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CHILD LAW - A WAY OUT THE CONFUSION?

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This is the text of the Trent Law Journal lecture as delivered on 13 March 1985.

There is currently great interest in reforming, clarifying, simplifying or even just codifying the law on rights and duties relating to children. The Law Commission has just begun a review of the private law. Civil servants from the DHSS, Home Office and Lord Chancellor's Department, with the Law Commission are considering the public law aspects - the law relating to children in the care of local authorities.[1] The latter group has produced 13 consultation papers on which responses were requested by the end of May 1985. In addition to all this, of course, we await the decision to the House of Lords in **Gillick**,[2] a decision which cannot fail to have considerable importance for both the private and public law relating to children.

Why all this activity? A major motivation is a desire to reduce the complexity of the law. Academics have noted this complexity for years[3] and a glance at any of the standard texts on the subject should convince anyone of the need for greater logic and clarity. It is ironic that this area of law which particularly concerns laypeople parents and social workers should be so needlessly technical and incomprehensible. The Short Report commented that a review should be undertaken with a view to "the production of a simplified and coherent body of law comprehensible not only to those operating it but also to those affected by its operation. It is not just to make life easier for practitioners that the law must be sorted out; it is for the sake of justice....."(para 119). The Law Commission similarly emphasises that the need is for simplification and rationalisation rather than radical change.[4]

The complexity of the law arises mainly from the following:

(a) There is no clear or adequate definition of parental rights and duties and correspondingly the rights of those who purport to exercise all or some of them.

(b) There are too many different legal concepts purporting to describe or define the relationship of a child with its carer, including "natural" parent, guardian, adoptive parent, custodianship, "ordinary" custody, "legal" custody, care and control and so on.

(c) There are too many separate statutes dealing with the upbringing of children and their interrelationship is confused.

(d) There are too many separate jurisdictions dealing with the issues - juvenile benches, domestic benches, county courts (divorce and otherwise), and the High Court, plus confused appellate jurisdictions embracing the crown courts, and the Family Division as well as the Court of Appeal.

Like Topsy, the law has just grown. It seems to be based on few discernable principles apart from the vague criteria of the "welfare of the child" (sometimes "first", sometimes "paramount", sometimes inapplicable). The time is obviously ripe for simplification and clarification but it is unlikely that this can be achieved without a re-examination of basic principles. This in turn may lead to a call for radical change. The issues involve some fundamental value judgements. How much power should parents exercise over their children? How long should this power last? How should it be enforced? Can all these powers be transferred to others, whether compulsorily or by agreement? What are the implications of splitting parental powers between two or more adults? Are there limits on the powers of local authorities to intervene in family life and if so how should they be expressed? Is a local authority really "like a parent" once a child is in care or should its powers be different to those of individual carers?

What are Parental Rights?

Conventionally such investigations into the law begin with an attempt to define "parental rights and duties" and then go on to ascertain what lesser or different rights are enjoyed by those not natural parents.[5] Adoptive parents, foster parents, guardians, custodians, local authorities are all seen as having some, in some circumstances all, of the natural parent's rights. Attempts to define parental rights and duties are now legion in the literature[6] and it is not necessary to further till the ground here. All agree that the law is "confusing and unclear".[7] In the words of Lord Justice Sachs, "the legislation has created a bureaucrats's paradise and a citzen's nightmare."[8]

The literature is also agreed that it is misleading to speak of rights and duties: they are more in the nature of powers and responsibilities. Many, indeed most, of these powers extend to a number of other people "in loco parentis". It is also argued that as the courts must decide cases in the best interest of the child rather than enforce or declare parental rights, the importance of those rights is limited.

The latter point is too court-centred. Parents and others want to know where they stand in relation to rights of custody, access, consent to medical treatment, discipline, travel abroad, administration of property etc without the need to go to court in every case. However the paucity of judicial decisions attempting to define parental rights can be explained by the fact that once a court is seized of the issue, the interests of the child become paramount.

The **Gillick**[9] case is therefore not only important but unusual. It also clearly illustrates both the importance of parental rights themselves and the remedies or procedures that may be involved to enforce or establish them.

Mrs Gillick successfully applied for two orders which were granted in the following terms. The first, against the Health Authority, was that their staff should not provide contraceptive or abortion advice or treatment to any of Mrs Gillick's daughters under 16 without her consent or that of the court except in an emergency. The second, against the DHSS, declared that its circular of December 1980 was "contrary to law". This circular concerned contraception only. After stating that "special care is needed not to undermine parental responsibility and family stability" and that every effort should be made to

involve parents at the earliest opportunity, the circular reminded doctors that consultations between them and patients were confidential and that to abandon this principle in the case of under 16s might cause some of them not to seek professional advice at all. The circular therefore concluded "The Department realises that in such exceptional cases the nature of any counselling must be a matter for the doctor or other professional worker concerned and that the decision whether or not to prescribe contraception must be for the clinical judgement of the doctor".

In the course of deciding for Mrs Gillick in the Court of Appeal, Lord Justice Parker, who gave the leading judgement, ranged widely over the whole field of parental rights and duties. He did not confine his analysis to contraception or abortion, or even to medical treatment generally.[10]

On the wider issue, Lord Parker examined what was meant by the right to custody or control. He relied heavily on S86 of the Children Act 1975. This purports to define "legal custody" as "so much of the parental rights and duties as relate to the person of the child (including the place and manner in which his time is spent)...." Lord Parker considered that this meant that the parent (or other legal custodian) had "the right or duty to determine the place and manner in which a child's time is spent, such right or duty **must** cover the right and duty **completely to control** the child" subject to the intervention of the court (my emphasis). This right lasted until majority (18) unless statute fixed an earlier age (16 in this case of medical treatment). This decision, reversing that of Mr Justice Woolf in the High Court, appears greatly to enhance the legal control that parents have over their minor children. It should be noted that the actual decision in the case covered both medical treatment and **advice** - it would appear that it is a contravention of parental rights event to give advice to a person under 16 without parental consent.[11]

Lord Parker's reasoning is logically defective however. The Children Act 1975 speaks of legal custody as including **"so much"** of the parental rights and duties that relate to a child's person. It does not seek to **quantify** or describe those rights. But Lord Parker concludes that this must mean that parents are empowered "completely to control" their children's activities. This is a far cry from the line taken by the Court of Appeal in **Hewer v Bryant** [12] in which custody was stated by Lord Denning to be " a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with a right of control and ends with a little more than advice."

It also pays scant respect to the more recent House of Lords decision in **R** v D.[13] This case concerned the offence of kidnapping (removing a child forcibily from the possession of its legal custodian) and the relevance of the child's consent in establishing the offence. In deciding that a parent could commit such an offence, Lord Brandon (with whom all the other Lords agreed) said "I see no good reason why.....it should not in all cases be the absence of the child's consent which is material, whatever its age may be. In the case of a very young child, it would not have the understanding or the intelligence to give its consent, so that absence of consent would be a necessary inference from its age. In the case of an older child, however, it must, I think, be a question of fact for a jury whether the child concerned has sufficient understanding and intelligence to give its consent." He considered that it would be unlikely that a jury would find a child under the age of 14 to have such understanding and intelligence.

Also of interest in Lord Brandon's judgement are his comments on the case of **Re Agar-Ellis.[14]** This case was, surprisingly, heavily relied upon by Lord Parker in **Gillick** who quoted with approval Lord Justice Bowen's views on the "natural parental jurisdiction" over children up to the age of 21 as being in accord with the "whole course and order of nature" and necessary to the foundation of family life. Lord Brandon in R v D regarded **Agar-Ellis** as outdated and noted that the common law was capable of adapting to changed social conventions and conditions. He is not, of course, the first judge to criticise **Agar-Ellis.** Lord Denning in **Hewer v Bryant[12]** has said that the case reflected "the attitude of a Victorian parent towards his children."

Gillick is, of course, to be considered by the House of Lords on 24 June 1985. Whatever the decision their Lordships will find it difficult to avoid further consideration and possibly clarification of the notion of parental rights. But it must be remembered that it is not the rights of **parents** only that are being defined. Those rights can be transferred, either voluntarily or by agreement to a host of others - between parents themselves, to step-parents, adoptive parents guardians and local authorities. The fact that in English law it has proved, so far, impossible to define parental rights has no way inhibited the development of a jurisprudence, byzantine in its complexity, relating to the transfer and division of those rights to others.

Division of Parental Rights

The actual substance of parental rights depends heavily on the legal definition of the concept of custody and its distinction from "lesser" rights such as care and control. Defining parental rights in this way however, soon runs into the sand because of the variety of orders that can be made and concepts that can be invoked. On matrimonial breakdown alone the following variety of orders can be made:

1 No order on custody, care and control to one parent.

2 Joint custody, care and control to one parent.

3 Custody to one, care and control to the other.

4 Custody and care and control to one, nothing to other.

5 Custody to one, care and control to third party.

6 Custody to third party.

7 Declaration that one parent unfit for custody.

8 Care order to local authority.

In addition access can be ordered for parents and, sometimes, grandparents.

Moreover the word "custody" does not have a single meaning. Parry[15] identifies at least three meanings where such orders are made in the divorce courts:-

custody in the wide sense (all parental rights)

custody in the narrow sense (effectively care and control)

custody in the intermediate sense (split orders)

But confusion is worse compounded when the legislation relating to guardianship and in the magistrates courts is considered. In these contexts the courts must take on board the "definition" of "legal custody" contained in the Children Act 1975 S86.[**16**] The difference betweeen this and "ordinary" custody under the Matrimonial Causes Act 1973 has, unsurprisingly, defied precise juristic analysis. According to the invaluable Martin Parry, "legal custody" is "narrower than [ordinary] custody in the wide sense" (but then so are the other two definitions of ordinary custody presented by Parry) in that it does not embrace **all** parental rights and duties. What is excluded? This is difficult to determine except that it is expressly provided that legal custody does not confer the right to arrange the child's emigration. Also excluded, probably, are rights to administer or succeed to the child's property.

Complexity does not end here. "Legal" custody, unlike "ordinary" custody, cannot be split, i.e. granted to more than one person. Hence, where "legal" custody is involved, if the court wishes to confer some parental rights on a person not having actual physical control over the child, it must resort to the device contained in S 8(4) of the Domestic Proceedings and Magistrates Courts Act 1978.[**17**]The court must specify the relevant rights and duties and order that they be exercised jointly with the person awarded legal custody.

If the court wishes to award legal custody to a third person (i.e. a person not a parent or party to the marriage) then it must resort to the totally fictional device laid down in S 8(3) of the 1978 Act of "treating" that person as though s/he had applied for a custodianship order under the Children Act 1975.[**18**] Then, even though s/he may not be qualified to apply directly for custodianship, such an order can be made. Just in case any hint of logic or clarity is in danger of surviving all this, it should be noted that although a custodian has "legal" custody there are at least two possible differences between legal position of a custodian and other persons with "legal" custody.[**19**] On top of all this, of course, access to the non-custodian person can be ordered, even though the Children Act definition of "legal" custody includes the right of access.

Further equally tortuous accounts of the law in this field could be given. What conceivable purpose is served by it all? The idea that it is the function of the law to protect and advance the best interests of the child seems to have been left behind long ago. It is obviously time to go back to first principles and start again. Any attempt at fine tuning or adjusting the present Heath Robinson legal machinery is bound to create further confusion and complexity.[**20**]

A New Beginning

First, agreement must be reached on the basic principles that should determine legal reforms. This requires consideration not only of the legislative structure but, obviously, also substantive law.

(a) Legislative Structure

To deal first with the easiest issue, the legislative structure. In its discussion paper on child law, the Law Commission asks -

> "A major step in reducing complexity would be to devise a single statute dealing with the allocation of responsibility for bringing up a child. This would, however, entail the separation of such matters from statutes dealing primarily with adults, in particular the Matrimonial Causes Act 1973 and the Domestic Proceedings and Magistrates Courts Act 1978. Would this matter?"

The answer is that it would not matter. On the contrary it would be desirable. A comprehensive Child Custody and Maintenance Act (or some other suitable title) is urgently needed to deal with all aspects of the private law responsibility for the upbringing of children and for resolving disputes.[**21**] Of course many disputes relating to children will arise and be resolved in the context of matrimonial breakdown. But the resolution of these disputes should come within the ambit of special unified legislation dealing centrally with children. This might encourage both the parties and the courts to cease to regard custody and access as "ancillary" or by-products of the matrimonial dispute. Such a change would also facilitate a genuine integration within a single legal structure of the illegitimate and legitimate child.

(b) Substantive Principles

This is obviously more difficult and more controversial. The current approach, noted at the beginning of this paper, is to define **parental** rights and then ascertain what other or lesser rights can be carved from the whole and attributed or given to other claimants. This approach suffers from three major defects:

1 It prioritises the idea of **parental** rights and duties. It implies that others with rights and duties over children are in an inferior, less desirable position. In its turn this feeling of inferiority leads to pressure from, eg., foster parents or other carers to become as much like natural parents as possible. The result can lead to dishonesty in relationships with children.

2 Concentration on parental rights means that the idea that the child might him or herself have rights, powers, duties, claims etc drops from view.

3 It is often an inappropriate method of proceeding. Developing a bundle of rights, duties etc appropriate to natural parents and their infant children and then transferring this bundle, or some of it, to those in a fundamentally different situation causes problems. The most obvious example of this relates to local authorities who are given "**parental** rights and duties" when by no stretch of the imagination can a local authority - an institution - be described as a parent or indeed any other kind of personal care giver.

Prioritising Parental Rights

This point can be illustrated particularly by the role that adoption plays in English law. Adoptive parents are treated in law as natural parents. They not only have full parental rights and duties but they have them exclusively. Both natural parents and other members of the child's natural family are excluded. Because of this, adoption is the status to which very many caregivers aspire. Whilst this aspiration may be appropriate in the case of a person undertaking the care of a young baby who has had little or no contact with his natural family, its appropriateness is very doubtful where an older child is being adopted, particularly one who has had contact with his natural family and may continue (in fact rather than in legal theory) to have such contact.

This is not the place to undertake an extended critique of the role of adoption. However examples of the conflicts - and its appropriateness - can be seen clearly in the recent study of step-parent adoptions undertaken on behalf of the DHSS.[22] In 1980 60% of adoption orders were made in favour of a natural parent and his or her new spouse.[23] In 96% of these cases adoption was designed to confer parental rights on a step-**father**. Adoption was not needed to exclude the natural father; he had already dropped out of the picture. The adoptions were therefore the product of the concern of adults, in particular men, about their status and power over children. The result, in legal terms, is to turn a legitimate child into an adopted child, not only of its stepfather, but also of its natural mother. This all has rather unpleasant patriarchal overtones apart from being a manifest legal fiction. It also has the result, incidentally, of severing the child from its natural family - grandparents, aunts, cousins etc on its natural father's side.

It would be preferable if the law ceased to prioritise or privilege the notion of **parental** rights and concentrate instead on the provision of an honest and acceptable conceptual framework for determining the relationship of child and any caregiver not the natural parent. In fact such a concept already exists and is ripe for development - it is guardianship.

Childrens' Rights

That children's rights tend to be overlooked is clearly illustrated by the **Gillick** case. The case has been seen as embodying a conflict between parental rights on the one hand and the clinical judgment of the medical profession on the other. The claim that the minor herself might be able to decide about abortion or contraception was inadequately dealt with both in the High Court (where, in effect, Mr Justice Woolf found in favour of doctors) and in the Court of Appeal, where parental rights triumphed. Similarly, in the long running debate on the on the powers of local authorities over children in their care, the issue has often been seen as one in which parental powers are in conflict with those of the State (in the form of local authorities) to protect children. The rights of the children themselves tend to get overlooked. Significantly, although local authorities claim to exercise **parental** rights their powers are more extensive than those of parents. For example they can "lock up" a child in care long after the age of 16, the age beyond which a parent will be unable to invoke the court's aid to force a child back into the parental home.[24] A care order itself can subsist up to the age of 19 in certain circumstances, which is beyond the age of majority. [25] Even academic commentators, like Goldstein, Freud & Solnit, who profess

to be exclusively concerned with the welfare of children, often appear to be blind to the need to have regard for the wishes of the children themselves. They argue, for example, that where the family is a going concern the parents alone should decide whether the child should receive medical treatment, including non-reversible treatment like sterilisation. The parent alone should decide if the child needs the services of a lawyer. These decisions are "an integral part of the autonomy of parents".[**26**] Children - of any age - appear to have no say.

Proposed Reform

With these considerations in mind I would suggest that reform should take the following route. All of the private law relating to the up-bringing (including maintenance) of children should be consolidated into a single statute. This statute should regulate three basic concepts - legal custody, care and control and access.

Legal custody should embrace the rights, powers and duties at present associated with parental rights, though a statutory formulation would, I hope, concentrate on the duty to protect and care rather than on coercive rights. But in addition to tabulating these powers - to possession, to educate, discipline, choose religion, consent to adoption etc - the new Act should state clearly:

(a) That legal custodians must exercise their rights, powers etc in the best interests of the child.

(b) That legal custodians must give due consideration to the wishes and feelings of the child and are not empowered to exercise their powers against the wishes of the child, having regard to his age and understanding and the nature of the matter in issue.

(c) That subject to the above, legal custodians must give due consideration to and facilitate contact between the child and members of his family and other persons with whom he has had close personal contact.

Of course such provisions in statutes cannot create legal rights and duties in the strict sense. But they can have an important symbolic and psychological effect - and such provisions might have lead to a very different analysis and result in the **Gillick** case.[**27**]

Actual care or possession should cover those situations where a person without legal custody undertakes the care of a child. Such a person should exercise the duties and responsibilities inherent in the daily care of a child but subject to the exercise of any rights etc by the legal custodian. The carer should similarly have regard to the child's wishes.

Legal custody should, prima facie, be exercised by two types of person, natural (or adoptive) parents and legal guardians. In both cases the powers should be exercisable jointly and severally. The position of natural parents is obvious. The expansion of guardianship needs further elaboration.

Guardianship

The concept of guardianship has many virtues. First, it is an honest description of the relationship that exists where a person who is not a natural parent has a long term commitment to the care of a child. Guardians do not pretend to be natural parents - as is often the case with adoption. Second, the relationship of guardian and ward is understandable and the term ''guardian'' unstigmatic. Third, the relationship involves security and long term commitment without the exclusiveness which again is inherent in adoption and which is inappropriate in so many cases where older children are concerned. Finally the concept of guardianship is of respectable antiquity.

The development of guardianship has been advocated before. The Houghton Committee[28] favoured it. Professor Bevan and his colleague Martin Parry have also recommended it, but so far there has been no response from any government department. It is an ideal concept to develop and replace the current confusion of concepts in this field.

The current law on guardianship is, however, as confused as the rest of child law - a major confusion relates to the obligation to maintain for example. There is no single meaning of the term guardian and currently there are severe limitations on who can be appointed as guardian when and how.[29] The principle should be clear. A person with legal custody, other than a natural (or adoptive) parent, should be described as a guardian. Guardianship should be confered by court order, under the will of a parent or by agreement with an existing parent or guardian.

Like parents, guardians should be able to exercise their powers jointly with parents or other guardians. Guardianship will be particularly appropriate for step-parents, for the fathers of illegitimate children (assuming that they continue to be excluded from legal custody by virtue of parenthood), for other relatives who assume long term care of a child and for long term foster parents.

Obviously a full account of these proposals would require a report of Law Commission dimensions. One further point should be made however. My proposal is that a person could be appointed by agreement with the child's natural parent. This would involve the abolition of the rule that agreements transferring parental rights are void, being contrary to public policy.[30] The reason for the rule, it is said, is that such agreements cannot be enforced. If the issue came before a court the welfare of the child would take priority over any dispute about the terms of an agreement. This is true; but it is also true of any dispute about parental rights that comes before a court. There seems in fact to be little justification for the rule. Moreover it leads to some extraordinary convolutions. In its report on illegitimacy the Law Commission appears to set its face against the idea that parental rights might be transferred by agreement (para 7.46), but recognises that an exception could be justified enabling the mother of an illegitimate child to transfer or share her parental rights with the father. But, says the Commission, this power should be exercisable only on a situation similar to that of a married couple about to separate. [31] An agreement on parental rights will, therefore, take effect when the parents separate but will not whilst they live together. A father living with the mother will have to go to court in order to acquire any parental rights. Try explaining to the average lay person that if you wish to enjoy equal parental

rights and live in harmony a court order is necessary but if you quarrel and separate all you need is an agreement. There is no logic in it. Moreover, like so many of the convoluted technical rules in this area of the law, it does nothing to secure the welfare of children which should be the first concern of legislators.

1. This move was a response to the Report of the Select Committee on Social Services into Children in Care (The **Short Report**) 1984, HC 360-1

2. Court of Appeal 20 December 1984. [1985] I All ER 533. House of Lords hearing 24 June 1985

3. A particularly useful article is that of Martin Parry, (1981) II Fam Law 213

4. Discussion Paper (unpublished) 1984, para 3

5. This is the structure adopted by the Law Commission both in its report on illegitimacy (Law Comm No 118, 1982) and the current discussion paper on child law

6. See particularly Hall, [1972B] CLJ 248; Eekelaar (1973) 89 LQR 210; Dickens (1981) 97 LQR 462

7. Law Comm No 118 para 4.17

8. **Hewer v Bryant** [1970] 1QB 357 at p 369

9. [1985] I All ER 533

10. He also professed to be uninfluenced by "social, moral and other non-legal" issues, an assertion which is difficult to believe when the judgement as a whole is read.

11. The judgement leaves many questions unresolved. Does it cover contraceptive advice only, all medical advice, all advice of whatever kind? What is "advice"? Does it include sex or other education in schools? Does it cover leaflets and books?

12. [1970] 1QB 357

13. [1984] 2 AllER 449

14. [1883] 24 Ch. D 317

15. [1981] 11 Fam Law 213

16. Legal custody means "so much of the parental rights and duties as relate to the person of the child (including the place and manner in which his time is spent)...." but excluding the right of a non-parent or guardian from arranging the emigration of a child.

17. See also the corresponding S11 (a) of the Guardianship of Minors Act 1971.

18. Custodianship is due to be brought into force on 1 December 1985.

19. They relate to the rights of others claiming custody (Children Act 1975, S44(1), (2) and consent to marriage (1975 Act Sched. 3 para 7)

20. This is indeed the result of the Law Commission proposals on illegitimacy which are based on the idea that the illegitimate child should, so far as is desirable, be integrated into the existing legal structure covering legitimate children. One proposal is that putative fathers should be able to ask the court for "parental rights and duties" over the child and that the court could grant all or some of them. This would be termed a "parental rights order" - thus adding yet another varient to the luxuriant list of orders already mentioned. See Report No 118 para 7.26 et seq.

21. I consider that the public law on children, relating to local authorities, should be dealt separately with for reasons beyond the scope of this paper.

22. **Mine, Yours or Ours?** A study of Step-Parent Adoption. Masson, Norbury and Chatterton. HMSO 1983.

23. Despite the fact that the Children Act 1975 S10(3) leans against such adoptions.

24. See **R v D** [1984] 2 All ER 449 and the authorities therein cited. See also **R v Rahman**, The Times 5 June 1985 on wrongful imprisonment of a child by a father.

25. See Children and Young Persons Act 1969, S 20(3) (a), (b) and 21(1)

26. **Before the Best Interests of the Child**, Andre Deutsch 1980. p112

27. Comparable provisions in the Child Care Act 1980 ss1 and 18 have had legal consequences. See eg **Tilly v London Borough of Wandsworth** and cases on the closure of children's homes such as **R v Avon CC ex parte Koumis and others** [1984] **Legal Action** 149; **Liddle v Sunderland BC** [1983] **Lag Bulletin** 94; **R v Solihull MBC** (1984) 14 Fam Law 175

28. Report of the Departmental Committee on the Adoption of Children HMSO 1972, Cmnd 5107

29. Guardians can exercise their powers only on the death of a parent. The concept should be extended so that guardians can be appointed and act during the lifetime of any parent.

30. The exception is an agreement made in the context of a separation of married parents.

31. See the draft bill in the Report on Illegitimacy (Law Comm No 118) clause 12(1) and also para 7.44 **et seq**.

WHO SHOULD SIT IN THE FAMILY COURT?

by N F Allen, Senior Lecturer in Law, Trent Polytechnic.

