R v Secretary of State for the Home Department, ex parte Fire Brigades Union and others

HOUSE OF LORDS

LORD KEITH OF KINKEL, LORD BROWNE-WILKINSON, LORD MUSTILL, LORD LLOYD OF BERWICK AND LORD NICHOLLS OF BIRKENHEAD

1, 2 FEBRUARY, 5 APRIL 1995

Compensation – Criminal injuries – Entitlement to compensation – Criminal Injuries Compensation Scheme – Replacement by Criminal Injuries Compensation Tariff Scheme – Home Secretary using prerogative powers to introduce tariff scheme – Whether Home Secretary acting lawfully – Criminal Justice Act 1988, s 171(1).

Crown – Prerogative – Ouster by statute – Criminal Injuries Compensation Scheme – Scheme based on common law principles codified in statute to come into force on day appointed by Home Secretary – Home Secretary not bringing statutory scheme into force but using prerogative powers to introduce Criminal Injuries Compensation Tariff Scheme – Whether Home Secretary acting lawfully in using prerogative powers to introduce tariff scheme to replace common law scheme – Whether Home Secretary under duty to bring statutory scheme into force – Criminal Justice Act 1988, ss 108–117, 171(1), Schs 6, 7.

In 1964 the Criminal Injuries Compensation Scheme was set up under the prerogative to provide compensation for victims of crimes of violence by ex gratia payments calculated in the same way as common law damages. Compensation was assessed on an individual basis by the Criminal Injuries Compensation Board, a non-statutory body consisting of lawyers experienced in the personal injury field. In 1988 the non-statutory scheme was codified in ss 108 to 117 of and Schs 6 and 7 to the Criminal Justice Act 1988, under which awards would in future be decided on a case by case basis on the common law principles

by which tort victims were compensated. Under s 171(1)[a] of the Act, ss 108 to 117 and Schs 6 and 7 were to come into force on a day to be appointed by the Secretary of State by order made by statutory instrument. Until then the non-statutory scheme remained in force. In December 1993 a White Paper set out details of a new tariff scheme to compensate the victims of violent crime by making awards based on a flat-rate tariff according to the category of injury into which the particular claim fell, instead of on the basis of common law damages, with no specific account being taken of special damages, loss of earnings and the circumstances of the particular case. The government estimated that the annual cost of compensating victims would be halved under the tariff scheme by the year 2000. The White Paper stated that the compensation provisions in ss 108 to 117 of and Schs 6 and 7 to the 1988 Act would not be implemented and would be repealed in due course. On 9 March 1994 the government announced that the tariff scheme would take effect from 1 April. The applicants, trade unions whose members were more than usually exposed to injuries from crimes of violence in the course of their work, applied for judicial review by way of declarations that the decisions of the Home Secretary not to bring into force the compensation provisions in the 1988 Act and to implement the tariff scheme were unlawful. The Divisional Court refused relief. The applicants appealed, contending that the Home Secretary had acted unlawfully (a) in failing to bring ss 108 to 117 of and Schs 6 and 7 to the 1988 Act into force in breach of his duty under the Act to do so, or (b) by implementing the non-statutory tariff scheme in abuse of his common law powers. The Court of Appeal held that s 171(1) of the 1988 Act conferred on the Home Secretary in unqualified terms power to decide when ss 108 to 117 of and Schs 6 and 7 to the Act were to come into force, but that he was not free while the provisions of the 1988 Act remained unrepealed to exercise prerogative powers to introduce a different criminal injuries compensation scheme. The Court of Appeal accordingly granted the second declaration sought but refused the first. The Home Secretary appealed and the applicants cross-appealed.

Held – The Home Secretary was under no legally enforceable duty to bring ss 108 to 117 of and Schs 6 and 7 to the 1988 Act into force since he had a discretion under s 171 to decide to bring those provisions into effect when it was appropriate to do so, that being a matter for him to decide. The courts could not intervene to compel the minister to bring those provisions into effect, since they would then be interfering in the legislative process and it could not be right that the minister was under a duty, notwithstanding any change of circumstances since the legislation was passed, to bring into force legislation which might then be inappropriate. However (Lord Keith and Lord Mustill dissenting), the Home Secretary's discretion was not unfettered and he was required while ss 108 to 117 and Schs 6 and 7 were not in force to keep the question whether they should be brought into force under review and it was an abuse or excess of power for him to exercise the prerogative power in a manner inconsistent with that duty. It followed that the Home Secretary's decision that ss 108 to 117 of and Schs 6 and 7 to the 1988 Act would not be implemented and would be repealed and that the tariff scheme would be implemented instead was unlawful. The appeal and the cross-appeal would therefore be dismissed (see p 247 *c* to *f*, p 248 *j* to p 252 *e* to *h*,

a Section 171(1) is set out at p 249 *g h*, post

statute book but not in force. I do not consider that the doctrine of legitimate expectation properly enters into the matter. In *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, [1985] AC 374 the minister had instructed that staff at GCHQ, Cheltenham were no longer to be permitted to belong to a national trade union. The instruction had been issued without any prior consultation with the staff or with trade unions. This House held that executive action under a prerogative power was open to judicial review in the same manner as action under a statutory power, so that in appropriate circumstances a minister might be under a duty to act fairly in relation to the exercise of the power. Further, it was held that the minister had acted unfairly in issuing the instruction in question because the staff had a reasonable expectation that they would be consulted before the instruction was issued and they had not been consulted. That case affords no parallel with the present. Certain rights of the staff at GCHQ had been taken away in breach of an obligation to act fairly towards them. In the present case no rights have been taken away from anyone, nor has the minister acted unfairly towards anyone. While no doubt many members of the public may be expected to have hoped that ss 108 to 117 of the 1988 Act would be brought into force, they had no right to have them brought into force. In any event, the doctrine of legitimate expectation cannot reasonably be extended to the public at large, as opposed to particular individuals or bodies who are directly affected by certain executive action.

The applicants argue that to make payments under the proposed new tariff scheme would be unlawful because that would be inconsistent with the scheme embodied in ss 108 to 117, since that would make it impossible for all practical purposes ever to bring the statutory scheme into operation. The Secretary of State must at least be under a duty, so it is said, to keep under review from time to time whether to bring ss 108 to 117 into force. I would accept that the Secretary of State is under such a duty, but in my opinion it is one owed to Parliament and not to the public at large. On the other hand, it does not seem to me that operating the proposed new tariff scheme would rule out any reasonable possibility of the statutory scheme ever being introduced. The decision not to introduce it at the present time is a political one and it is entirely predictable that political views might change, if not under the present administration then under a future one. If a political decision were made to bring in the statutory scheme then there is no reason to suppose that the political will would not be found, notwithstanding any difficulty there might be in dismantling the existing arrangements and setting up new ones. The extent to which it might be necessary to do so is in any event open to question.

Upon the whole matter I am clearly of opinion that the applicants' case fails upon a proper application of the rules of statutory construction and of the principles which govern the process of judicial review. To grant the applicants the relief which they seek, or any part of it, would represent an unwarrantable intrusion by the court into the political field and a usurpation of the function of Parliament.

I would allow the appeal and dismiss the cross-appeal.

LORD BROWNE-WILKINSON. My Lords, in this appeal your Lordships have to consider the legality of certain decisions made by the Secretary of State for the Home Department in relation to schemes for the payment of compensation to victims of violent crime. The respondents (the applicants for judicial review) are

trade unions or other bodies whose members are liable in the course of their working duties to suffer personal injuries as a result of such crimes.

THE FACTS

Until 1964 victims who suffered personal injuries as a result of crimes of violence had no right to compensation out of public funds. On 24 June 1964 a scheme compensating such victims was announced in both Houses of Parliament. In its original form the scheme came into force on 1 August 1964. It was non-statutory and was introduced under the prerogative powers, compensation being paid out of moneys voted by Parliament. The scheme (the old scheme) was modified on a number of occasions, most recently in February 1990 and January 1992.

The old scheme provided for a system of ex gratia payments to be assessed on the same basis as damages at common law. Compensation was assessed on an individual basis and included provision for pain and suffering and loss of earnings, as well as compensation for the dependants of dead victims, subject to certain limitations.

In March 1978 the Royal Commission on Civil Liability and Compensation for Personal Injury recommended that compensation under the old scheme in Great Britain should continue to be based upon tort damages and that the scheme should be put on a statutory basis (see Cmnd 7054-I). In March 1984 an inter-departmental working party was appointed to review the criminal injuries compensation scheme and to make recommendations for putting the scheme into statutory form. The working party reported in 1986 (see *Criminal Injuries Compensation: A statutory scheme*).

On 29 July 1988 the Criminal Justice Act 1988 received the royal assent. Sections 108 to 117 of and Schs 6 and 7 to that Act contain a statutory criminal injuries compensation scheme, which in substance follows the recommendations of the working party and gives statutory enactment to the old scheme. In particular, the amount of compensation under the statutory scheme would be calculated on the same basis as common law damages.

Section 171 of the 1988 Act, so far as relevant, provides:

> '(1) Subject to the following provisions of this section, this Act shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint and different days may be appointed in pursuance of this subsection for different provisions or different purposes of the same provision ...
>
> (5) The following provisions shall come into force on the day this Act is passed [ie including] this section.
>
> (6) The following provisions ... shall come into force at the end of the period of two months beginning with the day this Act is passed ...'

The provisions of ss 108 to 117 of and Schs 6 and 7 to the 1988 Act were not brought into force by any other provision of s 171. Accordingly, although s 171 itself is in force, the provisions of ss 108 to 117 of and Schs 6 and 7 to the Act (the statutory scheme) can only be brought into force by the Secretary of State under s 171(1). No order has been made under s 171(1) bringing the statutory scheme into force. Since 1988, the old non-statutory scheme has continued in operation subject to certain minor amendments made under prerogative powers.

In December 1993 a White Paper was published, entitled *Compensating Victims of Violent Crime: Changes to the Criminal Injuries Compensation Scheme* (Cm 2434).

The White Paper gave details of a proposed tariff scheme under which awards would be based upon a tariff according to the injuries received without any separate or additional payments being made for loss of earnings or other past or future expenses. The White Paper drew attention to the rise in the number of awards and cost of the old scheme and concluded that the new scheme would be more readily understood and enable claimants to receive their compensation more quickly and in a more straightforward manner. It also pointed out that the cost of administration should come down and that claimants should receive a better service.

