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## *Olla Podrida*

FRANCIS BENNION presents an occasional medley of legal snippets

### **MPs' Expenses and a Constitutional Outrage**

The long-running saga of MPs' expenses has taken another turn. Now the press is complaining about a process many people seem not to have heard of, *redaction*. Those who follow my writings will not have been surprised, because I used the term in a recent article.<sup>1</sup> It is more or less equivalent to editing.

Uproar was caused when around 16 June 2009 details of MPs' expense allowances for a recent period were published officially with large areas blacked out or redacted. This redaction was authorised by a 2008 order made which amended the Freedom of Information Act 2000.<sup>2</sup> The official explanatory note said that the order excluded from the Act information as to any residential address of an MP, or as to forthcoming or regular travel arrangements for MPs, or as to the identity of any person who delivers good or provides services to MPs' addresses. The sole justification given was that without the amendment MPs' ability to speak freely would be inhibited for security reasons.

Earlier the House of Commons Commission had unsuccessfully appealed to the High Court against an Information Tribunal ruling demanding inclusion of MPs' addresses when expenses information was published. The order amending the 2000 Act was made in defiance of the view of the High Court.<sup>3</sup>

For what amounts to an executive order to amend an Act of Parliament in this way is a growing constitutional outrage. It is convenient for the executive but inimical to the dignity of Parliament. It also, as here, allows the executive to override a decision of the court. What has become of the separation of powers?

### **Not Always Observed**

To find out the legal rule or rules laid down or followed in a judicial decision we are supposed to look at what is called the *ratio decidendi* or reason of the decision. The law would be simplified if judges took more care to ensure that this is clearly set out in their judgments. Lord Bingham of Cornhill said:

'First, whatever the diversity of opinion the judges should recognise a duty, not always observed, to try to ensure that there is a clear majority ratio. Without that, no one can know what the law is . . .'<sup>4</sup>

Where it involves the legal meaning of an enactment it would be best if the judge used the method known as interstitial articulation.<sup>5</sup>

<sup>1</sup> 'Complex Legislation: Is Redaction the Answer', 18 *Commonwealth Law Journal* (April 2009), p. 23, [www.francisbennion.com/2009/011.htm](http://www.francisbennion.com/2009/011.htm).

<sup>2</sup> Freedom of Information (Parliament and National Assembly for Wales) Order 2008 (SI 2009 No. 1967).

<sup>3</sup> *Daily Telegraph*, June 20, 2009.

<sup>4</sup> 'The Rule of Law', Sixth Sir David Williams Lecture, 2006.

<sup>5</sup> See *Bennion on Statutory Interpretation* (5<sup>th</sup> edn, 2008), s. 179.

In this connection it would also be of great advantage if, where the court consisted of two or more judges, they combined their efforts so as to produce a single agreed judgment. As Dr Roderick Munday says (though I am not sure that he entirely believes it):

‘ . . . a well-crafted unitary judgment can promote a degree of legal clarity, enabling successor courts – and, indeed, the profession at large – to comprehend the courts’ statement of law more readily . . . if one seeks after an intelligible layman’s law, composite judgments can make the law more accessible to its subjects, who have to comply with it.’<sup>6</sup>

If in a rare case any judge was unable to concur in a draft judgment of the court the answer would be a dissent (whether reasoned or not). This would tend to reduce the authority of the single judgment, but that is a price worth paying.

Where a multi-judge court produces individual reasoned judgments, as is commonly the case with the Appellate Committee of the House of Lords, it is almost impossible for the reader to work out the *ratio decidendi* of the decision. This is an unnecessary flaw in our jurisprudence, and should be remedied without delay.<sup>7</sup>

It is particularly troublesome where Judges in a multi-Judge court differ among themselves on what the *ratio decidendi* is. This happened for example with the 2008 House of Lords decision in *R (on the application of Bapio Action Ltd & Anor) v Secretary of State for the Home Department & Anor*.<sup>8</sup> Two of their Lordships decided the case on the ground that guidance given by the Secretary of State

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was not in accordance with the relevant law. Another two chose as their ground the fact that relevant persons had been deprived by the guidance of a legitimate expectation. The fifth dissented, on grounds that are not entirely clear.

Another, comparatively minor, blemish on our highest court is occasional carelessness and sloppiness in the wording of opinions. An editorial in the *Statute Law Review*<sup>9</sup> complains of this in relation to the 2008 decision in *Spencer-Franks v Kellogg Brown and Root Limited and others*.<sup>10</sup> UKHL 46.] There were five Law Lords and each delivered his own reasoned opinion. The case concerned the Provision and Use of Work Equipment Regulations 1998.<sup>11</sup> Lord Hoffmann called them for short ‘the equipment regulations’. The short name given by Lord Rodger of Earlsferry and Lord Mance was ‘the 1998 Regulations’. Lord Carswell chose ‘PUWER 1998’ as a short name. Lord Neuberger did not allocate any short name but called them ‘the 1998 Regulations’ anyway.

