

# 1

## Red and green light theories

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### 1. Law and state

Behind every theory of administrative law there lies a theory of the state. As Harold Laski once said, constitutional law is unintelligible except as the expression of an economic system of which it was designed to serve as a rampart.<sup>1</sup> By this he meant that the machinery of government was an expression of the society in which it operated; one could not be understood except in the context of the other. In 1941, Sir Cecil Carr made a similar point in a series of lectures on administrative law given at Harvard University, in the course of which he said:

We nod approvingly today when someone tells us that, whereas the State used to be merely policeman, judge and protector, it has now become schoolmaster, doctor, house-builder, road-maker, town-planner, public utility supplier and all the rest of it. The contrast is no recent discovery. De Tocqueville observed in 1866 that the State 'everywhere interferes

<sup>1</sup> H. Laski, *A Grammar of Politics* (Allen and Unwin, 1925), p. 578.

more than it did; it regulates more undertakings, and undertakings of a lesser kind; and it gains a firmer footing every day, about, around and above all private persons, to assist, to advise, and to coerce them' (*Oeuvres*, III, 501). Nassau William Senior, a Benthamite ten years older than Chadwick, a colleague of his on the original Poor Law Commission, had justified this tendency. A government, he thinks, must do whatever conduces to the welfare of the governed (the utilitarian theory); it will make mistakes, but non-interference may be an error too; one can be passively wrong as well as actively wrong. One might go back much earlier still to Aristotle, who said that the city-state or partnership-community comes into existence to protect life and remains in existence to protect a proper way of living. What is the proper standard? That is an age-long issue which is still a burning question of political controversy. The problems of administrative law are approached in the light of that fire. Those who dislike the statutory delegation of legislative power or the statutory creation of a non-judicial tribunal will often be those who dislike the policy behind the statute and seek to fight it at every stage. On the one side are those who want to step on the accelerator, on the other those who want to apply the brake.<sup>2</sup>

In this passage, Carr placed the demise of the minimal state, or state as 'policeman, judge and protector', and the birth of state interventionism, in the early nineteenth century, attributing the change to the work of the economist Nassau Senior and Edwin Chadwick, social and administrative reformer. Barker set two momentous decades of state growth slightly later, in the 1880s, when the number of state employees increased significantly, and the 1890s, when state expenditure as a percentage of national expenditure began to rise. By the end of the nineteenth century all the major political parties had for practical purposes abandoned the ideal of limited government, and accepted the necessity for intervention. The old conception of government as minimal and static was being swept away by a new conception, which was:

if not dynamic, then at least ambulatory. The old conception had viewed government as administering laws, keeping the peace and defending the frontiers. But it was not a part of government's function to act upon society, nor was it expected that legislation would do much more than sustain clear and established customs. In contrast the new conception was of government as the instigator of movement. This conception of movement was not restricted to the parties of progress or reform; the Conservative and Unionist Party at the beginning of the twentieth century was increasingly characterized, despite opposition, by a commitment to tariff reform, a programme of discriminatory trade duties designed to . . . provide funds for new military and social expenditure at home. Government was not merely to regulate society, it was to improve it.<sup>3</sup>

This was, in short, the beginning of the age of 'collectivism', as Dicey termed socialist theories that favoured 'the intervention of the State, even at some

<sup>2</sup> C. Carr, *Concerning English Administrative Law* (Oxford University Press, 1941), pp. 10–11.

<sup>3</sup> R. Barker, *Political Ideas in Modern Britain*, 2nd edn (Methuen, 1997), pp. 14, 18.

sacrifice of individual freedom, for the purpose of conferring benefit upon the mass of the people.<sup>4</sup> Dicey acknowledged collectivism grudgingly, although presciently he foresaw its influence as likely to increase in force and volume.

