HOUSE OF LORDS SESSION 2005–06
[2005] UKHL 74

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Davidson (AP) (Appellant)
v.
Scottish Ministers (Respondents) (Scotland)

Appellate Committee

Lord Nicholls of Birkenhead
Lord Hope of Craighead
Lord Rodger of Earlsferry
Lord Carswell
Lord Mance

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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. English courts have power to make coercive orders, prohibitory and mandatory, against ministers of the Crown. This was decided authoritatively by your Lordships' House in *M v Home Office* [1994] 1 AC 377. The question raised by this appeal is whether, in the context of judicial review proceedings, Scottish courts have similar jurisdiction in respect of Scottish Ministers, that is, members of the Scottish Executive.

2. It would be surprising if this were not so. But on this appeal the Scottish Ministers contend that the Crown Proceedings Act 1947 leads inescapably to the opposite conclusion.

The proceedings

3. The proceedings have an unusual history. For present purposes the essential facts are simple indeed. Scott Davidson spent 18 months in Barlinnie Prison, Glasgow, between April 2001 and August 2002. Initially he was there on remand and later as a convicted prisoner. While there he complained to the prison governor about prison conditions: gross overcrowding, inadequate sanitary facilities and poor regime activities. He said detention in these conditions was inhuman or degrading treatment contrary to article 3 of the European Convention on Human Rights.

4. On 24 October 2001 he presented a petition for judicial review in the Court of Session. He sought a declarator that he was being detained in conditions incompatible with article 3, an order ordaining the Scottish Ministers to secure his transfer to prison conditions compliant with article 3, and damages. The legal basis for these claims was that the general superintendence of prisons is vested in the Scottish Ministers under section 3(1) of the Prisons (Scotland) Act 1989. Accordingly, so the claim runs, Mr Davidson's detention in prison in Convention non-compliant conditions was unlawful conduct by the Scottish Ministers within the meaning of section 6 of the Human Rights Act 1998. Such conduct was also outside the power of the Scottish Ministers within the meaning of section 57(2) of the Scotland Act 1998.

5. On 26 October 2001 the Lord Ordinary (Johnston) refused an application for interim relief. He was bound by the decision of the Second Division of the Inner House in *McDonald v Secretary of State for Scotland* 1994 SC 234 to hold that an order of interdict against the Crown was prohibited by section 21 of the Crown Proceedings Act 1947 and no longer competent in Scotland even if it had been before the passing of the Act: 2002 SCLR 166, para 3. On 18 December 2001 an Extra Division dismissed Mr Davidson's appeal: 2002 SC 205.

6. The correctness of that decision is now in issue before your Lordships. The intervening vicissitudes which have beset these proceedings are recounted in the speeches in your Lordships' House reported at 2005 SC (HL) 7. Mr Davidson is no longer in prison but the issue raised by the decisions of the Lord Ordinary and the Extra Division in these proceedings is one of considerable public importance.

The Crown Proceedings Act: its effect in England

7. The question in the present case concerns the application of the Crown Proceedings Act 1947 in Scotland. But the proper interpretation of this statute in relation to Scotland calls first for an understanding of the way the Act operates in England: what was its purpose, and what were the changes it made to English law. This is a necessary first step because the 1947 Act is drafted in a form primarily directed at the legal position obtaining in England at that time.

8. As is well known, in the 1940s English law relating to proceedings against the Crown was disfigured by two anachronistic relics. One concerned substantive law, the other was essentially procedural. The defect in substantive law was that proceedings in tort did not lie against the Crown. The procedural defect concerned claims against the Crown for breach of contract or in quasi-contract or for the recovery of land or property. The remedy in respect of these claims was by way of the antiquated and cumbersome procedure of petition of right. Proceedings required the Sovereign's fiat. A third defect, also procedural in character, was that the Crown could not be sued in the county court.

9. The existence of these defects had been obvious for some time. In 1921 the Earl of Birkenhead LC set up a committee to consider these matters under the chairmanship of Lord Hewart CJ: Crown Proceedings Committee Report (1927) (Cmd 2842). Eventually practical problems came to a head in 1946. Observations in your Lordships' House in *Adams v Naylor* [1946] AC 543, followed by the decision in *Royster v Cavey* [1947] 1 KB 204, exposed the inadequacies of the make-shift expedients currently adopted as a means of doing justice despite the immunity of the Crown in tort.

10. Part I of the Act made changes to the substantive law. Section 1 dealt with cases where before the Act a claimant had to obtain His Majesty's fiat when seeking to proceed with a petition of right. In future those claims could be enforced against the Crown as of right. Section 2 imposed liability on the Crown in respect of torts committed by its servants or agents. Sections 3 to 12 contained sundry ancillary provision on such diverse matters as intellectual property, contribution, contributory negligence, Crown ships, postal packets, members of the armed forces and so forth.

11. Part II of the Act dealt with jurisdiction and procedure. Section 13 provided that in future 'all civil proceedings' by or against the Crown in the High Court should be instituted in accordance with rules of court. The old forms of civil proceedings by or against the Crown, including petition of right, were abolished. Section 15 enabled civil proceedings to be instituted against the Crown in a county court, in accordance with county court rules.

12. Section 21 made provision for the remedies which in future were to be available in 'civil proceedings' by or against the Crown. Subject

to the provisions of the Act, in future the court should have power to make 'all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require': subsection (1). This enabling provision was subject to two restrictive provisos in respect of proceedings against the Crown. Proviso (a) excluded the grant of an injunction or an order for specific performance where such relief might be granted in proceedings between subjects. In lieu the court might grant appropriate declaratory relief. Proviso (b) similarly excluded an order for the recovery of land or delivery of property. Here also a declaration was prescribed as the appropriate form of relief in proceedings against the Crown.

13. Section 21(2) contains a further restrictive provision. This concerned orders made against officers of the Crown, as distinct from orders made directly against the Crown. It is of Delphic opaqueness. Even contemporary writers of distinction were at a loss. Professor Glanville Williams, writing in 1948, described this as a 'somewhat obscure subsection': 'Crown Proceedings' (1948), page 150. The subsection reads:

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

'Officer of the Crown' includes a minister of the Crown and other servants of His Majesty: section 38(2). This expression now includes a member of the Scottish Executive: see the Scotland Act, section 125, and Schedule 8, para 7.

14. Some of the ramifications of these restrictive provisions in section 21 were considered by Lord Woolf in his learned discussion in *M v Home Office* [1994] 1 AC 377. In the present case it is unnecessary to explore these questions. The present appeal raises an anterior issue. The issue is whether a petition to the Court of Session by way of judicial review falls within section 21 at all. For this purpose what matters is the meaning of the phrase 'civil proceedings' in section 21. This phrase governs the scope of both section 21(1) and section 21(2).

15. In English law the phrase 'civil proceedings' is not a legal term of art having one set meaning. The meaning of the phrase depends upon the context. For instance, the phrase is often used when contrasting civil proceedings with criminal proceedings. So used, and subject always to the context, civil proceedings will readily be regarded as including proceedings for judicial review.

16. This usage was not intended in the 1947 Act. That is clear beyond doubt. Proceedings on the Crown side of the King's Bench Division were the predecessors to applications for judicial review, and the definition of 'civil proceedings' in section 38 of the Act states expressly that 'civil proceedings' does not include proceedings on the Crown side. Thus section 21 was not applicable to Crown side proceedings.

17. This is not surprising. Crown side proceedings were the subject of legislative attention and amendment in sections 7 to 10 of the Administration of Justice (Miscellaneous Provisions) Act 1938. Orders of mandamus, prohibition and certiorari were substituted for the ancient writs correspondingly named. Informations in the nature of quo warranto were replaced by injunctions. Rules of court were to be made prescribing the procedure for obtaining the new orders and the new form of injunctive relief. The 1947 Act was aimed at a different target, where reform was overdue.

18. Accordingly, with one immaterial exception in section 25, Crown side proceedings were not the subject of reform by the 1947 Act. The remedies available in Crown side proceedings were not affected by the Act. Prerogative writs and orders, including mandamus, had long been issued against officers of the Crown: see Lord Parker CJ in *R v Commissioners of Customs and Excise, Ex p Cook* [1970] 1 WLR 450, 455. The 1947 Act did not touch this jurisdiction.

19. Against this background I turn to the purpose and scope of section 21. In its application in England section 21 is essentially consequential on changes to substantive and procedural law made elsewhere in the Act. Take proceedings against the Crown. The Act created new rights against the Crown in sections 1 and 2 and other sections in Part I of the Act. The Act abolished petitions of right. The Act also repealed or amended existing 'sue and be sued' legislation: section 39. Some provision was therefore needed for the remedies a court could give where a claimant sought to enforce these newly-created

rights or sought to rely on the new procedures. This provision is found in section 21. Section 21 also served a corresponding purpose in respect of proceedings brought by the Crown. For instance, as already noted, section 13 abolished the old forms of proceedings, such as Latin information, then employed by the Crown in civil proceedings.

20. That this was the purpose of section 21 is made abundantly clear by section 23. Section 23 listed the proceedings falling within the expression 'civil proceedings by or against the Crown' in Part II of the Act. This list was exhaustive: '… the following proceedings only'. I can go straight to section 23(2). Under section 23(2) references to 'civil proceedings against the Crown' in Part II are confined essentially to three types of proceedings: first, proceedings seeking relief which pre-Act would have taken the form of proceedings against His Majesty by way of petition of right; secondly, proceedings which, under legislation repealed by the 1947 Act, would previously have taken the form of an action against the Attorney General, a government department, or an officer of the Crown as such; and, thirdly, proceedings which a person is entitled to bring against the Crown by virtue of the 1947 Act, for instance, a claim in tort: see section 23(2), paragraphs (a), (b) and (c). In each of these three types of case the need for the Act to set out the court's power to grant relief arose from other provisions of the Act itself. Section 23(1) made corresponding provision for the content of references to 'civil proceedings by the Crown'.