This complaint may appear trivial, but such irrational variations add to the already manifold difficulties of statute users. It is not too much to ask that they be ironed out, and consistency produced, before judgments are permitted to see the light of day.

In his complaint the editor of the *Statute Law Review* produced another oddity from the same case. Lord Carswell says<sup>12</sup> ‘As my noble and learned friend Lord Rodger of Earlsferry has pointed out in paragraph 6 of his opinion . . .’ But there is no paragraph 6 of the said opinion, which begins at paragraph 30. Not really good enough.

## **Logic and Human Rights**

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<sup>6</sup> ‘Suppressing Dissent’ 173 JPN (December 20/27 2008) 830 at 832.

<sup>7</sup> According to Dr Munday (*op. cit.*) it is well on the way to being remedied.

<sup>8</sup> [2008

<sup>9</sup> 29(3) *Statute Law Review* (2008) pp. iii, iv.

<sup>10</sup> [2008] UKHL 27.

<sup>11</sup> SI 1998/2306.

<sup>12</sup> Paragraph 68.

The law is reason, free from passion, said Aristotle. Reason proceeds by logic. Logic says either the European Convention on Human Rights ('the Convention') applies in a country or it does not. If it does apply in country A, says logic, the people of A are entitled to its benefits. Equally, if the Convention does not apply in country B the people of B are not so entitled. So far, so straightforward.

If X and Y, persons of country B, come to country A, have no other right to remain there, and are to be deported to country B, can they claim under the Convention to remain in A? This conundrum arose in a 2008 case ('the Lebanon Case').<sup>13</sup> UKHL 64.] Country A was the United Kingdom and country B was Lebanon, in which Sharia law is in force. The two people concerned were the appellant EM, a mother married in Lebanon under Sharia law and AF, her son of 12. Lord Hope of Craighead said:

' . . . Sharia law as it is applied in Lebanon was created by and for men in a male dominated society. The place of the mother in the life of a child under that system is quite different from that which is guaranteed in the contracting states by article 8 of the Convention read in conjunction with article 14. There is no place in it for equal rights between men and women. It is . . . the product of a religious and cultural tradition that is respected and observed throughout much of the world. But by our standards the system is arbitrary because the law permits of no exceptions to its application, however strong the objections may be on the facts of any given case. It is discriminatory too because it denies women custody of their children after they have reached the age of custodial transfer [seven years] simply because they are women. That is why the appellant removed her child from that system of law and sought protection against its effects in this country.'<sup>14</sup>

It might be thought that in logic the question was whether or not EM and AF, being physically located in a Convention country even though belonging to a non-Convention country, should be treated as persons to whom the Convention in all its fullness applied. Many British people might out of humanity prefer that they should. But there are dicta in other cases saying things like:

' . . . article 3 does not place an obligation on the contracting state to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the contracting states.'<sup>15</sup>

' . . . on a purely pragmatic basis, it cannot be required that an expelling contracting state only return an alien to a country which is in full and effective enforcement of all the rights and freedoms set out in the Convention.'<sup>16</sup>

Such thinking as that might lead us to suppose that EM and AF would be held to be altogether outside the Convention. Logically it must surely be either one thing or the other.

But our laws do not work logically, and that is why they are so unbearably complicated. In the Lebanon Case the House of Lords, reversing the Court of Appeal, held that the Convention does apply in such cases *but in a very watered-down, weakened way*. Logic did not enter into it.

### **The Problem of Plagiarism**

Plagiarism by students is a constant source of worry to law school authorities. Recently I received some notes on this from my friend Jeffrey Barnes, Senior Lecturer and Director of Teaching and Learning at the School of Law, La Trobe University Australia. He asked for my comments. What should I say?

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<sup>13</sup> *EM (Lebanon) v Secretary of State for the Home Department* [2008

<sup>14</sup> Lebanon Case, para. 6.

<sup>15</sup> See Lebanon Case, para. 9.

<sup>16</sup> See Lebanon Case, para. 11.

It is a complicated subject. The body of learning attached to any scholarly topic is like an old garden. Its soil is a mixture bearing traces of human activity going back many years. Most of this is now anonymous and untraceable. Some names are still remembered; most are lost. A new student is planted in this academic soil. Ultimately it is hoped he or she will add a portion of humus to it. In Charles Darwin's book *Earthworms* he said: 'Year after year the thrown-up castings

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cover the dead leaves, the result being a rich humus of great thickness'. So scholars are like Darwin's earthworms. It is a suitably humbling analogy.

In examinations students are mostly expected to produce samples from the academic soil rather than original work of their own, though they will try to express them in an original fashion. If in the course of this they repeat, verbatim and without acknowledging the author, formulations they have memorized they are not to be blamed. They may be remembering the words but not their origin. Or they may feel uncertain of the origin. Or of course they may remember the origin perfectly well but suppress it. Who is to tell?

