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Statute Law

FRANCIS BENNION, MA (Oxon.)

Barrister, Research Associate of the University of Oxford Centre for Socio-Legal Studies, former UK Parliamentary Counsel and Lecturer and Tutor in Law at St Edmund Hall Oxford.
www.francisbennion.com

Introductory note

For the convenience of users this section of the Review conforms to the Code set out in the fourth edition (2002) of the author's textbook *Statutory Interpretation*. A reference to the relevant section of the Code is given after each heading in the notes below, where the book is referred to as 'Code'. This article has appeared each year since 1985, apart from the past two years. The author apologises for this break, which was due to circumstances beyond his control. The gap will be made up in the Supplement to the main work, which is due to be published in 2005.

Mandatory and directory requirements (Code s 10)

Jurisdiction (pp 36-37)

Where there is doubt about whether a court has jurisdiction it should decline to act: *Atkinson v Director of Public Prosecutions* [2004] EWHC 1457 (Admin), [2004] 3 All ER 971. In a criminal matter the proof of jurisdiction must satisfy the criminal standard; in a civil matter presumably the civil standard will suffice: see *Atkinson v Director of Public Prosecutions* [2004] EWHC 1457 (Admin), [2004] 3 All ER 971.

Administrative or executive agencies (Code s 15)

Government departments (pp 67-69)

The court will allow a Minister an opportunity to make submissions in a case about the construction of legislation where this affects a material aspect of that area of the public interest for which he is responsible: see *Evans v Amicus Healthcare Ltd and others* [2004] EWCA 727, [2004] 3 All ER 1025, at [42], [43].

The courts assert a jurisdiction to prevent abuse of executive power: see *R (on the application of Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, [2004] 3 All ER 65, at [8] (defendant brought into jurisdiction unlawfully).

Delegation of administrative powers: the Carltona principle (pp 70-71)

The *Carltona* principle is also known as the alter ego doctrine: *Evans v Amicus Healthcare Ltd and others* [2004] EWCA 727, [2004] 3 All ER 1025, at [43].

Courts and other adjudicating authorities (Code s 19)

Jurisdiction (pp 80-83)

If a tribunal considers that a certain order should be made, and has power to make the order, it should not delegate the making of it to an administrative body such as the Law Society: *R (on the application of Camacho) v Law Society* [2004] EWHC 1675 (Admin), [2004] 4 All ER 126. It is not a justification for such purported delegation that it would save money: ‘We do not consider the resource implications can be material . . . if justice and the public interest require conditions to be imposed for an indefinite period . . . then the Law Society must find the resources necessary to keep open the relevant files’ (see [19]).

Ouster of jurisdiction (pp 83-85)

Where a decision is described in an enactment as ‘final’ it should be so treated unless the circumstances are exceptional: *R (on the application of G) v Immigration Appeal Tribunal, R (on the application of M) v Immigration Appeal Tribunal* [2004] EWHC 588 (Admin), [2004] 3 All ER 286 (statutory review under Nationality, Immigration and Asylum Act 2002 s 101(2)).

Open court principle (pp 90-92)

‘The concept of a secret judgment is one which I believe to be inherently abhorrent’: Jacob J in *Forbes v Smith* [1998] 1 All ER 973 at 974.

‘It is considered highly desirable that appellate proceedings wherever possible should be in open court, and the judgment which is given should be available to the public and the profession through the normal court reporting procedures’: *Re R (Court of Appeal: order against identification)* [1999] 3 FCR 213, cited *Pelling v Bruce-Williams* [2004] EWCA Civ 845, [2004] 3 All ER 875, at [44].

Inherent jurisdiction Since the coming into force of the Human Rights Act 1998 the inherent jurisdiction to restrain publication is less relevant: see *Re S (a child) (identification: restriction on publication)* [2004] UKHL 47, [2004] 4 All ER 683, at [22], [23].

Children The court’s power to impose restrictions has two foundations in law: inherent jurisdiction and the Children and Young Persons Act 1933 s 39: *Pelling v Bruce-Williams* [2004] EWCA Civ 845, [2004] 3 All ER 875, at [53] (on s 39 see Example 285.3). See also Children Act 1989 s 97(2) and Family Proceedings Rules 1991, SI 1991/1247 rr 4.16(7), 4.23(1), 10.20(3). In the case of children, judges should be aware that ‘there is such a strong inherited convention of privacy that the judicial mind is almost never directed to the discretion [to lift the veil of privacy]’: *Pelling v Bruce-Williams* [2004] EWCA Civ 845, [2004] 3 All ER 875, at [55]. This particularly applies now that the tradition of private hearings for children ‘has been franked by the European Court as convention compliant’: *Pelling v Bruce-Williams* [2004] EWCA Civ 845, [2004] 3 All ER 875, at [58].

Arbitration In *Department of Economic Policy and Development of the City of Moscow and another v Bankers Trust Co and another* [2004] EWCA Civ 314, [2004] 4 All ER 746, it was held that, although English arbitration is popular because it affords privacy and confidentiality (see [2]) and there has been a move to greater privacy in the hearing of arbitration applications since rule changes made in the light of the Arbitration Act 1996 (see [28]), the public interest in ensuring fairness in the conduct of arbitrations militates in favour of a public judgment under s 68 of that Act. This also complies with the requirements of art 6(1) of the human rights convention (see [27] and Code s 444).

Interpretation by adjudicating authorities (Code s 20)

Nature of discretion (pp 96-97)

Courts are frequently called on to exercise discretion, for example in relation to judicial review (see *R (on the application of G) v Immigration Appeal Tribunal*, *R (on the application of M) v Immigration Appeal Tribunal* [2004] EWHC 588 (Admin), [2004] 3 All ER 286, at [10]).

Discretion confused with judgment (pp 97-98)

The importance of correctly distinguishing between judgment and discretion is illustrated by *Campbell and others v South Northamptonshire District Council and another* [2004] EWCA Civ 409, [2004] 3 All ER 387, where it was held that if a certain decision was a matter of discretion it must be taken in accordance with the European Convention on Human Rights, whereas if it was a pure question of fact requiring judgment this would not be so (see [60]). This shows that Ward LJ was wrong to call the distinction between judgment and discretion 'pedantic' (see *Drury v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 200, [2004] 2 All ER 1056, at [44]).

Doctrine of judicial notice (Code s 21)

Judicial notice of fact (pp 103-104)

In *Adams v Bracknell Forest Borough Council* [2004] UKHL 29, [2004] 3 All ER 897, the court took judicial notice of 'the generally inhibiting effect of untreated dyslexia' (see [50]).

Judicial review (Code s 24)

Public law (pp 119-120)

A body is not necessarily subject to public law because it is regulated by private Act of Parliament: *R (on the application of West) v Lloyd's of London* [2004] EWCA Civ 506, [2004] 3 All ER 251, at [30]. Another countervailing factor is that a statutory supervisory body such as the Financial Services Authority operates in the field (see [7]).

Overriding effect of an Act (Code s 32)

Modification of common law rules

As to the implied effect of introducing a statutory scheme on the common law rules subsisting in the area concerned see *Eastwood and another v Magnox Electric plc* [2004] UKHL 35, [2004] 3 All ER 991, (effect of Industrial Relations Act 1971 (see now Employment Rights Act 1996 Part X) on future development of common law rules relating to unfair dismissal).