21. This limitation on the scope of civil proceedings is reflected in the content of section 21 itself. Under section 21(1) the court is empowered, in civil proceedings by or against the Crown, to make 'all such orders as it has power to make in proceedings between subjects'. This language is not apt to empower the court to make prerogative orders or to issue a writ of habeas corpus. This is to be expected, because Crown side proceedings were not within the reach of section 21. Section 21 concerned a different subject matter: civil proceedings by or against the Crown *other than* proceedings on the Crown side.

The Crown Proceedings Act: its application to Scotland

22. Part V of the Act made provision for the application of the Act to Scotland. It did so by enacting, in section 42, that certain sections should not apply in Scotland. Section 1 is one of the excluded sections. The reform achieved by this section was not needed in Scotland. Otherwise Part I, including section 2 imposing liability on the Crown in

cases of tort, applies in Scotland. The whole of Part II is excluded, with two exceptions. Section 13, so far as it abolished the old forms of proceedings by or against the Crown, is applicable in Scotland. So is section 21.

23. Section 43 translated certain terms. For instance, references to the High Court are to be read as references to the Court of Session; county court rules are references to Acts of Sederunt applying to the sheriff court; injunction means interdict; and tort means any wrongful or negligent act or omission giving rise to liability in reparation. Section 44 enables civil proceedings against the Crown to be instituted in the sheriff court.

The issue in the present appeal

24. The issue in the present case arises out of the bland reference to section 21 as one of the sections of the Act applicable in Scotland. The Act does not enlarge on how the provisions of section 21 are to be applied in Scotland. In particular, there is no explanation of how the definition of 'civil proceedings' in section 38 is to be interpreted in Scotland. The statutory definition is in these terms:

> "'Civil proceedings' includes proceedings in the High Court or the county court for the recovery of fines or penalties, but does not include proceedings on the Crown side of the King's Bench Division"

25. The problem in the present case derives from this definition and the failure to explain how the reference to Crown side proceedings is to be interpreted when section 21 is applied in Scotland. The Crown side of the King's Bench Division has no precise counterpart in Scotland which could simply be adopted by analogy when translating this definition for use in Scotland. Crown side proceedings originated in the former Court of King's Bench. It seems that the work in that court was divided into two sides, the Crown side and the plea side: *Blackstone's Commentaries on the Laws of England*, 3rd ed (1862), vol III, p 42. In the fullness of time the work of the plea side became merged with the general jurisdiction of the High Court, but the jurisdiction of the Crown side remained distinct. The jurisdiction of the Crown side was both criminal and supervisory. The supervisory jurisdiction now takes the form of judicial review. The nearest equivalent in Scotland is the

supervisory jurisdiction of the Court of Session. But the two jurisdictions cannot be wholly equated, because the supervisory jurisdiction of the Court of Session is not confined to those cases English law has accepted as amenable to judicial review: *West v Secretary of State for Scotla*nd 1992 SC 385.

26. This lack of equivalence figured prominently in the argument of the Scottish Ministers. The lack of equivalence or 'correlation', it is said, makes it impossible to substitute a reference to applications to the Court of Session's supervisory jurisdiction for the reference to proceedings on the Crown side of the King's Bench Division when applying the statutory definition in Scotland. The parallel is insufficiently close to justify what would, in any event, be a singularly bold implication to read into a statute. Absent any such implication, the Court of Session's supervisory jurisdiction by way of judicial review is not excepted from the scope of the expression 'civil proceedings' in section 21. Accordingly, proceedings invoking the Court of Session's supervisory jurisdiction, unlike judicial review proceedings in England, fall within the ambit of the phrase 'civil proceedings' in section 21. Hence, the argument concludes, the restrictive provisions in section 21 preclude the Court of Session from granting an interdict against the Crown or an officer of the Crown even when that court is exercising its supervisory jurisdiction.

27. This argument cannot be right. If correct, it would bring about a result Parliament cannot have intended. It would mean that in judicial review proceedings ministers of the Crown would be less amenable to coercive orders in Scotland than in England. It would mean that in this respect section 21, applicable throughout Great Britain, had the effect of granting to ministers of the Crown in Scotland an immunity not existing in England and not previously existing in Scotland. Pre-Act the courts of both countries could make coercive orders against ministers of the Crown in the contemporary equivalent of what are now known as proceedings for judicial review. Post-Act that remained the position in England but, according to this argument, that ceased to be the position in Scotland.

28. In my view an interpretation of the 1947 Act having such an unbalanced effect would be inconsistent with one of the principal purposes of the Act. It would frustrate one of the objects section 21 was intended to achieve.

29. This calls for elaboration. I have already noted that in England section 21 serves the purpose of setting out the remedies which are to be available in proceedings in cases where the Act abolished existing procedures or created new rights. In England section 21 is confined to that function by section 23. Section 21 serves the like purpose in Scotland. For instance, section 21 identifies the relief a Scottish court may afford in proceedings seeking reparation from the Crown under section 2.

30. In its operation in Scotland, however, section 21 has an important additional function. Section 21 is concerned to harmonise the law of Scotland with the law of England in relation to the types of remedies, and the limits on the remedies, available in civil proceedings against the Crown. This objective was sought to be achieved as follows. As applied to Scotland, section 21 contains no provision limiting its scope in the way section 23 confines the ambit of section 21 in England. Unlike England, in Scotland section 21 applied quite generally to all civil proceedings brought by or against the Crown. Thus the effect of section 21 in Scotland was that whatever may have been the law and practice in Scotland in the past, after 1947 the remedies available in Scotland in civil proceedings against the Crown were to be substantially the same in principle as those applicable in England as enacted by section 21. In the past the Court of Session may have granted interdicts or made orders against the Crown or its officers. In future the restrictive provisions in section 21 would apply on both sides of the border. In this way Scots law and English law on this constitutionally important subject would be brought into harmony.

31. Unfortunately, this harmonising legislation breaks down at one point if it is read literally. It breaks down in respect of the remedies available in judicial review proceedings against the Crown or its officers. The legislation *excludes* Crown side proceedings from section 21 as applied in England but, on its face, *includes* judicial review proceedings against the Crown within section 21 as applied in Scotland. Thus, when read literally these provisions fail to achieve the harmonising purpose of the 1947 Act. Far from achieving harmony, they bring discord where previously there was harmony.

32. Overall, three features stand out. First, in 1947 Parliament intended that the existing law and practice regarding Crown side proceedings should continue in England. This was made plain by the exclusion of Crown side proceedings from the scope of the Act. Secondly, Parliament intended that, so far as possible, the relief

available in civil proceedings against the Crown should be the same in both countries. That was one of the objects of section 21. Thirdly, the issue in this case has considerable constitutional importance. A drafting slip should not deprive citizens in Scotland of the protection Parliament intended they should have against government ministers.

33. With these considerations in mind it is my view that, by analogy with the exclusion of Crown side proceedings from section 21 in England, when applied in Scotland references to civil proceedings in section 21 are to be read as not including proceedings invoking the supervisory jurisdiction of the Court of Session in respect of acts or omissions of the Crown or its officers. By this means effect can be given to the intention of Parliament. Uniformity will be achieved. The coercive remedies available in judicial review proceedings against the Crown and its officers will be substantially the same in both countries.

34. So read, section 21 is not applicable to the present proceedings. I would so hold, and allow this appeal. On this footing it is not necessary to address the further grounds urged in support of this appeal. Nor, in the circumstances of this case, is it appropriate to do so.

LORD HOPE OF CRAIGHEAD

My Lords,

35. This appeal brings to an end a campaign that counsel for the appellant, Mr Aidan O'Neill QC, has been conducting to reverse the situation whereby remedies which were formerly available against the Crown in Scotland and which were made available by the Crown Proceedings Act 1947 for the first time in England have been held to have been denied by the same Act to Scottish litigants: see Aidan O'Neill, *Judicial Review, a Practitioner's Guide* (1999), paras 1.77-1.92. Although the case comes before us as an appeal against an interlocutor of the Inner House of the Court of Session dated 15 December 2004, it is in reality an appeal against a decision of an Extra Division on 18 December 2001 (Lords Marnoch, Hardie and Weir) to refuse a reclaiming motion against the refusal by the Lord Ordinary (Lord Johnston) on 26 October 2001 of the appellant's motion for an interim coercive order against the Scottish Ministers as incompetent: 2002 SC 205.

36. In *McDonald v Secretary of State for Scotland* 1994 SC 234, 238-239, Lord Justice Clerk Ross said:

> "It is thus clear that certain restrictions are imposed by section 21 [of the Crown Proceedings Act 1947] upon the granting of interdict in any civil proceedings against the Crown. The Act of 1947 in this respect changed the law of Scotland. Prior to the passing of the Act of 1947, the court in Scotland did on occasion pronounce interdict and interim interdict against the Crown (*Russell v Magistrates of Hamilton* (1897) 25 R 350; *Bell v Secretary of State for Scotland* 1933 SLT 519) …
>
> I accordingly agree with counsel that one effect of the Crown Proceedings Act 1947 has been to deprive litigants in Scotland of a right which they previously had, namely, a right to obtain interdict and interim interdict against the Crown."

37. Support for this view was undoubtedly to be found in the fine print of the Act. No one can pretend that it is easy to follow. It is obvious at a glance that the draftsman failed to examine the implications for the Scottish system to the same level of detail as is to be found in the provisions that are applicable in England. But those who cared for the structure and orderly development of the law found it hard to believe that this was indeed what Parliament had intended. Why should litigants in Scotland have been deprived in 1947 of a remedy which they had previously enjoyed and was, for the first time, being made available to their counterparts in England? Surely there would have been a protest about this result, if anyone had thought to explain that this was the intention while the Bill was being discussed in Parliament.