Paragraphs 38 and 39 of the White Paper stated:

> '38. The present scheme is non-statutory and payments are made on an ex-gratia basis. Provision was made in the Criminal Justice Act 1988 for the scheme to be placed on a statutory footing. However, at the request of the [Criminal Injuries Compensation] Board the relevant provisions were not brought into force, because this would have disrupted their efforts to deal with the heavy workload. With the impending demise of the current scheme the provisions in the 1988 Act will not now be implemented. They will accordingly be repealed when a suitable legislative opportunity occurs.
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> 39. The new scheme, like the present one, will at least initially be non-statutory and payments will continue to be made on an ex-gratia basis. Consideration will, however, be given to putting the scheme on a statutory basis once it has had time to settle down and any teething problems have been resolved.'

The new, non-statutory scheme (the tariff scheme) was published on 9 March 1994. On 16 March 1994 the respondent trade unions issued a notice of application for leave to apply for judicial review of (1) the continuing decision of the Secretary of State not to bring into force ss 108 to 117 of and Schs 6 and 7 to the 1988 Act and (2) the decision of the Secretary of State to implement the tariff scheme.

On 22 March 1994 leave to apply for judicial review was granted and the Secretary of State gave an assurance that no individual claimant would be prejudiced and no final award would be made to any claimant pending the matter being resolved in the courts. It was on the basis of that assurance that the applicants agreed not to press for interim relief.

The tariff scheme came into force on 1 April 1994 and contained transitional provisions whereby applications for compensation received by the Criminal Injuries Compensation Board (the board which administered the old scheme) before 1 April 1994 would be dealt with according to the provisions of the old scheme; applications received by the board on or after 1 April 1994 would be dealt with under the terms of the tariff scheme. The new tariff scheme involves the phasing out of the old board and the creation of a new Criminal Injuries Compensation Authority to administer the tariff scheme. The tariff scheme provides for the making of awards to the victims of crime, assessed by reference to a scale of fixed tariffs, according to the severity of the injuries sustained and without taking into account the circumstances of the individual case or common law principles governing the assessment of damages. The tariff scheme departs from the basic principles of the old scheme and the statutory scheme in that: (1) the assessment of compensation is no longer based upon common law principles; (2) awards are assessed according to a fixed scale of tariffs, without account being taken of the individual circumstances of the victim; (3) awards are made on behalf

of the authority by persons who need not be qualified lawyers, although qualified lawyers may be involved in the hearing of appeals.

It is common ground that in some cases, particularly in relation to very serious injuries involving prolonged loss of earnings, the amount payable to the victim under the tariff scheme will be substantially less than the amount he would have received under the old scheme or the statutory scheme.

On 23 May 1994 the substantive hearing of the application for judicial review came before the Queen's Bench Divisional Court (Staughton LJ and Buckley J) ([1994] PIQR 320) who refused to make an order. The Court of Appeal (Sir Thomas Bingham MR and Morritt LJ; Hobhouse LJ dissenting) ([1995] 1 All ER 888, [1995] 2 WLR 1) allowed an appeal against that decision but for differing reasons. As to the first ground of application (viz that the Secretary of State was in breach of duty under s 171 of the 1988 Act in failing to bring the statutory scheme into effect) Sir Thomas Bingham MR held that s 171(1) did impose such a duty on the Secretary of State but that he was not shown to have been in breach of that duty. Hobhouse and Morritt LJJ held that s 171 imposed no such duty on the Secretary of State. In the result, the Court of Appeal were unanimous in refusing any relief on the first ground claimed: this decision is the subject of a cross-appeal by the applicants. As to the second claim for relief (viz did the Secretary of State act unlawfully in introducing the tariff scheme?) Sir Thomas Bingham MR and Morritt LJ held that the Secretary of State by implementing the tariff scheme acted unlawfully and in abuse of his prerogative powers; Hobhouse LJ held that the Secretary of State had acted lawfully. The Secretary of State appeals against that decision on the second issue.

INTERLINKED DECISIONS

Although the application for judicial review identifies for attack two decisions by the Secretary of State, in reality the Secretary of State made either a number of interlocking decisions or one composite decision having a number of strands. In order to reach a position in which the new prerogative tariff scheme should come into operation on a permanent basis without Parliament repealing the statutory scheme contained in the 1988 Act, the Secretary of State had to take all the following steps: (1) to resolve not to exercise either immediately or in the future the power or duty conferred on him by s 171(1) to bring the statutory scheme into effect; (2) to discontinue under prerogative power the old, non-statutory, scheme which was in operation down to 1 April 1994; and (3) to introduce under prerogative powers the new tariff scheme. The second of those steps is not directly attacked by the application for judicial review. But, in my judgment, that is not material since all three steps are inextricably interlinked and the legality of the decision to introduce the new tariff scheme must depend, at least in part, on the legality of steps (1) and (2). I propose therefore to consider first the cross-appeal and the true effect of s 171 of the 1988 Act before returning to the subject matter of the appeal.

DOES SECTION 171(1) IMPOSE A DUTY OR A POWER ON THE SECRETARY OF STATE?

Duty

It is of central importance in this case that s 171(1) of the 1988 Act (providing that, inter alia, the statutory scheme 'shall come into force on such day as the Secretary of State may ... appoint') is itself in force. It is the applicants' case that, although the section confers a discretion as to the date on which the statutory scheme is to be brought into force, it in addition imposes on him a statutory duty

to bring the sections into force at some time. In the cryptic formulation of Mr Elias QC, the Secretary of State has a discretion as to *when* but not *whether* the sections are to come into force. The Lord Advocate, on the other hand, contends that s 171(1) confers on the Secretary of State an absolute and unfettered discretion whether or not to bring the sections into force. I do not accept either of these propositions.

The form of words to be found in s 171(1) is used in many statutes where Parliament considers, for one reason or another, that it is impossible to specify a day for the statutory provisions enacted to come into force. Therefore, although the case before your Lordships turns on the construction of s 171(1) it cannot be construed in isolation. Such a widely used statutory formula must have the same effect wherever Parliament employs it. The words of s 171(1) are consistent only with the Secretary of State having some discretion: indeed, even the applicants concede that he has a discretion. What is it then which suggests that there will come a time when that discretion is exhausted and that, whatever the change of circumstances since the sections in question were passed by the Queen in Parliament, the Secretary of State becomes bound to bring the sections into force? I can see nothing in the Act which justifies such an implied restriction on the discretion. Moreover, I can foresee circumstances in which it would plainly be undesirable for the Secretary of State to be under any such duty. Take, as an example, Pt I of the 1988 Act which introduced new provisions as to extradition. Part I of the Act was also to be brought into force by the Secretary of State under s 171(1). Say, further, that there was a subsequent extradition treaty which rendered the provisions of Pt I inappropriate. It cannot be right that, notwithstanding such change of circumstances, the Secretary of State should then be under a duty to bring into force inappropriate legislation. Where Parliament intends to impose a duty on a minister to bring legislation into force under a similar formula, it expressly states the time limit within which such power is to be exercised: see s 5(2) of the Domestic Violence and Matrimonial Proceedings Act 1976.

Further, if the argument of the applicants is right, there must come a time when the Secretary of State comes under a duty to bring the statutory provisions into force and accordingly the court could grant mandamus against the Secretary of State requiring him to do so. Indeed, the applicants originally sought such an order in the present case. In my judgment it would be most undesirable that, in such circumstances, the court should intervene in the legislative process by requiring an Act of Parliament to be brought into effect. That would be for the courts to tread dangerously close to the area over which Parliament enjoys exclusive jurisdiction, namely the making of legislation. In the absence of clear statutory words imposing a clear statutory duty, in my judgment, the court should hesitate long before holding that such a provision as s 171(1) imposes a legally enforceable statutory duty on the Secretary of State.

Power

It does not follow that, because the Secretary of State is not under any duty to bring the section into effect, he has an absolute and unfettered discretion whether or not to do so. So to hold would lead to the conclusion that both Houses of Parliament had passed the Bill through all its stages and the Act received the royal assent merely to confer an enabling power on the executive to decide at will whether or not to make the parliamentary provisions a part of the law. Such a conclusion, drawn from a section to which the sidenote is 'Commencement', is

not only constitutionally dangerous but flies in the face of common sense. The provisions for bringing sections into force under s 171(1) apply not only to the statutory scheme but to many other provisions. For example, the provisions of Pts I, II and III relating to extradition, documentary evidence in criminal proceedings and other evidence in criminal proceedings are made subject to the same provisions. Surely, it cannot have been the intention of Parliament to leave it in the entire discretion of the Secretary of State whether or not to effect such important changes to the criminal law. In the absence of express provisions to the contrary in the Act, the plain intention of Parliament in conferring on the Secretary of State the power to bring certain sections into force is that such power is to be exercised so as to bring those sections into force when it is appropriate and unless there is a subsequent change of circumstances which would render it inappropriate to do so.

If, as I think, that is the clear purpose for which the power in s 171(1) was conferred on the Secretary of State, two things follow. First, the Secretary of State comes under a clear duty to keep under consideration from time to time the question whether or not to bring the section (and therefore the statutory scheme) into force. In my judgment he cannot lawfully surrender or release the power contained in s 171(1) so as to purport to exclude its future exercise either by himself or by his successors. In the course of argument, the Lord Advocate accepted that this was the correct view of the legal position. It follows that the decision of the Secretary of State to give effect to the statement in para 38 of the 1993 White Paper (Cm 2434) that 'the provisions in the 1988 Act will not now be implemented' was unlawful. The Lord Advocate contended, correctly, that the attempt by the Secretary of State to abandon or release the power conferred on him by s 171(1), being unlawful, did not bind either the present Secretary of State or any successor in that office. It was a nullity. But, in my judgment, that does not alter the fact that the Secretary of State made the attempt to bind himself not to exercise the power conferred by s 171(1) and such attempt was an unlawful act.

