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In re M (A.P.) (Cross-appellant and Original Respondent)

JUDGMENT

Die Martis 27° Julii 1993

Upon Report from the Appellate Committee to whom was referred the Cause In re M, That the Committee had heard Counsel as well on Monday the 10th as on Tuesday the 11th, Wednesday the 12th, Thursday the 13th, Monday the 17th, Tuesday the 18th and Wednesday the 19th days of May last upon the Petition and Appeal of Kenneth Wilfred Baker of 50 Queen Anne's Gate, London SW1H 9AT, praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of the 29th day of November 1991, might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order might be reversed, varied or altered or that the Petitioner might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as upon the case of Makunsa Mbala lodged in answer to the said Appeal; as also upon the Petition and Cross-appeal of Makunsa Mbala of Her Majesty's Prison Pentonville, Caledonian Road, London N7, praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of the 29th day of November 1991, might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order might be reversed, varied or altered or that the Petitioner might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as upon the case of the Home Office and Kenneth Wilfred Baker lodged

in answer to the said Cross-appeal; and due consideration had this day of what was offered on either side in this Cause:

It is Ordered and Adjudged, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal of the 29th day of November 1991 complained of in the said Appeal and the said Cross-appeal be, and the same is hereby, **Affirmed** save that in place of Kenneth Wilfred Baker there be substituted the designation "Secretary of State for Home Affairs" as being the proper subject of the finding of contempt, and that the said Petition and Appeal and the said Cross-appeal be, and the same are hereby, dismissed this House: And it is further Ordered. That the Appellant do pay or cause to be paid to the said Respondent the Costs incurred by him in respect of the said Appeal and the said Cross-appeal, such costs to include provision for three Counsel and the amount thereof to be certified by the Clerk of the Parliaments if not agreed between the parties: And it is also further Ordered, That the costs of the Respondent be taxed in accordance with the Legal Aid Act 1988.

Cler: Parliamentor:

Judgment: 27 July 1993

HOUSE OF LORDS

INREM (A.P.)

(CROSS-APPELLANT

AND ORIGINAL RESPONDENT)

Lord Keith of Kinkel
Lord Templeman
Lord Griffiths
Lord Browne-Wilkinson
Lord Woolf

LORD KEITH OF KINKEL

My Lords.

I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend Lord Woolf. I agree with it, and for the reasons he gives would dismiss the appeal, while substituting the Secretary of State for Home Affairs for Mr. Baker personally as the subject of the finding of contempt.

LORD TEMPLEMAN

My Lords,

Parliament makes the law, the executive carry the law into effect and the judiciary enforce the law. The expression "the Crown" has two meanings: namely the Monarch and the executive. In the 17th century Parliament established its supremacy over the Crown as Monarch, over the executive and over the judiciary. Parliamentary supremacy over the Crown as Monarch stems from the fact that the Monarch must accept the advice of a Prime Minister who is supported by a majority of Parliament. Parliamentary supremacy over the Crown as executive stems from the fact that Parliament maintains in office the Prime Minister who appoints the ministers in charge of the executive. Parliamentary supremacy over the judiciary is only exercisable by statute. The judiciary enforce the law against individuals, against institutions and against the executive. The judges cannot enforce the law against the Crown as Monarch because the Crown as Monarch can do no

wrong but judges enforce the law against the Crown as executive and against the individuals who from time to time represent the Crown. A litigant complaining of a breach of the law by the executive can sue the Crown as executive bringing his action against the minister who is responsible for the Department of State involved, in the present case the Secretary of State for Home Affairs. To enforce the law the courts have power to grant remedies including injunctions against a minister in his official capacity. If the minister has personally broken the law. the litigant can sue the minister, in this case Mr. Kenneth Baker, in his personal capacity. For the purpose of enforcing the law against all persons and institutions, including ministers in their official capacity and in their personal capacity, the courts are armed with coercive powers exercisable in proceedings for contempt of court.

In the present case, counsel for the Secretary of State argued that the judge could not enforce the law by injunction or contempt proceedings against the minister in his official capacity. Counsel also argued that in his personal capacity Mr. Kenneth Baker the Secretary of State for Home Affairs had not been guilty of contempt.

My Lords, the argument that there is no power to enforce the law by injunction or contempt proceedings against a minister in his official capacity would, if upheld, establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War. For the reasons given by my noble and learned friend Lord Woolf and on principle. I am satisfied that injunctions and contempt proceedings may be brought against the minister in his official capacity and that in the present case the Home Office for which the Secretary

of State was responsible was in contempt. I am also satisfied that Mr. Baker was throughout acting in his official capacity, on advice which he was entitled to accept and under a mistaken view as to the law. In these circumstances I do not consider that Mr. Baker personally was guilty of contempt. I would therefore dismiss this appeal substituting the Secretary of State for Home Affairs as being the person against whom the finding of contempt was made.

LORD GRIFFITHS

My Lords,

I have had the advantage of reading in draft the speech to be delivered by my noble and learned friend Lord Woolf. I agree with it, and for the reasons he gives would dismiss the appeal, while substituting the Secretary of State for Home Affairs for Mr. Baker personally as the subject of the finding of contempt.

LORD BROWNE-WILKINSON

My Lords.

For the reasons given in the speech of my noble and learned friend Lord Woolf I agree that this appeal should be dismissed, while substituting the Secretary of State for Home Affairs for Mr. Baker personally as the subject of the finding of contempt.

LORD WOOLF

My Lords,

This appeal gives rise to issues of constitutional importance. It is an appeal from a decision of the Court of Appeal, which by a majority (Lord Donaldson of Lymington M.R. and Nolan L.J.. McCowan L.J.. dissenting) reversed a judgment of Simon Brown J. and decided that Mr. Kenneth Baker, when acting as Home Secretary, had been guilty of contempt of court.

This was the first time that a Minister of the Crown had been found to be in contempt by a court. The finding of contempt was made for not complying with an injunction granted by Garland J. ordering M., who had made a claim for asylum, which was rejected by the Home Office, to be

returned to this country. The Court of Appeal did not regard the contempt as requiring any punishment of Mr. Baker other than that he pay the costs of the appeal and, in so far as they related to the proceedings brought against him. in the court below. The Court of Appeal did not allow the appeal of M. against the dismissal of his application that other respondents, including the Home Office, should also be found guilty of contempt. Mr. Kentridge Q.C.. in his argument on behalf of M., made it clear that he would only seek to rely on a cross-appeal against the decision as to the Home Office if. contrary to his primary contention, the decision of the majority of the Court of Appeal was wrong in relation to the responsibility of Mr. Baker.

Mr. Stephen Richards submits on behalf of the Home Office and on behalf of Mr. Baker that neither the Crown in general, nor a Department of State, nor a Minister of the Crown, acting in his capacity as such, are amenable to proceedings in contempt. It is a necessary part of that submission that the courts also have no power to grant injunctions directed to such bodies and that the order which was made by Garland J.. which it was held by Simon Brown J. as well as the Court of Appeal that Mr. Kenneth Baker had contravened, was made without jurisdiction.

When advancing these submissions Mr. Stephen Richards stressed that it was no part of his case that the Crown or Ministers are above the law or

that Ministers are able to rely on their office so as to evade liability for wrongdoing. He argued that this was not a consequence of his submissions and he accepted that the Crown has a duty to obey the law as declared by the courts. He accepted that if a minister acted in disregard of the law as declared by the courts, or otherwise was engaged in wrongdoing, he would be acting outside his authority as a minister and so would expose himself to a personal liability for his wrongdoing.

The fact that these issues have only now arisen for decision by the courts is confirmation that in ordinary circumstances Ministers of the Crown and Government Departments invariably scrupulously observe decisions of the courts. Because of this, it is normally unnecessary for the courts to make an executory order against a Minister or a Government Department since they will comply with any declaratory judgment made by the courts and pending the decision of the courts will not take any precipitous action. Mr. Stephen Richards submits that the circumstances which have given rise to the present proceedings are highly unusual and that the fact that Garland J. felt it necessary to grant an injunction was due to a series of mishaps and misunderstandings. Mr. Richards also submits that, irrespective of the answers to the legal issues, this is not a case in which it was appropriate to make a finding of contempt, since there was no question of Mr. Kenneth Baker seeking to act in defiance of the court, nor was there any intention to

interfere with or impede the administration of justice. Support for these submissions is provided by two comments of Lord Donaldson in his judgment in the Court of Appeal, the first being made at the outset of his judgment when he said:

> "This case is remarkable for the chapter of accidents, mistakes and misunderstandings which has occurred." [1992] 1 Q.B. 284.

The second comment is part of the explanation which Lord Donaldson M.R. gave for concluding that, in the highly unusual circumstances of this case. Mr. Baker's responsibility for contempt fell at the lower end of the scale. The second comment is that Mr. Baker:

> "has disavowed any intention to act in defiance of an Order of the court or to hold himself above the law, a disavowal which I fully accept." [1992] 1 Q.B. at p. 306.

The sequence of events which led to the majority of the Court of Appeal coming to the conclusion that Mr. Baker was guilty of contempt are set out fully in the judgments of Simon Brown J. (not reported) and Lord Donaldson M.R. in the Court of Appeal. Although I will therefore summarise them as shortly as possible, I am afraid it is still necessary, especially in view of Mr. Richards' suggestion that it was unjust to find Mr. Baker guilty of contempt, to set out the events in some detail.

The Sequence of Events

M. is a citizen of Zaire. He arrived in the United Kingdom on 23 September 1990 and immediately claimed asylum. The claim was based on an allegation that he was a refugee within the meaning of the Geneva Convention Relating to the Status of Refugees (1951) (Cmd. 9171). He was interviewed and he was informed that the Home Secretary was minded to refuse his claim to asylum by a letter of 16 November 1990 which explained the basis upon which this preliminary decision had been reached.

M. was then re-interviewed on 2 December 1990 and given an opportunity to comment upon the letter of 16 November 1990. His position was then reconsidered by the asylum division of the Home Office and on 17 December 1990 a letter was written to M. setting out that, his further comments having been considered, it was still not considered that he qualified for asylum under the terms of the Convention.

