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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

[1] This section of the Review conforms to the Code set out in the fourth edition (2002) of the author's textbook *Statutory Interpretation* as updated by the 2005 Supplement to that work.

[2] A reference to the relevant section of the Code is given after each heading in the notes below, where the main work is referred to as 'Code'. Page numbers refer to the fourth edition pagination except where they have an S prefix, when they refer to the 2005 Supplement.

(p 1) Introduction

[3] I have refrained from adding material dealing with Scottish and Welsh devolution not because it lacks interest or importance but in order to keep the size of the work within bounds.

[4] Rarely, a legislative device has been so botched that a later Parliament has removed it in despair, leaving the courts to make what they can of the resulting hiatus: see eg *Lawson v Serco Ltd, Botham v Ministry of Defence, Crofts and others v Veta Ltd and others* [2006] UKHL 3, [2006] 1 All ER 823. This case is also noted in relation to Code ss 128 and 131.

(p 13) s 1. To 'construe' or 'interpret'?

[5] (p 14) In footnote 5, for 'p 99' substitute 'p 116'.

(p 15) s 3 Real doubt as to legal meaning

[6] In footnote 8 after 'See' insert ': *R (on the application of P) v West London Youth Court* [2005] EWHC 2583 (Admin), [2006] 1 All ER 477, at [17] and.

(p 29) s 9. Ignorantia juris neminam excusat

[7] (p 30) In footnote 1 at end insert: On 'knowingly' see further *Flintshire County Council v Reynolds* [2006] EWHC Admin 195 and Code pp 996, 1073.

(p 32) s 10 Mandatory and directory requirements

[8] At beginning of section 10 for 'This section' substitute 'Subsections (1) to (4) of this section'.

[9] (p 33) *Use of 'shall'* The word 'shall' may denote a mandatory or a merely directory duty: see *Garbutt and another v Edwards and another* [2005] EWCA Civ 1206, [2006] 1 All ER 553, at [37].

[10] After 'Yet the courts are forced to reach a decision' insert as a new paragraph: 'In some cases the intended consequences of disobedience are obvious, as where its result is that an action does not comply with the statute.'

[11] The Extradition Act 2003 s 2(1) says that section 2 applies if the designated authority receives a Part I warrant. Section 2(2) says a Part I warrant is an arrest warrant which contains a certain statement. Section (3)(a) says the statement must contain certain matters. Lord Hope of Craighead said 'If it does not do so it is not a Part I warrant and the provisions of that part cannot apply to it'.(*Office of the King's Prosecutor, Brussels v Cando Armas and another* [2005] UKHL 67, [2006] 1 All ER 647, at [42]; *Hunt v Court of First Instance, Antwerp* [2006] EWHC 165 (Admin), [2006] 2 All ER 735, at [18].)

(p 51) s 14. Civil sanction for disobedience (the tort of breach of statutory duty)

[12] (p 56) In footnote 1 at end insert: *Watkins v Secretary of State for the Home Department and others* [2006] UKHL 17, [2006] 2 All ER 353.

(p 75) s 18. Prosecuting agencies

[13] In footnote 4 on p 75 at end insert: The Board of Inland Revenue has been replaced by the Commissioners for Revenue and Customs: see Commissioners for Revenue and Customs Act 2005 s 50.

[14] (p 76) In paragraph beginning 'Certain government departments', in second line, after 'against Acts,' insert 'for', and at end of paragraph insert: Criminal investigations and prosecutions are in the charge of the Director of Revenue and Customs Prosecutions, who is appointed by, and acts under the superintendence of , the Attorney General (see Commissioners for Revenue and Customs Act 2005 ss 34-42).

(p 79) s 19 Courts and other adjudicating authorities

[15] (p 86) *Roberts v Parole Board* [2004] EWCA Civ 1031, [2004] 4 All ER 1136 (see 2005 Supplement p S9) affirmed [2005] UKHL 45, [2006] 1 All ER 39.

[16] (p 92) As to hearings *in camera* see Criminal Justice Act 1988 s 159(1) and *Re A and others* [2006] EWCA Crim 04, [2006] 2 All ER 1 at [41] (order for *in camera* hearing not irrational because alleged terrorist defendant would be present, since otherwise it would be impracticable to prosecute).

[17] Another aspect of open justice is the presumption that accused persons should be named. 'There should be no resort to anonymity in criminal cases without good reason and statutory authority.'(*R v Goldstein, R v Rimmington* [2005] UKHL 63, [2006] 2 All ER 257, per Lord Bingham of Cornhill at [3]).

(p 101) s 21 Doctrine of judicial notice

[18] *Growing complexity of law* (p 102) Judicial difficulties of the kind mentioned in Example 21.1 grow with the increasing complexity of statute law. A typical complaint about this by a senior judge was cited by Lord Walker of Gestingthorpe:

> '. . . it has become virtually impossible and almost unacceptable to decide points of this kind in short form. The legal materials on indirect discrimination and equal pay are increasingly voluminous and incredibly intractable. The available arguments have become more convoluted, while continuing to multiply. Separating the wheat from the chaff takes more and more time. The short snappy decisions of the early days of the industrial tribunals have long since disappeared. They have been replaced by what truly are 'extended reasons' which have to grapple with factual situations of escalating complexity and with thicker seams of domestic and EC law, as interpreted in cascades of case law from the House of Lords and the European Court of Justice'.(*Secretary of State for Trade and Industry v Rutherford and another* [2006] UKHL 19, [2006] 4 All

ER 577, at [37], citing Mummery LJ in the court below. This passage was also cited (at [7]) by Lord Scott of Foscote.)

[19] On the scandal of law-churning see also F A R Bennion, 'Déjà Vu, or the Judge Addresses the Society', 170 *Justice of the Peace* (18 November 2006) 888, http://www.francisbennion.com/2006/040.htm.

[20] *Judicial notice of fact* (pp 103-104) In *R (on the application of Calgin) v Enfield London Borough Council* [2005] EWHC 1716 (Admin), [2006] 1 All ER 112, at [24] Elias J said: 'It is common knowledge that London borough councils are very hard pressed to meet the needs of their homeless.'

(p 104) s 22. Adjudicating authorities with original jurisdiction

[21] (pp 107-108) For 'the Commissioners for general and for special purposes of the income tax' substitute 'the Commissioners for Revenue and Customs'.

[22] (p 108) For the content of footnote 1 substitute 'See Commissioners for Revenue and Customs Act 2005 s 50.'

(p 108) s 23 Adjudicating authorities with appellate jurisdiction

[23] *Opening* (pp 108-109) An appeal is against an order not a reason: *R (on the application of Jones and others v Ceredigion County Council* [2005] EWCA Civ 986, [2006] 1 All ER 138, at [34] (but see [43], [47]). 'There is a strong presumption that except by specific provision the legislature will not exclude a right of appeal as of right or with leave where such a right is ordinarily available': *R v Emmett* [1998] AC 781 at 781-782 (cited *R (on the application of Jones and others v Ceredigion County Council* [2005] EWCA Civ 986, [2006] 1 All ER 138, at [45]).

[24] (p 113) Before side-heading *Court of Appeal* insert:

Point of law An appeal sometimes lies only on a point or question of law. The meaning of this concept was examined in *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, [2006] 1 All ER 731, where Lord Hope of Craighead said at [6] that 'the question whether a tribunal was properly constituted or was acting in breach of the principles of natural justice is essentially a question of law'.