38. That having been said, the decision in *McDonald* has been regarded as having settled the issue in Scotland for over a decade. The appellant's attempt to open it up in the present proceedings, predictably, met with no success when the Extra Division heard the reclaiming motion against the Lord Ordinary's interlocutor. We on the other hand have had the benefit of examining the issue in a tribunal which draws its membership from all parts of the United Kingdom. There are occasions when those of your Lordships who come from Scotland feel justified in defending Scots law and the Scottish legal system against what are perceived to be alien influences. But this is not one of them. There is everything to be gained by the sharing of views among your Lordships which it has been possible to enjoy in this case. This has helped greatly,

as we step back and try to take a broader view of section 21 of the 1947 Act. I wish to pay tribute in particular to the analysis of how the 1947 Act operates in England which has been provided by my noble and learned friend Lord Nicholls of Birkenhead, as this is crucial to a proper understanding of how the Act as a whole was intended to operate.

39. There are number of features of the 1947 Act which I should like to mention before turning to what I have referred to as the fine print. First, and above all, it is a United Kingdom statute. Its subject matter, the taking of proceedings by and against the Crown, is of equal interest to litigants in Scotland as it is to those in England. Each country has its own legal system. The remedies that are on offer and the courts in which they are available have different names. But in this context this is merely a matter of machinery. The remedies are all designed with the same aim, which is to provide litigants with a means of obtaining justice. Furthermore in 1947, long before devolution, there was a single and indivisible system of government. It was administered in the name of the Crown, itself single and indivisible, from Westminster. If it was the intention that the Act should have diametrically opposing consequences in Scotland as compared with those in England, one would have expected this to have been provided for expressly in the Bill when it was before Parliament. The issue could then have been debated and the political and other consequences faced up to before it passed into law. The Act's silence on the matter is therefore highly significant. It is as powerful an indication as one could wish to find that it was not anticipated, nor was it intended, that it would have such consequences.

40. But I accept that it is necessary to examine the wording of section 21 in its application to England, and then to see whether, with such assistance as can be derived from Part V which applies the Act to Scotland, the meaning that is has in England can be applied in Scotland too. My noble and learned friend Lord Rodger of Earlsferry has conducted this exercise and for the most part I am content to adopt with gratitude his careful and valuable analysis. But I should like to expand upon my general acceptance of his conclusions in two respects. First I should like to explain how the expressions "private law" and "public law" which he has used should be understood when we are describing the sphere of application of section 21 of the Act. The second relates to the extent to which, if at all, the definition of "civil proceedings" in section 38(2) for England and Wales can be read across so as to apply to proceedings for judicial review in Scotland.

"Public law" and "private law"

41. The 1947 Act does not, of course, use the expressions "public law" and "private law" to describe the scope of its application. This is not surprising. It was not until several decades later that they became part of the English lawyer's vocabulary. As Lord Wilberforce explained in *Davy v Spelthorne Borough Council* [1984] AC 262, 276:

> "The expressions 'private law' and 'public law' have recently been imported into the law of England from countries which, unlike our own, have separate systems concerning public law and private law. No doubt they are convenient expressions for descriptive purposes. In this country they must be used with caution, for, typically, English law fastens, not upon principles but upon remedies. The principle remains intact that public authorities and public servants are, unless clearly exempted, answerable in the ordinary courts for wrongs done to individuals. But by an extension of remedies and a flexible procedure it can be said that something resembling a system of public law is being developed."

42. Scots law, in contrast to English law, tends to fasten not upon remedies but upon principles. But in Scotland too, notwithstanding references in article XVIII of the Act of Union 1707 to laws concerning private right and public right respectively and in the other texts referred to in para 77 of his speech by Lord Rodger, use of the expressions "private law" and "public law" is of recent origin and there too these expressions must be used with caution. Scots law does not find it easy in practice to recognise the boundaries between these two concepts. One of the problems to which the decision in *West v Secretary of State for Scotland* 1992 SC 385, was directed was the difficulty which the Court of Session had encountered when attempting to distinguish between cases which could be loosely described as being in the private law or the public law field when determining whether or not judicial review was a competent remedy: see *Connor v Strathclyde Regional Council* 1986 SLT 530; *Safeway Food Stores Ltd v Scottish Provident Institution* 1989 SLT 131; and especially *Tehrani v Argyll and Clyde Health Board* 1989 SC 342, where the Second Division allowed a reclaiming motion against an interlocutor of the Lord Ordinary (Lord Weir) reducing the board's decision to dismiss the petitioner from its employment, on the view that the issue between the petitioner and the board was a matter of private law and that proceedings by way of

ordinary action was the correct remedy. It was his concern about some of things said about the distinction between public law and private law in *Tehrani's* case that led Lord Weir as the Lord Ordinary in *West* 1992 SC 385, 391 to say that he would welcome the opportunity that a reclaiming motion would give for a comprehensive review of the supervisory jurisdiction of the court. It would be preferable to avoid disputes of that kind when a coercive remedy is being sought against the Crown under section 21 of the 1947 Act. A more precise criterion is needed to distinguish between cases where such a remedy is and is not competent.

43. The areas of the civil law of Scotland that fall within the expression "Scots private law" for the purposes of section 29(1) of and para 2(3) of Schedule 4 to the Scotland Act 1998 are set out in section 126(4) of that Act. This provision stops short of providing a statutory definition of the expression. But the general structure which it adopts has been familiar since the time of the institutional writers, and it provides us with a useful base from which to work for present purposes. Section 126(4) provides:

> "References in this Act to Scots private law are to the following areas of the civil law of Scotland –
>
> (a) the general principles of private law (including private international law),
>
> (b) the law of persons (including natural persons, legal persons and unincorporated bodies),
>
> (c) the law of obligations (including obligations arising from contract, unilateral promise, delict, unjustified enrichment and negotiorum gestio),
>
> (d) the law of property (including heritable and moveable property, trusts and succession), and
>
> (e) the law of actions (including jurisdiction, remedies, evidence, procedure, diligence, recognition and enforcement of court orders, limitation of actions and arbitration),
>
> and include references to judicial review of administrative action."

The inclusion of judicial review of administrative action was no doubt intended to ensure that all aspects of procedural law embracing in the law of actions (see para (e) of the subsection) were brought within the legislative competence of the Scottish Parliament.

44. Following Lord Rodger's analysis, the key to a proper understanding of the scope of the proviso as it applies to Scotland lies in the use of the phrase "proceedings between subjects" in proviso (a) to the subsection. The areas of private law where, in proceedings between subjects, the court grants relief by way of interdict or specific implement are those referred to in section 126(4)(b), (c) and (d) of the 1998 Act. In the context of proceedings by or against the Crown for the purposes of section 21 of the 1947 Act, where the law of persons does not operate, we need concern ourselves only with the law of obligations and the law of property.

45. In *West v Secretary of State for Scotland* 1992 SC 385, 413, the court said that the sole purpose for which the supervisory jurisdiction may be exercised is to ensure that the person or body does not exceed or abuse the jurisdiction, power or authority which has been delegated or entrusted to it or fails to do what the jurisdiction, power or authority requires. The scope of judicial review, as so defined, is wide enough to include disputes between subjects. But further on the same page the court said that contractual rights and obligations, such as those between employer and employee which were in issue in *Tehrani's* case, are not as such amenable to judicial review. The same might be said of rights and obligations arising under any other branch of the law of obligations referred to in section 126(4)(c) of the Scotland Act 1998. They too fall outside the scope of judicial review.

46. In my opinion the scope which is to be given to the proviso (a) to section 21(1) in Scotland should be understood in the light of this background. The proviso extends to any proceedings in which a remedy is sought against the Crown under those branches of Scots private law which are referred to in section 126(4) of the Scotland Act 1998 as the law of obligations and the law of property. It is not confined to the common law. It extends also to a remedy sought under any enactment which forms part of the law of obligations or of the law of property.

"Civil proceedings"

47. In *West v Secretary of State for Scotland* 1992 SC 385, 411, the court said that the use of the expressions "public law remedy", "public law areas" and "public administrative law" was inappropriate in a discussion as to whether an application for judicial review under RC 260 (now Chapter 58 of the Rules of the Court of Session 1994) was competent. At p 413 it said that the competency of the application does

not depend upon any distinction between public law and private law, nor is it confined to those cases which English law has accepted as amenable to judicial review, nor was it correct in regard to issues about competency to describe judicial review as a public law remedy.

48. There is an obvious tension here between the way the English system of judicial review is described and the extent of the supervisory jurisdiction in Scotland. But it is worth recalling the words of Lord Hardwicke in his letter to Lord Kames, quoted in *Lord Saltoun v Advocate General for* Scotland (1860) 3 Macq 659, 675, note (a), referred to by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 579-580:

> "By expounding the Act by analogy, and if you will apply your usual penetration to this point, you will find that there is often no other possible way of making a consistent sensible construction upon statutes conceived in general words, which are to have their operation upon the respective laws of two countries, the rules and forms whereof are different. These general views will probably always be taken from the language or style of one of these countries more than from the other, and not correspond equally with the genius or terms of both laws. You must then, as in other sciences, reason by analogy, or leave at least one-half of the statute without effect."

It was argued in *Pemsel* that, although the words "charity" and "charitable" had a definite legal meaning in England, they could not be applied in the same way in Scotland unless they had a definite legal meaning there too. As Lord Macnaghten observed at p 580:

> "That was not Lord Hardwicke's view. He seems to have thought reflected light better than none."