The contents of the two letters make it reasonably clear that the decision to refuse asylum was due to the Home Office not accepting M.'s

accounts of events which resulted in his seeking asylum. This account involved him claiming that he was a teacher in Zaire who had encouraged other teachers to take strike action which resulted in demonstrations by students at his school; that he was arrested for having organised the strike and detained for three days during which time he was whipped and beaten; and that a guard, who he believed had been bribed by his father, had then smuggled him into an aircraft bound for Lagos where he acquired a false Nigerian passport and a ticket for a flight to London.

An application was then made for leave to apply for judicial review and as a result the directions which had been made for his removal by the Home Office, which had been set for 17 January 1991. were cancelled. The basis of the application for leave was that the Secretary of State had failed to consider certain facts. On 20 March 1991 the application was refused by Kennedy J. The removal directions were then scheduled for 28 March 1991. M. then promptly applied to renew his application for leave before the Court of Appeal, but his solicitors failed to file the appropriate documents and so the application was not listed.

On 11 April 1991 M. was examined by a doctor from the Medical Foundation for the Care of Victims of Torture and he prepared a report dated 12 April 1991 which set out his opinion as follows:

> "I found nothing in his history or its presentation to suggest that it was in any way unreliable. His description of prison conditions has been confirmed innumerable times by other people who have experienced them. The scars he bears are entirely compatible with the causes he ascribes to them. He is suffering a degree of deafness and spinal trouble quite likely to have arisen from his mistreatment.

> Psychologically he describes symptoms very likely to arise from the experiences he described. He shows some evidence of depression and his continued detention can only aggravate these symptoms and he could easily become a serious suicide risk."

Regrettably the report was not sent to the Home Office until 30 April 1991. the day before the latest time which had been set for M.'s removal, which was 6.30 p.m. on 1 May 1991. The Court of Appeal heard M.'s application by interrupting its normal work for that day during the afternoon of 1 May and at about 4.55 p.m. Lord Donaldson M.R., sitting with Nicholls and Farquharson L.JJ., delivered a 5 page judgment giving the Court of Appeal's reasons for unanimously refusing the application. Unbeknown to the Court of Appeal, arrangements were already being made for M. to change his solicitors from those who had represented him up to that time, including in the

Court of Appeal, on the basis that his case was not being fully deployed by his existing legal advisors. Outside the Court of Appeal, the new solicitors for M. and the counsel then instructed informed counsel for the Home Office and his instructing solicitor (Mr. David Palmer) that a fresh application for leave to apply for judicial review was to be made on M.'s behalf to Garland J.. the judge in chambers, as it was outside normal court hours and there was no nominated Crown Office List judge available. It was indicated that the fresh grounds relied upon would include the availability of the medical report and the unreasonable reliance by the Home Office upon the respondent's failure to apply for asylum in Nigeria.

At about 5.25 p.m. on 1 May 1991 the hearing before Garland J. commenced. At that stage it was appreciated that M.'s aircraft was about to take off from Heathrow at 6.00 or 6.30 p.m. Having heard part of the argument. Garland J. not unnaturally took the view that the judge in chambers was not the proper tribunal to give leave to move for judicial review and that the obvious course was to adjourn the matter so that an application could be made the following day to a nominated judge. When it became apparent that Garland J. wished M.'s departure to be postponed Mr. Palmer telephoned the Home Office to convey the judge's wishes and told a senior executive officer at the Home Office that the judge had expressed the wish that M. should not be removed from the United Kingdom and asked him to do his best to insure the removal did not take place. This was at approximately 5.50 p.m.

In the absence of Mr. Palmer a misunderstanding took place between counsel who was representing the Home Office and Garland J. Garland J. understood that he had been given an undertaking by counsel on behalf of the Home Office that M. would not be removed pending the making of an application the following morning. On that basis Garland J. refrained from granting leave and adjourned the application. However, counsel for the Home Office did not intend to give an undertaking and did not believe that he had done so. However, the Order which was made in relation to the hearing recited the fact that "the application for leave to move for judicial review be

adjourned on the undertaking by counsel for the Home Office . . . that the applicant would not be removed from the United Kingdom to Zaire."

Unfortunately, through no one's fault, the steps which Mr. Palmer had set in motion to prevent M.'s removal were unsuccessful and at 6.30 p.m. the aircraft carrying M. commenced its departure for Zaire via Paris. The aircraft landed in Paris at 7.45 p.m. The plane on which M. was to continue his flight was not due to leave until 10.20 p.m.

Prior to M.'s departure from Paris, numerous discussions took place between officials of the Home Office, an M.P. who was intervening on M.'s behalf, his new solicitor and subsequently Mr. Peter Lloyd, the Parliamentary Under Secretary of State to the Home Office ("the Minister"). The conversation which took place revealed a considerable confusion as to what was the precise situation. The Home Office officials and the Minister were under the impression that the judge, whose identity they did not know, wanted M. to be renamed. The view was taken that it would not be appropriate to intervene in Paris, but it was decided that the judge should be informed about the situation. The Home Office officials were not able to contact a representative of the Treasury Solicitor and in fact although, subsequently, the identity of the judge was ascertained together with his telephone number, no one contacted him on behalf of the Home Office.

No action was taken by the Home Office to prevent M. leaving Paris and at 10.40 p.m. the aircraft carrying M. and his escort departed from Paris. It is accepted that at that time the Minister was ignorant of any undertaking, as opposed to an informal request, being given by the Home Office until it was too late to have secured M.'s return from Paris.

At about 11.20 p.m. M.'s solicitor telephoned Garland J. at his home and informed him what had happened and that, on M.'s case, he would be exposed to a grave risk of persecution on his arrival in Zaire. Garland J. then made a mandatory Order on the telephone requiring the Home Secretary to return M. to this country. The solicitor later at about 12.30 a.m. visited Garland J. at his home where the judge wrote out an Order in the following terms:

> "Whereas at 17.55 hours on Wednesday 1 May 1991, on an application to the judge in chambers for leave to move for judicial review of the determination that [M.] was not entitled to the status of refugee counsel for the Home Office ... on instructions undertook to the court that [M.] would not be removed from the United Kingdom to Zaire pending an adjourned application for leave to move for judicial review so soon as possible on Thursday 2 May 1991;
>
> and whereas the said undertaking was embodied in the order of the court adjourning the said application;

> and whereas it appears to the court that the said undertaking has been breached by the removal of [M.];
>
> upon hearing Mr. David Burgess, solicitor, on behalf of the said [M.]

It is ordered that the Secretary of State for the Home Department by himself, his servants or agents do forthwith procure that

1. The said [M.] be returned within the jurisdiction of this court, and further that:

2. pending the return of the said [M.] he be kept in the care of the servants or agents of the Secretary of State and/or of the servants or agents of Her Majesty's Government in Zaire until further order herein.

3. that the Secretary of State be at liberty to apply to vary or discharge this Order at 10.30 a.m. on Thursday 2 May 1991."

Having obtained the Order the solicitor first informed the Home Office of its contents on the telephone and subsequently faxed a copy to the Chief Immigration Officer. At about 1.40 a.m., the Minister's Private Secretary, who was by then aware of the terms of the Order and had spoken to a representative of the Treasury Solicitor, contacted the resident clerk of the Foreign and Commonwealth Office and asked him to contact Kinshasha immediately and arrange for the respondent to be met on arrival by officials from the British Embassy, who should look after him and help him to return provided that he wanted to do so. However, it was not possible to contact the British Embassy until 7 a.m. the following morning. In the meantime the Minister had been informed of what had been arranged.

When the plane carrying M. arrived at the airport at Kinshasa he was not met and was presented by his escort to the Zaire immigration authorities. Shortly afterwards he was seen by an official of the embassy. He told the official that he wished to return to London and he was booked on a flight due to leave Kinshasa at 9 p.m. that evening. His travel documents were taken for a return visa to be endorsed on them.

No application was made to Garland J. at 10.30 on 2 May in accordance with the terms of the Order, though a message was left with his clerk that the Home Office wished to make an application and would be in touch again as soon as possible.

During the morning discussions took place between the Minister and his officials but he concluded that the case raised issues of such importance that the instructions of the Secretary of State, Mr. Baker, should be sought. A meeting with Mr. Baker was arranged for 4 p.m. that afternoon which, having regard to his other commitments, was the earliest opportunity. At the

beginning of the meeting Mr. Baker knew nothing about the case. What happened at the meeting is set out in a note which was taken by Mr. Baker's private secretary for which public interest immunity was exceptionally waived. The meeting was attended by the Minister, an Assistant Under-Secretary of the Immigration Department, a member of the legal department of the Home Office and the respective Private Secretaries. The note describes what happened as follows:

> "The Home Secretary discussed the case of [M.] with Mr. Lloyd. Mr. Plait, Mr. Osborne and Ms. Spencer this afternoon.
>
> "2. Having read the facts of the case, as set out in your briefing note of 2 May, the Home Secretary asked the grounds on which officials proposed that the court Order should be opposed. Mr. Osborne explained that Mr. Justice Garland had exceeded his powers in making an Order that [M.] should be returned directly from Zaire: it was a mandatory Order against the Crown and was outside our jurisdiction. Treasury Solicitors were expected to confirm later this afternoon that the Home Office should appeal against the Order and that [M.] should not be returned to Britain. Mr. Platt explained that, because [M.] would require a visa or some form of entry clearance to re-enter Britain, it would be extremely difficult to remove him if. as expected, we won the case. Mr. Lloyd was confident that the reasons for [M's] removal still held good. The political difficulty was that the Home Office could be accused of having been dilatory in giving effect to the undertaking given by counsel to the judge. However, the undertaking had been that we would "do our best" to delay [M's] removal, and the chronology of events clearly demonstrated that we had fulfilled this undertaking.
>
> "3. The Home Secretary fully supported the action taken and, subject to Treasury Solicitors' [sic] advice, agreed in the present circumstances that [M.] should not be returned to Britain."

In an affidavit prepared for the hearing in the Court of Appeal. Mr. Baker described how he came to his decision as follows:

> "... two factors operated on my mind in particular:
>
> (1) The assurance which I received from Mr. Lloyd that the underlying asylum decision in relation to the [M.] was the right one: and (2) legal advice (subsequently confirmed by Treasury Counsel) was to the effect that the Order of Garland J. was made without jurisdiction and that an application to set aside his Order would be made at the first opportunity. I have to say that it was never suggested to me that my decision constituted contempt of court and my whole understanding was that in the circumstances it was perfectly in order for the Home

Office to apply to set aside the Order of Garland J. provided such

> application was prompt. I am sure that I never had it in contemplation to act in defiance of an Order of the court, much less to hold myself above the law. If I am wrong in any of these conclusions or if the legal advice on which I acted was wrong, then it is a matter of sincere regret to me and I unreservedly apologise to the Court."