There is a second consequence of the power in s 171(1) being conferred for the purpose of bringing the sections into force. As I have said, in my view, the Secretary of State is entitled to decide not to bring the sections into force if events subsequently occur which render it undesirable to do so. But if the power is conferred on the Secretary of State with a view to bringing the sections into force, in my judgment, the Secretary of State cannot himself procure events to take place and rely on the occurrence of those events as the ground for not bringing the statutory scheme into force. In claiming that the introduction of the new tariff scheme renders it undesirable now to bring the statutory scheme into force, the Secretary of State is, in effect, claiming that the purpose of the statutory power has been frustrated by his own act in choosing to introduce a scheme inconsistent with the statutory scheme approved by Parliament.

THE LAWFULNESS OF THE DECISION TO INTRODUCE THE TARIFF SCHEME

The tariff scheme, if validly introduced under the royal prerogative, is both inconsistent with the statutory scheme contained in ss 108 to 117 of the 1988 Act and intended to be permanent. In practice, the tariff scheme renders it now either impossible or at least more expensive to reintroduce the old scheme or the statutory enactment of it contained in the 1988 Act. The tariff scheme involves the winding up of the old Criminal Injuries Compensation Board together with its team of those skilled in assessing compensation on the common law basis and the creation of a new body, the Criminal Injuries Compensation Authority, set

up to assess compensation on the tariff basis at figures which, in some cases, will be very substantially less than under the old scheme. All this at a time when Parliament has expressed its will that there should be a scheme based on the tortious measure of damages, such will being expressed in a statute which Parliament has neither repealed nor (for reasons which have not been disclosed) been invited to repeal.

My Lords, it would be most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament expressed in a statute and, to an extent, to pre-empt the decision of Parliament whether or not to continue with the statutory scheme even though the old scheme has been abandoned. It is not for the executive, as the Lord Advocate accepted, to state as it did in the White Paper (para 35) that the provisions in the 1988 Act 'will accordingly be repealed when a suitable legislative opportunity occurs'. It is for Parliament, not the executive, to repeal legislation. The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body. The prerogative powers of the Crown remain in existence to the extent that Parliament has not expressly or by implication extinguished them. But under the principle in *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508, [1920] All ER Rep 80 if Parliament has conferred on the executive statutory powers to do a particular act, that act can only thereafter be done under the statutory powers so conferred: any pre-existing prerogative power to do the same act is pro tanto excluded.

How then is it suggested that the executive has power in the present case to introduce under the prerogative power a scheme inconsistent with the statutory scheme? First, it is said that since ss 108 to 117 of the Act are not in force, they confer no legal rights on the victims of crime and impose no duties on the Secretary of State. The *De Keyser* principle does not apply since it only operates to the extent that Parliament has conferred statutory powers which in fact replace pre-existing powers: unless and until the statutory provisions are brought into force, no statutory powers have been conferred and therefore the prerogative powers remain. Moreover, the abandonment of the old scheme and the introduction of the new tariff scheme does not involve any interference by the executive with private rights. The old scheme, being a scheme for ex gratia payments, conferred no legal rights on the victims of crime. The new tariff scheme, being also an ex gratia scheme, confers benefits not detriments on the victims of crime. How can it be unlawful to confer benefits on the citizen, provided that Parliament has voted the necessary funds for that purpose?

In my judgment, these arguments overlook the fact that this case is concerned with public, not private, law. If this were an action in which some victim of crime were suing for the benefits to which he was entitled under the old scheme, the arguments which I have recited would have been fatal to his claim: such a victim has no legal right to any benefits. But these are proceedings for judicial review of the decisions of the Secretary of State in the discharge of his public functions. The well-known passage in the speech of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 949–950, [1985] AC 374 at 408–410 (the *GCHQ* case) demonstrates two points relevant to the present case. First, an executive decision which affects the legitimate expectations of the applicant (even though it does not infringe his legal rights) is subject to judicial review. Second, judicial review is as applicable to decisions taken under prerogative powers as to decisions taken under statutory powers save to the extent that the

legality of the exercise of certain prerogative powers (eg treaty making) may not be justiciable.

The *GCHQ* case demonstrates that the argument based on the ex gratia and voluntary nature of the old scheme and the tariff scheme is erroneous. Although the victim of a crime committed immediately before the White Paper was published had no legal right to receive compensation in accordance with the old scheme, he certainly had a legitimate expectation that he would do so. Moreover, he had a legitimate expectation that, unless there were proper reasons for further delay in bringing ss 108 to 117 of the Act into force, his expectations would be converted into a statutory right. If those legitimate expectations were defeated by the composite decision of the Secretary of State to discontinue the old scheme and not to bring the statutory scheme into force and those decisions were unlawfully taken, he has locus standi in proceedings for judicial review to complain of such illegality.

Similar considerations apply when considering the legality of the minister's decisions. In his powerful dissenting judgment in the Court of Appeal, Hobhouse LJ decided that, since the statutory provisions had not been brought into force, they had no legal significance of any kind. He held, in my judgment correctly, that the *De Keyser* principle did not apply to the present case: since the statutory provisions were not in force they could not have excluded the pre-existing prerogative powers. Therefore the prerogative powers remained. He then turned to consider whether it could be said that the Secretary of State had abused those prerogative powers and again approached the matter on the basis that since the sections were not in force they had no significance in deciding whether or not the Secretary of State had acted lawfully. I cannot agree with this last step. In public law the fact that a scheme approved by Parliament was on the statute book and would come into force as law if and when the Secretary of State so determined is in my judgment directly relevant to the question whether the Secretary of State could in the lawful exercise of prerogative powers both decide to bring in the tariff scheme and refuse properly to exercise his discretion under s 171(1) to bring the statutory provisions into force.

I turn then to consider whether the Secretary of State's decisions were unlawful as being an abuse of power. In this case there are two powers under consideration: first, the statutory power conferred by s 171(1); second, the prerogative power. In order first to test the validity of the exercise of the prerogative power, I will assume that the 1988 Act, instead of conferring a discretion on the Secretary of State to bring the statutory scheme into effect, had specified that it was to come into force one year after the date of the royal assent. As Hobhouse LJ held, during that year the *De Keyser* principle would not apply and the prerogative powers would remain exercisable. But in my judgment it would plainly have been an improper use of the prerogative powers if, during that year, the Secretary of State had discontinued the old scheme and introduced the tariff scheme. It would have been improper because in exercising the prerogative power the Secretary of State would have had to have regard to the fact that the statutory scheme was about to come into force: to dismantle the machinery of the old scheme in the meantime would have given rise to further disruption and expense when, on the first anniversary, the statutory scheme had to be put into operation. This hypothetical case shows that, although during the suspension of the coming into force of the statutory provisions the old prerogative powers continue to exist, the existence of such legislation basically affects the mode in which such prerogative powers can be lawfully exercised.

Does it make any difference that the statutory provisions are to come into effect, not automatically at the end of the year as in the hypothetical case I have put, but on such day as the Secretary of State specifies under a power conferred on him by Parliament for the purpose of bringing the statutory provisions into force? In my judgment it does not. The Secretary of State could only validly exercise the prerogative power to abandon the old scheme and introduce the tariff scheme if, at the same time, he could validly resolve never to bring the statutory provisions and the inconsistent statutory scheme into effect. For the reasons I have already given, he could not validly so resolve to give up his statutory duty to consider from time to time whether to bring the statutory scheme into force. His attempt to do so, being a necessary part of the composite decision which he took, was itself unlawful. By introducing the tariff scheme he debars himself from exercising the statutory power for the purposes and on the basis which Parliament intended. For these reasons, in my judgment the decision to introduce the tariff scheme at a time when the statutory provisions and his power under s 171(1) were on the statute book was unlawful and an abuse of the prerogative power.

I should add for completeness that the Lord Advocate accepted that if the decision to introduce the tariff scheme was unlawful the fact that Parliament, in the Appropriation Act 1994, had voted the funds necessary to implement it could not cure that invalidity.

For these reasons, I would dismiss the appeal and the cross-appeal.

LORD MUSTILL. My Lords, this appeal turns on certain important but narrow constitutional issues, which form part of a wider debate on the relationship between Parliament, ministers, the courts and the private citizen.

I

Thirty-one years ago the government of the day established a scheme to compensate out of public funds the victims of criminal violence. The scheme was brought into existence through the exercise of the royal prerogative, and the payments were made ex gratia; that is, there was no statutory authority for the scheme, although the necessary funds were voted annually by Parliament, and the victims had no right in law to claim payment. Compensation was given in the shape of a lump sum arrived at in the same way as a civil award of damages for personal injury caused by a tort, subject to an upper limit on the amount attributable to loss of earnings. The scheme was administered by the Criminal Injuries Compensation Board, comprising a chairman and a panel of Queen's Counsel and solicitors.

At first, the scheme operated on a modest scale, but by 1978 the number of awards had increased twelvefold. In that year the Royal Commission on Civil Liability and Compensation for Personal Injury recommended, in ch 29 of its report (Cmnd 7054-I), that compensation for criminal injuries should continue to be based on tort damages, but that the scheme, which had originally been experimental, should now be put on a statutory basis. The government, however, preferred to wait until more experience had been gained. Although as the years passed some important changes were made, the scheme retained its original shape. But its scale and cost remorselessly increased. In its first year the board had paid out £400,000. By 1984 the annual amount had risen to more than £35m, and the backlog was approaching 50,000 claims.

At this point the government decided that the time had come to put the scheme into statutory form, and appointed an inter-departmental working party to consider how it should be done. The working party made numerous recommendations, largely accepted by the government. The most important was that compensation should continue to be given to the victims of criminal violence on the basis of civil damages. Accepting this amongst other recommendations the Secretary of State for the Home Department (the Rt Hon Douglas Hurd MP) announced in Parliament that legislation would be introduced accordingly, and that considerable extra public funds would be made available. Within a few years the promised legislation materialised in the shape of Pt VII of the Criminal Justice Act 1988 (ss 108 to 117) together with the dependent Schs 6 and 7. When brought into force, the scheme would be administered by a statutory board, appointed by the Secretary of State, being a body corporate, declared not to be a servant or agent of the Crown (Sch 6, para 1). The expenses incurred by the board in the discharge of its functions would be defrayed by the Secretary of State (Sch 6, para 7). Subject to certain exceptions and limitations, claims for compensation were to be determined, and the amounts payable assessed, in accordance with the laws of England and Wales or Scotland by which a claim in tort or delict arising out of the same facts would fall to be determined (Sch 7, para 8). There would be a right of appeal from a determination of the board to the High Court or the Court of Session (s 113).