49. The draftsman of the 1947 Act did not attempt to translate the entirety of the definition of the expression "civil proceedings" in section 38(2) so as to enable the Scottish reader to identify its Scottish equivalent. Section 38(2) provides:

> "'civil proceedings' includes proceedings in the High Court or the county court for the recovery of fines or penalties, but does not include proceedings on the Crown side of the King's Bench Division."

We are told by section 43(a) that in the application of the Act to Scotland for the references to the High Court and the county court references to the Court of Session and the sheriff court are to be substituted. But section 43 is silent as to the application to Scotland of the reference to proceedings on the Crown side of the King's Bench Division.

50. It is worth noting that, while the Notes on Clauses to the Bill state that the definition of "civil proceedings" in the interpretation clause "includes" proceedings on the Crown side, the definition which appears in section 38(2) remained unchanged throughout the Bill's progress through Parliament from the moment when it was first introduced in the House of Lords. Statements in the Notes on Clauses are usually regarded as a reliable guide to what was in the mind of the draftsman. But on this occasion it seems that the word "includes" was used in error. The history of the Bill shows that there never was any intention to include proceedings on the Crown side of the King's Bench Division within the definition of "civil proceedings" in section 38(2).

51. There are, I think, two reasons why section 43 is silent on this matter. The first is that under the Scottish system proceedings for the review of decisions of inferior courts in the exercise of their criminal jurisdiction in Scotland are brought in the High Court of Justiciary. The Court of Session has no jurisdiction in such matters. They are not brought before a civil court. They are not civil proceedings. The High Court of Justiciary has exclusive jurisdiction in all criminal matters: *Law Hospital NHS Trust v Lord Advocate* 1996 SC 301, 311. The draftsman would have been justified in regarding a provision designed to exclude such proceedings from the scope of the expression "civil proceedings" as unnecessary. The second reason is the vestigial nature of anything in Scottish practice that might be described as the equivalent in civil proceedings of the Crown side of the King's Bench Division. There was no obvious way of describing it in 1947, nor was there any obvious need to attempt to do so.

52. The situation seems therefore to be this. The language of English law has been used to exclude what we now recognise as judicial review

from the scope of the expression "civil proceedings" wherever it is used in section 21. There is no indication that the scope of that expression was intended to be different in Scotland. As Lord Jauncey of Tullichettle remarked in *British Medical Association v Greater Glasgow Health Board* 1989 SC (HL) 65, 94, it is inconceivable that Parliament should have intended to fetter the right of the subject to obtain a prohibitory order more strictly in Scotland than in England. Reasoning by analogy, in Lord Hardwicke's phrase, is preferable to accepting a result that is inconceivable.

53. It would, as Lord Rodger observes, be not to harmonise but to introduce a new difference simply to say that the definition of civil proceedings in section 38(2) excludes, in its application to Scotland, all proceedings by way of judicial review. But in my opinion it is possible, for present purposes, to define that area of proceedings by way of judicial review that matches its English counterpart in a way that produces harmony. I would do this by adopting the reference to "proceedings between subjects" that appears in proviso (a) to section 21(1) of the 1947 Act, and applying to it the distinction between public law and private law that I have already identified. Judicial review proceedings where the supervisory jurisdiction of the Court of Session is being invoked against the Crown are public law proceedings. This means that judicial review proceedings against the Crown, including the Crown in right of the Scottish Administration (see section 99(1) of the Scotland Act 1998), or against an officer of the Crown acting as such are not civil proceedings for the purposes of the proviso to section 21(1). They also fall outside the scope of the expression "civil proceedings" in section 21(2).

Conclusion

54. I would summarise the conclusions which I have reached about the meaning of section 21 in its application to Scotland in this way. There are excluded from the expression "any civil proceedings" in section 21(1) and section 21(2) proceedings by way of judicial review where relief is sought in respect of acts or omissions of the Crown or of an officer of the Crown acting as such. Proviso (a) to section 21(a) extends to any proceedings in which a remedy is sought against the Crown in private law proceedings, but not otherwise. I would allow the appeal.

LORD RODGER OF EARLSFERRY

My Lords,

55. In 2001 the appellant, Mr Scott Davidson, was a prisoner in Barlinnie prison, first in C Hall and later in E Hall. In September of that year his solicitors wrote to the Governor complaining of what they alleged were the insanitary conditions in which he was being held and, in particular, of the practice of slopping out. The solicitors claimed that the conditions were inhuman and degrading and that Mr Davidson's rights under article 3 of the European Convention on Human Rights were being violated. When nothing was done about the matter, Mr Davidson presented a petition for judicial review which was served on the Scottish Ministers as respondents. He sought, inter alia, declarators as to the violation of his rights and an award of damages. In addition, however, he sought an order "ordaining the Scottish Ministers to secure the transfer of the petitioner to conditions of detention compliant with article 3 of the Convention, whether within the prison or any other prison; and for such an order ad interim."

56. The Lord Ordinary (Johnston) refused the appellant's motion for an interim order as being incompetent, having regard to the terms of section 21 of the Crown Proceedings Act 1947 ("the 1947 Act"): 2002 SCLR 166. The appellant reclaimed and, at the start of the hearing before an Extra Division (Lord Marnoch, Lord Hardie and Lord Weir), on his unopposed motion, the pleadings were amended so as to crave two further declarators:

> "(a) declarator that an order ordaining the Scottish Ministers to transfer the petitioner to other conditions of detention (whether final or interim) may competently be made in proceedings by way of application to the supervisory jurisdiction of the Court of Session under Rule of Court 58, and is not precluded by operation of section 21 of the Crown Proceedings Act 1947;
>
> (b) declarator that an order ordaining the Scottish Ministers to transfer the petitioner to other conditions of detention under section 45(b) of the Court of Session Act 1988 (whether final or interim) may competently be made, and is not precluded by the operation of section 21 of the Crown Proceedings Act 1947."

On 18 December 2001 the Extra Division refused the reclaiming motion and, on 20 December, Lord Weir dissenting, refused leave to appeal to your Lordships' House.

57. How both those interlocutors came to be recalled and how your Lordships have nevertheless heard an appeal against the first of them is a long tale - and not without interest. But it has been twice told, first by my noble and learned friend, Lord Hope of Craighead, in *Davidson v Scottish Ministers (No 3)* 2005 SC (HL) 1 and then by Lord Bingham of Cornhill in *Davidson v Scottish Ministers (No 2)* 2005 SC (HL) 7. The tale needs no retelling by me: I merely bring it up to date by noting that, following a further judgment of the House of 11 October 2004, in the exercise of the nobile officium and of consent, the Inner House restored the interlocutor of the Extra Division of 18 December 2001 and decerned. They then granted Mr Davidson leave to appeal that interlocutor to this House.

58. At its broadest, the issue of public importance in the appeal is whether the Scottish courts can ever grant interdict and interim interdict, or an order for specific performance and an interim order for specific performance, against the Crown. As I have explained, the issue arose at the very outset of the present proceedings when Mr Davidson sought an interim order ordaining the Scottish Ministers to secure his transfer to conditions of detention compliant with article 3 of the Convention, whether within Barlinnie or in another prison. Happily, Mr Davidson completed his sentence in 2002 and so now has no reason to seek any such order. For him, the question is academic. But for other litigants in the Scottish courts, for the Scottish Ministers and indeed for the United Kingdom Government, it is of perennial interest. The appeal presents the first opportunity that the House has had to consider the question in a Scottish appeal.

59. The issue can be put shortly. Section 21 of the 1947 Act provides:

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

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

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

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

Clearly, the provisions of section 21(1)(a) prevent the courts in Scotland from granting interdicts or orders for specific performance in some civil proceedings against the Crown. The principal question is, therefore, whether that bar applies in all civil proceedings against the Crown or only in some and, if so, in which kind of proceedings. In *McDonald v Secretary of State for Scotland* 1994 SC 234 the Second Division held that the bar applied in a case where a serving prisoner alleged that he had been subjected to more than 3,000 illegal searches while in prison and sought interdict and interim interdict against the Secretary of State "or those of his lawful agents or servants acting on his instructions and for whom he is responsible, from searching the pursuer without lawful authority, warrant or justifiable cause, contrary to the law of Scotland." Mr McDonald was a party litigant and had drafted his own pleadings. They were therefore not in exactly the usual form, but essentially he was claiming damages for past unlawful searches and interdict against future unlawful searches. Before the sheriff the defender's agent had submitted that the pursuer's case seemed to depend on the standing orders governing the searching of prisoners being of no effect – which would have involved judicial review of those orders in the Court of Session. The Second Division did not enter into that question, since the issue was the competency of interdict and interim interdict in the actual sheriff court action. They held that the bar in section 21(1)(a) applied in those proceedings, but left open the possibility that it might not apply in judicial review proceedings. In the present case, which is presented as a

petition for judicial review, the Extra Division rejected that argument: *Davidson v Scottish Ministers* 2002 SC 205. The result appears to be that the bar is held to apply to all kinds of civil proceedings against the Crown in Scotland.

60. There is at least some authority to suggest that in Scotland interdict against the Crown was competent before the 1947 Act. But H Burn-Murdoch, *Interdict in the Law of Scotland* (1933), p 66, is anything but enthusiastic: "Although sheriffs, and public officials, such as even a Secretary of State, are sometimes made respondents to interdicts of procedure, this is rarely appropriate or necessary." He rather gives the impression that it was not regarded as good form to seek interdict in such cases. Nevertheless, if interdict was thought to be a competent remedy against the Crown, it would be somewhat surprising if a complete bar on its use had been introduced in an Act whose general purpose was "to make it easier rather than more difficult for a subject to sue the Crown", as Lord Jauncey of Tullichettle observed in *British Medical Association v Greater Glasgow Health Board* 1989 SC (HL) 65, 95. It is fair to say that, while holding that the bar applies, the Scottish judges have not regarded it with any great enthusiasm. The comments of Lord Weir 2002 SC 205, 227, para 18, would probably be endorsed by many.

