Draft judgment to be handed down on WED 4 May at 1000 [illegible] and [illegible] substance [illegible] one hour [illegible] than [illegible]

DRAFT JUDGMENT

Const: NEILL L.J.
EVANS L.J.
PETER GIBSON L.J.

R.P. and T.G.

-v-

The Secretary of State for the Home Dept.

and Criminal Injuries Compensation Board

NEILL L.J.

I shall call the appellants in these appeals P and G respectively. P was born in 1962. G was born in 1964. Both women were victims of sexual abuse when they were children. P claims that she suffered injury as the victim of offences involving sexual abuse committed against her by her step-father between 1967 and 1976. G claims that she suffered injury as the victim of offences involving sexual abuse committed against her by her step-father between 1971 and 1982. P made a claim for compensation to the Criminal Injuries Compensation Board (the Board) on 2 July 1990. This claim was rejected on the ground inter alia that the incidents complained of occurred prior to 1 October 1979. G submitted a claim to the Board in April 1990. The Board made her an award of £5000 in respect of the abuse which

had occurred after 1 October 1979 but rejected her claim for compensation in respect of any incidents occurring before that date. In both cases it was said that the claim in respect of incidents before 1 October 1979 had to be refused by reason of the provisions of paragraph 7 of the Criminal Injuries Compensation Scheme 1969 (the 1969 Scheme).

Both appellants seek judicial review of the determinations made by the Director of the Board rejecting their applications for compensation in respect of incidents which occurred before 1 October 1979. The appeals are brought following the dismissal by the Divisional Court of the Queen's Bench Division of their applications for judicial review by orders dated 28 April 1993.

The Criminal Injuries Compensation Scheme.

It is necessary to start by giving some account of the history of the Criminal Injuries Compensation Scheme (the Scheme) and the changes which have been made in the Scheme

in the last 30 years.

The Scheme was introduced in 1964 to provide for the payment of compensation from public funds to the victims of violent crime and to those injured in attempting to prevent crime and apprehend criminals. The original scheme was based on proposals contained in the 1964 White Paper "Compensation for Victims of Crimes of Violence" (Cmnd 2323). The Scheme was amended in 1969 and, following a review by an Interdepartmental Working Party which reported in 1978, a revised Scheme came into operation on 1 October 1979. In 1990 there was a further revision of the Scheme. The 1990 Scheme applied, subject to certain exceptions set out in paragraph 28 of the 1990 Scheme, to all applications for compensation received by the board on or after 1 February 1990. It will be seen therefore that the 1990 Scheme applies to the applications made by each of the appellants.

Since the outset of the Scheme it has been

administered by a body known as the Criminal Injuries Compensation Board. The Board is composed in the main of practising lawyers. The Board is provided with money through a Grant-in-Aid out of which payments for compensation are awarded in accordance with the principles set out in the Scheme. Hitherto compensation had been assessed on the basis of common law damages and has normally taken the form of a lump sum payment.

The scope of the 1964 Scheme was set out in paragraph 5 of that Scheme. As, however, the general scope of the Schemes has remained broadly constant it is unnecessary to refer further to this paragraph. It is sufficient to set out the scope of the 1990 Scheme.

The scope of the 1990 Scheme is set out in paragraph 4 in the following terms:

> "The Board will entertain applications for ex gratia payments of compensation in any case where the applicant [or in specified cases, the deceased] sustained in Great Britain [or in other places specified] personal injury directly attributable -
>
> (a) to a crime of violence (including arson or poisoning); or

(b) to the apprehension or attempted apprehension of an offender or a suspected offender or to the prevention or attempted prevention of an offence or to the giving of help to any constable who is engaged in any such activity; or

(c) to an offence of trespass on a railway.

Applications for compensation will be entertained only if made within three years of the incident giving rise to the injury, except that the Board may in exceptional cases waive this requirement. A decision by the Chairman not to waive the time limit will be final. ...."

It is to be noted that under each version of the Scheme applications for compensation were expressed to be for "ex gratia" payments.

In the 1964 Scheme two classes of offences were excluded. It is sufficient to set out the terms of paragraphs 7 and 8 of the 1964 Scheme:

"7.Offences committed against a member of the offender's family living with him at the time will be excluded altogether.

8. Motoring offences will also be excluded from the scheme, except where the motor vehicle has been used as a weapon - i.e. in a deliberate attempt to run the victim down."

The exclusion of compensation for injuries attributable to traffic offences has continued to be a feature of all four versions of the Scheme. The present

exclusion in respect of injuries attributable to traffic offences is contained in paragaraph 11 of the 1990 Scheme. The exclusion in respect of offences committed against persons in the same household as the offender, however, has been very substantially modified with the passage of time. It is with this aspect of the Scheme that the present appeals are concerned.

Paragraph 7 of the 1969 Scheme, which came into operation on 21 May 1969 and took the place of paragraph 7 of the 1964 Scheme, contained the following exclusion:

> "Where the victim who suffered injuries and the offender who inflicted them were living together at the time as members of the same family no compensation will be payable. For the purposes of this paragraph where a man and a woman were living together as man and wife they will be treated as if they were married to one another."