Delegated legislation: general interpretative principles (Code s 60)

Explanatory notes (p 218)

The court referred to an explanatory note in *R (on the application of the Confederation of Passenger Transport UK) v Humber Bridge Board and another* [2003] EWCA Civ 842, [2004] 4 All ER 533, at [19], [49]. They also referred to an inspector's decision letter (see [26]).

Amendment by delegated legislation (Code s 81)

An example of a power to repeal an enactment by delegated legislation is the Nationality, Immigration and Asylum Act 2002 s 101(4) (repeal by order of Lord Chancellor).

Basic rule as to extent of an Act (Code s 102)

The Strasbourg jurisprudence has developed an exception to the principle of territoriality, which may conveniently be described as giving indirect effect to the European Convention on Human Rights as applied by the Human Rights Act 1998: *Government of the United States of America v Montgomery (No 2)* [2004] UKHL 37, [2004] 4 All ER 289, at [22].

Selective comminution (Code s 139)

For an example of selective comminution by a judge see *Wright v Redrow Homes (Yorkshire) Ltd, Roberts and others v Redrow Homes (North West) Ltd* [2004] EWCA Civ 469, [2004] 3 All ER 98, at [30] (meaning of ‘worker’ in Working Time Regulations 1998, SI 1998/1833 reg 2(1)).

Legislative intention as the paramount criterion (Code s 163)

Introductory (pp 405-406)

What the legislator writes ideally passes directly to the reader’s brain by intuition (defined by the Oxford English Dictionary (2nd edn 1992) as ‘by immediate perception or direct mental apprehension; without the aid of intermediate ideas’). Thus Evans-Lombe J rejected a construction suggested by counsel on the ground that it was ‘counter-intuitive’ (*Todd and another v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 1450 (Admin), [2004] 4 All ER 497, at [51]). Sedley LJ relied on a different part of the anatomy in *A v Head Teacher and Governors of Lord Grey School* [2004] EWCA Civ 382, [2004] 4 All ER 628, at [38] when he confessed to a ‘visceral unease’ as to the meaning of a passage.

When implications are legitimate (Code s 174)

When an implication is ‘proper’

‘. . . it is a legitimate and proportionate reading of any statutory power to search that reasonable steps may be taken by the police to ensure that the search is effective’: see *Director of Public Prosecutions v Meaden* [2003] EWHC 3005 (Admin), [2004] 4 All ER 75, at [20].

Ascertaining cause of doubt (Code s 181)

Subsection (1) (pp 442-443)

It is important, before examining the particular issue of interpretation, to identify the correct starting point in the statutory framework: *Archibald v Fife Council* [2004] UKHL 32, [2004] 4 All ER 303, at [4]. In this case the crucial formula, whose significance had been overlooked in the court below, was ‘Subject to the provisions of this section’ at the beginning of the Disability Discrimination Act 1995 s 6(7) (see [68]). This is a common formula in legislation, the significance of which is often missed.

Basic rule of statutory interpretation (Code s 193)

In *Pennycook v Shaws (EAL) Ltd* [2004] EWCA Civ 100, [2004] 2 All ER 665, at [28] Arden LJ said ‘Parliament is presumed to know the law’.

Plain meaning rule (Code s 195)

Composite formulas

A composite formula must be construed according to its nature. In *Dunnachie v Kingston-upon-Hull City Council* [2004] UKHL 36, [2004] 3 All ER 1011 at [26] Lord Steyn, holding that ‘loss’ in the Employment Rights Act 1996 s 123(1) is confined to economic loss, said-

‘In my view s 123(1) must be construed as a composite formula. The interpretation preferred by Sedley LJ splits up the formula in a way which . . . is more than a little contrived. It unjustifiably relegates the criterion of loss to a subordinate role. Given the hypothesis that the legislature expressly provided for the recovery of economic loss, it fails to explain why the legislature did not also expressly provide for the compensation for injury to feelings. It also fails to take full account of the context.’

Commonsense construction rule (Code s 197)

Drafter’s silence (pp 473-474)

The Landlord and Tenant Act 1954 s 30(1)(f) permits a landlord to oppose the grant of a new tenancy on various grounds including the ground that on the termination of the current tenancy he intends to reconstruct the premises. *Held* This implies that the landlord must have a reasonable prospect of being able to bring about what he intends, including the obtaining of necessary consents: *Ivorygrove Ltd v Global Grange Ltd* [2003] EWHC 1409 (Ch), [2004] 4 All ER 144.

Statutory definitions (Code s 199)

Subsection (1) (pp 479-486)

Care must be taken to distinguish a legislative signpost from a definition: see *Green v Governing Body of Victoria Road Primary School and another* [2004] EWCA Civ 11, [2004] 2 All ER 763 at [50].

Subsection (4) (pp 486-487)

An implication disapplying a statutory definition may arise because the drafting technique used precludes express words such as ‘unless a contrary intention is expressed’: see *Crest Nicholson Residential (South) Ltd v McAllister* [2004] EWCA Civ 410, [2004] 2 All ER 991 (contrast between Law of Property Act 1925 s 78 (mandatory) and s 79 (subject to contrary intention)).

Interpretation Act 1978 (Code s 200)

The term ‘person’ (pp 492-493)

Section 169A of the Licensing Act 1964 was inserted by the Licensing (Young Persons) Act 2000 s 1. *Held* The term ‘person’ in s 169A must be construed as required by the context into which it was inserted, and therefore did not include a body corporate: *Haringey London Borough Council v Marks & Spencer plc, Liverpool City Council v Somerfield Stores plc* [2004] EWHC 1141 (Admin), [2004] 3 All ER 868. See also the note below related to Code s 202.

Powers and duties (p 496)

There is a public interest in finality, so the rule laid down by the Interpretation Act 1978 s 12(1) does not allow a litigant to reopen a case an unreasonable number of times: *Kataria v Essex Strategic Health Authority* [2004] EWHC 641 (Admin), [2004] 3 All ER 572, at [25]-[27].

Service by post (p 496)

All statutory deeming provisions relating to service of a document ‘are capable of working hardship by deeming that which did not in fact occur to have occurred. Some provisions allow for the deemed effect to be rebuttable by evidence to the contrary. Others do not’. See *CA Webber (Transport) Ltd v Railtrack plc* [2003] EWCA Civ 1167, [2004] 3 All ER 202, at [1]. The court held that the Landlord and Tenant Act 1927 s 23 showed a contrary intention disapplying the Interpretation Act 1978 s 7

and that the decision to the contrary in *Lex Service plc v Johns* [1990] 1 EGLR 92 was *per incuriam* (see [26]). See also (to the like effect) *Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd* [2003] EWHC 1252 (Ch), [2004] 3 All ER 184.

The ‘context’ of an enactment (Code s 202)

Section 169A of the Licensing Act 1964 was inserted by the Licensing (Young Persons) Act 2000 s 1. *Held* The term ‘person’ in s 169A must be construed as required by the context into which it was inserted, and therefore did not include a body corporate: *Haringey London Borough Council v Marks & Spencer plc, Liverpool City Council v Somerfield Stores plc* [2004] EWHC 1141 (Admin), [2004] 3 All ER 868. See also the note above related to Code s 200.