What Carr was saying was hardly novel and, to his American audience, would probably have seemed unexceptional; the link between realist jurisprudence and the ‘administrative state’ was well established in the USA at the time Carr spoke.<sup>5</sup> English lawyers, on the other hand, might have found the idea unpalatable. The nineteenth-century legal scholars who had laid the foundation stones of English administrative law were certainly alive to the relationship between constitutional law and political theory and were themselves well grounded in both.<sup>6</sup> But this was an era when positivism dominated legal theory and case law was predominantly formalist in its focus on legal principles and concepts. English lawyers understood law as properly isolated from its social context, ‘endowed with its own discrete, integral history, its own “science”, and its own values, which are all treated as a single block sealed off from general social history, from politics, and from morality’.<sup>7</sup> Barker confirms that a similar outlook obtained amongst political scientists. While the political consequences of ‘particular laws and particular legal judgments’ met with occasional recognition, the character of the judicial system and the general assumptions of law and lawyers were ‘little considered in debates about the political character and goals of the nation’, and legal ideas were in general ‘invisible’.<sup>8</sup> To question this – as Laski, by describing the judiciary as a branch of government had done and Griffith in *The Politics of the Judiciary*<sup>9</sup> was to do – seemed heretical.

The dominance of positivism in thinking about public law is largely due to the influence of two great men: in the nineteenth century, Albert Venn Dicey (1835–1922), to whom must go the credit of the first sophisticated attempt ‘to apply the juridical method to English public law’;<sup>10</sup> in the twentieth century, H. L. A. Hart (1907–92), whose *Concept of Law*<sup>11</sup> is a masterpiece of legal positivism. Like Jeremy Bentham (1748–1832) and John Austin (1790–1859), legal philosophers who saw themselves as rationalists and were concerned to excise mysticism and the doctrines of natural law from legal philosophy, Dicey believed that law was capable of reduction to rational, scientific principles. Hart set out ‘to understand the legal order in terms of governance through

<sup>4</sup> A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*, 2nd edn (Macmillan, 1914), pp. 64–5.

<sup>5</sup> See R. Gordon, ‘Willis’s American counterparts: The legal realists’ defence of administration’ (2005) 55 *UTLJ* 405.

<sup>6</sup> F. Maitland, ‘A historical sketch of liberty and equality’ in *Collected Papers*, vol. 1 (Cambridge University Press, 1911). p. 1; F. Pollock, *Essays in the Law* (Macmillan, 1922), Nos. 2 and 3.

<sup>7</sup> J. Shklar, *Legalism* (Harvard University Press, 1964), pp. 2–3.

<sup>8</sup> Barker, *Political Ideas in Modern Britain*.

<sup>9</sup> J. Griffith, *The Politics of the Judiciary* (Fontana, 1977).

<sup>10</sup> W. I. Jennings, ‘In praise of Dicey (1885–1935)’ (1935) 13 *Pub. Admin.* 123, 133.

<sup>11</sup> H. L. A. Hart, *The Concept of Law*, 2nd revised edn (Clarendon Press, 1997).

rules', working with the tools of analytic and linguistic philosophy. His work set in place an established legal hierarchy of primary and secondary rules. It is important not to underestimate these achievements. Formalism and conceptual reasoning are essential building blocks of a legal system, which structure judicial decision-making and help to maintain consistency.<sup>12</sup> This in turn helps to underpin the rule of law.<sup>13</sup>

This is not the place to debate the many degrees of positivism. It is, however, helpful to refer to Coyle's recent division of contemporary English jurisprudence into main groupings: (i) a moderate legal positivism, which maintains that 'law can be elucidated without reference to morality, and that it is the duty of judges to determine the content of and apply the law without recourse to moral judgments'; and (ii) liberal idealism, where law is viewed as an open-textured set of principles, rooted in rights derived from 'shared assumptions and beliefs which prescribe for law a particular moral content'.<sup>14</sup> In the evolution of liberal idealism, the 'interpretivist' work of the American theorist Ronald Dworkin<sup>15</sup> has been influential. The two approaches should not, however, be seen as monopolising the field of administrative law. Even if they infuse case law studied in later chapters more radical positions frequently emerge.