(p 118) s 24 Judicial review

[25] (p 124) Renumber Example 24.1 as Example 24.0000 (to remove duplication with Example 24.1 on p 127).

(p 129) s 26. Dynamic processing (doctrine of precedent)

[26] (p 133) In footnote 9 at end insert: As to 'aggrieved' see further Criminal Justice Act 1988 s 159(1) and *Re A and others* [2006] EWCA Crim 04, [2006] 2 All ER 1 at [23].

(p 143) s 28. Types of Act

[27] (p 147) After Example 28.4 insert: A modern form of the Adoptive Act is the model law on cross-border insolvency issued by the United Nations Commission on International Trade Law. This was adopted by the General Assembly by resolution 52/158 of 15 December 1997. See further *Re HIH Casualty and General Insurance Ltd and other companies, McMahon and others v McGrath and another* [2005] EWCH 2125 (Ch), [2006] 2 All ER 671, at [143].

[28] (p 149) In footnote 1 at end insert: For the status of Magna Carta as a statute see *R v Secretary of State for the Foreign and Commonwealth Office, ex p Bancoult* [2000] EWHC Admin 413, [2001] QB 1067, at [31]-[36].

(p 155) s 32. Overriding effect of an Act

[29] (p 159) After Example 32.15 insert:

The common law of nuisance has been largely replaced by statute. For example the Environmental Protection Act 1990 s 79(1) as amended establishes nine categories of statutory nuisance (see *R v Goldstein, R v Rimmington* [2005] UKHL 63, [2006] 2 All ER 257, at [9]). Lord Bingham of Cornhill has said:

> 'Where Parliament has defined the ingredients of an offence, perhaps stipulating what shall and shall not be a defence, and has prescribed a mode of trial and a maximum penalty, it must ordinarily be proper that conduct falling within that definition should be prosecuted for the statutory offence and not for a common law offence which may or may not provide the same defences and for which the potential penalty is unlimited . . . It cannot in the ordinary way be a reason for resorting to the common law offence that the prosecutor is freed from mandatory time limits or restrictions on penalty . . . good practice and respect for the primacy of statute do in my judgment require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise.'(*R v Goldstein, R v Rimmington* [2005] UKHL 63, [2006] 2 All ER 257, at [30].)

(p 197) s 50 Nature of delegated legislation

[30] Before paragraph beginning *Reasons for delegation*, insert:

Where an Act of the Westminster Parliament sets up a legislature for a territory (whether or not comprised in the United Kingdom) with the powers of a primary legislature for that territory (even though perhaps subject to the overall jurisdiction of the Westminster Parliament), its legislation falls to be treated *qua* that territory as primary rather than delegated legislation. Examples are the Scottish Parliament established by the Scotland Act 1998 s 1 and the legislatures established for former self-governing Dominions of the British Empire (for the latter see *Craies on Statute Law* (7th edn, 1971), Sweet & Maxwell, chap 19).

[31] (p 200) *Types of delegate* An example of a quasi-official delegate is the Law Society: see *Garbutt and another v Edwards and another* [2005] EWCA Civ 1206, [2006] 1 All ER 553, at [31]. In footnote 6, at end add '*Garbutt and another v Edwards and another* [2005] EWCA Civ 1206, [2006] 1 All ER 553, at [31]'.

[32] (p 201) After paragraph headed *Terminology* insert:

Care needs to be taken in applying the phrase 'under any Act'. An instrument is not necessarily made 'under' an Act just because the Act is relevant to its creation or status. This especially applies where the instrument is itself an Act of Parliament, for example one made in accordance with the procedure laid down by the Parliament Act 1911 (see Code p 197).

(p 218 s 61 Types of delegated legislation: (1) statutory instruments

[33] (p 219) Normally the introductory matter to a statutory instrument ends, by way of precaution in case any relevant power is missed out, with the ancient sweeping-up formula 'and of all other powers enabling him/her in that behalf'. For a purported restriction on the legal meaning of this phrase see *Vibixa Ltd v Komori UK Ltd and others, Polestar Joweths Ltd v Komori UK Ltd and others* [2006] EWCA Civ 536, [2006] 4 All ER 294. For criticism of this decision see F A R Bennion, 'Statutory Powers: a Dubious Decision', 170 JPN (7 October 2006) p 767, http://www.francisbennion.com/2006/037.htm

[34] Where two or more statutory powers would each found a particular statutory instrument it may be important to know under which of them it was made. A statutory instrument, the Supply of Machinery (Safety) Regulations 1992 SI 1992 No. 3073, could have been made under either or both of the following enactments: the European Communities Act 1972 s 2(2) and the Health and Safety at Work, etc. Act 1974 s. 15(1). However only if it was made under the 1974 Act power would it attract the

right to claim damages conferred by section 47(2) of that Act: see *Vibixa Ltd v Komori UK Ltd and others, Polestar Jowetts Ltd v Komori UK Ltd and others* [2006] EWCA Civ 536, [2006] 4 All ER 294.

(p 249) s 84 Extra-statutory concessions

[35] (p 250) In the reference to *R (on the application of Hooper and others) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813, [2003] 3 All ER 673 (inserted by 2005 Supplement p S16) add 'affirmed [2005] UKHL 29, [2006] 1 All ER 487'.

(p 276) s 102 Basic rule as to extent of an Act

[36] After 'This section' at beginning of Comment insert: , which was applied in *Office of Fair Trading v Lloyds TSB Bank plc and others* [2004] EWHC (Comm), [2005] 1 All ER 843, at [45; [2006] EWCA Civ 268, [2006] 2 All ER 821, at [73]-[76].

(p 306) s 128 General principles as to application

[37] At beginning of section 128 insert '(1)', and after section 128(1) as thereby created insert-

(2) Unless the contrary intention appears, an enactment does not apply so as to confer jurisdiction on a court or tribunal in a matter which is non-justiciable.

[38] At beginning of Comment insert:

Subsection (1)
This subsection was accepted by the Court of Appeal in *Office of Fair Trading v Lloyds TSB Bank plc and others* [2006] EWCA Civ 268, [2006] 2 All ER 821, at [73]-[76].

[39] (p 309) At end of Comment on s 128 insert:

Subsection (2)
Certain matters, for example treaties, are non-justitiable by a municipal court or tribunal (see pp 82-83 below). For an examination of the principles involved see *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116, [2006] 2 All ER 225 (whether application under Arbitration Act 1996 s 67 non-justiciable as involving interpretation of non-incorporated treaty and adjudication upon transactions of foreign sovereign states).

[40] In footnote 1 at end insert: 'See further *Lawson v Serco Ltd, Botham v Ministry of Defence, Crofts and others v Veta Ltd and others* [2006] UKHL 3, [2006] 1 All ER 823'. This case is also noted in relation to Code s 131.

(p 315) s 130 Application to foreigners and foreign matters outside the territory

[41] (p 318) After Example 130.4A insert**:** As to the location of an offence see generally *Office of the King's Prosecutor, Brussels v Cando Armas and another* [2005] UKHL 67, [2006] 1 All ER 647, at [36]-[40].

[42] (p 321) In footnote 2 at end insert: As to the extra-territorial effect of a company winding-up see generally *Re International Tin Council* [1987] Ch 419 at 446-447; *Re HIH Casualty and General Insurance Ltd and other companies, McMahon and others v McGrath and another* [2005] EWCH 2125 (Ch), [2006] 2 All ER 671.