In 1973 an Interdepartmental Working Party was appointed to review the working of the Scheme since 1964. The Working Party made its report in 1978. One of the matters which was considered by the Working Party was whether paragraph 7 of the 1969 Sceme should be retained.

In chapter 7 of their report the Working Party set out both the case for change and the difficulties to which cases of family violence gave rise. It was noted that in a family case there were problems of establishing the facts and of assessing the precise part that each party played in the circumstances leading up to the infliction of the injury. It was also noted that there was an additional problem caused by the possibility that the assailant might benefit from any money which was paid to the victim. The danger of such a benefit was particularly acute if awards were paid to children criminally injured within the family. Notwithstanding these possible difficulties, however, the Working Party recommended that the specific exclusion of applicants who were injured by members of the same family should not be retained. In paragraph 7.23 of the report the Working Party added this qualification:

> "... We are sure that some move should be made to extend the Scheme to cover at least the very seriously injured victims of such violence (in particular those who have been maimed or suffered serious injury of a permanent nature) but in view of

the lack of information about the size of the problem, or the extent of the financial staff resources which would be necessary to deal with it, we recommend that any extension of the Scheme in this direction should, in the first place, be for a limited period and experimental."

As I have already noted, there was a further revision of the Scheme in 1979. The 1979 Scheme, which came into operation on 1 October 1979, removed the complete exclusion of claims in respect of family violence where the injuries were incurred on or after 1 October 1979. I should refer to paragraphs 8 and 25 of the 1979 Scheme. Paragraph 8 provided:

"Where the victim and any person responsible for the injuries which are the subject of the application (whether that person actually inflicted them or not) were living in the same household at the time of the injuries as members of the same family, compensation will be paid only where -

(a) the person responsible has been prosecuted in connection with the offence, except where the Board consider that there are practical, technical or other good reasons why a prosecution has not been brought;

(b) the injury was one for which compensation - as assessed under paragraph 5 above - of not less than £500 would be awarded;

(c) in the case of violence between adults in the family, the Board are satisfied that the person responsible and the applicant stopped living in the same household before the application was made and seem unlikely to live together again; and

(d) in the case of an application under this paragraph by or on behalf of a minor, i.e. a person under 18 years of age, the Board are satisfied that it would not be against the minor's interests to make a full or reduced award.

For the purposes of this paragraph, a man and a woman living together as husband and wife shall be treated as members of the same family.

Paragraph 25 provided for the implementation of the 1979 Scheme. It was in these terms:

"The provisions of this Scheme will take effect from 1 October 1979. Applications in respect of injuries incurred on or after 1 October 1979 will be dealt with under this Scheme. Applications in respect of injuries before that date will be dealt with under the terms of the Scheme which came into operation on 21 May 1969, except that after 31 December 1979 applications relating to injuries incurred more than three years previously will be entertained only where the Board consider it appropriate exceptionally to waive this time limit. ..."

The latest relevant revision of the Scheme took place in 1990. The 1990 Scheme applied to all applications for compensation received by the Board on or after 1 February 1990.

Paragraph 8 of the 1990 Scheme was in these terms:

"Where the victim and any person responsible for the injuries which are the subject of the application (whether that person actually inflicted them or not) were living in the same household at the time of the injuries as members of the same family, compensation will be paid only where -

(a) the person responsible has been prosecuted in connection with the offence, except where the Board consider that there are practical, technical or other good reasons why a prosecution has not been brought; and

(b) in the case of violence between adults in the family, the Board are satisfied that the person responsible and the applicant stopped living in the same household before the application was made and seem unlikely to live together again; and

(c) in the case of an application under this paragraph by or on behalf of a minor, i.e. a person under eighteen years of age, the Board are satisfied that it would not be against the minor's interest to make a full or reduced award."

For the purposes of this paragraph, a man and a woman living together as husband and wife shall be treated as members of the same family.

Finally I should refer to paragraph 28 of the 1990 Scheme. So far as is material that paragraph provided:

"The provisions of this Scheme will take effect from 1 February 1990. All applications for compensation received by the Board on or after 1 February 1990 will be dealt with under the terms of this Scheme except that in relation to applications in respect of injuries incurred before that date the following provisions of the 1990 Scheme shall not apply -

.....

(b) paragraph 8, but only in respect of injuries incurred before 1 October 1979 where paragraph 7 of the 1969 Scheme will continue to apply."

It will be seen therefore that until the 1979 Scheme came into operation compensation was not payable in respect

of offences committed against persons in the same household. In 1979 the Scheme was revised and, subject to the conditions set out in the 1979 and 1990 Schemes, compensation became payable for such offences but only in respect of offences committed after 1 October 1979. It is this exception which lies at the centre of the present appeals.

Before I turn to consider the present appeals in detail, however, I should refer to one further aspect of the matter.

It will be seen that none of the four Schemes is a statutory scheme. As Lord Parker noted in R. v The Criminal Injuries Compensation Board, ex parte LAIN [1967] 2 QB 864 at 881 the 1964 Scheme was set up by the executive government under the prerogative. For many years, however, there have been discussions as to whether the Scheme should be put on a statutory basis, and one of the recommendations of the Royal Commission on Civil Liability and Compensation

for Personal Injury (The Pearson Commission) was that the Scheme should be made statutory. Furthermore, when announcing the terms of the 1979 revised Scheme, the Government declared its acceptance of the recommendation by the Pearson Commission, but announced that it did not intend to introduce the relevant legislation until there had been sufficient experience of the revised Scheme to enable any problems to be identified and solved.