The pre-Act law (Code s 210)

Civil Procedure Rules In *Hashtroodi v Hancock* [2004] EWCA Civ 652, [2004] 3 All ER 530, at [12] Dyson J discussed how far the Civil Procedure Rules 1998 (SI 1998/3132) are to be construed by reference to decisions on the meaning of the old Rules of the Supreme Court which they replaced. See also the dictum of Lord Woolf MR cited at Code p 844 (n 6).

Use of explanatory memoranda (Code s 219)

Explanatory memoranda on Bills (pp 543-544)

In *R (on the application of S) v Chief Constable of South Yorkshire, R (on the application of Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39, [2004] 4 All ER 193, Lord Steyn said at [4]-‘The mischief against which [the Police and Criminal Evidence Act 1984 s 64(1A)] is aimed is set out in the explanatory notes which, in accordance with the system introduced in 1999, accompanied the Bill in its progress through Parliament. Explanatory notes are not indorsed by Parliament. On the other hand, in so far as they cast light on the setting of a statute, and the mischief at which it is aimed, they are admissible in aid of construction of the statute. After all, they may potentially contain much more immediate and valuable material than other aids regularly used by the courts, such as Law Commission reports, government committee reports, Green Papers and so forth.’

Use of international treaties (Code s 221)

Direct enactment of treaty (p 580)

The Criminal Justice Act 1988 s 133 was enacted to give effect in domestic law to the obligation imposed by art 14(6) of the International Covenant on Civil and Political Rights (New York, 19 December 1966; TS6 (1977); Cmnd 6702). This was so that the right to be compensated should more obviously be ‘according to law’. The only change was to replace the word ‘conclusively’ in art 14(6) by the expression ‘beyond reasonable doubt’, familiar in domestic criminal law. The key to the interpretation of s 133 is ‘a correct understanding of art 14(6)’. See *R (on the application of Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, [2004] 3 All ER 65 at [5].

Use of enacting history to ascertain Parliament’s view of pre-Act law (Code s 226)

Mistake by legislator as to pre-Act law

The court may assume that Parliament would not have had in mind ancient or abstruse legislation, though relevant. In *Malekshad v Howard de Walden Estates Ltd (No 2)* [2003] EWHC 3106 (Ch), [2004] 4 All ER 162, at [90] Neuberger J said that although a certain apportionment could be effected under the Inclosure Act 1854 s 10 ‘it seems unlikely that the legislature would have had that

in mind, partly because this legislation is rather abstruse, and partly because the apportionment would have to be effected by the Secretary of State’.

The section (Code s 240)

Interpretation of a section (p 614)

In *R (on the application of Geologistics Ltd) v Financial Services Compensation Scheme* [2003] EXCA Civ 1905, [2004] 3 All ER 39, at [23] Waller LJ said that a construction of the Policyholders Protection Act 1975 s 6 suggested by counsel ‘is inconsistent with there being the two subsections’.

The short title (Code s 249)

A further example of an informal short title is the Ale House Act 1828 (otherwise the Licensing Act 1828): see *R (on the application of Bushell and others) v Newcastle Licensing Justices and another* [2004] EWCA (Civ) 767, [2004] 3 All ER 493, at [9].

Examples (Code s 250)

The Prosecution of Offences Act 1985 s 22(3) was amended to add examples of what would be ‘a good and sufficient cause’ for extension of custody time limits: see *R (on the application of Gibson and another) v Winchester Crown Court* [2004] EWHC 361 (Admin), [2004] 3 All ER 475, at [8], [9]. Examples of ‘steps which an employer may have to take’ are given in the Disability Discrimination Act 1995 s 6(3).

Nature of legal policy (Code s 263)

General (pp 657-658)

A central concept concerning legal policy is that of reasonableness. In *Adams v Bracknell Forest Borough Council* [2004] UKHL 29, [2004] 3 All ER 897, Lord Hoffmann said at [45]: ‘the hypothetical person to whom a standard of reasonableness is applied will be very much affected by the policy of the law in applying such a standard [in the instant case]’. See also [58].

Law should serve the public interest (Code s 264)

Example 264.1A

On the clean break in divorce see *McFarlane v McFarlane, Parlour v Parlour* [2004] EWCA Civ 872, [2004] 3 All R 921, at [63]-[65].

Law should be coherent and self-consistent (Code s 268)

Legal policy (p 624)

The need for coherence in law means that it is necessary to distinguish between a cause of action, the jurisdiction to entertain proceedings in respect of that cause of action, and procedural rules governing such proceedings: see *Drury v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 200, [2004] 2 All ER 1056, at [14] (order dealing with procedural matters does not affect extent or nature of court’s jurisdiction).

European Convention on Human Rights (pp 632-634)

Principle against penalisation under a doubtful law (Code s 271)

Nature of the principle (p 706)

An example of the principle is that on a statutory transfer of liabilities the transfer will not be taken to include criminal liability in the absence of clear words: see *R v Pennine Acute Hospitals NHS Trust* [2003] EWCA Crim 3436, [2004] 1 All ER 1324, at [20]-[27].

Statutory interference with economic interests (Code s 278)

Common law rights (p 725)

With regard to the last sentence in Example 278.6 it may be noted that in *Slamon and another v Planchon* [2004] EWCA Civ 799, [2004] 4 All ER 407, at [39] Rix LJ said of leasehold enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993 s 10-

‘I agree that the legislation is expropriatory but, since it is clearly intended to be, Parliament’s intention is liable to be flouted if the legislation is construed favourably to the landlord save in a case of genuine ambiguity. Save in such cases of ambiguity, it is inappropriate for the court to favour the landlord rather than the tenant or, indeed, the tenant rather than the landlord.’

Presumption that consequential construction to be given (Code s 286)

Adverse and beneficent consequences (pp 746-747)

For an example of adverse consequences see *R (on the application of Geologistics Ltd) v Financial Services Compensation Scheme* [2003] EXCA Civ 1905, [2004] 3 All ER 39, at [18] (recovery of costs).

Presumption favouring rectifying construction (Code s 287)

Casus omissus (pp 758-760)

In *R (on the application of the Confederation of Passenger Transport UK) v Humber Bridge Board and another* [2003] EWCA Civ 842, [2004] 4 All ER 533 the Court of Appeal rectified an inadvertent omission in a statutory instrument (see [53]).

Avoiding an unworkable or impracticable result (Code s 313)

Unworkable or impracticable result (pp 832-834)

In *Bolton Metropolitan Borough Council v Torkington* [2003] EWCA Civ 1634, [2004] 4 All ER 238, at [46] Peter Gibson LJ cited the ruling by Nourse LJ in *Longman v Viscount Chelsea* 2 EGLR 242 at 246 rejecting any presumption imposing a burden of proof as to delivery in the case of an individual who signed and sealed a lease, saying that the system would be unworkable.

