

# Clayton Comments

Richard Clayton QC

## STATUTORY CONSTRUCTION UNDER THE HUMAN RIGHTS ACT: A RADICAL DEPARTURE

Richard Clayton QC<sup>1</sup>

1. Statutory interpretation under the Human Rights Act is a critical means by which the Act gives effect to Convention rights. Section 3 of the Act provides:

‘So far as possible to do so, primary legislation and secondary legislation should be read and given effect in a way which is compatible with Convention rights.’

If such a construction is not possible, then the court has the power to grant a declaration of incompatibility under section 4.

2. The nature of the s 3 interpretative obligation has been vigorously debated. Some have argued that a s 3 interpretation is a radically different exercise from engaging conventional construction<sup>2</sup> whereas others suggest it should only be applied to ambiguous statutory provisions and be carefully tailored to the textual language of the statutory provision being examined.<sup>3</sup> As a result of the recent decision of the House of Lords in *Ghaidan v Godin-Mendoza*<sup>4</sup>, it seems that a more radical approach is appropriate.
3. Where a court is asked to construe legislation in accordance with section 3, it should proceed as follows:
  - It is necessary to identify with precision the particular statutory provision which is said to contravene Convention rights.<sup>5</sup>
  - The court should next ascertain whether, absent section 3, there is any breach of Convention rights.<sup>6</sup>
  - When the court comes to apply section 3, the touchstone is compatibility with Convention right
  - The principal focus is to identify possible meanings to be given to the legislation in question.
  - The court can interpret legislation under section 3 by “reading in” Convention rights (by implying words in a statute). For example, in *R v Offen*<sup>7</sup> the Court of Appeal

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<sup>2</sup> I take the view that the radical implications of s 3 are not sometimes appreciated: see R Clayton ‘The limits of what’s possible: statutory interpretation under the Human Rights Act’ [2002] EHRLR 559.

<sup>3</sup> See D Nicholl ‘Statutory interpretation and human rights after *Anderson*’ [2004] PL 274.

<sup>4</sup> [2004] 1 WLR 113.

<sup>5</sup> See *R v A (No 2)* [2002] 1 AC 45 per Lord Hope at 1582, 1583 para 110 and in *R v Lambert* [2002] AC 545 at 234 para 80; see also *In Re S (Care Order: Implementation of Care Plan) ibid* [2002] 2 AC 291 per Lord Nicholls at para 41.

<sup>6</sup> *Poplar Housing Association v Donoghue* [2002] QB 48 para 75.

<sup>7</sup> Above

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interpreted section 2 of the Criminal (Sentences) Act<sup>8</sup> to take a broad view of the meaning of “exceptional circumstances” in making the power to impose a life sentence following a conviction for a second serious offence compatible with the prohibition from inhuman and degrading treatment.

- The court can also interpret legislation by “reading down” (by applying a narrow interpretation in order to ensure that the legislation remains valid). Thus, the House of Lords in *R v Lambert*<sup>9</sup> construed a reverse onus provision in the Misuse of Drugs Act as imposing the evidential burden on the defendant.
- It is not possible under section 3 to interpret legislation compatibly if the construction conflicts with its express words. Thus, in *R(Anderson) v Secretary of State for the Home Department*<sup>10</sup> the House of Lords refused to give a s 3 interpretation which would override an express power on the Home Secretary to release a prisoner;<sup>11</sup> Lord Bingham said that to do so would not be judicial interpretation but judicial vandalism.
- It is also not possible under section 3 to interpret legislation compatibly if it conflicts with a statute by necessary implication. Thus, in *In Re S (Care Order: Implementation of Care Plan)*<sup>12</sup> the House of Lords examined the reinterpretation of the Children Act given by the Court of Appeal,<sup>13</sup> purportedly under section 3 of the Human Rights Act. The Court of Appeal had formulated a new procedure, requiring the local authority to notify the child’s guardian if a child failed to achieve a starred milestone within a reasonable time; and entitling the local authority or guardian to apply to the court for directions once it did so. Lord Nicholls<sup>14</sup> emphasised that where a court is being asked to give a meaning which is substantially different from an Act of Parliament, it is likely to have crossed the boundary line between interpretation and amendment. The Children Act had been reinterpreted contrary to one of its cardinal principles, that the courts had no power to intervene in the way local authorities carried out their responsibilities to children under care orders. The Court of Appeal had therefore attempted to construe section 3 beyond the implied limitations of the statutory scheme created by the Children Act.
- It is not possible to interpret a statutory provision so as fundamentally to alter the statutory scheme. Therefore, in *International Transport Roth v Secretary of State for the Home Department*<sup>15</sup> the court could not use s 3 to recreate a fixed penalty scheme so as to make it compatible with Article 6. As Simon Brown LJ observed,

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<sup>8</sup> Now s 109 of the Powers of Criminal Courts (Sentencing) Act 2000.

