3 Statutory interpretation

Introduction

This chapter looks at:

- cases illustrating the different rules of statutory interpretation: the literal rule, the golden rule and the mischief rule;
- the purposive approach to statutory interpretation and the limits to this approach;
- when the courts will make direct reference to *Hansard* (the official record of parliamentary proceedings); and
- the impact of the Human Rights Act 1998 on statutory interpretation.

The literal rule

When faced with a piece of legislation, the courts are required to interpret its meaning so that they can apply it to the facts of the case before them. The courts have developed a range of rules of interpretation to assist them. When the literal rule is applied the words in a statute are given their ordinary and natural meaning, in an effort to respect the will of Parliament. The literal rule was applied in the case of **Fisher** *v* **Bell** (1960).

Fisher *v* Bell (1960), Divisional Court

On December 14, 1959, an information was preferred by Chief Inspector, George Fisher, of the Bristol Constabulary, against James Charles Bell, the defendant, alleging that the defendant, on October 26, 1959, at his premises in The Arcade, Broadmead, Bristol, unlawfully did offer for sale a knife which had a blade which opened automatically by hand pressure applied to a device attached to the handle of the knife (commonly referred to as a 'flick knife') contrary to section 1 of the Restriction of Offensive Weapons Act, 1959.

Lord Parker CJ

The sole question is whether the exhibition of that knife in the window with the ticket constituted an offer for sale within the statute. I confess that I think most lay people and, indeed, I myself when I first read the papers, would be inclined to the view that to say that if a knife was displayed in a window like that with a price attached to it was not offering it for sale was just nonsense. In ordinary language it is there inviting people to buy it, and it is for sale; but any statute must of course be looked at in the light of the general law of the country. Parliament in its wisdom in passing an Act must be taken to know the general law. It is perfectly clear that according to the ordinary law of contract the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale the acceptance of which constitutes a contract. That is clearly the general law of the country. Not only is that so, but it is to be observed that in many statutes and orders which prohibit selling and offering for sale of goods it is very common when it is so desired to insert the words 'offering or exposing for sale,' 'exposing for sale' being clearly words which would cover the display of goods in a shop window. Not only that, but it appears that under several statutes – we have been referred in particular to the Prices of Goods Act, 1939, and the Goods and Services (Price Control) Act, 1941 – Parliament, when it desires to enlarge the ordinary meaning of those words, includes a definition section enlarging the ordinary meaning of 'offer for sale' to cover other matters including, be it observed, exposure of goods for sale with the price attached.

In those circumstances I am driven to the conclusion, though I confess reluctantly, that no offence was here committed. At first sight it sounds absurd that knives of this sort cannot be manufactured, sold, hired, lent, or given, but apparently they can be displayed in shop windows; but even if this – and I am by no means saying it is – is a casus omissus it is not for this court to supply the omission. I am mindful of the strong words of Lord Simonds in **Magor and St Mellons Rural District Council** *v* **Newport Corporation** [1952] AC 189. In that case one of the Lords Justices in the Court of Appeal ([1950] 2 All ER 1226, 1236) had, in effect, said that the court having discovered the supposed intention of

Parliament must proceed to fill in the gaps – what the Legislature has not written the court must write – and in answer to that contention Lord Simonds in his speech said ([1952] AC 189, 191): 'It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation.'

Approaching this matter apart from authority, I find it quite impossible to say that an exhibition of goods in a shop window is itself an offer for sale. We were, however, referred to several cases, one of which is **Keating *v* Horwood** (1926) 28 Cox CC 198, a decision of this court. There, a baker's van was being driven on its rounds. There was bread in it that had been ordered and bread in it that was for sale, and it was found that that bread was under weight contrary to the Sale of Food Order, 1921. That order was an order of the sort to which I have referred already which prohibited the offering or exposing for sale. In giving his judgment, Lord Hewart CJ said this [at p 201]: 'The question is whether on the facts there were, (1) an offering, and (2) an exposure, for sale. In my opinion, there were both.' Avory J said [at p 201]: 'I agree and have nothing to add.' Shearman J, however, said [at p 201]: 'I am of the same opinion. I am quite clear that this bread was exposed for sale, but have had some doubt whether it can be said to have been offered for sale until a particular loaf was tendered to a particular customer.' There are three matters to observe on that case. The first is that the order plainly contained the words 'expose for sale,' and on any view there was an exposing for sale. Therefore the question whether there was an offer for sale was unnecessary for decision. Secondly, the principles of general contract law were never referred to, and thirdly, albeit all part of the second ground, the respondent was not represented and there was in fact no argument. I cannot take that as an authority for the proposition that the display here in a shop window was an offer for sale . . .

Accordingly, I have come to the conclusion in this case that the justices were right, and this appeal must be dismissed.

The golden rule

Under the golden rule for statutory interpretation, where the literal rule gives an absurd result, which Parliament could not have intended, the judge can substitute a reasonable meaning in the light of the statute as a whole. The case of **Adler *v* George** (1964) is a classic example of the courts applying the golden rule.

Adler *v* George (1964), Queen's Bench Division

Lord Parker CJ

This is an appeal by way of case stated from a decision of justices for the county of Norfolk sitting at Downham Market who convicted the defendant of an offence contrary to section 3 of the Official Secrets Act, 1920, in that, in the vicinity of a prohibited place, namely, Marham Royal Air Force station, he obstructed a member of Her Majesty's Forces engaged in security duty in relation to the said prohibited place.

Section 3 provides that: 'No person in the vicinity of any prohibited place shall obstruct, knowingly mislead or otherwise interfere with or impede, the chief officer or a superintendent or other officer of police, or any member of His Majesty's forces engaged on guard, sentry,

patrol, or other similar duty in relation to the prohibited place, and, if any person acts in contravention of, or fails to comply with, this provision, he shall be guilty of a misdemeanour.' In the present case the defendant had obtained access to – it matters not how – and was on the Air Force station on May 11, 1963, and there and then, it was found, he obstructed a member of Her Majesty's Royal Air Force.