61. Against that background it is scarcely surprising that counsel for parties bringing proceedings against the Crown have striven to find some legitimate way round the bar. It applies, of course, only in civil proceedings "against the Crown". In *Beggs v The Scottish Ministers* 2005 SC 342, counsel therefore argued that, for the purposes of the 1947 Act, the Scottish Ministers should not be regarded as "the Crown", but rather as "officers of the Crown". So any proceedings against the Scottish Ministers were proceedings against officers of the Crown rather than against the Crown itself. On this basis the First Division held that *McDonald v Secretary of State for Scotland* was distinguishable and that the bar in section 21(1)(a) did not apply. They did not, however, consider whether, on their approach, section 21(2) might be relevant. The House is to hear an appeal from that decision in due course. In the circumstances, at the hearing of this appeal, neither side presented any substantial argument on the point. For that reason, I prefer to express no opinion on it and to go directly to the interpretation of section 21.

62. The 1947 Act was passed to try to cure various problems which litigants and practitioners had been experiencing. Some 60 years later, it is not easy to see those problems as they must have appeared to people

at the time. But, perhaps, as good a starting point as any is the report of the Committee on Ministers' Powers ("the Donoughmore Committee") (Cmd 4060) published in 1932. The remit of the committee embraced many topics which are not relevant for present purposes, but in connexion with the control of delegated legislation they referred, at p 62, para 14(d), to the "archaic and in some ways cumbrous and inelastic" procedure by way of prerogative order and suggested that it would be expedient to introduce a simpler, cheaper and more expeditious procedure. They returned to the subject, at pp 98–99, para 12, under the heading "The supervisory jurisdiction of the High Court of Justice." They referred to the control of what they had described, at p 88, para 8, as "the judicial and quasi-judicial powers conferred by Parliament on Ministers themselves" – terms that are reminiscent of Dicey's language in his famous article "The Development of Administrative Law in England" (1915) 31 LQR 148. The Committee declared that the wholesome jurisdiction of the High Court should be no less vigilantly exercised in the case of a Minister than in the case of inferior courts of law. They therefore regarded it as essential that there should be a simple and cheap access to the High Court in order to invoke it. They repeated their previous criticism of the existing procedure and their "recommendation … in favour of the establishment of a simpler and less expensive procedure and one more suited to the needs of the modern age."

63. The committee's criticisms did not lead directly to legislation to reform the prerogative orders. Instead, within their much wider remit, the Committee on the Business of the Courts, set up in 1932 under the chairmanship of Lord Hanworth, considered Crown side procedures. In their third and final report published in 1936 (Cmd 5066), pp 5-11, the committee recommended various reforms, including reforms to proceedings in which any of the prerogative writs was sought and the abolition of informations in the nature of quo warranto. Two years later, the Administration of Justice (Miscellaneous Provisions) Act 1938 included a group of sections, 7 to 10, which were designed to implement those recommendations. They are to be found under the heading "Amendment of Law with respect to proceedings heretofore usually dealt with on the Crown side of King's Bench Division." Whether or not the measures thus enacted were a wholly satisfactory way of dealing with the problems facing litigants, the position was that by 1938 Parliament had tackled the reform of the Crown side procedures.

64. Another topic which the Donoughmore Committee considered was whether to establish a system of administrative law. Remaining faithful to the heritage of Dicey, they rejected the suggestion, at p 110,

para 19. None the less, at p 112, they confessed that "under the rule of law in England the remedy of the subject against the Executive Government is less complete than the remedy of subject against subject." They then identified three "main defects" in the subject's remedies against the government in England: (a) that, owing to the peculiar procedure in cases in which the Crown was a litigant, the subject was to some extent placed at a disadvantage; (b) that there was no effective remedy against the Crown in the county court and (c) that the Crown was not liable to be sued in tort.

65. As this account shows, the committee dealt separately with Crown side proceedings and other proceedings against the Crown. The three "main defects" concerned proceedings other than Crown side proceedings. Except in relation to tort, the defects were procedural. For instance, a litigant might have a perfectly good claim in contract against the Crown but he had to proceed by the cumbersome petition of right procedure. So far as tort was concerned, in practice the Crown did much to alleviate the potential injustices, but the obiter observations of their Lordships in *Adams v Naylor* [1946] AC 543 signalled that such practical expedients were not the answer and that reform was urgently needed.

66. In Scotland the situation was slightly better. The petition of right doctrine had never applied and the Crown could be sued according to the usual procedures of the Court of Session. But proceedings against the Crown could not be brought in the sheriff court. Moreover, belatedly and - in retrospect – unfortunately, in *Macgregor v Lord Advocate* 1921 SC 847 the Second Division had held that in Scotland too the Crown could not be held liable in delict.

67. In the 1947 Act Parliament set out, inter alia, to remedy the three "main defects" identified by the Donoughmore Committee. Part I deals with substantive law, Part II with jurisdiction and procedure in general. Part III covers judgments and execution, while Part IV contains miscellaneous and supplemental provisions. Part V governs the application to Scotland of the provisions of the Act which had been drafted with English law in mind. By common consent, the application to Scotland is anything but elegant. I need to say a little more at this stage about Parts I and II.

68. In Part I, section 1 sweeps away the petition of right and the other procedures used in England and provides that any claim can be enforced

as of right by proceedings taken against the Crown for that purpose in accordance with the provisions of the Act. This section does not, of course, apply to Scotland. Section 2 subjects the Crown to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject. Since there was a need to make a similar reform for cases of delict, section 2, as translated by section 43(b), applies to Scotland. Section 3 deals with intellectual property and section 4 with the application of the law as to indemnity, contribution, joint and several tortfeasors and contributory negligence. Again, with some help in translation, that section applies to Scotland. As enacted, Part I contained a number of other important provisions dealing with various aspects of the Crown's liability to its subjects in relation to ships, docks, the post etc. They applied to Scotland, but they have since been repealed. All that needs to be said is that they were designed to set out the basis and limits of the Crown's liability to its subjects in those areas.

69. Since the old petition of right procedure and certain other procedures were being superseded, Parliament needed to make provision for a new system of procedure for actions against the Crown in England and Wales. That was the function of Part II. Scotland already had appropriate procedures in the usual forms of action and petition in the Court of Session. Therefore, only two provisions in Part II apply to Scotland. Section 13 is not relevant for present purposes. Section 21 lies at the heart of the appeal.

70. In Part V I need draw attention only to section 44 which provides that, subject to the provisions of the Act and to any enactment limiting the jurisdiction of the sheriff court, "civil proceedings against the Crown may be instituted in the sheriff court in like manner as if the proceedings were against a subject …" The section goes on to give the Lord Advocate power (which has scarcely been used) to issue a certificate which has the effect of requiring certain proceedings in the sheriff court to be remitted to the Court of Session.

71. This brief survey is enough to show that in England and Wales the Act did indeed remedy the three defects identified by the Donoughmore Committee. So far as Scotland was concerned, section 2 made provision for the Crown to be liable in delict, while section 44 allowed pursuers to bring their actions in the sheriff court. Again, two obvious problems were put right.

72. The defects identified by the committee concerned the way that the Crown was treated differently from its subjects in cases where it could have been expected to be subjected to the same liabilities and procedures as a subject. So, for example, if I had a contractual claim against a shopkeeper, I could sue him by a relatively straightforward procedure in the county court or sheriff court, if I wished. But if my claim was under a contract with the Crown, in England I would have to bring petition of right proceedings in the High Court, while in Scotland I could not sue in the sheriff court. In both jurisdictions the Crown was not liable for acts which would have made an individual liable in tort or delict. Since, as I explain below, liabilities between individuals can be conveniently described as private law liabilities, what the Committee were highlighting in this part of their report were problems which litigants faced in bringing liability home to the Crown in the realm of private law. What the 1947 Act did, therefore, was to complete the programme of reform, begun with the 1938 legislation on Crown side procedures, by making changes in the substance of the private law and in the procedures used to sue the Crown in relation to its private law liabilities. In the words of a contemporary author, "On 1 January 1948, with the commencement of the Crown Proceedings Act 1947, there started a new era in Crown law. The subject has been given a remedy as of right against the Crown, both in tort and in contract, and the procedure governing litigation between subjects has, so far as possible, been applied to civil proceedings by and against the Crown": R McMillan Bell, *Crown Proceedings* (1948), p iii.

73. Reform of the private law and its procedures in respect of the Crown was no insignificant matter. By concentrating on judicial review, lawyers and judges today may tend to forget the historical importance of the law of tort or delict as a way of vindicating the subject's rights and freedoms. To take only the most obvious example, *Entick v Carrington* (1765) 19 St Tr 1030 was an action of trespass for breaking and entering the plaintiff's house and seizing his papers. As Mr Weir puts it in his peerless *Casebook on Tort* (10th ed) (2004), p 18, in addition to providing compensation, the other function of the law of tort is "to vindicate the rights of the citizen and to sanction their infringement. In this respect the flagship of the fleet is not negligence but trespass, protecting as it does the rights of freedom of movement, physical integrity, and the land and goods in one's possession." So, if pushed too far, the doctrine that the Crown can do no wrong and so cannot be liable in tort could have been an engine of tyranny. But actions against officers of the Crown (such as Carrington, a King's messenger) as individuals meant that the law of tort could be used to protect the liberties and property of the subject. Indeed Dicey's second meaning of the "rule of law" as a characteristic of England was "that here every

man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals": *Introduction to the Law of the Constitution* (10th ed) (1959), p 193. The same applied in Scotland: *McDonald v Secretary of State for Scotland* 1994 SC 234 is indeed a more recent case in point. What a government might therefore have to fear was that, especially in a time of emergency when it might be necessary, as a matter of urgency, to enter and take possession of lands and perhaps even to evict the owners and occupiers, the government would be faced with common law actions of trespass and assault. Of course, in practice, in later times there would usually be special emergency powers legislation to authorise such acts. That was indeed the case in both World Wars. But, even so, actions for common law trespass were not unknown.