<sup>9</sup> Above

<sup>10</sup> [2003] 1 AC 837.

<sup>11</sup> Under s 29 of the Crime (Sentences) Act 1997.

<sup>12</sup> Above

<sup>13</sup> (2001) 2 FLR 582.

<sup>14</sup> Above at 731 para 40.

<sup>15</sup> [2003] QB 728.

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such a construction would be turning the legislative scheme inside out- something the court could not do.<sup>16</sup> Similarly, in *Bellinger v Bellinger*<sup>17</sup> recognition of a transsexual as a female for the purpose of marriage had very wide ramifications, raising issues not well suited for determination by court processes.

4. In *Ghaidan v Godin- Mendoza* the House of Lords significantly clarified the force to be given when construing legislation under s 3. Lord Nicholls emphasised that s 3 has an unusual and far-reaching character; it may require the court to depart from the unambiguous meaning that legislation would otherwise bear.<sup>18</sup> He said that the intention of Parliament in enacting s 3 was, to the extent bounded only by what is 'possible', a court can modify the meaning and hence the effect of primary and secondary legislation.<sup>19</sup>
5. Lord Steyn in *Ghaidan* looked at the use of declarations of incompatibility in practice compared to s 3 interpretations; in an Appendix to his opinion he showed that 10 declarations of incompatibility made by the courts, 5 other declarations overturned in an appeal and only 10 s 3 interpretation. He pointed out that s 3 is the principal remedial measure and that declarations were a measure of last resort so that the statistics showed that the law may have taken a wrong turn.<sup>20</sup>
6. Lord Steyn focused on two factors which are contributing to a misunderstanding of the Act. First, there is a constant refrain that judicial reading down or reading in flouts the will of Parliament as expressed in the statute under examination. But, as he observed, that question cannot sensibly be considered without giving full weight to the countervailing will of Parliament as expressed in the HRA.<sup>21</sup>
7. Secondly, Lord Steyn said there has been an excessive concentration on the linguistic features of the particular statute. He rejected a literalistic approach, emphasising a broad approach, concentrating amongst other things, in a purposive way on the importance of the fundamental right involved.<sup>22</sup> Lord Steyn then drew attention<sup>23</sup> to the European Community *Marleasing*<sup>24</sup> analogy and the strength of the interpretative obligation under EEC law.<sup>25</sup> He concluded by stressing that interpretation under s 3 is the prime remedial remedy and that resort to s 4 must be exceptional. In practical effect there is a strong rebuttable presumption in favour of an interpretation consistent with Convention rights.<sup>26</sup>
8. Lord Roger expressed similar views. He said that it was important to notice that s 3 required

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<sup>16</sup> Ibid, para 66.

<sup>17</sup> [2003] 2 AC 467.

<sup>18</sup> Ibid, para 30.

<sup>19</sup> Ibid, para 33.

<sup>20</sup> Ibid, para 39.

<sup>21</sup> Ibid, para 41

<sup>22</sup> Ibid, para 42.

<sup>23</sup> Ibid, para 45.

<sup>24</sup> [1990] ECRI-4135.

<sup>25</sup> Ibid, para 48 (discussing *Pickstone v Freemans* [1989] 1 AC 66 and *Litster v Forth Dry Docks*

[1990] 1 AC 546.

<sup>26</sup> Ibid, para 50.

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legislation to be 'read' and 'given effect' to Convention rights: creating two distinct but complementary obligations.<sup>27</sup> He too stressed that it was not the intention of those drafting s 3 to place those asserting Convention rights at the mercy of the linguistic choice of the individual who drafted the statutory provision; it required s 3 interpretation to concentrate on matters of substance, not matters of mere language.<sup>28</sup>

9. The decision in *Ghaidan* is one of the most important decisions yet made under the Human Rights Act. The House of Lords have concluded that statutory interpretation under the HRA is very different from ordinary principle of statutory construction.

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<sup>27</sup> Above para 107.

<sup>28</sup> Above, paras 123, 124.