## 2. The Diceyan legacy

### (a) Dicey and the rule-of-law state

Dicey's *Introduction to the Law of the Constitution*, published in 1885, acts almost as a substitute for a written constitution. His ideas lock up together to form the ideal-type of a 'balanced' constitution, in which the executive, envisaged as capable of arbitrary encroachment on the rights of individual citizens, will be subject, on the one side, to political control by Parliament and, on the other, to legal control through the common law by the courts. As expressed by Dicey in terms of the twin doctrines of the rule of law and parliamentary sovereignty, the balance necessarily tips in favour of representative government.<sup>16</sup>

The ancient philosophical ideal of the rule of law can be traced to Aristotle's government of 'laws not men' and has been explored by generations of political philosophers. It provides the basis for the idea of 'limited government' and 'constitutionalism' (government limited by law and by a constitution or

<sup>12</sup> N. MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, 1994).

<sup>13</sup> See C. Forsyth, 'Showing the fly the way out of the flybottle: The value of formalism and conceptual reasoning in administrative law' (2007) 66 *CLJ* 325.

<sup>14</sup> S. Coyle, 'Positivism, idealism and the rule of law' (2006) 26 *OJLS* 257, 259 citing T. Campbell, *The Legal Theory of Ethical Positivism* (Dartmouth, 1996), p. 1.

<sup>15</sup> R. Dworkin, *Taking Rights Seriously* (Duckworth, 1967) and *Law's Empire* (Fontana, 1986).

<sup>16</sup> M. Vile, *Constitutionalism and Separation of Powers* (Clarendon Press, 1967), pp. 230–3; J. Griffith, 'The common law and the political constitution' (2001) 117 *LQR* 42. See generally on Dicey's legacy, M. Loughlin, *Public Law and Political Theory* (Clarendon Press, 1992), pp. 140–62.

constitutional principles). Below, Martin Shapiro, an American political scientist, nicely encapsulates the conception of 'bounded and billeted' government, central to Anglo-American public law:

Administrative law as it has historically been understood presupposes that there is something called administration. The administrator and/or the administrative agency or organization exist as a bounded reality. Administrative law prescribes behaviour within administrative organizations; more importantly, it delineates the relationships between those inside an administration and those outside it. Outside an administration lie both the statemaker whose laws and regulations administrators owe a legal duty to faithfully implement and the citizens to whom administrators owe legally correct procedural and substantive action.

More generally, the political and organization theory that inform our administrative law have traditionally viewed public administration as a set of bounded organizations within which decisions are made collectively. On this view, these 'organs of public administration' are coordinated with one another, subordinated to political authority, and obligated to respect the outside individuals and interests whom they regulate and serve.<sup>17</sup>

In the work of Friedrich Hayek, economist and political theorist, there was a close link between the rule of law and his own strong belief in the limited, minimal or 'night-watchman' state mentioned by Carr. In a passage that looks forward to contemporary faith in the market, Hayek in his early classic, *The Road to Serfdom*, drew a 'general distinction between the rule of law and arbitrary government':

Under the first, government confines itself to fixing rules determining the conditions under which the available resources may be used, leaving to the individuals the decision for what ends they are to be used. Under the second, the government directs the use of the means of production to particular ends. The first type of rules can be made in advance, in the shape of *formal rules* which do not aim at the wants and needs of particular people . . . Economic planning of the collectivist kind necessarily involves the very opposite of this. The planning authority cannot confine itself to providing opportunities for unknown people to make whatever use of them they like. It cannot tie itself down in advance to general and formal rules which prevent arbitrariness. It must provide for the actual needs of people as they arise and then choose deliberately between them.<sup>18</sup>

Hayek here assumes that, in a rule-of-law state, there must be as much individual freedom as is compatible with the freedom of others, reflecting the ideal of a liberal democratic society, which expects '*freedom from* the state,

<sup>17</sup> M. Shapiro, 'Administrative law unbounded' (2001) 8 *Indiana Journal of Global Legal Studies* 369.

<sup>18</sup> F. Hayek, *The Road to Serfdom* (Routledge, 1944), p. 10. See also F. Hayek, *The Constitution of Liberty* (Routledge and Kegan Paul, 1960) and *Law, Legislation and Liberty* (Routledge and Kegan Paul, 1973-79).

demanding that some individual freedoms, or rights, should be protected from the state and from majority decisions.<sup>19</sup> This ‘thin’ rule of law excludes by definition a planned economy or welfare state and is the context for what we have called ‘red light theories’ of administrative law, where the emphasis is on citizens’ rights and on law as a brake on state action. This is a highly contestable proposition which has become the centre of much political controversy.