Introduction

Writing in 1967, M A Millner expressed the view that the task of surveying the law of negligence was "not unlike catching a bird in flight"[1]. I would suggest that the same sort of comment could properly be made of English family law today. Wherever one looks, change has either been recently implemented or is under active consideration. Virtually no area has remained untouched. The Law Commission is responsible for much of this, of course, having decided right at the start of its work in 1965 that family law was ripe for codification. Working Papers and Reports have continued to flow relentlessly from John Street, WC1, contributing more and more to our better understanding of this fascinating branch of the law. In this article I have chosen to study not substantive family law, which has inevitably received the most attention over the years, but the procedural side of the subject. Specifically, I want to consider the question: who decides in family disputes? Various types of legal animal are to be found on the bench in family cases and what I want to suggest is that the present scheme of things is by no means satisfactory.

The question of who is to make decisions in family cases is, of course, part of the wider issue of the need for a Family Court in this country and the Family Court, as we know, is a matter which has been keenly debated for many years. Indeed, it is currently under official examination, although surprisingly not at the hands of the Law Commission. The Commission did in fact at one time look set to produce proposals for reform of the adjudicating machinery because in 1971 it established a working party on the subject under Lord Scarman's chairmanship[2]. This venture was suspended indefinitely in 1974, however, when the Finer Committee on One-Parent Families, following five years of study but apparently without warning, produced detailed suggestions of its own (what a strange way to conduct law reform). The situation then remained fairly static until 1983, when the Lord Chancellor's Department produced its Consultation Paper entitled "Family Jurisdiction of the High Court and County Courts" Various interesting ideas were put forward in this Paper but as its title indicates, there was no attempt to deal with the still important family jurisdiction of magistrates' courts (traditionally the responsibility of the Home Office). This was bound to, and did, lead to critical comment, the result of which was that the Lord Chancellor, when introducing the Matrimonial and Family Proceedings Bill in the House of Lords in November 1983 (this Bill implementing some of the more limited proposals contained in the Consultation Paper[3]), made the following announcement:

> "I have agreed with the Home Secretary that we should now re-examine the idea of a unified family court, starting with a detailed study of the resource implications in terms of finance, manpower and accommodation"[4].

This re-examination has been given the title of "Family Court Review"[5] and we await its findings with interest. One basic issue for the Family Court Review is the question of staffing and it is this staffing issue which provides the theme for this article.

The Present Decision-makers

An examination of the relevant legislation reveals that at present decisions in family litigation are made by the following[**6**]:

1. Lay magistrates
2. Stipendiary magistrates
3. County court registrars
4. Recorders
5. Circuit judges
6. Registrars of the Principal Registry of the Family Division
7. High Court judges
8. The President of the Family Division.

All of these people are evidently considered by Parliament to be qualified to make decisions in family disputes, but the fact is, of course, that they are not treated in exactly the same way. Parliament has over the years devised a series of demarcation lines for these decision-makers which spell out which types of case can and cannot be handled. These demarcation lines have been allowed to develop in an all too familiar haphazard fashion and this is to be much regretted. The establishment of the Family Court Review, however, now presents the Government with an opportunity to remedy the omission. Let us take a closer look at these decision-makers and their demarcation lines.

I Lay Magistrates

Lay magistrates deal with a wide variety of family cases, both in the domestic court[**7**] and the juvenile court. These magistrates by definition need not have legal qualifications but that is not to say that no special qualifications at all are necessary. To sit in the domestic court or the juvenile court one needs to be a member of the relevant "panel" and membership of the panels is not automatic for lay magistrates. The Domestic Courts (Constitution) Rules 1979[**8**] require the justices for each petty sessions area to appoint "suitable justices" to form a panel. No indication is given in the Rules, however, of the meaning of "suitable" in this context. A similar pattern exists in the case of juvenile courts. The Juvenile Courts (Constitution) Rules 1954 require the justices to form a juvenile court panel from "justices specially qualified for dealing with juvenile cases" without specifying the sort of qualification expected[**9**]. Whatever "qualifications" the member of a panel has, however, there is a further restriction imposed by the legislation: the general rule is that when hearing domestic or juvenile proceedings the magistrates' court must contain both a male and a female justice[**10**]. One can easily appreciate why the presence of both a man and a woman on the bench should promote greater understanding by the court of the factual, legal and social policy issues raised by litigation involving spouses, parents and children. At the same time, however, one is perhaps entitled to ask why this rule only applies in magistrates' courts. If the principle is correct, are county courts and the Family Division of the High Court labouring under a disadvantage in this respect (I do not propose to consider here the implications of the fact that the two highest courts in the land have never had a woman within their permanent establishment)?

What sort of decisions are lay justices authorised to make? The list of matters falling within their jurisdiction is impressively wide and includes applications for financial provision, domestic violence cases, child custody disputes, adoption and children in or in need of local authority care. But within these areas there are restrictions. For example, magistrates' powers in financial provision cases are limited. They can order a husband to pay his wife a lump sum (and vice versa) but their jurisdiction runs out at £500. Why should this be so? In its Working Paper "Matrimonial Proceedings in Magistrates' Courts", the Law Commission recommended that magistrates be given a power to make a lump sum order and considered "various ways in which the power might be limited"[**11**] but failed to reveal the rationale for introducing a limitation. Differing views were expressed by those who submitted comments in response to the Working Paper. Some thought that there should be no limit at all on lump sums. In the event, the Law Comission adhered to its original proposal and recommended a maximum of £500, alterable by statutory instrument[**12**], but once again it failed to advance reasons for the need for this restriction. What distinguishes lay magistrates from all the other decision-makers in our list is a professional legal qualification. One may question whether this mark of distinction is well reflected in the monetary cut-off point for lump sums. In personal protection cases, the magistrates' jurisdiction does not extend to making orders concerning non-violent forms of molestation. Why not? The Law Commission argued that "psychological damage by itself should not be a ground for the remedy we propose in the magistrates' courts. Our reason is that adjudication on an allegation of psychological damage is a very difficult matter which may involve the assessment of expert evidence by psychiatrists. This is a highly skilled task which we do not think can appropriately be placed on magistrates"[**13**]. This line of reasoning stands very strangely indeed alongside the magistrates' jurisdiction in children's cases, where extremely demanding psychological issues frequently present themselves. On the subject of children, we should raise the question of wardship. Bearing in mind their considerable powers in custody and adoption cases, why are magistrates deemed unfit to hear wardship applications? Serious suggestions for an extension of magistrates' powers here have been put to at least one official review body[**14**] and it is interesting to note in this context the provisions of the Matrimonial and Family Proceedings Act 1984 enabling county courts to deal with these cases[**15**].

II Decision-makers with legal qualifications

Turning now to the professional lawyers on the bench, we encounter seven types of 'judge', all distinguished by such factors as official title, method of appointment, salary and conditions of service generally. When we consider the minimum qualifications laid down, variety again flourishes:

1. Barrister or solicitor of at least seven years' standing (Stipendiary magistrate)[**16**]

2. Solicitor of at least seven years' standing (County Court Registrar)[**17**]

3. Barrister or solicitor of at least ten years' standing (Recorder and Registrar of the Principal Registry of the Family Division)[**18**]

4. Barrister of at least ten years' standing or a Recorder of at least three years' standing (Circuit judge)[**19**]

5. Barrister of at least ten years' standing (High Court judge)[**20**]

6. Barrister of at least fifteen years' standing (the President)[**21**]

As one would expect, those at the top of this judicial tree (the President and his fellow judges of the Family Division of the High Court) are deemed qualified to deal with any type of family case The only original family jurisdictions presently denied to the High Court are affiliation (where the domestic court has exclusive powers) and the various local authority procedures (juvenile court only) and such allocation of power is really due to historical factors rather than deliberate choice[**22**].

The demarcation lines pertaining to those occupying 'inferior' positions in the decision-making hierachy are more complex and controversial. Stipendiary magistrates, sitting alone, are able to deal with matters assigned to the domestic court and the juvenile court[**23**] but are subject to the same restrictions as those courts. This means, for example, that they lack the jurisdiction in divorce which is possessed by the decision-makers of the county court. While a case can be made, on grounds of the complexity of many ancillary applications, for keeping divorce away from lay magistrates, it would be difficult to argue that stipendiaries lack the appropriate degree of competence[**24**]

What about county court registrars? They are really the unsung heroes of family litigation insofar as they perform the leading role in most divorce cases, making the key decision as to the eligibility of the petitioner for a decree, as well as the decision regarding financial provision. Their arrival on the family law scene has been well chronicled by Bartrip in an appendix to Barrington Baker's survey of registrars published in 1977[**25**]. He relates how registrars "have gained power not as a direct intention of any Act of Parliament, nor as part of any underlying policy or philosophy, nor as a result of influence exerted by pressure groups (least of all themselves)"[**26**]. The main factor has been the need to reduce the workload of the judiciary and thereby improve waiting times. "Registrars," he writes, "have slipped into their present positions, virtually unnoticed by non-lawyers, by backdoors consisting primarily of additional, altered and amended rules and orders of court"[**27**]. Be that as it may, registrars now carry out a vital function. But there are limitations. In divorce, they cannot at present grant the decree itself, this task being reserved for a judge[**28**]; and yet, under the special procedure laid down for undefended cases, it is the registrar who examines the merits of the case. The judge is allocated merely a rubber-stamping function. This extraordinary arrangement reflects little credit on our legal system and it is therefore hardly surprising that the Booth Committee has provisionally recommended that registrars be empowered to grant decrees of divorce[**29**]. This recommendation, however, applies only to undefended petitions. The committee thought that where a divorce suit is fully contested "this is a matter to be heard by a judge"[**30**]. Rather surprisingly, no reasons were put forward in support of this proposition. Another notable area of limitation is children. Registrars are subject to important restrictions as far as the custody of children in divorce proceedings is concerned. Rule 92(1) of the Matrimonial Causes Rules 1977 lays down the general rule that decisions concerning children are to be taken by the judge. The exceptions to this rule are to be found in rule 92(2) and significantly they were extended in 1982 and again in 1984[**31**]. As things now stand, the registrar is confined to making orders relating to custody, supervision or committal to local authority care in those cases where the terms of the order have been agreed between the parties. With regard to access, the registrar is empowered to decide on the extent of this, but only where the parties are agreed that **some** form of access should be granted. When one considers that all county court registrars are eligible qualification-wise for appointment as stipendiary magistrates, and that stipendiaries can make custody orders under the Guardianship of Minors Act 1971 (as well as adoption orders under the Children Act 1975), the soundness of these particular limitations is open to question. The Booth Committee appears to have been divided on the question of the desirability of the registrar's involvement in children's matters[**32**]. One other area of child law should be mentioned at this stage: the wardship

jurisdiction of the High Court is exercisable only by a judge of the Family Division. A no-entry sign directed at registrars was erected in **Re L**[33]. This case arose out of a dispute as to care and control between mother and paternal grandmother. The grandmother instituted wardship proceedings in the Newcastle district registry and at the hearing care and control was awarded to her by a deputy district registrar. When the mother appealed, the Court of Appeal took the opportunity of ruling that the wardship jurisdiction should not be exercised by a registrar[34]. Roskill L J contented himself with saying that it was "contrary to practice" for a registrar to assume jurisdiction[35]. Ormrod L J agreed and made the point that since registrars' powers regarding children in divorce proceedings were expressly limited by the Matrimonial Causes Rules, consistency required self-denial in wardship. Ormrod L J's point is a valid one but one will look in vain at the report of **Re L** for a discussion of why, in principle, registrars should be excluded from custody cases. The Court of Appeal's lack of enthusiasm for the involvement of registrars in wardship has not been completely mirrored in the Family Division of the High Court. In 1980 a Practice Direction was issued by the Senior Registrar[36] in which it was stated that the judges of that Division considered that registrars ought normally to hear wardship applications which are analogous to those applications in divorce in which they have jurisdiction (in other words, agreed care and control applications and disputes as to the extent of access). Notwithstanding the limitations imposed on registrars, and the relatively dark corner of the legal world which they occupy, their progressive elevation in terms of judicial power is unmistakably clear. The distinction in practice between "registrar" and "judge" is in fact being rather rapidly eroded, as far as family law is concerned. Mention has already been made of their increased powers in divorce cases. Also of relevance are the amendments effected to the Matrimonial Causes Rules in 1978, 1981 and 1984 which respectively have enabled registrars to handle applications under section 37(2)(a) of the Matrimonial Causes Act 1973, section 27 of the 1973 Act and sections 1 and 9 of the Matrimonial Homes Act 1983[37]. Whether these are developments to be applauded or deplored is not a particularly straightforward question. What is so disappointing is the almost total absence of open discussion of the matter.

Finally, we come to the judges of the county court, Recorders and Circuit judges. As we have seen, occupiers of these posts must be either barristers of at least ten years' standing (Recorders and Circuit judges) or solicitors of either ten (Recorders) or thirteen (Circuit judges) years' standing. On the face of it, there are clear dividing lines between these judges and High Court judges but in family law substantial erosion of these has taken place over the years. Divorce is a case in point. From 1875 to 1967, all divorce petitions had to be heard in the High Court. In 1967 Parliament passed the Matrimonial Causes Act which gave county courts jurisdiction over divorce, but in undefended cases only. The story is more complicated than this, however. Even before 1967, county court judges were dealing with divorce, through the device of wearing a different hat. What happened was that the judge was appointed a "Divorce Commissioner". Under the terms of the legislation, such Commissioners were empowered to assist the judges of the Probate, Divorce and Admiralty Division (as it then was) with their divorce caseload. In fact it proved to be more than just assistance. In 1966, for example, out of a total of 38,000 undefended cases, 34,000 were tried by county court judges[38]. We no longer have Divorce Commissioners, of course, but judges of the county court still hear divorce cases. In undefended cases, as has been seen, the 1967 Act applies. In defended cases, the device used is section 9(1) of the Supreme Court Act 1981[39], which enables the Lord Chancellor to request a Circuit judge or a Recorder to act on a temporary basis as a High Court judge again, a 'different hat' scheme. The Matrimonial and Family Proceedings Act 1984 carries this development to its logical conclusion. When Part V of the Act is brought into force, defended divorce cases will no longer have to be

transferred to the Family Division. The duty to transfer will be replaced by a discretion[**40**]. Just how this discretion will be exercised remains to be seen[**41**], but what is clear is the steady move towards amalgamation, in the family law context, of the High Court and the county court. It is not just the new divorce rule which drives us to this conclusion. Sections 38 and 39 of the 1984 Act will introduce greater transferability between High Court and county court in family proceedings generally. Wardship is worth mentioning again in this connection. This ancient and powerful jurisdiction has always been the exclusive property of the High Court, first the Chancery Division then[**42**] the Family Division. As with divorce, however, the device of a 'junior' judge wearing a senior's hat has meant that decision-making in wardship has not been the preserve of the puisne judges. In **Re L**, mentioned earlier, Roskill L J referred, without criticism, to the practice in Newcastle whereby "Judge Smith and Judge Wilks regularly deal with matters such as this, there doing the work of Family Division judges"[**43**]. Recorders, as well as Circuit judges, have a valuable role to play in wardship, even (mirabile dictu) solicitor Recorders. Their contributions were explicitly acknowledged by the Lord Chancellor in 1982:

> "recorders, including solicitor recorders, have taken in the past urgent High Court applications in matrimonial and wardship cases, to the general benefit of the public"[**44**].

The provisions of the Matrimonial and Family Proceedings Act 1984 concerning wardship illustrate brilliantly the caution and indecisiveness which have so often characterised the approach of government to the allocation of decision-making functions in litigation. Section 38(2)(b) of the Act provides that the wardship jurisdiction can henceforth be exercised by the county court as well as the High Court, except that the decision to confirm wardship or terminate it must still be taken by the High Court. As a result of this provision, one can expect to see from time to time a sort of legal pantomime, in which a Circuit judge or a Recorder dons a High Court uniform at the outset of the case, reverts to normal attire to make orders regarding the day to day upbringing of the child, and then does a further quick change to finally dispose of the case. There must be some doubt as to whether such a sequence of events will improve the image of the English legal system.

Conclusions

What qualifications should we demand of decision-makers in family cases? Nobody could reasonably deny that the English substantive and procedural law of the family is complex. This applies particularly to the law relating to children. This last topic has been aptly described by Sir Roger Ormrod:

> "It is in a state of confusion which is unparalleled in any other branch of the law now or at any time in the past"[**45**].

Consequently, the need for someone on the bench (or across the table) with a recognised legal qualification is indisputable. But what sort of legal qualification? We have seen how existing legislation makes distinctions between barristers and solicitors and requires differing lengths of professional practice for different types of job. Are these distinctions appropriate? Is an extra three years' practice at the Bar a sufficient reason to discriminate as between stipendiary magistrate and High Court judge? Why are county court registrars drawn exclusively from solicitors? What is the reason for drawing demarcation lines between Circuit judges and High Court judges when their statutory qualifications are so similar? These questions raise issues well beyond just family law, of course, but that is no reason to avoid them - quite the reverse.

Is anything more than a legal qualification desirable in a family court judge? We should remind ourselves here that in so many family cases, in contrast with litigation concerning other branches of the law, the function of the judge is not so much to declare whether 'the rules' have been broken; rather, it is to exercise a discretion given to him by Parliament. As the House of Lords has recently acknowledged[**46**], in family litigation there is no question of there always being a single right answer - it is more a question of selecting the least damaging option. The court is frequently and knowingly taking a gamble and its decision will often have fundamental and irreversible effects on the lives of the parties involved. Common sense suggests that direct and personal experience of both marriage and parenthood can only be an advantage in discharging this onerous task. Whilst Parliament has, not surprisingly, refrained from legislating on this point, references to the experience factor are not hard to find. Speaking during the Second Reading debate on the Matrimonial and Family Proceedings Bill, Lord Roskill, a law lord and also a member of the Basingstoke Domestic Panel, drew attention to the valuable work done by magistrates:

> "In many respects the jurisdiction now exercised by the domestic panels of magistrates' courts is indistinguishable from the work which is done in the High Court or in the county court in matrimonial matters. It has the enormous advantage that it is not being dealt with by one lawyer sitting alone. It is being dealt with by two or three justices, all or most of whom will have been married and have brought up families, some of whom will have been through the traumas of the divorce court themselves, and who will be familiar with all the problems"[**47**].

A more oblique reference to the advantages of personal experience is to be found in a judgment of that much missed legal analyst, Bagnall J. **Re D**[**48**] was a wardship case involving a dispute between mother and father as to care and control. Having noted that the discretion he had to exercise was a judicial one, Bagnall J expressed the view that "in the end the decision must be made as an individual and perhaps even as a parent."[**49**]

Even if decision-makers need not be married parents, some experience of family litigation is certainly desirable. There are obvious dangers involved in sending any judge into territrory which as far as he or she is concerned is unknown. If the territory is a highly emotionally-charged domestic one, the results can be disastrous. In **Re C**[**50**] an adoption application was made to a county court by the child's mother and stepfather. The natural father having refused his consent to adoption, the applicants asked for it to be dispensed with on the grounds of unreasonableness. To quote the report of the Court of Appeal's judgment (quashing the adoption order), "the case had been heard at the county court by an assistant recorder who admitted he had no experience of this type of case, there had been a delay of sixteen months between the filing of the application and judgment, including a gap of four months between the hearing and judgment and the guardian ad litem was also totally inexperienced in contested adoptions ... In a contested adoption it was necessary for the judge to ask himself first whether adoption would safeguard and promote the child's welfare and, if the answer was in the affirmative, to consider whether the parent's consent should be dispensed with. The assistant recorder had made no finding on the first question, nor had he dealt with the issue of consent. Since he had failed to approach the case as he should have done it was open to the Court of Appeal to decide the case **de novo**".

In this article I have tried to show how complicated, unpredictable and irrational our approach to the question of allocation of power in family cases has been. An elaborate hierarchy of decision-makers has emerged from the morass of legislation passed by

Parliament over the years, stretching from lay magistrate right up to the President of the Family Division. As far as the demarcation lines are concerned, the position has been one of almost constant change. Taking an overall view, however, one is, I think, entitled to say that the general trend is in favour of giving these decision-makers more or less equal powers in family matters. We have certainly not reached that situation yet but the developments which have taken place in the recent past have an ominous ring about them. In this connection I would single out for special mention the Domestic Proceedings and Magistrates' Courts Act 1978, the Matrimonial and Family Proceedings Act 1984 and the Consultation Paper from the Booth Committee on Matrimonial Causes Procedure. I do not intend to advance detailed proposals for reform here. What I would say is that there is an urgent need for our legislators to engage in a full, open and constructive debate about the right way of staffing those courts exercising family jurisdiction. This will be no easy task, because such a debate will inevitably raise highly delicate issues, such as the contribution laymen can make in our judicial institutions, the difference in quality between solicitors and barristers and the difference in quality between the various types of judge[**51**]. Another controversial factor which is sure to raise its head is the supposed symbolic effect of preserving demarcation lines. This particularly applies to matrimonial causes, especially divorce, where the perennial argument has been that the status of marriage is adversely affected by giving jurisdiction to inferior courts[**52**]. All these issues will have to be tackled, however, and in detail, if a genuine Family Court is to be established in this country. If, as is hoped, the Family Court Review takes the plunge and looks fully at this question which has been lurking in the shadows for so long, its report will be essential reading, not just for family lawyers, but for all those who have an interest in the machinery of justice in England.

1. **Negligence in Modern Law**, p.v.

2. Consistent with the muddled approach adopted over the years, the working party was instructed to look only at courts below High Court level.

3. See now Part V of the Matrimonial and Family Proceedings Act 1984.

4. HL Debs, Vol 445, cols 36 - 37.

5. The first meeting of the steering committee took place on June 28, 1984: see (1984) 3 CJQ 380.

6. For the sake of completeness one must not overlook the fact that in the case of Registrars, Recorders, Circuit judges and High Court judges, deputies and assistants can be appointed by the Lord Chancellor to facilitate the disposal of business.

7. Domestic courts deal with "domestic proceedings". For a definition of this last term, see s.65 of the Magistrates' Courts Act 1980.

8. S.I 1979/757, as amended by S.I 1983/676. Inner London domestic courts are covered by separate legislation: see S.I. 1979/758, as amended by S.I 1983/677.

9 S.I 1954/1711, r.1(1). These rules do not apply to the Inner London area. For these juvenile courts, appointment to the panel is governed by Sch.2 of the Children and Young Persons Act 1963.

10. See s.66 of the Magistrates' Court Act 1980; Sch.2, para 15 of the Children and Young Persons Act 1963; the Juvenile Courts (Constitution) Rules 1954, r.12.

11. Working Paper 53, para 59.

12. Law Com No 77, para 2.35. See now s.2(3) of the Domestic Proceedings and Magistrates' Courts Act 1978.

13. Law Com No 77, para 3.12. See now ss 16 - 18 of the 1978 Act.

14. See the Report of the Latey Committee on the Age of Majority (1967), Cmnd 3342, paras 241 - 248. The Committee recommended that the suggestions be considered by the Law Commission.

15. See s.38(2) of the Act, considered later.

16. S.13(1) and s.31(2) of the Justices of the Peace Act 1979.

17. S.9 of the County Courts Act 1984.

18. S.21(2) of the Courts Act 1971; section 89 and Sch2 of the Supreme Court Act 1981.

19. S.16(3) of the Courts Act 1971, as amended by s.12 of the Administration of Justice Act 1977.

20. S.10 of the Supreme Court Act 1981.

21. As for note 20.

22. The Law Commission has made proposals to abolish affiliation proceedings and to cater for the maintenance of non-marital children by widening the scope of the Guardianship of Minors Act 1971 Applications under the 1971 Act can, of course, be made to the High Court. See generally Law Com No 118, "Illegitimacy", Part VI.

23. See s.67(7) of the Magistrates' Courts Act 1980; Sch2, para 17 of the Children and Young Persons Act 1963; the Juvenile Courts (Constitution) Rules 1954, r.12(2).

24. Her Honour Judge Graham Hall is widely known as an enthusiastic supporter of the concept of a Family Court. She was a member of the 1971 Law Commission working party and has written extensively on the matter. What is not so well known is that for the six years preceding her appointment as a Circuit judge, she was a Metropolitan stipendiary magistrate.

25. **The Matrimonial Jurisdiction of Registrars**, Centre for Socio-Legal Studies, Oxford.