Avoiding an anomalous or illogical result (Code s 315)

Where anomaly intended (pp 854-855)

‘The Limitation Acts are designed to protect defendants from the injustice of having to fight stale claims especially when any witnesses the defendants might have been able to rely on are not available or have no recollection and there are no documents to assist the court in deciding what was done or not done and why’: Sir Murray Stuart-Smith, *Robinson v St Helens Metropolitan BC* [2003] PIQR P128 (cited *Adams v Bracknell Forest Borough Council* [2004] UKHL 29, [2004] 3 All ER 897, at [54]).

Construction which otherwise defeats legislative purpose (Code s 326)

Subversion of statutory procedure The Damages Act 1996 s 1 provides for orders to be made by the Lord Chancellor fixing the rate of investment return to be expected in relation to damages for future loss. It was held in *Cooke v United Bristol Healthcare NHS Trust, Sheppard v Stibbe and another, Page v Lee* [2003] EWCA Civ 1370, [2004] 1 All ER 797, that an alternative rate would not be applied by the court where this was ‘a plain attempt to subvert the Lord Chancellor’s rate’ (see [44]). A single rate was ‘a somewhat crude instrument’, but was adopted ‘for the public policy reasons that certainty was necessary in order to facilitate settlements and save costs’ (see [42]).

Presumed application of rules of equity (Code s 330)

Equitable remedies (pp 914-915)

Where possession of the fungible property of a person (eg cash) is taken from him under statutory authority, a trust of the property in his favour will not be inferred in the absence of any indication of intention: *Duggan v Governor of Full Sutton Prison and another* [2004] EWCA Civ 78, [2004] 2 All ER 966.

Presumed application of rules of evidence (Code s 335)

Standard of proof (pp 935-937)

An enactment may import an unusual civil standard of proof. For example the Wildlife and Countryside Act 1981 s 53(3) provides for an order making modifications in a definitive map and statement where a right of way not shown in the map and statement ‘is reasonably alleged to subsist’. In *Todd and another v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 1450 (Admin), [2004] 4 All ER 497, it was held by Evans-Lombe J that this was a lower standard of proof than the normal civil standard (see [22]) but that the lower standard should not be taken to be applied in deciding objections, since this would be ‘counter-intuitive’ (see [51]). The normal standard should be applied where the proceedings were judicial or quasi-judicial (ibid).

Burden of proving exceptions (pp 937-939)

The dictum by Lord Wilberforce cited at Code p 937 was relied on by Lord Hope of Craighead in *Kerr v Department for Social Development* [2004] UKHL 23, [2004] 4 All ER 385, at [16].

Reliance on illegality: *allegans suam turpitudinem non est audiendus* (Code s 340)

Reliance on wrongdoing (pp 948-950)

In *Vakante v Addey & Stanhope School* [2004] EWCA Civ 1065, [2004] 4 All ER 1056, at [3] Mummery LJ said: ‘. . . the defence of illegality is an appeal to the self-evident legal principle or policy that justice, and access to it, does not require courts and tribunals to assist litigants to benefit from their illegal conduct, if it is inextricably bound up in their claim’. See also [7].

Construction of Act or other instrument as a whole (Code s 355)

Every word to be given meaning (pp 993-994)

In *Collins v Royal National Theatre Board* [2004] EWCA Civ 144, [2004] 2 All ER 851, at [33] Sedley LJ said-

‘Bennion *Statutory Interpretation* (4th edn, 2002) pp 992-995 stresses the presumption against holding words in an Act to be idle but also cites judicial decisions which have had to go against the presumption. Some of these contain comments about parliamentary drafting far sharper than anything deserved by the drafter of [the Disability Discrimination Act 1995]

which is . . . pioneering social legislation always known to be in need of monitoring and review. If absolutely necessary, words may have to be held to be idle.’

Ordinary meaning of words and phrases (Code s 363)

Opening (pp 1013-1014)

The ordinary meaning of a word may be officially laid down. For example the World Health Organisation has since 1948 adopted the following definition of the word ‘health’: ‘Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity’: see *Manchester City Council v Romano* [2004] EWCA Civ 834, [2004] 4 All ER 21, at [69].

Several ordinary meanings (pp 1016-1018)

In *R (on the application of Geologistics Ltd) v Financial Services Compensation Scheme* [2003] EXCA Civ 1905, [2004] 3 All ER 39 it was argued that the expression ‘in respect of’ had a wider and a narrower meaning, but Waller LJ said at [28] that as used in the Policyholders Protection Act 1975 s 6(5) ‘it has to mean “in connection with”’.

Composite expressions (Code s 364)

Modifiers

Where one term modifies another it is important to give due weight to the term modified. In *Williams v Horsham District Council* [2004] EWCA Civ 39, [2004] 3 All ER 30, the Court of Appeal considered the phrase ‘sole or main residence’ in the Local Government Finance Act 1992 s 6(5). They held that a place cannot be the ‘sole or main’ residence of a person unless it is, to start with, his ‘residence’. They upheld the reversal of the decision of a tribunal which had given undue weight to previous authorities on the meaning of ‘sole or main’ in that phrase. Lord Phillips of Worth Matravers said at [23] that the tribunal’s starting point should have been the meaning of the word ‘residence’ not the decided cases on the meaning of the entire phrase.

Technical terms (general) (Code s 365)

General (p 1026)

An appellate or reviewing court will be more inclined to accept a finding on technical matters if made by a specialist tribunal: see *Wright v Redrow Homes (Yorkshire) Ltd, Roberts and others v Redrow Homes (North West) Ltd* [2004] EWCA Civ 469, [2004] 3 All ER 98, at [36].

Technical legal terms (Code s 366)

Free-standing terms (p 1028)

In the Taxation of Chargeable Gains Act 1992 s 69(1) the term ‘jointly’ does not have its technical meaning but is to be more widely construed: see *Jerome v Kelly (Inspector of Taxes)* [2004] UKHL 25, [2004] 2 All ER 835, at [22].

Terms of art (pp 1028-1029)

In *R (on the application of Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, [2004] 3 All ER 65, at [9] Lord Bingham of Cornhill said that the term ‘miscarriage of justice’ as used in the Criminal Justice Act 1988 s 133 ‘is an expression which, although very familiar, is not a legal term of art and has no settled meaning’. He compared it to the term ‘wrongful conviction’.

Ejusdem generis principle: genus-describing terms followed by wider residuary words (Code s 382)

In *R (on the application of G) v Westminster City Council* [2004] EWCA Civ 45, [2004] 4 All ER 572, the Court of Appeal applied the principle to the generic string ‘by reason of illness, exclusion from school’, with the residuary words ‘or otherwise’, in the Education Act 1996 s 19(1) (see [30], [42]).

Proportionality (Code s 406)

Interpretation of terms (p 1101)

The term ‘proportionate’ has been described as the Strasbourg court’s translation of the phrase ‘necessary in a democratic society’: see *Evans v Amicus Healthcare Ltd and others* [2004] EWCA 727, [2004] 3 All ER 1025 at [60]. The term ‘margin of appreciation’ is ‘a solecism originating in the literal rendering in the English text of the decision in *Handyside v UK* (1976) 1 EHRR of the French phrase “marge d’appréciation” meaning margin of appraisal or judgment’: *Evans v Amicus Healthcare Ltd and others* [2004] EWCA 727, [2004] 3 All ER 1025, at [63]. On this term see further Code s 421.

