the basis, in turn, for the digest sent to the relevant Secretaries of State in early 2013 with the request from the Privy Council Office that they each make a fresh recommendation (paragraphs 28-29). I see nothing in the documents to cast doubt on the independence or genuineness of the exercise and I attach no significance to the existence of differences between the documents. As the judge observed, the fact that Mr Pitchford's reasons were not identical to those of Ms Turner simply goes to underline that independent thought was being applied.

iii) During this whole period, PMI was given a full opportunity to make representations, and the extensive representations it made were all taken into consideration. There may have been delays in communication, for example the delay before the Privy Council Office told PMI in January 2012 that APM had requested its application to be progressed (paragraph 27), but no sinister motivation can reasonably be attached to those delays and they did not in practice place PMI at any disadvantage: PMI received, and was able to respond to, every submission made by APM. Miss Steyn QC reminded us that one of the original grounds of judicial review related to procedural unfairness but that permission to apply for judicial review on that ground was refused on the basis that it was unarguable.

iv) Thus the decision taken by the Minister for the Cabinet Office, as lead minister within the committee of the Privy Council, to recommend the grant of a Charter to APM was reached by a fair and independent process which took due account of all the representations made.

v) Although there is no evidence that the same degree of rigour was applied within the other relevant departments in relation to the handling of APM's application, the fact is that in February 2013 copies of all of the representations and the digest were sent by the Privy Council Office to each of the Secretaries of State, with a request to consider all the information provided and to make a fresh recommendation; and the terms of the letters from the Secretaries of State in reply show that the decision to recommend the grant of a Charter was taken in each case on the basis of the fresh consideration requested (paragraphs 28-33 above). It is also clear that, in the course of that

exercise, weight was attached to the independent assessment made by the Cabinet Office. I do not accept that the ministerial submissions underlying the letters from the Secretaries of State, the detail of which I have not thought it necessary to set out, affect the conclusion to be drawn from consideration of the letters themselves.

vi) Nothing turns on the fact that reference was made, in particular in the letter from the Secretary of State for Defence, to the support given to APM's application from the outset. That does not begin to show that the decision made was anything other than a genuine decision based on fresh consideration of all the relevant material. The same applies to Mr Crow's points about the language used in various government communications over time (mainly in the period 2008-2010). As Mitting J said at paragraph 34 of his judgment, the weight of opinion within the relevant departments was no doubt strongly supportive of APM's application; but that was an opinion they were entitled to form and give effect to, and the fact that this was done does not give rise to any appearance of bias in the decision-making process described above.

74. As regards the operational links relied on by Mr Crow, Ms Powell states her belief, in paragraph 32 of her witness statement, that the 2009 Concordat between OGC and APM had ceased to have any effect by the time the lead role in relation to APM's application was transferred to the Cabinet Office, but she says in any event that it was not regarded as relevant to the Cabinet Office's consideration of the application. More generally, against the background I have described, I do not think that either the Concordat or the existence of other links between government departments and APM (including the fact that some government departments were corporate members of APM) provides any support for Mr Crow's argument as to an appearance of bias. Nor is there any substance in the reliance placed on personal or personnel links, which I consider to be of no significance.

75. As regards the question of indirect pecuniary interest arising out of the possible effect of the grant of a Charter on the take-up of PRINCE 2, I agree with Mitting J's dismissal of the point and have nothing to add to his reasoning.

76. Mr Crow's final point, on predetermination, is covered by what I have said above about the process following the transfer of lead responsibility to the Cabinet Office. In the light of the handling of the application thereafter, there is no basis for any suggestion of predetermination, either by reference to what was said or done during that period or on the basis of what was said or done previously.

77. In conclusion, there is in my view no force in Mr Crow's points, whether taken individually or considered in combination. They do not get near to establishing a case of apparent bias. I have no doubt that the fair-minded and informed observer, having considered the facts, would *not* conclude that there was any real possibility that, in deciding to recommend the grant of a Charter to APM, the committee of the Privy Council was biased.

Conclusion

78. For the reasons given above, I consider that Mitting J reached the right conclusion on the substantive grounds of challenge to the decision, and I would dismiss the appeal.

Lord Justice Underhill :

79. I agree.

The Master of the Rolls :

80. I also agree.