IN THE HIGH COURT OF JUSTICE CO/2912/92
QUEEN'S BENCH DIVISION
(DIVISIONAL COURT)

Royal Courts of Justice
Wednesday, 7th July 1993.

Before:

LORD JUSTICE WATKINS

and

LORD JUSTICE NEILL

and

MR JUSTICE TUCKEY

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Crown Office List

THE QUEEN
- v -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Ex parte IRIS PAMALA BENTLEY

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(Computer Aided Transcript of the Stenograph Notes
of John Larking, Chancery House, Chancery Lane,
London WC2
Telephone No: 071-404 7464
Official Shorthand Writers to the Court)

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MR D PANNICK Q.C. and MR M SHAW (instructed by Messrs B M Birnberg & Co., London, SE1) appeared on behalf of the Applicant.

MR S RICHARDS and MR R SINGH (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

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J U D G M E N T
(As Approved by the Court)
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LORD JUSTICE WATKINS: This is the judgment of the Court.

Iris Pamala Bentley, the applicant for judicial review, has been campaigning for almost 4O years to obtain recognition of what she and many other people regard as a gross miscarriage of justice in the case of her brother, Derek Bentley. She wants that recognition to take the form of a posthumous Free Pardon for him. That, Mr. Kenneth Clarke, the Secretary of State for the Home Department (the Home Secretary), by a decision which was announced on l October l992, declined to recommend.

That is the decision which we have been asked by the applicant to review. The relief which she seeks, and for which she has the leave of this Court to apply, is a declaration that the Home Secretary erred in law in declining to recommend a posthumous Free Pardon for Derek Bentley and mandamus to require the Home Secretary to reconsider the matter.

Bentley, then l9 years of age, was convicted, together with Christopher Craig, at the Central Criminal Court on ll December l952 before Lord Goddard, Chief Justice, of the murder of Police Constable Sidney George Miles at Croydon on 2 November l952. He was sentenced to death. The jury added a recommendation for mercy. An appeal by Bentley against conviction was dismissed by the Court of Criminal Appeal on l3 January l953. Craig was also found guilty of murder, but being only l6 years of age, he could not be sentenced to death. He was ordered to be detained during Her Majesty's pleasure.

It had been alleged by the Crown that during the evening of 2 November l952 a married woman saw Bentley and Craig climbing over a gate at the side of a confectionery warehouse in West Croydon. She informed the police. Detective Constable Fairfax, accompanied by Police Constable Harrison and two other officers, came to the scene at about the same time as a wireless car in which were Police Constable Miles and Police Constable McDonald.

D.C. Fairfax, on being told that Bentley and Craig had climbed up on to the roof of the warehouse via a drainpipe, did likewise. He saw Bentley and Craig almost immediately. He walked towards them. They backed away and went behind a brickstack. D.C. Fairfax, when about six feet away, shouted out "I am a police officer. Come out from behind that stack". Craig shouted back that if he wanted them he would have to come and get them. D.C. Fairfax then rushed behind the stack and seized hold of Bentley. He pulled Bentley round the stack with a view to closing in on Craig, at which point Bentley broke away and shouted "Let him have it, Chris". There was then a flash and a loud report. A bullet hit D.C. Fairfax on his right shoulder, making him spin round and fall to the ground. He got up and again seized hold of Bentley and knocked him down with his fist. There was then a second shot and D.C. Fairfax pulled Bentley up in front of him as a shield and pulled him behind a large skylight where he held him down and felt over his clothing to see if he was carrying a gun. D.C. Fairfax did not find a gun but found a

knuckleduster and a knife. Bentley said "That's all I've got, guvnor. I haven't got a gun". D.C. Fairfax then told Bentley that he was going to work him round the roof to the door of a fire escape, and Bentley said "He will shoot you". D.C. Fairfax then worked him round until they were both sheltered behind the staircase head.