Nature of the Convention rights (Code s 419)

Definition of ‘the Convention rights’

Living nature of convention In *R (on the application of Douglas) v North Tyneside Metropolitan Borough Council and another* [2003] EWCA Civ 1847, [2004] 1 All ER 709, at [22] Scott Baker LJ said ‘the convention is a living thing’. The case concerned art 2 (education) of the First Protocol. Scott Baker LJ went on: ‘In the 50-year life of the convention the number of adults undertaking higher education has increased dramatically’.

Common law origin The Convention rights are based largely on the common law. Thus in *Director of Public Prosecutions v Meaden* [2003] EWHC 3005 (Admin), [2004] 4 All ER 75, at [26] and [27] Rose LJ said that in specified respects articles 5 and 8 did not add anything to the relevant common law principles.

Facts ‘The convention cannot and does not purport to change facts or make evidence relating to a factual inquiry inadmissible . . . [it does not require] that at the stage of a factual investigation reality should be ignored’: *Campbell and others v South Northamptonshire District Council and another* [2004] EWCA Civ 409, [2004] 3 All ER 387, (test of commercial basis where religion relevant) at [13], [14].

Judicial review In *R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary (Chief Constable of Thames Valley Police and Commissioner of Police of the Metropolis, interested parties)* [2004] EWHC 253 (Admin), [2004] 4 All ER 874, the court noted at [29] that in *R v Shayler* [2002] UKHL 11, [2002] 2 All ER 477, [2003] 1 AC 247, at [33] Lord Bingham of Cornhill said that, in any application for judicial review alleging contravention of a convention right, the court will now conduct a much more rigorous and intrusive review than was once thought to be permissible. It also noted that this should include a close and penetrating examination of the defendant’s factual justification for his acts.

Subsidy The Convention does not require a state positively to subsidise a person who has not made a contribution to the benefit claimed: *Campbell and others v South Northamptonshire District Council and another* [2004] EWCA Civ 409, [2004] 3 All ER 387, at [28]-[33] (test of commercial basis where religion relevant).

Duty to take account of Convention jurisprudence (Code s 420)

The state and individuals ‘There is no principled distinction between the need to protect the interests of the state and the need to protect an individual if that is necessary. Why should a member of the security services be protected and not a member of the public? No such distinction is recognised domestically or in the Strasbourg jurisprudence’: see *Roberts v Parole Board* [2004] EWCA Civ 1031, [2004] 4 All ER 1136, at [44].

Need for uniform interpretation In *R (on the application of S) v Chief Constable of South Yorkshire, R (on the application of Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39, [2004] 4 All ER 193, at [27] Lord Steyn cited the dictum of Lord Bingham of Cornhill in *R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept* [2004] UKHL 26, [2004] 3 All ER 785, at [20] that the convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court, and that-

‘It is of course open to member states to provide for rights more generous than those guaranteed by the convention, but such provision should not be the product of interpretation of the convention by the national courts, since the meaning of the convention should be uniform throughout the states party to it. The duty of the national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time; no more, but certainly no less.’

Discretion and certainty In *R (on the application of S) v Chief Constable of South Yorkshire, R (on the application of Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39, [2004] 4 All ER 193, Lord Steyn at [36] said-

‘Counsel cited *Silver v UK* (1983) 5 EHRR 347 at 372 (para 88) for the proposition that “[a] law which confers a discretion must indicate the scope of that discretion”. Standing alone this is an impractical and unworkable prescription. But the European Court of Human Rights added:

“... the Court has already recognised the impossibility of attaining absolute certainty in the framing of laws and the risk that the search for certainty may entail excessive rigidity ... the Court points out once more that ‘many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice’.”

Here it may be noted that, while application may be a question of practice, interpretation is a question of technique and principle.

Reference to overseas authorities

In construing the Convention, domestic authorities outweigh any persuasive authorities from foreign jurisdictions: *Myles v Director of Public Prosecutions* [2004] EWHC 594 (Admin), [2004] 2 All ER 902.

Compatible construction rule (Code s 421)

Subsection (1)

For a list of cases where courts considered whether to exercise the power conferred by s 3(1) see *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, at [39.]

Section 3(1) should not be applied by the court before it has worked out what the legal meaning of the enactment would be apart from it: see *Attorney General’s Reference* (No 4 of 2002) [2003] EWCA Crim 762, [2004] 1 All ER 1, at [12]. It is unfortunate that in *Manchester City Council v Romano* [2004] EWCA Civ 834, [2004] 4 All ER 21, at [75] Brooke LJ said, without explaining his reasoning, that ‘In our judgment s 3 ... constrains the court to interpret s 24(3)(a) [of the Disability Discrimination Act 1995] in the following way ...’

In *Wilson v First County Trust Ltd* [2003] UKHL 40, [2003] 3 All ER 97 at [70] Lord Nicholls of Birkenhead said that courts should bear in mind that theirs is a reviewing or supervisory role. He added-

‘Parliament is charged with the primary responsibility for deciding whether the means chosen to deal with a social problem are both necessary and appropriate. Assessment of the advantages and disadvantages of the various legislative alternatives is primarily a matter for Parliament . . . The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person’s convention right . . . The more the legislation concerns matters of broad social policy the less ready will be a court to intervene.’

Is ambiguity needed? It might be thought that it is not ‘possible’ to strain the clear and obvious literal meaning of an enactment, and that the s 3(1) power is therefore available only where the literal meaning is ambiguous or otherwise uncertain. This limitation has been rejected by the courts. In *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, Lord Nicholls of Birkenhead said at [29]-

‘This interpretation of s 3 would give the section a comparatively narrow scope. It is not a view which has prevailed. It is now generally accepted that the application of s 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, s 3 may none the less require the legislation to be given a different meaning. The decision of your Lordships’ House in *R v A* [2001] UKHL 25, [2001] 3 All ER 1, [2002] 1 AC 45 is an instance of this. The House read words into the Youth Justice and Criminal Evidence Act 1999 s 41 so as to make the section compliant with an accused’s right to a fair trial under art 6.’

In the case mentioned by Lord Nicholls, *R v A*, Lord Steyn gave an example of an enactment which could not be read down under s 3(1) of the 1998 Act (at [40]) and one which could (at [45]). These were respectively s 41(3)(b) and 41(3)(c) of the Youth Justice and Criminal Evidence Act 1999. He said that s 3(1) ‘requires the court to subordinate the niceties of the language of s 41(3)(c)’, in other words to strain that language well beyond its ordinary meaning. He went on to say that s 3(1) required the language to be read as ‘subject to an implied provision that evidence or questioning which is required to ensure a fair trial under art 6 of the convention should be treated as admissible’. It is submitted that this purported finding of an implication (which was followed in *R (on the application of Hammond) v Secretary of State for the Home Department* [2004] Times LR 6 December) is illegitimate as offending against the principle *expressum facit cessare tacitum* (statement ends implication), which is explained in Code pp 423-424. Lord Hope of Craighead dissented (at [108]) from Lord Steyn’s dictum but then (at [110]) appeared to resile from that dissent. The speeches in *R v A* leave the matter to the trial judge. In this state of confusion (not aided by Lord Hutton at [162]-[164]) it is ironic that Lord Steyn should say at [46] that it is ‘of supreme importance that the effect of the speeches today should be clear to trial judges’.