On 14 December 1983 Lord Allen of Abbeydale initiated a short debate in the House of Lords calling attention to the need to put the Scheme on a statutory basis. In the course of that debate the Government confirmed its intention to introduce legislation. As a result a provision was made in Part VII of the Criminal Justice Act 1988 for the Scheme to be placed on a statutory footing. This part of the 1988 Act was not implemented immediately, however, because, it seems, the Board wished to have time to dispose of their current workload. It now seems clear

that the Government wishes to introduce a new non-statutory Scheme to provide compensation on a different basis than before and that as a result the provisions in the 1988 Act will in due course be repealed. A new Scheme has been published and was due to come into operation on 1 April 1994.

The Proceedings for Judicial Review.

The application by P for judicial review related in the first place to the determination set out in a letter of 31 October 1990 from the Director of the Board that her application for compensation would not be entertained because (in addition to another reason which is no longer relevant) the events occurred before 1 October 1979. By amendment the application also related to the further decision of the Chairman of the Board taken between 23 October 1991 and 17 December 1991 to affirm the earlier determination. The application by G was for judicical review of the determination set out in a letter of 9

January 1991 from the Director of the Board that part of her application for compensation which related to incidents that occurred before [1 October 1979] would not be entertained. Both P and G sought orders quashing the relevant decisions and requiring their cases to be remitted to the board for reconsideration.

The applications were heard by a Divisional Court of the Queen's Bench Division consisting of Leggatt L.J. and McCullough J. on 22 April 1993. By orders dated 28 April 1993 the applications were dismissed.

In his judgment in the case of P given on 28 April 1993 Leggatt L.J. recorded the argument put forward on behalf of P in these terms (4C):

> "[Counsel] remarks that neither the Secretary of State nor the Board has adduced any evidence to justify what he called the 'same roof' rule or its application in the circumstances of the present case. His contention is a simple one: since it was adjudged unreasonable in 1979 to retain the rule for the future, there can have been no justification for retaining it in relation to the previous period of operation of the Scheme.
>
> .....
>
> For [victims of family violence], the Secretary of State has maintained in force an absolute and

> inflexible exclusionary rule which, according to [counsel's] submission, is arbitrary, irrational and unfair, and unlawfully prevents the Board from making an award in the circumstances of the applicant's case. .... [the rule] discriminates arbitrarily and unfairly between different classes of citizens, bearing in mind that girls are more commonly than boys the victims of sexual abuse; and it lacks any rational nexus or proportionality between the Secretary of State's legitimate aims and the means employed to achieve those aims. The solution is simple: to waive the 'same roof' rule in relation to violence sustained before October 1979."

The Divisional Court rejected these arguments. At page 8G of the transcript Leggatt L.J. said:

> "In my judgment the Scheme was not irrational at its inception and it has not been rendered so, in whole or in part, by subsequent amendments. The making of a claim is not a right but a privilege. It follows that the only legitimate expectation that a claimant can have is of recovering an award in accordance with the Scheme in force for the time being. In short, ... the fact that some claimants are or continue to be excluded from the Scheme by force of amendments made to it neither demonstrates that it is perverse nor renders it so. Like any essay in bounty it is tempered with expedience."

The Case for the Appellants on the Appeal.

The argument on behalf of the appellants was developed on the following lines:

(1) That the Secretary of State in prescribing and maintaining in force the terms of the several Schemes acts either in the exercise of the powers vested in him under

the prerogative or as part of his executive powers.

(2) That the Secretary of State is under a duty to exercise these powers rationally, fairly and according to law.

(3) That the exercise of these powers by the Secretary of State is subject to the supervisory jurisdiction of the courts by way of judicial review.

(4) That though in 1964 there was no obligation on the Secretary of State to introduce the Scheme, once the Scheme had been introduced persons in the position of the appellants had a legitimate expectation that the Scheme would be administered rationally, fairly and according to the law. Our attention was drawn to the fact that the United Kingdom is a signatory of the European Convention on the Compensation of Victims of Violent Crimes which was signed in Strasbourg in November 1983.

(5) That since 1979, if not before, it has been recognised that it is unjust to exclude from the Scheme those who are the victims of family violence. It was to be noted that

there was no such exclusion in the Strasbourg Convention.

(6) That notwithstanding the fact that the exclusion of victims of family violence was now recognised as being unjust, the Secretary of State has maintained in force what has been called the "same roof" rule which has the effect of excluding persons in the position of the appellants from obtaining proper compensation. It was said that this inflexible exclusionary rule is arbitrary, irrational and unfair, and operates with particular harshness against children and women because they are the most common victims of domestic abuse of a criminal nature. In this context Lord Lester said that he wished to reserve his position with regard to challenging the majority decision of the House of Lords in R. v. Entry Clearance Officer, ex parte Amin [1983] 2 AC 818, where it was held that the Sex Discrimination Act 1975 applied only to acts done on behalf of the Crown which are of a kind similar to acts that might be done by a private person: see Lord Fraser at 835E.

