

Section 3(1) of the Human Rights Act 1998

FRANCIS BENNION*

The Government has announced that the main provisions of the Human Rights Act 1998 are to be brought into force on October 2 2000. They include the crucial s. 3(1) of the Act, which states: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". Not surprisingly, since it is not yet in force, there is no judicial authority on the legal meaning of s. 3(1) though it is significant that in a recent case Lord Cooke of Thornden said that it is "a key element in the Act" and "a strong adjuration".¹

Section 3(1) resembles s. 6 of the New Zealand Bill of Rights Act 1960, which says that "wherever an enactment can be given a meaning that is consistent with [the Bill of Rights] that meaning shall be preferred to any other meaning". In both cases the test is what is "possible", what "can" be done. But those familiar with the way courts have handled statutory interpretation over the years know that almost anything is possible. Where can we find firm ground here? Pointing to that is the object of this article.

We must begin with the current rules of statutory interpretation as they apply to ordinary British legislation with no European connection. I have recently described these in a series of twelve articles in this journal entitled "Threading the Legislative Maze".² They are more fully described in my book *Statutory Interpretation*.³ They are largely based on the common law and comprise rules of interpretation, presumptions derived from the nature of legislation, principles of legal policy, and linguistic canons of construction. There are a large number of them, though only a few are likely to be relevant in any one case. Because these interpretative criteria are so numerous I decided in the 1999 Supplement to the book to christen the method of interpretation by which they are deployed the Global method, from the definition of global given in the OED, namely 'pertaining to or embracing the totality of a number of items, categories, etc; comprehensive, all-inclusive, unified; total'.⁴ Under the Global method what the court does (or should do) is consider the opposing constructions put forward by either side in the case, take an overall view of the interpretative criteria, weigh *all* the interpretative factors that are relevant to the enactment in question and arrive at a balanced conclusion.

The Developmental method

A European Community law may have direct effect in the United Kingdom or be transposed into specifically British legislation. Either way, it must be construed by our courts as it would be by the Court of Justice of the European Communities (CJEC). This court uses a method of construction which follows the Global method in some ways but differs from it in others. It differs in making very little use of the doctrine of precedent and in applying a much broader version of purposive construction. On the latter aspect, it applies teleological rather than

* MA (Oxon.), Barrister.

¹ *R v Director of Public Prosecutions, ex p Kebilene* [1999] 4 All ER 801 at 837.

² See volume 162 (1998) at pages 356, 436, 516, 596, 696, 856 and 995 and volume 163 (1999) at pages 264, 364, 484, 624 and 683. The articles are shortly to be republished in book form.

³ Third edition 1997, supplement 1999 (collectively referred to as 'S.I.' in following footnotes).

⁴ Oxford English Dictionary, second edition (1992).

historical methods and seeks to give effect to what it conceives to be the spirit rather than the letter of the relevant treaties, directives etc. It views the European Union as a living and expanding organism and the interpretation of Community law as changing to match its growth.⁵ “The interpretation of Community instruments involves very often not the process familiar to common lawyers of laboriously extracting the meaning from words used but the more creative process of supplying flesh to a spare and loosely constructed skeleton. The choice between alternative submissions may turn not on purely legal considerations, but on a broader view of what the orderly development of the Community requires.”⁶

The British doctrine of purposive construction, comprised within the Global method, is markedly more literalist than the European variety, but is increasingly obliged to give way to the European system. “The adoption of a construction which departs boldly from the ordinary meaning of the language of the statute is . . . particularly appropriate where the validity of legislation has to be tested against the provisions of European law. In that context it is proper to give effect to the design and purpose behind the legislation, and to give weight to the spirit rather than the letter”.⁷

I call the CJEC method Developmental construction because in advancing the “spirit” of a legislative text at the expense of the text it is always aiming to develop the effectiveness of the EU.⁸ Thus we now have operating, in relation to different items of legislation having effect within the United Kingdom, two distinct methods of statutory interpretation: the Global method and the Developmental method. Does s. 3(1) of the Human Rights Act 1998 provide us with a third method?