The court does not need to formulate the precise words to be inserted by virtue of s 3(1); it is their substantive effect that matters: *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, at [35].

For an example of a case where the power conferred by s 3(1) is not available see *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, at [108].

Margin of appreciation On the so-called margin of appreciation (see Code s 406), it was said in *Evans v Amicus Healthcare Ltd and others* [2004] EWCA 727, [2004] 3 All ER 1025, at [63]-

‘It has no direct relevance to the process by which a court adjudicates, within a state, on the compatibility of a measure adopted by the executive or legislature, for it is only at the end of that process that the state’s act crystallises. This is why Lord Hope in *R v DPP, ex p Kebilene* [1999] 4 All ER 801 at 844, [2000] 2 AC 326 at 381, took such care to distinguish the

Strasbourg approach [applying the margin of appreciation] from what he characterised domestically as the discretionary area of judgment. Discretion implies a choice between two or more legitimate (and therefore proportionate) courses, and where Parliament has made such a choice the courts have no power of intervention under the 1998 Act. To invoke a supposed 'margin of discretion' by contrast is to collapse two distinct concepts into a single nebulous one . . . the role of the court does not extend to intervention in legislative policy choice (the "discretionary area of judgment") save where the policy itself contravenes the convention.'

Here it may be remarked that 'the discretionary area of judgment' is an unfortunate phrase to use here because discretion and judgment are entirely different concepts having different juridical effects. They are fully explained and distinguished in chapters 13 (judgment) and 14 (discretion) in F A R Bennion, *Understanding Common Law Legislation*.

A change of view may reduce the application of the margin of appreciation. For example in relation to transsexuals Lord Bingham of Cornhill said in *A v Chief Constable of West Yorkshire* [2004] UKHL 21, [2004] 3 All ER 145, at [13]-

' . . . the court recognised that the legal or administrative consensus among member states, the understanding of transsexuality, and evolving perceptions of individual dignity and freedom, had reached a point where the margin of appreciation accorded to a state could no longer be held to legitimise the denial of formal recognition to an acquired change of gender.'

Judicial declaration of incompatibility (primary legislation) (Code s 422)

For a list of cases where courts considered whether to make a declaration of incompatibility see *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, at [39.]

For an example of a declaration of incompatibility see *R (on the application of Uttley) v Secretary of State for the Home Department* [2003] EWCA Civ 1130, [2003] 4 All ER 891 (reversed [2004] UKHL 38, [2004] 4 All ER 1). According to *Evans v Amicus Healthcare Ltd and others* [2004] EWCA 727, [2004] 3 All ER 1025, at [49], the leading case on the making of declarations of incompatibility is *Wilson v First County Trust Ltd* [2003] UKHL 40, [2003] 3 All ER 97. This was applied in *CA Webber (Transport) Ltd v Railtrack plc* [2003] EWCA Civ 1167, [2004] 3 All ER 202. See also (to the like effect) *Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd* [2003] EWHC 1252 (Ch), [2004] 3 All ER 184.

Remedies for incompatible acts and omissions: damages (Code s 438)

Award of damages The question of when damages should be awarded was examined by Lord Woolf CJ in *Anufrijeva and another v Southwark London Borough Council*, *R (on the application of N) v Secretary of State for the Home Department*, *R (on the application of M) v Secretary of State for the Home Department* [2003] EWCA Civ 1406, [2004] 1 All ER 833. He noted at [49] that the Law Commission in its 'helpful and informative' report *Damages under the Human Rights Act 1998* (Law Com no 266) (Cm 4853) (October 2000) suggests that the obvious analogy is a claim against a public authority in tort, but the analogy must not be drawn too strictly. He added in [50] that whereas damages are recoverable as of right in the case of damage caused by a tort, the same is not true of a 1998 Act claim. See further [52]-[78]. On the need to secure that excessive costs are not incurred see [79]-[81].

Article 2 of the Convention (right to life) (Code s 440)

Art 2(1)

Inquests In *R (on the application of Middleton) v West Somerset Coroner* [2004] UKHL 10, [2004] 2 All ER 465, the House of Lords considered how far the regime for conducting inquests in England and Wales matched up to the investigative obligation imposed by art 2 (see [29]). Lord Bingham of

Cornhill said (at [2]) that the European Court of Human Rights had repeatedly interpreted art 2 as imposing on member states substantive obligations not to take life without justification ‘and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life’. He continued (in [3])-

‘The European Court has also interpreted art 2 as imposing on member states a procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way implicated.’

The House of Lords held (see [35]) that it was in consequence necessary, under the power conferred by the Human Rights Act 1998 s 3 (see Code s 421), to change the established interpretation of ‘how’ in the Coroners Act 1988 s 11(5)(b) and the Coroners Rules 1984 r 36(1)(b) so as to give it ‘the broader sense previously rejected, namely as meaning not simply “by what means” [the deceased died] but “by what means and in what circumstances”’. For an example of the application of this ruling see *R (on the application of Sacker) v West Yorkshire Coroner* [2004] UKHL 11, [2004] 2 All ER 487.

Article 5 of Convention (right to liberty and security) (Code s 443)

Art 5(1)

In *R (on the application of Von Brandenburg (aka Hanley) v East London and City Mental Health NHS Trust and another* [2003] UKHL 58, [2004] 1 All ER 400, at [6] Lord Bingham of Cornhill said-

‘. . . the common law respects and protects the personal freedom of the individual, which may not be curtailed save for a reason and in circumstances sanctioned by the law of the land. This principle is reflected in, but does not depend on, art 5(1) . . . It can be traced back to Ch 29 of Magna Carta 1297 and before that to Ch 39 of Magna Carta 1215.’

Prescribed by law For the meaning of this phrase see *R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary (Chief Constable of Thames Valley Police and Commissioner of Police of the Metropolis, interested parties)* [2004] EWHC 253 (Admin), [2004] 4 All ER 874, at [39].

Art 5(1)(b) The term ‘detention’ here does not include mere transitory detention: *R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary (Chief Constable of Thames Valley Police and Commissioner of Police of the Metropolis, interested parties)* [2004] EWHC 253 (Admin), [2004] 4 All ER 874, at [46].

Art 5(1)(c) In *R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary (Chief Constable of Thames Valley Police and Commissioner of Police of the Metropolis, interested parties)* [2004] EWHC 253 (Admin), [2004] 4 All ER 874 the court noted that it was held in *Steel v UK* (1988) 5 BHRC 339 at 357 that, although a breach of the peace is not classified as an offence under English law it is nevertheless to be considered an offence within para (c).

Art 5(1)(e) This recognises in appropriate cases ‘the compulsory detention in hospital of those who suffer from mental disorder if detention is judged to be necessary for the health or safety of the patient or the protection of others’: see *R (on the application of Von Brandenburg (aka Hanley) v East London and City Mental Health NHS Trust and another* [2003] UKHL 58, [2004] 1 All ER 400, at [6].