(7) That in addition the rule lacks any rational and proportionate nexus between the Secretary of State's legitimate aims and the means employed by him to achieve those aims.

(8) That the Secretary of State had not produced any evidence to explain or justify the continuation of the exclusionary rule in the case of incidents before 1 October 1979. Nor was any evidence given as to why the safeguards against the possibility of collusion or abuse were not adequate and sufficient.

(9) That in the circumstances the decisions to reject the appellants' claims for compensation in respect of the period before 1 October 1979 on the basis of the application of paragaraph 7 of the 1969 Scheme were unlawful and irrational and should be quashed.

The Case for the Secretary of State on the Appeal.

It was accepted on behalf of the Secretary of State that decisions of the Board in the course of the

administration of the Scheme were subject to judicial review: see Lain's case (supra). It was submitted, however, that the original determination of the scope and the terms of the Scheme and the subsequent revisions of the terms of the Scheme were exercises by the executive Government of its discretion as to the way into which moneys voted by Parliament were to be distributed. It was therefore argued that the scope and the terms of the Scheme were not subject to judicial review. Our attention was drawn to the annual report and accounts of the Board which are open to debate in Parliament. Moreover, as payments out of public funds to victims of crime require the authorisation of Parliament and Parliament has only authorised payment out of public funds within the scope of the Scheme from time to time in force, the terms of the Scheme cannot be reviewed by the court. For this purpose it is irrelevant whether the Scheme was set up by executive action or whether it came into existence and has been

maintained by an exercise of the Royal Prerogative in its strict sense.

Counsel for the Secretary of State advanced three additional reasons why the court had no jurisdiction to intervene:

(a) The payments were made ex gratia and accordingly those who benefitted from the Scheme had no rights or legitimate expectations on which they could rely. In this context counsel drew our attention to a passage in the speech of Lord Diplock in CCSU v. Minister for Civil Service [1985] AC 374 at 408F:

> "To qualify as a subject for judicial review the decision must have consequences which affect some person [or body of persons] other than the decision-maker although it may affect him too. It must affect such other person either:
>
> (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
>
> (b) by depriving him of some benefit or some advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity

of advancing reasons for contending that they should not be withdrawn."

(b) It was for the Secretary of State not the court to decide what was a fair Scheme. Counsel reminded us of the dictum of Lord Roskill in the CCSU case at 414H "It is not for the courts to determine whether a particular policy or particular decisions taken in fulfillment of that policy are fair."

(c) Where, as here, the basis on which compensation is to be paid involves competing policy considerations and the allocation of limited resources, the court does not have sufficient information available to it or the necessary facilities to make a judgment.

In addition it was argued that, even if the appellants were able to satisfy the threshold test and could show that the court had jurisdiction, there was no basis for arguing that the retention of the old rule in relation to incidents before 1 October 1979 was irrational or open to question. None of the recommendations that had been made had

suggested that a change in the Scheme to include cases of family violence should be made retrospective. Furthermore, it had been recognised in the 1978 Report that any change should be on an experimental basis only because of the special difficulties to which family cases gave rise.

The Court's Approach.

I have come to the conclusion that I should approach these arguments in stages by seeking to answer the following questions:

(1) Does the court have jurisdiction to examine the legality of the scheme?

(2) Can the court decide the issue raised in the proceedings, namely whether the Secretary of State acted lawfully in excluding claims in respect of incidents which took place before October 1979? Is this a justiciable issue?

(3) Have the appellants any right or legitimate expectation to receive compensation in respect of any offence committed

before October 1979?

(4) Was the decision of the Secretary of State to exclude claims in respect of offences committed before October 1979 irrational?

Jurisdiction.

At one time it could have been asserted with confidence that there were certain activities carried on by the executive Government which could not be questioned in the courts. Such activities were outside the "jurisdiction" of the courts. It seems to me, however, that at the present day it is necessary to look at this matter again.

I take as my starting point the speech of Lord Templeman in M. v. Home Office [1993] 3 WLR 433, where he said at 437:

> "Parliament makes the law, the executive carry the law into effect and the judiciary enforce the law. ... 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."

It follows therefore that if a question arises as to the legality of any action taken by the executive the court as a general rule has jurisdiction to entertain the question, unless the court's powers in this regard have been removed or restricted by Parliament. Indeed recent cases such as R. v. Employment Secretary, ex p. EOC [1994] 2 WLR 409 and the Factortame litigation show that the courts may have a part to play even where the object of the challenge is Parliamentary legislation.

I would therefore reject any argument that the court has no jurisdiction to consider the legality of the Scheme nor, as I see it, is the court's jurisdiction affected or diminished by the fact that the funds used for the administration of the Scheme are voted by Parliament by means of the annual Appropriation Act. The court's jurisdiction over the Scheme has not been removed or restricted by Parliament and it is therefore the court

which under our consititution is empowered to determine questions of legality. But the fact that the court is able to entertain the question of legality does not necessarily mean that it can decide the issue raised in the particular proceedings or provide any effective remedy.

Justiciability.

In order to ascertain what role, if any, the court can play it may often be necessary to take account of a number of factors including the following:

(a) The source of the power exercised by the executive.