26. Ibid, p 103.

27. P. 104.

28. See r.43(1) and r.48(2) of the Matrimonial Causes Rules 1977.

29. Consultation Paper from the Matrimonial Causes Procedure Committee (1983), para 3.6.

30. Ibid, para 6.5.

31. See the Matrimonial Causes (Amendment) Rules 1982, S.I 1982/1853, rule 2; the Matrimonial Causes (Amendment) Rules 1984, S.I 1984/1511, rule 9.

32. See the rather limited discussion at paras 3.6 and 7.6 of its Consultation Paper.

33. [1978] 1 WLR 181.

34. All district registrars of the High Court are drawn from the ranks of county court registrars: s.100 of the Supreme Court Act 1981. A deputy district registrar must be qualified for appointment as county court registrar: s.102.

35. [1978] 1 WLR 181.

36. [1980] 1 WLR 321.

37. See the Matrimonial Causes (Amendment) Rules 1978, S.I 1978/527, rule 6; the Matrimonial Causes (Amendment) Rules 1981, S.I 1981/5, rule 2; the Matrimonial Causes (Amendment) Rules 1984, S.I 1984/1511, rule 12.

38. HL Debs, Vol 280, col 169 (Lord Gardiner LC).

39. As amended by s.58 of the Administration of Justice Act 1982.

40. See s.33(3) and s.39.

41. S.37 of the Act enables the President to issue directions on the matter.

42. Since October 1, 1971, when s.1 and Sch 1 of the Administration of Justice Act 1970 were brought into force.

43. [1978] 1 WLR 181, 182.

44. HL Debs, Vol 435, col 569 (Lord Hailsham, speaking during proceedings on the Administration of Justice Bill).

45. Extract from a speech delivered in June 1983 and reported in (1983) 4 Adoption and Fostering, p.10.

46. See **G** v **G** [1985] 1 WLR 647, 651, per Lord Fraser.

47. HL Debs, Vol 445, cols 76 - 77.

48. [1973] Fam 179.

49. P.197. Another interesting aspect of this case concerns the decision-makers involved: stipendiary magistrate initially, followed (in separate proceedings) by a High Court judge.

50. Court of Appeal, March 8, 1984, reported in (1984) 3 Adoption and Fostering, p.57.

51. "Among the judiciary there is a marked reluctance to admit to any imperfection and to release any jurisdiction": Walter Merricks, discussing Law Society proposals for a Family Court, (1985) 135 NLJ 376.

52. "It has been suggested to me that if a marriage can be dissolved in a county court people will rush around committing adultery like anything": Lord Gardiner LC, speaking during proceedings on the Matrimonial Causes Bill, HL Debs, Vol 280, col 173 (14.2.1967).

POSTSCRIPT:

the publication of the Booth Committee's Report on Matrimonial Courses Procedure in August 1985 came too late for detailed examination in this article, but in the words of Susan Maidment "[a] feature of the Report is the increased role in which registrars will play in the legal process of divorce" — (1985) 135 NLJ 815.

JUDICIAL REVIEW OF ADMINISTRATIVE DISCRETION: ANGLO-AMERICAN PERSPECTIVES[1]

by M A Fazal, Principal Lecturer in Law, Trent Polytechnic.

Background

American administrative law is generally regarded as a highly developed system of law in many respects, in particular in relation to judicial review of questions of fact. It has evolved doctrines and principles to which the British courts are still feeling their way. Yet in the area of judicial review of administrative discretion there was a remarkable gap until fairly recently. Judges, practitioners and academics were not sufficiently conscious of the importance of this branch of administrative law. By contrast there has always been a stimulating discussion among the lawyers in this country on this subject.[2] However, this is not to say that administrative law in Britain is anywhere near the state of perfection.

American lawyers tend to approach the subject in terms of the issues of law and fact. Once they have characterised an issue as one of fact then the courts are prepared to grant an extended review to the extent of weighing up the evidence supporting administrative actions.[3] In the sphere of questions of law an agency determination is upheld if it has 'warrant in the record' and 'reasonable basis in law'.[4] Many issues which the American courts first characterise as issues of law or facts, on which the courts then determine their policy on the scope of review, could be approached in terms of discretionary powers of the administrative agencies calling for the development of substantive law governing judicial review of discretionary powers. Thus immigration, nationality and deportation are traditionally areas of discretionary powers.[5] Nonetheless, the American courts have approached these areas in terms of the law/fact dichotomy and fashioned their scope of review.[6] Thus in **Woodby v Immigration and Naturalisation Service**[7] involving deportation of a long term resident alien the Supreme Court viewed the issue as one of fact and laid down that no order for deportation of resident aliens could be entered, unless it is found by "clear unequivocal and convincing evidence that facts alleged as grounds for deportation are true". The British Courts on the other hand have treated this issue as one of discretion[8] (without necessarily arriving at a better solution). Whether a different approach in terms of discretionary powers by the American courts would have produced a better solution either in terms of justice in the case or of a better system of administrative law is an interesting question. One possible explanation for the lack of discussion on judicial review of discretionary powers is that discretion was thought to fall outside the scope of judicial review. This view is supported by the fact that S.10(e) of the Administrative Procedure Act 1946 (APA) exempted from judicial review agency actions "by law committed to agency discretion" although agency actions, findings and conclusions found to be "arbitrary, capricious, an abuse of discretion,or otherwise not in accordance with law" were subjected to judicial review.

However, the American courts and lawyers have begun to address themselves to the question of reviewing administrative discretion. This has come about in a fortuitious way. In the early sixties Professor H.W.R. Wade paid a visit to

the United States. In the course of his contact with American lawyers he pointed out this gap. He has stated "...the Supreme Court, constantly occupied as it is with administrative law, seems to have few such decisions in recent times (i.e. dealing with judicial review of administrative discretion). And there is certainly a dearth of commentary in the textbooks. Thus the principal work devotes its last two chapters to errors of fact and errors of law but touches on discretion only interstitially in a chapter on 'Unreviewable Administrative Action'.[9] If I am not mistaken, it was my persistent complaint at this lacuna at the very heart of the subject that stimulated (or perhaps rather provoked) a learned friend and a colleague to write a valuable article which does much to fill the gap".[10]

This seems to have sparked off American literature on the subject of judicial review of administrative discretion. Professor K.C. Davis has been the main pioneer in this area. Discretionary Justice: A Preliminary Inquiry (1969), Police Discretion (1975), Discretionary Justice in Europe and America (1976) were his earlier works. The second edition of his leading work entitled Administrative Law Treatise volume 2 (1979) contains towo important chapters on discretion (chapters 8 and 9). A steady stream of the courts' rulings on review of discretionary powers under various statutes including the APA S10 has followed. The courts are endeavouring to spell out the relevant principles of review. One of the questions that they are grappling with is: do the 'substantial evidence' and 'arbitrary/capricious' tests differ?[11] We will attempt our evaluation in the light of the current state of legal development.

Judicial Review of Discretion

(a) Unfettered Discretion

Anglo-American attitudes towards discretion show a marked difference. Thus while uncontrolled or unfettered discretion is open to constitutional objection in the United States, British courts do not find any such objection to it,[12] provided that there is legislative authority for the conferment of such power. On judicial review of administrative discretions in English law[13] one ought to start with a case like **Carltona Ltd** v **Commissioners of Works**[14]. In that case the validity of an order requisitioning certain premises was challenged. The order was made under a war-time statutory regulation which had provided that "a competent authority, if it appears to that authority to be necessary or expedient so to do in the interest of public safety.....may take possession of any land". It was held that Parliament had committed to the executive the discretion of deciding when an order for the requisition of premises should be made and with that discretion, if bona fide exercised, no court could interfere.

Although **Carltona** was a war-time case and the courts' view as to the scope of review over discretionary actions has changed over the years (as illustrated in the relatively recent ruling in **Secretary of State for Education and Science v Tameside MBC**[15]) the view that untettered discretion is acceptable to the courts still prevails. Thus in **Atkinson v United States Government**[16] involving extradition of an alleged criminal to the United States, the House of Lords held that under s.11 of the Extraditon Act 1870 the Secretary of State had power to refuse to surrender a man committed to prison by a magistrate, and that this power could be exercised whenever it would be wrong, unjust or oppressive

to surrender him. Lord Reid said using the very language of **Liverside v Anderson[17]** another well-known war-time case, "the Secretary of State is answerable to Parliament, but not to the courts, for any decision he may make". (p. 1322). Similarly in **R v Secretary of State ex p. Anderson Strathclyde PLC[18]**, a 1983 decision, the Minister had allowed a take-over bid for a company to go ahead contrary to the recommendation of the Monopolies and Merger Commission. It was held that the Minister had an 'unfettered discretion' in deciding whether to approve a take-over bid. In **Royal Government of Greece v Brixton Prison Governor[19]** Lord Reid referred to "an unfettered discretion whether or not to surrender a fugitive criminal" (at p. 1339) while Lord Donovan spoke of the "ultimate discretion" of the Home Secretary as to surrender. "This" he said "is a matter entirely for him, and he may have information relevant to the issue which the courts do not possess" (pp. 1342 - 43)

There is an euphoria in some quarters[20] over the fact that in some cases while reviewing subjective discretion, the courts have enquired into the facts to see whether the authorities could be 'satisfied' on facts so as to justify the action complained of. Thus in **Secretary of Education and Science v Tameside MBC[21]** Lord Wilberforce said

> "I must now enquire what were the facts upon which the Secretary of State expressed himself as satisfied that the council were acting or proposing to act unreasonably (in postponing the comprehensive education scheme). And Lord Wilberforce concluded "...If he [i.e. the Secretary of State] had exercised his judgment on the basis of the factual situation..... there was no ground..... upon which he could find that the authority was acting or proposing to act unreasonably".[22]

However the court found it possible to review discretion in this and similar other cases[23] only because the authorities volunteered to disclose evidence. In the Tameside case this consisted of the department's letter at the relevant time and affidavits sworn by its officers. Where the private litigant has no knowledge of the facts on the basis of which the authority might have acted or where the latter withholds information under a claim of public interest immunity (or executive privilege as it is known on the United States) there is hardly any scope for review of discretion. In **R v. Brixton Prison Governor ex p. Soblen[24]** involving the deportation of an American citizen and the alleged use of deportation power to secure the extradition of a political offender contrary to s. 3 of the Extradition Act 1970 and the relevant principle of international law, the Court of Appeal held that so long as the deportation order was good on its face the court could not go behind it to establish illegality unless the deportee adduced evidence to show that the Home Secretary had used the power of deportation for an ulterior purpose. The evidence consisted of a communication from the Government of the United States to the British Government seeking the surrender of the deportee for which Crown Privilege had been claimed successfully denying disclosure. In the absence of evidence said Donovan L.J., the deportee "will be left to do his best without such assistance and in the nature of things, he will seldom be able to do more than raise a prima facie case"(p.641).

All these go to show that unfettered discretion is very much a part of English law.

By contrast, unfettered discretion is not an acceptable doctrine in American law. An important statement appears in **Historic Green Springs Inc. v. Bergland [25]**, a 1980 decision. The Department of Interior designated 14000 acres of land as a National Historic Landmark. As a result restrictions were imposed on the plaintiff's land. The landmark designation was held invalid.

The Court stated:-

> "Two inter-related principles have developed... the first principle holds that... some form (is required)....the second principle... recognises that due process means that administrators must do what they can to structure and confine their discretionary powers through safeguards, principles and rules ... due process requires some standards, both substantive and procedural to control agency discretion.... the Court thus finds the landmark designation invalid based on the Department's failure to promulgate substantive standards for national historic significance and its failure to prepare and publish rules of procedure to govern the designation process" (pp.853 - 56).

This suggests that uncontrolled discretion is inconsistent with procedural due process. In **Morton v. Ruiz [26]** involving denial of general assistance benefits to an applicant by the Bureau of Indian Affairs, the Supreme Court stated that "the power of an administrative agency to administer a Congressionally created and funded programme necessarily requires the formulation of policy and the making of rules to fill any gap left implicitly or explicitly by Congress"

In other words discretion that is exercised without a guiding rule is liable to be declared invalid.

(b) Unregulated Discretion

There has developed a steady movement in the United States against the use of uncontrolled discretion. The demand is now for the regulation of discretion. Even the sphere of enforcement of criminal law is not immune from this movement[27]. In the **United States v. Nixon[28]** the Supreme Court conceded "absolute discretion" to prosecutors. However, in **Marshall v. Jerrico Inc[29]** the Supreme Court shifted the ground by saying "we do not suggest that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors.... traditions of prosecutorial discretion do not immunise from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors..... a scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decisions".

English courts on the other hand have by and large adopted a policy of non-interference with prosecutorial discretion.[30]

In the U.S.A. attempts are being made to codify rules both at federal and state level to structure discretion. The Revised Model State Administrative Procedure Act issued by the Commissioners on Uniform Laws in 1981 provides:-

"Each agency shall... as soon as feasible and to the extent practicable, adopt rules.... embodying appropriate standards principles and procedural safeguards that the agency will apply to the law it administers.... (and) as soon as feasible and to the extent practicable, adopt rules to supercede principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases".[31]

Studies undertaken by the Informal Action Committee of the Administrative Conference have resulted in a number of documents.[32] Professor K.C. Davis has formulated "Twenty Basic Propositions About the Rule and Discretion" in the second edition of his leading work.[33]

English Law

The English Courts adopted a different attitude to the question of structuring discretion. Devlin L.J. (as he then was) said in **Merchandise Transport Ltd.** v. **British Transport Commission,**[34] when dealing with the question whether a transport tribunal ought to be inhibited by its previous decisions while granting licences,

"the tribunal may not in my opinion make rules which prevent or excuse either itself or the licensing authorities from examining each case on its merits.... a tribunal must not pursue consistency at the expense of the merits of individual cases. If the discretion is to be narrowed, that must be done by statute; the tribunal has no power to give its decisions the force of statute".

Devlin L.J. conceded the case for uniformity when he said "In my opinion a series of reasoned judgements such as the tribunal gives is bound to disclose the general principles on which it proceeds. I think that this is not only inevitable but also desirable. It makes for uniformity of treatment and it is helpful to the industry and to its advisers to know in a general way how particular classes of applications are likely to be treated"(p. 507). Indeed in a series of cases the English courts have in recent years recognised the need for consistency and uniformity[35]. In **H.T.V. Ltd.** v. **Price Commission,**[36] the Price Commission was not permitted to depart from its statement that a certain levy was to be treated as a cost for the purpose of determining the net profit margin. Lord Denning M.R. said (at p.185)

"It is the duty of the Price Commission to act with fairness and consistency in their dealings with the manufacturers and traders. Allowing that is primarily for them to interpret the Code (the Counter-Inflation Price Code Order 1974), nevertheless if they regularly interpret the words of the Code in a particular sense - or regularly apply the Code in a particular way - they should continue to interpret it and apply it in the same way thereafter unless there is a good cause for departing from it".

However, while it is permissible in English law to pursue a policy of consistency and uniformity, it is not permissible to adopt them as a rule. **A rule is applied whenever a situation comes within it, there being no discretion to act otherwise.**[37] A distinction is drawn in English law between adopting a policy and adopting a rule. "where a tribunal in the honest exercise of a discretion has

adopted a policy and without refusing to hear an applicant intimates to him what its policy is, and after hearing him it will in accordance with its policy decide against him.... no objection could be taken to such a course. On the other hand... where a tribunal has passed a rule... not to hear any application of a particular character'' the rule would be void.[38]

Where a policy is adopted ''the applicant is entitled to put forward his reasons urging that the policy should be changed or saying that in any case it should not be applied to him''.[39] Consequently the authority should be ''ready to hear anything new which might be said''.[40]

The main feature distinguishing the English courts' reasoning from their American counterparts seems to be the insistence that a **pre-determined policy must be regarded as only one of the relevant factors to be considered and not the sole factor to determine the issue.** In **Stringer v. Minister of Housing and Local Government**[41] the Minister's policy not to allow development around Jodrell Bank was upheld. Cooke J. said

> ''It is not ..... a policy which is intended to be pursued to the disregard of other relevant considerations''

Similarly in **H. Lavender & Son Ltd v. Minister of Housing and Local Government**[42] one of the reasons for holding the Minister's policy void was that by always adopting the decision of another Minister as to whether certain agricultural land should be developed he had precluded himself from considering other matters that could be relevant.

These cases seem to proceed on the basis that it is wrong to decide a case **solely** on the basis of a predetermined policy. In **British Oxygen Co. Ltd. v. Minister of Technology**[43] the Board of Trade considered applications for investment grants but refused grants in a particular case owing to their policy of not allowing grants on items costing less than £25. The decision was upheld as valid. Lord Reid expressed the view that a policy could be applied in deciding a case provided the authority was willing to listen to an applicant with something new to say. In other words the policy could be relied on as the sole consideration for decision providing each applicant is given a chance to argue that the policy should be changed. In **Sagnata Investments Ltd. v. Norwich Corporation**[44] where the corporation had applied a policy of not granting permits for an amusement centre Lord Denning M.R. adopted the approach of Lord Reid in the **British Oxygen** case so as to uphold the policy. But the majority judgement was of the view that since all other factors pointed towards the granting of licence it was wrong to refuse it solely on the basis of a predetermined policy.

Notwithstanding the above, the difference between the British and American approach seems to be narrowing. Thus Lord Reid said in the **British Oxygon case**[45]

> ''I do not think that there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Minister or a large authority may have to deal already with a multitude of similar

applications and they will almost certainly have evolved a policy so precise that it could well be called a rule''.[46]

The above observations in the **British Oxygen** case were cited with approval by Lord Scarman in **Findlay v. Secretary for the Home Department.**[47] In that case the Home Secretary introduced a new parole policy without prior consultation with the Parole Board, rendering prisoners within certain categories ineligible for parole save in exceptional circumstances. The House of Lords upheld the policy as valid. Lord Scarman emphasised the need for a policy when he said ''...I have difficulty in understanding how a Secretary of State could properly manage the complexities of his statutory duty without a policy (p.828). His Lordship accepted that there could be cases in which ''statutory duty.... admitted of no policy other than that every case must be considered individually'' However, ''consideration of a case is not excluded by a policy which provides that exceptional circumstances or compelling reason must be shown because of the weight to be attached to the nature of the offence, the length of the sentence and the factors of deterrence, retribution and public confidence, all of which it was the duty of the Secretary of State to consider'' (p. 828).

The view that discretion ought to be structured by rules is being increasingly accepted by official documents and commentators in Britain. Thus the Franks Committee stated:-

''....the rule of law stands for the view that decisions should be made by the application of known principles or laws .... On the other hand there is what is arbituary. A decision may be made without prior principle, without any rules. It is therefore unpredictable, the antithesis of a decision taken in accordance with the rule of the law''.[48]

Review of Abuse of Power

The British courts will review administrative actions found to have involved abuse of power. In **Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation**[49] Lord Greene M.R. specified the grounds for such challenge, viz. bad faith, dishonesty, unreasonableness, considering irrelevant factors, ignoring relevant factors, not directing oneself properly in law etc. Lord Greene stated that:-

''The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or conversely have refused to take into account, or, neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever come to it. In such a case, again, I think the court can interfere. The power of the court in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority had contravened the law by acting in excess of their powers which Parliament has confided in them''.

The principles are commonly referred to as **Wednesbury principles** and have formed the basis of many leading decisions on judicial review of administrative discretion.[50] In **Khawaja** v. **Secretary of State for the Home Department**[51] Lord Scarman pointed out that the Wednesbury list provides for a limited basis of review.

His Lordship said:-

> "The principle formulated by Lord Greene M.R. [in **Associated Provincial Picture Houses** v. **Wednesbury Corpn.** (1948) I K.B. 223] was that the courts will not intervene to quash the decision of a statutory authority unless it can be shown that the authority erred in law, was guilty of a breach of natural justice or acted 'unreasonably'. If the authority has considered the matters which it is its duty to consider and has excluded irrelevant matters, its decision is not reviewable **unless so absurd that no reasonable authority could have reached it**".[52]

In this case the House of Lords ruled that the court will go beyond the Wednesbury principle in reviewing administrative actions where the exercise of discretion depends on "Jurisdictional facts" In such a case the court had to be satisfied on the civil law standard of proof, the authority having the burden of proof that those facts did exist.

The Wednesbury principle was also construed by the Court of Appeal in **Cannock Chase D.C.** v. **Kelly**[53] to mean an unreasonable decision - so unreasonable as to amount to an absurd act - a rare phenomenon in human behaviour. The difficulty of establishing a ground of review under the **Wednesbury** principle was also apparent in **Findlay** v. **Secretary of State for the Home Department**[54] where Lord Scarman said

> "Counsel for the applicants also invoked the Wednesbury principle ... submitting that no reasonable Home Secretary could have reasonably omitted to consult the board..... . In deciding to adopt the new policy without consulting the board the Secretary of State took into account the factors of deterrence, retribution and public confidence in the administration of criminal justice. These were plainly material matters for his consideration in the exercise of his discretion. He cannot, therefore, be said to have acted unreasonably in having regard to them".

Indeed the courts seem to be willing to grant a great deal of latitude to the administrative authorities in considering whether they have acted unreasonably. Thus Lord Hailsham said in **Re W (an infant)**:-[55]

> "Two reasonable [persons] can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.... Not every reasonable exercise of judgement is right and not every mistaken exercise of judgement is unreasonable".

These remarks were cited with approval by Lord Salmon in **Secretary of State for Edcuation and Science** v. **Tameside M.B.C.**[56]

Notwithstanding the above, an indication of some possibilities of judicial review

under the Wednesbury principle appears in the judgement of Sir Donaldson M.R. in the **Findlay** case when he said

> "I do not doubt that, theoretically, a situation could arise in which the courts would have no hesitation in judicially reviewing the policy of the Home Secretary, on **the basis that he was atteching wholly unreasonable weight to a particular factor or, if it was not known what weight he was attaching to what factor, that the results of his policy were such that he must have done so.**"[57]

However, judicial review was not possible in **Findlay** on that basis as Sir Donaldson M.R. explained:-

> "In the present instance we do know that one of the criteria to which the Home Secretary is having regard is the nature of the offence of each prisoner. This cannot possibly be criticised. We also know that he regards violent crime and drug trafficking as being of particular seriousness and therefore as being, if viewed in isolation, contra-indicative of release on parole. We further know that in forming this view he has had regard to 'general public concern' and 'growing criticism'. Since the success of the parole scheme must depend on its public acceptability, I cannot see that this is as such, unreasonable".(p. 814)

These remarks coming from the Court of Appeal in the **Findlay** case are pregnant with immense possibilities. If they are persistently developed and applied, they could provide a basis for disclosure of reasons for discretionary decisions and of information concerning their factual basis and could make a difference in cases such as **Hosenball**[58] which is discussed below.

The Wednesbury principle governs judicial review of administrative actions in non-jurisdictional fact cases i.e. where the jurisdiction of the authority is not dependent on the existence of certain precedent facts. An example of the latter category was provided in **Hosenball**[59]. The case involved deportation of two American journalists on the basis of an allegation that they had tried to publish information harmful to the security services. It was held that there was no scope for judicial review, there being no disputed jurisdictional facts i.e. the alien status of the journalists.

The American courts use the "arbitrary or capricious" rule, meaning more or less what Lord Greene M.R. ascribed to the rule he stated in the Wednesbury case,[60] but there is a difference in their approach to the scope of review. In the U.S.A. while non-jurisdictional findings will stand unless unsupported by 'substantial evidence', jurisdictional facts must be fully retried by the reviewing court. The first and clearest example is a case of 1922 where the Supreme Court ordered a trial de novo of the issue of citizenship in a deportation case[61]. Mr Justice Brandeis said "jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus denial of an essential jurisdictional fact". In **Crowell** v. **Bension**[62] the supreme Court held again on the jurisdictional fact ground that whether the relationship of master and servant existed between the parties must be tried de novo. Trial de novo involves the court in making its own findings of fact or its own appraisal of evidence, to weigh the preponderance of evidence or to exercise an independent judgment thereon or to substitute its own judgment for that of the agency.[63]

While in **Khawaja** the House of Lords enhanced the scope of review of jurisdictional facts involving deprivation of personal liberty, judicial review in English law under the recently created remedy of "application for judicial review" comprises summary proceedings. There is hardly any room for retrial of issues of facts as there is in American law. Thus Lord Diplock said in **O'Reilly** v. **Mackman[64]**

> "The facts can seldom be a matter of relevant dispute on application for judicial review since the tribunal or authority's findings of fact....are not open to review by the court in the exerciseof its supervisory powers except on the principles laid down in **Edwards** v. **Bairstow** (1956) A.C. 14 at p 36" (i.e. that they were based on no evidence or on a view of the facts that could not reasonably be entertained).