Art 5(2)

The relevant principles remain those set out in *Christie v Leachinsky* [1947] 1 All ER 567, [1947] AC 573, but the best modern statement of these is in the decision of the European Court of Human Rights in *Fox v UK* (1991) 13 EHRR 157 at 170 (para 40): *Taylor v Chief Constable of Thames Valley Police* [2004] EWCA Civ 858, [2004] 3 All ER 503, at [23].

Art 5(4)

After he has served the tariff part of his sentence, a life prisoner has the right under this to have the lawfulness of his continued detention decided by a body which qualifies as a 'court'. The Parole Board so qualifies: see *Roberts v Parole Board* [2004] EWCA Civ 1031, [2004] 4 All ER 1136, at [19], [32].

Article 6 of Convention (right to a fair trial) (Code s 444)

Art 6(1)

'The common law principles of natural justice anticipated by many years the concept of a fair trial which has been elaborated by [Art 6(1)]: *Bow Spring (owners) v Manzanillo II (owners)* [2004] EWCA Civ 1007, [2004] 4 All ER 899, at [57]. The court at [58] stressed the need 'for the court to know, before it reaches a conclusion, what the parties have to say about the issues and the evidence which goes to them', The court cited the view of the Strasbourg court that the concept of a fair hearing 'implies the right to adversarial proceedings, according to which the parties must have the opportunity not only make known any evidence needed for their claims to succeed, but also have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision'. The case concerned the evidence, as an expert witness, of a nautical assessor called by the court.

If a person cannot be given a fair trial he should not be tried at all. Art 6(1) requires that the trial process, viewed as a whole, must be fair. Here fairness is 'a constantly evolving concept'. See *R v H, R v C* [2004] UKHL 3, [2004] 1 All ER 1269, at [10], [11].

'There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.' See *A-G's Reference (No 3 of 1999)* [2001] 1 All ER 577 at 584, [2001] 2 AC 91 at 118, (cited *R v H, R v C* [2004] UKHL 3, [2004] 1 All ER 1269, at [12]).

'The duty of prosecuting counsel . . . is not to obtain a conviction at all costs but to act as a minister of justice . . . Defending counsel are also subject to clear professional duties: they may not invent a case for their client or pursue serious accusations in the absence of material to support them . . . In Dr Johnson's famous formulation: "A lawyer is to do for his client all that his client might *fairly* do for himself, if he could".' See *R v H, R v C* [2004] UKHL 3, [2004] 1 All ER 1269, at [13] (emphasis by the court).

'*In the determination of his civil rights*' Art 6 is not engaged where no determination is being made of the defendant's civil rights, as with the making of an interim ASBO (anti-social behaviour order) under the Crime and Disorder Act 1998 s 1D: *R (on the application of M) v Secretary of State for Constitutional Affairs and Lord Chancellor and another* [2004] EWCA Civ 312, [2004] 2 All ER 531.

Legal advice In *Myles v Director of Public Prosecutions* [2004] EWHC 594 (Admin), [2004] 2 All ER 902 at [13], Mackay J said: '[In *Kennedy v CPS* [2002] EWHC 2297 (Admin)], (2002) JP 267 Kennedy LJ concluded that the right to a fair trial enshrined in art 6 could be said to be in play from the outset of a police investigation but it did not spell out a right to legal advice at any particular stage. At [11] Mackay J cited the following dictum of Lloyd LJ in *DPP v Billington* [1988] 1 All ER 435 at 439, [1988] 1 WLR 535 at 551-

‘All that the [Police and Criminal Evidence Act 1984 requires is that the defendant be permitted to consult a solicitor as soon as practicable. There is nothing in the Act which requires the police, whether expressly or by implication, to delay the taking of a specimen . . . in the mean time.’

Legal aid In Perotti v Colyer-Bristow (a firm) and other applications [2003] EWCA Civ 1521, [2-4] 2 All ER 189 Chadwick LJ said at [29]-

‘As the [Legal Services] Commission observed in *Munro v UK* (1987) 52 DR 158, it must be assumed that in making specific provision in art 6(3)(c) for the right to free legal services in relation to criminal matters, a difference of approach was intended. There is no obligation imposed therefore, in express terms, to provide free legal representation in civil cases. Nevertheless, it is not in doubt that one aspect of the right to a fair hearing, conferred itself in terms by art 6(1), is effective access to the courts.’

It was held that since the question was whether leave to appeal should be given, which the court was competent to decide without the assistance of counsel, the court would not give an indication to the Legal Services Commission that public funding for representation should be granted.

Disclosure of information See *R v Brady* [2004] EWCA Crim 1763, [2004] 3 All ER 520, (information obtained under Insolvency Act 1986 s 235).

Right to public hearing On this see Code s 19 (*Open court principle*), pp 90-92 and above.

Abuse of process ‘It is well established in Strasbourg jurisprudence that the court is entitled to protect its process from abuse, provided that the very essence of a litigant’s right of access to a court is not impaired’: *Perotti v Colyer-Bristow (a firm)(No 2)* [2004] EWCA Civ 1019, [2004] 4 All ER 72, at [4].

Extra-territorial effect The Strasbourg jurisprudence has developed an exception to the principle of territoriality, which may conveniently be described as giving *indirect effect* to the European Convention on Human Rights as applied by the Human Rights Act 1998: *Government of the United States of America v Montgomery (No 2)* [2004] UKHL 37, [2004] 4 All ER 289, at [22] (application of art 6 to overseas case).

As to similar rights conferred by the International Covenant on Civil and Political Rights (New York, 19 December 1966; TS6 (1977); Cmnd 6702) see *R (on the application of Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, [2004] 3 All ER 65.

Art 6(2)

In *Attorney General’s Reference* (No 4 of 2002) [2003] EWCA Crim 762, [2004] 1 All ER 1, at [41] Latham LJ said-

‘Although art 6(2) is in apparently absolute terms, the European Court of Human Rights made it plain in *Salabiaku v France* (1988) 13 EHRR 379 that . . . a balancing exercise has to be carried out which takes into account the importance of what is at stake for the state on the one hand and the defendant on the other.’

For an enactment designed to show that a defendant’s rights under art 6(2) were not being infringed by certain provisions see the Terrorism Act 2000 s 118 (on this aspect see *Attorney General’s Reference* (No 4 of 2002) [2003] EWCA Crim 762, [2004] 1 All ER 1, at [22]).

Article 7 of Convention (no punishment without law) (Code s 445)

As to the position under art 7 where a husband was convicted of raping his wife at a time before it was established by *R v R* [1992] 1 AC 599 (see Code pp 894, 994) that that constituted an offence, see *R v C* [2004] EWCA Crim 292, [2004] 3 All ER 1.

Art 7(1)

The word ‘applicable’ refers to the maximum sentence which could be imposed by law. ‘This is borne out by the references in the travaux préparatoires to a penalty “authorised by the law” and the “maximum penalty under the law in force at the time”’: (*R (on the application of Uttley) v Secretary of State for the Home Department* [2004] UKHL 38, [2004] 4 All ER 1, at [58]).