(b) The subject matter and the nature of the decision or action taken by the executive.

(c) The basis of the challenge.

(d) The interest of the person seeking the court's assistance.

(e) The remedy sought.

Many of the decisions made by the executive will be in pursuance of a power conferred by statute. In such cases

the court will be able to examine the impugned decision in the light of its interpretation of the enabling power. The challenge may be on one or more of the grounds formulated by Lord Diplock in the CCSU case - illegality, procedural unfairness or irrationality and, though these grounds may not be exhaustive, (cf Notts. CC v. Secretary of State for Environment [1986] AC 240, 249E per Lord Scarman), they provide useful headings by reference to which any proceedings for judicial review can be considered. The court will then be in a position to consider such questions as: Was the action taken intra vires? Was a fair procedure followed before the action was taken?

In the present case, however, the decisions as to the scope and terms of the various schemes were taken under prerogative or analogous powers. There is therefore no clear framework, as there is where a power is conferred by statute, by which the legality of the provisions in the Scheme can be judged. Nevertheless it is clear that the

court may have some role to play even where the executive power springs from the prerogative or some analogous source. As Lord Diplock explained in the CCSU case at 411B:

> "... that a decision of which the ultimate source of power to make it is not a statute but the common law (whether or not the common law is for this purpose given the label of 'the prerogative') may be the subject of judicial review on the ground of illegality is, I think, established by the cases cited by my noble and learned friend, Lord Roskill, and this extends to cases where the field of law to which the decision relates is national security, as the decision of this house itself in Burmah Oil Co. Ltd. v. Lord Advocate [1964] SC 117 shows."

One turns therefore to consider the issue which is raised in the present case. It is not said that the decisions infringed any statute or any provisions of European law or that any unfair procedure was adopted. The ground of complaint is that the decision to maintain the old exclusion rule in force in respect of offences committed before 1 October 1979 is arbitrary and irrational. It is therefore necessary to take note of the warning given by Lord Diplock in relation to a complaint of

irrationality where the decision is one taken in the exercise of prerogative powers. He said at 411D:

> "While I see no a priori reason to rule out 'irrationality' as a ground for judicial review of a ministerial decision taken in the exercise of 'prerogative' powers, I find it difficult to envisage in any of the various fields in which the prerogative remains the only source of the relevant decision-making power a decision of a kind that would be open to attack through the judicial process upon this ground. Such decisions will generaly involve the application of government policy. The reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another - a balancing exercise which judges by their upbringing and their experience are ill-qualified to perform."

With these words in mind one looks at the decisions in issue in this case. In my judgment they fall within the class of decision which Lord Diplock had in mind. These decisions involve a balance of competing claims on the public purse and the allocation of economic resources which the court is ill equipped to deal with. In the language of the late Professor Fuller in his work "The Forms and Limits of Adjudication" decisions of this kind involve a

polycentric task. The concept of a polycentric situation is perhaps most easily explained by thinking of a spider's web. "A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but rather create a different complicated pattern of tensions. This would certainly occur, for example, if the double pull caused one or more of the weaker strands to snap." : (92 Harvard Law Review 395).

The Secretary of State had to make a judgement as to how to allocate the resources at his disposal. It will be remembered that in respect of claims after 1979 a time limit of three years was imposed between the relevant offence and the date of a claim. I cannot see that a different time limit, say two years, could have been attacked. Such a decision would not have been "justiciable". Similarly, I cannot see that the decision

to continue the pre-1979 exclusion can be regarded as a "justiciable" issue on the facts of the present case. As Lord Wilberforce said in Buttes Gas v. Hammer [1982] AC 888 at 938B, in a case involving relations with a foreign state, the court has "no judicial or manageable standards by which to judge" the issue. In attempting to review the Secretary of State's decision in this regard the court would be "in a judicial no-mans land".

Legitimate Expectation.

It will be remembered that counsel for the Secretary of State underlined the fact that payments under the scheme were made ex gratia and that accordingly those who benefited from it had no rights or legitimate expectations on which they could rely. Their only right was to have their claims considered fairly in accordance with the scheme presently in force.

This is a formidable argument, but in view of my decision on the issue of justiciability I do not think it

is necessary to reach a final conclusion on this point.

Irrationality.

In the light of the decision which I have reached on justiciability it is not necessary to deal separately with the facts or to investigate the question of irrationality in detail. I am quite satisfied, however, that if the court were to embark on considering whether the Secretary of State's decision was irrational in fact the appellants' cases would fail on this ground also. I can see no material on which the court could decide that no Secretary of State acting rationally could have maintained in force the pre-1979 rule in respect of claims for offences committed before 1 October 1979. As I pointed out earlier the changes which were recommended were expected to be on an experimental basis only.

This extra-statutory scheme raises a number of serious questions. As far as the present appeals are concerned, however, I for my part have no doubt that the Divisional

Court reached the correct conclusion. I would dismiss the appeals.

Evans L.J.

I agree that these appeals should be dismissed and with the judgment of Lord Justice Neill as regards the Court's jurisdiction to hear these applications. I also agree with his conclusion that the appellants fail to prove their charge of irrationality against the Home Secretary's decision, or his continuing decision, to exclude claims for injuries caused by family violence before 1 October 1979 from the revised Scheme which came into operation on that date.