74. For instance, in *AB v Lord Advocate* 1916 2 SLT 200 and 327, the complainers in a note of suspension and interdict were the proprietors of certain lands round a loch and of the loch itself. The military authorities took possession of the lands and loch in September 1915 in order to carry out works. The complainers sought interdict against the commanding officer and those acting under his orders from entering on the lands in question without the owners' consent, from erecting any buildings without the owners' consent and from blasting rocks and carrying out certain other operations. The Lord Advocate, as representing the War Office, was called for any interest he might have. He lodged answers. The defence was, of course, that the military authorities had powers under the Defence of the Realm legislation and regulations to do what they did and that the commanding officer and his men were acting in accordance with those powers. But, at first instance, the Lord Ordinary on the Bills initially granted interim interdict against the blasting and other operations. He subsequently recalled the interim interdict but passed the note. The respondents reclaimed against the passing of the note. The First Division held that, having regard to the Defence of the Realm provisions, the note must be refused. Two things are worth noticing. First, as Lord President Strathclyde pointed out, at p 328, the foundation of the proceedings was that the respondent was a wrongdoer and trespasser. The Lord President had indeed no doubt that the respondent "might have been interdicted if the complainer had been able to shew that the action was taken outwith the statute and the regulations of 1914, which have the force of statute." The other point to notice is that Lord Johnston observed, at p 329, that "the true object of the complainers [was] to strike at the War Department through Captain CD…"

75. Any reform of the law of tort or delict in the 1947 Act which allowed proceedings to be taken against the Crown would only serve to increase the scope for actions of this kind. One issue that would have had to be considered by those framing the legislation, therefore, was whether injunctions or interdicts or orders of specific performance should be permitted in such circumstances, with the risk that operations of national importance might be disrupted.

76. However that may be, what I have said so far is enough to suggest that the procedural changes made in Part II of the Act were concerned with private law matters. It would follow that section 21, which is to be found in Part II, would be concerned with private law proceedings.

77. Before going any further, I must say a word about the sense in which I have used the expression "private law". As my noble and learned friend, Lord Hope of Craighead, has recalled, until recently practitioners of both Scots law and English law had comparatively little use for the categories of "public law" and "private law". The categories had been of more service to authors of legal textbooks. Significantly enough, it was in an elementary work that Ulpian contrasted publicum ius and privatum ius (D.1.1.1.2, Ulpian 1 institutionum). Justinian incorporated part of the passage into his own elementary work, Institutes 1.1.4. From there, despite the difficulties in defining their exact scope ("There is no need to pause on this," said Birks in his introduction to *English Private Law* (2000), p xxxvi), the terms went on to find a place in many general accounts of the law - though not, for example, in Blackstone's. Holland, *Jurisprudence* (13th ed) (1924), p 128, said that, when rights subsist "between subject and subject", they are regulated by private law, when "between State and subject" by public law. According to *Stair, Institutions of the Laws of Scotland* (2nd ed) (1693) 1.1.23, public rights are those which concern the state of the commonwealth; private rights are the rights of persons and particular incorporations. The terminology was sufficiently understood to be adopted in article XVIII of the Treaty of Union. Bankton also sees positive law as relating to public or private right: *An Institute of the Laws of Scotland* (1751-1753) 1.1.54. Erskine, *An Institute of the Laws of Scotland* (1773) 1.1.29 says that private law "is that which is chiefly intended for ascertaining the civil rights of individuals." In the opening paragraph of his *Principles of Scottish Private Law* (4th ed) (1988) Professor Walker summarises the position in this way:

> "The private law is the branch of the municipal law of Scotland comprising the principles and rules applied in defining and determining the rights and duties of ordinary private persons in their relations with one another, and of the State, and of public and governmental agencies and persons, in their relations with persons, in respects in which they do not enjoy any special position, right, or immunity, by virtue of any rule of public law. The division between private and public law is not clear or rigid nor is it so familiar as in continental legal systems."

The core idea is that private law regulates relations between individuals. I therefore use the expression "private law" simply as a convenient label for that branch of the law. But the Crown can, for example, own property and enter into leases and other types of contract with its subjects. It can also commit torts or delicts against them. When it does these things, unless statute provides otherwise, the same private law applies as between two subjects. Part II of the 1947 Act gives the procedure to be used when a subject sues the Crown in relation to such a private law matter in the English courts.

78. In his speech in *M v Home Office* [1994] 1 AC 377 Lord Woolf reached essentially the same conclusion by a slightly different route. He drew attention, at p 412B-D, to the definition of "civil proceedings" in section 38(2): the term "does not include proceedings on the Crown side of the King's Bench Division." By excluding Crown side proceedings from the definition of civil proceedings, Parliament also excluded the prerogative order proceedings from the definition of "civil proceedings against the Crown" in section 23(2), which governs the application of Part II, including section 21, in English law. This exclusion is, of course, readily explained by the fact that Parliament had already reformed the procedure in Crown side proceedings in 1938. Lord Woolf went on to show how the exclusion of Crown side proceedings should be taken to apply to the modern procedure for judicial review which has replaced the prerogative orders. So far as judicial review proceedings were concerned, therefore, section 21 would not apply but, he said at p 422G, "[t]he restriction provided for in section 21(2) of the Act of 1947 does, however, remain in relation to civil proceedings." In other words, the procedural provisions in Part II do not apply to judicial review proceedings against the Crown which, in English law, now largely cover public law matters: *O'Reilly v Mackman* [1983] 2 AC 237; *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988. The necessary conclusion is that these provisions apply to proceedings in relation to the Crown's private law obligations.

79. This is confirmed by the definition of "civil proceedings against the Crown" in section 23(2) governing the application of Part II in English law. Subsection (2)(a) refers to proceedings for the enforcement or vindication of any right or for the obtaining of any relief which, if the Act had not been passed, might have been enforced or vindicated by petition of right or monstrans de droit. The latter was a method of obtaining or recovering possession of real or personal property from the Crown. Both remedies were thus concerned with enforcing the plaintiff's private law rights. Subsection (2)(b) refers to proceedings replacing an action against the Attorney General, any Government department or any officer of the Crown as such. Again, as the use of the term "action" indicates, Parliament had in mind situations where previously, under statute, ministers or departments or officers of the Crown could have been sued in respect of civil liabilities, especially contracts. A well-known example was the Minister of Transport who, under section 26(1) of the Ministry of Transport Act 1919, as amended by Schedule 2 to the Crown (Transfer of Functions) Act 1946, could be sued "in respect of matters whether relating to contract, tort or otherwise arising in connection with his powers and duties under this Act or any enactment relating to highways, by the name of the Minister of Transport …" Further details of such situations can be found conveniently in G L Williams, *Crown Proceedings* (1948), pp 3–5. Finally, subsection (2)(c) refers to all such proceedings as any person is entitled to bring against the Crown by virtue of this Act. This is a reference to proceedings by virtue of Part I of the Act, which are essentially of a private law nature.

80. Both in the court below and before the House, counsel for the appellant argued that it is legitimate to "read across" from the exclusion of Crown side proceedings from the definition of civil proceedings in section 38(2), as it applies to England and Wales, so as to conclude that judicial review proceedings are also excluded from the definition as it applies to Scotland. That would not be an altogether easy argument even if there were a neat fit between judicial review proceedings in the two jurisdictions. As the discussion in *West v Secretary of State for Scotland* 1992 SC 385 demonstrates, however, judicial review in Scotland is based on the supervisory jurisdiction of the Court of Session which has been exercised on a somewhat broader basis, to control not only public bodies but bodies which are private in nature. So, for instance, it has been used to compel an arbiter to proceed with an arbitration (*Forbes v Underwood* (1886) 13 R 465) and to check whether the proceedings leading to a disciplinary decision of the Scottish Football Association, a private association, had been conducted in accordance with natural justice (*St Johnstone Football Club v Scottish Football Association Ltd* 1965 SLT 171). Therefore, by implying into

the definition of civil proceedings in section 38(2) an exclusion of judicial review proceedings in Scotland, the House would not be harmonising the definition in the two systems but introducing a new difference. I would therefore reject counsel's argument.

81. As the First Division emphasised in *West v Secretary of State for Scotland* 1992 SC 385, 410, however, the mere fact that the supervisory jurisdiction of the Court of Session is somewhat wider than in England does not mean that it can be invoked, for example, where a public body has entered into a private contract. In proceedings for breach of that contract, the issue does not concern the exercise of the public body's statutory powers. There is accordingly no entitlement to judicial review and the pursuer must seek contractual remedies under the ordinary jurisdiction of the court. The same would apply in other areas, such as an action of reparation for personal injuries caused by the negligence of a public body or an action of declarator of the ownership of a plot of land claimed by a public body.

82. In turning to consider the wording of section 21 as it applies to Scotland, it seems to me entirely legitimate to bear in mind that, for the reasons which I have given, in English law it is one of a chapter of provisions which regulate proceedings in relation to private law rather than public law matters. That being its sphere of application in English law, it would be surprising, to say the least, if Parliament had intended that in Scotland section 21 should apply in relation to public law as well as private law matters. Certainly, on behalf of the Scottish Ministers Mr Brailsford QC advanced no reason why Scotland should have been treated differently in this respect – especially in the absence of any other attempt in the Act to reform Scottish public law proceedings.