(p 322) s 131 Application to Britons and British matters outside the territory

[43] (p 326) After Example 131.7 insert:

Modern employment law may be intended to operate to the advantage of British citizens working outside the territory, especially where the employment is peripatetic.

Example 131.8 The Employment Rights Act 1996 s 196 restricted the Act's application in cases where the employee worked outside Great Britain, the area of the Act's extent. This caused interpretative difficulty, whereupon s 196 was repealed, with nothing being

put in its place. The matter was thus left to the judges, who decided, in relation to s 94(1), that the Act should apply to certain such cases.: see *Lawson v Serco Ltd, Botham v Ministry of Defence, Crofts and others v Veta Ltd and others* [2006] UKHL 3, [2006] 1 All ER 823. This case is also noted in relation to Code s 128.

(p 333) s 136 Applying the enactment to the facts

[44] (p 335) At end of Comment insert-

Duplication of application As to the case where two or more different enactments apply to the same facts see *R v D* [2005] EWCA Crim 3660, [2006] 2 All ER 726 (overlapping of sexual offences prevention order and Family Court jurisdiction).

(p 350) s 141 Precise and disorganised enactments

[45] (p 351) After Example 141.4 insert-

Example 141.4A In *Office of Fair Trading v Lloyds TSB Bank plc and others* [2006] EWCA Civ 268 the Court of Appeal said of the Consumer Credit Act 1974 (drafted by the present author) 'the draftsman has been careful and precise in his choice of language: for example, where "means" is intended the statute says "means", and where "includes" is meant it says "includes"' (para [65]).

(p 414) s 167 Legislative intention and delegation to the court

[46] At end of Comment insert-

This dynamic processing is also known as judicial glossing (see also Code ss 177-179). This in turn may have to be interpreted in later cases. Thus Carnwith LJ said in a case where this glossing had occurred:

> 'The court's task is not of statutory interpretation in the conventional sense, but of the interpretation of a "judicial gloss" on a statute . . .'(*Jones v Garnett (Inspector of Taxes)*[2005] EWCA Civ 1553, [2006] 2 All ER 381, at [105]).

(p 420) s 171 Intention distinguished from motive

[47] The motive may relate to a particular enactment within the Act.

Example 171.5 In *Re Cawston's Conveyance and the School Sites Act 1841, Hassard-Short v Cawston* [1940] Ch 27 at 33-34 (cited *Fraser and another v Canterbury Diocesan Board of Finance and others* [2005] UKHL 65, [2006] 1 All ER 315, at [28]) Greene MR said regarding the School Sites Act 1841 that no doubt the provision as to reverter was regarded by the legislature as an encouragement to the owners of estates to give land for a school because they would get it back if the school closed.

(p 427) s 174 When implications are legitimate

[48] *Implied ancillary powers* (pp 429-430) Implied ancillary powers do not include a power to terminate an employment contract by a person who is not party to the contract: *Rose v Dodd* [2005] EWCA Civ 957 (the reasoning here is doubtful).

[49] (p 430) *Implied abolition of inconsistent right* An existing right will by implication be abolished by an Act, even though no compensation is paid, where its continuance is inconsistent with the exercise of powers conferred by the Act: *Yarmouth Corp v Simmons* (1878) 10 Ch D 518; *Jones v Cleanthi* [2005] EWHC (QB), [2006] 1 All ER 1029.

(p 433) s 176 Dynamic processing by the court (*stare decisis*)

[50] (p 434) After end of Comment insert:

Example 176.4 In *R v James, R v Karimi* [2006] EWCA Crim 14, [2006] 1 All ER 759, the Court of Appeal, Criminal Division, departed from the usual rule of precedent and followed a decision of the Judicial Committee of the Privy Council (*Attorney General for Jersey v Holley* [2005] UKPC 23, [2005] 3 All ER 371) rather than the conflicting

decision of the House of Lords in *R v Smith (Morgan)* [2000] 4 All ER 289. The reason was expressed in para [22] of *Holley*-

> 'In 1957 Parliament altered the common law relating to provocation and declared what the law on this subject should thenceforth be . . . it is not open to judges now to change ("develop") the common law and thereby depart from the law as declared by Parliament . . . the majority view [of the House of Lords] does represent a departure from the law as declared in s 3 of [the Homicide Act 1957]. It involves a significant relaxation of the uniform, objective standard adopted by Parliament.'

(p 441) s 180 Nature of the interpretative criteria

[51] *Interpretative criteria as part of the common law* Since the enactment of the compatible construction rule contained in the Human Rights Act 1998 s 3 (see Code s 421), there has been a tendency by courts to emphasise the common law origin of the interpretative criteria discussed in this book (other than Parts XXIX AND XXX). In *AIG Capital Partners Inc and another v Republic of Kazakhstan (National Bank of Kazakhstan intervening)* [2005] EWHC 2239 (Comm), [2006] 1 All ER 284, Aikens J referred to 'common law canons of construction' (para [27]), 'common law principles of construction' (paras [29], [62], [88]) and '"common law" construction' (para [64]).

(p 453) s 186 Nature of the weighing operation

[52] In a case involving defective drafting (*R (on the application of the Crown Prosecution Service) v Bow Street Magistrates' Court (James and others, interested parties)* [2006] EWHC 1763 (Admin), [2006] 4 All ER 1342), the balancing of interpretative factors involved at least three criteria: the principle against doubtful penalisation (see Code Part XVI), the need for a rectifying construction (see the note on the case below, relating to Code s 287), and the plain meaning rule (see Code s 195). The court held, by somewhat questionable reasoning, that 'the proper construction of [the relevant provision] merely continues the existing law until its replacement by the new provisions and that no increase in penalty is involved at any stage' (see [47]).

(p 468) s 193 Basic rule of statutory interpretation

[53] (p 469) In centre of page, after 'and that includes the interpretative criteria' insert: In *R v Lang and others* [2005] EWCA Crim 2864 Rose LJ said at [8] 'Parliament is presumed to know the law'.

(p 470) s 194 Duty to respect the juridical nature of an enactment

[54] At end of Comment insert:

A further aspect of the juridical nature of an enactment lies in the process that used to be called 'glossing the statute'. Where an enactment has been in existence for a considerable period it is likely to have attracted, through the processes of litigation (whether civil or criminal), binding judicial dicta which affect its legal meaning and need to be taken into account by the interpreter. In *Synthon BV v Smith Kline Beecham plc* [2005] UKHL 59, [2006] 1 All ER 685, at [57], Lord Walker of Gestingthorpe expressed it as follows:

> 'The law of patents . . . has been wholly statutory since the Statute of Monopolies 1623, an important landmark in constitutional history because of its effect in curbing the royal prerogative. It is a field of law in which statutory change . . . has been a process, not of revolution, but of slow evolution. Bankruptcy law and, until recently, the law of rating are comparable in this respect. In these fields the courts have shown an inclination to enrich the bare simplicity of the statutory text with their own explanatory commentary . . . This sort of judicial exposition is more than what the old cases called glossing the statute.'

(p 477) s 198 The rule *ut res magis valeat quam pereat*

[55] After first sentence of Comment insert-

In *R (on the application of Hasani) v Blackfriars Crown Court* [2005] EWHC 3016 (Admin), [2006] 1 All ER 817, Hooper LJ at [14] referred to 'the well-known rule of statutory interpretation that, if it is possible, the provisions of an Act must be construed so as to give them a sensible meaning.'