As regards the latter, I am particularly influenced by the fact that it was a feature of the original 1964 Scheme, as it is of the revised Schemes which have been introduced since that date, that it was limited to claims made in respect of injuries caused after the relevant date, not merely to claims mnade after that date: see for example paragraph 5(b) of the 1964 Scheme. It is impossible in my judgment to say that this is or was an irrational feature either of the original or the revised Schemes.

I gratefully adopt Lord Justice Neill's analysis of the issues of jurisdiction and justiciability, and it is

only with regard to the latter that I have difficulty in agreeing with his conclusion that the issues raised by these applications are "non-justiciable", or "not amenable to judicial process" (per Lord Roskill in CCSU [1985] A.C. at 418). In short, I do not regard the facts that the Scheme may be described as the distribution of "bounty" on behalf of the Crown and that moneys are granted to the Home Office by Parliament for this purpose, either as justifying an unfair or irrational scheme, if such was the case, or as precluding the Courts from exercising their constitutional powers of judicial review in an appropriate case.

A statutory Scheme was enacted in 1988, but it was not to take effect until a date to be specified by the Home Secretary, and the Government has now indicated that the relevant legislation will be repealed. Putting this unusual development on one side, there has never been express parliamentary approval of either the original 1964 Scheme or its successors, and there is no question of the Scheme having statutory force. On the other hand, by passing the Appropriation Act each year, Parliament has authorised the use of public funds for this purpose by the Home Office.

If it is permissible to infer a Parliamentary intention from the annual grant of Funds, then in my judgment the inference must be that the money was intended

to be distributed in a fair and rational manner, rather than otherwise, and that the Courts were expected to exercise their powers so far as is lawful to ensure that this is done.

The question of principle was dealt with by Lord Diplock in CCSU in the following terms :-

> "While I see no a priori reason to rule out "irrationality" as a ground for judicial review of a ministerial decision taken in the exercise of "prerogative powers, I find it difficult to envisage in any of the various fields in which the prerogative remains the only source of the relevant decision-making power a decision of a kind that would be open to attack through the judicial process upon this ground. Such decisions will generally involve the application of government policy. The reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy decisions which, if the executive discretion is to be wisely exercised, need to be weighed against one another--a balancing exercise which judges by their upbringing and experience are ill-qualified to perform. So I leave this as an open question to be dealt with on a case to case basis if, indeed, the case should ever arise."

More recent authority confirms this view. In R. v. S. of S. for Foreign and Commonwealth Affairs, ex p. Everett [1989] 2 W.L.R. 224 the Court of Appeal reviewed the Foreign and Commonwealth Secretary's refusal of a passport application. The decision in CCSU was applied on the basis that a majority of their Lordships, Lord Diplock, Lord Scarman and Lord Roskill "unequivocally held that judicial review did lie of decisions taken under the prerogative" (per O'Connor L.J. at 228A). "Whether judicial review of

the exercise of prerogative power is open depends upon the subject-matter and in particular upon whether it is justiciable" (per Taylor L.J. at 231A).

Among the examples of the exercise of prerogative powers given by Lord Diplock in CCSU were "the grant of pardons to condemned criminals ... and of bounty from moneys made available to the executive government by Parliament" ([1985] A.C. at 410A). The grant of pardons came up for review in the case of Bentley (R. v. S. of S. for the Home Department ex p. Bentley [1994] 2 W.L.R. 101) and the Divisional Court decided the question of jurisdiction as follows :-

> "The *C.C.S.U.* case [1985] A.C. 374 made it clear that the powers of the court cannot be ousted merely by invoking the word "prerogative." The question is simply whether the nature and subject matter of the decision is amenable to the judicial process. Are such questions of policy that they should not intrude because they are ill-equipped to do so? Looked at in this way there must be cases in which the exercise of the Royal Prerogative is reviewable, in our judgment. If, for example it was clear that the Home Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and, in our judgment, would be entitled to do so.
>
> We conclude therefore that some aspects of the exercise of the Royal Prerogative are amenable to the judicial process. We do not think that it is necessary for us to say more than this in the instant case. It will be for other courts to decide on a case by case basis whether the matter in question is reviewable or not."(per Watkins L.J.).

The distribution of moneys made available to the executive government by Parliament arises for consideration in the present case. The phrase "distribution of bounty"

by the Crown, or by the government on behalf of the Crown, has an archaic flavour which prompts what Diplock L.J. called "nostalgic echoes of Maundy Thursday" (Ex p.Lain [1967] 2 Q.B. 864 at 888). That particular ceremony must be regarded, however, as an act of the "Crown-as-monarch" (per Lord Templeman in M. v. Home Office [1993] 3 W.L.R. 433 at 437). The present case is concerned with the "Crown-as-executive", the Royal prerogative of mercy being a similar power (Bentley's case at p.109F, citing Lord Denning M.R. in Hanratty v. Lord Butler (unreported 12 May 1971)).

The decision under attack in the present case is excluding from claims for family violence, when these were permitted for the first time under the 1979 Scheme, those cases where the incident had occurred before the 1st October 1979 when the revised Scheme was introduced, and maintaining the exclusion since that date. The applicants became persons affected by the exclusion and therefore by the decisions when their claims were rejected in 1990.