83. Section 21(1) begins with a general statement. If proceedings by the Crown are left out of account, it provides that in any civil proceedings against the Crown, subject to the provisions of the Act, the court is to have power to make "all such orders as it has power to make *in proceedings between subjects*, and otherwise to give such appropriate relief as the case may require …" I have emphasised "in proceedings between subjects" since, as will become apparent, the phrase occurs in a number of provisions in the Act. And the words are of importance here because they tend to confirm that section 21 is dealing with cases where a subject is suing the Crown in proceedings which are similar to proceedings between two subjects: the court is to have the power to make the same orders as it would have the power to make in proceedings between two subjects. This meets the complaint, identified

by the Donoughmore Committee, that comparable proceedings against the Crown were unnecessarily different from proceedings against a subject. Now, so far as remedies are concerned, proceedings between a subject and the Crown are to be treated, for the most part, in the same way as proceedings between two subjects. And, of course, proceedings between subjects are, par excellence, private law proceedings: Holland's description of private law as regulating rights "between subject and subject" comes to mind. So, already in the opening words, there is an indication that, as was to be expected, the section is concerned with proceedings to vindicate private law rights.

84. I skip over paragraph (a) of the proviso and go first to paragraph (b) which deals with proceedings against the Crown for the recovery of land or other property. Previously, such proceedings would have taken the form of a petition of right or, conceivably, a monstrans de droit. These remedies having been swept away, this paragraph deals with the new form of proceedings to vindicate what are obviously property rights of the plaintiff. The court is not to make an order for the recovery of the land or the delivery of the property, but may make an order declaring that the plaintiff is entitled as against the Crown to the land or property or to the possession thereof. I have tried to suggest above why, especially in the aftermath of two World Wars, Parliament might have thought that a restriction of this kind would have been appropriate. Although there would have been no need to reform the procedures in actions against the Crown for the recovery of land or other property in Scotland, the same policy considerations which must have been thought to justify restricting an English plaintiff to a declaration would be thought equally to justify restricting a Scottish pursuer to a declarator. So the paragraph applies to proceedings of that kind in Scotland. Since they are quintessentially proceedings relating to private law rights of the subject, paragraph (b) is a further indication that section 21 applies to proceedings of that kind.

85. Paragraph (a) contains the first proviso to the general powers which the court is to have. It begins: "Provided that – (a) where in any proceedings against the Crown any such relief is sought as might *in proceedings between subjects* be granted by way of injunction or specific performance …" These words describe the situation in which the court is not to grant an injunction or make an order for specific performance, but may instead make an order declaratory of the rights of the parties – in Scottish terminology, a declarator. Again, I have emphasised the words "in proceedings between subjects", precisely because they are often passed over. But the draftsman plainly considered that they were important since, otherwise, he would simply

have written: "Provided that … where in any proceedings against the Crown an injunction or specific performance is sought…" The additional words show that the proviso applies where the pursuer is seeking the kind of remedy against the Crown that would be given, by way of an interdict or order for specific performance, if a similar situation arose in proceedings between subjects. In other words, Parliament is yet again contemplating a case where the Crown is the defender in proceedings at the instance of a subject which are similar to proceedings between subjects. It is hard to see that this can have been intended to describe anything other than private law proceedings. The policy reasons behind this proviso would be similar to those behind proviso (b). If this is correct, the restriction on the availability of the remedies of interdict or specific performance applies only to private law actions against the Crown and not to proceedings like the present where the appellant's case is based on the duties of the Crown in public law.

86. The occurrence of the phrase "proceedings between subjects" elsewhere in the Act, whether in relation to England or Scotland, is consistent with the view that, when it uses that expression, Parliament is contemplating private law proceedings. Section 22, applying to England, is fairly neutral and simply provides that, subject to the provisions of the Act, all enactments, rules of court and county court rules relating to appeals and stay of execution are to apply, with any necessary modifications, to proceedings by or against the Crown as they apply to "proceedings between subjects". There is no difficulty in seeing this as referring to private law proceedings. In Part III, applying to both jurisdictions, section 31(1) provides inter alia that in any civil proceedings against the Crown, the Crown may rely on the provisions of any Act of Parliament which could, "if the proceedings were between subjects," be relied on by the defender as a defence to the proceedings. This appears to be aimed at statutory defences such as limitation or prescription which can be advanced to defeat proceedings to enforce some contractual, delictual or other private law obligation of a defender. In Part V section 44, which permits civil proceedings against the Crown to be begun in the sheriff court, does not use the same phrase, but says that the proceedings "may be instituted … in like manner as if the proceedings were against a subject." Since the pursuer would be a subject, the effect is that proceedings in the sheriff court between a subject and the Crown are to be instituted in the same way as proceedings between subjects. Although the position is less clear-cut in this case, again the language is consistent with the view that Parliament has in mind private law proceedings which are, generally, competent in the sheriff court.

87. I turn for a moment to the Scotland Act 1998. Although its provisions cannot be an authoritative guide to the interpretation of the provisions of the 1947 Act, the language used in section 99(1) and (2) of the later Act is so similar and distinctive that it is hard to imagine that the draftsman did not have the language of the earlier statute in mind. So far as relevant, section 99 of the Scotland Act provides:

> "(1) Rights and liabilities may arise between the Crown in right of Her Majesty's Government in the United Kingdom and the Crown in right of the Scottish Administration by virtue of a contract, by operation of law or by virtue of an enactment as they may arise between subjects.
>
> (2) Property and liabilities may be transferred between the Crown in one of those capacities and the Crown in the other capacity as they may be transferred between subjects; and they may together create, vary or extinguish any property or liability as subjects may.
>
> …
>
> (4) This section applies to a unilateral obligation as it applies to a contract.
>
> (5) In this section-
>
> ...
>
> 'subject' means a person not acting on behalf of the Crown."

The section concerns rights and liabilities between the Crown in right of Her Majesty's Government in the United Kingdom and the Crown in right of the Scottish Administration. Relations between the Crown in its two capacities are to be treated in the same way as relations "between subjects". Here the description of the rights and liabilities in subsection (1) shows that they are private law rights and liabilities: arising by contract, by operation of law (eg common law delictual obligations or obligations in unjust enrichment) or by virtue of an enactment. With a touch of that "completomania" which is still the hallmark of some modern drafting, subsection (4) makes sure that the section applies to unilateral obligations in the same way as it does to a contract. The comparison with contract indicates that the draftsman has in mind unilateral obligations under Scottish private law. Subsection (2) provides that property and liabilities are to be transferred between the Crown in its two capacities "as they may be transferred between subjects." Again, this suggests that they are to be transferred in the

same way as property and liabilities are transferred between individuals under the relevant system of private law.

88. The use of the phraseology in the other provisions of the 1947 Act and its occurrence in the context of section 99 of the Scotland Act confirm my provisional conclusion in para 30 that the proviso in para (a) of section 21(1) applies only in proceedings against the Crown to enforce a pursuer or claimant's private law rights. I would so hold. It follows that the court cannot grant an interim or final interdict or an interim or final order for specific performance in private law proceedings against the Crown, but in other proceedings against the Crown the section is no bar to such remedies. In particular, since a pursuer's contractual, proprietary and other private law rights are not enforced by invoking the supervisory jurisdiction of the Court of Session, I agree with my noble and learned friend, Lord Nicholls of Birkenhead, that references to civil proceedings in section 21 are to be read as not including proceedings invoking that supervisory jurisdiction in respect of acts or omissions of the Crown or its officers.

89. The need for a specific statutory bar to prevent the grant of the remedies in private law proceedings against the Crown shows that Parliament legislated on the basis that the courts would otherwise have the power to grant them. I would so hold. On that basis I would allow the appeal and recall the interlocutor of the Extra Division. It is, however, unnecessary to grant a declarator, which would be nothing but a declarator of a pure matter of law with no practical effect in these proceedings.

90. I would disapprove the reasoning of the Second Division in *McDonald v Secretary of State for Scotland* 1994 SC 234. On the other hand, Mr McDonald's complaint was that he had been unlawfully searched on countless occasions. In other words he was complaining that he had been repeatedly assaulted. Assault is a delict and Mr McDonald craved damages for the assaults. His action was a private law action of damages for a delict which he alleged had been committed against him on innumerable occasions and would be repeated in the future. For that reason, section 21 of the 1947 Act did indeed apply to the action and it was not competent for the court to grant the interdict or interim interdict which he craved. So the Second Division reached the correct decision, but for the wrong reasons.

91. I add two brief comments, neither of which is necessary for the disposal of the appeal.

92. First, as I have explained, in *M v Home Office* [1994] 1 AC 377 Lord Woolf showed how section 21 did not apply to judicial review proceedings in England and Wales. Since the issue in that case arose in the context of an application for leave to move for judicial review of the Home Secretary's decision to remove the applicant from the country, the conclusion that section 21 did not apply to judicial review proceedings meant that the restrictions did not apply to M's application. That, in turn, meant that Garland J had had jurisdiction to grant the ex parte order requiring the Secretary of State to procure the applicant's return to the jurisdiction of the High Court and to ensure his safety pending the return. This was the basis on which the House decided to dismiss the Home Secretary's appeal, save in one respect.

93. Although he held that section 21 did not apply to the proceedings, Lord Woolf made certain obiter observations, at p 412D-G, about the construction of the section and, in particular, about the construction of subsection (2). In *McDonald v Secretary of State for Scotland* 1984 SC 234, 242, the Lord Justice-Clerk (Ross) outlined difficulties which he had experienced in interpreting those remarks. It is unnecessary to investigate those criticisms in this case. But one matter is worth mentioning. Lord Woolf said, at p 412D-E:

> "That subsection is restricted in its application to situations where the effect of the grant of an injunction or an order against an officer of the Crown will be to give any relief against the Crown which could not have been obtained in proceedings against the Crown *prior to the Act*" (emphasis added).