The note, in paragraph 3. is probably in error in referring to the "Treasury Solicitor's advice." What was probably intended was to refer to the advice of "Treasury Counsel" with whom a conference took place at 5.15 p.m. At the conference counsel advised that, as the liberty to apply granted by the judge (although spent) itself indicated, the Home Office should have an opportunity to challenge the Order made late the night before but that the Home Office should take that opportunity at the earliest practicable time: in the meantime the Home Office might reasonably hold its hand. As a result the booking for the respondent's return flight was cancelled and arrangements were made for an application to be made to Garland J. at 9 a.m. on the following morning, 3 May. In the meantime M. was seen at Kinshasha airport by officials and informed that there was no urgent need for him to attend court proceedings in the United Kingdom. He was asked to remain in touch with the embassy. He wrote down two addresses which he gave to the officials as to where he could be contacted. Nothing was done to protect him in the meantime.

In accordance with the arrangements which had been made, on 3 May the application was made to Garland J. to discharge the Order that he had made. Though that application was opposed. Garland J. came to the conclusion that he had had no jurisdiction to make the Order, but indicated that he had made the Order:

> "on the basis not that I was granting a mandatory injunction against the Crown, which clearly I could not do, on authority, but that I was seeking to compel obedience of an undertaking freely given to the court and which to the court appeared to have been breached."

Later the same day a further conference took place with counsel. As a result of that conference in the light of Garland J.'s holding that an undertaking had been received, a decision was taken by the Minister to effect M.'s return to the United Kingdom. It proved impossible to contact M. at the addresses which he had given. He did eventually contact his solicitors from Nigeria and, although arrangements were made for his return from Nigeria, by the time those arrangements were made contact had been lost again and his whereabouts are now unknown.

On 7 May 1991 proceedings were commenced on behalf of M. seeking to have the Home Office fined and the Minister committed to prison or fined for contempt of court in failing to comply with the Order made on 2 May. The notice of motion was subsequently amended, to include a number of other claims including a claim against Mr. Baker. At the commencement of the

hearing before Simon Brown J. on 9 July, the only charges which were maintained were those against the Home Office and Mr. Baker. Simon Brown J. came to the conclusion that he had no power to make a finding that either the Home Office or the Home Secretary were guilty of contempt. He indicated that, if he had had such power, he would have found the Home Office in contempt in failing to prevent M. being put on the plane in Paris when they had had notice that an undertaking had been given to the court and of its terms. With regard to Mr. Baker, Simon Brown J. said:

> "Not without considerable hesitation. I have finally come to accept Mr. Laws' submission that, jurisdiction apart, it would be wrong to find the Secretary of State in contempt in the particular circumstances of this case. It is just not proved beyond reasonable doubt that he had a reasonable opportunity to decide to seek, and then in fact to seek, discharge prior to 9 a.m. on 3 May. It is not sufficient for the applicant to establish merely that in an ideal world things would have been ordered differently. A respondent to contempt proceedings is entitled to a reasonably benevolent construction of his actions and decisions following receipt of a mandatory order made apparently without jurisdiction, not least when, as here, these actions and decisions are being guided at every step by responsible legal advisers."

Before Simon Brown J., Mr. Laws who was appearing for the Home Office and Mr. Baker, but who had not appeared before Garland J. when the alleged undertaking had been given, "did not feel it proper" to dispute that the undertaking had in fact been given. As to this aspect of the case in the Court of Appeal Lord Donaldson M.R. (at p. 298) said:

> "Whilst I understand and respect Mr. Laws' attitude. I do not think that it would be right for the court to shut its eyes to the wholly exceptional circumstances of this case. In any ordinary circumstances if a party, or solicitors or counsel on his behalf, so act as to convey to the court the firm conviction that an undertaking is being given, that party will be bound and it will be no answer that he did not think that he was giving it or that he was misunderstood. Here, however, the circumstances were extraordinary and the pressures of time overwhelming. It was a situation in which a misunderstanding was waiting to happen. If, as I think, it would not be right to regard the Home Office or the Home Secretary as being bound by an undertaking

at a time when all concerned left court at the conclusion of the hearing before Garland J. this position could not be altered by Mr. Burgess informing Mr. George that an undertaking had been given. I do not. therefore, think that any question of contempt arises in this context. This is very far from saying that the Home Office can escape serious criticism. On any view the judge was *informed* that the Home Office would seek to prevent M. leaving the United Kingdom and I should have thought that it was implicit in this that, if this proved impossible, any other practicable means of preventing his reaching Zaire would be

adopted. This was why Mr. Palmer left the court in order to telephone to the Home Office before the proceedings had been concluded. Given greater efficiency and determination. I have no doubt that M. could probably have been prevented from leaving Heathrow and certainly he could have been returned to the United Kingdom from Paris. He was not unwilling and he was in the custody of the Home Office or its agents throughout the whole period ending with his arrival in Zaire."

There is no reason for disagreeing with those criticisms. What does appear to me to be clear from the events which occurred on 1 and 2 May 1991 is that, if there is no power in a court to make an order to prevent the Home Office moving a person in any circumstances, this would be a highly unsatisfactory situation. The facts of this case illustrate that circumstances can occur where it is in the interests both of a person who is subject to the powers of government and of the government itself that the courts should be in a position to make an order which clearly sets out either what should or what should not be done by the government. If there had been no confusion in this case as to the extent of the court's power. I have little doubt that Mr. Baker would not find himself in his present position where he has been found guilty of contempt.

Lord Donaldson M.R. described Mr. Baker's contempt as "a very serious one" because he had taken "a deliberate decision which has the effect of ensuring that an Order of the court, to whomsoever addressed, is not complied with, particularly when non-compliance could have had irremediable and even fatal consequences for M., for whose protection the Order was made." He however added:

"Any contempt of court is a matter of the utmost seriousness, but the culpability of the contemnor can vary enormously. In the highly unusual circumstances of this case. Mr. Baker's culpability falls at the lower end of the scale for the following reasons:

"(1) He had no advance knowledge of M.'s case or of the court's Order before 4 p.m. on 2 May.

"(2) He had very little time in which to decide upon his course of action.

"(3) He was advised, wrongly, that the court's Order was made without jurisdiction and may have got the impression that it could be treated as a nullity.

"(4) Whether or not his advisers intended it, I think that he was left with the impression that he could properly delay action in compliance with the Order until after the judge had decided whether or not to rescind it and that the cancellation of the

return flight should be viewed as part of a decision by Mr. Baker to postpone action rather than to decline to take it.

"(5) His decision was expressly made subject to any advice which might be given by Treasury Counsel.

"(6) He has disavowed any intention to act in defiance of an order of the court or to hold himself above the law. a disavowal which I fully accept.

"(7) He has expressed sincere regret if he acted wrongly, as undoubtedly he did."

Nolan L.J. regarded Mr. Baker as being in contempt because he "interfered with the administration of justice by completing the removal from the court's jurisdiction and protection of a litigant who was bringing proceedings against him."

Injunctions And The Crown

Mr. Kentridge placed at the forefront of his argument the issue as to whether the courts have jurisdiction to make coercive orders against the Crown or Ministers of the Crown. It was appropriate for him to do so for at least two reasons. First, and more importantly, because whether the courts have or do not have such a coercive jurisdiction would be a strong indicator as to whether the courts had the jurisdiction to make a finding of contempt. If there were no power to make coercive orders, then the need to rely on the law of contempt for the purpose of enforcing the orders would rarely arise. The second reason is that, on the facts of this case, the issue is highly significant in determining the status of the order which Garland J. made and

which it is alleged Mr. Baker breached. If that order was made without jurisdiction, then Mr. Richards would rely on this in support of his contention that Mr. Baker should not have been found guilty of contempt. As Mr. Richards admitted, the issue is of constitutional importance since it goes to the heart of the relationship between the executive and the courts. Is the relationship based, as he submits, on trust and cooperation or ultimately on coercion?

Mr. Richards submits that the answer to this question is provided by the decision of *Factortame Ltd.* v. *Secretary for State for Transport* [1990] 2 A.C. 85 and in particular by the reasoning of Lord Bridge of Harwich who made the only speech in that case. This speech was highly influential in causing Simon Brown J. and McCowan L.J. to take a different view from the majority of the Court of Appeal as to the outcome of the present proceedings. That case was not, however, primarily concerned with the question as to whether injunctive relief was available against the Crown or its officers. It involved the allegedly discriminatory effect of the requirement of British ownership and the other requirements of Part II of the Merchant Shipping Act

1988 and the associated Regulations, which prevented fishing vessels which were owned by Spanish nationals or managed in Spain being registered under the legislation. This it was said contravened Community Law. It was an issue of difficulty which had accordingly been referred to the European Court under article 177 of the E.E.C. Treaty. The question then arose as to whether the applicants were entitled to interim relief pending the outcome of the reference. The primary contention of the applicants was that it was in the circumstances a requirement of Community Law that interim relief should be available. This was an additional point as to which Community Law was unclear so your Lordships' House decided that that issue should also not be determined until after a reference under article 177. This meant that pending the outcome of the second reference your Lordships had to determine whether interim relief should be granted under domestic law .

In deciding whether under domestic law interim relief should be granted Lord Bridge initially examined the position without reference to the involvement of a Minister. He concluded that no relief could be granted since English Law unassisted by Community Law treated legislation as fully effective until it was set aside. Lord Bridge described the position in these words, at pp. 142-143:

> "But an order granting the applicants the interim relief which they seek will only serve their purpose if it declares that which Parliament has enacted to be the law from 1 December 1988, and to take effect in relation to vessels previously registered under the Act of 1894 from 31 March 1989, not to be the law until some uncertain future date.