For present purposes nothing turns on the details of the compensation scheme itself. The important provision is s 171, which governs the implementation of the numerous important changes in criminal law and practice brought about by the Act as a whole. So far as material it reads:

> '(1) Subject to the following provisions of this section, *this Act shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint* and different days may be appointed in pursuance of this subsection for different provisions or different purposes of the same provision.
>
> (2) An order under this section may make such transitional provision as appears to the Secretary of State to be necessary or expedient in connection with any provision thereby brought into force other than a provision contained in sections 108 to 117 above or in Schedule 6 or 7 to this Act.
>
> (3) The Secretary of State may by regulations made by statutory instrument make such provision as he considers necessary or expedient in preparation for or in connection with the coming into force of any provision contained in those sections or Schedules.
>
> (4) A statutory instrument containing any such regulations shall be subject to annulment in pursuance of a resolution of either House of Parliament.
>
> (5) The following provisions shall come into force on the day this Act is passed ...
>
> (6) The following provisions ... shall come into force at the end of the period of two months beginning with the day this Act is passed.'

The words emphasised form the crux of this dispute. They apply, not only to the compensation scheme, but also to the provisions of Pts I to IV, VI, and IX of the Act, which are concerned with quite different subjects. Step by step, during the intervening years, they have all (with a few scattered exceptions) been brought into force. Only Pt VII stands isolated, awaiting the appointment of a day.

In the years immediately following the passing of the Act it seemed probable that, whether or not the statutory scheme took effect, the compensation regime would continue much as before; and indeed as recently as December 1991 the Secretary of State (the Rt Hon Kenneth Baker MP) announced to Parliament an increase in the lower limit of entitlement, without suggesting that the general principles of the scheme might be under reconsideration. However, in the light of what was to happen later it may be significant that he took the opportunity to report even greater increases in the amounts of the annual payments and the costs of running the scheme.

At all events, during the following year the government changed their mind. On 23 November 1992 the Secretary of State (the Rt Hon Kenneth Clarke MP) gave notice of an intention to replace the existing scheme with a new tariff scheme, with effect from 1994, and this was followed in December 1993 by a White Paper, *Compensating Victims of Violent Crime: Changes to the Criminal Injuries Compensation Scheme* (Cm 2434), presented to Parliament by the Secretary of State for the Home Department (the Rt Hon Michael Howard MP) and the Secretary of State for Scotland (the Rt Hon Ian Lang MP). Since your Lordships are not concerned in any way with the merits or otherwise of the decision to change the entire shape of the scheme there is no need to describe the new arrangements in detail. The following extracts from the White Paper will show what was proposed:

> '10. There is no obvious or logical way of matching a particular sum of money precisely to the degree of pain and hurt suffered by an injured person. Even under common law damages the award of damages is not an exact science. Judgments tend to be made pragmatically on the facts of the case and with regard to precedent. But the assessment is essentially subjective ... and any amount awarded must to some extent be regarded as artificial. There is no exactly right answer ...
>
> 12. Such factors have been major elements in the consideration that led the Government to decide that awards based on common law damages are no longer appropriate for a state financed compensation scheme. Since there is no absolute or right figure for an award, the Government does not consider it appropriate to attempt the very difficult and time consuming task of trying to assign a precisely calculated, but essentially arbitrary sum to the injury suffered ... The new system will accordingly be based on a tariff or scale of awards under which injuries of comparable severity will be grouped together in bands for which a single fixed payment is made. This means that people with similar injuries will get the same payment ...
>
> 21. Under the current scheme loss of earnings and costs of future medical care can be paid as separate heads of damage. That is a feature of the common law system, though the necessary calculations can often prove to be very difficult and time consuming to make. The tariff scheme will however, break the link with common law damages; and the aim will no longer be to provide finely calculated "compensation" as such. Instead a simple lump sum award related to the severity of the injury will be paid. That removes the subjective element of assessment and substitutes a more objective test which is easier to apply ...
>
> 28. The severance of the link to common law damages and the introduction of a straightforward tariff scheme, under which payments are made from a scale of awards related to the nature of the injury, means that

the specialised skills of senior lawyers with experience of personal injury casework will no longer be needed and that cases can be decided administratively. There will accordingly be no longer term role for the present Board to play under the tariff arrangements ...

34. ... If the applicant is dissatisfied with the initial decision he may request reconsideration of his case by the Criminal Injuries Compensation Authority. This will be an internal review of the case conducted by a more senior member of the administration ...

35. If the claimant remains dissatisfied after this review of his case, he will be able to appeal to an appeals panel independent of both the CICA. and the Secretary of State ...

38. The present scheme is non-statutory and payments are made on an ex-gratia basis. Provision was made in the Criminal Justice Act 1988 for the scheme to be placed on a statutory footing. However, at the request of the Board the relevant provisions were not brought into force, because this would have disrupted their efforts to deal with the heavy workload. With the impending demise of the current scheme the provisions in the 1988 Act will not now be implemented. They will accordingly be repealed when a suitable legislative opportunity occurs.

39. The new scheme, like the present one, will at least initially be non-statutory and payments will continue to be made on an ex-gratia basis. Consideration will, however, be given to putting the scheme on a statutory basis once it has had time to settle down and any teething problems have been resolved.'

The general shape of the proposed scheme is thus quite clear. It will be entirely different in principle and practice both from the present arrangements and from those contemplated by the 1988 Act. The statutory scheme is treated as redundant, and the intention is to persuade Parliament to remove it from the statute book. Meanwhile, the minister is presently resolved not to exercise his power under s 171(1) to bring Pt VII into force.

II

The government's radical change of course has engendered much controversy, both within Parliament and outside. Your Lordships are not concerned with events in Parliament, and with only one aspect of the public debate, namely the proceedings for judicial review instituted by the present respondents. 11 trade unions and similar bodies, whose members are liable in the course of their duties to suffer personal injury as a result of criminal violence. It is important to state in full the relief claimed by the respondents in their notice of application for leave to apply for judicial review:

'(1) A Declaration that the Secretary of State by failing or refusing to bring into force sections 108–117, and Schedules 6 and 7 of the 1988 Act, has acted unlawfully in breach of his duty under the 1988 Act;

(2) A Declaration that the Secretary of State, by implementing the Tariff Scheme. has acted unlawfully in breach of his duty under the 1988 Act and has abused his common law powers;

(3) Mandamus, to order the Secretary of State, in accordance with section 171 of the 1988 Act, to bring into force by order made by statutory instrument sections 108–117 and Schedules 6 and 7 to the 1988 Act;

(4) an Injunction, to prevent the Secretary of State from bringing the Tariff Scheme into effect from 1st April 1994.' a

It is also convenient to quote the grounds of application given by the respondents in their notice, since they are in substance those maintained in their arguments before the House:

'30. ... the Secretary of State has acted unlawfully, ultra vires and in breach of his duty under section 171 of the 1988 Act, in that: (i) he has delayed the implementation of the Statutory Scheme without a good or proper purpose; (ii) he has announced in Parliament and in the White Paper that it is his intention not to perform his statutory duty to implement the Statutory Scheme; (iii) he has decided to implement, and has published the details of, the Tariff Scheme which is wholly inconsistent with the Statutory Scheme passed by Parliament; (iv) he has thereby sought to frustrate both the will of Parliament and the purposes of the relevant provisions of the 1988 Act. b c

31. Further or in the alternative, in implementing and publishing the new scheme in the manner aforesaid, the Secretary of State has abused his common law powers.' d

On 22 March 1994 leave to apply for judicial review was granted by Owen J. Upon the Secretary of State giving an assurance that no individual claimant would be prejudiced and no final award would be made to any claimant pending the matter being resolved in the courts or by this House, the applicants did not press for interim relief to stay the implementation of the tariff scheme pending the outcome of the proceedings. e

On 23 May 1994 the Divisional Court (Staughton LJ and Buckley J) ([1994] PIQR 320) refused all relief. On appeal the Court of Appeal ([1995] 1 All ER 888, [1995] 2 WLR 1) was divided in opinion. Indeed, the fact that the three cogent judgments delivered, each of them convincing when read in isolation, were not unanimous on either issue shows the difficulty of this important case. On the first issue Hobhouse and Morritt LJJ held that there was no duty to implement the statutory scheme. Sir Thomas Bingham MR arrived at the same conclusion, but by a different route, holding ([1995] 1 All ER 888 at 894–895, [1995] 2 WLR 1 at 8): f g

'In my opinion the effect of s 171(1) was to impose a legal duty on the Home Secretary to bring the provisions into force as soon as he might properly judge it to be appropriate to do so. In making that judgment he would be entitled to have regard to all relevant factors. These would plainly include the time needed to make preparations and prepare subordinate legislation. They would also include the request initially made (although not persisted in) by the chairman of the non-statutory board to defer implementation. They would also in my opinion include (and here I part company from the applicants) the escalating cost of the non-statutory and the enacted statutory scheme: if it appeared that the cost would be much greater than Parliament envisaged when the provisions were debated and approved, or if since that time economic expectations had significantly declined, these would be factors which a prudent Home Secretary could not be expected to ignore and they could in my judgment provide good grounds for delay in exercise of the power to bring the sections into force.' h j

Sir Thomas Bingham MR went on to hold that the rapidly increasing cost of the scheme provided reasons for delay and that there was accordingly no breach of duty on the facts.

On the second issue, the court was again divided. Sir Thomas Bingham MR and Morritt LJ held that the Secretary of State had acted unlawfully and abused his prerogative and common law powers by introducing a scheme radically different from what Parliament had approved whilst the relevant provisions of the Act stood unrepealed. Hobhouse LJ was of the opposite opinion, essentially on the grounds that the new scheme could not be contrary to law since the statutory scheme was not yet law, and that the Secretary of State had by virtue of a grant in aid under the Appropriation Act 1994 directed specifically to the Criminal Injuries Compensation Authority a mandate to spend money on the new scheme.