In the same paragraph he went on to make other comments which were based on the assumption that subsection (2) was intended to prevent the court from granting an injunction against the Crown unless it could have done so before the 1947 Act. There are, however, no words in subsection (2) which refer to the position before the passing of the 1947 Act. If, as seems likely, Lord Woolf was thinking of the closing words of the subsection, I would respectfully prefer to interpret them as referring to the hypothetical situation where the claimant or pursuer had brought proceedings against the Crown rather than against an officer of the Crown. The purpose of the subsection seems to be to prevent the

claimant or pursuer from circumventing the ban on an injunction, interdict or order for specific performance against the Crown in subsection (1)(a) by seeking a similar remedy against an officer of the Crown. The comment of Lord Johnston in *AB v Lord Advocate* 1916 2 SLT 327, 329, quoted in para 20 above, may point to the kind of thing that Parliament had in mind. But, in the absence of full argument on the point, I would express no concluded view on the exact scope of subsection (2).

94. The other point concerns the application of section 57(2) of the Scotland Act in a case like the present where the appellant alleged that the Scottish Ministers were acting in a way that was incompatible with his article 3 Convention right. Section 57(2) says that a member of the Scottish Executive "has no power to … do any … act, so far as the … act is incompatible with any of the Convention rights ..." Now, clearly, Mr Davidson was being held in Barlinnie and the Scottish Ministers had overall responsibility for the prison. But if, as he alleged, Mr Davidson was being held in conditions which infringed article 3 of the Convention, then no member of the Scottish Executive had power to hold him in those conditions. One possible conclusion is that, in so far as any member of the Executive was responsible for maintaining those conditions in the prison, he cannot have been acting in his capacity as a member of the Scottish Executive since, in that capacity, he had no power to act in that way. In which event, the appropriate respondent in proceedings of this nature might be the relevant member or members of the Executive as an individual or individuals. Although this point was raised with counsel during the hearing of the appeal, neither side had previously considered the matter and the House did not hear anything like a full argument. Therefore, while I have thought it right to mention the question for possible future consideration, I express no opinion as to the appropriate answer.

95. In all the circumstances, therefore, I would simply allow the appeal.

LORD CARSWELL

My Lords,

96. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Nicholls of Birkenhead, Lord Hope of Craighead and Lord Rodger of Earlsferry. I agree entirely with their conclusion that the appeal should be allowed on the ground that, contrary to the conclusion reached by the Extra Division, it is possible for the Scottish courts to grant interim interdict or an interim order for specific performance against the Crown. For the reasons given by Lord Rodger, I would simply allow the appeal and recall the interlocutor of the Extra Division. The conclusion which we have reached makes it unnecessary to consider in this appeal the question whether the Scottish Ministers should be regarded for the purposes of section 21 of the Crown Proceedings Act 1947 as "the Crown". The House will have to deal with this question in due course on the hearing of an appeal in *Beggs v The Scottish Ministers* 2005 SC 342, with the benefit of fuller argument, and I do not wish to express an opinion on it.

97. I am reluctant to venture an opinion on the validity of the distinction between public law and private law in Scots jurisprudence or the ambit of either. I am, however, content to hold, in agreement with Lord Nicholls, that the expression "civil proceedings" in section 21 does not include proceedings invoking the supervisory jurisdiction of the Court of Session. Such an interpretation, as Lord Nicholls says (para 28), would be inconsistent with one of the principal purposes of the Crown Proceedings Act and frustrate one of the objects which section 21 was intended to achieve.

98. I do not find it necessary or think it appropriate for me to express an opinion on any of the other issues argued in this appeal.

LORD MANCE

My Lords,

99. I have had the benefit of reading in draft the speeches prepared by my noble and learned friends, Lord Nicholls of Birkenhead, Lord Hope of Craighead and Lord Rodger of Earlsferry. The single issue requiring determination on this appeal is whether the proceedings are "civil proceedings" within the meaning of section 21 of the Crown Proceedings Act 1947 as it applies in Scotland. For the reasons given by Lord Nicholls, supported by those given in paragraphs 55 to 88 of Lord Rodger's speech indicating that Parliament's attention in section 21 was focused on private law proceedings of a kind which could take place between subjects, I agree that references in section 21 to civil proceedings are to be read as not including proceedings invoking the supervisory jurisdiction of the Court of Session in respect of acts or omissions of the Crown or its officers, and that the appeal succeeds on this basis.

100. I add a few words with regard to the concept of the Crown in the 1947 Act, in particular in section 21. This may be of importance in a case where the proceedings can be classified as civil proceedings within the meaning of that section. It is in my view improbable that Parliament, when enacting the 1947 Act, can have envisaged or intended that this concept would have radically different meanings in the separate English and Scottish jurisdictions, just as the House in this appeal has held it to be improbable that Parliament envisaged that the concept of civil proceedings in section 21 would have radically different significance in the two jurisdictions.

101. In an English context, the concept of the Crown was considered, albeit in *obiter dicta*, in the speech of Lord Woolf in *M v Home Office* [1994] 1 AC 377, especially at pp 412D-413C. Lord Woolf concluded that the section maintained a traditional distinction between claims in civil proceedings to restrain the Crown and claims to restrain an officer of the Crown who was threatening to commit a tortious wrong or (as he went on to say) to commit a breach of a statutory duty laid upon the officer of the Crown personally (rather than upon such an officer sued in a representative capacity). Lord Woolf drew in support on a powerfully expressed article ("Injunctive Relief against the Crown and Ministers" (1991) 107 LQR 4, 4-5), in which the late Professor Sir William Wade QC said that:

> "It is of primary constitutional importance that ministers should not be confused with the Crown. All the ordinary powers of government, subject to relatively few exceptions, are conferred upon ministers in their own names and not upon the Crown."

This approach, adopted by Lord Woolf in the House of Lords, was one which Hodgson J sitting at first instance would also have preferred in the absence of other authority: cf *R. v. Secretary of State for the Home Department, Ex p Herbage* [1987] 1 QB 872, 882G-883C.

102. For the reason given by my noble and learned friend, Lord Rodger, in paragraph 93 of his speech, I also feel some doubt about the basis for the phrase "prior to the Act" which Lord Woolf used at p 412E and which Lord Rodger has italicised when quoting the relevant passage. However, even without that phrase, the purpose of subsection (2) can hardly have been to remove or preclude a right on the part of a claimant to injunctive relief against an officer of the Crown threatening to commit a tortious act against the claimant – cf, as an example of such a tort, *Entick v. Carrington* (1765) 19 St Tr 1030 cited by Lord Rodger in paragraph 73 - or, if one takes the extended principle mentioned by Lord Woolf, against an officer of the Crown threatening to breach a duty imposed on the officer personally in favour of the claimant. The words used in subsection (2), "if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown" on any view contemplate situations in which the effect of granting an injunction or making of an order against an officer of the Crown is *not* to be regarded as giving like relief against the Crown. I note that, even in *McDonald v. Secretary of State for Scotland* 1994 SC 234, 247, Lord Sutherland accepted that section 21(2) must preserve "the right to obtain relief against an officer of the Crown in a truly individual capacity where the relief granted would have no effect on the Crown".

103. It follows from paragraph 99 above, that I disagree with the views provisionally expressed by the Lord Justice-Clerk and Lord Sutherland at pp 243 and 248 in *McDonald* to the effect the concept of "civil proceedings" in section 21 embraces applications to the supervisory jurisdiction of the Court of Session against the Crown. But *McDonald* was actually decided on the basis that the proceedings were neither for nor to be equated with public law proceedings for judicial review. They were, as Lord Rodger has indicated in paragraph 90, private proceedings for damages for assault together with an interdict to

restrain future assaults. However, the Secretary of State was not being pursued in respect of any actual or anticipated assault or breach of duty by or authorised by him individually (cf pp 235, 237 and 247). Rather, it is clear that the proceedings were brought against him in a representative capacity as the government minister responsible for the relevant department, whose officers, it was alleged, had committed or might commit such assaults (cf pp 235, 237, 245 and 247). As such, the claim would, at present at least, appear to me to have been to an interdict of the character which Lord Woolf identified as falling potentially within section 21(2), that is an interdict against an officer of the Crown in a representative capacity, the effect of which would be to give relief against the Crown which could not have been obtained in proceedings brought directly against the Crown. It does not follow that all actions against a minister or the Attorney General under section 17(3) of the 1947 Act constitute proceedings against the Crown within section 21(1), or that section 21(2) has in either England or Scotland the very limited or almost undetectable meaning suggested in the reasoning in *McDonald*. The true scope of section 21(1) and (2) must in these circumstances be a matter for full argument in another case, especially in the light of the forthcoming appeal to this House in *Beggs v The Scottish Ministers* 2005 SC 342. With regard to the dictum of Lord Johnston in *AB v Lord Advocate* 1916 2 SLT 327, 329, cited by Lord Rodger in paragraph 74, I note only that it was uttered in a very different context to the present.

104. Accordingly, quite apart from the specific point (relating to the limitation of the Scottish Ministers' powers under section 57(2) of the Scotland Act 1998) identified by Lord Rodger in paragraph 94 of his speech, I would reserve for argument in a future case all questions about the extent to which the Scottish Ministers may, in civil proceedings within section 21, either claim to be equated with the Crown under section 21(1) or claim immunity from orders by way of interdict or specific performance as officers of the Crown under section 21(2) of the 1947 Act.