> Effective relief can only be given if it requires the Secretary of State to treat the applicants' vessels as entitled to registration under Part II of the Act in direct contravention of its provisions. Any such order, unlike any form of order for interim relief known to the law, would irreversibly determine in the applicants' favour for a period of some two years rights which are necessarily uncertain until the preliminary ruling of the E.C.J. has been given. If the applicants fail to establish the rights they claim before the E.C.J., the effect of the interim relief granted would be to have conferred upon them rights directly contrary to Parliament's sovereign will and correspondingly to have deprived British fishing vessels, as defined by Parliament, of the enjoyment of a substantial proportion of the United Kingdom quota of stocks of fish protected by the common fisheries policy. I am clearly of the opinion that, as a matter of English law, the court has no power to make an order which has these consequences."

Pending the outcome of the second reference this conclusion was in itself sufficient to determine the applicants' appeal. However, Lord Bridge went on to give a second reason for his decision which is directly relevant to the present appeal. The second reason is that injunctive relief is not available against the Crown or an officer of the Crown, when acting as such, in judicial review proceedings. When determining this aspect of the appeal the House

had the advantage of full argument on behalf of the Crown from junior counsel. Mr. Laws, as to why relief was not available, but judging by the report the House did not have the benefit of the very extensive argument in favour of the contrary view based on the historical development of proceedings against the Crown on which Mr. Kentridge relied at the hearing of this appeal. In saying this I make no criticism whatsoever of counsel for the applicants in *Factortame.* It is clear that what for the Crown was a question of the greatest importance was for the applicants a side-show. The Crown was anxious to have reconsidered the dicta in two cases which indicated that in judicial review proceedings injunctive relief could be granted against officers of the Crown. The first case was *Reg.* v. *Secretary of State for the Home Department, Ex parte Herbage* [1987] Q.B. 872. The second was *Reg. v. Licensing Authority, Ex parte Smith Kline & French Laboratories Ltd. (No. 2)* [1990] Q.B. 574, where the majority of the Court of Appeal approved the judgement of Hodgson J. in *Herbage.* In both those cases the Crown had been unable to appeal as it had been successful and so the *Factortame* case proved an ideal opportunity in which to vindicate its view that the dicta were wrong. Since the decision in *Factortame* there has also been the important development that the European Court has determined the second reference against the Crown so that the unhappy situation now exists that while a citizen is entitled to obtain injunctive relief (including interim relief) against the

Crown or an Officer of the Crown to protect his interests under Community Law he cannot do so in respect of his other interests which may be just as important.

Before examining the second reason that Lord Bridge gave for his conclusion I should point out that I was a party to the judgment of the majority in the *Smith Kline* case. In my judgment in that case I indicated that injunctive relief was available in judicial review proceedings not only against an officer of the Crown but also against the Crown. Although in reality the distinction between the Crown and an officer of the Crown is of no practical significance in judicial review proceedings, in the theory which clouds this subject the distinction is of the greatest importance. My judgment in the earlier case may have caused some confusion in *Factortame* by obscuring the important fact that, as was the position prior to the introduction of judicial review, while prerogative orders are made regularly against Ministers in their official capacity, they are never made against the Crown.

Lord Bridge in determining the second issue acknowledged the importance of the relevant history in determining this issue and it is necessary for me to set out my understanding of that history.

In support of their respective submissions as to the correct answer to this issue, Mr. Richards and Mr. Kentridge relied on principles which had been repeatedly reiterated down the centuries since medieval times. The principles on which Mr. Richards founded his argument are that the King can do no wrong and that the King cannot be sued in his own courts. Mr.

Kentridge on the other hand relied on the equally historic principle which is intimately linked with the name of Professor Dicey that:

> "when we speak of the 'rule of law' as a characteristic of our country, [we mean] not only that with us no man is above the law. but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. In England the idea of legal equality, or the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment. or to the payment of damages, for acts done in their official character

> but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person". *(Introduction to the Study of the Law of the Constitution* by A. V. Dicey 10th ed. 1965 p. 193).

In the course of argument we were referred to numerous authorities which supported these principles. However, in the present proceedings what is in dispute is not the validity of the principles but the manner in which in practice they were reconciled by the courts. The fact that the Sovereign could do no wrong did not mean that a servant of the Crown could do no wrong. Prior to the Crown Proceedings Act 1947 it was long established that what would now be described as private law rights could be established against the Crown cither by bringing a petition of right or. in the case of an action in ton. when a petition of right was not available *(Tobin v. The Queen* (1864) 16 C.B. (N.S.) 310), by bringing an action for damages against the servant of the Crown responsible for the tort in his own name. Such an action was possible since, as was pointed out by Cockburn C.J. in *Feather v. The Queen* (1865) 6 B. & S. 257 at p. 296 "As the Sovereign cannot authorise wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown". However, difficulties did exist in relation to an action against an officer or servant of the Crown in an action for a tort. The officer or servant had to be identified. There could be no vicarious liability placed personally on an officer for the acts of other officers or servants of the Crown since the "employer" was the Crown. Only a servant who committed or authorised the commission of the wrong could be responsible.

The position was accurately described by Romer J. in *Raleigh v. Goschen* [1898] 1 Chancery 73 at p. 79. In that case the plaintiffs commenced an action against the Lords Commissioners of the Admiralty with

the object of establishing that they were not entitled to enter or acquire by way of compulsory purchase land belonging to the plaintiffs and in order to obtain damages for trespass and an injunction to restrain any further trespass. It was held that while the plaintiffs could not sue any of the defendants as an official body they could sue the defendants individually for trespass committed or threatened by them personally. As the action was a claim against the defendants in their official capacity Romer J. decided that it was misconceived and that the action did not lie. In the course of his judgment he said:

> "So, if any of the defendants had themselves ordered or directed the alleged trespass now complained of by the plaintiffs, and it was in consequence of such order or direction that the alleged trespass took

> place, or if any of the defendants threatened to order or direct further trespass, then they could be sued. But in this case they could be sued not because, but in despite of the fact that they occupied official positions or acted as officials. In other words ... the plaintiffs, in respect of the matters they are now complaining of, could sue any of the defendants individually for trespasses committed or threatened by them, but they could not sue the defendants officially or as an official body. The question . . . narrows itself down to this: Is the present action one against the defendants as an official body, or is it an action against them as individuals?"

Having come to the conclusion that the action was against the defendants in their official capacity, Romer J. considered whether he should give leave to amend. In explaining his decision not to give leave to amend, he stated that to have done so would have amounted to changing "one action into another of a substantially different character." He added that this was illustrated by the fact that "an action against the defendants in their official capacity, supposing it to lie, would differ in most material respects from an action against them as individuals, as will be seen when consideration is paid to questions of discovery, and to the form of any interlocutory injunction or final judgment that could be obtained by the plaintiffs, and as to how and against whom such injunction or judgment could be enforced."

When dismissing the action Romer J. was careful to do so "without prejudice to any claim the plaintiffs" might have "against any of the defendants individually, in respect of any trespass committed or threatened." In identifying the nature of the action, he did not confine himself merely to looking at the title: he examined the substance of the claim as it was disclosed in the pleadings.

The authorities on which the plaintiffs relied in *Raleigh v. Goschen* for seeking an injunction against the Lords Commissioners of the Admiralty included *Ellis v. Earl Grey* (1833) 6 Sim. 214. The reasoning of Vice-Chancellor Shadwell for granting the relief claimed in that case is not entirely satisfactory. However, the argument of counsel expressed the position correctly when he concluded his submission in support of the Bill, which

included a claim for an order restraining the Lords of the Treasury from making certain payments in their official capacity, by saying of the Lords of the Treasury that they "are not made panics to the Bill as Public Functionaries, but as mere Stakeholders of the Fund: and, in that character there can be no objection to their being restrained from making the payment as they have hitherto done, until the rights of the opposing Claimants have been determined". The Vice-Chancellor presumably accepted this argument

since he described the Lords of the Treasury as being "mere ministerial conduit-pipes for payment ... to the Parties entitled" and overruled the claim of demurrer.

Raleigh v. Goschen was applied in *Hutton v. Secretary of State for War* (1926) 43 T.L.R. 106 by Tomlin J. It is interesting to note that in the latter case the Attorney-General's submission, which was accepted by the judge, made it clear that for the alleged breach of statutory duty the only remedy was "by petition of right unless the existing Secretary of State had acted wrongfully, and then he could be sued personally, but not as Secretary of State".

The position so far as civil wrongs are concerned, prior to the Crown Proceedings Act, can be summarised, therefore, by saying that as long as the plaintiffs sued the actual wrongdoer or the person who ordered the wrongdoing he could bring an action against officials personally, in particular as to torts committed by them and they were not able to hide behind the immunity of the Crown. This was the position even though at the time they committed the alleged tort they were acting in their official capacity. In those proceedings an injunction, including, if appropriate, an interlocutory injunction, could be granted. The problem which existed in seeking a remedy against the Crown was not confined to injunctions. It applied to any form of proceedings and where proceedings were possible by suing the wrongdoer personally then an injunction would be available in the same circumstances as other remedies. If such a position required reconciling with the historic maxim as to the Crown doing no wrong, then this could be achieved by an approach, which Mr. Richards endorsed in the course of argument, by saying that, as the Crown could do no wrong, the Crown could not be considered to have authorised the doing of wrong, so the tortfeasor was not acting with the authority of the Crown. (In this summary I put on one side the position with regard to a claim for immunity on the basis of Act of State. This is not relevant for present purposes).

The difficulty which a plaintiff might have in identifying the appropriate servant of the Crown who was the tortfeasor in practice was overcome by the Crown nominating the individual responsible for the damage and the lack of resources of the defendant did not cause problems since the Treasury would make an ex gratia payment of compensation if it was a case where, but for Crown immunity, the Crown would be vicariously liable. In such proceedings, if it was appropriate for an injunction to be granted, there was no reason why this should not be done.

It was the criticisms in *Adams* v. *Naylor* [1946] A.C. 543, and the cases which applied those criticisms, of the practice of the Crown nominating a defendant who might not have been personally guilty of any tort which were

the catalysts for the changes which were brought about by the Crown Proceedings Act 1947.

However, before referring to that Act it is necessary to draw attention to one additional development in bringing proceedings against the Crown. This involved the grant of declaratory relief against the Crown. In *Dyson v. Attorney-General* [1911] 1 KB 410 it was decided that it was unnecessary to have a cause of action in order to obtain declaratory relief. This opened the door to proceedings for a declaration against the Crown, at least where the estate of the Crown was not involved *(Dyson* at p. 421), without the necessity of proceeding by petition of right. In such proceedings there would be no question of obtaining an injunction.