The Secretary of State now appeals against the decision of the majority in the Court of Appeal that he had abused his powers by introducing the new scheme in face of Pt VII and the two Schedules, and the applicants cross-appeal against the ruling (unanimous in the result, but not as to the reasoning) that the Secretary of State was not in breach of duty by declining to bring Pt VII into force.

III

It will be seen that two, and only two, aspects of the controversy are before the court. The proceedings call in question first the announcement that Pt VII of the 1988 Act will not be brought into force (at any rate during the lifetime of the present government), and secondly the plan to pre-empt the unimplemented statutory scheme by installing a wholly different regime. It is with these challenges, and with these alone, that the Appellate Committee, reporting to your Lordships' House in its judicial capacity, can be concerned.

My Lords, I put the matter in this way to emphasise that although the issues arising on the appeal are of great constitutional importance they are limited in range. The present appeal is directly concerned only with the relationship between the executive and the public. Save to the extent necessary for a ruling upon the lawfulness of what the Secretary of State has said and done the Appellate Committee has no competence to express any opinion on the relationship between the executive and Parliament. By way of example, stress was laid by the applicants on the statement in the White Paper (para 38) that the provisions of the 1988 Act relating to compensation for criminal injuries 'will accordingly be repealed when a suitable legislative opportunity occurs' as demonstrating at the best a forgetfulness that it is Parliament, not the Secretary of State or a government, which decides whether an existing enactment shall be repealed. This may be so, or it may not, but it is of no consequence here. If the attitude of the Secretary of State is out of tune with the proper respect due to parliamentary processes this is a matter to which Parliament must attend. It is true that in some cases the frame of mind in which a minister approaches the exercise of a statutory or common law discretion may be relevant to the lawfulness of his decision. But this is not such an occasion. It is not suggested that the Secretary of State has acted in bad faith, simply that when his duties under statute and at common law are properly understood it can be seen that what he has done, omitted to do and proposed to do are contrary to law. Criticisms of the manner, rather than the matter, of his actions are for political debate, not legal argument.

Equally, your Lordships are not concerned in your appellate capacity to inquire whether the Secretary of State's decisions were sound. The task of the courts is to ensure that powers are lawfully exercised by those to whom they are entrusted, not to take those powers into their own hands and exercise them afresh. A claim that a decision under challenge was wrong leads nowhere, except in the rare case where it can be characterised as so obviously and grossly wrong as to be irrational, in the lawyers' sense of the word, and hence a symptom that there must have been some failure in the decision-making process. No such proposition is advanced here, nor could it have been; for, whatever their rights and wrongs, if the decisions manifested by the Secretary of State's words and actions are otherwise lawful it is impossible to say that no decision-maker acting rationally could have arrived at them. Once again, it is for Parliament to intervene if it finds the new policies unacceptable.

My Lords, I have begun in this way because the narrow focus of the inquiry is blurred if factors, highly relevant in a wider perspective but not germane to the questions of law for decision, are allowed to intrude. In broad terms, these questions are as follows. First, does s 171(1) impose on the Secretary of State a legally enforceable duty to bring into force all the provisions of the Act to which it applies, including Pt VII? If so, what considerations are relevant to determining when the duty must be performed? Was the announcement that Pt VII would not be implemented a separate breach of duty? Second, was either the winding up of the existing scheme or the inauguration of the new scheme, or both, (a) a breach of a duty created by s 171(1), or (b) an abuse of the prerogative power?

IV

I will begin with the first question, since in my opinion the answer to it is an essential starting point for consideration of the second. It is common ground that this part of the dispute turns on the interpretation of s 171(1). There are I believe three possible meanings. The first is that the Secretary of State has no obligations at all as regards the implementation of the sections to which it applies; his discretion is entirely free from control. This need not be considered at length, for the Lord Advocate does not propose it, and indeed it must be unsound. Parliament cannot have intended that the minister could simply ignore the power, or exercise it for his own personal advantage. He must give consideration to the exercise of the power, and do so in good faith.

At the other extreme is the interpretation for which the applicants contend, that the Secretary of State is under a legally enforceable obligation to bring the relevant sections into force, not immediately for that would be absurd but as soon is it is administratively practicable to do so. For this purpose, so they maintain, questions such as financial and political feasibility must be left entirely out of account. I am quite unable to accept that Parliament can have intended to hamstring the discretion in such a mechanical and unrealistic way. Parliamentary government is a matter of practical politics. Parliament cannot be taken to have legislated on the assumption that the general state of affairs in which it was thought desirable and feasible to create the power to bring a new regime into effect will necessarily persist in the future. Further study may disclose that the scheme has unexpected administrative flaws which would make it positively undesirable to implement it as enacted, or (for example) it might happen that a ruling of the European Court of Human Rights would disclose that persistence with the scheme would contravene the international obligations of the United Kingdom. Financial circumstances may also change, just as the Secretary of State

maintains that they have changed in the present case; the scheme may prove unexpectedly expensive, or a newly existing or perceived need for financial stringency may leave insufficient resources to fund public expenditures which might otherwise be desirable. I cannot attribute to Parliament an intention that all the provisions of this Act falling within s 171(1), not limited as we have seen to the criminal injuries scheme, and all the relevant provisions of the numerous other statutes in which a similar formula is used, will be brought inexorably into effect as soon as it is physically possible to do so, even if the country can no longer afford them.

A less extreme version of this submission, albeit one which would not yield success for the applicants in the present dispute, is that the Secretary of State is entitled and bound to take into account all relevant considerations, including financial practicability, but that as soon as it becomes feasible in the more general sense to do so he is compelled to appoint a day. My Lords, I am constrained to hold that this alternative must also be rejected, for more than one reason. In the first place, it postulates that instead of reserving to itself the power, through the use of its own methods, to ensure that ministers do not delay unduly in the appointment of a day, Parliament has chosen to create and through the medium of s 117(1) has expressed in the Act, a duty owed to the public at large and capable of enforcement in the courts.

If this is right, it must follow inevitably that though there is implicit in s 171(1) a surrender by Parliament to the courts of a power not only to investigate whether the Secretary of State in failing to appoint a day and hence to bring primary legislation into force has acted in a way which is, in a legal sense, irrational but also, if all else fails, and if the Secretary of State is obdurate in the face of a declaration as to the true legal position, to make an order of mandamus against him, backed by the threat of imprisonment. That this is indeed the consequence of the applicants' submission is shown by the fact that just such an order forms part of the relief claimed in these proceedings. For the courts to grant relief of this kind would involve a penetration into Parliament's exclusive field of legislative activity far greater than any that has been contemplated even during the rapid expansion of judicial intervention during the past 20 years. Recalling that your Lordships, in your appellate capacity, are concerned when dealing with the first question brought before them solely with a question of statutory interpretation it must be asked whether Parliament, jealous as it is of its prerogatives and possessed as it is of its own special means to scrutinise and control the actions of ministers, can have intended to create, through the medium of s 171(1), any such rights and remedies. I do not believe that it can.

The second reason is that a legal regime of this kind would be so lacking in precision that it can scarcely have been the intention of Parliament to create it. Where the exercise of power is challenged it is possible for the court to assess the question of irrationality in the light of the relevant factors as they stood at the relevant time. Once taken, the decision can once and for all be put in question. But if the applicants are right and the non-exercise of the power was intended by Parliament to be controllable by the courts, a continuing omission to appoint a day, under any one of the innumerable statutory provisions subject to the same regime as is created for the 1988 Act by s 171(1), would be continuously open to challenge in the light of the changing interplay of practicality and policy in the light of which decisions of this kind must be made. It seems to me highly improbable that Parliament would have wished to make justiciable in court what

are essentially political and administrative judgments, rather than retain them for its own scrutiny and enforcement.

The third and simplest reason is that the words of s 171(1) do not mean what the applicants wish them to say. It is true that 'may' is capable of denoting 'shall' if the context so demands, but this is not the customary usage. If one looks to the Act at large, taking Pt VII as an example, the words appear more than 30 times, omitting compound expressions such as 'shall only' and 'shall not'. It is to my mind beyond doubt that in every one of these instances 'may' invokes a choice and 'shall' an order. Looking next at the immediate context of the word 'may' in s 171(1), we find that, only a few words before, 'shall' is used in its natural sense, which makes it unlikely that the draftsman immediately afterwards chose 'may' to convey the same meaning; and if one seeks guidance elsewhere in the section there is no need to go further than sub–s (3), where it is quite clear that 'may' does not denote an unqualified obligation. If Parliament had intended to compel the Secretary of State to bring Pt VII and all the other provisions governed by s 171(1) into force just as soon as practicable, it could easily have said so. In my opinion it has not.

V

For these reasons I would reject the argument that the continuing omission to implement the statutory scheme was a breach of any duty arising from s 171(1). There remains the question whether the positive act of the Secretary of State in announcing that he would not implement the scheme in the interval which remained before the statutory underpinnings were removed was in itself an unlawful act. At first acquaintance an alternative answer can be made to seem quite plausible. The tone of the White Paper and of the utterances in Parliament can be presented as a defiance of the will of Parliament, embodied in Pt VII of the Act. There may be substance in this complaint, which has already been voiced in Parliament, and which may be voiced again if the Houses ever have occasion to discuss the obligations owed by a minister to Parliament in respect of powers entrusted to him under provisions such as s 171(1). But the substance, if there is any, is one of Parliamentary practice, expectation and courtesy, not of public law. If there is no duty to bring the relevant provisions into force, there can be no breach of duty simply by announcing in advance that the non-existent duty will not be performed. I must emphasise the words 'simply by', for it is possible that such an announcement could be evidence of a lack of the good faith which, as the Lord Advocate freely acknowledged, is an indispensable element of the lawful exercise of the discretion conferred by s 171(1), as much as of any other statutory discretion. But this is out of context here. Although the applicants, and no doubt others, object to the substance of the change as well as to the way in which it has been done, it has not been suggested, and on the facts could not properly have been suggested, that the Secretary of State has acted in bad faith, in any sense relevant to such control of his discretion as the courts can properly exercise through the medium of judicial review.