Article 8 of Convention (right to respect for private and family life) (Code s 446)

The question of when a duty arises under art 8 to take positive action was examined by Lord Woolf CJ in *Anufrijeva and another v Southwark London Borough Council*, *R (on the application of N) v Secretary of State for the Home Department*, *R (on the application of M) v Secretary of State for the Home Department* [2003] EWCA Civ 1406, [2004] 1 All ER 833. He said at [19] (see also [30]) that the European Court of Human Rights ‘has always drawn back from imposing on states the obligation to provide a home, or indeed any other form of financial support’. As to when maladministration constitutes a breach of art 8 see [44]-[48].

Neither art 8 nor art 10 has any pre-eminence against the other: see *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 All ER 995, (balancing of Naomi Campbell’s right to privacy against media’s right to impart information).

Art 8(1)

In determining whether a statutory scheme is convention-compliant it is necessary to understand the subsidiary nature of the convention. National authorities have ‘direct democratic legitimation’ and are in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, ‘the role of the domestic policy maker should be given special weight’. A fair balance must be struck between the interests of the individual and of the community as a whole, and it must be determined whether or not a particular claim is justiciable and if so what is the margin of appreciation. See *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, [2004] 1 All ER 135, at [41], [70], [84], [85] (damage through inadequacy of sewerage scheme provided under Water Industry Act 1991).

Developments in technology In *R (on the application of S) v Chief Constable of South Yorkshire*, *R (on the application of Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39, [2004] 4 All ER 193, it was held that the retention of DNA samples and similar material under the Police and Criminal Evidence Act 1984 s 64(1A) did not engage art 8(1). Lord Steyn said at [1], [2]-

‘. . . it is of paramount importance that law enforcement agencies should take full advantage of the available techniques of modern technology and forensic science. Such real evidence has the inestimable value of cogency and objectivity. It enables the guilty to be detected and the innocent to be rapidly eliminated from enquiries . . . the dramatic breakthrough was the use of DNA techniques since the 1980s . . . as a matter of policy it is a high priority that police forces should expand the use of such evidence . . .’

A definition of DNA is set out at [5].

Art 8(2)

Protection of the rights and freedoms of others The court needs to beware lest protecting the rights and freedoms of one party imperils those of another. In *Evans v Amicus Healthcare Ltd and others* [2004] EWCA 727, [2004] 3 All ER 1025, at [66] it was said that a particular reading ‘. . . would

enable Ms Evans to seek a continuance of treatment because of her inability to conceive by any other means. But unless it also gave weight to Mr Johnstone's firm wish not to be the father of a child borne by Ms Evans, such a rule would diminish the respect owed to his private life in proportion as it enhanced the respect accorded to hers'.

Article 10 of Convention (freedom of expression) (Code s 448)

Neither art 8 nor art 10 has any pre-eminence against the other: see *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 All ER 995, (balancing of Naomi Campbell's right to privacy against media's right to impart information). As to a balancing exercise between the two articles see *Jameel and another v Wall Street Journal Europe SPRL* [2003] EWHC 2945 (QB), [2004] 2 All ER 92, at [25]. In that case Eady J said (at [24]) that 'the convention gives a high priority to the protection of reputation'.

Article 14 of Convention (prohibition of discrimination) (Code s 451)

Even though the state is not required by the Convention to make the provision in question, if it chooses to do so the provision must not display discrimination on any ground such as is mentioned in art 14: *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, at [6]. Lord Nicholls of Birkenhead said at [9]-

'It goes without saying that art 14 is an important article of the convention. Discrimination is an insidious practice. Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced . . . opinions can differ on whether a suggested ground of distinction justifies a difference in legal treatment. But there are certain grounds of factual difference which by common accord are not acceptable, without more, as a basis for different legal treatment.'

In *R (on the application of Clift) v Secretary of State for the Home Department* [2004] EWCA Civ 514, [2004] 3 All ER 338, at [7], [8] Lord Woolf CJ said, applying a dictum of Brooke LJ in *Wandsworth London BC v Michalak* [2002] EWCA Civ 271, [2002] 4 All ER 1136, at [20] that, in determining whether art 14 had been infringed, the following four questions should be asked-

1. Do the facts fall within the ambit of one or more substantive articles?
2. If so, was there different treatment between the complainant and the chosen comparators?
3. Were the chosen comparators in an analogous position to the complainant's situation?
4. If so, did the difference in treatment have an objective and reasonable justification?

Lord Woolf went on to say at [10] that though art 14 has no independent life of its own, and obtains its virility from its relationship with some other article, its relationship with that other article is symbiotic rather than parasitic (see also [14]). See further *R (on the application of Douglas) v North Tyneside Metropolitan Borough Council and another* [2003] EWCA Civ 1847, [2004] 1 All ER 709, at [65].

An example of the application of art 14 is provided by Brooke LJ in *R (on the application of A) v National Asylum Support Service and another* [2003] EWCA Civ 1473, [2004] 1 All ER 15, at [87]-

'In the present case the two children are disabled, and I agree with Waller LJ, for the reasons he gives [at [6]] that art 14 . . . obliges us not to interpret the word 'adequate' [in the Immigration and Asylum Act 1999 s 122(3)] in such a way as to imply that a lower standard of accommodation might be appropriate for a disabled *child* than accommodation that is 'suited' to a disabled *adult* within the meaning of the National Assistance Act 1948 s 21(2).' [Emphasis added.]

Article 1 of First Protocol (protection of property) (Code s 455)

The term ‘possessions’ in the first Protocol ‘is apt to embrace contractual rights as much as personal rights’: *Wilson v First County Trust Ltd* [2003] UKHL 40, [2003] 4 All ER 97, at [39]. It also embraces statutory rights: *Pennycook v Shaws (EAL) Ltd* [2004] EWCA Civ 100, [2004] 2 All ER 665, at 35. It is necessary to distinguish *delimitation* of a right (which does not engage art 1) from *deprivation* of a right (which may do): *Pennycook v Shaws (EAL) Ltd* [2004] EWCA Civ 100, [2004] 2 All ER 665, at [36].

Article 2 of First Protocol (right to education) (Code s 456)

In *A v Head Teacher and Governors of Lord Grey School* [2004] EWCA Civ 382, [2004] 4 All ER 628, Sedley LJ said at [44]-

‘It was established by the European Court of Human Rights (the European Court) in the *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252 at 280, 281 that the first sentence of art 2 of the First Protocol “does enshrine a right” - not a right with any fixed content but a right for the citizens of member states “in principle , to avail themselves of the means of instruction existing at a given time”.’

See also *R (on the application of Douglas) v North Tyneside Metropolitan Borough Council and another* [2003] EWCA Civ 1847, [2004] 1 All ER 709, at [19]. At [46] Scott Baker LJ said ‘the convention lays down no specific obligation [on the state] concerning the subsidisation of institutions’.

Tertiary education As to whether art 2 extends to tertiary education see *R (on the application of Douglas) v North Tyneside Metropolitan Borough Council and another* [2003] EWCA Civ 1847, [2004] 1 All ER 709, at [44].

Defined terms (Code s 462)

Public authority

On the question of what is a public authority see further *R (on the application of West) v Lloyd’s of London* [2004] EWCA Civ 506, [2004] 3 All ER 251, at [33]-[39]; *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2003] 3 All ER 1213; *A v Head Teacher and Governors of Lord Grey School* [2004] EWCA Civ 382, [2004] 4 All ER 628 (head teacher and governing body of maintained school).

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