The sole point here, and a point ably argued by the defendant, is that if he was on the station he could not be in the vicinity of the station, and it is only an offence under this section to obstruct a member of Her Majesty's Forces while he is in the vicinity of the station. The defendant has referred to the natural meaning of 'vicinity,' which I take to be, quite generally, the state of being near in space, and he says that it is inapt to and does not cover being in fact on the station as in the present case.

I am quite satisfied that this is a case where no violence is done to the language by reading the words 'in the vicinity of' as meaning 'in or in the vicinity of.' Here is a section in an Act of Parliament designed to prevent interference with members of Her Majesty's forces, among others, who are engaged on guard, sentry, patrol or other similar duty in relation to a prohibited place such as this station. It would be extraordinary, I venture to think it would be absurd, if an indictable offence was thereby created when the obstruction took place outside the precincts of the station, albeit in the vicinity, and no offence at all was created if the obstruction occurred on the station itself. It is to be observed that if the defendant is right, the only offence committed by him in obstructing such a member of the Air Force would be an offence contrary to section 193 of the Air Force Act, 1955, which creates a summary offence, the maximum sentence for which is three months, whereas section 3 of the Official Secrets Act, 1920, is, as one would expect, dealing with an offence which can be tried on indictment and for which, under section 8, the maximum sentence of imprisonment is one of two years. There may be, of course, many contexts in which 'vicinity' must be confined to its literal meaning of 'being near in space' but under this section, I am quite clear that the context demands that the words should be construed in the way I have said. I would dismiss this appeal.

The mischief rule

The mischief rule for interpreting statutes was laid down in **Heydon's case** in the sixteenth century and requires judges to consider three factors:

1 what the law was before the statute was passed;
2 what problem (or mischief) the statute was trying to remedy;
3 what remedy Parliament was trying to provide.

Below is an example of the mischief rule being applied by the courts.

Smith *v* Hughes (1960), High Court

Police officers preferred two informations against Marie Theresa Smith and four informations against Christine Tolan alleging that on various dates, they, being common prostitutes, did solicit in a street for the purpose of prostitution contrary to section 1(1) of the Street Offences Act, 1959.

The magistrate found the following facts in relation to the first information against Smith. The defendant was a common prostitute who lived at No. 39 Curzon Street, London, . . . , and used the premises for the purposes of prostitution. On November 4, 1959, between 8.50 p.m. and 9.05 p.m. the defendant solicited men passing in the street, for the purposes of prostitution, from a first-floor balcony of No. 39 Curzon Street (the balcony being some 8–10 feet above street level). The defendant's method of soliciting the men was (i) to attract their attention to her by tapping on the balcony railing with some metal object and by hissing at them as they passed in the street beneath her and (ii) having so attracted their attention, to talk with them and invite them to come inside the premises with such words as 'Would you like to come up here a little while?' at the same time as she indicated the correct door of the premises.

It was contended on behalf of the defendant, inter alia, that the balcony was not 'in a street' within the meaning of section 1(1) of the Street Offences Act, 1959, and that accordingly no offence had been committed.

Lord Parker CJ

These are six appeals by way of case stated by one of the stipendiary magistrates sitting at Bow Street, before whom informations were preferred by police officers against the defendants, in each case that she 'being a common prostitute, did solicit in a street for the purpose of prostitution, contrary to section 1(1) of the Street Offences Act, 1959.' The magistrate in each case found that the defendant was a common prostitute, that she had solicited and that the solicitation was in a street, and in each case fined the defendant.

The facts, to all intents and purposes, raise the same point in each case; there are minute differences. The defendants in each case were not themselves physically in the street but were in a house adjoining the street. In one case the defendant was on a balcony and she attracted the attention of men in the street by tapping and calling down to them. In other cases the defendants were in ground-floor windows, either closed or half open, and in another case in a first-floor window.

The sole question here is whether in those circumstances each defendant was soliciting in a street or public place. The words of section 1(1) of the Act of 1959 are in this form: 'It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution.' Observe that it does not say there specifically that the person who is doing the soliciting must be in the street. Equally, it does not say that it is enough if the person who receives the solicitation or to whom it is addressed is in the street. For my part, I approach the matter by considering what is the mischief aimed at by this Act. Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being molested or solicited by common prostitutes. Viewed in that way, it can matter little whether the prostitute is soliciting while in the street or is standing in a doorway or on a balcony, or at a window, or whether the window is shut or open or half open; in each case her solicitation is projected to and addressed to somebody walking in the street. For my part, I am content to base my decision on that ground and that ground alone. I think the magistrate came to a correct conclusion in each case, and that these appeals should be dismissed.

The purposive approach

Historically, the preferred approach to statutory interpretation was to look for a statutes' literal meaning. However, over the last three decades, the courts have accepted that the literal approach can be unsatisfactory. Instead, the judges have been increasingly influenced by the European approach to statutory interpretation which focuses on giving effect to the purpose of the legislation. In **Regina *v* Secretary of State for Health *ex parte* Quintavalle (on behalf of Pro-Life Alliance)** (2003) the House of Lords expressly used a purposive approach to statutory interpretation in order to interpret the Human Fertilisation and Embryology Act 1990. This Act had been passed in response to medical developments in fertility treatment. In July 1978 the first child was born using *in vitro* fertilisation techniques (where the egg is fertilised outside the mother's womb). This prompted considerable ethical and scientific debate as to the social, ethical and legal implications of these scientific developments. In 1982 a Committee of Inquiry was established under the chairmanship of Dame Mary Warnock and in the light of its report the 1990 Act was passed. This Act aimed to regulate and outlaw certain practices involving the use of human embryos. However, at the time that the Act was passed embryos could only be created by a process of fertilisation with sperm. After the Act was passed a new scientific process was developed known as cell nuclear replacement (CNR). Under this process an embryo can be created without fertilising an egg but by removing the nucleus from one egg and replacing it with another nucleus. This process was used in the cloning process to create the famous Dolly the sheep.