VI

I turn to the second area of complaint, which relates to the implementation of the new scheme in a form which differs radically from that contained in Pt VII of the Act. This complaint is advanced in two ways. First, that the actions and statements of the Secretary of State were an abuse of the powers conferred by

s 171(1). Secondly, that the powers exercisable under the royal prerogative were limited by the presence in the background of the statutory scheme.

At first sight a negative answer to each of these averments seems inevitable, once given the premise that s 171(1) creates no duty to appoint a day. As regards the Act, in a perspective which may never yield a statutory scheme, the possibility of substituting one non-statutory scheme for another must have been just as much envisaged and tolerated as was the continuation of the existing non-statutory scheme, or indeed the termination of any scheme at all. The interval between the passing of the Act and the bringing into force of Pt VII, if it ever happened, was simply a statutory blank.

So too, it would appear, as regards the argument based on the royal prerogative. The case does not fall within the principle of *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508, [1920] All ER Rep 80. There, in the words of Lord Dunedin, it was established that 'if the whole ground of something which is covered by the prerogative could be done by the statute, it is the statute that rules' (see [1920] AC 508 at 526, [1920] All ER Rep 80 at 86). Thus, if in the present case Pt VII had been brought into force there was no room left for the exercise of that aspect of the prerogative which had enabled the Secretary of State to establish and maintain the scheme. Once the superior power of Parliament has occupied the territory, the prerogative must quit the field. In the present case, however, the territory is quite untouched. There is no Parliamentary dominion over compensation for criminal injuries, since Parliament has chosen to allow its control to be exercised today, or some day, or never, at the choice of the Secretary of State. Until he chooses to call the Parliamentary scheme into existence there is a legislative void and the prerogative subsists untouched. The position is just the same as if Pt VII had never been enacted, or had been repealed soon afterwards.

This is not to say that the decisions of the Secretary of State in the exercise of the prerogative power to continue, modify or abolish the scheme which his predecessor in the exercise of the same power had called into existence are immune from process. They can be called into question on the familiar grounds: *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 All ER 770, [1967] 2 QB 864. But no question of irrationality arises here, and the decision to inaugurate a new scheme cannot be rendered unlawful simply because of its conflict on paper with a statutory scheme which is not part of the law.

VII

My Lords, I introduced the preceding discussion with the words 'At first sight' because the applicants have a further (and to my mind altogether more formidable) argument which challenges the implicit assumption that in the absence of a duty to appoint a day the Secretary of State's dealings with the compensation scheme are entirely free from statutory restraint. Contrary to this assumption, it is said, there is no statutory void; for although Pt VII is not itself in force, s 171(1) is in force and must not be ignored. The continued existence of s 171(1) means that, even if there is no present duty to appoint a day, there is a continuing duty, which will subsist until either a day is appointed or the relevant provisions are repealed, to address in a rational manner the question whether the power created by s 171(1) should be exercised. This continuing duty overshadows the exercise by the Secretary of State of his powers under the royal prerogative.

belongs to the executive, not only to verify that the powers asserted accord with the substantive law created by Parliament, but also, that the manner in which they are exercised conforms with the standards of fairness which Parliament must have intended. Concurrently with this judicial function Parliament has its own special means of ensuring that the executive, in the exercise of delegated functions, performs in a way which Parliament finds appropriate. Ideally, it is these latter methods which should be used to check executive errors and excesses; for it is the task of Parliament and the executive in tandem, not of the courts, to govern the country. In recent years, however, the employment in practice of these specifically Parliamentary remedies has on occasion been perceived as falling short, and sometimes well short, of what was needed to bring the performance of the executive into line with the law and with the minimum standards of fairness implicit in every Parliamentary delegation of a decision-making function. To avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers the courts have had no option but to occupy the dead ground in a manner, and in areas of public life, which could not have been foreseen 30 years ago. For myself, I am quite satisfied that this unprecedented judicial role has been greatly to the public benefit. Nevertheless, it has its risks, of which the courts are well aware. As the judges themselves constantly remark, it is not they who are appointed to administer the country. Absent a written constitution much sensitivity is required of the parliamentarian, administrator and judge if the delicate balance of the unwritten rules evolved (I believe successfully) in recent years is not to be disturbed, and all the recent advances undone. I do not for a moment suggest that the judges of the Court of Appeal in the present case overlooked this need. The judgments show clearly that they did not. Nevertheless some of the arguments addressed would have the court push to the very boundaries of the distinction between court and Parliament established in, and recognised ever since, the Bill of Rights 1688. Three hundred years have passed since then, and the political and social landscape has changed beyond recognition. But the boundaries remain; they are of crucial significance to our private and public lives; and the courts should, I believe, make sure that they are not overstepped.

VII

For these reasons I would allow the appeal and dismiss the cross-appeal.

LORD LLOYD OF BERWICK. My Lords, until 1964 victims who suffered personal injuries as a result of crimes of violence had no remedy other than the right, almost always worthless, to sue the person who caused the injury. On 24 June 1964 a scheme was announced in both Houses of Parliament whereby ex gratia payments were to be paid to victims of violent crime. The scheme was widely welcomed. It was regarded by many as long overdue. Compensation was assessed on an individual basis by the Criminal Injuries Compensation Board, a non-statutory body consisting of Queen's Counsel and other senior lawyers experienced in the personal injury field. The basis of compensation was the amount which the victim would have been entitled to recover in an action for tort against the wrongdoer, including damages for pain and suffering, and loss of earnings, subject, however, in the case of loss of earnings to an upper limit.

In March 1978 the Royal Commission on Civil Liability and Compensation for Personal Injury, under the chairmanship of Lord Pearson (see Cmnd 7054-I), recommended that the scheme should be put on a statutory basis, and that

compensation should continue to be based on damages recoverable in tort. Six years later the Home Secretary of the day appointed an inter-departmental working party to review the position and make recommendations. The government accepted the working party's recommendations. They introduced legislation, now contained in ss 108 to 117 of and Schs 6 and 7 to the Criminal Justice Act 1988. The Act received the royal assent on 29 July 1988. But the statutory scheme has never been brought into force. Furthermore, in para 38 of a White Paper, *Compensating Victims of Violent Crime: Changes to the Criminal Injuries Compensation Scheme* (Cm 2434) published in December 1993 the government announced that the relevant provisions of the 1988 Act 'will not now be implemented.'

It might cause surprise to the man on the Clapham omnibus that legislative provisions in an Act of Parliament, which have passed both Houses of Parliament and received the royal assent, can be set aside in this way by a member of the executive. It is, after all, the normal function of the executive to carry out the laws which Parliament has passed, just as it is the normal function of the judiciary to say what those laws mean. The explanation, if there is one, is to be found in s 171 of the 1988 Act, to which I will shortly return.

But first I should mention the history of the proceedings so far. On 23 November 1992 the Home Secretary announced the government's intention of introducing a new scheme. This scheme, known as the tariff scheme, was published on 9 March 1994. It differs in certain fundamental respects from the statutory scheme. On 22 March 1994 the Fire Brigades Union and a number of other unions, whose members are especially exposed to injuries from crimes of violence, obtained leave to apply for judicial review. In their evidence they point out that the tariff scheme is less favourable to their members, first, because it is based on a flat rate instead of being assessed on a case by case basis by members of the board and, secondly, because it excludes altogether compensation for loss of earnings. One can get some idea of how much less favourable the new scheme is from figures produced by the Home Office. By the beginning of the next century the estimated annual cost under the tariff scheme will be about £225m, whereas under the statutory scheme it would be about double. No doubt part of this difference can be explained by a saving in the cost of administration.

The applicants challenge the decision of the Home Secretary not to bring into force the relevant sections of the 1988 Act. They also challenge his decision to implement the tariff scheme, which they say is altogether inconsistent with the statutory scheme approved by Parliament.

Staughton LJ and Buckley J in the Divisional Court ([1994] PIQR 320) dismissed the application. They held that the Home Secretary was under no duty to bring the statutory scheme into force. But their decision was reversed by the Court of Appeal ([1995] 1 All ER 888, [1995] 2 WLR 1) on a ground which may not have been fully developed in the court below. Sir Thomas Bingham MR held that the Home Secretary was under a duty to bring the statutory scheme into operation as soon as he might properly judge it appropriate, but, on the facts, he found that the Home Secretary was not in breach of that duty. Sir Thomas Bingham MR went on to hold, however, that the Home Secretary was not entitled to introduce a scheme radically different from what Parliament has approved so long as the 1988 provisions stand unrepealed as an enduring statement of Parliament's will.

Morritt LJ disagreed with Sir Thomas Bingham MR on the first point. He held that there was no duty to bring the statutory scheme into force. But he agreed

with Sir Thomas Bingham MR on the second point, that it was an abuse of the discretionary statutory power conferred on the Crown under s 171 of the 1988 Act to introduce a compensation scheme 'wholly at variance' with the statutory scheme.

Hobhouse LJ dissented. In a forceful judgment he held that there was no duty to implement the statutory scheme, in this respect agreeing with Morritt LJ. But he also held that there was no abuse of power. I quote the last paragraph of his judgment ([1995] 1 All ER 888 at 908, [1995] 2 WLR 1 at 21):

> 'The argument on abuse of power is really another way of putting the same arguments. The difference is that the appellants do not need for this purpose to say that the minister has acted ultra vires. But they still have to make good the proposition that there is something unlawful about what the minister has done in introducing the tariff scheme. That they cannot do. There is no law in force which makes the minister's actions unlawful. There is no excess of authority or infringement of authority. The only authority which the minister requires is that which he has received from Parliament in the constitutional fashion. How it can be said that it is an abuse for the minister to apply moneys voted by Parliament for a stated purpose to that purpose escapes me. Similarly, it cannot be said that it is contrary to the will of Parliament. The argument on abuse of power is not founded upon any coherent principle, nor is the legal basis for it made good.'

I now come to s 171 of the Act. A number of provisions of the Act came into force on the day the Act was passed, including s 171 itself: see s 171(5). Other provisions came into force two months later: see s 171(6). Sections 108 to 117 are not covered by either of these subsections. They are covered by s 171(1) to (3), which are:

> '(1) Subject to the following provisions of this section, this Act shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint and different days may be appointed in pursuance of this subsection for different provisions or different purposes of the same provision.
>
> (2) An order under this section may make such transitional provision as appears to the Secretary of State to be necessary or expedient in connection with any provision thereby brought into force other than a provision contained in sections 108 to 117 above or in Schedule 6 or 7 to this Act.
>
> (3) The Secretary of State may by regulations made by statutory instrument make such provision as he considers necessary or expedient in preparation for or in connection with the coming into force of any provision contained in those sections or Schedules.'