So far as civil proceedings were concerned the position was transformed by the Crown Proceedings Act 1947. Section 1 enabled the Crown to be sued directly in those situations where prior to the Act a claim might have been enforced by petition of right. Section 2 in general permitted actions to be brought against the Crown in respect of torts committed by its servants or agents for any breach of its duties which gave rise to a tortious liability (including a breach of statutory duty where the breach created a cause of action). Section 2 did not remove the right to sue the actual tortfeasor.

Part II of the Crown Proceedings Act 1947 deals with "Jurisdiction and Procedure". Section 17 provides for the Minister for the Civil Service to publish a list of authorised government departments for the purposes of the Act and requires civil proceedings against the Crown to be instituted against the appropriate authorised government department or, if there is no appropriate authorised department or where there is reasonable doubt as to the identity of the appropriate department, against the Attorney-General. An examination of the current list indicates that some of the authorised departments are in fact the descriptions of the official names of individuals or collections of individuals who head the departments. Thus proceedings can be brought against a number of different Director Generals and bodies such as the Commissioners of Customs and Excise or Inland Revenue. However, there are other authorised departments which are not linked with the name of the head of the department, so to take a typical example, the Home Office and not the Home Secretary is listed.

Lord Bridge attaches importance to section 21 of the Act. Its terms are as follows:

"21 Nature of relief

"(1) In any civil proceedings by or against the Crown the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

"Provided that:

"(a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

"(b) in any proceedings against the Crown for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Crown to the land or property or to the possession thereof.

"(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown."

Before considering the provisions of section 21 in greater detail, it is convenient to refer to the relevant provisions of section 23(2) which limits the scope of Part II of the Act, including section 21. The terms of that subsection are as follows:

"(2) Subject to the provisions of this section, any reference in this Part of this Act to civil proceedings against the Crown shall be construed as a reference to the following proceedings only:

"(a) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by any such proceedings as are mentioned in paragraph 2 of the First Schedule to this Act;

"(b) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by an action against the Attorney-General, any Government department, or any officer of the Crown as such; and

> "(c) all such proceedings as any person is entitled to bring against the Crown by virtue of this Act:
>
> "and the expression 'civil proceedings by or against the Crown' shall be construed accordingly."

Section 23(2)(a) refers to petitions of right, (b) refers, inter alia, to proceedings for a declaration and (c) refers, inter alia, to proceedings in tort. The language of section 23 makes it clear that Part II of the Act does not generally apply to all proceedings which can take place in the High Court. In particular, it does not apply to the proceedings which at that time would have been brought for prerogative orders. If there is any doubt about this, that doubt is removed by the general interpretation provisions of the Act contained in section 38, section 38(2) providing:

> "In this Act, except in so far as the context otherwise requires or it is otherwise expressly provided, the following expressions have the meanings hereby respectively assigned to them, that is to say:
>
> > 'Civil proceedings' includes proceedings in the High Court or the county court for the recovery of fines or penalties, but does not include proceedings on the Crown side of the [Queen's] Bench Division."

Proceedings for the prerogative orders were brought on the Crown side.

Returning to section 21, what is clear is that in relation to proceedings to which section 21(1) provisos (a) and (b) apply, no injunction can be granted against the Crown. In addition there is the further restriction on granting an injunction against an officer of the Crown under section 21(2). That subsection is restricted in its application to situations where the effect of the grant of an injunction or an order against an officer of the Crown will be to give any relief against the Crown which could not have been obtained in proceedings against the Crown prior to the Act. Applying those words literally, their effect is reasonably obvious. Where, prior to 1947. an injunction could be obtained against an officer of the Crown, because he had personally committed or authorised a tort, an injunction could still be granted on precisely the same basis as previously since, as already explained, to grant an injunction could not affect the Crown because of the assumption that the Crown could do no wrong. The proceedings would, however, have to be brought against the tortfeasor personally in the same manner as they would have been brought prior to the 1947 Act. If, on the other hand, the officer was being sued in a representative capacity, whether as an authorised government department, for example, one of the named Director-Generals or as Attorney-General, no injunction could be granted because in such a

situation the effect would be to give relief against the Crown. The position would be the same in those situations where proceedings would previously

have been brought by petition of right or for a declaration but could now be brought against the authorised department.

There appears to be no reason in principle why, if a statute places a duty on a specified Minister or other official which creates a cause of action, an action cannot not be brought for breach of statutory duty claiming damages or for an injunction, in the limited circumstances where injunctive relief would be appropriate, against the specified Minister personally by any person entitled to the benefit of the cause of action. If. on the other hand, the duty is placed on the Crown in general, then section 21(2) would appear to prevent injunctive relief being granted, but as Professor Sir William Wade Q.C. has pointed out ("Injunction Relief against the Crown and Ministers" (1991) 107 L.Q.R. 4, 4-5) there are likely to be few situations when there will be statutory duties which place a duty on the Crown in general instead of on a named Minister. In broad terms therefore the effect of the Act can be summarised by saying that it is only in those situations where prior to the Act no injunctive relief could be obtained that section 21 prevents an injunction being granted. In other words it restricts the effect of the procedural reforms that it implemented so that they did not extend the power of the courts to grant injunctions. This is the least that can be expected from legislation intended to make it easier for proceedings to be brought against the Crown.

It is now necessary refer to the case of *Merricks v. Heathcoat-Amory* [1955] Ch. 567, a case which requires careful consideration because of the importance attached to it, as we shall see later, by Lord Bridge in *Factortame.*

In *Merricks* the plaintiff sought a mandatory injunction against the Minister of Agriculture, Fisheries and Food both in his personal capacity and in his capacity as Minister, a corporation sole constituted by statute. The injunction required the Minister to withdraw the draft of a statutory scheme regulating the marketing of potatoes which had been laid by the Minister before Parliament for approval when acting in his capacity as Minister and also restraining him from seeking approval of the scheme by Parliament. An application was made on behalf of the Minister to strike out the proceedings as being misconceived. It was argued by the Law Officers on behalf of the Minister that, in so far as the proceedings were brought against the Minister in his official capacity , there was no jurisdiction to grant an injunction against a Minister and, in so far as the proceedings were brought against the Minister in his personal capacity, he could not and did not purport to lay the scheme in his personal capacity. It was also submitted that the Minister owed no duty to the plaintiff and that, if he acted in a personal capacity, he acted as a

Member of Parliament, which involved parliamentary privilege. Not surprisingly Upjohn J. acceded to the application. Even today on an application for judicial review it could be difficult to persuade a court to intervene on similar facts to those in the *Merricks* case, though in view of the decision in *Reg. v. Her Majesty's Treasury, Ex parte Smedley* [1985] Q.B. 657 I do not go so far as to say it would be impossible to do so. However, the *Merricks* case was brought by what today can be described as private law

proceedings and the plaintiff, most certainly in those proceedings was not entitled to seek any, and in particular injunctive. relief. He was not seeking to enforce any legal or equitable right to which he was entitled. He would as the law had so far developed lack the necessary standing to bring the proceedings. However, Upjohn J. came to the conclusion that the Minister, "from start to finish . . . was acting in his capacity as an officer representing the Crown" and went on to say that as this was the position it was conceded that no injunction could be obtained against him and therefore the motion failed in limine. He added that he could not see how there could be the three categories of situation for which the plaintiff argued, the first being when the Minister was representing the Crown, the third where he was acting in a purely individual capacity and the second, which he considered created the difficulty, involving a person designated in an official capacity but not representing the Crown. As to the second category, Upjohn J. said:

> "It is possible that there may be special acts where named persons have special duties to perform which would not be duties normally fulfilled by them in their official capacity; but in the normal case where the relevant or appropriate Minister is directed to carry out some function or policy of some Act, he is either acting in his capacity as a minister of the Crown representing the Crown, or is acting in his personal capacity, usually the former. I find it very difficult to conceive of a middle classification".

I do not find the scope of this statement clear. If Upjohn J. was intending to suggest that it was not possible for a Minister to be under a personal liability and subject to injunctive relief for wrongs committed by him in his official capacity then it is inconsistent with the authorities cited earlier. The approach indicated by those authorities was relied on by the plaintiff in *Merricks* who cited in support the first instance decision of Roxburgh J. in *Harper v. Secretary of State for the Home Department* (1954) The Times, 18 December. However, that was a case heard ex parte and Upjohn J. did not in those circumstances attach importance to it. The case went to the Court of Appeal [1955] Ch. 238 where, without finally committing himself. Sir Raymond Evershed M.R. in fact described the position accurately when he said, at p. 254 (see *Merricks,* at p. 574):

> "But I return at the end of my judgment to the point which I mentioned earlier and on which I would say one final word, namely, the question of the defendant to this action. I have said that the defendant is 'the Secretary of State for the Home Department' - sued, that is to say, by his official title as a Minister of the Crown. It is said by Sir Andrew that, since the report disregarded the rules in the Act of 1949, therefore it is not a report within the meaning of the Act, and that the Secretary of State has neither the duty to the House or to anyone else, nor the power or authority, to take this proposed Order in Council to Her Majesty. I am not myself satisfied that Sir Andrew is not in this respect upon the horns of a dilemma. If the whole thing

> pis a nullity and all he seeks to do is to restrain a particular individual, who happens at the moment to be the Secretary of State for the Home Department. I am not satisfied that he ought not to sue him in his personal capacity as for an ordinary wrong - though, in that case, it would not be clear to me what breach of duty to the plaintiffs he was engaged in committing. On the other hand, if he does sue him, and rightly sues him, in his capacity as Secretary of State for the Home Department, then I am not satisfied (though I express no final view on it. as we have not heard full argument) that the case is one which, having regard to the terms of the Crown Proceedings Act 1947, will lie. And I am not satisfied, having regard to section 21 of that Act. that, on this alternative, the plaintiff could, in any event, obtain an injunctions. . . '

Upjohn J.'s approach appears to treat a duty placed upon a named Minister as being placed upon the Government as a whole. This could be said to be in accord with the approach of Lord Diplock and Lord Simon in *Town Investments Ltd.* v. *Department of the Environment* [1978] AC 359. However, in that case your Lordships' House was dealing with a very different situation, namely the consequence of a grant of a lease to a named Department of Government which can make the Crown and not the Department the tenant. It is not appropriate to apply that approach to actions in tort, including actions for breach of statutory duty, since this would mean that the Act of 1947 had the surprising effect of treating the wrongful act of a named Minister as being that of the Crown so that the Minister could no longer be sued personally in tort or for injunctive relief. Thus while the outcome of the *Merricks* case was correct, the reasoning of Upjohn J. was incorrect, if and in so far, by his remarks which have been cited, he was seeking to suggest that a Minister when acting in his official capacity could not be sued personally and an injunction granted. In any event his remarks could have no application to proceedings for the prerogative orders or judicial review which he was not considering.