The emphasis on formal, predictable rules makes the rule-of-law idea attractive to lawyers. Lawyers have willingly adopted the rule-of-law paradigm as a constitutional justification for the judicial power to ‘review’ governmental and administrative acts and to declare them lawful or unlawful and in excess of power. Dicey’s late nineteenth-century restatement of the rule-of-law doctrine comprised three elements – (i) that the state possesses no ‘exceptional’ powers and (ii) that *individual* public servants are responsible to (iii) the ordinary courts of the land for their use of statutory powers:

When we say that the supremacy of the rule of law is a characteristic of the English constitution we generally include under one expression at least three distinct though kindred conceptions.

[First] that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint . . .

[Secondly], not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen . . .

[Thirdly] that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.<sup>20</sup>

Dicey’s articulation of the rule-of-law principle is so quintessentially English that its opponents readily dismiss it as chauvinistic. Yet Allan thinks Dicey:

<sup>19</sup> P. Dunleavy and B. O’Leary, *Theories of the State: The politics of liberal democracy* (Macmillan, 1987), p. 5.

<sup>20</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, E. C. S. Wade (ed.), 10th edn (Macmillan, 1959) (hereafter *Introduction*), pp. 187–196.

wise to seek an interpretation of the rule of law which reflected the traditions and peculiarities of English common law. Whatever its faults, Dicey's work recognised the importance of expounding a constitutional philosophy, which could serve as a basis for the systematic exposition and consistent development of legal principle. More recent efforts to give analytical precision to the concept of the rule of law have not always been wholly successful – at least in Britain – and constitutional law has perhaps been weakened in consequence, because its foundations have come to seem uncertain and insecure . . .

At the heart of the problem lies the difficulty of articulating a coherent doctrine which resists a purely formal conception of legality – according to which even brutal decrees of a dictator, if formally 'valid', meet the requirements of the rule of law – without instead propounding a complete political and social philosophy. The formal conception, which serves only to distinguish the commands of the government in power (whatever their content) from those of anyone else, offers little of value to the constitutionalist theorist. And the richer seams of political theory – ideal versions of justice in the liberal, constitutional state – are inevitably too ambitious (because too controversial) to provide a secure basis for practical analysis . . . It seems very doubtful whether it is possible to formulate a theory of the rule of law of universal validity . . . But it does not follow that we cannot seek to elaborate the meaning and content of the rule of law within the context of the British polity – exploring the legal foundations of constitutionalism in the setting of contingent political institutions. That was, of course, Dicey's purpose in *The Law of the Constitution*.<sup>21</sup>

In an exploration of the rule-of-law principle popular with lawyers, Lord Bingham breaks the idea down into eight sub-rules:<sup>22</sup>

1. The law must be accessible and so far as possible intelligible.
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
3. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.
4. The law must afford adequate protection of human rights.
5. Means must be provided for resolving disputes, without prohibitive cost or inordinate delay.
6. Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purposes for which the powers were conferred and without exceeding the limits of such powers.
7. Adjudicative procedures provided by the state should be fair.
8. The state must comply with its obligations in international law.

Dicey's procedural prerequisites, slightly modernised, all make an appearance but with three significant additions: Principle 6, which purports to include most of the modern principles of judicial review which, given their fluidity and

<sup>21</sup> T. Allan, *Law, Liberty and Justice: The legal foundations of British constitutionalism* (Clarendon Press, 1993), pp. 20–1.