In the sphere of non-jurisdictional facts the American courts seem to apply the dual tests of 'substantial evidence' and 'arbitrary-capricious' rules. In **Abbott Laboratories** v. **Gardner[65]** the Supreme Court stated that the " 'substantial evidence' test [affords] a considerably more generous judicial review than the 'arbitrary and capricious' test...." even if an action is supported on 'arbitrary-capricious' test it might fall under the 'substantial evidence' rule depending on whether the issues are factual or not. Perhaps the 'substantial evidence' test relates to only what is factual whereas 'capricious and abitrary' rule reaches both factual and non-factual issues.**[66]**

There is no 'substantial evidence' rule in English law although the courts occasionally act on the 'no evidence' rule.**[67]** The Wednesbury principle which roughly corresponds to what the American lawyers call 'arbitrary and capricious' has been used to provide an extended review involving property rights. **Bromely L.B.C.** v. **G.L.C.[68]**, which invalidated the G.L.C.'s fares policy for London Transport, is a leading example of this approach. The English courts have also resorted to "purposive interpretation" of statutes**[69]** to curtail discretionary powers. **Padfield** v. **Minister of Agrculture[70]** illustrates this. However, English administrative law is very much weaker in the protection of civil liberties and personal freedom particularly in the sphere of immigration and deportation, notwithstanding the improvement effected by the ruling in **Khawaja** v. **Secretary of State[71]** which is confined to 'juisdictional facts' cases. Introduction of the 'substantial evidence' rule in the English law would be an important step forward. However, this requires that evidence is made available to the reviewing court. This aspect of the matter is explored in the next section.

Review of Motives

The most central question in judicial review of administration action is - will the courts probe into the mental process of the administrator in order to lay bare the motives that induced the challenged act? As a matter of substantive law in Britain and in the U.S.A. it is established that the courts do have such power. Thus a local authority with powers of compulsory purchase of land to effect civic improvement or extension cannot acquire land to reap the benefit cf its enhanced value;**[72]** nor can an education authority use its power to dismiss teachers on eduational grounds to effect economy.**[73]**

In this context we are talking about review of motives as distinct from purpose.**[74]** There is no problem on review of purpose. Once a purpose is found to be unauthorised the decision will be set aside.**[75]**

The problem with regard to review of motives is how to prove that an administrator's act has been prompted by improper motives when the private litigant has no access to the information on the basis of which he might have acted. Furthermore when faced with a request for disclosure the administration withholds the information, claiming public interest or executive privilege. This was the very difficulty that led to the denial of review in the **Soblen case[76]**. There it seemed that the Home Secretary was using his power of deportation to secure extradition of a political offender - something that is forbidden both under British law and international law.[77] However, since the content of the communciation between the British and American Governments which could have proved whether the surrender of the political fugitive was a bilateral transaction (i.e. extradition) was held to be protected by Crown Privilege, the court could not enquire into the real motives of the Home Secretary.

Indeed bad faith or ulterior motives are not easy to prove. **Cannock Chase D.C.** v. **Kelly[78]** is a typical illustration of this. In that case the local authority granted the tenant a tenancy of a council house. Eleven months later the authority served the tennant with notice to quit and subsequently brought an action claiming possession of the house. Evidence established that the tenant had been a good tenant and had not been in breach of any of the terms of tenancy. She had put fittings into and had redecorated the house which was in a good state. The tenant in her defence pleaded that in giving her the notice to quit the local authority had failed to exercise its powers of management, regulation and control 'in good fatih and taking into account all relevant considerations'. The Court of Appeal granted the local authority an order for possession and held that bad faith or lack of good faith meant dishonesty and should not be treated as a synonym for an honest though mistaken taking into consideration of an irrelevant factor. If a charge was made against a local authority of bad faith in the exercise of its powers it was entitled to have the charge particularised by the tenant and if that were not done the tenant's pleadings might be struck out. Where the precise factor had not been pleaded the court might be justified in inferring abuse of power if the local authority's decision had been so unreasonable that no reasonable authority could have reached that decision (i.e. an absurd decision - a rare event) on the basis of the 'Wednesbury principle'.

Burden of Proof

One way of dealing with the difficulty of proof in judicial review of administrators' motives would be to transfer to the executive the burden of proof. This would require the executive not only to justify its decisions by advancing reasons in support thereof but also to disclose findings of fact backed by supporting evidence. In cases such as **Soblen** and **Kelly** this would impose on the executive the obligation to justify its decisions by the necessary disclosures of factors that prompted them. Thus the motives underlying the decisions would come to the light.

The principle was recognised by the Privy Council in **Eshugbayi Elko v. Government of Nigeria(Officer Administering)[79]**. Where Lord Atkin said:-

> ''In accordance with British Jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice''.

However, in **Liversidge** v. **Anderson**[80] the House of Lords held that "If the Secretary of State has reasonable cause to believe any person to be of hostile origin or association" he does not have to justify before the court of law any order of detention made by him. However, Lord Atkin said in his dissenting judgement "...in English law every imprisonment is prima facie unlawful, and ....it is for a person directing imprisonment to justify his act" (at p.245)

In **IRC** v. **Rossminster Ltd.**[81] the House of Lords held that the majority decision in **Liversidge** v. **Anderson** was "expediently and at that time, perhaps excusably wrong and the dissenting speech of Lord Atkin was right". Lord Scarman said that 'the ghost of **Liversidge** v. **Anderson**' need no longer haunt the law.[82] However, 'the ghost' soon reappeared in **Zamir** v. **Secretary of State for the Home Department**[83] where whether a certain person was an 'illegal entrant' was held to depend not on the actual facts but on the Home Secretary's opinion of them, although the Immigration Act 1971 had objectively defined the expression 'illegal entrant'. This ruling introduced subjective interpretation not only of subjective provisions but also of objective language of statutes. Professor H.W.R. Wade commented:-

> "The objective interpretation of objective language is the foundation stone of judicial review and it is of great importance that it should not be undermined"[84].

Fortunately **Zamir** was overruled by the House of Lords in **Khawaja** v. **Secretary of State for the Home Department**[85]. In this case (involving the question whether a certain person was an 'illegal entrant') the House of Lords held that where an executive officer's power to make a decision which would restrict or take away a subject's liberty was dependent on the existence of certain facts, the court was not limited merely to enquiring whether the executive officer had reasonable grounds for believing that those 'precedent facts' existed. In other words in cases of what the American courts call 'jurisdictional facts' and what the English courts call 'collateral facts' or 'Precedent facts' judicial review is not confined to 'the Wednesbury principle'. In these cases the court will go a step further and will demand that the court be satisfied on the civil law standard of proof, the executive having the burden of proof that those facts did in fact exist at the time the power was exercised. Lord Scarman said on the question of proof:-

> "The initial burden is on the applicant. At what stage, if at all, is it transferred? And if it is transferred, what is the standard of proof he has to meet? It is clear from the passages cited from Lord Atkin's opinions in **Liversidge** v. **Anderson** and **Eshugbayi**'s case that in cases where the exercise of executive discretion interferes with liberty or property rights, he saw the burden of justifing the legality of the decision as being on the executive. Once the applicant has shown a prima facie case, this is the law"[86]

On the question of standard of proof Lord Scarman considered the choice between criminal law's requirement of proof beyond reasonable doubt and the civil law's standard of balance of probabilities and came down decidely in favour of the latter. He said (at p. 783):-

"My Lords, I have come to the conclusion that the choice between the two standards is not one of any great moment. It is largely a matter of words. There is no need to import in this branch of the civil law the formula used for juries in criminal cases. The civil standards as interpreted and applied by the civil courts will meet the ends of justice"

Detournement de pouvoir

The above shows that the ruling in **Khawaja** has bought about an improvement in 'jurisdictional facts' or 'precedent facts' cases. However, in non-jurisdictional facts cases (which normally involve the exercise of discretion) 'the Wednesbury principle' will govern the scope of review. Under 'the Wednesbury principle' the burden of proving the illegality of administrative actions rests on the party seeking to challenge them. Thus Lord Greene M.R. said in **Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.[87]**

"What then is the power of the courts? The courts can only interfere with an act of the executive authority if it be shown that the authority have contravened the law. It is for those who assert that the local authority have contravened the law to establish that proposition".

In **Cannock Chase D.C. v. Kelly[88]** Megaw L.J. said after citing the above remarks with approval:-

"So the burden is on the tenant. It is for the tenant first properly to allege, and then, if challenged, to prove, the 'contravention of the law' in what prima facie, is a permitted and lawful act of the local authority".

This discussion shows that with the exception of jurisdictional facts cases, the difficulty of establishing that the motives of the administrators were ulterior or irrelevant to the authorised purpose remain.

It is submitted that a principle camparable to the French doctrine of **detournement de pouvoir** is called for. This involves an inquiry into the motves of the administrator which inspired the alleged act. If the discretion has been exercised for an object other than that for which it was conferred by the statute then the principle could be invoked. The French court in exercising review will not be bound by the precise terms of the statute but will ascertain the object of the statute from Parliamentary debates on the bill or from any other relevant official document. The reviewing court must ascertain what was the object behind the particular exercise of discretion. Only if the object does not agree with the object of statute can the French court intervene on the basis of **detournment de pouvoir[89]**.

It is submitted that an effective operation of the principle requires the following: (i) duty to give reasons for discretionary decisions; (ii) duty to make findings of fact and to disclose those findings coupled with the evidentiary basis of the findings; (iii) power of the court to order discovery of documents, the extent of discovery being determined by the interest of justice; (iv) the court's power to resort to legislative history to ascertain the object of the statute. In the light of these requirements, it seems that the American courts are better equipped than the British counterparts to enquire into the motives of the administration.

In Britain, outside the Tribunals and Inquiries Act 1971 which applies to specified tribunals and not to discretionary actions and decisions, there is no duty to state reasons for decisions. There was a suggestion in **Padfield v. Minister of Agriculture**[90] that if the authority ommitted to give reasons to justify its decision the court could infer that it had no good reason to justify its decision. However, this suggestion has not yet been followed up to impose a general duty to state reasons for decisions[91]. Neither the rules of natural justice[92] nor the comcept of 'acting fairly'[93] import any such duty.

The position regarding the duty to state reasons for discretionary decisions may have marginally improved as a result of the recent decision of the House of Lords in **Council of Civil Service Unions v. Minister for the Civil Service**[94]. In this case the imposition of ban on the trade union rights of the civil servants at the Government Communication Headquarters(GCHQ) without prior consultation with the civil servants in question, contrary to past practice, was held to be a denial of 'legitimate expectation' amounting to a failure to act fairly. But for the reasons of national security involved, the court would have granted judicial review. In this case the House of Lords indicated that omission to state reasons for decisions that affect 'legally enforceable rights' or 'legitimate expectations' would be a failure to act fairly which would qualify for judicial review. Lord Diplock stated (at p. 949)

> ''To qualify as a subject for judicial review the decision must have consequences which affect some person .... it must affect such .... person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision-maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation that qualifies for inclusion in class (b) a 'legitimate expectation' rather than a 'reasonable expectation'....)''[95]

This is a definite improvement on the previous law. However, in the vast majority of cases discretionary decisions affect neither 'legally enforceable rights' nor 'legitimate expectations'. Refusal to renew an existing licence without a hearing[96], removal of illegal immigrants contrary to a publicly announced undertaking to give them an opportunity to make a representation prior to a decision on removal[97] and denial of trade union rights without prior consultation contrary to past practice[98] have been held to involve denial of 'legitimate expectation'.

For these reasons we have called this advance a marginal improvement only.

In the U.S.A. Section 6(d) of the APA imposes a duty to give reasons by providing that notice of denial be given and that "such notice shall be accompanied by a simple statement of procedural or other grounds" except where the agency has affirmed a prior denial or when the denial is self-explanatory[**99**]. This requirement has been held to be applicable to discretionary denials[**100**]. In **Dunlop v. Bachowski**[**101**] after holding that the Secretary of Labour's discretion not to bring a prosecution is reviewable the Supreme Court stated "the Secretary must provide the court and the complaining witness with copies of a statement of reasons supporting his determination" that the statement "must be such as to enable a reviewing court to determine with some measure of confidence whether or not the discretion.... has been.... arbitrary (or) capricious.... For this essential purpose, although detailed findings of fact are not required, the statement of reasons should inform the court.... both the grounds of decisions and the essential facts upon which the Secretary's inferences are based"

This ruling is taken as applying to the whole spectrum of administrative process including informal action.[**102**] The important requirement to furnish "the essential facts upon which the Secretary's inferences are based" which could have made all the difference in a case like **Soblen** has no counterpart in English administrative law.

In **Air Canada v. Secretary of State (No.2)**[**103**] the House of Lords curtailed the right of discovery by ruling that it is no longer possible to obtain discovery by showing that it is necessary in the interest of justice. The party seeking discovery must show that the disclosure would help his own case or damage his oppenent's case. It seems that in American law disclosure of documents can be obtained on a wider basis. Apart from the common law right to inspect and copy public records, [**104**] the Freedom of Information Act 1966 as amended in 1974 (amending s. 3 of the APA) makes governmental records generally available to any person. This right is subject to exceptions with regard to matters listed within nine stated categories including matters of national defence or foreign policy. But there is no specific exception of executive privilege which of course exists in the law of discovery in legal proceedings.

The courts's power to resort to legislative history exists in American law but not in English law except in the case of 'substantial ambiguity' in the words of statutes.[**105**]

Concluding Remarks

The above shows that the English courts started with a better background of review of discretion than the American courts. Yet when dealing with the central issue of review of administrator's motives they are far less equipped than their American counterparts. They could have developed a far more satisfactory set of principles capable of effectively dealing with the problems of reviewing discretion but they have failed to do so. That makes a strong case for legislative intervention providing the necessary power of review. American precedent for such intervention was seen in the enactment of the Administrative Procedure Act 1946 which has been subsequently improved and expanded. A public debate on a similar measure is called for in Britain.

1. An address given at the Seventh British American Conference on Law held at Edinburgh in July 1984. The article has been up-dated since then to take account of recent cases.

2. See H.W.R. Wade, Administrative Law (5th ed.) Ch.11 and 12; S.A. de Smith, Judicial Review of Administrative Action (2nd ed.) Ch. 6; Griffith and Street, Principles of Administrative Law (5th ed.) 218-214; Foulkes, Administrative Law (5th ed.) Ch. 7; Carol Harlow and Richard Rawlings, Law and Administration, Ch. 11; Beatson and Mathews, Administrative Law: Cases and Materials, Part 11; Baliley, Cross and Garner, Cases and Materials in Administrative Law, Ch. 8.

3. Thus in **Universal Camera Corpn. v. N.L.R.B. 340 U.S. 474, 478 [1951]** the Supreme Court stated "The substantiality of evidence must take into account whatever in the recoord fairly detracts from its weight"

4. **Gray v. Powell** 314 U.S. 402, 411 (1941); **N.L.R.B. v. Hearst Publicatien** 322U.S. 111 (1944); **Unemployment Compensation Commission of Alaska v. Aragon** 329U.S. 143 (1946).

5. See Davis, Administrative Law Treaties (2nd ed.) S. 8.10 entitled "Structuring Discretion Through Precedents: The INS"

6. "Of course, not all the questions need be classified as either law or fact. But the judicial tendency to write opinions in terms of the simple dichotomy is very strong and, if one may believe the opinions, judicial thinking which puts all questions into one or the other of the two categories is probably dominant". Davis op. cit. (1st ed.) S.30.04

7. 385 U.S. 276 (1966).

8. R v. **Home Secy. ex p. Duke of Chateau Thierry** (1917) I K.B. 922; **Rv. Lemon Street Police Station Inspector ex p. Venicoff** (1920) 3 K.B. 72; **R. v. Brixton Prison Governor ex p. Soblen** (1963) 2 Q.B. 243; **R. v. Home Secy. ex p. Hosenball** (1977) 3 All E.R. 452.

9. Reference is to Davis, Administrative Law Treatise (1958) Ss. 28, 29 and 30.

10. H.W.R. Wade, "Anglo-American Administrative Law: More Reflections" (1966) 82 L.Q.R. 226 at 249. Reference is to Raoul Berger, "Administrative Arbitrariness and Judicial Review" 65 Col. L.R. 55.

11. See Davis, 1982 Supplement pp. 520-522.

12. However, the commentators do not favour unfettered or uncontrolled discretion. Dicey thought it to be incompatible with the rule of law: Law of the Constitution 9th ed. p. 202. H.W.R. Wade states "the fisrt requirement.... is that the courts should draw those limits in a way which strikes the most suitable balance between executive efficiency and legal protection of the citizen. Administrative Law (5th ed.) p.347.

13. The notion of 'discretion' was explained by Lord Diplock in **Secy. v. State of State for Education and Science** (1976) 3 All E.R. at 694 as follows: "The very concept of administrative discretion involves a right to chose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred"

14. (1943) 2 All E.R. 5600

15. (1976) 3 All E.R. 665 (H.L.). For similar other cases where the court has demonstrated its willingness to intervene see **Roberts v. Hopwood** (1925) A.C. 578; **Prescott v. Birmingham Corpn.** (1955) 1 Ch. 210; **Taylor v. Munrow** (1960) 1 All E.R. 129 (h.L.); **Mixnam Properties Ltd. v. Chertsey U.D.C.** (1965) A.C. 735; **Hartnell v. Minister of H. & L.G.** (1965) A.C. 1134; **Hall & Co. Ltd. v. Shoreham-by-Sea UDC** (1964) 1 W.L.R. 240.

16. (1969) 3 All E.R. 1317 (H.L.)

17. (1942) A.C. 206.

18. (1983) 2 All E.R. 233 at 243 para 6.

19. (1969) 3 All E.R. 1337 (H.L.)

20. As for instance see JUSTICE'S "Review of Administrative Law in the United Kingdom (1981) p. 41.

21. (1976) 3 All E.R. 665 (H.L.)

22. (1976) 3 All E.R. at 682 and 686. Lord Wilberforce expressly approved the following statement of Lord Denning M.R. in **SOS for Employment v. ASLEF (No. 2)** (1972) 2 Q.B. 455 at 492-3, where the Secretary of State was empowered to order a ballot of the workmen if it appeared that industrial action was imminent: " 'If it appears to the Secretary of State?' This, in my opinion does not mean that the Minister's decision is put beyond challenge. The scope available to the challenger depends very much on the subject matter with which the Minister is dealing. In this case I would think that, if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law, it may well be that a court would interfere; but when he honestly takes a view of the facts or the law which could reasonably be entertained, then his decision is not to be set aside simply because thereafter someone thinks that his view is wrong. After all this is an emergency procedure. It has to be set out in motion quickly, when there is no time for minute analysis of facts or of law. The whole process would be made of no effect if the Minister's decision was afterwards to be conned over word by word, letter by letter, to see if he has in any way misdirected himself. That cannot be right"

23. **Municipal Council of Sydney v. Campbell** (1925) A.C. 339; **Webb v. Minister of H. & L.G.** (1965) 1 W.L.R. 755; **Maradana Mosque Trustees** (1967) 1 A.C. 13. In this case the court acted on the view that there was no evidence on which the Minister could be 'satisfied' that the school was not being managed properly. The obiter statement of Lord Denning M.R. in **Ashbridge Investment Ltd. V. Minister of H. & L.G.** (1965) 1 W.L.R. 1320 at 1326 that if the Minister acted on no evidence the court could interfere with his order has been applied repeatedly: **Coleen Properties Ltd.** v. **Minister of H. & L.G.** (1971) 1 All E.R. 1049; **Crabtree v. Minister of H. & L.G.** (1965) 64 L.G.R. 104; **Howard v. Minister of H. & L.G.** (1967) L.G.R. 257; **British Dredging (Services) Ltd. v. Secretary of State for Wales** (1975) 1 W.L.R. 687.

24. (1962) 3 All E.R. 641

25. 497 F. Supp. 839 (E.D. Va. 1980)

26. 415 U.S. 199 (1974) at 231: held: determination of eligibility for welfare benefits cannot be made on an ad hoc basis nor on the basis of an interpretive rule as opposed to a legislative type of rule.

27. See James Vorenberg, "Decent Restraint of Prosecutorial Power" 94 Harv. L. Rev. 1521 (1981)

28. 418 U.S. 683, 693 (1974)

29. 446 U.S. 238, 249-50 (1980).

30. See R. v. **Metropolitan Polico Commissioner ex p. Blackburn** (1968) 2 Q.B. 1128; **Union of Post Office Workers** (1978) A.C. 435.

31. S. 2-104(4).

32. The most significant of these are the 12 page statement by Warner Gardner, Chairman of the Committee on the Procedure by which Informal Action is Taken: 24 Ad. L. Rev. 155 (1972) and the accompaning Guidelines for the Study of Informal Action in Federal Agancies by William J. Lockhart, consultant to the Committee: 24 Ad. L. Rev. 167-203 (1972). For comments on these see 2 Davis, Administrative Law Treatise S. 8.6.

33. 2 Davis, Administrative Law Treatise S. 8.7.

34. (1961) 3 All E.R. 495 at 507; see also A-G (ex rel Tilley) v. Wandsworth London B.C. (1981) 1 All E.R. 1162.

35. **R. v. Preston S.B.A.T. ex p. Moore** (1975) 1 W.L.R. 624; **Laker Airways Ltd. v. Department of Trade** (1977) Q.B. 643; **Pearlman v. Keepers and Governors of Harrow School** (1979) Q.B. 56.

36. (1976) I.C.R. 170 (C.A.)

37. D.J. Galligan, "Nature and Function of Policies Within Discretionary Power" (1976) P.L. 332 at 348.

38. Per Bankes L.J. in **R. v. Port of London Authority ex p. Kynoch Ltd.** (1919) I.K.B. 176 at 184; see also **R. v. Flintshire C.C. ex p. Barrett** (1957) I.Q.B. 350 per Jenkins J. 367-368; **R. v. Torquay Licensing JJ ex p. Brockman** (1951) 2 Q.B. 784 per Lord Goddard, 788-792; **R. v. Secretary of State for Environment ex p. Brent L.B.C.** (1983) 3 All E.R. 321 per Ackner L.J., 355-356.

39. Per Lord Denning M.R. in **Sagnata Investments Ltd v. Norwich Corpn.** (1971) 2 All E.R. 1441 at 1447.

40. Per Ackner L.J. in **R. v. Secretary of State for Environment ex p. Brent L.B.C.** (1983) 3 All E.R. at 356.

41. (1979) 1 W.L.R. 1281 at 1297. Here there was also a statutory duty to consider all 'material factors'.

42. (1970) 1 W.L.R. 1231.

43. (1970) 3 All E.R. 165 (H.L.).

44. (1971) 2 All E.R. 1441 (C.A.).

45. (1970) 3 All E.R. 165 (H.L.).

46. (1970) 3 All E.R. at 170-171.

47. (1984) 3 All E.R. 801 at 828.

48. The Report of the Franks Committee, cmnd. 218, (1957) p.6. J.A. Farmer in his Tribunals and Government (1974) at pp. 178-179 states that the tribunals have in fact laid down general principles for application in subsequent cases while stopping short of developing these into hard and fast legal rules. He concludes that theoretical differences between the operation of precedent in court and tribunals have little practical significance because of what may be termed as the first principle if justice... namely the requirement of consistency, uniformity and equal treatment. See also Wraith and Hutchinson, Administrative Tribunals (1973) pp. 274-276.

49. (1948) 1 K.B. at 229.

50. The principles could be traced back to **Roberts v. Hopwood** (1925) A.C. 578. Subsequent cases are **Prescott v. Birmingham Corpn.** (1955) 1 Ch. 210; **Taylor v. Munrow** (1960) 1 All E.R. 455; **Secretary of State for Education and Science V. Tameside M.B.C.** (1976) 3 All E.R. 665 (H.L.); **Bromely L.B.C. v. G.L.C.** (1982) 1 All E.R. 129 (H.L.).

51. (1983) 1 All E.R. 765 at 781 (H.L.).

52. (1983) 1 All E.R. at 781. Emphasis added.

53. (1978) 1 All E.R. 152.