D.C. Fairfax shouted to Craig to drop his gun, and Craig replied "Come and get it".

Meanwhile, P.C. Miles and others reached the roof by another route. P.C. Miles confronted Craig, who shot at him, hitting him between the eyes. P.C. Miles dropped dead.

The day after Bentley was convicted, Lord Goddard CJ, wrote to the then Home Secretary, Sir David Maxwell Fyfe, and stated: "In Craig's case the defence endeavoured to obtain a verdict of manslaughter. Had the jury returned such a verdict I should have passed a sentence of detention for fifteen years as I am convinced that he is a most dangerous criminal.....In Bentley's case the jury added a recommendation to mercy. I have no doubt the reason for their recommendation was that they realised that a capital sentence could not be passed on Craig whom they probably regarded as the worst of the two. So far as merits were concerned, I regret to say I could find no mitigating circumstances in Bentley's case. He was armed with a knuckleduster of the most formidable type that I have ever seen and also with a sharp pointed knife and he called out to Craig when he was arrested to start the shooting."

On l6 January l953, Philip Allen, later Lord Allen, wrote a Home Office memorandum in which he advised that effect be given to the jury's recommendation for mercy. His advice rested "principally on the ground, which has been held to be valid in previous cases, that it would not seem right to exact the extreme penalty from the accomplice when the principal offender is escaping with his life". There was reference in the memorandum to Bentley's mental state and to it being "just above the level of a feeble minded person". That memorandum was endorsed with comments from Sir Frank Newsam, the Permanent Secretary, who also advised against the execution of Bentley. Nevertheless, Sir David Maxwell Fyfe, for reasons which he set out in a memorandum of

his own, decided that the law should take its course.

In that memorandum he stated:

"It was a very bad murder, involving the death of a police officer, committed at a time when there is much public anxiety about numbers of crimes of violence. Many of these crimes of violence are committed by young persons and I must pay regard to the deterrent effect which the carrying out of the sentence in this case would be likely to have. If Craig had been of an age when he could have been executed, the sentence would have been carried out in his case and there would have been no grounds for interfering with the sentence against Bentley. It would be dangerous to give the impression that an older adolescent could escape the full penalty by using an accomplice of less than l8 years of age. I feel also that it is important to protect the unarmed police."

Bentley was hanged on 28 January 1953. The Home Secretary, in announcing the decision now complained of, stated, inter alia:

"I have concluded that nothing has emerged from my review of this case which establishes Derek Bentley's innocence and that I therefore have no grounds for recommending a free pardon...

In my judgment most of the concern that has arisen about this case reflects strong feelings that Derek Bentley should not have been hanged. Personally I have always agreed with that concern but I cannot now simply substitute my judgment for that of the then Home Secretary, Sir David Maxwell Fyfe...

It has been the long established policy of successive Home Secretaries that a Free Pardon in relation to a conviction for an indictable offence should be granted only if the moral as well as technical innocence of the convicted person can be established. I do not believe that is the case on either point in relation to Derek Bentley."

An accompanying memorandum from the Home Office emphasized that:

"Successive Home Secretaries have taken the view it would not be right to recommend the exercise of the Royal Prerogative for the grant of a Free Pardon in any particular case unless satisfied that the person concerned is both morally and technically innocent of any crime."

The grounds for relief relied upon by Mr. Pannick Q.C., on behalf of the applicant, as stated in the

application, are that (l) the Home Secretary erred in law in his approach to the problem confronting him for the following reasons: (a) He considered that a Free Pardon depended on whether it could be established that Bentley was morally and technically innocent of the crime of which he was convicted. He said that this had long been the approach taken by the Home Office to the question of a Free Pardon. (b) A Free Pardon would not entail recognition that Bentley was wrongly convicted. As Watkins L.J. Explained in the Court of Appeal in R. V. Foster [l985] Q.B. Ll5, l3OA:

> "The effect of a free pardon is such as, in the words of the pardon itself, to remove from the subject of the pardon, all pains, penalties and punishments whatsoever that from the same conviction may ensue', but not to eliminate the conviction itself."