It is different when in course work students pass off an extended passage as their own when it is copied word for word from elsewhere. That indeed should be treated as punishable plagiarism. Short of it, the student should be given the benefit of the doubt. Student life is stressful enough.

The above was written before I read Jeffrey's notes. He usefully adds that universities should 'draw a clear line in misconduct law and policy between forms of cheating and dishonesty on the one hand, and conduct which is poor scholarship on the other'. Also he includes the following quotation:

'... the depiction of plagiarism as a moral issue can actually encourage plagiarism. Within the humanities plagiarism often happens when students, faced with the fear that they haven't provided enough of their 'own ideas', try to play down the extent to which their essays derive from borrowed material. More often than not, what's really expected of these students is some demonstration of an ability to sift through a body of published ideas and to piece together a selection of discussions and arguments relevant to the topic, with the aim of reaching a conclusion of some kind.'<sup>17</sup>

Jeffrey's notes do not include a reference to computer systems for detecting plagiarism, though he may want to add this. A useful website giving many arguments and sources is at <http://cyberdash.com/plagiarism-detection-software-issues-gvsu>.

### **An Etonian Triumvirate**

Following the election of Boris Johnson as Conservative Mayor of London from 5 May 2009, there is now an Etonian triumvirate embracing Johnson, David Cameron (leader of the Conservative Opposition) and George Osborne (Shadow Chancellor of the Exchequer). Some jeer at this expensively-educated trio as 'salesmen'. What is it that Eton College really gives its pupils? In pursuit of the answer I picked up *The Oppidan*, a novel by Sir Shane Leslie which I have owned for years and not found myself able to read. I noted that the dedication was

TO E. S. P. HAYNES

AN OPPIDAN TO A COLLEGER

The subject of this dedication, who died in 1949, was a family solicitor with an office in Lincoln's Inn. I picked up his book *The Lawyer*<sup>18</sup> which again I have owned for years and not

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<sup>17</sup> Robert Briggs, 'Shameless! Reconceiving the Problem of Plagiarism' (2003) 46(1) *Australian Universities' Review* 19 at 21.

<sup>18</sup> E. S. P. Haynes, *The Lawyer: A Conversation Piece* (London, Eyre & Spottiswoode) 1951.

found myself able to read. It is a book of reminiscences. I began to read it at last, quickly discovering that it bears the Etonian stamp. Perhaps, I thought, this book will give me what I am looking for. Having now finished it, I feel moved to share with readers some random gleanings.

Haynes's tutor as a Colleger at Eton was the famous Henry Elford Luxmoore, and they kept in touch later. I struck gold at once. Haynes says that Luxmoore was a disciplinarian in the best sense. He preserved discipline while discussing everything with his pupils on a footing of intellectual equality. 'His disapproval was quite as polite when I was fifteen', says Haynes, 'as when I was forty-five'. Then comes the crucial passage. Haynes says:

'I cannot help feeling that this wonderful courtesy towards youth – and especially callow and self-confident youth – may have had much to do with Etonian success in public life . . . Looking back . . . on thirty years of studying various types of humanity, I have seen Etonians succeed where Balliol men have failed, and the success has been due to a quite genuine urbanity which has not ruffled any inferiority complex which might otherwise have come into play . . .'

Now I will mention another Eton luminary, Edmond Warre. He was Headmaster during Haynes's time as a pupil, and later Provost. I had a third unread Eton volume, the life of Edmond Warre by C. R. L. Fletcher.<sup>19</sup> I took it down.

Warre was a notable scholar, winning the Newcastle Scholarship as a boy at Eton and later a double First in Classics at Balliol. At the age of 23 he was summoned to return to Eton as a temporary master to deal with an emergency. A House whose Housemaster was stricken with a long illness had put in a substitute who failed to control the boys. In Fletcher's words, Warre was sent for to 'curb the unruly flock'. Fletcher goes on:

'He accepted, and within a week had restored order in a House which has been described as 'not far from pandemonium' when he took it over; and this was effected not by punishments but by his own force of character . . . culprits would say, 'It's a good deal worse to be *talked to* seriously by Warre than to be flogged by Hornby (James John Hornby, the then Headmaster); he doesn't get angry in the ordinary sense of the word, but he makes you feel such an infinitesimal worm.'<sup>20</sup>

I have a photograph of Warre as a young man at this time. He is truly of noble appearance.<sup>21</sup> One can well understand how the recalcitrant boys of 1860 were cowed by his force of character. I wonder if there is any young Englishman like this flourishing today – in Eton or elsewhere.

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<sup>19</sup> London: John Murray, 1922.

<sup>20</sup> *Op. cit.*, p. 45.

<sup>21</sup> See [www.francisbennion.com/pages/01/03/02/photos01.htm](http://www.francisbennion.com/pages/01/03/02/photos01.htm).