54. (1984) 3 All E.R. at 826-827.

55. (1971) A.C. 682 at 700.

56. (1976) 3 All E.R. at 700.

57. (1984) 3 All E.R. at 813-814. Emphasis added.

58. R. v. Secretary of State for the Home Department ex p. Hosenball (1977) 3 All E.R. 452.

59. (1977) 3 All E.R. 452.

60. See 2 Am. Jur. 2d Administrative Law S 650. APA section 10(e) speaks of actions, findings and conclusions found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law"

61. **Ng Fung Ho** v. **White** 59 U.S. 276 (1922).

62. 285 U.S. 22 (1932).

63. 2 Am Jur. 2d. Administrative Law S 594.

64. (1982) 3 All E.R. at 1132.

65. 387 U.S. 136, 143 (1967). The question whether the two tests differ has not been finally resolved. The Supreme Court expressed a somewhat different view in **Bowman Transportation Inc. v. Arkansas - Best Freight System Inc.** 419 U.S. 281, 284 (1974) but again in **Industrial Union Dapartment AFL-CIO** v. **American Petroleum Institute** 448 U.S. 607, 705 (1980) the Supreme Court stated that the 'substantial evidence' standard requires "review more stringent than the traditional 'arbitrary and capricious' standard for informal rule-making"

66. See on this 1982 Supplement to Administrative Law by K.C. Davis S 29.00-1 which at p.522 states "The D.C. Circuit has reffered to the arbitrary-capricious standards as 'the far less demanding' one. **Action for Children's Television** v. **FCC** 564, F. 2d 458, 478 (D.C. Cir. 1977). Yet clearly one test is not 'far less demanding' than the other with respect to non-factual questions such as questions of law, policy or discretion...."

67. e.g. in **Maradana Mosque Trustees** v. **Mahmood** (1967) 1 A.C. 13; **Secy of State for Education** v. **Tameside MBC** (1977) A.C. 1014.

68. (1982) 1 All E.R. 129 (H.L.).

69. Lord Diplock "Administrative Law: Judicial Review Revived" (1974) 33(2) C.L.J. 233; Lord Scarman (1983) unpublished lecture quoted in Carol Harlow and Richard Rawlings, Law and Administration (1984) pp. 344-345.

70. (1968) A.C. 997.

71. (1983) 1 All E.R. 765 (H.L.).

72. **Municipal Council of Sydney** v. **Campbell** (1925) A.C. 338.

73. **Hanson** v. **Radcliffe U.D.C.** (1922) 2 Ch. 490.

74. Occasionally the courts in Britain refuse to draw the distinction between motive and purpose. See for instance **Westminster Corpn.** v. **L. & N.W. Rly Co.** (1905) A.C. 426.

75. In R. v. **Hillington B.C. ex** p. **Royco Homes Ltd.** (1974) Q.B. 720 it was held that a local authority cannot use its planning powers (e.g. power to impose planning conditions) to achieve its housing policy (e.g. to have houses built for those on its housing list). See also **Webb** v. **Min of H & L.G.** (1965) 1 W.L.R. 755.

76. R. v. **Brixton Prison Governor ex p. Soblen** (1963) 2.Q.B. 302.

77. See Paul O'Higgins "Disguised Extradition: The Soblen Case" (1964) 27 Mod. L. Rev. 521.

78. (1978) 1 All E.R. 152 (C.A.).

79. (1931) A.C. 662 at 670.

80. (1942) A.C. 206.

81. (1980) A.C. 952 at 1011 per Lord Diplock.

82. (1980) A.C. 952 at 1025.

83. (1980) A.C. 930.

84. H.W.R. Wade, Administrative Law (1982; 5th ed.) p.408.

85. (1983) 1 All E.R. 765 (H.L.)

86. (1983) 1 All E.R. at 782; see also **IRC v. Rossminster Ltd.** (1980) 1 All E.R. 80 at 105.

87. (1948) 1 K.B. 223 at 228.

88. (1978) 1 All E.R. at 156.

89. Brown and Garner, French Administrative Law (3rd ed.) p. 148.

90. (1968) A.C. 997.

91. In **R. v. Home Secy. ex p. Hosenball** (1977) 3 All E.R. 452 the applicant's claim for a reasoned decision did not succeed.

92. In **Breen v. Amalgamated Engineering Union** (1971) 1 All E.R. Lord Denning M.R. suggested in his union dissenting judgement that a right to be heard ought to carry with it a right to a reasoned decision. However, this has not prevailed: **R. v. Gaming Board ex p. Benaim** (1970) 2 Q.B. 417, 431; **William v. Home Office** (No. 2) (1981) 1 All E.R. 1121.

93. **McInnes v. Onslow Fane** (1978) 3 All E.R. 211.

94. (1984) 3 All E.R. 945 (H.L.).

95. Emphasis added.

96. **McInnes v. Onslow Fane** (1978) 3 All E.R. 211.

97. **A.G. Of Hong Kong v. Ng Yuen Shiu** (1983) 2 All E.R. 346 (P.C.).

98. **Council of Civil Service Unions v. Minister for the Civil Service** (1984) 3 All E.R. 935 (H.L.).

99. See the Annotation in 57 A.L.R. Fed. 765.

100. **Roelofs v. Secretary of Air Force** (1980) 202 App. D.C. 307.

101. 421 U.S. 560 at 571 (1975).

102. 1982 Supplement to Davis, Administrative Law Treatise Ch. 29, p.568.

103. (1983) 1 All E.R. 910 (H.L.).

104. **Nixon v. Warner Communication Inc.** 435 U.S. 589, 597 (1978).

105. Per Lord Wilberforce in **Farrell v. Alexander** (1977) A.C. at 72.

THE CONCEPT OF INTENTIONAL HOMELESSNESS IN THE HOUSING (HOMELESS PERSONS) ACT 1977

by S Gupta

The following article consists of extracts from a project submitted as one element of the requirements for the award of an honours degree in law of Trent Polytechnic (CNAA).

The project deals briefly with the origin and purpose of the legislation and then proceeds to consider the manner in which the courts and authorities implementing the Act have interpreted and applied the concept of "intentional homelessness" and the consequences of the provisions for the homeless.

The author consulted a number of Housing Authorities as to the manner in which they interpreted and administered the legislation and includes in the finished work a detailed study of the attitudes and approaches of four such Authorities. In addition there are a number of appendices containing statistics and other details.

1.1 Introduction

The Housing (Homeless Persons) Act 1977 (which I shall call the 1977 Act for brevity) places the duty to house the homeless clearly on Housing Authorities (which I shall call Authorities for brevity), which duty hitherto had been on the Social Services Authorities,[1] and it confers a corresponding right on individuals who are homeless to housing under the 1977 Act.

The 1977 Act orignated as a private members[2] Bill which was adopted by the government of the day and came into force on 29th July 1977.

1.2 The Emergence of the Concept of Intentional Homelessness

The exact nature and extent of the duty on Authorities towards the homeless is a direct result of conflict between two opposing views, one of which was embodied in the Bill in its original form which attempted to impose a strict and clearly defined duty on Authorities towards certain categories of homeless. The other view put forward by opposition M.P.s and certain Local Authorities in the Association of District Councils was that substantial discretion should be given to Authorities in deciding who was owed a duty.[3] Otherwise, it was argued, Authorities would be forced to permanently accomodate all the homeless falling in the category of priority need[4]and this would, in the words of one Director of Housing,[5] result in "chaos" as the "floodgates" opened; Authorities would be burdened with people who need not hesitate to make themselves subjects of self-induced homelessness.

> "Families who have hesitated in the past to make themselves homeless (as opposed to finding themselves homeless) need have no such reluctance now."

was one reported view.[6] The Bill was even described by one opposition M.P. as " a charter for scroungers and scrim-shankers."[7]

Such fear by the opposition that people would take advantage of social benefits placed pressure on the government to amend the Bill, so that despite protests from organisations such as Shelter, the concept of "intentional" homelessness was introduced. It was intended to act as a deterrent for those who thought of deliberately making themselves homeless, because where an Authority believed that a person under the 1977 Act (whom I call the Applicant for brevity) could have avoided his homelessness, it would owe only a limited duty to provide accommodation for a temporary period.[7]

1.3 The Scope of the 1977 Act

The basic aim of the 1977 Act is that an Authority must ensure that permanent accommodation is provided to a person who is "homeless" or threatened with homelessness,[8] and in "priority need"[9] of accommodation provided that that person did not become homeless or threatened with homelessness "intentionally"[10] and that, normally, that person has a "local connection"[11] with the area of the Authority to which he applies.

1.3.1 The Full Duty

Where an Authority has reason to believe that an Applicant is homeless or threatened with homelessness and has a priority need for accommodation, then it must make "appropriate enquiries" to "satisfy" itself[12] that the applicant did not become homeless or threatened with homelessness intentionally and where it is so satisfied, the Authority owes the full duty to ensure that accommodation is made available to the Applicant if he is homeless, and if he is threatened with homelessness, it must take reasonable steps to ensure that the accommodation does not cease to be available for him.[13] Furthermore, section 5 provides that where the Applicant is actually homeless the Authority has discretion to make further enquiries as to whether the Applicant has a local connection with the area of another Authority, and provided that the Applicant will not run the risk of domestic violence in the other area, the full duty may be transferred to that Authority who must first be notified.[14] In addition, the Authority must notify the Applicant of any decision it makes in connection with his application and its reasons for the decision.[15]

1.3.2 The Duty where an Applicant is Intentionally Homeless

Where an Authority ajudges an Applicant who is homeless intentionally, then the Authorities must furnish him with "appropriate advice and assistance", and ensure that accommodation is available for him for a period the Authority considers will give him a reasonable opportunity to find accommodation for himself.[16]

1.4 Guidance to Authorities to determine whether Applicants are intentionally Homeless

1.4.1 The Role of the Code of Guidance

The Code of Guidance which accompanies the 1977 Act and is published by the Secretary of State provides detailed guidance for Authorities on how to interpret the provisions of the 1977 Act. Section 12 provides that an Authority must "have regard" to the Code when exercising its functions under the 1977 Act, and the Code repeats this in paragraph 1.2.

1.4.2 The Status of the Code of Guidance

The major problem here is that the precise meaning of section 12 is unclear. The Code by its very nature does not have the force of a statute and many decisions of the courts have

emphasised this, as in **De Falco** v **Crawley B.C.**[17] where Lord Denning M.R. stated that so long as an Authority "had regard" to the Code, it could depart from its guidance when it thought fit.

On the other hand, it was stated that the Code could not be "casually disregarded" in the case of **R** v **Wyre B.C. ex p. Parr.**[18]

What then is the status of the Code in relation to an Authority's duties towards an Applicant? A case useful here is **Bristol C.C.** v **Stockford.**[19] It was stated that the Applicant under the National Assistance Act 1948 (the corresponding Act applicable before the enactment of the 1977 Act) had an "arguable case", because he adduced evidence that the Authority had failed to have regard to a Ministerial Circular which it was bound to take into account by virtue of section 7(1)(g) of the Local Authority Social Services Act 1970. This required Authorities "to act under the general guidance of the Secretary of State".

Although section 12 is loosely worded so that its directions are less obligatory than those under 7(1)(g) of the 1970 Act, the **Bristol C.C.** case does show that infringement of ministerial guidance referred to in an Act may be actionable. Also it is submitted that the view expressed by Hoath[**20**]that unless an Authority can justify its departure from the advice of the Code where it is clear, it can't properly show that it has had "regard" to it, is based on sound reasoning, for there is little purpose in having a detailed Code if an Authority can ignore it whenever it wishes.

1.4.3 The New Code of Guidance

An amended Code was published on 2nd July 1983 in a response to a four year review by the Government of the 1977 Act and the Code, after consultation with Local Authorities and other bodies, but the Government did not feel the Code should be made mandatory so as to clarify its status, and so the position in respect of the new Code remains the same as that of its predecessors.[**21**]

1.5 Challenging an Authority's Decision

There is no statutory remedy for an Applicant against an Authority defaulting in its duties under the 1977 Act, so that a disappointed Applicant can only resort to the general powers of the courts in relation to public bodies.[**22**] However, before considering the interpretation of the concept of intentional homelessness by the courts, it is necessary and desirable to put the role of the courts in connection with the 1977 Act, into context.

1.5.1 The Grounds

The courts do not provide an appeals system as of right against an Authority's decision for an Applicant under the 1977 Act, and the courts may only interfere where an Applicant proves that the Authority has infringed a principle of administrative law such as making a decision which no reasonable Authority could ever have made, or misdirecting itself in law.[**23**] Thus the result is that a court cannot interfere with a decision which, though within the letter of the law, may not be within the spirit of the Act.

It is also important to remember that decisions of fact are left to an Authority, and as the most important duties under the 1977 Act are drafted in the subjective form, such as section 4 which provides that an Authority must "satisty" itself on the key definitions, it would seem that an Authority has considerable discretion in the way it determines the extent of its duties towards an Applicant.

1.5.2 The Procedure

An aggrieved Applicant must normally seek the public remedy of judicial review since the decision of the House of Lords in **Cocks** v **Thanet District Council.**[24] In that case the Applicant wished to challenge the decision of the Council which had decided that the Applicant was intentionally homeless so that he was not owed a duty to be housed.

Their Lordships divided into categories, the functions under the 1977 Act:

(1) the decision-making function which comprised the decision whether there were facts which gave rise to a housing duty which could be challenged only by way of judidcial review under Order 53 R.S.C.

(2) the executive functions which arose once an Authority was satisfied that a housing duty arose, and which could be enforced by an ordinary action in the county court or the High Court. It was stated that an Authority would be protected against excessive and groundless critism as, under Order 53, an Applicant had to surmount hurdles such as a three month limitation period (extendable if a good cause is shown); leave to proceed must be obtained from the court resulting in a two tier system, which is expensive and can take months so that it is "academic to talk of a court action" as a remedy[25]; applications for leave have to be supported by reasons and affidavits at a time when there is no automatic discovery of documents, which might have produced valuable information for the Applicant, on whom the burden of proof lies.

The significance of the decision in the **Cocks Case** is that as the "decision-making" functions of an Authority are more frequently contested by an Applicant, than the "executive" functions, many decisions of Authorities' will go unchallenged because the courts are not easily accessible.

2 The Interpretation of the Concept of Intentional Homelessness

2.1 Introduction

Intentional homelessness has become a major concern because since the 1977 Act, there have been numerous legal actions on the application of this provision.As the number[26] of the homeless increases, so does the concept of intentional homelessness gain more importance. Over the years the proportion of total Applicants under the 1977 Act adjudged to be homeless intentionally has been increasing perceptibly.

However this increase is not due just to an increase in homelessness, but reflects that Authorities are interpreting the provision on intentional homelessness differently, as a survey done by Shelter shows. It can be seen from Shelter's statistics that the differences between areas are considerable; while 78 Authorities had less than 5% or no cases of intentional homelessness, 42 had more than 15% and 6 had over 50%.

It is impossible to know from mere statistics the exact extent to which the high rates of intentional homelessness are due to Authorities legitimately using their discretion under the 1977 Act. Therefore it is proposed to make a detailed examination of the cases on intentional homelessness and the manner in which Authorities are applying section 17 to cases coming before them.

2.2 The Definition of Intentional Homelessness

An Authority must satistfy itself that the Applicant falls within the definition in section 17 to be intentionally homeless. Thus, if it is decided that the accommodation was not available[**27**] for the Applicant's occupation, then there cannot be an intentionally homeless finding.[**28**] As section 17 consists of several elements it is convenient for the purposes of this study to label the elements and to consider these seriatim, they include;

1) the Applicant must deliberately have done or ommitted to have done an act whilst being aware of all relevant facts;

2) the loss of accommodation must have been a result of this act or ommission;

* 3) the Applicant must have ceased to occupy accommodation;

* 4) this accommodation must have been available for the Applicant;

† 5) it must have been reasonable for the Applicant to have continued in occuaption of this accommodation.

When an Applicant is threatened with homelessness, the nature of these elements is the same.

* (Not reproduced here)

† (Not reproduced fully here)

2.2.1 The Applicant Deliberately does or fails to do an Act.

2.2.1.1 The Intention of the Applicant.

The word intentional in the present context is given a wide meaning, namely deliberate, so that an Applicant is intentionally homeless if he is deliberately homeless. The word deliberate has been held by the Court of Appeal in the case of **Davenport v Salford City Council**[**29**] to qualify the act or ommission of the Applicant so that he may be considered intentionally homeless even where he did not want to lose the accommodation by his act, so long as he intended the act or ommission.

In that case, the Applicants had been evicted from their accommodation because of their children's misconduct which the Applicants had deliberately failed to control.

The **Davenport Case** reiterates the view in the case of **R v Thurrock B.C. ex p William**[**30**] that if by the Applicant's act, the "likely result" is that he becomes homeless, then it would be "strongly arguable" that the applicant was intentionally homeless.

A case taking a wider view is **R v Slough B.C. ex p London B.C. of Ealing** where the Master of the Rolls stated that deliberate in section 17 required that the Applicant should act deliberately "so as to get turned out."[**31**]

This view seems to require intention on the part of the Applicant to lose accommodation, and tallies with the view that section 17 was designed to eliminate those abusing the 1977 Act by contrived homelessness. The prevailing view expressed in the **Davenport Case** in effect brings the test for intentional homelessness in line with the law before the

1977 Act.[32] It is submitted that as the old law was expressly repealed by the 1977 Act, the review of the Master of the Rolls in the **Slough Case** is to be preferred for it not only avoids returning to the test under the old law, but also prevents relief being refused to families

> "whose homelessness is far from deliberate in the everyday sense of the word."[33]

2.2.2 The Loss of Accommodation must be the Consequence of the Applicant's Act or Ommission

2.2.2.1 Whose Act or Ommission can an Authority take into Account?

The issue here is how far the Applicant can be attributed with the blame for acts or ommissions of other members of his family resulting in the homelessness. A case dealing directly with this issue is: **Lewis** v **North Devon D.C.**[34]

The facts of the case were that the husband of the Applicant had tied-accommodation as a farm labourer which he lost when he resigned, and his wife applied under the 1977 Act. Woolf J. stated that in principle, section 17 only deals with the position of the Applicant and could not be construed as dealing with the wider question of whether the "family unit" as a whole is intentionally homeless.[35] Woolf J. correctly recognised that even though it was desirable to prevent a person who had become homeless by for example wilful refusal to pay rent to be rehoused through a member of his family applying under the 1977 Act, he said that this was

> "not so wholly unreasonable that there should be read into the 1977 Act words which are not there, so as to arrive at the opposite conclusion."[36]

It is submitted that this view follows the spirit of the 1977 Act for it recognises that the need to rehouse the rest of the non-intentionally homeless, who would otherwise be penalised because of the act of another member of the family.

2.2.2.2 Shifting the Burden of Proof

However Woolf J. qualified this view by going on to say that in circumstances where

> "the conduct of one member of the family was such that he should be regarded as having become homeless intentionally, and that that was conduct to which the other members of the family (thus including the Applicant) were a **party**"

the Authority could attribute the consequences of that act to the Applicant.[37] Woolf J. also stated that in assessing the situation an Authority can

> "assume in the absence of material that indicates to the contrary"

that the Applicant is a "party" to the conduct which caused the homelessness.

It is submitted that this comes very close to reversing the burden of proof so that it is, in effect, up to the Applicant to put forward facts to rebut such a presumption, for fear of being adjudged a "party"[38] and it is clearly contrary to section 4 of the 1977 Act which provides that it is the Authority which must satisfy itself, and not the Applicant that must satisfy the Authority. Such a qualification could undermine the basic principle enunciated

by Woolf J., to the detriment of the Applicant because whether the Applicant is a "party" will be a question of fact for the Authority to make a decision on. Therefore in cases which are not clear, the Authority may well decide against the Applicant. Indeed further derogation from the principle can already be seen where the Authorities are applying it strictly, such as in the following case studied by Shelter:**[39]**

> The husband of ms. K. who had tied accommodation, refused offers of accommodation from the council and left the tied-accommodation. Ms. K., upon applying for accommodation under the 1977 Act after seperating from her husband was held to be intentionally homeless because her husband had previously refused offers of accommodation by the Council.

It is hoped that such decisions will become less frequent since the new Code of Guidance**[40]** which emphasises that a spouse or cohabitee should not automatically be held responsible for rent or mortgage arrears incurred by the other partner.

2.2.3 It must have been Reasonable for the Applicant to have remained in the Accommodation

2.2.3.1 Section 17(4) and Local Housing Conditions

When ascertaining for the purpose of sections 17(1)-(2) whether it would have been reasonable for the Applicant to have remained in accommodation, an Authority may take the housing situation in its area into account but it is not obliged to, as the wording in section 17(4) is clearly "may" and not "shall" as was emphasised by the court in the case **R v Hammersmith and Fulham L.B.C. ex p Duro Rama.[41]**The court went on to say that section 17(1)-(2) does not limit an Authority to look solely at the condition of the accommodation and to ignore other reasons the Applicant may have for leaving accommodation, as was done by the Borough Council in that case.Thus any Authorities who construe section 17(4) restrictively are doing so unlawfully since the decision in the **Duro Rama Case**

2.2.3.2 Local Housing Conditions as an Objective Criterion

Section 17(4) raises further problems, in that the criterion of the housing situation is purely objective and refers not to the condition of accommodation the Applicant left, but to the condition in the area of the Authority to which he applies so that an applicant was held to be intentionally homeless where he left one area because of employment problems and moved to another because, inter alia

> "you left Italy and came to Crawley where we are absolutely crowded out"

were the words of Lord Denning, M.R. in the **De Falco Case.**

This makes mockery of the 1977 Act's initial aims to house those in need, for it ignores that the Applicant's needs for housing are the same whichever area he applies to, particularly as there is no requirement that he must **know** of the housing situation in the area of the Authority to which he applies so that the success of the Applicant depends on the Authority he applies to. Indeed it is ironic that before the 1977 Act, Authorities were urged to give Priority Groups - similar to those under the 1977 Act -**priority** in areas of acute housing stress.**[42]**

2.2.3.3 Waiting Lists for Council Housing

Under section 17(4), an Authority may take into account the length of the waiting list for council housing in its area, where the people are competing for houses with the homeless under the 1977 Act. The reason for this was stated in the case of **Goddard** v **Torridge D.C.** [43] as being that it would be "unfair to allow queue jumping" for council homes, because the waiting lists consisted of

> "young couples waiting to be married; young married couples sometimes staying with their in-laws; or people in poor accommodation"

who had been waiting for years. This continues the view in the **Din Case** where it was stated that

> "the mischief at which section 17 is aimed is unfair queue jumping,"

so the result is that some Authorities put battered women into refuges whilst they await their turn on the council waiting lists, whilst others use restrictive policies such as a "one offer" policy.[44]

2.2.3.4 Apparent Conflict or Real Conflict?

A closer look at the part council housing plays for applicants under the 1977 Act will reveal whether waiting lists should be considered under section 17(4), and the question must be asked: what is the relationship between council housing and Applicants under the 1977 Act?

Section 113 of the Housing Act 1957 (as amended by section 6(2) of the 1977 Act) provides that Authorities must give reasonable preference to those towards whom it is subject to a duty under the 1977 Act. The term "reasonable preference" is very vague and so does not give rise to a positive, enforceable right on the part of any individual. Also an Authority can offer accommodation through some other landlord instead of from their own stock or merely give advice and assistance so that the Applicant obtains accommodation from some other person.

Furthermore, an Authority is not bound to give **absolute** preference to Applicants under the 1977 Act in allocating council houses and may give it to some other group, such as those in slum clearance areas. As slum clearance is generally accepted as giving priority in allocating housing where the need exceeds the supply, it cannot be justified in all cases to label those under the 1977 Act as undeserving "queue-jumpers" for many of the homeless are so because of bad housing which does not fall within the slum clearance areas.[45]

Even where the homeless are given priority over those on waiting lists, there is no real conflict between the 1977 Act and those on the waiting lists, because when the composition of the list and the way in which housing is allocated is closely analysed, one can see that the list does not always adequately reflect the **need** of a person for housing, whereas priority groups under the 1977 Act are based on need. One example of where this will result in injustice is that, whereas a single parent with a dependent child is a priority category under the 1977 Act, adults get more "points" than children under the "points scheme" which determines priority in allocations, so that a single parent with dependent children will get few points. This can result in grave injustice to single parents who are already a disadvantaged group compared to their counter-parts - the married parents when it comes to housing.