(p 491) s 200 The Interpretation Act 1978

[56] (p 493) The words 'the comparison should be with a person of like age' were confirmed as correct by *Attorney General for Jersey v Holley* [2005] UKPC 23, [2005] 3 All ER 371; *R v James, R v Karimi*, [2006] EWCA Crim 14, [2006] All ER(D) 170. These cases also confirmed the objective test where the comparator is a person of like age *and sex* but does not otherwise resemble the defendant.

(p 526) s 217 Use of Hansard

[57] *Rowing back from Pepper v Hart*

EXECUTIVE ESTOPPEL

[58] In the years since *Pepper v Hart* was decided its constitutional defects have become more obvious. In a 2006 case Brooke LJ summed up the considered response of leading Law Lords:

'The House of Lords has made it clear that reference to statements made in Parliament about the meaning or effect of a particular clause in a Bill is only permissible for the purpose of construing the equivalent section when enacted if three conditions are all satisfied. Thos conditions were first identified by Lord Browne-Wilkinson in *Pepper (Inspector of Taxes) v Hart* [1993] AC 594, and are clearly set out by Lord Bingham of Cornhill in his speech in *R v Secretary of State for Transport, the Environment and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, 391. The first of these conditions is that such reference was permissible only where legislation was ambiguous or obscure, or led to an absurdity.' (*Tarlochan Singh Flora v Wakom (Heathrow) Ltd* [2006] EWCA Civ 1103 at [9].)

[59] Later Brooke LJ said (at [12]-[13]):

'My belief that it is illegitimate in this case to rely on what was said by a minister at an advanced stage of the progress of the Bill through the House of Lords is fortified by a passage in the speech of Lord Hoffmann in *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32 at [40]:

> "I am not sure that it is sufficiently understood that it will be very rare indeed for an Act of Parliament to be construed by the courts as meaning something different from what it would be understood to mean by a member of the public who was aware of all the material forming the background to its enactment but who was not privy to what had been said by individual members (including Ministers) during the debates in one or other House of Parliament. And if such a situation should arise, the House may have to consider the conceptual and constitutional difficulties which are discussed by my noble and learned friend Lord Steyn in his Hart Lecture ((2002) 21 *Oxford Journal of Legal Studies* 59) and were not in my view fully answered in *Pepper v Hart.*"

Lord Hoffmann no doubt had in mind, among other things, the passage in that lecture in which Lord Steyn said at p 65:

> "Parliament can legislate only through the combined action of both Houses...Although the legislative powers of Parliament are exercised by human beings, Parliament as an abstraction cannot have a state of mind like an

individual. It would be strange use of language to say even of an individual legislator that he intended something in regard to the meaning of a Bill which was never present in his mind. To ascribe to all, or a plurality of legislators, an intention in respect of the meaning of a clause in a complex Bill and how it interacts with a ministerial explanation is difficult. The ministerial explanation in *Pepper v Hart* was made in the House of Commons only. What is said in one House in debates is not formally or in reality known to the members of the other House. How can it then be said that the minister's statement represents the intention of Parliament, i.e. both Houses."

[60] The remainder of this long paragraph need not be cited here, but it provides a powerful reminder of the problems inherent in access to Hansard unless Lord Browne-Wilkinson's three conditions are all met. In *Robinson* Lord Hobhouse spoke powerfully to similar effect (at [65]), and Lord Millett (at [76]) expressed himself fully in agreement with Lord Hoffmann. For the argument that the true rationale of *Pepper v Hart* is that the government were precluded by a form of estoppel from resiling from the minister's statement see F A R Bennion, 'Executive estoppel: *Pepper v Hart* revisited', *Public Law* [2007] Spring 1.

[61] Lord Phillips of Worth Matravers LCJ has suggested obiter that the rule in *Pepper v Hart* does not apply to criminal statutes:

'If a criminal statute is ambiguous, I would question whether it is appropriate by the use of *Pepper v Hart* to extend the ambit of the statute so as to impose criminal liability upon a defendant where, in the absence of the Parliamentary material, the court would not do so. It seems to me at least arguable that if a criminal statute is ambiguous, the defendant should have the benefit of the ambiguity.' (*Thet v Director of Public Prosecutions* [2006] EWHC 2701 (Admin), [2006] All ER (D) 09, at [15].)

[62] It is submitted that this is incorrect as failing to recognise the rationale of the rule in *Pepper v Hart*, which is that in cases of ambiguity etc the court is entitled to inform itself as to Parliament's intention by looking at Hansard. It also fails to recognise the basic principle of statutory interpretation (see Code s 193). Under this there may be other relevant interpretative criteria in the case apart from the principle against doubtful penalisation (for this principle see Code s 271) and that if so the matter is to be decided by weighing and balancing all relevant factors.

(p 580) s 221 Use of international treaties

[63] (p 584) *Vienna Convention* 'The [Refugee Convention] must be interpreted as an international instrument, not a domestic statute, in accordance with the rules prescribed in the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, [Treaty Series No 58 (1980); Cmnd 7964]). As a human rights instrument the [Refugee Convention] should not be given a narrow or restricted interpretation. None the less, the starting point of the construction exercise must be the text of the [Refugee Convention] itself . . . because it expresses what the parties to it have agreed. The parties to an international convention are not to be treated as having agreed something they did not agree, unless it is clear by necessary implication from the text or from uniform acceptance by states that they would have agreed or have subsequently done so': *Januzi v Secretary of State for the Home Department, Hamis v Secretary of State for the Home Department and other appeals* [2006] UKHL 5, [2006] 3 All ER 305, *per* Lord Bingham of Cornhill at [4]. Lord Bingham was referring to the definition of 'refugee' in the United Nations Refugee Convention (see [1]) but his dictum applies generally.

(p 593) s 229 Persuasive authority

[64] (p 594) Before paragraph beginning *Drafting etc error* insert:

General interpretative guidance by court Occasionally a senior court will give general interpretative guidance. This particularly happens with a new Act, but always in relation to an actual case or cases before the court.

> *Example 229.1* In *R v Lang and others* [2005] EWCA Crim 2864 the Court of Appeal (Criminal Division) heard thirteen appeals together in order to give guidance to the profession on the interpretation of the new mandatory sentencing provisions contained in the Criminal Justice Act 2003. At [153] Rose LJ criticised 'these astonishingly complex provisions' which he called 'labyrinthine', adding that there was much to be said for a sentencing system which, unlike this one, 'is intelligible to the general public' rather than being 'decipherable with difficulty by the judiciary'.

(p 620) s 245 The long title

[65] (p 621) In footnote 2, at end of first sentence insert: ; *R (on the application of Hasani) v Blackfriars Crown Court* [2005] EWHC 3016 (Admin), [2006] 1 All ER 817, at [6].

(p 636) s 256 Sidenote

[66] Change title of s 256 to 'Section name (sidenote, heading or title)'.

[67] In *Sandhu v Gill* [2005] EWCA Civ 1297, [2006] 2 All ER 22, at [17], Neuberger LJ refereed to a section's name (formerly sidenote, now heading) as its 'title'.

(p 658) s 263 Nature of legal policy

[68] (p 661) In footnote 7 at end insert: As to the meaning of 'acting as a solicitor' in relation to costs see *Agassi v Robinson (Inspector of Taxes) (Bar Council and another intervening)* [2005] EWCA Civ 1507, [2006] 1 All ER 900.