In the **Quintavalle** case of 2003, the appellant, acting on behalf of the pressure group Pro-Life, argued before the House of Lords that because CNR was a new process it was not covered by the 1990 Act and therefore the Human Fertilisation and Embryology Authority did not have the authority under the Act to licence research involving CNR. It pointed out that in s. 1 of the Act an embryo regulated by the Act is defined as 'a live human embryo where fertilisation is complete' and that CNR does not involve a process of fertilisation. This argument was rejected by the House of Lords which applied a purposive approach to interpreting the 1990 Act.

R *v* Secretary of State for Health *ex parte* Quintavalle (on behalf of Pro-Life Alliance) (2003), House of Lords

Lord Bingham

My Lords,

1 The issues in this appeal are whether live human embryos created by cell nuclear replacement (CNR) fall outside the regulatory scope of the Human Fertilisation and Embryology Act 1990 and whether licensing the creation of such embryos is prohibited by section 3(3)(d) of that Act.

. . .

The approach to interpretation

8 The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention

should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.

9 There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now.

10 . . . More pertinent is the guidance given by the late Lord Wilberforce in his dissenting opinion in **Royal College of Nursing of the United Kingdom** *v* **Department of Health and Social Security** [1981] AC 800. The case concerned the Abortion Act 1967 and the issue which divided the House was whether nurses could lawfully take part in a termination procedure not known when the Act was passed. At p 822 Lord Wilberforce said:

> In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question 'What would Parliament have done in this current case – not being one in contemplation – if the facts had been before it?' attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself.

Both parties relied on this passage, which may now be treated as authoritative.

Section 1(1)(a)

14 It is against this background that one comes to interpret section 1(1)(a). At first reading [the Pro-Life] construction has an obvious attraction: the Act is dealing with live human embryos 'where fertilisation is complete', and the definition is a composite one including

the last four words. But the Act is only directed to the creation of embryos *in vitro*, outside the human body (section 1(2)). Can Parliament have been intending to distinguish between live human embryos produced by fertilisation of a female egg and live human embryos produced without such fertilisation? The answer must certainly be negative, since Parliament was unaware that the latter alternative was physically possible. This suggests that the four words were not intended to form an integral part of the definition of embryo but were directed to the time at which it should be treated as such . . . The crucial point . . . is that this was an Act passed for the protection of live human embryos created outside the human body. The essential thrust of section 1(1)(a) was directed to such embryos, not to the manner of their creation, which Parliament (entirely understandably on the then current state of scientific knowledge) took for granted.

15 Bearing in mind the constitutional imperative that the courts stick to their interpretative role and do not assume the mantle of legislators, however, I would not leave the matter there but would seek to apply the guidance of Lord Wilberforce quoted above in paragraph 10:

(1) Does the creation of live human embryos by CNR fall within the same genus of facts as those to which the expressed policy of Parliament has been formulated? In my opinion, it plainly does. An embryo created by *in vitro* fertilisation and one created by CNR are very similar organisms. The difference between them as organisms is that the CNR embryo, if allowed to develop, will grow into a clone of the donor of the replacement nucleus which the embryo produced by fertilisation will not. But this is a difference which plainly points towards the need for regulation, not against it.

(2) Is the operation of the 1990 Act to be regarded as liberal and permissive in its operation or restrictive and circumscribed? This is not an entirely simple question. The Act intended to permit certain activities but to circumscribe the freedom to pursue them which had previously been enjoyed. Loyalty to the evident purpose of the Act would require regulation of activities not distinguishable in any significant respect from those regulated by the Act, unless the wording or policy of the Act shows that they should be prohibited.

(3) Is the embryo created by CNR different in kind or dimension from that for which the Act was passed? Plainly not: as already pointed out, the organisms in question are, as organisms, very similar.

While it is impermissible to ask what Parliament would have done if the facts had been before it, there is one important question which may permissibly be asked: it is whether Parliament, faced with the taxing task of enacting a legislative solution to the difficult religious, moral and scientific issues mentioned above, could rationally have intended to leave live human embryos created by CNR outside the scope of regulation had it known of them as a scientific possibility. There is only one possible answer to this question and it is negative. . . .

19 For these reasons I would dismiss the appeal with costs.

Lord Steyn

Purposive interpretation

21 . . . The pendulum has swung towards purposive methods of construction. This change was not initiated by the teleological approach of European Community jurisprudence, and

the influence of European legal culture generally, but it has been accelerated by European ideas: see, however, a classic early statement of the purposive approach by Lord Blackburn in **River Wear Commissioners** *v* **Adamson** (1877) 2 App Cas 743, 763. In any event, nowadays the shift towards purposive interpretation is not in doubt. The qualification is that the degree of liberality permitted is influenced by the context, eg social welfare legislation and tax statutes may have to be approached somewhat differently. For these slightly different reasons I agree with the conclusion of the Court of Appeal that section 1(1) of the 1990 Act must be construed in a purposive way.

The House of Lords' judgment of **Regina** *v* **Secretary of State for Health *ex parte* Quintavalle (on behalf of Pro-Life Alliance)** (2003) is available on Parliament's website at:
www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd030313/quinta-1.htm

The limits of the purposive approach

In a more recent case involving the interpretation of the Human Fertilisation and Embryology Act 1990 the House of Lords refused to take a purposive approach to interpreting the statute. In **Quintavalle** *v* **Human Fertilisation and Embryology Authority** (2005) the case concerned an application to the Human Fertilisation and Embryology Authority (HFEA) for permission to carry out tests on an embryo to determine whether, if the embryo grew to be a child, that child would be able to provide human blood or tissue that would enable its brother to survive a rare genetic disorder. Schedule 2 provides:

> (1) A licence under this paragraph may authorise any of the following in the course of providing treatment services—
> . . .
> (d) practices designed to secure that embryos are in a suitable condition to be placed in a woman or to determine whether embryos are suitable for that purpose.