Mr Elias QC argues that the purpose of conferring on the Home Secretary the power to bring ss 108 to 117 into force is apparent from s 171(3). It was to enable the Home Secretary to make regulations by statutory instrument 'in preparation for or in connection with the coming into force' of those sections. Parliament could not tell how long it would take to make the necessary regulations. So instead of providing that ss 108 to 117 should come into force after six months or a year, or other finite period, it left the date blank. It was for the Home Secretary to fill in the blank when the necessary administrative arrangements had been put in place.

I agree with Mr Elias that s 171(3) throws light on the purpose for which Parliament conferred on the Home Secretary the power to bring the sections into force. But quite apart from s 171(3), I would construe s 171 so as to give effect to, rather than frustrate, the legislative policy enshrined in ss 108 to 117, even though those sections are not in force. The mistake which, if I may say so, underlies the dissenting judgment of Hobhouse LJ is to treat these sections as if they did not exist. True, they do not have statutory force. But that does not mean they are writ in water. They contain a statement of Parliamentary intention, even though they create no enforceable rights. Approaching the matter in that way, I would read s 171 as providing that ss 108 to 117 *shall* come into force *when* the Home Secretary chooses, and not that they *may* come into force *if* he chooses. In other words, s 171 confers a power to say when, but not whether.

If that is the right construction of s 171, then the intention of Parliament in enacting that section is exactly, and happily, mirrored by the reaction of the hypothetical man on the Clapham omnibus. The Home Secretary has power to delay the coming into force of the statutory provisions in question; but he has no power to reject them or set them aside as if they had never been passed.

I now return to the facts. The initial delay in bringing the sections into force may have been regrettable, but was hardly surprising, considering that it took over ten years for the government to act on the recommendations of the Royal Commission on Civil Liability and Compensation for Personal Injury (Cmnd 7054-I (1978), chairman Lord Pearson). Moreover, as the evidence makes clear, the board itself requested some delay owing to its heavy workload at the time. I do not think anything which the Home Secretary did, or failed to do, during the period of four years between 1988 and 1992 can be characterised as a misuse of his power under s 171. As Staughton LJ pointed out in the Divisional Court, the statute book is littered with statutory provisions which have never been brought into force for one reason or another (see [1994] PIQR 320 at 327). The Easter Act 1928 is a good example.

The situation changed on 23 November 1992 when the Home Secretary announced in Parliament that he intended to replace the existing non-statutory scheme by the tariff scheme; and this was confirmed on publication of the White Paper (Cm 2434), which stated in terms (para 38) that the statutory scheme 'will not now be implemented'.

I can find nothing in s 171 which, on its true construction, justifies the Home Secretary's refusal to implement the statutory scheme. Whether that refusal should be regarded as an abuse of the power which he was given under s 171, or as the exercise of a power which he has not been given, does not matter. The result is the same either way. By renouncing the statutory scheme, the Home Secretary has exceeded his powers, and thereby acted unlawfully. It is the paramount duty of the courts to say so. If authority is needed for the simple proposition that a minister must act within the powers granted by Parliament, and for the purposes for which those powers were conferred, it is to be found in *Padfield v Minister of Agriculture Fisheries and Food* [1968] 1 All ER 694, [1968] AC 997. In this connection it is worth emphasising, yet again, that although ss 108 to 117 have not been brought into force, s 171 has been in force since the day the Act was passed.

The Lord Advocate advanced an ingenious argument in reply. Given that the Home Secretary has power to say *when* the sections come into place, let it be assumed that he had appointed a day five years hence. Surely, goes the

argument, the Home Secretary must have power to substitute a non-statutory scheme in the meantime?

There is a short answer to this argument. If one assumes that the postponement for five years was a valid exercise of the power conferred by Parliament, then of course the Home Secretary would be free to continue the existing non-statutory scheme in the meantime, as he has in the past, or substitute another scheme, whether more or less favourable to the victims of violent crime. But the assumption begs the question. It is the decision of the Home Secretary to renounce the statutory scheme and to surrender his power to implement it, which constitutes the abuse of power in the present case, not the substitution of an interim measure. In any event, it is clear from the White Paper that the tariff scheme is not an interim measure.

Then it was said that the Home Secretary has not abused his power under s 171 of the Act because it is always open to him to change his mind. He cannot bind his successors, whether in this or any other administration. So another Home Secretary may at any time decide to implement the statutory scheme after all.

I regard this as little short of fanciful. Ministers must be taken at their word. If they say that they will not implement the statutory scheme, they are repudiating the power conferred on them by Parliament in the clearest possible terms. It is one thing to delay bringing the relevant provisions into force. It is quite another to abdicate or relinquish the power altogether. Nor is that all. The government's intentions may be judged by their deeds as well as their words. The introduction of the tariff scheme, which is to be put on a statutory basis as soon as it has had time to settle down, is plainly inconsistent with a continuing power under s 171 to bring the statutory scheme into force.

Finally, it is said that to grant the applicants relief in a case such as this would be an intrusion by the courts into the legislative field, and a usurpation of the function of Parliament. If the Home Secretary has trespassed, it is for Parliament to correct him. It is most unlikely, so the argument goes, that Parliament intended to confer on the courts the power to declare that the Home Secretary has acted unlawfully.

I find this argument difficult to understand. The duty of the court to review executive action does not depend on some power granted by Parliament in a particular case. It is part of the court's ordinary function in the day-to-day administration of justice. If a minister's action is challenged by an applicant with sufficient locus standi, then it is the court's duty to determine whether the minister has acted lawfully, that is to say, whether he has acted within the powers conferred on him by Parliament. If the minister has exceeded or abused his power, then it is the ordinary function of the Divisional Court to grant appropriate discretionary relief. In granting such relief the court is not acting in opposition to the legislature, or treading on Parliamentary toes. On the contrary: it is ensuring that the powers conferred by Parliament are exercised within the limits and for the purposes which Parliament intended. I am unable to see the difference in this connection between a power to bring legislation into force and any other power.

Nor, with respect, can I understand the concept, or relevance, of a duty owed to Parliament, as distinct from a duty owed to the public at large. Some cases are more likely to attract Parliamentary attention than others. But the availability of judicial review is unaffected.

No court would ever depreciate or call in question ministerial responsibility to Parliament. But as Professor Sir William Wade points out in Wade and Forsyth

Administrative Law (7th edn, 1994) p 34, ministerial responsibility is no substitute for judicial review. In *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93 at 107, [1982] AC 617 at 644 Lord Diplock said:

> 'It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.'

It may be that I have misunderstood the Lord Advocate's argument on this point. But if I have stated it correctly, then I fear that it would, if accepted, put the clock back 30 years or more.

There was much discussion in the courts below, and before your Lordships, about the scope of the prerogative, and reference was made in that connection to *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508, [1920] All ER Rep 80. I agree with Hobhouse LJ that the principles established in that case do not touch directly on the present problem.

I do not find it necessary to decide whether, as Sir Thomas Bingham MR held, the Home Secretary was under a duty to bring the sections into force as soon as he judged it appropriate, or whether, as the Lord Advocate conceded, his duty was limited to keeping the exercise of the power under review. I can see that the former view might present difficulties. I prefer to decide the appeal on the alternative ground favoured by Sir Thomas Bingham MR and Morritt LJ, namely that the Home Secretary has exceeded or abused the power conferred on him by Parliament, and thereby acted unlawfully. I would dismiss both appeal and cross-appeal.

LORD NICHOLLS OF BIRKENHEAD. My Lords, this case involves two powers, one statutory and the other common law. The statutory power is the power given to the Secretary of State by s 171(1) of the Criminal Justice Act 1988. This section came into force on the day the Act received the royal assent: 29 July 1988. By this section the Secretary of State was empowered to make an order, by statutory instrument, appointing a day on which other sections of the Act, including ss 108 to 117, shall come into force. Sections 108 to 117 set up the criminal injuries compensation scheme. This scheme would put the existing ex gratia scheme on to a statutory footing.

The common law power is the prerogative power of the Crown. In this context the prerogative power can be sufficiently described as the residue of discretionary power left at any moment in the hands of the Crown.

The case turns on the interaction of these two powers. The commencement day power in s 171(1) is in force, but it has not been exercised in respect of ss 108 to 117. The question of law which has to be addressed is whether, so long as this remains the position, this power nevertheless operates to limit the manner in which, or the purposes for which, the prerogative power may lawfully be exercised in the field to which ss 108 to 117 relate. The question of fact which arises is whether, if the existence of s 171(1) does operate to curtail the prerogative power, the Secretary of State has overstepped the mark in introducing the new, ex gratia 'tariff' scheme.

There would be no difficulty if ss 108 to 117 were repealed. The field of compensation for victims of criminal injuries would then be wide open for the prerogative power. The position in law would become as it was before the 1988 Act was passed. There could then be no question of a statutory impediment to setting up and making payments under a new tariff scheme in exercise of the prerogative. Likewise, although for a different reason and with a different result, the position would be straightforward if the commencement day power in s 171(1) were exercised and ss 108 to 117 came into force. With the new statutory scheme in operation, the present problem could not arise. The problem arises only because at present ss 108 to 117 exist, but exist only in embryonic form.

The commencement day provision

I must start with some general comments about commencement day provisions. The first point to note is that s 171(1) is a common form provision. This form of words is widely used in many Acts of Parliament. There is nothing special about the wording of the provision in this Act. Secondly, the purpose for which this common form provision exists is to facilitate bringing legislation into force. Parliament enacts legislation in the expectation that it will come into operation. This is so even when Parliament does not itself fix the date on which that shall happen. Conferring power on the executive to fix the date will often be the most convenient way of coping with the practical difficulty that when the legislation is passing through Parliament, it is not always possible to know for certain what will be a suitable date for the legislation to take effect. Regulations may need drafting, staff and accommodation may have to be arranged, literature may have to be prepared and printed. There may be a host of other practical considerations. A wide measure of flexibility may be needed. So the decision can best be left to the minister whose department will be giving effect to the legislation when it is in operation. He is given a power to select the most suitable date, in the exercise of his discretion.