Thus a pardon is not the equivalent of an acquittal. It leaves unaffected the fact of a conviction.

(c) The Home Secretary failed to have regard to relevant considerations or he acted perversely. If a Free Pardon leaves the conviction unaffected but expunges the penalty, the question in considering the grant of a free pardon is not whether Derek Bentley was innocent of the crime, but whether, in all the circumstances, he should be relieved of the punishment which was imposed. The punishment was, of course, the sentence of death, which Sir David Maxwell Fyfe refused to commute to life imprisonment.

(2) It may be that the Home Secretary asked himself the wrong question because he was following Home Office policy in relation to a Free Pardon, which policy was established long before the judgment of the Court of

Appeal in R. V. Foster. Had the Home Secretary asked himself the right question and considered whether the law should recognise that the penalty of death should not have been carried out, it is very probable that the Home Secretary would have recommended a Free Pardon, seeing that (a) the jury recommended mercy, (b) Craig was not executed, (c) Philip Allen and Sir Frank Newsam advised that the jury's recommendation for mercy be acted upon, (d) Bentley was considered to be just above the level of a feeble minded person, (e) Lord Goddard's view that there were "no mitigating circumstances in Bentley's case" was irrational and (f) the Home Secretary had not only stated that "I agree that Derek Bentley should not have been hanged", but also that "I do not believe that I would have reached the same decision as the then Home Secretary".

(3) The application raises an important question of constitutional and administrative law: Is the decision of the Home Secretary subject to judicial review? The answer to that question is that (a) whilst there are statements in a number of cases which suggest, in the context of the prerogative power, decisions of the Home Secretary are not susceptible to judicial review, there are other cases wherein the contrary view is expressed, and (b) there is no good reason for refusing to entertain a judicial review of a decision in relation to a free pardon, especially where the challenge raises a question of law and alleges that the Home Secretary has misunderstood the relevant law.

It is clear from those grounds that one, if not the

main, of the contentions made on behalf of the applicant, is that the Home Secretary misdirected himself. Therefore, it is, we think, helpful to recite parts of the affidavit of Mr. Austin Peter Wilson, an Assistant Under Secretary of State and head of the Criminal Policy Department in the Home Office at the present time.

In it he draws on past Home Office files, records and memoranda, as well as well-known standard works including Pollock & Maitland's History of English Law and Stephen's History of the Criminal Law.

Constitutionally, he states, the prerogative is exercised by the Sovereign on the advice of the Home Secretary in one of three ways, namely

(a) the grant of a free, i.e. Unconditional, pardon;

(b) the grant of a conditional pardon, whereby the penalty is removed, on condition that a lesser sentence is served; and

(c) the remission, or partial remission, of a penalty.

The exercise of mercy by the Crown appears to have become firmly established in the Middle Ages, with the infringement of the King's Peace emerging as the basis for criminal liability. Since major felonies were invariably capital, and pleas to self defence had not developed, judicial procedure produced inflexible and unsatisfactory results. Use of the prerogative relieved those results.

The prerogative was, and remained until the early l8th Century, a matter for the personal decision of the Sovereign. By the mid-19th Century the convention had

developed that the prerogative would be exercised on the advice of one of the principal Secretaries of State.

Mr. Wilson refers further to memoranda of the last century from which, he says, it is possible to ascertain that Home Office practice in relation to the grant of a Free Pardon is founded upon the ground of innocence.

In a l874 memorandum it is recorded:

"A free pardon is granted only on legal grounds or where there is ascertained innocence or a doubt of guilt. A conditional pardon substitutes one punishment for another, such as penal servitude, death etc. A remission of the remainder of the sentence is a customary mode of authorising release from prison."