The critical question was whether tissue testing is a practice designed to determine whether an embryo is 'suitable' for placing in a woman which is permissible under Schedule 2 of the Act. In interpreting the word 'suitable' the House of Lords refused in this context to apply a purposive interpretation and concluded that HFEA did have the power to issue the licence.

Quintavalle *v* Human Fertilisation and Embryology Authority (2005), House of Lords

Lord Hoffmann

32 Lord Wilberforce's remarks [in **Royal College of Nursing of the United Kingdom** *v* **Department of Health and Social Security** (1981)] provided valuable assistance to the House in **R (Quintavalle)** *v* **Secretary of State for Health** [2003] 2 AC 687. . . . The House followed Lord Wilberforce's guidance in holding that there was a 'clear purpose in the legislation' which could 'only be fulfilled if the extension [was] made'.

33 But, like all guidance on construction, Lord Wilberforce's remarks are more appropriate to some cases than others. This is not a case in which one starts with the presumption that Parliament's intention was directed to the state of affairs existing at the time of the Act. It obviously intended to regulate research and treatment which were not possible at the time. Nor is it a case, like the first **Quintavalle** case, in which the statutory language needs to be extended beyond the 'expressed meaning'. The word 'suitable' is an empty vessel which is filled with meaning by context and background. Nor is it helpful in this case to ask whether some new state of affairs falls within 'the same genus' as those to which the expressed policy has been formulated. That would beg the question because the dispute is precisely over what the genus is. If 'suitability' has the meaning for which the authority contends, then plainly PGD and HLA typing fall within it. If not, then not. Finally, Lord Wilberforce's recommendation of caution in the construction of statutes concerning controversial subjects 'involving moral and social judgments on which opinions strongly differ' would be very much to the point if everything which the Act did not forbid was permitted. It has much less force when the question is whether or not the authority has power to authorise it.

Lord Brown

43 The ethical questions raised by such a process are, it need hardly be stated, profound. Should genetic testing be used to enable a choice to be made between a number of healthy embryos, a choice based on the selection of certain preferred genetic characteristics? Is it acceptable to follow a procedure resulting in the birth of a child designed to secure the health of a sibling and necessarily therefore intended to donate tissue (including perhaps bone marrow) to that sibling? Is this straying into the field of 'designer babies' or, as the celebrated geneticist, Lord Winston, has put it, 'treating the offspring to be born as a commodity?' These are just some of the questions prompted by this litigation. But troubling though such questions are, the arguments are certainly not all one way, as may be demonstrated by the facts of this very case.

The House of Lords' judgment **Quintavalle** *v* **Human Fertilisation and Embryology Authority** (2005) is available on Parliament's website at: **www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd050428/quint-1.htm**

Reference to *Hansard*

While Parliament passes legislation, the courts have to interpret the legislation when applying it to particular cases. Sometimes the courts can have difficulty in determining what Parliament intended provisions of the legislation to mean. In the past the courts refused to look at Parliamentary debates published in *Hansard* in order to determine this intention. The House of Lords changed this position in the important case of **Pepper *v* Hart** (1992), ruling that in limited circumstances the courts could refer to *Hansard*. The case concerned the interpretation of the Finance Act 1976 in order to calculate how much tax some teachers were required to pay.

Pepper *v* Hart (1992), House of Lords

Lord Browne-Wilkinson

The case was originally argued before your Lordships without reference to any Parliamentary proceedings. After the conclusion of the first hearing, it came to your Lordships' attention that an examination of the proceedings in Parliament in 1976 which lead to the enactment of sections 61 and 63 might give a clear indication which of the two rival contentions represented the intention of Parliament in using the statutory words. Your Lordships then invited the parties to consider whether they wished to present further argument on the question whether it was appropriate for the House (under Practice Statement (Judicial Precedent) (1966)) to depart from previous authority of this House which forbids reference to such material in construing statutory provisions and, if so, what guidance such material provided in deciding the present appeal. The taxpayers indicated that they wished to present further argument on these points. The case was listed for rehearing before a committee of seven members not all of whom sat on the original committee . . .

My Lords, I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria. I accept Mr Lester's submissions, but my main reason for reaching this conclusion is based on principle. Statute law consists of the words that Parliament has enacted. It is for the courts to construe those words and it is the court's duty in so doing to give effect to the intention of Parliament in using those words. It is an inescapable fact that, despite all the care taken in passing legislation, some statutory provisions when applied to the circumstances under consideration in any specific case are found to be ambiguous. One of the reasons for such ambiguity is that the members of the legislature in enacting the statutory provision may have been told what result those words are intended to achieve. Faced with a given set of words which are capable of

conveying that meaning it is not surprising if the words are accepted as having that meaning. Parliament never intends to enact an ambiguity. Contrast with that the position of the courts. The courts are faced simply with a set of words which are in fact capable of bearing two meanings. The courts are ignorant of the underlying Parliamentary purpose. Unless something in other parts of the legislation discloses such purpose, the courts are forced to adopt one of the two possible meanings using highly technical rules of construction. In many, I suspect most, cases references to Parliamentary materials will not throw any light on the matter. But in a few cases it may emerge that the very question was considered by Parliament in passing the legislation. Why in such a case should the courts blind themselves to a clear indication of what Parliament intended in using those words? The court cannot attach a meaning to words which they cannot bear, but if the words are capable of bearing more than one meaning why should not Parliament's true intention be enforced rather than thwarted?

Restrictions on referring to *Hansard*

In **Wilson** *v* **Secretary of State for Trade and Industry** (2003) the House of Lords imposed restrictions on when the courts could refer to *Hansard*. Only statements made by a Minister or other promoter of legislation could be looked at by the court, other statements recorded in *Hansard* had to be ignored. In that case a lawyer, Mr Sumption, was appointed to put forward the concerns that Parliament had if *Hansard* was too readily relied upon, as this could actually serve to subvert the will of Parliament as expressed in the legislation passed.