[69] (p 660) for the content of footnote 9 substitute the following: See further *Watkins v Secretary of State for the Home Department and others* [2006] UKHL 17, [2006] 2 All ER 353.

(p 672) s 264 Law should serve the public interest

[70] The court discourages satellite litigation (that is the extending of existing litigation by ancillary proceedings parasitic on it) because it brings litigation into disrepute. See *Garbutt and another v Edwards and another* [2005] EWCA Civ 1206, [2006] 1 All ER 553, at [7] ([59]), [47].

(p 698) s 270 Municipal law should conform to international law

[71] (p 703) After dictum of Lord Hoffmann, for 'This newly-coined term' substitute 'This use of the term' and after that sentence insert:

> It has been applied to the principle that no one should be punished for an act which was not an offence when it was done: see *R v Goldstein, R v Rimmington* [2005] UKHL 63, [2006] 2 All ER 257, at [24].
>
> It was held by the House of Lords that the acceptance by the Court of Appeal of the argument that the objections to the reception of evidence obtained by torture 'can be overridden by a statute and a procedural rule which makes no mention of torture at all' contravened the principle of legality: see *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 1 All ER 575 (a decision of seven Law Lords) at [51].

(p 705) s 271 Principle against penalisation under a doubtful law.

[72] The courts have adopted the following words of the present author in *Halsbury's Laws*:

> '. . . the true test is now considered to be whether a particular construction inflicts a detriment, or greater detriment, on persons affected. A law that inflicts hardship or deprivation of any kind on a person is in essence penal. There are

degrees of penalisation, but the concept of detriment inflicted through the state's coercive power pervades them all. The substance, not the form, of the penalty is what matters. The law is concerned that a person should not be put in peril of any kind upon an ambiguity; hence the principle against doubtful penalisation' (F A R Bennion in *Halsbury's Laws of England*, 4th edn reissue 1995, vol 44(1), para 1240: see *R (on the application of the Crown Prosecution Service) v Bow Street Magistrates' Court (James and others, interested parties)* [2006] EWHC 1763 (Admin), [2006] 4 All ER 1342, at [47].)

[73] (p 707) The principle is sometimes expressed by using the word 'narrowly'. Thus in *Agassi v Robinson (Inspector of Taxes) (Bar Council and another intervening)* [2005] EWCA Civ 1507, [2006] 1 All ER 900, at [56], Dyson LJ said of a doubtful definition 'because there are potential penal consequences, its very obscurity means that the words should be construed narrowly'. Whether 'strictly' or 'narrowly' is used the effect is the same, namely that if the case lies within the penumbra of doubt surrounding unclear statutory words the finding should be for the accused. The position is the opposite where the case is within a clear core meaning, even though there is a penumbra of doubt. (See the treatment of relative ambiguity in Code s 153).

(p 714) s 273 Statutory restraint of the person

[74] In footnote 7, at end insert: ; *Nikonovs v Governor of Brixton Prison and another* [2005] EWHC Admin 2405, [2006] 1 All ER 927.

(p 745) s 286 Presumption favouring consequential construction

[75] (p 747) After fifth line on p 747 insert:

Example 286.0 Where the literal construction of a taxing enactment had the 'startling' consequence of a perpetual liability on the taxpayer to pay interest to the revenue, subject only to the possibility of administrative remission, the House of Lords rejected it: *Burton (Collector of Taxes) v Mellham Ltd* [2006] UKHL6, [2006] 2 All ER 917.

(p 750) s 287 Presumption that rectifying construction to be given

[76] In a modern statutory instrument the drafter managed to include two separate errors in one brief sub-paragraph: see para 23(2) of the Criminal Justice Act 2003 (Commencement No.8 and Transitional and Saving Provisions) Order 2005 (SI 2005/950), which reads: 'Paragraph 12(1) and (2) of Schedule 9 to the Crime and Disorder Act 1988 [instead of "1998"] shall continue to apply to the recall of prisoners whose sentence [instead of "offence"] was committed before the commencement of section 103 of that Act.' Charitably these lapses were attributed by Sir Ivor Judge P to 'Homeric exhaustion': see *R (on the application of Buddington) v Secretary of State for the Home Department* [2006] EWCA Civ 280, [2006] All ER (D) 402, at [18].

[77] Elsewhere in this errant order (see [26]) the Court of Appeal in that case found it necessary to infer the presence of a missing comma to avoid absurdity. This is reminiscent of the case of the traitor Sir Roger Casement, who is said to have been 'hanged by a comma' in the Treason Act 1351.

[78] The Identity Cards Act 2006 s 44(2) says: 'The enactments in Schedule 2 are repealed to the extent shown in the second column of that Schedule'. Section 44(3) says: 'This Act, (*apart from this section* and sections 36 and 38) shall come into force on such day as the Secretary of State may by order appoint . . .', which literally means that the repeals effected by s 44(3) took immediate effect whereas the provisions of the Act intended to replace them came into effect on a (later) appointed day. The applicants were convicted during the 'gap' period. *Held* This was a slip by the drafter which should be rectified see *R (on the application of the Crown Prosecution Service) v Bow Street Magistrates' Court (James and others, interested parties)* [2006] EWHC 1763

(Admin), [2006] 4 All ER 1342. For the balancing operation required here see the note above relating to Code s 186.

(p 751) After fourth line insert:

In *Office of the King's Prosecutor, Brussels v Cando Armas and another* [2005] UKHL 67, [2006] 1 All ER 647, at [21], Lord Hope of Craighead said the European arrest warrant was intended by its promoters to substitute for extradition, in the case of persons who were fleeing from justice after having been finally sentenced, a simple transfer of such persons. He said that for the Extradition Act 2003 to use the word 'extradition' to describe the resulting system was only possible 'if one subscribes to the *Through the Looking Glass* school of legislative drafting' (a reference to *Alice Through the Looking Glass* by Lewis Carroll).

(p 763) s 288 Presumption that updating construction to be given

[79] *Changes in social conditions* (pp 771-775) 'The 1969 Act is to be construed in the circumstances of today . . .': *R (on the application of Jones and others v Ceredigion County Council* [2005] EWCA Civ 986, [2006] 1 All ER 138, at [56]).

[80] (p 771) After line 3 insert:

Changes may take place in Parliament's attitude to a particular matter. Lord Hoffmann said that since 1971 'there has been a radical change in the attitude of Parliament and the courts to the employment relationship': see *Lawson v Serco Ltd, Botham v Ministry of Defence, Crofts and others v Veta Ltd and others* [2006] UKHL 3, [2006] 1 All ER 823.

As to *criminal* liability without fault (strict liability), there was a movement away from this in the latter part of the twentieth century. Lord Diplock said in 1980:

> 'The climate of both parliamentary and judicial opinion has been growing less favourable to the recognition of absolute offences over the last few decades, a trend to which s 1 of the Homicide Act 1957 and s 8 of the Criminal Justice Act 1967 bear witness in the case of Parliament, and in the case of the judiciary is illustrated by the speeches in this House in *Sweet v Parsley* [1970] AC 132.'(*R v Sheppard* [1981] AC 394 at 407–408.

More recently the pendulum has swung back with regard to strict liability in criminal law: see *R (on the application of P) v Liverpool City Magistrates* [2006] EWHC 887 (Admin); *Brooklyn House Limited v Commission for Social Care Inspection* [2006] EWHC 1165 (Admin), [2006] All ER (D) 357 (May); *Director of Public Prosecutions v Collins* [2006] UKHL 40, [2006] 4 All ER 602.