In a l899 memorandum it is further recorded:

"Free pardons are reserved for cases in which, according to the opinion of the Secretary of State, a wrongful conviction or the innocence of the accused person is satisfactorily established. Sometimes where there has been a sentence of penal servitude and doubt is thrown on the justice of the conviction, but not to a sufficient extent to justify the grant of a free pardon or the remission of sentence, the case is met by granting a licence, usually accompanied by a remission of the requirements to report to the police."

Since the Criminal Appeal Act l9O7 which introduced the Court of Criminal Appeal, the significance of the pardon has been, Mr. Wilson suggests, much reduced. That is because that Act gave a right of appeal on a question of law or, with leave, on a question of fact. The Home Secretary was given the power "On consideration of any petition for the exercise of His Majesty's mercy" to refer cases to the Court. That power was subsequently re-enacted.

Successive Home Secretaries, he says, have continued to play a significant part in the correction of miscarriages of justice. Pardon has remained an option

in exceptional cases where a reference to the Court of Appeal is not practicable, for example where relevant material is not admissible in evidence. It is also used in summary cases, largely because there is, in these cases, no power in the Home Secretary to make a reference to an appellate court.

There has been only one posthumous Free Pardon in modern times. That was granted to Timothy Evans in l966. A Free Pardon was granted in that case because, so Mr. Wilson states, the Home Secretary of the day considered the conviction itself to be wrong. The pardon has, therefore, been established as a remedy for wrongful convictions.

Having referred to R. V. Foster, Mr. Wilson maintains that the decision in that case was in accordance with the submissions made on behalf of the Crown, and with the view long taken within the Home Office as to the precise legal effect of the pardon. It is not he said, in the Home Office view that the effect of the grant of a free pardon is to quash a conviction.

At paragraphs l7 and l8 of his affidavit, Mr. Wilson further states:

Paragraph 17:
"I am advised by the Association of Chief Police Officers and believe that the grant of a free pardon is noted on the individual's criminal record so that the conviction in respect of which it was exercised would not be included in any subsequent list of convictions. I am also advised by the Lord Chancellor's Department and believe that copy of the pardon is attached to a court's record sheet. In our respectful submission, the fact that the conviction itself remains intact after the grant of a free pardon is simply because the Crown has no power to quash or to reverse a criminal conviction, which is uniquely a judicial function. That fact has no bearing on the crucial question of what criteria should be adopted before a free pardon is granted."

Paragraph 18:

"The present Home Secretary is fully aware there is nothing to prevent him recommending the grant of a free pardon even in a case in which he is not persuaded that the conviction was wrong. However, he is mindful of the fact that the free pardon has for over a century been used as a remedy for wrongful convictions and has been recognised as such by Parliament and public. It is widely understood that the effect of a free pardon is to clear the name of the person in respect of whom it is granted. He continues to think that a free pardon should be recommended only when the Home Secretary of the day is satisfied that the convicted person was not guilty of the offence charged."

We now turn to the first of the two essential questions with which we are concerned, namely jurisdiction. Mr. Richards, Counsel for the Home Secretary, contended that the exercise of the Royal prerogative of mercy is not reviewable in the instant case. He left open the question of whether it ever was. Here, so he submits, the Applicant seeks to challenge the criteria upon which the pardon should be granted: This is purely a question of policy which is not justiciable. In fact, as we shall consider later in this judgment, the substance of the applicant's complaint is not about the criteria for the grant of a Free Pardon but about the failure of the Home Secretary to recognise the wide scope of the prerogative of mercy and to consider how that prerogative should be exercised to meet the facts of the present case.