It is submitted that though Authorities face a hard task of allocating limited housing amongst many people in an ever worsening situation, the courts by their pronouncements have disadvantaged those applying for accommodation under the 1977 Act by obscuring the real reason why the 1977 Act was enacted, that is to help those in priority need who are homeless because they are unable to get accommodation in the normal way.

2.3 Temporary Accommodation where the Applicant is Intentionally Homeless

2.3.1 The Duration

[In chapter 1], it was stated that accommodation must be given to the Applicant who is actually homeless and in priority need and who is intentionally homeless, for a period the Authority considers ample for him to find accommodation for himself. The Code advises Authorities that they should "not arbitarily nor too quickly" withdraw the accommodation. This provision was inserted because under the law before the 1977 Act, Authorities were able to withdraw accommodation once it became clear that no suitable permanent housing would be available from any source[**46**] because the court in the case of **Roberts v Dorset C.C.**[**47**] had interpreted "temporary" very restrictively as meaning "not permanent" so that the Applicant was evicted even if he had nowhere to go.

It was recognised by Lord Denning M.R. in the case of **R v Slough B.C. ex p. Ealing L.B.C.**[**48**] that there should be no fixed period, so that individual consideration must be given to each case to determine the appropriate period.

However, SHAC reports that although some Authorities provided as much as a year in some cases in temporary accommodation, others continue to impose "blanket" policies of providing as little as 7 days, whilst most Authorities provided 28 days. Also some Authorities clearly in breach of the 1977 Act, provided no accommodation at all so that in some cases the children go into care and the parents have to fend for themselves. Statistics show that in 1982, 230 out of 1680 intentionally homeless Applicants were required to leave temporary accommodation whether or not they had secured suitable accommodation of their own, (It could be argued that those who still had nowhere to go inspite of efforts to find accommodation were given too short a period by the Authority,) so that where those Applicants with dependent children did not get assistance from elsewhere,[**49**] the children probably went into care. Again, the Code is contravened where it provides at para 4.1 that "where children are involved" Authorities should ensure that these families are "not left without shelter", and this provision was added to prevent the situation existing before the 1977 Act, where due to pressure on housing, certain families (who are evicted for rent arrears) were allowed to stay in hostels for 3 months after which the children wre taken into care.[**50**]

2.3.2 The Standard

The Act does not specify the standard or type of the accommodation, but only that it must be available for the Applicant and his family, and the Code requires Authorities to "bear in mind relevant provisions of general housing and public health legislation[**51**] when meeting the requirements of the 1977 Act to secure accommodation."

This is a surprising ommission particularly as the situation before the 1977 Act was clearly unsatisfactory in that Authorities were using accommodation ranging from old workhouses, communal dormitories and substandard tenement blocks to short-life houses in clearance areas and purpose-built accommodation.[**52**] Indeed the result of

lack of guidance here has been that under the 1977 Act, Authorities are using at times accommodation such as "bed and breakfast" which is clearly unsuitable for families and very expensive. National statistics show that in 1980, 12% of the homeless were given quality houses, but 15% were given "bed and breakfast" and 9% were given short-life accommodation.

2.4 Conclusion

Even with detailed guidance in the Code, there appears to be much variation in the interpretation by Authorities of section 17. Such variation can be expected until precedents are set by the courts who themselves have generally construed section 17 restrictively with the effect that the boundaries of intentional homelessness have been pushed further and further back, so that more than were intended by the legislators are caught by the provision.[**53**] In other words, the emphasis of the Act has been shifted so that the responsibility on a person not to become homeless is greater than that person's right to claim help under the Act once he is homeless.

Although numerous people are better off because of the 1977 Act, there are others who would probably have been better off under the previous law, because under the 1977 Act, they **must** be a priority category, and even when they are, they face the hurdle of intentional homelessness which did not exist as such before the 1977 Act, where accommodation was given as long as one's homelessness was not reasonably foreseable.

Ironically, traces of the harshness of the law, which the 1977 Act was meant to repeal remain, whilst the favourable aspects of it no longer exist.

3 General Conclusion and Recommendations

3.1 Introduction

It is evident that the provision on intentional homelessness is far from satisfactory as it stands. In this chapter it is intended to conclude generally on this finding and to recommend possible reforms.

3.2 Recommendations by the Author

3.2.1 The Code of Guidance

It is submitted that policies of Authorities vary so much despite detailed guidance in the Code because it is only advisory and not law. This could be solved by an amending Act rewriting section 12 of the 1977 Act to make it clear that Authorities have a duty to apply the Code always. Alternatively, the Code could be issued as a Statutory Instrument. However, it is unlikely that changes will be forthcoming, at least during the present government's reign, because it missed the opportunity to put this right when it reviewed the 1977 Act and the Code in 1982. The government did, however, make amendments to the Code most of which are minor and of a technical nature. On the other hand some which were made to "tighten"[**54**] the Code in relation to section 17 have been discussed in Chapter II. Many of the issues have been ignored and at best, because the Code lacks the force of law, the changes will only influence Authorities' decisions where the Code is followed.

3.2.2 Section 17

A provision which attempts to define intentional or deliberate behavior causing homelessness is inherently faulty because a definition will never embrace the many fact-situations that in fact occur. For instance, deliberate behavior as defined in section 17 fails to take into account loss of accommodation due to rent arrears caused by a combination of factors perhaps arising over a period of time, where the homelessness was not foreseeable. Here, one single act or ommission cannot be attributed to the Applicant, but nonetheless, the cause of the homelessness is seen as a result of the ommission to keep up with the rent payments. It is submitted that in agreement with Shelter section 17 could be amended to replace the emphasis on a deliberate act or ommission with a requirement of intention or calculation on the part of the Applicant to lose the accommodation, This would limit to a degree the discretion of those applying it and avoid abuse.

Section 17 fails to make clear whose acts or ommissions are to be taken into account and the Code too is silent on this issue. The Code could be amended to make it clear that the Applicant is to be tainted with a deliberate act or ommission of a member of his household resulting in homelessness, where the Authority satisfies itself that the Applicant colluded with that person. Anything less than this would not suffice.

It was noted that section 17(4) often worked in an anomolous fashion because it enabled Authorities with acute housing stress to compare this with the causes of the Applicant's homelessness which ranged from bad housing conditions to severe personal or financial problems. In the words of Lord Fraser in the case of **Din** v **Wandsworth L.B.C.**[55] this is a "comparison of things which are unlike".

Thus the treatment an Applicant received was far from objective but depended on local resour circumstances in which it can justly operate, including a provision that the Applicant hat section 17(4) be amended to emphasise the limitedmust have been aware of the prevalent housing conditions at the time of the act or ommission resulting in his homelessness.

Authorities' policies have varied in respect of the treatment given to battered women who have left accommodation because of fear of violence from someone living there. As this is a serious problem, there should be more guidance to ensure that there is no undue delay in rehousing the women and that a sympathetic reception is given.[56]

Some Authorities have "blanket" policies that any Applicant leaving accommodation without an eviction order is intentionally homeless. Although the Code provides ample guidance on this, it is not always followed. An amendment could be made to section 1 of the Act to provide that if a person is homeless because he had no defence to an eviction, he cannot be found to be intentionally homeless.

Similarly, this method could be used to deal with the problem faced by a battered woman in a refuge who the court has recently held is "homeless" under section 1(2)(b) in the case of **R** v **Ealing B.C. ex p. Sidhu**[57] Section 1 could be amended to authoritatively declare that a woman in a refuge is homeless.

3.2.3 Judicial Review

Other "blanket" policies which could not be prevented by amending the Act, can only be curtailed by judicial review to scrutinise Authorities' decisions and to ensure that the

intention of the legislature is implemented. However, as this method is at present inadequate (see chapter II), a revised method of appeal which is speedy, inexpensive and informal should be introduced on the lines suggested by the Joint Charities Group.

3.2.4 The Duty towards an Applicant who is Intentionally Homeless

Where it is clear that Authorities owe some duty to the Applicant, there is variation in the policies of different Authorities, because of lack of guidance concerning issues such as the standard of accommodation porvided to Applicants, so that "bed and breakfast" or low quality accommodation is being used as a matter of policy, against the recommendations of the Code, by some Authorities for homeless families. This is not only inadequate but a very expensive means of accommodating the homeless. this contravention of the Code can only be rectified by Parliament giving the Code the force of law.

Neither the Act nor the Code give any guidance on the meaning of "reasonable opportunity" in section 4(3), so that some Authorities are operating policies of ending temporary accommodation after an arbitrary period such as 28 days, regardless of whether the Applicant has found suitable alternative accommodation. It is submitted that the recommendation by The Joint Charities Group that an Authority should not be able to end the temporary accommodation until it is sure that the Applicant has a definite offer of accommodation at a price he can afford, is a sound one and should be incorporated into the Code.

Advice and assistance which an Authority must give to any Applicant, who is intentionally homeless is defined in very vague terms by the 1977 Act, but sufficient detail is provided in the Code. Once again, to ensure that the practice of Authorities is uniform, the status of the Code must be clarified to make its provisions more meaningful and effective.

3.2.5 Resources available to Authorities

It was seen that housing stress can play a part in the performance of Authorities, and so if they are to be expected to implement the 1977 Act correctly, they must be provided with the resources to do so, for without the resources, the duties of the Authorities are academic. This would probably require an expansion of the public sector housing programme as the private sector has not been able to adequately meet housing needs.[**58**] An increase in funds to Authorities would enable them to contribute to the cost of running women's refuges which Authorities use to accommodate Applicants under the 1977 Act.[**59**] It would seem that due to the present economic climate and priorities of the present government[**60**] it is unlikely that there will be immediate improvements in housing conditions to alleviate the housing stress.

This is unfortunate for the homeless because "homelessness is a need that cannot wait for better times".[**61**]

3.2.6 The Value of Section 17 as a Deterrent

As the 1977 Act was passed with all party support, whilst section 17 is a provision added by the opposition to deal with the problem of self-induced homelessness which does exist in a few cases, but for which there is no easy solution, it is submitted that the place of such a provision in social welfare legislation should be reviewed, because very few people can be said to make themselves homeless where it is not justified. It is clear that the causes of homelessness vary. Some are literally forced to leave accommodation

because of a domestic dispute; others voluntarily leave because of the condition of accommodation, for example overcrowding, and others find themselves homeless after a convergence of personal problems. In all cases, priority need under section 2 should be the sole criterion to qualify the Applicant to the legal right to accommodation under the 1977 Act but with one reservation, and that is where the Applicant deliberately leaves accommodation because it is overcrowded. Here there may be a conflict with those on the council waiting list and awaiting a transfer into better accommodation, who are in equally bad conditions, for here it would be unfair to allow Applicants to avoid the lengthy wait on the lists by applying under the 1977 Act. This problem could be solved if Authorities were encouraged to review their allocation policies to ensure that the priorities on the waiting list coincide with those under the 1977 Act, and are based on needs rather than on criteria such as the age of the person registering on the list.

3.4 Conclusion

The 1977 Act has brought relief to a great number of the homeless who are unable to help themselves in finding accommodation, but many have fallen foul of the intentionally homeless provision which is used more widely than the Parliament intended, sometimes in direct breach of the 1977 Act and the Code of Guidance. It was noted in Chapter II that ironically, the result of this is that for many of the homeless the law before the 1977 Act was probably more generous.

As this could not have been the intention of Parliament which repealed the previous law, it is submitted that to put this intention into effect, more guidance is needed for those implementing the 1977 Act by amending it or by enacting the Code as law, and by providing an effective procedure for examining the performance of those Authorities whose policies appear to be outside the spirit of the 1977 Act.

1. It was because the law was unsatisfactory in dealing with the homeless that the 1977 Act was passed.

2. Proposed by Stephen Ross, Liberal M.P.

3. The duty under Section 21(1)(b) of the National Assistance Act 1948 was loosely worded so that it conferred much discretion on those implementing it.

4. Before the 1977 Act, Authorities were urged to give priority to prescribed "Priority Groups" by virtue of Circular 18/74, but there was no duty to do so.

5. Len Barnes, Besingstoke Gazette 18.3.77.

6. Vice -President of the Institute of Housing, Shelter 1981 P.6.

6a. Mr W. Rees-Davis. Hansard 18.2.1977, 2nd Reading HOC.

7. Dividing the homeless between the deserving and the undeserving can be traced to the Poor Law in the 17th Century where the principle of "less eligibility" was applied in the workhouses.

8 Section 1.

9. Section 2.

10. Section 17.

11. Section 18 defines "local connection".

12. Section 3.

13. Section 4(5) and 4(4) respectively.

14. Section 5.

15. Section 8.

16. Section 4.

17. [1980] 1 ALL ER 913 C.A. See also **Dyson** v **Kerrier D.C.** [1980] 3 ALL ER 313 (C.A.) per Brightman L.J.

18. The Times Feb. 1982.

19. [1973] (Ch. D.)

20. D.C. Hoath. "Homelessness" 1983 at P 28.

22. Under the 1948 Act, section 36 provided for appeal by an Applicant to the Secretary of State, so that judicial remedy was precluded by a principle of administrative law to this effect: "**Roberts** v **Dorset C.C.** (1976) 75 L.G.R. section 36 is successfully used.

23. "**Associated Provincial Pictures Houses Ltd.** v **Wednesbury Corp.**" [1947] 2 ALL ER 680 C.A.

24. [1982] 3 ALL ER 1135 H.L.

25. SHELTER [1981] "Intentional Homelessness" at P. 39.

26. The statistics only show the number of homeless who are helped under the 1977 Act, and do not show those who don't apply because they are unaware of their rights, or those who are turned down because they have no rights, under the 1977 Act, such as those single homeless not in the priority category.

27. Available has a special meaning in section 16.

28. **R** v **Westminster City Council ex p. Ali** [1983]. Q.B. LAG BUL. Nov 1983, p142.

29. [1983] F.L.R. 744 (CA).

30. [1982] 1 H.L.R. 129.

31. [1981] 1 H.L.R. 601 at pp 612 - 613.

32. Under the National Assistance Act 1948 a person was eligible for housing only where his homelessness could not reasonably be foreseen.

33. SHAC "Working the Act" (1983) p 17.

34. [1981] 1 ALL ER 27.

35. Evidence for this can be found by comparing other sections of the 1977 Act to Section 17; whereas Section 17 refers to "a" person, other sections refers to third parties by specifically qualifying person by words such as "any" e.g. section 11.

36. [1981] 1 ALL ER 27 at p 31.

37. [1981] 1 ALL ER 27 at p 18.

38. Shelter [1981] Intentional Homelessness : at p 38 reports that more often than not, the Applicant has to prove he isn't intentionally homeless by enlisting the help of outside agencies.

39. Shelter (1981). Intentional Homeless at p 32.

40. Paragraph 2.15.

41. The Times, March 1983, High Ccurt.

42. D.O.E. Circular No 18/74.

43. (1982) LAG BUL 9 (Q.B.D.)

44. Section 6(1)(b) - (c).

45. When the 1977 Act was introduced, homelessness was seen by the Government as a residual problem to be mopped up in areas of housing stress, but some areas have been left behind in the general improvements in housing standards, especially in the inner cities; Housing Pclicy Review Green Paper quoted in SHAC, working the Act 1983 at p. 8.

46. This was despite Ministry of Housing & Local Govt. Circulars Nos. 62/67 paragraph 13 and 58/66 paragraph 10, urging Authorities to be flexible.

47. (1976) 75 L.G.R. 462.

48. [1981] 1 ALL ER 601 C.A.

49. Section 1 Child Care Act 1980 provides that assistance may be given to prevent homelessness tc diminish the need to receive children into care.

50. B Glastonbury (1971) Homeless near a Thousand Homes at p. 40.

51. Public Health Act 1936 and the Housing Acts 1957 & 1961.

52. R. Bailey (1977) Penguin Special. Homeless and Empty Homes

53. The Original Code at paragraph 2.19, envisaged that a "small" number of would be intentionally homeless.

54. Statement of Government Conclusions on the review of the Housing (Homeless Persons) Act 1977, D.O.E. 1983.

55. [1981] 3 ALL ER H.L. 881 at p 889.

56. H.M.S.O. The Scottish Code of Guidance, paragraph 2.22(b) provides a good example of the type of guidance needed.

57. (1982) The Times.

58. Government attempts to encourage short term lettings in the private sector have failed to provide many new lettings; the Assured and Shorthold tenancies created by the Housing Act 1980 have failed to produce more than a few hundred new lettings; Review of the Code of Guidance. D.O.E. 1982.

59. Leaving Violent Men (1981) by W.A.F. at p 45, states that in 1978, Housing Department grants to fund refuges nationally was 9% (the smallest) compared to 25% by Urban Aid (the largest). In 1980, this had risen to 12%.

60. For instance, the sale of Council houses to sitting tenants seriously reduces the housing chances of many awaiting an allocation, or transfer to better accommodation.

61. Shelter (1981) Intentional Homelessness.

THE SEARCH FOR THE PRECEDENT FACTS

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This article is concerned with the effect of recent cases in administrative law in which the courts have developed judicial control over administrative actions by means of the extension of the doctrine of "precedent facts" Two fundamental devices for judicial control over administrative actions have been the Wednesbury principle for controlling discretion, and precedent facts for controlling the assumption of jurisdiction. Each subject to the regulator of statutory interpretation. Each has worked well in its separate department.

The so called "jurisdictional principle" (the establishment of precedent facts for controlling assumptions of jurisdiction) may be traced as far back at least as 1853 when it was said by Coleridge J in **Bunbury v Fuller[1]** that "no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collated to the merits of the case" This means simply that a court is entitled to be satisfied that the statutory components and ingredients conferring a jurisdiction upon an inferior court or tribunal or body with limited jurisdiction have been satisfied. It can be shown to work well by such cases as **R v Hammersmith Rent Tribunal ex p Zerek**[2]. Here the tribunal had power to fix rents of unfurnished premises and the question was whether a particular flat had been let on a furnished or unfurnished basis. The landlord produced an agreement with the tenant to the effect that it was furnished. The tenant contended he had been obliged to hire to the landlord the furniture with which he arrived, so as to permit the landlord to "furnish" the flat. The court held it could enquire as to whether the flat had been let unfurnished or not.

It was argued that it was unsuitable for the tribunal to investigate questions of fraud, forgery, duress etc, but this view did not prevail. The Tribunal could investigate, since its jurisdiction depended on it coming to a conclusion on the precedent fact; it had to reach the correct decision, otherwise the decision could be reviewed.

At this point the purpose and interpretation of the statute becomes important, because upon it depends the point at which facts might become precedent facts. Thus in **R** v **Ludlow ex p Barnsley Corpn[3]**, having regard to the nature of the Act, the court held that whether an applicant was a former employee or not was not a precedent fact. The Reinstatement in Civil Employment Act 1944 S.1(1) provides that "where a person to whom this Act applies whose war service ends after the commencement of this Act makes an application to his former employer to be taken into his employment the former employer shall ... be under an obligation to take the applicant into his employment." The applicant for reinstatement in this case was unsuccessful and appealed to the Umpire under the Act. The question was whether the Umpire had jurisdiction to decide whether the applicant was one of the category of persons coming within the Act. The court held that the Act empowered the Umpire to decide this preliminary question and then proceed to the substantive issue.

So far there is no difficulty with precedent facts which are geographical (eg, **Bunbury** v **Fuller**), or to do with tangible objects (such as ships **Brittain** v **Kinneard**), or concerned with the Rent Acts. The application of the doctrine becomes more difficult and a new judicial game starts to emerge when the facts become intangibles or "criteria"

However, it has to be conceded that even with physical objects there may be difficulties. Students familiar with that type of Lecture in statutory interpretation which examines the philosophical nature of the meaning of words will readily appreciate that if it can be debated whether reducing a corpse to ashes is "the subjection of goods or materials to any process"[**4a**] or whether a war memorial is or is not a building, then it may be difficult to determine whether a house is furnished or not if it has lino on the floor. A fortiori if the statute conferring jurisdiction on a tribunal deals in concept such as "economic factors" or "competition" it is even more of a puzzle. This process of development got well under way in 1968 with the case of **Padfield** v **Minister of Agriculture**[**5**] and **Secretary of State for Education and Science** v **Tameside Council.**[**6**]

The **Padfield** case was concerned with the roles of the Milk Marketing Board, the Minister, the Committee of Inquiry and the courts in a dispute concerned with the pricing policy of the Board. Certain milk producers complained that a differential element in the price paid to them in the South East Area was too small to compensate them, as was the intention of the scheme for loss of their advantageous trading position (near London). The Act [**7**] provided that "a Committee of Inquiry shall be charged with the duty, if the Minister in any case so directs, of considering and reporting to the Minister on any complaint made to the Minister as to the operation of any scheme which in the opinion of the Minister could not be considered by a Consumer's Committee ..." This provision could mean either that the Minister has absolute unfettered discretion to refer or not, or that he has some discretion which must be exercised properly and not capriciously, in accordance with what the courts have stated to be the scope and purpose of the Act. The House of Lords favoured the last approach. It considered that discretion is determined not only by policy considerations but by the legal nature and purpose of the Act. Thus the same route used to determine any precedent fact was applied to this statute; the difference being that precedent facts are not usually fluid but tangible -discretion by definition should be flexible. In this particular case the dispute could be and was referred to an independent specialist body so that the outcome might be reached on its expert view of the needs of the industry, the consumers and the public interest. In many cases there might not be such a body and then there would be a direct implementation of the judges' interpretation of the criteria.

Craig[**8**] states "one of the reasons why the Minister did not wish to make a referral of the complaint to the committee was that if the committee upheld the complainant's view the Minister might feel bound to amend the scheme; the desire for the quiet life as one of the rewards of monopoly power clearly has anologies within the administrative system." This is clearly right but had all the possible policy based explanations been considered? The Minister might have quite properly taken the view that a resulting finding from the committee might have required extensive alteration of the scheme. The effect of any change on the majority of producers might have been disproportionate to the complainants interests. The whole scheme had been designed to replace a free market in milk. Clearly any tampering with such a delicate system will produce distortions and some unfairness. But the interests of uniform milk production generally might justify this. In the House of Lords Lord Morris, who dissented, was aware of this. He said that because "a national scheme results in a measure of advantage to some and a measure of disadvantage to others it does not follow that the members of the Board have been guided not by consideration of national interest or of the fixed interests of their industry but solely by consideration as to how the pockets of their colleagues would be affected." In dealing with the actual operation of the scheme his speech also shows that the implications are much wider than those which can be met by asking the "legal" questions such as whether the Minister was under a "duty" or "discretion" or whether he applied the Wednesbury principle properly. For example,"it is manifest that a scheme will

be more acceptable to some producers of milk than others. The advantage of having a buyer for all the milk which a producer produces will appeal to those who have produced more than they could sell. There will be no such advantage for those so placed that they could have a sure and ready market for all they could produce. If prices are fixed regionally and are fixed having regard to the average of transport and marketing costs within their region there will be some within the region who could assert that their costs if left to themselves would have been less than those of others. If in fixing prices regionally it is not deemed advisable fully to reflect the variations as between regions of transport and marketing costs then it follows that encouragement to production is being given to certain regions at the expense of others. Within the regions, therefore, as well as within the industry the interests of some producers are being advantaged at the expense of others. The less fortunate are being helped by the more fortunate."

Austin[**9**] said that it "hinted at a disturbing possibility, namely that if the source of the power does not impose any objective criteria the courts will imply such criteria; the disturbing element ... is that the courts may simply be replacing their own subjective views for those of a person such as a Minister who is better qualified and equipped to exercise the power." Carol Harlow asked the question of the Padfield case "Yet what resulted? The complaint having been duly investigated the Minister refused to follow the advice of the Committee. The remedy had proved illusory; the same decision could be reached with only nominal deference to the court and the waste of time and money is a deterrant to future complainants"[**10**]

In **Padfield** the courts demonstrated clearly for the first time how far they were prepared to go in determining the basis on which the Minister might choose to act or not. They did this by examining the nature and purpose of the Act and the relative functions of the relevant bodies to the Minister. This is really giving the court a role in the determination of objective jurisdictional criteria. This attitude was developed to include a more subjective assessment of a Minister's role in the case of **Secretary of State for Education and Science** v **Tameside Council.**[**11**] It is a development made easier because unlike the **Padfield** case the statute used much vaguer language; in particular much revolved around the phrase "proposes to act unreasonably." The whole part of the Education Act reads "If the Secretary of State is satisfied ... that any local education authority ... have acted or are proposing to act unreasonably ... he may give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient." The local authority in question had instituted plans for comprehensive education which had been approved by the Secretary of State in 1975 and the scheme was to start in September 1976. In May 1976 the local authority suddenly changed its mind. It produced a modified scheme which would have involved selecting children for grammar schools within the next six weeks. The selection would be based on what are now recognised to be "profiles" rather than the examinations normally used. The Secretary of State tried to prevent this by invoking the above statute. He argued that "a change of plan at this stage must give rise to considerable difficulties", that the parents would be confronted with a "dilemma", and that the improved selection procedure would raise "substantial doubts about its educational validity."