I now turn to the historical development of relief against the Crown in prerogative proceedings. I do so because the historical development of the two sets of proceedings have been on different lines.

Prior to the introduction of judicial review, the principal remedies which were available were certiorari, mandamus, prohibition and habeas corpus. As we are primarily concerned with the possible availability of injunction, I will focus on mandamus and prohibition since they are indistinguishable in their effect from final injunctions. However, it should not be forgotten that, at least indirectly, the other remedies are capable of having a coercive effect. In addition, as in private law proceedings, once the Crown or a body representing the Crown is a party to proceedings, unless some express restriction exists, the Crown, like any other litigant, is liable to have interlocutory orders made against it with which it is required to comply, such as an order for discovery. Historically the result of issuing the writ of

certiorari was to require proceedings of inferior bodies to be brought before the courts of chancery and common law so that they could be supervised by those courts and if necessary quashed. Habeas corpus similarly required the bringing before the courts of the body of the person concerned. As the case of *In re Thompson* (1889) 5 T.L.R. 565 vividly makes clear, the non-compliance with the writ of habeas corpus was a matter which at that time a Divisional Court of the Queen's Bench Division found no difficulty in treating as contempt by a captain of one of Her Majesty's ships.

The prerogative remedies could not be obtained against the Crown directly as was explained by Lord Denman C.J. in *Reg. v. Powell* (1841) 1 Q.B. 352:

> " ... both because there would be an incongruity in the Queen commanding herself to do an act. and also because the disobedience to a writ of mandamus is to be enforced by attachment."

Originally this difficulty could not be avoided by bringing the proceedings against named Ministers of the Crown *(Reg.* v. *Lords Commissioners of the Treasury* (1872) L.R. 7 Q.B. 387). But. where a duty was imposed by statute for the benefit of the public upon a particular Minister, so that he was under a duty to perform that duty in his official capacity, then orders of prohibition and mandamus were granted regularly against the Minister. The proceedings were brought against the Minister in his official name and according to the title of the proceedings by the Crown. The title of the proceedings would be *Reg.* v. *Minister, Ex parte the applicant* (as is still the position today), so that unless the Minister was treated as being distinct from the Crown the title of the proceedings would disclose the "incongruity" of the Crown suing the Crown. This did not mean that the Minister was treated as acting other than

in his official capacity and the order was made against him in his official name. In accordance with this practice there have been numerous cases where prerogative orders, including orders of prohibition and mandamus, have been made against Ministers. This was accepted by Mr. Richards as being the position prior to the introduction of judicial review and I will merely refer to one authority, *Reg. v. The Commissioners of Customs and Excise, Ex parte Cook and another* [1970] 1 W.L.R. 450 (which was not cited in *Factortame)* to illustrate the position. Lord Parker, C.J. described the then situation of which he had great experience (at p.455). He said:

> "Accordingly, one approaches this case on the basis, and I confess for my part an alarming basis, that the word of the Minister is outweighing the law of the land. However, having said that, one moves on to the far more difficult question whether mandamus will lie. It is sometimes said as a general proposition that mandamus will not lie against the Crown or an officer or servant of the Crown. I think we all know in this day and age that that as a general proposition is quite untrue. There have been many cases, of which the most recent

> is *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 in which a mandamus was issued to a Minister. Indeed, that has always been the case, as can be seen since as long ago as 1850 when in *Reg. v. Commissioners of Woods, Forests, Land, Works and Buildings, Ex parte Budge* (1850) 15 Q.B. 761, Sir Frederick Thesiger expressed the proposition in argument in this form, at p. 768:
>
> > 'Whenever a person, whether filling an office under the Crown or not, has a statutory duty towards another person, a mandamus will lie to compel him to perform it.'
>
> "Those words of Sir Frederick Thesiger were in fact adopted by Cockburn C.J.
>
> "There are. of course, cases in which it has been held that a servant or officer of the Crown may have as his only duty a duty towards the Crown. That, indeed, was the deciding factor in *Reg.* v. *Lords Commissioners of the Treasury* (1872) L.R. 7 Q.B. 387: but equally there are other cases, for example. *Rex* v. *Income Tax Special Purposes Commissioners, Ex parte Dr. Barnado's Homes National Incorporated Association* [1920] 1 K.B. 26, and the well known case *of Reg.* v. *Income Tax Special Purpose Commissioners* (1888) 21 Q.B. 313, which show quite clearly that where by statute an officer or servant of the Crown has also a duty towards a member of the public,

then provided that member of the public has a sufficient interest, mandamus will lie."

It is interesting to note the comment by Lord Parker about mandamus not being available since similar comments were sometimes made about injunctions in private law proceedings. Nonetheless, there were limits at that time, as Lord Parker C.J. indicates, to the availability of mandamus. It was necessary that there should be a duty which was owed to the applicant as a member of the public. The duty which was required was not a private duty which would give rise to a right to damages in the event of a breach, but a public duty. In addition the duty had to be placed on a named Minister. As already indicated, in most situations today statutory duties are conferred on ministers in their own name and not upon the Crown in general. (Professor Sir William Wade Q.C., L.Q.R. (1991) Vol. 107 p.4). Furthermore, by the time of the introduction of the remedy of judicial review the position had developed so that the prerogative orders, including prohibition and mandamus, were being granted regularly against Ministers without any investigation of whether a statutory duty, which had not been complied with, was placed upon the Minister or some one else in the Department for which the Minister was responsible. Thus the Immigration Act 1971 places some duties on immigration officers and others on the Home Secretary, but even where it is the immigration officer who has not complied with the statutory duty it is the practice to make an order of mandamus against the Minister (an example is

provided by *Reg. v. Secretary of State for the Home Department, Ex parte Phansopkar* [1976] 1 Q.B. 606). As a result of even more recent developments, illustrated by the decision in the *Council of Civil Service Unions v. The Minister for the Civil Service* [1985] 1 A.C. 374 a distinction probably no longer has to be drawn between duties which have a statutory and those which have a prerogative source.

After the introduction of judicial review in 1977 it was therefore not necessary to draw any distinction between an officer of the Crown "acting as such" and an officer acting in some other capacity in public law proceedings.

The changes made in procedure introduced in 1977 by Order 53 for judicial review were first given statutory authority by primary legislation in section 31 of the Supreme Court Act 1981. The relevant provisions of that section, which do not differ materially from the corresponding provisions of Order 53, are as follows;

"Application for judicial review

"(1) An application to the High Court for one or more of the following forms of relief, namely -

1. an order of mandamus, prohibition or certiorari:

2. a declaration or injunction under subsection (2); or

(c) an injunction under section 30 restraining a person not entitled to do so from acting in an office to which that section applies.

shall be made in accordance with rules of court by a procedure to be known as an application for judicial review.

"(2) A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to -

1. the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition or certiorari;

2. the nature of the persons and bodies against whom relief may be granted by such orders: and

(c) all the circumstances of the case.

it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be.

"(3) No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court: and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

"(4) On an application for judicial review the High Court may award damages to the applicant if -

1. he has joined with his application a claim for damages arising from any matter to which the application relates; and

2. the court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he would have been awarded damages."

In section 31 the jurisdiction to grant declarations and injunctions is directly linked to that which already existed in relation to the prerogative orders. The jurisdiction to award damages by contrast is restricted to those situations where damages are recoverable in an action begun by writ. It has never been suggested that a declaration is not available in proceedings against a Minister in his official capacity and if Order 53 and section 31 apply to a Minister in the case of declarations then, applying ordinary rules of construction, one would expect the position to be precisely the same in the case of injunctions. As an examination of the position prior to the introduction of judicial review indicates, because of the scope of the remedies of mandamus and prohibition the availability of injunctions against Ministers would only be of any significance in situations where it would be appropriate to grant interim relief. Even here the significance of the change was reduced by the power of the court to grant a stay under Ord. 53, r. (10). Furthermore in practice an injunction against a Minister would be no more than a peremptory declaration because of the limitations on execution contained in Ord. 77, r. 15 which because of the definition of "order against the Crown" in Ord. 77, r. 1(2) applies to judicial review and proceedings against an officer of the Crown as such.

Lord Bridge of Harwich acknowledged (at p. 143), "the question at issue depends, first, on the true construction of section 31". Lord Bridge also accepted (at p. 149) that if section 31 "were to be construed in isolation" there would be "great force in the reasoning" that section 31 did enable injunctions to be granted for the first time against Ministers of the Crown in judicial review proceedings. Why then did Lord Bridge come to the conclusion that an injunction could not be granted against a Minister in proceedings for judicial review?

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A primary cause for Lord Bridge's taking this view was that he concluded that it would be a dramatic departure from what was the position prior to the introduction of judicial review for an injunction to be available against the Crown or a Minister of the Crown, so that the change was one which could be expected to be made only by express legislation. His conclusion was not. however, based on as comprehensive an argument of the history of both civil and prerogative proceedings as was available to your Lordships. In particular he did not have an account of the developments which had taken place in the granting of prerogative orders against Ministers, which meant that in practical terms the only consequence of treating section 31 as enabling injunctions to be granted against Ministers acting in their official capacity would be to provide an alternative in name only to the orders of prohibition and mandamus which were already available and to allow interim relief other than a stay for the first time.