We think it is necessary to consider first whether the prerogative is ever reviewable. The starting point for a 1993 consideration of this question must be the decision of the House of Lords in CCSU v Minister for Civil Service (1985) AC 374 (the GCHQ case). There the House was concerned with an instruction given in the exercise of a delegated power (contained in an Order in

Council) conferred by the prerogative, rather than a direct exercise of the prerogative itself. Lords Fraser and Brightman left open the question of whether the latter was reviewable. The majority however held that it was. The essence of their decision was expressed by Lord Roskill at page 417 F in this way:

> "If the executive in pursuance of [a] Statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged ... If the executive instead of acting under a statutory power acts under a prerogative power ... So as to affect the rights of the citizen, I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive. To talk of that act as the act of the Sovereign savours of the archaism of past centuries."

What he went on to say later at page 418 A was:

> "But I do not think that the right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner, or Parliament dissolved on one date rather than another".

None of the others dealt with the prerogative of mercy but Lord Diplock, having accepted that the exercise of prerogative power might be subject to review on the grounds of illegality or procedural impropriety, said at page 411D:

> "While I see no a priori reason to rule out

"irrationality" as a ground for judicial review of a ministerial decision taken in the exercise of prerogative powers, I find it difficult to envisage in any of the various fields in which the prerogative remains the only source of the relevant decision making power a decision of a kind that would be open to attack through the judicial process upon this ground. Such decisions will generally involve the application of government policy. The reasons for the decision maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another - a balancing exercise which judges by their upbringing and experience are ill qualified to perform. So I leave this as an open question to be dealt with on a case to case basis if, indeed, the case should ever arise."

Before the decision in CCSU it had been thought that the exercise of prerogative power was not susceptible to judicial review and so the earlier cases must be viewed with some caution. We have, however, been referred to a number of them including two which deal specifically with the prerogative of mercy. The first of these is Hanratty v Lord Butler (Court of Appeal transcript 12 May 1971) where the court had to consider whether to strike out a negligence claim against the Home Secretary for the way in which he had exercised the prerogative of mercy. Lord Denning at page 4A said:

"These courts have had occasion in the past to cut down some of the prerogatives of the Crown; but they have never sought to encroach on the prerogative of mercy. It is not exercised by the Queen herself personally. It is exercised by her on the advice of one of the principal Secretaries of State. He advises her with the greatest conscience and good care. He takes full responsibility for the manner of its exercise. That being so, the law will not enquire into the manner in which the prerogative is exercised. It is outside the competence of the courts to call it into question: Nor would they wish to do so".

Lord Justice Salmon at page 5E said:

"As a matter of constitutional practice it is of course well known that the Crown acted upon the advice of the Home Secretary. But the prerogative was and still would be the prerogative of the Crown alone. It is well established that the courts have no power to review the exercise by the Crown of its prerogative, providing the Crown is acting within the scope of its powers. Nor are the courts entitled to be informed of, let alone to pass any opinion upon, such advice as may have been given to the Crown".

The second case is Defreitas v Benny (1976) AC 234. In that case the appellant claimed he was entitled to have disclosed to him the material furnished to the Minister to enable him to advise the Governor General of Trinidad and Tobago as to the exercise of the prerogative of mercy. In rejecting this claim Lord Diplock at page 247F said:

"Except in so far as it may have been altered by the Constitution the legal nature of the exercise of the royal prerogative of mercy in Trinidad and Tobago remains the same as it was in England at common law. At common law this has always been a matter which lies solely in the discretion of the sovereign, who by constitutional convention exercises it in respect of England on the advice of the Home Secretary to whom Her Majesty delegates her discretion. Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function".

There are no English cases dealing with the prerogative of mercy since 1985. We were referred to R v Secretary of State for Foreign and Commonwealth Affairs Ex P Everett (1989) QB 811 in which the Court of Appeal had to consider whether the decision to refuse the Applicant a passport was reviewable. Taylor LJ at page 820B said:

"I am in no doubt that the court has power to review the withdrawal or refusal to grant or renew a passport. ....At the top of the scale of executive

functions under the prerogative are matters of high policy (such as) making treaties, making war, dissolving Parliament, mobilising the armed forces. Clearly those matters, and no doubt a number of others, are not justiciable. But the grant or refusal of a passport is in a quite different category. It is a matter of administrative decision affecting the rights of individuals and their freedom of travel. It raises issues which are just as justiciable as, for example, the issues arising in immigration cases".