Wilson *v* First County Trust Ltd (No. 2) (2004), House of Lords

Lord Hope

114 The concern which [Mr Sumption] expressed was directed to the use of *Hansard* in this case for the purpose of seeking to discover from debates in Parliament the reasons which Parliament had for making the enactment. He said that this was quite different from seeking to discover what words mean. It was one thing to refer to *Hansard* to ensure that legislation was not misconstrued in favour of the executive. That use could be said to be in support of the principle of Parliamentary sovereignty. It was another to refer to it in order to form a view as to whether Parliament had given sufficient reasons for doing what it did and, if not, whether the legislation was incompatible with Convention rights. To use *Hansard* in this way was to use it for a purpose which was adverse to the intention of Parliament.

115 Mr Sumption put forward two objections to this use of *Hansard* on grounds of principle. The first was that it involved examining the nature and quality of Parliament's reasoning in a case where there was no doubt about what Parliament had enacted. Where it was used for the purpose explained in **Pepper** *v* **Hart** there was a threshold that had to be satisfied – the test of ambiguity. Here there was no such threshold, as the suggestion was that *Hansard* could be resorted to however clear were the provisions set out in the enactment. The second was that its object was not to give effect to the will of Parliament but to measure the sufficiency of reasons given for the legislation against standards derived from the Convention. He said that this was contrary to Article 9 of the Bill of Rights. It was not for the courts to consider whether speeches made during debates in Parliament had put forward Convention-compliant reasons for supporting it.

116 I think that there is much force in these criticisms of the approach which the Court of Appeal took to this issue. But it would be going too far to say, as Mr Sumption did, that there are no circumstances where use may be made of *Hansard* where the purpose of doing so is to answer the question whether legislation is compatible with Convention rights. The boundaries between the respective powers and functions of the courts and of Parliament must, of course, be respected. It is no part of the court's function to determine whether sufficient reasons were given by Parliament for passing the enactment. On the other hand, it has to perform the tasks which have been given to it by Parliament. Among those tasks is that to which section 4(1) refers. It has the task of determining, if the issue is raised, whether a provision of primary legislation is compatible with a Convention right. It does not follow from recognition that there is an area of judgment within which the judiciary will defer to the elected body on democratic grounds that the court is absolutely disabled from forming its own view in these cases as to whether or not the legislation is compatible. That question is ultimately for the court not for Parliament, as Parliament itself has enacted. The harder that question is to answer, the more important it is that the court is equipped with the information that it needs to perform its task.

117 This, then, is the justification for resorting to *Hansard* in cases where the question at issue is not one of interpretation but whether the legislation is compatible. A cautious approach is needed, and particular care must be taken not to stray beyond the search for material that will simply inform the court into the forbidden territory of questioning the proceedings in Parliament. To suggest, as the Court of Appeal did [2002] QB 74, 94, para 36, that what was said in debate tends to confuse rather than illuminate would be to cross that boundary. It is for Parliament alone to decide what reasons, if any, need to be given for the legislation that it enacts. The quality or sufficiency of reasons given by the promoter of the legislation is a matter for Parliament to determine, not the court.

118 But proceedings in Parliament are replete with information from a whole variety of sources. It appears in a variety of forms also, all of which are made public. Ministers make statements, members ask questions or propose amendments based on information which they have obtained from their constituencies, answers are given to written questions, issues are explored by select committees by examining witnesses and explanatory notes are provided with Bills to assist members in their consideration of it. Resort to information of this kind may cast light on what Parliament's aim was when it passed the provision which is in question or it may not. If it does not this cannot, and must not, be a ground for criticism. But if it does, the court would be unduly inhibited if it were to be disabled from obtaining and using this information for the strictly limited purpose of considering whether legislation is compatible with Convention rights. This is an exercise which the European Court may wish to perform in order to determine, for example, whether the aim of the contested legislation was a legitimate one or whether an interference with the peaceful enjoyment of possession was justified . . . It is an exercise which the domestic court too may perform when it is carrying out the task under section 4(1) of the 1998 Act which has been entrusted to it by Parliament.

The House of Lords' judgment **Wilson** *v* **Secretary of State for Trade and Industry** (2003) is available on Parliament's website at: **www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd030710/will-1.htm**

Human Rights Act 1998 and statutory interpretation

The House of Lords has had to consider the impact of section 3 of the Human Rights Act 1998 when interpreting statutes. Section 3 provides that : 'So far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' The case of **Attorney-General's Reference No. 4 of 2002**; **Sheldrake *v* DPP** (2004) involved two separate appeals which were considered together because they raised the same legal issue. They were concerned with whether the imposition of a legal burden on a defendant to prove that they had not committed an offence breached the presumption of innocence protected in Article 6 of the European Convention. The House of Lords concluded that the relevant legislation did not breach the European Convention and in reaching this conclusion it considered its role in interpreting statutes following the Human Rights Act 1998.

Attorney-General's Reference No. 4 of 2002; Sheldrake *v* DPP (2004), House of Lords

Lord Bingham

My Lords,

1 Sections 5(2) of the Road Traffic Act 1988 and 11(2) of the Terrorism Act 2000, conventionally interpreted, impose a legal or persuasive burden on a defendant in criminal proceedings to prove the matters respectively specified in those subsections if he is to be exonerated from liability on the grounds there provided. That means that he must, to be exonerated, establish those matters on the balance of probabilities. If he fails to discharge that burden he will be convicted. In this appeal by the Director of Public Prosecutions and this reference by the Attorney-General these reverse burdens ('reverse' because the burden is placed on the defendant and not, as ordinarily in criminal proceedings, on the prosecutor) are challenged as incompatible with the presumption of innocence guaranteed by Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969). Thus the first question for consideration in each case is whether the provision in question does, unjustifiably, infringe the presumption of innocence. If it does the further question arises whether the provision can and should be read down in accordance with the courts' interpretative obligation under section 3 of the Human Rights Act 1998 so as to impose an evidential and not a legal burden on the defendant. An evidential burden is not a burden of proof. It is a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact. If an issue is properly raised, it is for the prosecutor to prove, beyond reasonable doubt, that that ground of exoneration does not avail the defendant.