A secondary cause was his reliance upon Upjohn J.'s judgment in the *Merricks* case, a judgment which as already indicated should be approached with caution. Lord Bridge was also influenced by the fact that the new Order 53 was introduced following the Law Commission's Report on Remedies in Administrative Law (1976) (Law Com. No. 73) (Cmnd. 6407) and that that Report drew attention to the problem created by the lack of jurisdiction to grant interim injunctions against the Crown and recommended that the problem should be remedied by amending section 21 of the 1947 Act. The report included a draft of the legislation proposed. This proposal of the Law Commission was never implemented. Instead the decision was taken following the Law Commission's Report to proceed by amendment of the Rules of the Supreme Court rather than by primary legislation. Lord Bridge in his speech explains why, in his view, this meant that section 31 of the Act of 1981 should be given a restricted interpretation:

> "First, section 31(2) and Ord. 53, r. 1(2) being in identical terms, the subsection and the sub-rule must have the same meaning and the sub-rule, if it purported to extend jurisdiction, would have been ultra vires. Secondly, if Parliament had intended to confer upon the court jurisdiction to grant interim injunctions against the Crown, it is inconceivable, in the light of the Law Commission's recommendation in paragraph 51 of its report, that this would not have been done in express terms either in the form of the proposed clause 3(2) of the Law Commission's draft Bill or by an enactment to some similar effect. There is no escape from the conclusion that this recommendation was never intended to be implemented. Thirdly, it is apparent from section 31(3) that the relief to which section 31(2) applies is final, as opposed to interlocutory, relief. By section 31(2) a declaration may be made or an injunction granted 'where an application for judicial review . . . **has** been made . . .' But by section 31(3) 'no application for judicial review **shall** be made unless the leave of the High Court has been obtained in accordance with rules of court; . . . Under the rules there are two stages in the procedure,

> first the grant of leave to apply for judicial review on ex parte application under Ord. 53. r. 3, secondly the making of the application for judicial review which by r. 5 is required to be by originating motion or summons duly served on all panics directly affected. Section 31(2) is thus in terms addressed to the second stage, not the first, and is in sharp contrast with the language of Ord. 53, r. 3(10), which by its terms enables appropriate interim relief to be granted by the court at the same time as it grants leave to apply for judicial review. This point occurred to me at first blush to be one of some technicality. But on reflection I am satisfied that it conclusively refutes the views that section 31(2) was intended to provide a solution

> to the problem of the lack of jurisdiction to grant interim injunctions against the Crown. The form of final relief available against the Crown has never presented any problem. A declaration of right made in proceedings against the Crown is invariably respected and no injunction is required. If the legislature intended to give the court jurisdiction to grant interim injunctions against the Crown, it is difficult to think of any reason why the jurisdiction should be available only in judicial review proceedings and not in civil proceedings as defined in the Act of 1947. Hence, an enactment which in turn applies only to forms of final relief available in judicial review proceedings cannot possibly have been so intended."

This is a very closely and carefully argued justification for adopting a narrow approach to the effect of section 31 of the Supreme Court Act 1981. It deserves very careful attention coming, as it does, from a judge who is acknowledged to have made an outstanding contribution to this area of the law. Nonetheless, I do not regard it as justifying limiting the natural interpretation of section 31 so as to exclude the jurisdiction to grant injunctions, including interim injunctions, on applications for judicial review against Ministers of the Crown. I will try to explain why.

First of all it is unsafe to draw any inference from the fact that judicial review was not first introduced by primary legislation. Primary legislation could have led to delay. As it happens, in Northern Ireland, when judicial review was introduced, the primary legislation, the Judicature (Northern Ireland) Act 1978. came first and was followed by a subsequent amendment of the Rules involving a new Order 53 which came into operation on 1 January 1981.

The fact that in England and Wales it was decided that an amendment to the Rules of the Supreme Court should precede primary legislation did mean that it was inevitable that the recommendation of the Law Commission that section 21 of the Crown Proceedings Act 1947 should be amended had to be abandoned. However, this decision not to amend section 21 is not really surprising bearing in mind that the exercise in hand related to public law proceedings while section 21 dealt with private or "civil" law proceedings. Not having dealt with section 21 at the outset it was natural that, as section

31 was merely confirmatory of the changes already made, it should not deal with section 21 either.

Order 53 undoubtedly extended the circumstances in which a declaration could be granted against the appropriate representative of the Crown. Prior to the change no remedy whatsoever in the nature of a declaration could be obtained in prerogative proceedings. Furthermore, there are situations where no declaration could be obtained in private law

proceedings against the Crown without the assistance of the Attorney-General in circumstances in which it is now available on judicial review. It is not suggested that Order 53 was ultra vires in allowing declarations against Ministers and in my view if it was not ultra vires in relation to declarations there is no reason why it should be regarded as being ultra vires in relation to injunctions, albeit that the effect is that an injunction cannot be obtained against a Minister of the Crown where previously only an order of mandamus or prohibition could be obtained. However, if Order 53 were to be regarded as being open to challenge on this ground, this would explain why the unusual course was taken, a change having been introduced by an amendment to the Rules of the Supreme Court, of confirming the amendment a substantial period later by the Supreme Court Act. As a matter of construction it is difficult to treat the provisions as to injunctions in Order 53 and section 31 as not applying to Ministers, but as doing so in the case of the other remedies. This difficulty is underlined in the case of Northern Ireland since the interpretation section 118(1), of the Act of 1978 expressly provides that it should bind the Crown, but in a restricted manner "as respects civil proceedings to which the Act of 1947 applies." It would therefore bind the Crown as to injunctions in non - "civil proceedings", that is judicial review. Section 19 of that Act also gives the court a wide discretion to grant such interim relief as it considers appropriate. It would, therefore, seem to be difficult to say that there is no power to grant interim injunctions against Ministers in Northern Ireland.

If this is the effect of the Northern Ireland legislation the position is likely to be the same in England and Wales, though the position is different in Scotland. In *Factortame* no reference was made to the Northern Ireland Act.

Ord. 53, r. 3(10) deals with the grant of interim relief on an application for judicial review. It provides:

> "Where leave to apply for judicial review is granted, then - (a) if the relief sought is an order of a prohibition or certiorari and the court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders; (b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ."

So far as respondents other than Ministers are concerned, the provisions of Ord. 53, r. 3(10)(b) have always been treated as giving the Court jurisdiction to grant interim injunctions. This is confirmed to be the position by the decision of the Court of Appeal in *Reg. v. Kensington and Chelsea Royal*

London Borough Council, Ex parte Hammell [1989] Q.B. 518. The power of the Court to grant interim injunctions is linked to the power of the Court to grant final injunctions. If the court has the power to grant a final injunction against a Minister it must surely have the power to grant an interim injunction and vice versa. This is confirmed by section 37(1) of the 1981 Act which provides:

> "The High Court may by order (whether interlocutory or final) grant an injunction ... in all cases which it appears to the court to be just and convenient to do so."

As to the "technical" point referred to by Lord Bridge, Ord. 53. r. 3(10) is similarly linked to Ord. 53, r. 1(2) and the almost identically worded provisions of section 31(2). While it is correct that an application for judicial review cannot be made until leave is granted, this does not mean that section 31(2) restricts the court's jurisdiction to gram interim or final injunctions until after leave has been given and this has been followed by lodging the formal application with the court. This would be quite out of accord with practice which has always been followed on judicial review and would involve the expense and delay of two hearings when at present there is usually one. The clear intent of Ord. 53, r. 3(10) is that the Court where it considers an application for leave at an oral hearing should deal with questions of interim relief if it is appropriate to do so. During the course of the hearing Mr. Richards was asked whether he could provide any justification for Lord Bridge regarding the language of section 31(2) and section 31(3) together with Ord. 53, r. 3(10) as "conclusively [refuting] the view that section 31(2) was intended to provide a solution to the problem of the lack of jurisdiction to grant interim injunctions against the Crown." but he was not able to do so. Prior to the introduction of Order 53 there was the same problem of the inability to grant interim injunctions against bodies which had no connection with the Crown. The changes which are reflected in sections 31(2)and (3) and Ord. 53, r. 3(10) provided a solution in relation to those bodies and it must surely follow that if section 31(2) gives the court jurisdiction to grant final injunctions against Ministers it must also provide the jurisdiction to grant interim injunctions. Counsel for the applicants in *Factortame* did not reply to the Crown's submissions on this aspect of the case and I expect this explains why in *Factortame* the position was misunderstood.

I am, therefore, of the opinion that, the language of section 31 being unqualified in its terms, there is no warrant for restricting its application so that in respect of Ministers and other officers of the Crown alone the remedy of an injunction, including an interim injunction, is not available. In my view the history of prerogative proceedings against officers of the Crown supports such a conclusion. So far as interim relief is concerned, which is the practical

change which has been made, there is no justification for adopting a different approach to officers of the Crown from that adopted in relation to other respondents in the absence of clear language such as that contained in section 21(2) of the 1947 Act. The fact that in any event a stay could be granted against the Crown under Ord.53, r. 3(10), emphasises the limits of the change in the situation which is involved. It would be most regrettable if an approach which is inconsistent with that which exists in Community Law should be allowed to persist if this is not strictly necessary. The restriction provided for in section 21(2) of 1947 does, however, remain in relation to civil proceedings.

The fact that, in my view, the court should be regarded as having jurisdiction to grant interim and final injunctions against Officers of the Crown does not mean that that jurisdiction should be exercised except in the most limited circumstances. In the majority of situations so far as final relief is concerned, a declaration will continue to be the appropriate remedy on an application for judicial review involving officers of the Crown. As has been the position in the past, the Crown can be relied upon to co-operate fully with such declarations. To avoid having to grant interim injunctions against officers of the Crown, I can see advantages in the courts being able to grant interim declarations. However, it is obviously not desirable to deal with this topic, if it is not necessary to do so, until the views of the Law Commission are known .

The Validity Of The Injunction Granted By Garland J.

What has been said so far does not mean that Garland J. was necessarily in order in granting the injunction. The injunction was granted before he had given the applicant leave to apply for judicial review. However, in a case of real urgency, which this was, the fact that leave had not been granted is a mere technicality. It would be undesirable if. in the situation with which Garland J. was faced, he had been compelled to grant leave because he regarded the case as an appropriate one for an interim injunction. In the case of civil proceedings, there is recognition of the jurisdiction of the court to grant interim injunctions before the issue of a writ, etc. (see Ord. 29, r. 1(3)) and in an appropriate case there should be taken to be a similar jurisdiction to grant interim injunctions now under Order 53. The position is accurately set out in Note 53/1-14/24 of the White Book where it is stated that:

> "Where the case is so urgent as to justify it, [the judge] could grant an interlocutory injunction or other interim relief pending the hearing of the application for leave to move for judicial review. But, if the judge has refused leave to move for judicial review he is functus officio and has no jurisdiction to grant any form of interim relief. The application for an interlocutory injunction or other interim relief could, however,

be renewed before the Court of Appeal along with the renewal of the application for leave to move for judicial review."