We have also been referred to the New Zealand case of Burt v Governor General both at first instance (1989 3 NZLR 64) and on appeal (1992 3NZLR 672). The Plaintiff sought judicial review of the Governor General's refusal to grant him a full pardon in the exercise of the prerogative of mercy. At first instance Greig J decided that the decision could not be reviewed. Having considered the effect of the CCSU case he concluded a detailed judgment by saying (at page 74 line 20) that:

"... The prerogative of mercy is a unique extra legal, extra judicial and extraordinary power that cannot be subject to court review".

The Court of Appeal (Cooke P, Gault and McKay JJ) dismissed the appeal but in doing so they said at page 678 line 32:

"The prerogative of mercy is a prerogative power in the strictest sense of that term, for it is peculiar to the Crown and its exercise directly affects the rights of persons. On the other hand it would be inconsistent with the contemporary approach to say that, merely because it is a pure and strict prerogative power, its exercise or non exercise must be immune from curial challenge. There is nothing heterodox in asserting, as Counsel for the Appellant do, that the rule of law requires that challenge should be permitted insofar as issues arise of a kind with which the courts are competent to deal".

And at page 681 line 45:

"In the end the issue must turn on weighing the competing considerations, a number of which we have stated. Probably it cannot be said that any one answer is necessarily right; it is more a matter of a value or

conceptual judgment as to the place in the law and the effectiveness or otherwise of the prerogative of mercy at the present day.
In attempting such a judgment it must be right to exclude any lingering thought that the prerogative of mercy is no more than an arbitrary monarchical right of grace and favour. As developed it has become an integral element in the criminal justice system, a constitutional safeguard against mistakes".

It is clear from that judgment that the court would have been prepared to review the exercise of the prerogative of mercy if they felt that justice required it. They concluded however that this was not necessary in New Zealand "at any rate at present".

Finally we have been referred to a passage from Judicial Remedies in Public Law by Clive Lewis. At page 21 he says:
"In principle, a failure to consider exercising the power to grant a pardon should be reviewable, at least if an individual can demonstrate that there is some reason why the Home Secretary should consider the case. It is also difficult to see why a decision to refuse a pardon should not also be reviewable in appropriate circumstances, for example, where the allegation is that there has been a failure to consider relevant material, or a failure to act in accordance with any relevant guidelines, or if there is an error of law as to the elements of the offence for which the pardon was sought".

Mr Pannick relies on this passage. He argues that the prerogative of mercy is exercised by the Home Secretary on behalf of us all. It is an important feature of our criminal justice system. It would be surprising and regrettable in our developed state of public law were the decision of the Home Secretary to be immune from legal challenge irrespective of the gravity of the legal errors which infected such a decision. Many types of decisions made by the Home Secretary do involve an element of policy (eg parole) but are subject to review.

We accept these arguments. CCSU made it clear that the powers of the court cannot be ousted merely by invoking the word "prerogative". The question is simply whether the nature and subject matter of the decision is amenable to the judicial process. Are the courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they are ill equipped to do so? Looked at in this way there must be cases in which the exercise of the Royal prerogative is reviewable in our judgment. If, for example, it was clear that the Home Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and in our judgment would be entitled to do so.

We conclude therefore that some aspects of the exercise of the Royal prerogative are amenable to the judicial process. We do not think that it is necessary for us to say more than this in the instant case. It will be for other courts to decide on a case by case basis whether the aspect in question is reviewable or not.

We do not think that we are precluded from reaching this conclusion by authority. Lord Roskill's passing reference to the prerogative of mercy in CCSU was obiter. Hanratty and DeFreitas were decided before CCSU and neither concerned judicial review of an error of law.