(p 810) s 304 Nature of purposive construction

[81] (p 811) In footnote 4 at end insert: Cf *Office of the King's Prosecutor, Brussels v Cando Armas and another* [2005] UKHL 67, [2006] 1 All ER 647, at [24].

[82] (p 815) At end of paragraph beginning 'In another case' insert-

In *Szoma v Secretary of State for the Department of Work and Pensions* [2005] UKHL 64, [2006] 1 All ER 1, at [25], Lord Brown of Eaton-under-Heywood said:

> '. . . it would in my judgment be quite wrong to carry the fiction beyond its originally intended purpose so as to deem a person in fact lawfully here not to be here at all. "The intention of a deeming provision, in laying down a hypothesis, is that the hypothesis shall be carried so far as necessary to achieve the legislative purpose, but no further" – the effect of the authorities as summarised by Bennion *Statutory Interpretation* (4th edn, 2002), p 815 (section 304)'.

(p 831) s 312 Presumption that 'absurd' result not intended

[83] (p 832) The reasons why judges dislike giving effect to absurdity are illustrated in *R (on the application of Hasani) v Blackfriars Crown Court* [2005] EWHC 3016 (Admin), [2006] 1 All ER 817, where Hooper LJ at [14] said that to impose a literal reading of the Criminal Procedure (Insanity) Act 1964 would lead to 'a quite absurd waste of time and money' and 'risk bringing the criminal justice system into disrepute'.

[84] In the reference to *Office of the King's Prosecutor, Brussels v Cando Armas and another* [2004] EWHC 2019 (Admin), [2005] 2 All ER 181, added in 2005 All ER Review, insert '(affirmed on different grounds [2005] UKHL 67, [2006] 1 All ER 647)'.

(p 879) s 322 Methods of evasion: doing indirectly what must not be done directly

[85] (p 880) At end of Comment insert:

Where a statutory detriment is limited in extent it is unlawful to evade the limitation by manipulating the statutory wording in a way not intended by the legislator.

> *Example 322.3* The National Health Service (Performers List) Regulations 2004 SI 2004/585 reg 13(1) authorises the temporary suspension of a medical practitioner for a period which (with certain exceptions) must not exceed six months. Collins J said 'it would be unlawful to try to avoid that limit by revoking a suspension (which there is power to do under para (1)) and then seeking to reimpose it': *R (on the application of Malik) v Waltham Forest Primary Care Trust (Secretary of State for Health, interested party)* [2006] EWHC 487 (Admin), [2006] 3 All ER 71, at [9], [20].

(p 887) s 327 Presumption that ancillary rules of law intended to apply

[86] (p 892) After Example 327.8B insert:

> *Example 327.8C* That the limitation period for purposes of the Civil Liability (Contribution) Act 1978 should run from the ascertainment of quantum rather than liability was decided by reference to the fact that this was 'the underlying common law notion' in the case of claims for contribution between co-sureties etc: *Aer Lingus plc v Gildacroft Ltd and another*[2006] EWCA Civ 4, [2006] 2 All ER 290, at [11].

(p 901) s 329 Law regulating decision making

[87] (p 910) After first sentence under heading *Duty to give reasons* insert:

Wall LJ said:

> 'In my judgment, the proper exercise of a judicial discretion requires the judge to explain how he has exercised it. This is the well-known "balancing exercise". The judge has not only to identify the factors he has taken into account , but to explain why he has given more weight to some rather than to others. Either a failure to undertake this exercise, or for it to be impossible to discern from the terms of the judgment that it has been undertaken, vitiates the judicial conclusion . . .': *Cunliffe v Fielden and another* [2005] Civ 1508, [2006] 2 All ER 115, at [23]. See [24] for the principles as laid down by Bingham LJ in *Meek v Birmingham City Council* [1987] IRLR 250.

[88] In footnote 4 at end of first sentence add: *R v Lang and others* [2005] EWCA Crim 2864 at [17 ix].

(p 920) s 333 Presumed application of rules of tort law

[89] (p 921) In footnote 4 at end insert: For the history of the tort of nuisance see *R v Goldstein, R v Rimmington* [2005] UKHL 63, [2006] 2 All ER 257, at [5]. The

ingredients of the tort of nuisance are the same as those of the offence of nuisance: ***R v Goldstein, R v Rimmington*** [2005] UKHL 63, [2006] 2 All ER 257, at [7].

(p 926) s 334 Presumed application of rules of criminal law

[90] (p 932) At end of Comment insert:

Individual offences An offence exists either at common law or by statute. Where it is doubtful whether or not a particular offence exists, it is for the courts to decide the question.

> *Example 334.7* The House of Lords has held that public mischief – even conspiracy to effect a public mischief – is not an offence known to the law: ***DPP v Withers*** [1975] AC 842; ***R v Goldstein, R v Rimmington*** [2005] UKHL 63, [2006] 2 All ER 257, at [24], [33].

The courts have no power to create a new offence or widen an existing offence: ***DPP v Withers*** [1975] AC 842; ***R v Goldstein, R v Rimmington*** [2005] UKHL 63, [2006] 2 All ER 257, at [24], [33]. Nor can they reinvent a discredited offence under another name: ***R v Goldstein, R v Rimmington*** [2005] UKHL 63, [2006] 2 All ER 257, at [37] (reinventing public mischief as public nuisance).

(p 949) s 340 Reliance on illegality: allegans suam turpitudinem non est audiendus

[91] (p 950) At end of passage before side-heading *Defences* insert**:**

The fact that a statutory requirement has not been complied with does not necessarily render the transaction unlawful and unenforceable. 'What the court has to do is to determine the effect of the requirement as a matter of the true construction of the statutory provision': ***Garbutt and another v Edwards and another*** [2005] EWCA Civ 1206, [2006] 1 All ER 553, at [35], [41].

(p 975) s 348 Judge in own cause: *nemo debet esse judex in propria causa*

[92] (p 977) In footnote 7 at end insert: See further ***Gillies v Secretary of State for Work and Pensions*** [2006] UKHL 2, [2006] 1 All ER 731, at [3], [23]; ***AWG Group Ltd and another v Morrison and another*** [2006] EWCA Civ 6, [2006] 1 All ER 967.

[93] (p 978) At end of paragraph before side-heading *Application to non-judicial decisions* insert:

It is the duty of a judge to recuse himself or herself where bias may be suspected, and this is a question of judgment rather than discretion: ***AWG Group Ltd and another v Morrison and another*** [2006] EWCA Civ 6, [2006] 1 All ER 967. Here Mummery LJ said at [19], [20]-

> 'If the judge had a discretion whether to recuse himself and had to weigh in the balance all the relevant factors, this court would be reluctant to interfere with his discretion, unless there had been an error of principle or unless his decision was plainly wrong. As already indicated however, I do not think that disqualification of a judge for apparent bias is a discretionary matter.'

(p 1013) s 363 Ordinary meaning of words and phrases

[94] (p 1014) Asked to consider whether cutting off a woman's hair constituted 'actual bodily harm' within the meaning of the Offences against the person Act 1861 s 47, Cresswell J said in ***Director of Public Prosecutions v Smith (Michael Ross)*** [2006] EWHC 94 (Admin), [2006] 2 All ER 16, at [15]:

> 'As there are no decisions directly in point, we must address the problem on first principles, noting that, according to Viscount Kilmuir LC in ***DPP v Smith*** [1961] AC 290 at 334, "bodily harm" needs no explanation, and that the phrase "actual bodily harm" consists of three words of the English language which require no

elaboration and in the ordinary course should not receive any . . .'