<sup>22</sup> T. Bingham, 'The rule of law' (2007) 66 *CLJ* 67 (slightly paraphrased).

rapidly changing nature, might be thought over-ambitious; and Principles 4 and 8, which pull international and human rights law into the compass of the rule of law. The last two are highly controversial. They cross – or invite us to cross – the boundary between procedural and substantive versions of the rule of law.<sup>23</sup>

The case made for this ‘thick’ rule of law by those of a liberal persuasion is that law cannot ‘serve a bad master’; a rule of law without values is not a true rule of law. A slightly different road to the same end is to incorporate the ‘thick’ rule of law as a constituent element of democracy.<sup>24</sup> This leads to a still more bounded view of government according to which majoritarian institutions are debarred from overriding normative values of the rule of law (see Chapter 3). As Raz has cogently argued, the danger here is that in seeking to encapsulate a complete social and political philosophy within a single principle, liberals have deprived the rule of law of any useful role independent of their dominant philosophy.<sup>25</sup> Dicey’s prioritisation of parliamentary sovereignty has been reversed, tipping the balance in favour of the rule of law (and law courts). As Dicey insisted and Raz is affirming, the core of the rule of law is procedural: it is ‘a necessary, but not sufficient condition of other vital, civic virtues – freedom, tolerance and justice itself.’<sup>26</sup>

### (b) ‘The English have no administrative law’

At the heart of Dicey’s exposition of the rule of law lay the concept of formal or procedural equality: the submission of ruler and subject alike to the jurisdiction of the *same* courts of law. Dicey set his face against the French system, where separate and autonomous tribunals attached to the administration handle cases involving the state. Dicey gave a specific and peculiar meaning to the term *droit administratif*, which he maintained had no proper English equivalent:

Anyone who considers with care the nature of the *droit administratif* of France, or the topics to which it applies, will soon discover that it rests, and always has rested, at bottom on two leading ideas alien to the conceptions of modern Englishmen.

The first of these ideas is that the government, and every servant of the government, possesses as representative of the nation, a whole body of special rights, privileges, or prerogatives as against private citizens, and that the extent of these rights, privileges, or prerogatives is to be determined on principles different from the considerations which fix the legal rights and duties of one citizen towards another. An individual in his dealings with

<sup>23</sup> See P. Craig, ‘Formal and substantive conceptions of the rule of law: An analytical framework’ [1997] *PL* 467; R. Cotterell, *Law’s Community. Legal theory in sociological perspective* (Clarendon Press, 1995), pp. 160–77, discussing variant continental conceptions of the rule of law.

<sup>24</sup> J. Jowell, ‘Beyond the rule of law: Towards constitutional judicial review’ [2000] *PL* 671.

<sup>25</sup> J. Raz, ‘The rule of law and its virtue’ (1977) 93 *LQR* 195.

<sup>26</sup> J. Laws, ‘The rule of law - form or substance?’ [2007] 4 *Justice Journal* 24.



the State does not, according to French ideas, stand on anything like the same footing as that on which he stands in dealings with his neighbour.

The second of these general ideas is the necessity of maintaining the so-called 'separation of powers' (*séparation des pouvoirs*), or, in other words, of preventing the government, the legislature, and the courts from encroaching upon one another's province. The expression, however, separation of powers, as applied by Frenchmen to the relations of the executive and the courts, with which alone we are here concerned, may easily mislead. It means, in the mouth of a French statesman or lawyer, something different from what we mean in England by the 'independence of the judges', or the like expressions. As interpreted by French history, by French legislation, and by the decisions of French tribunals, it means neither more nor less than the maintenance of the principle that while the ordinary judges ought to be irremovable and thus independent of the executive, the government and its officials ought (whilst acting officially) to be independent of and to a great extent free from the jurisdiction of the ordinary courts.<sup>27</sup>

It was only towards the end of his long career that Dicey admitted the capacity of the separate French system of administrative courts to control abuse of power. Later still he conceded 'a considerable step towards the introduction among us of something like the *droit administratif* of France', though maintaining that the jurisdiction of 'ordinary law courts' in cases of breach of the law by public officials 'is fatal to the existence to true *droit administratif*'.<sup>28</sup> Dicey's preference was for a unitary court structure, in which administrative cases are handled by 'ordinary' courts and judges and public officials stand at least theoretically on an equal footing with private persons. Underlying this arrangement is the principle strongly favoured by Dicey that relationships of citizens with public officials are not – and should not be – radically different from relations between citizens and private bodies.