Strained construction

In my series of articles “Threading the Legislative Maze” I showed that where, on the facts of the instant case and taken by itself, an enactment has a clear grammatical meaning, it is a strained construction to give it a different meaning. Where an enactment has two or more grammatical meanings (or in other words is ambiguous) it is a strained construction to give it a meaning other than one of the grammatical meanings. Where an enactment is semantically obscure, it is a strained construction to give it a meaning other than the grammatical meaning, or (in case of ambiguity) one of the grammatical meanings, of the corrected version. This can be summed up by saying that a strained meaning of an enactment is any meaning other than its literal meaning.⁹

It may be found necessary on balance to apply a strained construction where the interpretative factors favouring the opposing constructions in a particular case have been ascertained and weighed. Judges do not like to admit they are doing this because it may appear that they are trespassing on the legislator’s function. Yet in a wide variety of cases such stretching of the legislative language is found to be necessary in order to give effect to the intention of Parliament. Strained construction plays an important part in the Global method of statutory interpretation. As pointed out above, it is even more widely applied in the Developmental method. It is also required by s. 3(1) of the Human Rights Act 1998.

What s. 3(1) requires

⁵ See *Henn and Darby v. D.P.P.* [1981] A.C. 850, *per* Lord Diplock at 905.

⁶ *Customs and Excise Comrs v ApS Samex* [1983] 1 All E.R. 1042, *per* Bingham J. at 1056.

⁷ *Cutter v. Eagle Star Insurance Co Ltd* [1998] 4 All E.R. 417, *per* Lord Clyde at 426.

⁸ Similarly the term ‘dynamic or evolutive interpretation’ has been used in relation to the Convention: see D. J. Harris, M. O’Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995) p.7.

⁹ See the third article (volume 162 (1998) at page 516). Strained construction is also fully explained in S.I. s. 157.

Section 3(1) contemplates two kinds of interpretation: a construction of the Convention right in question and a construction of the enactment being tested by reference to that Convention right. In determining the ambit of a Convention right a court must take into account relevant decisions of the European Court of Human Rights and the European Commission of Human Rights.¹⁰ It is also necessary to bear in mind the margin of appreciation afforded to individual countries.¹¹ Subject to this, it would for obvious reasons be incorrect for a UK court to arrive at a legal meaning of a Convention right other than that likely to be found by the European Court of Human Rights. The right of petition to the European Court will remain fully operative after October 2 2000. It would be highly undesirable if litigants who had failed before the UK court felt it worth while to try their luck with a second bite of the cherry at Strasbourg.

Dr. Geoffrey Marshall has suggested that the two concepts in s. 3(1), “read and given effect”, may each produce different outcomes, so that an enactment may be “read” in one way but “given effect” in another.¹² I do not believe this to be the case. To read an enactment in a particular way is to give it that legal meaning. If the court’s “reading” of an enactment is that the legal meaning is M then the court must “give effect” to M. Nothing should be read into the use by the drafter of two terms where one would have sufficed.¹³ Section 3(1) speaks of compatibility between UK legislation and the Convention rights. Here we must appreciate that a Convention right may be absolute or qualified, and the two types need different handling.

Dr. Marshall called s. 3(1) a “a deeply mysterious provision”.¹⁴ I agree with the criticism implied by that description. What s. 3(1) lays down should have been made much clearer. There should indeed be no need for articles of this sort. Its legislative history has been set out by Francesca Klug.¹⁵ I need not repeat it here. It shows that there was much vagueness and confusion in the minds of the Act’s promoters about the intended meaning of s. 3(1). This renders the legislative history largely useless, because it is inconsistent and one can “prove” almost anything by it. In his Tom Sargent Memorial Lecture on 16 December 1997¹⁶ Lord Irvine of Lairg L.C. said that in applying s. 3(1) the courts must strike a balance, going neither too far nor not far enough. Elsewhere he said “the courts will be required to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so”.¹⁷ He added that our courts may interpret Community law by “straining the meaning of words or reading in words which are not there” and that this “shows the strong interpretative techniques that can be expected in Convention cases”. All that suggests s. 3(1) may require the Developmental method to be used. However remarks by the

¹⁰ Human Rights Act 1998 s. 2.