[95] (p 1017) After Example 363.2 insert:

A word may have different meanings because its meaning is subjective, depending on the characteristics of the person in question.

Example 363.2A In *R v Porter* [2006] EWCA Crim 560 it was held that whether a person was, within the meaning of the Criminal Justice Act 1988 s 160(1), in possession of a 'deleted' indecent photograph which remained on the hard drive of a computer admittedly in his possession depended on whether it was in fact accessible to him having regard to the degree of his computer expertise and other relevant factors applying to him.

(p 1027) s 366 Technical legal terms

[96] (p 1029) In the paragraph headed *Status terms*, after the fourth sentence, insert: The offence of public nuisance is also known as common nuisance: *R v Goldstein, R v Rimmington* [2005] UKHL 63, [2006] 2 All ER 257, at [8], [11].

(p 1046 s 375 Judicial notice of meaning

[97] In *R v Da Silva* [2006] EWCA Crim 1654, [2006] 4 All ER 900 Longmore LJ said at [7]-[9]:

'The mere fact that a word is an "ordinary English word" within *Brutus and Cozens* [1973] AC 854 does not prevent a judge assisting a jury with its meaning . . . If he does so assist the jury . . . he must do so correctly.'

In this case the word in question was 'suspecting' (as used in the Criminal Justice Act 1988 s 93A(1)(a)) and the judge did not assist the jury correctly. He added words of his own to the dictionary definition and thus committed 'a misdirection of a technical kind' which nevertheless did not render the conviction unsafe (see [19]).

(p 1084) s 397 Implication where statutory description only partly met

[98] A statutory description of an agreement is likely to apply rather to the substance than the form of the agreement, unless it is in terms related to form. In *Patel and another v Pirabakaran* [2006] EWCA Civ 685, [2006] 4 All ER 506 at [34] Wilson LJ said 'I conclude that the phrase "let as a dwelling" in [the Protection from Eviction Act 1977 s 2] means "let wholly or partly as a dwelling" and so applies to premises which are let for mixed residential and business purposes'.

[99] (p 1086) In *Fraser and another v Canterbury Diocesan Board of Finance and others* [2005] UKHL 65, [2006] 1 All ER 315, the House of Lords ruled that where a school was required to admit a certain description of pupils this was complied with even though other pupils were also admitted, provided no child of the specified description was turned away.

(p S53) Introduction to Part XXX

[100] (p S54) Before paragraph beginning 'Conflicts sometime arise' insert-

The question arises of whether developing 'our own system of human rights jurisprudence' as referred to in the above citation from Lord Woolf CJ means that judges should develop the common law to accommodate the requirements of the Convention. This appears to be what Butler-Sloss P intended in *Venables v News Group Newspapers Ltd* [2001] 1 All ER 908 (see Example 462.2 and *R v Quayle and other appeals, Attorney General's Reference (No 2 of 2004)* [2005] EWCA Crim 1415, [2006] 1 All ER 988, at [61], [64]). However it is surely contrary to principle for British courts to purport to alter the common law to accommodate a treaty not binding on common law countries generally. In *Watkins v Secretary of State for the Home Department and others* [2006] UKHL 17, [2006] 2 All ER 353 the House of Lords held

that the common law should not be 'developed' to provide remedies which were in effect provided by the Human Rights Act 1998 (see [26[, [64], [73].

(p S56) s 419. Nature of the Convention rights

[101] (p S57) In reference to *R (on the application of Hooper and others) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813, [2003] 3 All ER 673 (inserted by 2005 Supplement p S57 n 3) add 'affirmed [2005] UKHL 29, [2006] 1 All ER 487'.

(p S59) s 420 Duty to take account of Convention jurisprudence

[102] *Roberts v Parole Board* [2004] EWCA Civ 1031, [2004] 4 All ER 1136, (see 2005 Supplement p S59 n 4) affirmed [2005] UKHL 45, [2006] 1 All ER 39.

(p S60) s 421 Compatible construction rule

[103] For 'is now judicially referred to as conventional interpretation' substitute 'has been judicially referred to as conventional interpretation'. Insert as next sentence 'This is unfortunate as suggesting a link with the Convention (when the opposite is intended), and a more appropriate term would be common law interpretation.'.

[104] Lord Hoffmann has likened the compatible construction rule imposed by s 3 to the principle of legality (see Code pp 702-703): see *R (on the application of Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30, [2006] 1 All ER 529, at [17].

[105] (p S61) *Subsection (1): Rule of construction* (p S61) *R (on the application of Hammond) v Secretary of State for the Home Department* [2004] EWHC 2753 (Admin), [2005] 4 All ER 1127 (see All England Annual Review 2005 (Statute Law) para [113]) affirmed [2005] UKHL 69, [2006] 1 All ER 219. Note that because counsel did not challenge this 'bold' interpretation of section 3(1) of the 1998 Act the majority of Law Lords did not rule on whether it was a correct interpretation: see paras [17], [29] and [30]. Lord Brown of Eaton-under-Heywood ruled that it was correct (para [47]) and Lord Carswell (para [35]) concurred. This is plainly unsatisfactory.

[106] (p S63) In R (on the application of Hooper and others) v Secretary of State for Work and Pensions [2005] UKHL 29, [2006] 1 All ER 487, Lord Hoffmann said at [32]:

> '. . . in making decisions about social and economic policy, particularly those concerned with the equitable distribution of public resources, the Strasbourg court allows member states a generous margin of appreciation (see *James v UK* (1986) 8 EHRR 123 at 142 (para 46)). In a domestic system which (unlike the Strasbourg court) is concerned with the separation of powers, such decisions are ordinarily recognised by the courts to be matters for the judgment of the elected representatives of the people'.

[107] *Pre-incorporation legislation* Before paragraph beginning 'The following are examples' insert: 'See further *R (on the application of Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30, [2006] 1 All ER 529, *per* Lord Hoffmann at [18]'.

[108] After Example 421.8 insert-

Example 421.8A Eady J held that, notwithstanding a contrary decision of the Court of Appeal which was binding on him (*Plummer v Charman* [1962] 3 All ER 823), in the light of section 3(1) of the 1998 Act the Defamation Act 1952 s 10 should not be construed to deprive an election candidate of qualified privilege where a person who was not such a candidate would have enjoyed that privilege.

(p S74) s 433 Exceptions from liability for incompatible acts and omissions

[109] For a case where it was unclear which of paragraphs (a) and (b) of HRA s 6(2) applied see *R (on the application of Hooper and others) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2006] 1 All ER 487.