. . .

7 Until the coming into force of the Human Rights Act 1998, the issue now before the House could scarcely have arisen. The two statutory provisions which it is necessary to consider are not obscure or ambiguous. They afford the defendant (Mr Sheldrake) and

the acquitted person a ground of exoneration, but in each case the provision, interpreted in accordance with the canons of construction ordinarily applied in the courts, would (as already noted) be understood to impose on the defendant a legal burden to establish that ground of exoneration on the balance of probabilities. Until October 2000 the courts would have been bound to interpret the provisions conventionally. Even if minded to do so, they could not have struck down or amended the provisions as repugnant to any statutory or common law rule. Domestic law would have required effect to be given to them according to their accepted meaning. Thus the crucial question is whether the European Convention and the Strasbourg jurisprudence interpreting it have modified in any relevant respect our domestic regime and, if so, to what extent.

The Convention and the Strasbourg jurisprudence

8 Article 6 of the Convention provides, so far as relevant:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . .
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

9 The right to a fair trial has long been recognised in England and Wales, although the conditions necessary to achieve fairness have evolved, in some ways quite radically, over the years, and continue to evolve. The presumption of innocence has also been recognised since at latest the early 19th century, although (as shown by the preceding account of our domestic law) the presumption has not been uniformly treated by Parliament as absolute and unqualified. There can be no doubt that the underlying rationale of the presumption in domestic law and in the Convention is an essentially simple one: that it is repugnant to ordinary notions of fairness for a prosecutor to accuse a defendant of crime and for the defendant to be then required to disprove the accusation on pain of conviction and punishment if he fails to do so. The closer a legislative provision approaches to that situation, the more objectionable it is likely to be. To ascertain the scope of the presumption under the Convention, domestic courts must have regard to the Strasbourg case law. It has there been repeatedly recognised that the presumption of innocence is one of the elements of the fair criminal trial required by Article 6(1): see, for example, **Bernard *v* France** (1998) 30 EHRR 808, para 37.

. . .

21 From this body of authority certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic

standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case.

. . .

The House of Lord's judgment **Attorney-General's Reference No. 4 of 2002**; **Sheldrake** *v* **DPP** (2004) is available on Parliament's website at: **www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041014/gen4-1.htm**

Statutory interpretation and the Human Rights Act: further analysis

The case of **Ghaidan** *v* **Godin-Mendoza** (2004) was concerned with the interpretation of the Rent Act 1977 following the Human Rights Act 1998. The Rent Act 1977 creates protected tenancies which give tenants very favourable rights, including in practice low rents. Under the legislation the protected tenancy passes on the death of the protected tenant to the surviving spouse living in the house or the person living with the protected tenant 'as his or her wife or husband'. Before the Human Rights Act 1998 was passed this was interpreted by the House of Lords as not including homosexual relationships. In the **Ghaidan** appeal, it was successfully argued that the 1977 Act had to be interpreted, following the Human Rights Act 1998, in a way that did not discriminate against homosexuals.

Ghaidan *v* **Godin-Mendoza** (2004), House of Lords

Lord Nicholls of Birkenhead

4 I must first set out the relevant statutory provisions and then explain how the Human Rights Act 1998 comes to be relevant in this case. Paragraphs 2 and 3 of Schedule 1 to the Rent Act 1977 provide:

> 2(1) The surviving spouse (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence.
>
> (2) For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant.
>
> 3(1) Where paragraph 2 above does not apply, but a person who was a member of the original tenant's family was residing with him in the dwelling-house at the time of and for the period of 2 years immediately before his death then, after his death, that person or if there is more than one such person such one of them as may be decided by agreement, or in default of agreement by the county court, shall be entitled to an assured tenancy of the dwelling-house by succession.

5 On an ordinary reading of this language paragraph 2(2) draws a distinction between the position of a heterosexual couple living together in a house as husband and wife and a homosexual couple living together in a house. The survivor of a heterosexual couple may become a statutory tenant by succession, the survivor of a homosexual couple cannot. That

was decided in **Fitzpatrick**'s case. The survivor of a homosexual couple may, in competition with other members of the original tenant's 'family', become entitled to an assured tenancy under paragraph 3. But even if he does, as in the present case, this is less advantageous. Notably, so far as the present case is concerned, the rent payable under an assured tenancy is the contractual or market rent, which may be more than the fair rent payable under a statutory tenancy, and an assured tenant may be evicted for non-payment of rent without the court needing to be satisfied, as is essential in the case of a statutory tenancy, that it is reasonable to make a possession order. In these and some other respects the succession rights granted by the statute to the survivor of a homosexual couple in respect of the house where he or she is living are less favourable than the succession rights granted to the survivor of a heterosexual couple.

6 Mr Godin-Mendoza's claim is that this difference in treatment infringes Article 14 of the European Convention on Human Rights read in conjunction with Article 8. Article 8 does not require the state to provide security of tenure for members of a deceased tenant's family. Article 8 does not in terms give a right to be provided with a home: **Chapman** *v* **United Kingdom** (2001) 33 EHRR 399, 427, para 99. It does not 'guarantee the right to have one's housing problem solved by the authorities': **Marzari** *v* **Italy** (1999) 28 EHRR CD 175, 179. But if the state makes legislative provision it must not be discriminatory. The provision must not draw a distinction on grounds such as sex or sexual orientation without good reason. Unless justified, a distinction founded on such grounds infringes the Convention right embodied in Article 14, as read with Article 8. Mr Godin-Mendoza submits that the distinction drawn by paragraph 2 of Schedule 1 to the Rent Act 1977 is drawn on the grounds of sexual orientation and that this difference in treatment lacks justification.