The courts rejected these arguments. Their view was that the authority would only be acting unreasonably if it was proposing to take a course of action which no reasonable authority would take. The principle used by the courts in the case was that the Secretary of State must have valid reasons for finding himself to be satisfied. This clearly prevents the capricious use of power and is a well established rule.[**12**] In assessing whether or not a particular Secretary of State was proposing to act unreasonably the court must see the evidence and assess what effect it would have. This is technical material and in this

case an immediate decision was needed. The Secretary of State might have been concerned about the informal nature of the assessment. But it is really for him to decide whether it is important or not. No speedy decision would result were he to be required to give this sort of reason which would be challenged before the courts. The resulting position is that the Secretary does not have to satisfy himself but has to satisfy a "hypothetical, objective and notional Secretary of State" which is not far short of a fiction as the real Secretary in each case would be the Court of Appeal or High Court.

In the **Tameside** case all this review is possible because the courts interpreted the Education Act in a highly jurisdictional way. Thus "We have seen that apart from procedural requirements the test is whether the authority has relied on relevant factors. This immediately suggests that the Department takes the view that the criteria of unreasonableness are the same as those applied by Lord Greene in the judgement inn **Associated Picture Houses Ltd** v **Wednesbury Corpn.**

It is suggested that it does not follow that the test of reasonableness applied by a court when determining the legality of a local authority's action is the correct one to be applied by a Minister deciding whether to prevent the unreasonable exercise of its functions by a local authority. Because of their differing constitutional roles supervision of local authorities by central government and the courts is not necessarily to be exercised on the same principles. In particular the duty imposed on the Secretary of State by s.1 of the Edcuation Act 1944 may be thought to justify the adoption of a wider test of unreasonableness."[**12a**] The courts long ago reached the position where they could establish the existence of elementary physical jurisdictional facts and after **Padfield** and **Tameside** can determine whether it thinks a Minister is correctly assuming or declining a jurisdiction upon relevant standards or criteria.

Thus the Wednesbury principle has been subverted from its proper role of keeping out irrelevant criteria from administrator's decisions to making sure administrators reach decisions by starting off from a "correct" set of assumptions, views of the purpose of Acts and other criteria. Having gone this far the courts can now proceed to investigate the administrative fact finding basis before proceeding to classity the facts found to be jurisdictional or not. When doing this it could also determine the probability of their existence. The most recent case of **Khera** v **Secretary of State**[**13**] shows that this process is now happening. In this case the House of Lords held that it was a court's function to examine the evidence on which an Immigration Officer reached a decision and detained a person as an illegal immigrant and apply the civil standard of proof to determine the probability of the facts asserted, being precedent facts, actually existing.

The Immigration Act s.33(1) provides that an "illegal immigrant" includes a person unlawfully entering the country and the **Khera** case is definitive authority for the proposition that this includes persons who have passed through Immigration Control by fraud or deception as well as those evading control by comming in secretly. At the time of this case an unmarried and dependent son under 21 who formed part of a family unit did not have to qualify for admission in his own right. Khera's father was settled in the United Kingdom and he had applied for clearance for Khera to join him in 1972. In 1973 Khera, aged 16, was married in India. In 1974 Khera came to this country. In 1978 he applied for his wife to come and was then detained as having himself entered illegally by virtue of being married and not therefore dependent.

It is clear that Khera was not qualified for residence here. But the House of Lords also decided that a prospective immigrant was not under a positive duty of oondour to disclose material facts. The Immigration authorities have to prove that he is disqualified,

unless he is proved to have entered by fraud. Therefore failure to qualify does not automatically mean deportation. The question which now arises in cases like this is whether the Immigration authorities have been deceived or have merely failed to ellicit material facts. This becomes a jurisdictional issue - questions of precedent facts arise.

The position of illegal immigrants is governed by Schd. 2 Para 9 of the Immigration Act 1971. "Where an illegal immigrant is not given leave to enter or remain in the United Kingdom and immigration officer may give such directions ..." Lord Scarman said "The paragraph declares an illegal immigrant to be liable to removal" This paragraph had previously been applied to similar facts in the case of **Zamir** v **Secretary of State.**[14] There the House of Lords held that "the immigration officer in deciding whether or not too grant leave to enter is performing an administrative duty in a statutory or parastatutory framework. It follows that the decision can only be reviewed by the courts on the normal principles applicable to such decisions of which those capable of being invoked in the present cases are that there was no evidence on which he could be reach that decision or that no reasonable person in this position could have reached it" Against this it was argued that these were not cases of administrative decisions reviewable on those (above) grounds, that is to say "Wednesburyism" but cases where the exercise of power or jurisdiction depends on the precedent establishment of an objective fact. Lord Wilberforce said "I am of the opinion that the whole scheme of the Act is against this argument ... the nature and process of decisions conferred on immigration officers by existing legislation is incompatible with any requirement for the establishment of precedent facts whose existence the court may verify." In **Zamir**, therefore, the courts refused to review the decision.

The function of the Zamir decision was to emphasise the role of the decision maker on the spot and to give a good deal of weight to the views formed by him. Lord Wilberforce pointed out that "the Immigration Officer whether at the stage of entry or that of removal, has to consider a complex of statutory rules and non statutory guidelines. He has to act on documentary evidence and such other evidence as inquiries may provide. Often there will be documents whose genuiness is doubtful, statements which cannot be verified, misunderstandings as to what was said, practices and attitudes in a foreign state which have to be estimated. There is room for appreciation, even for discretion."

In **Khera** the House invoked the 1966 Practice Statement to overrule Zamir. The reason for this can be explained in the words of Lord Scarman "I am convinced that the Zamir reasoning gave insufficient weight to the important I would say fundamental consideration that we are here concerned with the scope of judicial review of a power which inevitably infringes the liberty of those subjected to it. The consideration ... outweighs any difficulties in the administration of immigration control." This does not mean that the decision to enter cannot be appealed or the way in which it was reached need only be questioned by the Wednesbury principle. But the courts should not assume that the use of the jurisdictional fact theory is the best way, even though it works well in many areas of law as my first examples show. The essence is that in setting out to determine the precedent fact of whether he is an illegal immigrant the Court has to embark on an examination of all the facts starting way back in the country of origin.

As Lord Wilberforce said "Sometimes very extensive inquiries have to be made. In **R** v **Secretary of State for the Home Dept, ex p Yasmeen** (11 February 1982, unreported) the officer made a visit to the village where it was said that the applicant had married, taking photographs of her and her alleged husband or fiancé. These he showed to a group of four or five women, he spoke to other women and then to a group of eight to ten people. He interviewed the financé. He sent a report to the Home Office. On this an immigration

officer interviewed the applicant and put to her the report of the entry clearance officer. That officer concluded that in spite of her denials, the applicant was married. The whole case was then reviewed by an officer of the Home Office, who took the view that she was an illegal entrant, for reasons which he stated. The point is, and I tried to make this in **Zamir**, that the conclusion that a person is an illegal entrant is a conclusion of fact reached by immigration authorities on the basis of investigations and interviews which have the power to conduct, including interviews of the person concerned, of an extensive character, often abroad, and of documents whose authenticity has to be verified by inquiries."

There are no "special" or "precedent" facts in cases like these. There are only the facts of the cases in the ordinary sense. The system of immigration control is specially designed to find them and test them and the courts are really undertaking a "retrial on the pretext of a special classification, The difficulty of this sort of operation becomes more apparent when one considers the alleged deception in the **Khera** case. Details of this appear in the speech of Lord Fraser, "It was at one time contended on behalf of the Secretary of State that there had been four separate occasions between the refusal of the clearance certificate to the appellant and the eventual grant of leave to enter on which the appellant or his father ought to have disclosed to the immigration authorities that the appellant had been married but on which one or other of them had failed to do so ... counsel eventually relied only on the fourth which was on 16 December 1974 when the applicant underwent a medical examination in India ... The Home Office asserted that on that occasion the appellant had falsely told the medical officer that he was not married and that this lie had been a material factor in the grant of a clearance certificate to him."

It is not explained in the reports why the first three reasons for the Crown allegation of deception was not relied on. The Immigration Officer referred to them in an affidavit but by the time the case came to the courts only the fourth one was used and there was no evidence on the affidavit to that one. As Lord Fraser said "There is no evidence, on affidavit or otherwise, on behalf of the respondent setting out the respondent's account of the interview with the medical officer. The only affidavit on behalf of the respondent is dated 30 October 1980, and was sworn by a Mr Chalmers, who appears to be the immigration officer who made the decision of 22 November 1978 that the appellant was an illegal entrant. In that affidavit he referred to the three occasions, now no longer relied on, on which the appellant or his father had not disclosed that he had been married, but he made no reference to the medical examination. It must, therefore, be taken that in reaching his decision he did not rely on what happened at the medical examination. If the alleged lie was to be part of the basis for his decision it should have been mentioned in Mr Chalmer's affidavit; that was all the more necessary as it had been denied by the appellent's father on his behalf. As it is now conceded that the failure to disclose on the three earlier occasions did not amount to deception, and as they are apparently the only occasions on which Mr Chalmers relied in coming to his decision, the inevitable consequence is, in my opinion, that Mr Chalmers was not entitled, on the evidence that was before him, to decide that the appellant had been guilty of deception."

It is clear that difficulties will be experienced in trying to discover precisely what was said in circumstances far distant in time and place. This is of course not a new problem. Two leading writers**'15]** have said "Under the 1971 Act section 3(8) the burden of proving that a person is a patrial or is entitled to an exemption under the Act is placed on the person asserting it. But it may be difficult to determine the truth of events in the past particularly when an intending immigrant has not always told the same story, or to decide the true nature of his future intentions."

And the difficult position of the reviewing court was explained in Zamir by Lord Wilberforce, "The Divisional Court, on the other hand, on judicial review of a decision to remove and detain, is very differently situated. It considers the case on affidavit evidence, as to which cross-examination, though allowable, does not take place in practice. It is, as this case well exemplifies, not in a position to find out the truth between conflicting statements: did the applicant receives notes, did he read them, was he capable of understanding them, what exactly took place at the point of entry. Nor is it in a position to weigh the materiality of personal or other factors present, or not present, or partially present, to the mind of the immigration authorities. It cannot possibly act as, in effect,a court of appeal as to the facts on which the immigration officer decided. What it is able to do, and this is the limit of its powers, is to see whether there was evidence on which the immigration officer, acting reasonably, could decide as he did. It is to be noted that the Act does in fact create procedure of appeal against directives for a person's removal; but this is to an adjudicator and cannot ordinarily be invoked so long as the person concerned is in the United Kingdom (see s 16)."

This raises a more general point. In some cases, where a statute clearly confers a juridiction upon an inferior court or tribunal, the components of the jurisdiction can be identified. Where the statue does not undertake this task specifically, is there any discernible distinction between jurisdictional and non jurisdictional facts, for example in immigration cases and other technical areas? It can be argued that in any system of organisation whether directly involving law or not the value of any fact is relative to the context as a whole. Thus "the full significance of any (fact) cannot be perceived unless and until it is integrated in to the structure of which it forms a part."[**16**] That is to say the real meaning of the facts does not lie in themselves but in the relationship which we construe and perceive between them. The context determines the significance of any fact. The individual fact cannot be more significant than the whole structure to which it is related. In this case the whole structure is the Immigration Act and the persons charged with the construction of the value of the facts in any dispute are the personnel and machinery set up by the Act. The process of construction cannot be over-emphasised.

Thus in **Anismic Ltd** v **Foreign Compensation Commission** Lord Justice Diplock said;

> "Lawyers, when they talk of "error", whether of "fact" or of "law", in such a statement, are dealing not with absolutes but with the opinions of human beings. A statement that these exist particular facts which give rise to specified legal consequences is "right" if it is made by a person whose opinion as to the existence or non-existence of those facts, and as to the legal consequences, effect will be given by the executive branch of Government. But such a statement from being "right" may become "wrong" if subsequently a contrary statement is made by some other person to whose opinion as to the legal consequences of those facts effect will be given by the executive branch of Government in substitution for that of the person who made the first statement. It is then the later statement that is "right". But it may be that effect will be given to the substituted opinion of such other person as to the legal consequences of facts only, and not as to the existence or non-existence of the particular facts which give rise to those legal consequences. In that event the original statement that particular facts exist remains "right" and must be so treated by the person to whose substituted opinion as to the legal consequences of facts effect will be given."[**17**]

It is clear from this that judicial review of immigration decisions will now be more readily undertaken. However at present this does not mean that every administrative decision

will be subject to the high degree of factual investigation by the courts in **Khera**. The dividing line between this and cases like **Padfield** and **Tameside** was explained by Lord Scarman:-

> "This principle is undoubtedly correct in cases where it is appropriate. But, as I understand the law, it cannot extend to interference with liberty unless Parliament had unequivocably enacted that it should. The principle was formulated by Lord Greene MR in **Associated Provincial Picture Houses Ltd** v **Wednesbury Corp**[1947] 2 All ER 680, [1948] 1 KB 223. The case concerned the conditions imposed on the issue of a licence. The principle formulated was that the courts will not intervene to quash the decision of a statutory authority unless it can be shown that the authority erred in law, was guilty of a breach of natural justice or acted 'unreasonably'. If the authority has considered the matters which it is its duty to consider and has excluded irrelevant matters, its decision is not reviewable unless so absurd that no reasonable authority could have reached it. The principle excludes the court from substituting its own view of the facts for that of the authority.
>
> Such exclusion of the power and duty of the courts runs counter to the development of the safeguards which our law provides for the liberty of the subject"

If this dividing line remains intact administrators in "non liberty" areas may take decisions without looking over their shoulders at the courts all time. Indeed, Khera might more properly be seen closely related to the body of law associated with the Writ of Habeas Corpus. Such identification would help to maintain the distinction between traditional areas of limited jurisdictional intervention and the "liberty" cases in which closer judicial review is permitted.

1. 1853 9 Ex 11

2. 1951 2 KB 1

3. 1947 KB 634

4. 1819 1 B & B 432

4a. **Bourne** v **Norwich Crematorium Ltd** 1967 1 WLR 691

5. 1968 AC 997

6. 1977 AC 1014

7. Agricultural Marketing Act 1958

8. Administrative Law by P P Craig

9. Public Law 1976 P.177

10. Public Law 1976 P.120

11. 1977 AC 1014

12. discovered by Lord Atkin in **Liversidge** v **Anderson** 1942 AC

12a. Foulkes, D in NLJ 1976 at 649.

13. 1984 AC 74

14. 1980 AC

15. Wade & Phillips' Constitutional and Administrative Law

16. Marxism, Structuralism, Education - theoretical developments in the Sociology of Education by M Sarup.

17. **Anismlnic Ltd** v **FCC** 1969 2 AC 147

18. Wade & Phillips supra.

UNDULY INFLUENTIAL RELATIONSHIPS

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"The greatest trust between man and man is the trust of giving counsel."

Francis Bacon

Two recent decisions of the Court of Appeal have illustrated yet again the remarkable flexibility of equity in its application to modern situations.

The first was delivered by the Court of Appeal in **O'Sullivan v Management Agency and Music Ltd[1]**, which is the lastest in a growing number of modern cases where the equitable presumption of undue influence has been successfully invoked by a plaintiff in the context of a commercial transaction.

The Facts

The first plaintiff (P) was a composer and performer of 'pop' music who, until he met M, had enjoyed relative obscurity. However, relying on M's superior experience of show business, as a well-known manager, P entered into an exclusive management agreement with him. M was a substantial shareholder in a music agent company which was associated with three other companies.

Acting on M's advice, P entered into three separate agreements with these three latter companies and, as a result of M's and the companies' efforts, records of P's composition were produced and circulated worldwide, giving P considerable success and fame. The second plaintiff company, wholly owned by the first plaintiff, was formed to receive P's UK earnings, thus reducing his tax liability. THe second plaintiff then entered into two agreements with the associated companies. All these agreements were prepared by S, who was a co-director of one of the associated companies and managing director of three of them.**P, a young man with no business experience or knowledge, relied on M in signing the agreements, being neither independently advised by a third party, nor recommended by M or S to take independent advice before entering into the agreements[1a]**.

Subsequently, an action was brought by the plaintiff against M and the companies[**1b**] seeking declarations that the agreements had been abinitio void and unenforceable as they had been obtained as a result of, inter alia, undue influence. In fact, all the agreements had been performed and had expired by the date of the trial.

The judgment at first instance

The judge held that M and, through him, the companies, were in a fiduciary relationship to the first plaintiff, and that consequently a presumption arose that the agreements had been obtained through undue influence. Accordingly, the declarations sought were granted and orders were made that the agreements should be set aside and an account be taken of the profits formed by the companies as a result of the agreements, the sums found to be due upon the taking of this account to paid to the first plaintiff with compound interest. The judgment, therefore, was to a degree a punitive one as regards the defendants, who naturally appealed.

The judgment of the Court Appeal.

The Court of Appeal, however, upheld the trial judge's finding that a fiduciary relationship existed between the first plaintiff and the defendants, only varying the judgment in respect of the order as to the payment of (1) compound interest, as it was, with one exception, in appropriate as the first plaintiff had in fact benefitted from the use by the company, in the course of their trade, of the profits which had been made in breach of the fiduciary duty, and (2) an allowance to the companies, over and above out-of-pocket expenses, in respect of their skill and labour in promoting the first plaintiff' s professional work and in managing his business affairs. However, this allowance was less than might have been obtained by the companies had the agreements been negotiated between properly advised parties.

Referring to the statement in **Re Brocklehurst,[2]** of Bridge LJ that "undue influence as such has never been judicially defined", and to the leading case of **Allcard v Skinner,[3]** Edward Nugee, Q.C., declared:

> "....this much at least is clear, that it is implicit in a finding of undue influence, whether resulting from sufficient evidence of actual influence or from insufficient evidence to rebut the presumption where it arises, that the transaction is not the result of free benefit of the independent will of the donor and that undue influence must therefore be influence of such a character as to prevent the donor from possessing that freedom and independence of mind that is necessary in order that the transaction should stand."

In contrast, in **National Westminster Bank plc v Morgan[3a]** the House of Lords upheld the principle enuciated by Lindley, L.J., in **Allcard v Skinner,[3b]** namely that for a transaction to be set aside on the grounds of undue influence it must be one in which the party exercising that influence had done so as to take unfair advantage of the party influenced; in other words, there must be an element of victimization.**[3c]**

The facts

The first and second defendants, Mr and Mrs Morgan, had bought their house in 1974 with the assistance of a legal mortgage in favour of Abbey National Building Society. Mr Morgan had died after the County Court judgment and before the Court of Appeal hearing. In 1977 his business had been in difficulties and the building society had begun proceedings for the possession of the house in default of payment of mortgage instalments, alleging a debt of £13,000.

On January 30, 1978, Mr Morgan had asked the bank to "refinance" the building society loan, saying that he only needed a bridging loan for some five weeks, after which he would arrange for the bank to be repaid by his Company which had, it was believed, good prospects. On the recommendation of its Branch Manager, the bank accepted that proposal, subject to a legal mortgage on the house, which was held by Mr and Mrs Morgan as beneficial joint tenants. However, the bridging loan was not repaid and the bank had instituted the present proceedings. At first instance the deputy judge had made an order for possession.

Whilst, on behalf of Mrs Morgan, it was not suggested that the relationship between the Morgans and the bank had been other than the normal business relationship of banker and customer, prior to the interview at which Mrs Morgan had signed the charge, it was

argued that the relationship between Mrs Morgan and the bank had assumed a very different character when, in early February 1978, the bank manager had called at the Morgans' home to obtain her signature, Mr Morgan having already signed.

The conversation between Mrs Morgan and the bank manager had lasted a mere five minutes. She had been concerned lest the charge might enable Mr Morgan to borrow from the bank for business purposes. The atmosphere had been tense: Mr Morgan had been in and out of the room, 'hovering around'. Mrs Morgan had indicated to the bank manager that she did not wish her husband to be present, and the bank manager had managed to discuss the more delicate matters when her husband was out of the room. The deputy judge had accepted that it had never been the bank manager's intention that the charge should be used to secure Mr Morgan's business liabilities.

The judgment of the House of Lords.

Lord Scarman stated that the facts appeared to him a far cry from a relationship of undue influence or from a transaction in which an unfair advantage had been obtained by one party over the other. The judge at first instance, too, had clearly been of the same opinion, having accepted the bank's submission that the transaction had not been manifestly disadvantageous to Mrs Morgan, who had in fact thereby been provided with what to her was vital, namely the rescue of the house.

Further, his Lordship confirmed, the judge at first instance had

1) rejected her submission that she had been subjected by the bank manager to pressure which had in fact, been caused by the building society's attaining of possession;

2) held that the circumstances had not called for the bank manager to advise her to take legal advice; nor had she been harried into signing: the decision had been her own;

3) rejected the submission that a confidential relationship had existed between Mrs Morgan and the bank such as gave rise to the presumption of undue influence: the relationship had never gone beyond the normal one of banker and customer.

The Court of Appeal had failed to persuade his Lordship that the judgment at first instance was incorrect: whatever the legal character of the transaction sought to be set aside for undue influence, it was clear from precedent that it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that, in the circumstances of the relationship between partners, it had been procured by undue influence. Hence, the Court of Appeal had erred in law to hold that the presumption could merely arise from evidence of the relationship of the parties without corresponding evidence that the transaction itself had involved some element of victimization.

On a meticulous examination of the facts, his Lordship concluded that the bank manager had never " crossed the line" into the area of confidentiality; nor had the transaction been unfair to Mrs Morgan. Hence, the bank had owed her no duty to ensure that she obtained independent advice.

Thus, his Lordship allowed the Bank's appeal against the judgment of the Court of Appeal, while warning that there was no precisely defined law delineating the equitable jurisdiction of a court to give relief in cases concerning undue influence.

While **O'Sullivan's** case, then, illustrates dramatically the successful application of an ancient equitable invention to a particularly modern type of commercial transaction, **Morgan's** case shows that the application of the doctrine does have limits.

When then, does undue influence apply? At the outset, it must be distinguished from its common law counterpart, duress: for whilst both concern the avoidance of a transaction for lack of genuine consent on the part of the weaker party, there the similarity ends. Duress involves compulsion under which someone acts through fear of personal physical suffering, for example, bodily injury or imprisonment. No such obvious pressure, however, is usually[**4**] necessary to invoke the court's exercise of its equitable discretion to set aside a transaction on the grounds of undue influence.

Indeed, this apparent willingness of the courts to intervene has frequently masqueraded as a manifestation of the exercise by judges of their residual jurisdiction as custodians of the public morals[**5**] and, therefore, in the public interest. It is important to remember that the basis of judicial intervention on the ground of undue influence is that it is inequitable for anyone to take advantage, either for himself or for others[**6**], of the position of trust which he occupies, and is **not** the mere protection of the foolish or the weak from the consequences of their folly or weakness.

Whilst undue influence[**7**] concerns an abuse of confidence, it does not necessarily involve fraud in the strict sense but is rather concerned with eliminating all possibility of fraud, whether actual or potential. The court's treatment of cases invoking undue influence is an excellent practical example of the equitable maxim "He who comes to Equity must come with clean hands", reflecting the influence of Roman law upon the earlier Chancellors.

Whether a transaction procured through undue influence is voidable rather than void is debatable, although on balance the latter appears to be the case, for the person influenced may either expressly or impliedly confirm the transaction after the influence has ceased.[**8**]

To set aside a gift inter vivos on the grounds of undue influence the complainant must prove the existence[**9**] of a relationship which is either (1) presumed or (2) proven by him to be one of confidence, and the party against whom the complaint is made must be able to rebut the presumption of undue influence arising under (1) or (2).