### (c) State and Crown

But a gaping hole was left in Dicey's theory of equality by the existence of substantial areas of monarchical prerogative power. When Dicey wrote, the Crown was immune from civil proceedings in the 'ordinary courts', a fact that somewhat undercut his argument. The Crown had to be pursued by the special procedure of 'petition of right', a form of *droit administratif* that lasted until the Crown Proceedings Act 1947. The state does not need to possess special powers 'in its own name' if those powers are held by government ministers acting in the name of the Crown.

<sup>27</sup> Dicey, *Introduction*, pp. 336–8. For further exposition, see J. Allison, *A Continental Distinction in the Common Law: A historical and comparative perspective on English public law*, revised edn (Clarendon Press, 2000).

<sup>28</sup> A. V. Dicey, 'Droit administratif in modern French law' (1901) 18 *LQR* 302 and 'The development of administrative law in England' (1915) 31 *LQR* 148; and see F. Lawson, 'Dicey revisited' (1959) 7 *Political Studies* 109, 207.

Dicey himself defined prerogative power widely, maintaining that ‘every act which the executive government can lawfully do without the authority of an Act of Parliament is done in virtue of this prerogative’.<sup>29</sup> This unnecessarily broad definition conflates the Crown’s prerogative and common law powers. As we shall see in Chapter 8, this has had serious effects on the law of government contracting. Nevertheless, it is important to understand that the prerogative powers are not merely powers confined to emergency or national security; in the British constitution, the Crown fills the place filled in other constitutions by the notion of executive power.<sup>30</sup> Even on Blackstone’s view of prerogative power as ‘exceptional’,<sup>31</sup> which brings much Crown activity within the ambit of public law and renders it justiciable, this is a matter of some importance.

Until relatively recently, it was accepted that a court faced with a claim of prerogative power could merely pronounce on its validity; the way in which it was exercised could not be reviewed. Not until the seminal ruling of the House of Lords in the *GCHQ* case<sup>32</sup> was it finally established that government is accountable to the courts for its use of prerogative power. In his striking and often-quoted speech, Lord Diplock not only asserted that the prerogative powers form part of the common law but broke new ground in saying that he could ‘see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should *for that reason only* be immune from judicial review’. Accepting his view that no qualitative distinction could be made between statutory and prerogative powers, the House advised that both were subject in the same way to judicial review in respect of their use. In itself, the decision was no more than a warning shot, since the House of Lords endorsed the right of the Prime Minister in her capacity as minister responsible for the Civil Service to withdraw the privilege of joining a trade union from workers at the operational headquarters of the security services. The case, discussed on other grounds in Chapter 3, is a landmark in establishing the justiciability of prerogative power. In recent cases, the courts have tended to intensify the war against prerogative power. *M v Home Office*<sup>33</sup> involved the remnants of Crown

<sup>29</sup> Dicey, *Introduction*, p. 425.

<sup>30</sup> M. Sunkin and S. Payne (eds), *The Nature of the Crown: A legal and political analysis* (Oxford University Press, 1999); T. Daintith and A. Page, *The Executive in the Constitution: Structure, autonomy and internal control* (Oxford University Press, 1999); P. Craig and A. Tomkins (eds), *The Executive and Public Law* (Oxford University Press, 2006).

<sup>31</sup> For a strong rebuttal of Dicey’s over-generous definition, see H. W. R. Wade, *Constitutional Fundamentals* (Stevens, 1980), pp. 46–9; and see B. Harris, ‘The “third source” of authority for government action’ (1992) 108 *LQR* 626; ‘The “third source” of authority for government action revisited’ (2007) 123 *LQ R* 225.

<sup>32</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, see p. 107 below.

<sup>33</sup> *M v Home Office* [1994] AC 377, noted in Harlow, ‘Accidental death of an asylum seeker’ (1994) 57 *MLR* 620. A similar point arose in respect of Scotland after devolution and was settled pragmatically in the same way: see *Davidson v Scottish Ministers* [2005] UKHL 74; *Beggs v Scottish Ministers* [2007] UKHL 3.