Thirdly, although the purpose of the commencement day provision is to facilitate bringing legislation into effect, the width of the discretion given to the minister ought not to be rigidly or narrowly confined. The common form commencement day provision is applicable to all manner of legislation and it falls to be applied in widely differing circumstances. The range of unexpected happenings is infinite. In the course of drafting the necessary regulations, a serious flaw in the statute might come to light. An economic crisis might arise. The government might consider it was no longer practicable, or politic, to seek to raise or appropriate the money needed to implement the legislation for the time being. In considering whether the moment has come to appoint a day, as a matter of law the minister must be able to take such matters into account. Of particular relevance for present purposes, as a matter of law the minister must be entitled to take financial considerations into account when considering whether to exercise his power and appoint a day. It goes without saying that the minister will be answerable to Parliament for his decision, but that is an altogether different matter.

A duty to consider

The next point to note is that in the present case the complaint is not about the *exercise* by the Secretary of State of the power given him by s 171(1). The complaint is about the *non-exercise* of the power. A failure to exercise a power can only be the subject of complaint if the person entrusted with the power has

thereby acted in breach of some duty imposed on him, or acted improperly in some other respect.

On its face the commencement day provision confers on the minister a power to appoint a commencement day, rather than imposing upon him a duty to do so. In my view, this provision is not to be read as imposing a duty which, if not carried out, could be the subject of a mandatory order by a court directing him to appoint a day on pain of being in contempt of court. In the first place, a legal duty to appoint would be substantially empty of content in view of the wide range of circumstances the minister can properly take into account in deciding whether or not to appoint a commencement day. Secondly, and much more importantly, a court order compelling a minister to bring into effect primary legislation would bring the courts right into the very heart of the legislative process. But the legislative process is for the legislature, not the judiciary. The courts must beware of trespassing upon ground which, under this country's constitution, is reserved exclusively to the legislature. Clearer language, or a compelling context, would be needed before it would be right to attribute to Parliament an intention that the courts should enter upon this ground in this way.

Nevertheless, although he is not under a legal *duty to appoint* a commencement day, the Secretary of State is under a legal *duty to consider* whether or not to exercise the power and appoint a day. That is inherent in the power Parliament has entrusted to him. He is under a duty to consider, in good faith, whether he should exercise the power. Further, and this is the next step, if the Secretary of State considers the matter and decides not to exercise the power, that does not end his duty. The statutory commencement day power continues to exist. The minister cannot abrogate it. The power, and the concomitant duty to consider whether to exercise it, will continue to exist despite any change in the holders of the office of Secretary of State. The power is exercisable, and the duty is to be performed, by the holder for the time being of the office of one of Her Majesty's Principal Secretaries of State: see the Interpretation Act 1978, ss 5 and 12(2) and Sch 1. So, although he has decided not to appoint a commencement day for ss 108 to 117, the Secretary of State remains under an obligation to keep the matter under review. This obligation will cease only when the power is exercised or Parliament repeals the legislation. Until then the duty to keep under review will continue.

This statutory duty is not devoid of practical consequence. By definition, the continuing existence of this duty has an impact on the Secretary of State's freedom of action. Since the legislature has imposed this duty on him, it necessarily follows that the executive cannot exercise the prerogative in a manner, or for a purpose, inconsistent with the Secretary of State continuing to perform this duty. The executive cannot exercise the prerogative power in a way which would derogate from the due fulfilment of a statutory duty. To that extent the exercise of the prerogative power is curtailed so long as the statutory duty continues to exist. Any exercise of the prerogative power in an inconsistent manner, or for an inconsistent purpose, would be an abuse of power and subject to the remedies afforded by judicial review.

The non-introduction of the statutory scheme

I turn now to the facts of the present case. The Home Secretary has made plain that he has decided not to bring ss 108 to 117 into force. The statutory scheme would be too expensive. The picture, he says, has been changing dramatically,

even since the passing of the 1988 Act. Administrative costs continue to escalate. The volume of cases has gone up by one-half and is still rising. The amount paid out in compensation has increased threefold. Without change, the estimated annual cost of compensation by the year 2000/01 would be some £550m. The view of the government is that this rate of growth is not sustainable or appropriate for a state scheme funded by the taxpayer. Growth in expenditure on compensation for criminal injuries can only be provided at the cost of other socially desirable objectives such as schools and hospitals. The country cannot now afford the scheme.

It follows from what I have set out above that, in my view, the Home Secretary was entitled, as a matter of law, to take these financial considerations into account when deciding whether to bring ss 108 to 117 into force.

The Secretary of State went further than merely deciding not to bring ss 108 to 117 into force for the time being. He went further, in two interlinked respects. First, the government have made plain that it regards the statutory scheme as a dead letter. Paragraph 38 of the White Paper, *Compensationg Victims of Violent Crime: Changes to the Criminal Injuries Compensation Scheme* (Cm 2434), presented to Parliament in December 1993 by the Secretary of State for the Home Department and the Secretary of State for Scotland, stated:

> '... With the impending demise of the current scheme the provisions in the 1988 Act will not now be implemented. They will accordingly be repealed when a suitable legislative opportunity occurs.'

As to this, it follows from the general observations made above that by treating his decision as the last word on this subject, the Secretary of State misunderstood the extent of his duty in respect of the commencement day power. He failed to appreciate that, so long as the commencement day power remains unrepealed, he is obliged to keep the exercise of that power under review.

I do not consider this misapprehension by the Secretary of State is a matter calling for relief. In the course of his submissions the Lord Advocate accepted that the Secretary of State is under a duty to keep the exercise of the commencement day power under review. Sending the matter back to the Secretary of State to consider this afresh now would be a pointless exercise. There can be no doubt that, for the financial reasons already noted, his decision would still be against bringing ss 108 to 117 into operation at present.

The introduction of the tariff scheme

In a second respect the Home Secretary went further than deciding not to bring the statutory scheme into operation. He decided to replace the existing ex gratia scheme with a new, less expensive scheme. Under the tariff scheme the estimated annual cost of compensation by the year 2000/01 would be about £225m. This is half the corresponding estimated cost of the statutory scheme and, hence, of the existing ex gratia scheme.

Herein lies the real difficulty in this case. In the ordinary run of things, where the carrying out of legislation would be too expensive in the view of the minister, the answer may be simple: postpone bringing the legislation into force. In the present case that simple course will not provide an answer to the financial problem perceived by the government. Letting matters continue as they are, with the existing ex gratia scheme in force, would cost just as much as the statutory scheme.

In these circumstances, so the argument runs, the Secretary of State cannot be obliged to continue the existing ex gratia scheme. If he is entitled to decide not to bring ss 108 to 117 into operation for financial reasons, he cannot be under a legal obligation to maintain in force the equally expensive ex gratia scheme. That, it is said, cannot be the effect of the commencement day provision. That would be to read far too much into this common form provision. The Secretary of State must be at liberty, while keeping the exercise of the commencement day power under review, to cut the cost of the ex gratia scheme. He must be at liberty to reduce the amounts paid out to victims as compensation. He must be able to make other alterations, designed to reduce administrative costs and to produce a scheme which is fair but simpler and speedier to operate. In other words, he must be entitled to introduce and operate a revised scheme while keeping the exercise of the commencement day power under consideration from time to time. That is what he has done. This argument brings me to the crucial question in the present case. As already noted, pending the exercise of the commencement day power or its repeal the Secretary of State can act only within the constraint imposed by the duty attendant upon the continuing existence of that power. He cannot lawfully do anything in this field which would be inconsistent with his thereafter being able to carry out his statutory duty of keeping the exercise of the commencement day power under review. If he wishes to act in a manner or for a purpose which would be inconsistent in this respect, he must first return to Parliament and ask Parliament to relieve him from the duty it has imposed on him. Parliament should be asked to repeal ss 108 to 117 and the relating commencement day provision.

The crucial question is whether the Secretary of State has taken such an inconsistent step in this case. Expressed in different words, but to the same effect: is the introduction of the tariff scheme inconsistent with the Secretary of State being able henceforth to keep under consideration the practicability and desirability of exercising the commencement day power and bringing the statutory scheme into effect? The answer to this question depends upon an appraisal of the facts. It is on this point that the views of your Lordships are divided.

It is true that the Secretary of State has done nothing which is irrevocable. The terms of the new scheme are not immutable. In that sense, despite the introduction now of the tariff scheme, it would still be open to him at a future date to discontinue the new scheme and bring the statutory scheme into operation in its place. However, it seems to me that such an evaluation of the facts is detached from reality. The new tariff scheme is not intended as a temporary solution while the minister awaits a more propitious moment at which to bring ss 108 to 117 into operation. The new ex gratia scheme is intended to mark out the way ahead for the foreseeable future. It is intended to be the long-term replacement of the existing ex gratia scheme and its statutory embodiment. It is an alternative, not a stopgap. It is being brought into operation on the footing that ss 108 to 117 will never come into operation. The Home Secretary will, of course, monitor the operation of the tariff scheme. He will consider recommending to Parliament that the tariff scheme itself should be put on to a statutory basis once it has had time to settle down and any teething troubles have been resolved. But there is no expectation of ever bringing the statutory scheme into operation.

This is not just a matter of words, or of presentation. The matter goes beyond ministerial statements of intention. The steps being taken would in practice make it very difficult, if not impossible, for the Home Secretary at any time in the

future to exercise the commencement day power. The Criminal Injuries Compensation Board will be dismantled, and a new authority will replace it. There will be other major procedural changes. The inescapable conclusion is that the Home Secretary has effectually 'written off' the statutory scheme and that once the tariff scheme has been introduced, there would be no realistic prospect of him being able to keep the exercise of the commencement day power under review. By setting up the tariff scheme the minister has set his face in a different direction. He has struck out down a different route and thereby disabled himself from properly discharging his statutory duty in the way Parliament intended. For this reason the new scheme is outside the powers presently vested in him. I would dismiss both the appeal and the cross-appeal.

Appeal and cross-appeal dismissed.

Celia Fox Barrister.