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There having been jurisdiction for Garland J. to make the order which he did. it cannot be suggested that it was inappropriate for him to have made the order. On the view of the law which I now take. Garland J. was therefore not required to set aside the order though his decision to do so was inevitable having regard to the state of the authorities at that time.

The Effect of the Advice Received By Mr. Baker

Having come to the conclusion that Garland J.'s order was properly made, the next question which has to be considered is the effect of the advice which was understandably given to Mr. Baker that the order was made without jurisdiction. Here there are two important considerations. The first is that the order was made by the High Court and therefore has to be treated as a perfectly valid order and one which has to be obeyed until it is set aside. (See the speeches of Lord Diplock in *In re A Company* [1981] AC 374 at p.384 and *Isaacs v. Robertson* [1985] AC 97 at p. 102.) The second consideration is that it is undesirable to talk in the terms of technical contempt. The courts only make a finding of contempt if there is conduct by the person or body concerned which can, with justification, be categorised as contempt. If. therefore, there is a situation in which the view is properly taken (and usually this will only be possible when the action is taken in accordance with legal advice) that it is reasonable to defer complying with an order of the court until application is made to the Court for further guidance then it will not be contempt to defer complying with the order until an application has been made to the court to discharge the order. However, this course can only be justified if the application is made at the first practicable opportunity and in the meantime all appropriate steps have been taken to ensure that the person in whose favour the order was made will not be disadvantaged pending the hearing of the application.

Mr. Baker's difficulties in this case are that, while it was understandable that there should be delay before he could give the matter personal attention, Garland J. was not kept informed of what was happening and totally inadequate steps were taken to protect the position of M. pending the application to the court. In addition Mr. Baker has the problem that this House will not normally interfere with the assessment of the facts which was made by the Court of Appeal unless it can be shown that the assessment is flawed by some error of law.

Jurisdiction To Make A Finding Of Contempt

The Court of Appeal were of the opinion that a finding of contempt could not be made against the Crown, a government department or a Minister

of the Crown in his official capacity. Although it is to be expected that it will be rare indeed that the circumstances will exist in which such a finding would be justified, I do not believe there is any impediment to a court making such a finding, when it is appropriate to do so, not against the Crown directly, but

against a government department or a Minister of the Crown in his official capacity. The Master of the Rolls considered that a problem was created in making a finding of contempt because the Crown lacked a legal personality. However, at least for some purposes, the Crown has a legal personality. It can be appropriately described as a corporation sole or a corporation aggregate, (per Lord Diplock and Lord Simon respectively in *Town Investments Ltd. v. The Department of the Environment* [1978] AC 359). The Crown can hold property and enter into contracts. On the other hand, even after the Crown Proceedings Act 1947, it can not conduct litigation except in the name of an authorised government department or, in the case of judicial review, in the name of a Minister. In any event it is not in relation to the Crown that I differ from the Master of the Rolls, but as to a government department or a Minister.

Nolan L.J. considered that the fact that proceedings for contempt are "essentially personal and punitive" meant that it was not open to a court, as a matter of law, to make a finding of contempt against the Home Office or the Home Secretary. While contempt proceedings usually have these characteristics and contempt proceedings against a government department or a Minister in an official capacity would not be either personal or punitive (it would clearly not be appropriate to fine or sequest the assets of the Crown or a government department or an officer of the Crown acting in his official capacity), this does not mean that a finding of contempt against a government department or Minister would be pointless. The very fact of making such a finding would vindicate the requirements of justice. In addition an order for costs could be made to underline the significance of a contempt. A purpose of the courts' powers to make findings of contempt is to ensure the orders of the court are obeyed. This jurisdiction is required to be coextensive with courts' jurisdiction to make the orders which need the protection which the jurisdiction to make findings of contempt provides. In civil proceedings the court can now make orders (other than injunctions or for specific performance) against authorised government departments or the Attorney-General. On applications for judicial review orders can be made against Ministers. In consequence of the developments identified already such orders must be taken not to offend the theory that the Crown can supposedly do no wrong. Equally, if such orders are made and not obeyed, the body against whom the orders were made can be found guilty of contempt without offending that theory, which would be the only justifiable impediment against making a finding of contempt.

In cases not involving a government department or a Minister the ability to punish for contempt may be necessary. However, as is reflected in the restrictions on execution against the Crown, the Crown's relationship with the courts does not depend on coercion and in the exceptional situation when a government department's conduct justifies this, a finding of contempt should suffice. In that exceptional situation, the ability of the court to make a finding of contempt is of great importance. It would demonstrate that a government department has interfered with the administration of justice. It will then be

for Parliament to determine what should be the consequences of that finding. In accord with tradition the finding should not be made against the "Crown" by name but in the name of the authorised department (or the Attorney-General) or the Minister so as to accord with body against whom the order was made. If the order was made in civil proceedings against an authorised department, the department will be held to be in contempt. On judicial review the order will be against the Minister and so normally should be any finding of contempt in respect of the order.

However, the finding under appeal is one made against Mr. Baker personally in respect of an injunction addressed to him in his official capacity as the Secretary of State for the Home Department. It was appropriate to direct the injunction to the Secretary of State in his official capacity since, as previously indicated, remedies on an application for judicial review which involve the Crown are made against the appropriate officer in his official capacity. This does not mean that it cannot be appropriate to make a finding of contempt against a Minister personally rather than against him in his official capacity provided that the contempt relates to his own default. Normally it will be more appropriate to make the order against the office which a Minister holds where the order which has been breached has been made against that office since members of the department concerned will almost certainly be involved and investigation as to the part played by individuals is likely to be at least extremely difficult, if not impossible, unless privilege is waived (as commendably happened in this case). In addition the object of the exercise is not so much to punish an individual as to vindicate the rule of law by a finding of contempt. This can be achieved equally by a declaratory finding of the court as to the contempt against the Minister as representing the department. By making the finding against the Minister in his official capacity the Court will be indicating that it is the department for which the Minister is responsible which has been guilty of contempt. The Minister himself may or may not have been personally guilty of contempt. The position so far as he is personally concerned would be the equivalent of that which needs to exist for the Court to give relief against the Minister in proceedings for judicial review. There would need to be default by the department for which the Minister is responsible.

In addition Mr. Richards argued that for a finding of contempt against Mr. Baker personally it would not suffice to establish contempt to show that Mr. Baker was aware of the order and had not complied with it. It would also be necessary to show an intention to interfere with or impede the administration of justice. If such an intent was shown to exist, then Mr. Richards conceded that the conduct of the Minister would fall outside his authority as a Minister: it would be a personal act not the act of the Crown; and it would expose him to a personal liability for contempt. In support of the distinction which he relied upon, Mr. Richards referred to the speech of Lord Oliver of Aylmerton in *Attorney-General v. Times Newspapers Ltd.* [1992] 1 A.C. 191 at p. 217-218, where Lord Oliver stated:

> "A distinction (which has been variously described as 'unhelpful' or 'largely meaningless') is sometimes drawn between what is described as 'civil contempt', that is to say, contempt by a party to proceedings in a matter of procedure, and 'criminal contempt'. One particular form of contempt by a party to proceedings is that constituted by an intentional act which is in breach of the order of a competent court. Where this occurs as a result of the act of a party who is bound by the order or of others acting at his direction or on his instigation, it constitutes a civil contempt by him which is punishable by the court at the instance of the party for whose benefit the order was made and which can be waived by him. The intention with which the act was done will, of course, be of the highest relevance in the determination of the penalty (if any) to be imposed by the court, but the liability here is a strict one in the sense that all that requires to be proved is service of the order and the subsequent doing by the party bound of that which is prohibited. When, however, the prohibited act is done not by the party bound himself but by a third party, a stranger to the litigation, that person may also be liable for contempt. There is, however, this essential distinction that his liability is for criminal contempt and arises not because the contemnor is himself affected by the prohibition contained in the order but because his act constitutes a wilful interference with the administration of justice by the court in the proceedings in which the order was made. Here the liability is not strict in the sense referred to, for there has to be shown not only knowledge of the order but an intention to interfere with or impede the administration of justice - an intention which can of course be inferred from the circumstances."

I happily adopt the approach of Lord Oliver. It reflects the distinction which I have drawn between the finding of contempt and the punishment of the contempt. I also accept the distinction which Lord Oliver draws between the position of a person who is subject to an order and a third party. I also recognise the force of Mr. Richards' submission that if Mr. Baker was not

under a strict liability to comply with the order it would not be possible to establish that he had the necessary intention to interfere with or impede the administration of justice to make him guilty of contempt as a third party. However, although the injunction was granted by Garland J. against Mr. Baker in his official capacity this does not mean that he is in the same position as a third party. To draw a distinction between his two personalities would be unduly technical. While he was Home Secretary the order was one binding upon him personally and one for the compliance with which he as the head of the department was personally responsible. He was, therefore, under a strict liability to comply with the order. However, on the facts of this case I have little doubt that if the Court of Appeal had appreciated that they could make a finding against Mr. Baker in his official capacity this is what the Court would have done. The conduct complained of in this case which justified the bringing of contempt proceedings was not that of Mr. Baker alone and he was

acting on advice. His error was understandable and I accept that there is an element of unfairness in the finding against him personally.

In addition, there are technical differences between the two findings because of the provisions of Ord. 77. r. 1(2) of the R.S.C. which define an "order against the Crown" in a broad sense to include an order against the government department or against an officer of the Crown as such. Unlike the definition of "civil proceedings by the Crown", this definition expressly applies to proceedings "on the Crown side of the Queen's Bench Division". This means that the provisions of Orders 45 to 52 (which deal with execution and satisfaction of orders of the court) would not apply to an order against the Home Secretary while they would do so in the case of an order against Mr. Baker personally.

It is for these reasons that I would dismiss this appeal and cross appeal save for substituting the Secretary of State for Home Affairs as being the person against whom the finding of contempt was made. This was the alternative decision which was the subject of the cross-appeal, except that there the order was sought against the Home Office rather than the Home Secretary.

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