7 That is the first step in Mr Godin-Mendoza's claim. That step would not, of itself, improve Mr Godin-Mendoza's status in his flat. The second step in his claim is to pray in aid the court's duty under section 3 of the Human Rights Act 1998 to read and give effect to legislation in a way which is compliant with the Convention rights. Here, it is said, section 3 requires the court to read paragraph 2 so that it embraces couples living together in a close and stable homosexual relationship as much as couples living together in a close and stable heterosexual relationship. So read, paragraph 2 covers Mr Godin-Mendoza's position. Hence he is entitled to a declaration that on the death of Mr Wallwyn-James he succeeded to a statutory tenancy.

. . .

Section 3 of the Human Rights Act 1998

25 I turn next to the question whether section 3 of the Human Rights Act 1998 requires the court to depart from the interpretation of paragraph 2 enunciated in **Fitzpatrick's** case.

26 Section 3 is a key section in the Human Rights Act 1998. It is one of the primary means by which Convention rights are brought into the law of this country. Parliament has decreed that all legislation, existing and future, shall be interpreted in a particular way. All legislation must be read and given effect to in a way which is compatible with the Convention rights 'so far as it is possible to do so'. This is the intention of Parliament, expressed in section 3, and the courts must give effect to this intention.

27 Unfortunately, in making this provision for the interpretation of legislation, section 3 itself is not free from ambiguity. Section 3 is open to more than one interpretation. The

difficulty lies in the word 'possible'. Section 3(1), read in conjunction with section 3(2) and section 4, makes one matter clear: Parliament expressly envisaged that not all legislation would be capable of being made Convention-compliant by application of section 3. Sometimes it would be possible, sometimes not. What is not clear is the test to be applied in separating the sheep from the goats. What is the standard, or the criterion, by which 'possibility' is to be judged? A comprehensive answer to this question is proving elusive. The courts, including your Lordships' House, are still cautiously feeling their way forward as experience in the application of section 3 gradually accumulates.

28 One tenable interpretation of the word 'possible' would be that section 3 is confined to requiring courts to resolve ambiguities. Where the words under consideration fairly admit of more than one meaning the Convention-compliant meaning is to prevail. Words should be given the meaning which best accords with the Convention rights.

29 This interpretation of section 3 would give the section a comparatively narrow scope. This is not the view which has prevailed. It is now generally accepted that the application of section 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, section 3 may nonetheless require the legislation to be given a different meaning. The decision of your Lordships' House in **R *v* A (No. 2)** [2002] 1 AC 45 is an instance of this. The House read words into section 41 of the Youth Justice and Criminal Evidence Act 1999 so as to make that section compliant with an accused's right to a fair trial under Article 6. The House did so even though the statutory language was not ambiguous.

30 From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.

31 On this the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the 'interpretation' of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.

32 From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.

33 Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.

34 Both these features were present in **In re S (Minors) (Care Order: Implementation of Care Plan)** [2002] 2 AC 291. There the proposed 'starring system' was inconsistent in an important respect with the scheme of the Children Act 1989, and the proposed system had far-reaching practical ramifications for local authorities. Again, in **R (Anderson)** *v* **Secretary of State for the Home Department** [2003] 1 AC 837 section 29 of the Crime (Sentences) Act 1997 could not be read in a Convention-compliant way without giving the section a meaning inconsistent with an important feature expressed clearly in the legislation. In **Bellinger** *v* **Bellinger** [2003] 2 AC 467 recognition of Mrs Bellinger as female for the purposes of section 11(c) of the Matrimonial Causes Act 1973 would have had exceedingly wide ramifications, raising issues ill-suited for determination by the courts or court procedures.

35 In some cases difficult problems may arise. No difficulty arises in the present case. Paragraph 2 of Schedule 1 to the Rent Act 1977 is unambiguous. But the social policy underlying the 1988 extension of security of tenure under paragraph 2 to the survivor of couples living together as husband and wife is equally applicable to the survivor of homosexual couples living together in a close and stable relationship. In this circumstance I see no reason to doubt that application of section 3 to paragraph 2 has the effect that paragraph 2 should be read and given effect to as though the survivor of such a homosexual couple were the surviving spouse of the original tenant. Reading paragraph 2 in this way would have the result that cohabiting heterosexual couples and cohabiting heterosexual couples would be treated alike for the purposes of succession as a statutory tenant. This would eliminate the discriminatory effect of paragraph 2 and would do so consistently with the social policy underlying paragraph 2. The precise form of words read in for this purpose is of no significance. It is their substantive effect which matters.

36 For these reasons I agree with the decision of the Court of Appeal. I would dismiss this appeal.

Lord Steyn

My Lords,

38 I confine my remarks to the question whether it is possible under section 3(1) of the Human Rights Act 1998 to read and give effect to paragraph 2(2) of Schedule 1 to the Rent Act 1977 in a way which is compatible with the European Convention on Human Rights. In my view the interpretation adopted by the Court of Appeal under section 3(1) was a classic illustration of the permissible use of this provision. But it became clear during oral argument, and from a subsequent study of the case law and academic discussion on the correct interpretation of section 3(1), that the role of that provision in the remedial scheme of the 1998 Act is not always correctly understood. I would therefore wish to examine the position in a general way.

39 I attach an appendix to this opinion which lists cases where a breach of an ECHR right was found established, and the courts proceeded to consider whether to exercise their interpretative power under section 3 or to make a declaration of incompatibility under section 4. For the first and second lists (A and B) I am indebted to the Constitutional Law Division of the Department of Constitutional Affairs but law report references and other information have been added. The third list (C) has been prepared by Laura Johnson, my judicial assistant, under my direction. It will be noted that in 10 cases the courts used their interpretative power under section 3 and in 15 cases the courts made declarations of incompatibility under section 4. In five cases in the second group the declarations of incompatibility were subsequently reversed on appeal: in four of those cases it was held that no breach was established and in the fifth case (**Hooper**) the exact basis for overturning the declaration of incompatibility may be a matter of debate. Given that under the 1998 Act the use of the interpretative power under section 3 is the principal remedial measure, and that the making of a declaration of incompatibility is a measure of last resort, these statistics by themselves raise a question about the proper implementation of the 1998 Act. A study of the case law reinforces the need to pose the question whether the law has taken a wrong turning.