It is alleged that this decision was both irrational and discriminatory against women, because the majority of victims of domestic or household violence are female. The preliminary question, however, is whether by reason of the subject matter it is non-justiciable and therefore not amenable to judicial review, and within the category of

cases described in CCSU,, Everett and Bentley.

This category includes matters of "high policy" (per Taylor L.J. in Everett). Examples given are "matters so vital to the survival and welfare of the nation as the conduct of relations with foreign states" (per Lord Diplock in CCSU at p.410B) and in the domestic sphere executive decisions which involve "competing policy considerations" (per Lord Diplock in the passage already cited). It is difficult to see how the decision to exclude previous "same roof" incidents from the 1979 Scheme, or even the decision to revise the Scheme in the light of the 1978 Working Party report, can be said to come within the category of "high policy" decisions.

In substance, the submission on behalf of the Home Secretary appears to rest upon the financial aspects to which I shall refer further below. It is said that the "policy" decision involved a choice between competing claims upon the public purse. There is no evidence to this effect, or otherwise to explain the decision as there was for example in CCSU. Whilst the Court should be careful not to extend the scope of judicial review beyond its proper limits, nevertheless in my judgment when an issue as to jurisdiction is raised it should decide the issue as best it can on the material before it.

It does not seem inevitable or even likely that there was some financial constraint which led to the exclusion which is complained of. If a fixed amount of funds was available to implement the Scheme, then this did not justify an unfair (irrational) as opposed to a fair distribution under the Scheme. It is the nature of the Scheme which is complained of and, far from being non-justiciable, the decisions to introduce and continue a Scheme to be administered by an independent body of persons on a judicial or quasi-judicial basis seem to me to be almost the epitome of an executive or administrative decision which is amenable to review by the Courts.

Legitimate expectation

Mr Sankey Q.C. submitted that the applicants, like other persons who benefitted or sought to benefit from the Scheme, had no right or legitimate expectations on which they could rely to support their applications for judicial review. He relied upon the passage from Lord Diplock's speech in C.S.S.U. which Neill L.J. has quoted. I agree that it is unnecessary to express any conclusion on this potentially wide-ranging issue. I should add, however, that in my provisional view the status of the applicant for judicial review is governed by section 31(1) of the 1981 Act, which requires him to show a sufficient interest for the purposes of the application. Lord Diplock, as I read

the passage in question, was not concerned with the status of the applicant but with the kinds of decision that qualify as a subject for judicial review, and his definition includes the references to a person or body of persons affected by the decision. If this is correct, it is unnecessary to consider whether and if so to what extent the other members of the House of Lords in C.S.S.U. agreed verbatim with Lord Diplock's formulation.

Jurisdiction

In this respect I would add only the following to Lord Justice Neill's judgment. Mr Sankey for the Home Secretary submits that Parliament has sole jurisdiction over the spending of monies from the Consolidated Fund and that therefore he is accountable only to Parliament for payments made by way of ex gratia compensation pursuant to the Scheme. That was the purpose for which the moneys were made available by Parliament under the Appropriation Act each year.

This submission seems to me to have two aspects. First, that there is a kind of Parliamentary approval which, short of having statutory effect, protects executive action by the government from being subject to the jurisdiction of the Courts. In my judgment, no such hybrid exists. If the Scheme had statutory authority, the

Courts would have power to see that the statute was properly implemented in accordance with its terms, but the validity of the statute could not be queried, unless questions arose as to its validity under European law, which does not apply here. That is because "Parliamentary supremacy over the judiciary is only exercisable by statute "(per Lord Templeman in M. v. Home Office [1993] 3 W.L.R. 433 at 437D). The fact that Parliament makes public funds available to the Home Secretary for the purposes of the Scheme, which may be revised by him from time to time, does not mean, in my judgment, that the Scheme itself has force and effect as a statute. Short of statutory authority for the Scheme, as distinct from the costs of funding it, there is no constitutional bar, in my judgment, to the exercise of the Court's powers of judicial review.

The second aspect is the fact that the application for judicial review, if granted, may have financial consequences for the public purse. This has never been suggested, as far as I am aware, as a ground for limiting the Court's powers. We were referred to one recent decision of Mr Justice Schiemann where the financial consequences of a decision were expressly considered : Ex p. Schaffer 1987 I.R.L.R. 53.

I note also that the Interdepartmental Working Party whose report in 1978 led to the revised Scheme promulgated

in 1979, did consider the financial implications of their report in some detail (Appendix 2). They distinguished between increasing the funds available for the Scheme or, alternatively, altering the allocation of a fixed amount made available to it. An order requiring certain classes of claim not to be excluded from the Scheme would not necessarily have the effect of increasing the amount of funds expended on the Scheme.

Conclusion

I agree that the Court has jurisdiction. I would reject the submission that the subject-matter of the appellants' complaints is such that it is not amenable to the judicial process; but I further agree that the complaint of irrationality is not made out in either of these two cases.