But is the exercise of the prerogative reviewable in the instant case? As originally framed, the

applicant sought to attack the Home Secretary's application of long standing Home Office policy that a Free Pardon would not be granted unless he was satisfied that the person concerned was both morally and technically innocent of the crime. That disclosed an error of law, so it was argued, since it misunderstood the nature and effect of a Free Pardon. If that had remained the basis of the Applicant's case we have considerable doubt as to whether the decision could have been reviewed on the basis contended for.

We think that Mr. Richards was probably right in submitting that the formulation of criteria for the exercise of the prerogative by the grant of a Free Pardon was entirely a matter of policy which is not justiciable.

However, as the argument before us developed it became clear that the substance of the applicant's case was that the Home Secretary failed to recognise the fact that the prerogative of mercy is capable of being exercised in many different circumstances and over a wide range and therefore failed to consider the form of pardon which might be appropriate to meet the facts of the present case. Such a failure is, we think, reviewable.

We turn, therefore, to the decision of the Home Secretary. In the concluding part of this decision, the Home Secretary explained the reasons why he had decided not to recommend a Free Pardon:

> "In the light of a very careful consideration of the evidence produced at the trial and of the representations which have since been made I have been unable to conclude that Bentley was either technically or morally innocent, and consequently it would not be

right for me to recommend that he should be pardoned. In my view, Bentley was properly found guilty of murder and, in my opinion, that is the relevant consideration as far as a Free Pardon is concerned in this case.

It has been suggested that Bentley should receive a Free Pardon not because he was innocent but because it was in some way wrong that he was not reprieved. The law relating to murder at the time of his trial required that a person over the age of l8 who was convicted of murder should be sentenced to death. Bentley was properly sentenced in accordance with the requirement of the law. It was the duty of the Home Secretary of the day to decide in each case whether to leave the law to take its course, or whether to recommend a reprieve. The decision rested solely with the judgement of the Home Secretary.

It is clear that, in reaching his decision, the then Home Secretary carefully considered what he believed to be all the relevant considerations as well as the representations made to him. With the passage of time attitudes and values may change. Parliament has, of course, since changed the law to abolish capital punishment for murder. While I recognise that I am putting myself in the position of a predecessor working in a different climate of opinion, I do not believe that I would have reached the same decision as the then Home Secretary. But none of this provides sufficient reason to set up a public inquiry or recommend a posthumous Free Pardon in order to be disassociated from a decision with which many people might now disagree."

In an earlier part of the announcement of the decision, the Home Secretary, it will be recalled, stated that while he personally agreed that Derek Bentley should not have been hanged, he could not simply substitute his judgment for that of the then Home Secretary, Sir David Maxwell Fyfe.

We understand the strength of the argument that, despite the fact that a Free Pardon does not eliminate the conviction, the grant of a Free Pardon should be reserved for cases where it can be established that the convicted person was morally and technically innocent. Furthermore, the policy of confining the grant of a Free Pardon to such cases has been followed by successive Secretaries of State for over a century.

We therefore propose to set aside any question of a

Free (or full) Pardon and look at the matter afresh.

The facts as disclosed by the contemporary papers are very striking:

(l) Christopher Craig, who fired the fatal shot, was not executed.

(2) The jury recommended mercy in the case of Derek Bentley.

(3) Both Mr. Philip Allen, who wrote the memorandum dated l6 January l953, and Sir Frank Newsam, the Permanent Secretary, advised that effect should be given to the jury's recommendation for mercy.

(4) The precedents established by the previous cases to which Mr. Allen drew attention supported the argument for a reprieve.

(5) Tests which had been carried out indicated that Bentley's mental state was "just above the level of a feeble minded person". He was aged nineteen.

(6) It seems clear from the memorandum initialled by the Secretary of State dated 22 January l953 that he consulted Lord Goddard, the trial judge, before making his final decision. It will be remembered that in his letter to the Secretary of State dated l2 December l952 Lord Goddard had said that he could find "no mitigating circumstances in Bentley's case".