(p S81) s 441 Article 3 of Convention (prohibition of torture)

Evidence obtained by torture As to the use of evidence obtained in contravention of Art 3 see *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 1 All ER 575, a decision of seven Law Lords. Here it was held: (1) torture is defined by the Torture Convention of 1984 (para [111]); (2) torture is an aggravated and deliberate form of 'inhuman or degrading treatment or punishment' under Art 3 (para [31]); (3) the common law forbids torture (para [52]); (4) evidence is inadmissible only if it is established on a balance of probabilities that it was obtained by torture (para [118]); (5) if the existence of a 'ticking bomb' is disclosed through evidence obtained by torture that does not prevent its investigation ([paras [67]-[69]). See further F A R Bennion, 'Evidence obtained by torture' 169 JP (24-31 December 2005), 989, http://www.francisbennion.com/2005/062.htm

(p S81) s 443 Article 5 of Convention (right to liberty and security)

[110] (p S83) *Art 5(4)* In *R (on the application of Girling) v Parole Board and another* [2005] EWHC 5469 (Admin), [2006] 1 All ER 11 it was held that to preserve the status of the Parole Board as a court for purposes of Art 5(4) the power of the Home Secretary to give directions to the Board under the Criminal Justice Act 1991 s 32(6) should be treated as limited to directions as to its administrative or advisory functions and should not be taken to apply to its judicial functions. See F A R Bennion, 'Separation of Powers in Written and Unwritten Constitutions' 15 *Commonwealth Lawyer* (April 2006) 17, http://www.francisbennion.com/2006/015.htm

[111] On the need for an oral hearing see *R (on the application of Dudson) v Secretary of State for the Home Department* [2005] UKHL 52, [2006] 1 All ER 421.

[112] *Roberts v Parole Board* [2004] EWCA Civ 1031, [2004] 4 All ER 1136, (see p S83 n8) affirmed [2005] UKHL 45, [2006] 1 All ER 39.

(p S84) s 444 Article 6 of Convention (right to a fair trial)

[113] *Criminal or civil?* Whether Art 6 applies to proceedings with full force or 'in the attenuated form in which it is applied to administrative decisions or domestic tribunals' depends on how the domestic law would regard the matter: *R (on the application of Hammond) v Secretary of State for the Home Department* [2005] UKHL 69, [2006] 1 All ER 219, at [28], affirmed [2005] UKHL 69, [2006] 1 All ER 219. However '[t]he principle of the separation of powers is a fundamental purpose of art 6 and it would be strange if a member state could avoid the full requirements applicable to "classic" judicial proceedings by characterising the relevant decision in domestic law as "administrative"' (ibid). See F A R Bennion, 'Separation of Powers in Written and Unwritten Constitutions' 15 *Commonwealth Lawyer* (April 2006) 17, http://www.francisbennion.com/2006/015.htm

[114] (p S85) *Art 6(1)(a)* If a defendant is of limited capacity his trial will not be fair unless it pays due regard to this: *R (on the application of P) v West London Youth Court* [2005] EWHC 2583 (Admin), [2006] 1 All ER 477.

[115] (p S86) 'In the determination of his civil rights' As to restriction by the State Immunity Act 1978 s 14(4) of access to a court in a case concerning a central bank see AIG Capital Partners Inc and another v Republic of Kazakhstan (National Bank of Kazakhstan intervening) [2005] EWHC 2239 (Comm), [2006] 1 All ER 284.

[116] *'Independent and impartial tribunal established by law'* Where a judge has replaced a minister in deciding the term of a period of imprisonment of a discretionary lifer, but the minister retains custody of the prisoner, his duty keep the period of imprisonment under review remains: *R (on the application of Smith) v Secretary of State for the Home Department* [2005] UKHL 51, [2006] 1 All ER 407.

[117] (p S87) Art 6(1)(b) *Right to public hearing* The process of execution is part of the trial for this purpose: *AIG Capital Partners Inc and another v Republic of Kazakhstan*

(National Bank of Kazakhstan intervening) [2005] EWHC 2239 (Comm), [2006] 1 All ER 284, at [71].

[118] (p S88) *Art 6(3)(d)* This is not infringed where witnesses cannot be examined, even though their statements have been allowed to be considered, because they are dead: ***R v Al-Khawaja*** [2005] EWCA Crim 2697, [2006] 1 All ER 543.

(p S88) s 445 Article 7 of Convention (no punishment without law)

[119] *Article 7(1)(a)* For the reasons underlying this see ***R v Goldstein, R v Rimmington*** [2005] UKHL 63, [2006] 2 All ER 257, at [33]-[35]. As to the need for clarity and certainty in the law see ***R v Goldstein, R v Rimmington*** [2005] UKHL 63, [2006] 2 All ER 257, at [33].

(p S89) s 446 Article 8 of Convention (right to respect for private and family life)

[120] *Positive action* 'There is no art 8 right to be made a better parent at public expense': *Re G (a child) interim care order: residential assessment)* [2005] UKHL 68, [2006] 1 All ER706 at [24].

[121] *Family life* Lord Bingham of Cornhill said:

> '. . .the concept of family life in art 8 is an "autonomous" convention concept having the same meaning in all contracting states. According to the established Strasbourg jurisprudence that meaning does not embrace same-sex partners.' (***M v Secretary of State for Work and Pensions*** [2006] UKHL 11, [2006] 4 All ER 929 at [24]. See also [25]-[27].)

(p S93) s 451 Article 14 of Convention (prohibition of discrimination)

[122] (p S94) In reference to ***R (on the application of Hooper and others) v Secretary of State for Work and Pensions*** [2003] EWCA Civ 813, [2003] 3 All ER 673 (inserted by 2005 Supplement p S94 n 6) add 'affirmed [2005] UKHL 29, [2006] 1 All ER 487'.

[123] (p S95) In ***Francis v Secretary of State for Work and Pensions*** [2005] EWCA Civ 1303, [2006] 1 All ER 748 it was held that the claimant's case was on a par with that of persons entitled to maternity grant under certain regulations even though the regulations did not cover her, and that therefore art 14 applied. The Court of Appeal made a declaration to that effect. They declined to apply the HRA s 3 (see Code s 421) but left it to the Secretary of State to amend the regulations accordingly.

[124] In ***R (on the application of Gillan and another) v Metropolitan Police Commissioner and another*** [2006] UKHL 12, 4 All ER 1041, at [80] Lord Brown of Eaton-under-Heywood said:

> 'It seems to me inevitable . . . that so long as the principal terrorist risk against which use of the [power of stop and search conferred by the Terrorism Act 2000 s 44] has been authorised is that from Al Qa'ida, a disproportionate number of those stopped will be of Asian appearance . . .' Art 14 was not accordingly infringed. This decision distinguished, and in effect overruled, the somewhat wayward decision of the House of Lords in ***European Roma Rights Centre and others v Immigration Officer at Prague Airport and another (United Nations High Commissioner for Refugees intervening)*** [2004] UKHL 55, [2005] 1 All ER 527.

(p S99) s 462 Defined terms

[125] (p S101) In reference to ***R (on the application of Hooper and others) v Secretary of State for Work and Pensions*** [2003] EWCA Civ 813, [2003] 3 All ER 673 (inserted by 2005 Supplement p S101 n 8) add 'affirmed [2005] UKHL 29, [2006] 1 All ER 487'.

Appendix E

[126] The following notes relate to Appendix E as substituted by the 2005 Supplement pp S125-S139.

central bank: See *AIG Capital Partners Inc and another v Republic of Kazakhstan (National Bank of Kazakhstan intervening)* [2005] EWHC 2239 (Comm), [2006] 1 All ER 284, at [38].

family: See *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 4 All ER 929 at [24]. See also [25]-[27].

lawful: See also *unlawful* and *Szoma v Secretary of State for the Department of Work and Pensions* [2005] UKHL 64, [2006] 1 All ER 1, at [26]-[28].

reasonably practicable: See also *R (on the application of Calgin) v Enfield London Borough Council* [2005] EWHC 1716 (Admin), [2006] 1 All ER 112, at [30]-[35].

unlawful: See also *lawful*.