40 My impression is that two factors are contributing to a misunderstanding of the remedial scheme of the 1998 Act. First, there is the constant refrain that a judicial reading down, or reading in, under section 3 would flout the will of Parliament as expressed in the statute under examination. This question cannot sensibly be considered without giving full weight to the countervailing will of Parliament as expressed in the 1998 Act.

41 The second factor may be an excessive concentration on linguistic features of the particular statute. Nowhere in our legal system is a literalistic approach more inappropriate than when considering whether a breach of a Convention right may be removed by interpretation under section 3. Section 3 requires a broad approach concentrating, amongst other things, in a purposive way on the importance of the fundamental right involved.

42 In enacting the 1998 Act Parliament legislated 'to bring rights home' from the European Court of Human Rights to be determined in the courts of the United Kingdom. That is what the White Paper said: see Rights Brought Home: The Human Rights Bill (1997) (cm 3782), para 2.7. That is what Parliament was told. The mischief to be addressed was the fact that Convention rights as set out in the ECHR, which Britain ratified in 1951, could not be vindicated in our courts. Critical to this purpose was the enactment of effective remedial provisions.

43 The provisions adopted read as follows:

> 3. Interpretation of legislation
>
> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section—
> (a) applies to primary legislation and subordinate legislation whenever enacted;
> (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
> (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.
>
> 4. Declaration of incompatibility
>
> (1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
>
> (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
>
> (3)–(6).

If Parliament disagrees with an interpretation by the courts under section 3(1), it is free to override it by amending the legislation and expressly reinstating the incompatibility.

44 It is necessary to state what section 3(1), and in particular the word 'possible', does not mean. First, section 3(1) applies even if there is no ambiguity in the language in the sense of it being capable of bearing two *possible* meanings. The word 'possible' in section 3(1) is used in a different and much stronger sense. Secondly, section 3(1) imposes a stronger and more radical obligation than to adopt a purposive interpretation in the light of the ECHR. Thirdly, the draftsman of the Act had before him the model of the New Zealand Bill of Rights Act which imposes a requirement that the interpretation to be adopted must be reasonable. Parliament specifically rejected the legislative model of requiring a reasonable interpretation.

45 Instead the draftsman had resort to the analogy of the obligation under the EEC Treaty on national courts, as far as possible, to interpret national legislation in the light of the wording and purpose of directives. In **Marleasing SA** *v* **La Comercial Internacional de Alimentación SA** (Case C-106/89) [1990] ECR I-4135, 4159 the European Court of Justice defined this obligation as follows:

> It follows that, in applying national law, whether the provisions in questions were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.

Given the undoubted strength of this interpretative obligation under EEC law, this is a significant signpost to the meaning of section 3(1) in the 1998 Act.

46 Parliament had before it the mischief and objective sought to be addressed, viz the need 'to bring rights home'. The linch-pin of the legislative scheme to achieve this purpose was section 3(1). Rights could only be effectively brought home if section 3(1) was the prime remedial measure, and section 4 a measure of last resort. How the system modelled on the

EEC interpretative obligation would work was graphically illustrated for Parliament during the progress of the Bill through both Houses. The Lord Chancellor observed that 'in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility' and the Home Secretary said 'We expect that, in almost all cases, the courts will be able to interpret the legislation compatibly with the Convention': *Hansard* (HL Debates,) 5 February 1998, col 840 (3rd reading) and *Hansard* (HC Debates,) 16 February 1998, col 778 (2nd reading). It was envisaged that the duty of the court would be to strive to find (if possible) a meaning which would best accord with Convention rights. This is the remedial scheme which Parliament adopted.

. . .

49 A study of the case law listed in the Appendix to this judgment reveals that there has sometimes been a tendency to approach the interpretative task under section 3(1) in too literal and technical a way. In practice there has been too much emphasis on linguistic features. If the core remedial purpose of section 3(1) is not to be undermined a broader approach is required. That is, of course, not to gainsay the obvious proposition that inherent in the use of the word 'possible' in section 3(1) is the idea that there is a Rubicon which courts may not cross. If it is not possible, within the meaning of section 3, to read or give effect to legislation in a way which is compatible with Convention rights, the only alternative is to exercise, where appropriate, the power to make a declaration of incompatibility. Usually, such cases should not be too difficult to identify. An obvious example is **R (Anderson)** *v* **Secretary of State for the Home Department** [2003] 1 AC 837. The House held that the Home Secretary was not competent under article 6 of the ECHR to decide on the tariff to be served by mandatory life sentence prisoners. The House found a section 3(1) interpretation not 'possible' and made a declaration under section 4. Interpretation could not provide a substitute scheme. **Bellinger** is another obvious example. As Lord Rodger of Earlsferry observed '. . . in relation to the validity of marriage, Parliament regards gender as fixed and immutable': [2003] 2 WLR 1174, 1195, para 83. Section 3(1) of the 1998 Act could not be used.

50 Having had the opportunity to reconsider the matter in some depth, I am not disposed to try to formulate precise rules about where section 3 may not be used. Like the proverbial elephant such a case ought generally to be easily identifiable. What is necessary, however, is to emphasise that interpretation under section 3(1) is the prime remedial remedy and that resort to section 4 must always be an exceptional course. In practical effect there is a strong rebuttable presumption in favour of an interpretation consistent with Convention rights. Perhaps the opinions delivered in the House today will serve to ensure a balanced approach along such lines.

The House of Lords' judgment of **Ghaidan** *v* **Godin-Mendoza** (2004) is available on parliament's website at:
www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040621/gha-1.htm