It is clear from the affidavit of Mr. Wilson that one of the ways in which the prerogative of mercy can be exercised is by the grant of a conditional pardon, whereby the penalty is removed on condition that a lesser sentence is served. Had Bentley been reprieved in l953, the substitution of a sentence of life

imprisonment would have constituted a conditional pardon.

These questions, therefore, arise

(a) is there any objection in principle to the grant of a posthumous conditional pardon?

(b) was the Home Secretary in error in failing to consider the grant of a conditional pardon in this case?

On the first question it may be objected that a conditional pardon is inappropriate where the full penalty has already been paid. The answer to this objection, however, is that it is an error to regard the prerogative of mercy as a prerogative right which is only exercisable in cases which fall into specific categories. The prerogative is a flexible power and its exercise can and should be adapted to meet the circumstances of the particular case. We would adopt the language used by the Court of Appeal in New Zealand in Burt v. Governor General (supra):

> "The prerogative of mercy can no longer be regarded as no more than an arbitrary monarchical right of grace and favour".

It is now a constitutional safeguard against mistakes. It follows, therefore, that, in our view, there is no objection in principle to the grant of a posthumous conditional pardon where a death sentence has already been carried out. The grant of such a pardon is a recognition by the state that a mistake was made and that a reprieve should have been granted.

We return to the facts of the present case. We can well understand the decision of the Home Secretary in so far as it constituted a response to a Free (or full)

Pardon. But we are far from satisfied that he gave sufficient consideration to his power to grant some other form of pardon which would be suitable to the circumstances of the particular case. It is true, as the Home Secretary pointed out in the announcement of his decision, that in l953 the then Home Secretary was working in a different climate of opinion. But, as we have already underlined, the facts of this case are very striking. There is a compelling argument that even by the standards of l953 the then Home Secretary's decision was clearly wrong.

In these circumstances the court, though it has no power to direct the way in which the prerogative of mercy should be exercised, has some role to play. The Home Secretary's decision was directed to the grant of a Free Pardon. In these circumstances we do not think it would be right to make any formal order nor is this an appropriate case for the grant of a Declaration. Nevertheless, we would invite the Home Secretary to look at the matter again and to examine whether it would be just to exercise the prerogative of mercy in such a way as to give full recognition to the now generally accepted view that this young man should have been reprieved.

It was submitted to the court that even a limited form of pardon might lead to a flood of other applications seeking to re-open past convictions. No doubt account has to be taken of such a risk. From our examination of the papers in this case, however, and in the light of our understanding of the broad scope of the

prerogative of mercy, we are satisfied that the matter is exceptional and requires further consideration. The decision is, of course, one for the Home Secretary and not for the court, but it seems to us that it should be possible to devise some formula which would amount to a clear acknowledgement that an injustice was done.

MR PANNICK: Can I thank your Lordships on behalf of Miss Bentley for that judgment. Would your Lordships then order the Secretary of State to pay the costs of this application?

LORD JUSTICE WATKINS: Mr Richards?

MR RICHARDS: My Lords, in the light of your Lordships judgment, the matter will now be called to be considered further by the Home Secretary. Since your Lordships are making no order in this application it would, in my submission, be the appropriate course if there were no order as to costs.

LORD JUSTICE WATKINS: Mr Pannick, are you legally aided?

MR PANNICK: My Lord, we are legally aided. It is a matter of whether or not the Legal Aid Fund ought to bear the costs of this application. Although your Lordships are making no formal order you have clearly accepted our submissions to a reviewability of this decision and your Lordships have expressed strong views as to the need for the Secretary of State to consider the matter again. In those circumstances, I would submit costs must follow.

LORD JUSTICE WATKINS: Mr Pannick, the decision we will make is no order as to costs and legal taxation.

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