Lord Justice Peter Gibson: The decisions sought to be challenged by these proceedings for judicial review are ostensibly the decisions of the Director and Chairman of the Criminal Injuries Compensation Board. Lord Lester Q.C. for the Appellants at one stage in his argument went so far as to submit that the Board was the agent of the Home Secretary and acted on his behalf. But I can see no basis in law or fact for that submission. The Board and its officers were, and are, independent, but they are bound to

administer the Scheme in accordance with the terms of the Scheme for the time being applicable, and unless those terms can themselves be challenged, the decisions of the officers of the Board which were made in accordance with the Scheme cannot in my judgment successfully be impugned.

The challenge mounted by Lord Lester was to the decision or decisions of the Home Secretary, although no decision by the Home Secretary is specified in either of the two Forms 86A as a decision in respect of which relief is sought. However, Mr. Sankey Q.C. for the Home Secretary has taken no point on this nor on delay, despite the fact that in substance the decision that is the main target of Lord Lester's criticism is that of the Home Secretary in 1979 to introduce a revised scheme limiting (save as specified in para. 25 of the 1979 Scheme, which Neill L.J. has already set out) compensation for injury caused to a claimant by a person living in the same household to cases where the injury was caused on or after 1 October 1979.

Like Neill L.J. I accept that the Court has jurisdiction to consider the legality of the Scheme and any revision to it, notwithstanding that it was set up and revised under the prerogative, or, perhaps more correctly, by executive action without statutory authority in order that ex gratia payments may be made out of money voted by Parliament to be distributed in accordance with the Scheme

(see Wade on Administrative Law, 6th ed. 1988, pp. 241-2).

I was at one stage attracted by the submissions of Mr. Sankey, based on the remarks of Diplock L.J. in R. v Criminal Injuries Compensation Board, ex p. Lain [1967] 2 Q.B. 864 at pp. 885-7 (to the effect that exercises of the executive government's discretion as to the way in which moneys voted by Parliament are to be distributed are not subject to judicial review) and of Lord Diplock in Council of Civil Service Unions v Minister for Civil Service [1985] A.C. 374 at p.408 (to the effect that to qualify as a subject for judicial review the decision must affect a right or legitimate expectation of the applicant). Mr. Sankey submitted that in the light of those authorities neither the initial decision in 1979 to introduce the terms of the revised Scheme nor any subsequent decision to maintain the relevant terms could be a decision susceptible to judicial review. It was common ground that those decisions affected no rights of the Appellants. To extend the concept of legitimate expectation to embrace, as Lord Lester suggested, an expectation that the Scheme would not be arbitrary or capricious or that the Home Secretary would perform his public duties, in relation to moneys supplied by Parliament, fairly, rationally and according to law would in effect remove the restriction on the scope of judicial review which Lord Diplock plainly thought it provided.

But on further consideration, particularly in the light of the judgment of Evans L.J. which I have had the benefit of reading, I have come to the conclusion that these appeals should not be dismissed in limine as attempts to impugn non-justiciable decisions. To take the fanciful but archetypal example of perversity, if the Scheme had been revised in 1979 to exclude only red-headed victims of crimes committed by persons under the same roof, I would have thought that the court could intervene on the application of a red-headed victim notwithstanding that (a) the decision to introduce such a revised scheme was an exercise of the executive's discretion on how public moneys were to be distributed and (b) the decision affected no right nor any legitimate expectation, in the sense of an expectation arising from a previously prevailing benefit or from an assurance of the applicant. But those matters would be relevant to a consideration of the merits and to the exercise of discretion by the Court in deciding whether or not to grant relief. Neill L.J. has already cited the remarks of Lord Diplock in the C.C.S.U case, supra at p.411, on the difficulties in the way of challenges to ministerial decisions involving the application of government policy. The nature and extent of the interest of an applicant who has crossed the relatively low statutory threshold of having a sufficient interest for the purpose of obtaining leave to bring judicial review proceedings may be relevant at the substantive hearing in

relation to the exercise of discretion (see I.R.C. v National Federation of Self-Employed and Small Businesses Ltd. [1982] A.C. 617 and the Law Commission's Consultation Paper on Administrative Law : Judicial Review and Statutory Appeals, 1993 L.C.C.P. No. 126, Ch.9).

Looking at the merits, I find it impossible to say that the Home Secretary's decision in 1979 to introduce the revised Scheme with prospective effect for the victims of offenders in the same household can be called irrational. When new measures are taken by government, whether to impose burdens or confer benefits, the general rule is that they will operate prospectively and not retrospectively. To have allowed the revised Scheme full retrospective operation in 1979 would inevitably have some effect on resources, both in terms of payments out of the moneys provided by Parliament for the Scheme and in terms of manpower, particularly because of the especial difficulty in establishing the facts when the victim and the offender are of the same household. It was for the Home Secretary to decide on the allocation of limited resources in the light of competing policy considerations. I agree with Neill L.J.'s comments that the Court is ill-equipped to deal with questions of this sort. It will, I would expect, be a very rare case where the Court will be able to interfere with such a decision on the ground of irrationality. I am wholly unsatisfied that the evidence

on which the Appellants rely demonstrates that the Home Secretary was irrational in introducing the revised Scheme containing the relevant terms in 1979 or in subsequently maintaining the operation of those terms.

For these reasons I too would dismiss these appeals.