Several special relationships are presumed by the courts to be fiduciary, and proof of their existence thus gives rise to the presumption of undue influence. However, the courts have consistently refused to fetter their discretion by enumerating an exhaustive or exclusive list of the relationships in which the presumption is deemed to arise.[**10**] It is clear from the judgments in such cases that the principle on which Equity gives relief will be extended and applied to all relationships in which dominion may be exercised by one person over another. The wisdom of the judges in refusing to fetter their possible future intervention in cases involving undue influence was shown in **Lyon** v **Hume**[**11**]. The fiduciary relationship in that case, that of medium and dupe, had never previously been considered by the courts. Nonetheless, the judges had no hesitation in exercising their discretion to enable them to set aside substantial gifts by the plaintiff to the defendant, the latter being unable to discharge the burden of proof of lack of undue influence thus thrown upon him by the evidence of the existence of a fiduciary relationship.

The leading case of **Allcard** v **Skinner**[**12**] is a most important milestone in the history of development of the law relating to undue influence. Briefly, the case concerned gifts

made by a nun to the mother superior of a covent. It was held that this relationship was one which gave rise to the presumption of undue influence and prima facie therefore the gifts would be set aside. However, in this particular case the fact that the nun had delayed[13] in bringing an action for several years[14] after leaving the convent was held to bar her from recovering her property, which by this time had been applied for the benefit of the convent.

Lindley LJ's judgment is particularly important, as in it he classifies and distinguishes the two groups of cases in which undue influence will be invoked, although they often overlap. They are

(1) "Cases in which there has been some unfair and improper conduct, some coercion from outside, some over-reaching, some form of cheating, and generally, though not always, some personal advantage obtained by the donee placed in some close and confidential relation to the donor."

(2) "Cases in which the position of the donor to the donee has been such that it has been the donee's duty to advise the donor, or even to manage his property for him."

His Lordship also makes the vital point that

> **"The question is not whether [the plaintiff] knew what [he] was doing, had done, or proposed to do, but how the intention was produced:** whether all that care and providence was placed around him, as against those who advised him, which, from their situation and relation with respect to him, they were bound to exert on his behalf."

However, it is clear that while even the obtaining of independent advice may sometimes be insufficient to rebut the presumption of undue influence, the lack of such advice will not necessarily upset a transaction if it is found as a matter of fact that no undue influence in facts exists.[15]

Further, Lord Lindley stated that he had failed to find any case which did not fall within one or other of the above groups; nor could he find any authority which actually covered the situation in **Allcard** v **Skinner**. "But it does not follow that it is not reached by the principle on which courts have proceeded in dealing with the cases which have already called for decision. **They illustrate but do not limit the principle applied to them**."

In the later case of **re Craig deceased**[16], where substantial gifts by an elderly man in favour of his secretary-companion were set aside, Ungoed-Thomas J explained the dicta of Lindley LJ, emphasising that far from restricting the application of the concept of undue influence they had re-inforced the view that the courts would always intervene in cases involving undue influence in fiduciary relationships regardless of the absence of an identical previous precedent.

Lord Denning MR too, in **Lloyd's Bank** v **Bundy**[17], set the courts' development of the law on undue influence in context with other categories **euisdem generis** where Equity has intervened to set aside transactions where there has been "inequality of bargaining power."

Reference has already been made to the existence of several relationships where Equity will presume the existence of undue influence. Two of those relationships will now be examined more closely - legal and medical.[18]

i) The Legal Adviser and Client

It should cause no surprise that the first of the professional relationships to be subjected to the equitable doctrine of undue influence was that of legal adviser and client. Indeed, one is tempted to ask what would be the point in imposing harsh rules of Equity upon laymen if members of the legal profession were seen openly to escape their rigour!

Here the history of the development of the law of England and of Rome is very similar, although the Romans actually legislated upon the subject: their Lex Cincia de Donis de Muneribus 204 BC prohibited the acceptance of gifts by an advocate from his client "**ob causam orandam**".[**19**] This law enabled the donor to recover the gift during the joint lives of himself and the donee, and was clearly regarded by contemporary writers as of importance: it was a"plebiscitum", introduced to curb the growing domination of the Senate, from which came most of the advocates, over the plebeians. The Romans therefore acknowledged that the advocate's knowledge of the law might be used by him (and, indeed, probably would be so used in the increasingly corrupt society of Rome) in taking advantage of his clients, those very people he was professionally intended to protect. If lawyers did not observe the spirit of the law, who else could be expected to do so?

However, the plebiscitum failed in its purpose and advocates continued to collect their illegal gains until the Senate, corrupt as it was, was finally shamed into action by a particularly flagrant violation of the law relating to such gifts. A compromise was reached, a limit of **dena sestertia** (about £80) being set for any one gift.

England of course, as has been shown, developed her law in this area entirely by judicial decisions. Thus, the same presumptions, and the same burden of proof to dislodge them exist in respect of the relationship between lawyer and client. Further, while the burden of proof may be relatively easy to shift in some cases, yet in others it weighs exceedingly heavily upon the person seeking to uphold the gift,[**20**] it will come as no surprise top find that it rests particularly heavily upon the shoulders of the lawyer. There is little of our lives which does not come within the ambit of the seamless cloak of the common law, increasingly patched as it is nowadays by statute! Thus, the lawyer's advice is sought on matters of every description, and to him or her are imparted confidences not only of details[**20a**] of assets owned and debts owed, but frequently family and domestic matters of a most personal and intimate nature.

Thus, a solicitor[**21**] is often in possession of extremely confidential information which, by virtue of his professional expertise, he can use to the advantage (or, as concerns us here, disadvantage) of his client. This combination gives him a personal ascendancy over his client and while to speak of "the crushing influence of the power of an attorney"[**22**] may sound dramatic it is a frighteningly potential reality. His position may, of course, also put the solicitor in a situation where, apart from obtaining actual gifts from his client, he could be tempted to gain, however apparently innocently, personal benefit. This has been forcefully acknowledged judicially.[**23**] Indeed, it could be said that Equity's rules are far more strict than the continental doctrine of unjust enrichment, as Equity does not make unjust enrichment a condition precedent for its intervention to set aside a transaction between trustee and cestui que trust, the mere hope of possibility of personal profit by a fiduciary being all that is necessary. It follows that the mere fact that such a transaction has taken place between the parties where a relationship giving rise to the presumption of undue influence exists is sufficient for Equity to set it aside, without more, if the donee fails to rebut the presumption.

Further, as an officer of the Court the solicitor is in a position of trust where he owes a duty of good faith and disclosure not only to his client but also to the Court. Further, since his professional knowledge of the law obviously exceeds that of the layman, even less is ignorance an excuse.[**23a**]

The stringency of the rule means that it is exceedingly difficult for a solicitor or similar person to retain any gift at the hands of a client, whilst the professional relationship subsists, should the gift be questioned, unless it is deemed "**de minimis.**"[**24**] It has been seen that gifts in favour of a third party, too, will be caught by the rule,[**25**] and thus dispositions in favour of a solicitor's son[**26**] or wife[**27**] have been set aside. Even if the solicitor is consulted in a personal and not professional capacity a disposition in his favour may be set aside.

It goes without saying that it is a fundamental rule that a solicitor when contracting with his client in respect of any transaction whatsoever is under an absolute duty of full disclosure of all material circumstances known to him, failure in which will enable the grantor to have the transaction[**28**] set aside.

Thus, a transaction where a solicitor fails to discharge the burden of proof is not void but merely voidable and, therefore, may be ratified or acquiesced in after the influence has ceased, either by action - eg written affirmation of the intention to make the disposition -or by mere inaction, as in **Allcard** v **Skinner.**[**29**]

Finally, a solictor's duty as such may well continue after the discontinuance of the solicitor-client relationship in a strict sense. This will however be a question of fact and degree.

ii) Medical Adviser and Patient

Just as in the case of religious adviser the considerable influence wielded by him derives from the acquisition of knowledge of a most intimate nature concerning matters both spiritual and temporal, coupled with a relationship of the most confidential and trusting kind involving the right and indeed the duty of the adviser to counsel and warn, so too the medical adviser exercises a comparable influence in the field of physical wellbeing and, with the modern tendancy to link physical ailments to mental discords, in the area of mental health too.

Indeed, one could argue that the influence enjoyed by a medical adviser as a result of his relationship with his patient is stronger than any other, involving as it does such a dependence upon the adviser for health of body and mind or for life itself. However, the courts have not seen fit to accord to this particular relationship such pre-eminence as some others, for example religious adviser and disciple,[**30**] parent and child,[**31**] and solicitor and client. By judicial reckoning at any rate, Louis XI, who apparently feared his confessor but feared his barber-surgeon more, was in a minority![**32**]

The medical adviser, then, is required to prove that any gift or other disposition in his favour by a patient, whereby the adviser gains any substantial advantage, was not made as a result of the undue influence which his special relationship with his patient is presumed to give him over the latter.

It is interesting to note that the Romans too distrusted such dispositions: indeed, unlike England they actually legislated against gifts in favour of "archiatri"[**33**] on the same grounds as those in favour of advocates. The promise by a gravely ill patient of a gift to his

doctor did not enable the latter to accept it.[**34**] Upon the patient's complete recovery however acceptance of a present was allowed. This raises an interesting point: surely it could be argued that the doctor's influence was even greater when he had cured his patient; for the latter's gratitude and admiration of the doctor's skill might then know no bounds! Here, however, doubtless the Romans were wisely striking the balance between preventing the doctor from taking advantage of his patient whilst in fear of his life and yet preserving the latter's right to voluntarily make a gift of appreciation to the doctor upon recovery. We have already noted that English law is free of statute in the area of undue influence, so it is interesting to see how where the assistance of statute was invoked this balance was struck. Further, whilst paying tribute to the imagination of the Roman legislature one must also admire the English judiciary for having adopted that peculiar English doctrine of precedent so successfully, thus avoiding the necessity for such legislation.

There has been relatively little litigation concerning the doctor- patient relationship. Twc contrasting cases suffice to illustrate the application to it of the presumption of undue influence. In **Dent** v **Bennett**[**35**] the court refused, on grounds of public policy to sustain an agreement whereby an elderly man, without separate legal advice, agreed that his excutors should pay to his surgeon, in consideration of past and future attendance, the sum of £25,000 within 6 months of his death. Clearly such a payment was out of all proportion to the benefit thus acquired by the patient, being then in his eighty-sixth year.

On the other hand, in **Pratt** v **Barker**[**36**] where a surgeon proved that the patient from whom he had received a gift had had the independent advice of his own solicitors, and a complete explanation of all the consequences which would flow from his execution of a settlement to the surgeon's benefit, and had nonetheless chosen to execute it rather than deal with the matter by will (to save legacy duty), it was held that the gift was in order.

Thus, though the onus of proof on the donee in this case too heavy, yet if it is met the gift will be upheld.

Since Equity first intervened to remedy the shortcomings of the common law in cases concerning catching bargains made with expectant heirs[**37**], the judges have consistently developed this branch of law so that it truly illustrates the excellence of the English system of precedent when used by the judges as "stepping stones and not as halting places."[**38**]

Indeed, as has been shown, a characteristic of the growth of this branch of case law has been that the judges have consistently refused to fetter their discretion in any way,[**39**] and thus the area has remained refreshingly free of statute: the problems of judges becoming entangled in their own web of precedent, as has happened eleswhere,[**40**] have happily been avoided. Lord Diplock once remarked[**41**] that the intervention of statute was often a mark of failure[**42**] by the judges to use precedent[**42a**] correctly. Surely the absence of statute in the area which we have examined is a shining example of the exellence which the judicial process can achieve in the service of the living law. Of course, as even Sir Henry Maine[**42b**] conceded, in a progressive society there will inevitably be statutory enactments, both to further the better administration of justice and, with the law increasingly nowadays (for better or worse) playing a paternalistic role, to mould society itself according to the ephemeral will of the people. Nonetheless, while it would be dangerous to generalise, the life of a statute is often nasty, brutish and short It has been seen how the Romans actually attempted legislation to counteract undue influence yet had limited success in curing the malady. The English judges, on the other hand, have quietly but resolutely developed the concept: from the early cases they

evolved the principles from which it was born yet, like its mother Equity, it too is not past the age of child-bearing. For with their consistent refusal to delineate exhaustively, and therefore to limit, their discretion in respect of cases of undue influence the judges have ensured its continuous fertility so that, when confronted with cases like **Lyon** v **Home**, **Allcard** v **Skinner**, re **Craig** and **Brocklehurst**, they can apply their reasoning with flexibility so as to attain a result which is based on certain, established principles.

The approach of the judges has neither been capricious nor has it been rigid. Albeit not blatantly indulging in social engineering in the mode of Roscoe Pound of the American school[43] they have nonetheless as an over-riding factor borne in mind the balance which must be held between the evils of interfering with the freedom of contract on the one hand and of on the other hand allowing the strong to exploit the weak where society has placed the former in a position in relation to the latter where undue influence may be wielded as a result.

Some of the relationships where confidence giving rise to the presumption has been held to exist have been discussed but there are others as has been mentioned. By analogy, the presumption of undue influence can arise from a factual situation, the only practical legal difference being that in a relationship judicially recognised as being one of confidence giving rise to the presumption the onus is on the person seeking to uphold the transaction to discharge the presumption, whereas where it is alleged that a factual situtation gives rise to a confidential relationship from which flows the presumption the person seeking to set aside the transaction by raising it must prove that the circumstances were such as to raise the presumption. Once he has proved this the burden of discharging the presumption will again be upon the person seeking to uphold the transaction, commensurate with the latter's degree of influence.

The decision of the Court of Appeal in **Re Brocklehurst**[44] is an interesting example of a modern attempt to invoke undue influence in order to have a transaction set aside. The facts, which are lucidly set out by Lord Denning MR in his inimitable prose, albeit in a dissenting judgment, were briefly these: an 'aged and eccentric' baronet owned a substantial estate in respect of which he had barred the entail, having no direct heir. During the last six months of his life he gave away by the creation of a 99-year lease, the shooting rights upon the whole of the estate - even right up to the mansion house windows! This obviously considerably reduced the value of the estate.

The donee of the shooting rights was the proprietor of a small garage, who had befriended the deceased during the last two years of his life. It was accepted both by the judge at the first instance and by the Court of Appeal and by the plaintiffs that the donee had done nothing consciously improper to influence the deceased. However, Lord Denning MR pointed out that the mere fact that the relationship in the case was not one of the established fiduciary categories nevertheless did not prevent the application of the presumption of undue influence if it was found as a matter of fact that a situation of confidence existed which he found did. He also laid great stress on the age and eccentricity of the deceased, and on the potential damage which his gift of the shooting rights could wreak on the estate. Finally, he made the curious - albeit, in the context of Equity, understandable - comment that the deceased was "morally, though not in law, only a life tenant." In holding that the gifts should set aside, Lord Denning observed that "the courts had always, as a matter of public policy, looked with care at gifts or improvident bargains which are made by a person whose motives or judgment are impaired by reason of age, or ignorance, eccentricity or infirmity, or even by a failure to know or appreciate the consequences." Even, his Lordship continued, where no undue influence or undue pressure is present "there are occasions when the courts will say that

the transaction is so exceptional and so unreasonable that it cannot stand. A good instance is standard form contracts which contain unreasonable exemption clauses".

Neither Lawton LJ nor Bridge LJ, however, had sympathy for Lord Denning's viewpoint: as far as they were concerned, since the defendant had manifestly not acted improperly that was an end to the matter. In particular, they found the fact that no independent advice had been taken by the deceased irrelevant in the particular case. The taking of such advice was one type of evidence which might in appropriate circumstances rebut a presumption of undue influence. It was by no means, however, the only type of evidence. Here the defendant had adduced other evidence: although their Lordships agreed that a fiduciary relationship did exist on the facts given, such as would have enabled the defendant to exercise undue influence over the deceased, the evidence showed that the deceased had nevertheless made the gift of the free and independent exercise of his will. Indeed, their Lordships ventured to suggest that, far from the deceased being under the defendant's influence, the reverse had been the case: the deceased was an autocratic, influential and wealthy person who, having inherited the baronetcy and the family estate at the age of 17, had for most of his life been used to getting his own way. The defendant on the other hand was a former butcher's apprentice, lorry driver, and naval rating. The social and financial postitions of the two were poles apart: there was no ascendancy by the defendant over the deceased, who in fact gained much comfort from his friendship with the defendant during the last few years of his life, the defendant being on the one hand a "yes-man" who always did the deceased's bidding, and yet not being an "obsequious crony" but always meticulously keeping his distance entering the deceased's mansion by the rear entrance and observing such other social niceties indicative of the distinction in social status between the two.

Lawton LJ, observing the stigma which a decision against the defendant would attach to him, went on to say that, since the defendant had neither, as was conceded by the plaintiffs, consciously behaved improperly nor, as his Lordships found as a matter of fact, unduly influenced the deceased, the gifts would not be set aside. Bridge LJ, concurred.

On balance it does seem, whatever the possible moral attractions of Lord Denning's judgment, that the majority decision is preferable in this case, although the dividing line is, it is submitted, very thin: the absence of independent advice, to which Lord Denning attached such importance, is likely in the majority of cases to be highly prejudicial to a person seeking to uphold a transaction in his favour where a fiduciary relationship existed. The decision here turned on the peculiar facts of the case: had the deceased been a fragile, impressionable spinster recluse can one really believe that Lord Denning's view would not have won the day?

Conclusion

As has been seen, Equity initially intervened to set aside transactions where the circumstances of the parties were such as to lead to a presumption against being fully entered into. The categories of such transactions were set forth by Lord Denning MR in his judgment in **Lloyds Bank** v **Bundy** where, gathering together the principles, he suggested that through them runs a common thread: they rest on the inequality of bargaining power. It is interesting to note that the doctrine of undue influence itself seems to have been recently invoked more frequently in cases concerning commercial transactions such as **O'Sullivan[45]** rather than, as in earlier days, in the domestic or spiritual fields. One wonders whether this could be a sign of the judiciary's acceptance of the changing circumstances of modern society, where the movement from status to contract now seems to have partly reversed and where, too, in the modern context of

large commercial institutions[**46**] and imposed standard forms of contract, consensus is to an extent illusory.

Sir George Jessel MR said in 1875:

> "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore, you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract."[**47**]

The courts have not interfered with this freedom lightly; while **O'Sullivan** shows that the judges will not shirk intervention when the circumstances warrant it, **Morgan's** case makes it clear that there are limits to the circumstances in which the presumption of the influence can be successfully invoked.

1. (1984) C.A. 14th February 1984

1a. which were with companies with which they both had connections.

1b. the first to fifth defendants in the instant case.

2. (1978) 1 All E.R. 767

3. at 12, infra.

3a. Times Law Report, March 8th 1985.

3b. at n 12 infra.

3c. see also **Bank of Montreal** v **Stuart** (1911) ac 120, and Poosanthurai v Kannappa Chettiar (1919) LR 47 1A1.

4. Undue influence to avoid a **testamentary** disposition must however involve fraud or coercion — see **Parfitt** v **Lawless** (1872) LR2 P& D 462

5. Holdsworth: History Vol XIV at pp 536 - 7

6. Huguenin v Basely (1807) 14 Ves Jan 273

7. For cases on undue influence generally see 12 Digest (Resissue) 125 - 142 (687 - 820) and 8 Halsbury's Laws (3rd Ed) p 86 para 147 and 17 ibid pp 672 - 681, paras 1297 - 1312.

8. cf duress

9. See, eg **Inche Norian** v **Shaik Allie Bin Omar** (1929) AC 127

10. per cottenham C, in **Dent** v **Bennett** 4 My and Cr 262

11 (1868) LR 6 Eq 655

12 (1887) 36 Ch 145

13. ie the equitable doctrine of laches was applied: "Delay defeats Equity".

14. and was thus no longer under the influence of the Mother Superior.

15 **Re Brocklehurst deceased** (1978) 1 All ER 767

16 (1970) 2 All ER 390

17. (1974) 3 All ER 757

18. For a fuller examination of both these and several other relationships, see dissertation by the author dated 1977, in Trent Polytechnic Library.

19. Nor could he stipulate for a fee under the existing law (c f. the fact that English barristers cannot sue for theirs)

20. pro rata to the amount of influence which through his position in relation to the donor he is deemed to exercise

20a. and often involving the entrusting of physical custody in the deposit of title, deeds, etc.

21. This rule is usually referred to as relating to the solicitor-and-client relationship. It also however applies wherever in the course of a professional relationship one party undertakes to give legal advice to the other, under whatever label or in whatever capacity. Thus it has been applied to counsel: **Kingsland (Visc)** v **Barnwell** (1706) 4 Brown PC 154; a certified conveyancer: **Rhodes** v **Bate** (1886) 1 Ch App 252 (proceeded on grounds of relation created by circumstances, rather than legal adviser and client); a Scottish law agent: **McPherson** v **Watt** (1977) 3 App Case 254 HL

22. **Thomson** v **Judge** 3 Drew 306, per Kindersley V - C

23. See, eg. **Phipps** v **Boardman** (1967) 2 AC 46

23a. **Ignorantid legis neminem excusat.**

24. Even such a gift will be set aside if "mala fides" is proved: **Rhodes** v **Botes** (1866) 1 Ch App 252

25. Huguenin v Baseley (supra)

26. **Willis** v **Barron** (1902) AC 271 AL at p 277

27. **Goddard** v **Carlisle** (1821) 9 Price 169. Interestingly the rule was even applied and a gift set aside where the beneficiary, the solicitor's wife, was a near relative of the donor - **Liles** v **Terry** (1895) 2 QB 679 CA

28. **Moody** v **Cox and Hart** (1917) 2 Ch 71 CA at p 80, **Nocton** v **Ld Ashburton** (1914) AC 932 HL at p 965; also see **Wright** v **Carter** (1903) 1 Ch 27 CA (where the obligation to give full information is stated though not separated from the rebuttal of the presumption of undue influence).

29. supra

30. **McMaster** v **Byrne** (1952) 1 All ER (pc Canada) 1362 (approving dictum of Parker J in **Allison** v **Clayhills** (1907) 97 LT 709 at p 712)

31. **Wycherley** v **Wycherley** (1763) 2 Eden 175.

32. George Spencer Bowne, The Law Relating to Actionable Non-Disclosure (1915) at p 387, para 425.

33. C 10.52.9

34. cf the case of the shipmaster agreeing to pay an extortionate sum to have his saved from sinking - Ormes v Beadel (1860) 2 De QF and J333 - referred to by Lord Denning MR as one of the category of instances of "inequality of bargaining power" in **Lloyds Bonk Ltd** v **Bundy** (1974) 3 All ER 757

35. 4 My and Cr 262

36. (1825) 1 Sim 1

37. Holdsworth Vol VI at p 661

38. per Jessel MR in Re Hallett's Estate (1879) 13 CD

39. **Dent** v **Bennett** (supra);

40. See, for instance, the doctrine of Common Employment arising from the case of **Priestley** v **Fowler** 3M & W1.

41. Diplock L J: Presidential Address to The Houldsworth Club of the Unversity of Birmingham "The Courts as Legislators", 1965

42. The 1966 House of Lords Practice Statement bears witness to their Lordships' acknowledgement of this.

42a. a good servant but a bad master.

42b. Ancient Law. (1939)

43. For a rare articulated example of Poundian balancing of interests in an English decision, see **Conway** v **Rimmer** (1968) AC - particularly per Lord Reid at p 940. Also see Lord Denning MR's judgments in **Miller** v **Jackson** (1977) Times Law Report April 6th: "There was a contest between the interest of the public at large and that of a private individual."

44. (1978) 1 All ER 767 - 790

45. supra

46. eg banks and finance houses. See eg **National Westminister Bank Ltd** v **Morgan** at n. 3a supra.

47. Sir George Jessel MR in **Printing** and Numerical Registering Co v Sampson (1875) LR 19 Eq 462 at p 465

Fcr a case concerning a court order, see **Tomaney** v **Tomaney** (1982) 12 March C.A., where undue influence by a husband on a wife during negotiations prior to dissolution of marriage was not a ground for setting aside a consent order whereby all the wife's financial claims against the husband were dismissed. There is nc presumption of undue influence in the case of husband and wife, although it may be proved: see **Kings North Trust Ltd** v **Bell (1985) March 1 L.K. C.A.**