¹¹ This allows a state “a certain measure of discretion, subject to European supervision, when it takes legislative, administrative or judicial action in the area of a Convention right”: see the work cited in n. 8 above at p. 12 and the detailed exposition at pp. 12-15. See also *R v Director of Public Prosecutions, ex p. Kebilene and others* [1999] 4 All ER 801, per Lord Hope of Graighead at 843-844 and David Pannick, “Principles of Interpretation of Convention rights under the Human Rights Act and the discretionary area of judgment” [1998] *Public Law*, p. 545 at pp. 548-551.

¹² Geoffrey Marshall, ‘Two kinds of compatibility: more about section 3 of the Human Rights Act 1998’ [1999] *Public Law* 377.

¹³ It is explained in the eighth article in my series: see volume 163 (1999) at page 264.

¹⁴ ‘Interpreting interpretation in the Human Rights Bill’ [1998] *Public Law* 167.

¹⁵ ‘The Human Rights Act 1998, *Pepper v. Hart* and All That’ [1999] *Public Law* 246 at 252-255.

¹⁶ This is so far unpublished except on the Internet, though parts of it were quoted in debates on the Bill for the 1998 Act: see the article cited in the previous footnote at p. 254. See also the article cited in the next footnote.

¹⁷ ‘The Development of Human Rights in Britain under an Incorporated Convention on Human Rights’ [1998] *Public Law* p. 221 at p. 228.

Lord Chancellor in articles and lectures, though worthy of great respect, cannot be regarded as altogether authoritative.

In drafting s. 3(1) it seems there was a failure to understand the current British method of statutory interpretation, which I call the Global method. Its wording overlooks the crucial fact that the Global method requires a two-stage approach.¹⁸ It is not a matter of deciding at first sight whether words are ambiguous or obscure, and if so going on to decide what they mean. The true rule is that there are two stages. It must first be decided, on an informed basis¹⁹, whether or not there is a real doubt about the legal meaning of the enactment. Then, if there is, the interpreter moves on to the second stage, which is resolving the doubt. As Lord Upjohn said in a vital dictum, “you must look at all the admissible surrounding circumstances before starting to construe the Act”.²⁰

When you do start to “construe the Act”, the basic rule of statutory construction must be applied. This is that it is taken to be the legislator’s intention that it shall be construed in accordance with the various general guides to legislative intention laid down by law; and that where these conflict the problem shall be resolved by weighing and balancing the interpretative factors concerned.²¹ Section 3(1) now provides an addition to these general guides. What its drafter should have done was to say that the general guides are in future to be taken to include the strong principle that it is highly desirable that legislation should be taken to conform to the Convention (while Parliament of course reserves the right expressly to provide in a special case that it intends to depart from it).

I suggest that that is what Parliament must be taken as really intending by s. 3(1). I also submit that the provision should be applied using the Developmental method. The CJEC uses that method when taking notice of the Convention, and consistency here is essential. This means that in applying s. 3(1) the machinery of the Global method should in general be used, except that where it differs from the Developmental method the latter should be followed. To this a further factor must be added, namely that our courts may be expected to apply the principle, hitherto only used by the Judicial Committee of the Privy Council in relation to Commonwealth bill of rights provisions, that a generous and purposive construction is to be given to that part of a constitution which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled.²²

This new interpretative principle cancels all previous authority. No pre-1998 Act precedent on the legal meaning of an enactment to which a Convention right is relevant can now stand. Even though it truly reflected the intention Parliament had when passing the enactment, the decision needs to be looked at again in the light of s. 3(1). Parliament’s original intention is no longer the sole deciding factor. While it retains its importance, it must now be reassessed in the light of the new rule. For pre-1998 Act enactments the interpretative criteria can therefore be ultimately reduced to “legislative intention plus s. 3(1)”. This reopening will not apply to post-1998 Act enactments, for here Parliament in forming its intention must be taken to have s. 3(1) in mind and wish it to be taken into account (unless of course Parliament expresses a contrary intention).

1999.025 163 JP 984

¹⁸ See S.I. s. 204. The same applies to the Developmental method.

¹⁹ For the informed interpretation rule see S.I. Part XIII.

²⁰ *R. v. Schildkamp* [1971] AC 1 at 23. The two-stage approach is fully explained in S.I. s. 204.

²¹ See S.I. s. 193.

²² *R v Director of Public Prosecutions, ex p. Kebilene and others* [1999] 4 All ER 801, per Lord Hope of Craighead at 838-839.