Of animals and Rubicons: legislative interpretation and the elusive art of the possible

Lord Steyn asserted in *Ghaidan v Godin-Mendoza*[1] that the Human Rights Act 1998 ('the Act') was widely misunderstood and had been inconsistently and incorrectly applied. His speech, very clearly in favour of human rights,[2] arguably sought to become the '*ultimate House of Lords ruling that sets us all straight*.'[3]

Sections 3 and 4 of the Act were asserted to form the remedial provisions of the Act, with section 3 as the '*prime remedial measure'*. Two factors influencing professional, judicial and academic misunderstanding of this remedial scheme were then set up for attack: the aversion to flouting the will of Parliament was dismissed by reference to the 'countervailing' will of Parliament expressed in the Act; and the disproportionate focus on semantics was polemically dismissed with an assertion that a pedantic approach is singularly inappropriate in the context of human rights protection.

Debate as to the correct scope of section 3 continues to revolve around the meaning of the word 'possible'.[4] Differentiating the possible and impossible, their Lordships have referred to cats, dogs, sheep, goats, elephants and Rubicons. These metaphors may develop the poetics of law; however, the meaning of 'possible' remained (and remains) elusive.[5] Lord Steyn asserts that 'possible' is not restricted to ambiguous statutory provisions,

[1] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557
[2] The Guardian 2005
[3] Bennion 2000 p77
[4] Kavanagh 2004 p537
[5] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 per Lord Nicholls para27

purposive interpretation or any requirement for a reasonable interpretation;[6] he then reviews three House of Lords decisions to demonstrate the broad scope envisaged.

Firstly, despite inconsistent reasoning, *R v A (No 2)*[7] is affirmed as a unanimous decision. Even Lord Mustill's dissenting opinion in *Ghaidan* confirms this is correct.[8] Academic criticism of *R v A* is thereby consigned to irrelevance. Further, the section 3 obligation is no mere 'strong adjuration;'[9] the command *must* be obeyed.[10]

Pickstone and *Litster* are then used to demonstrate what had already been possible in the context of EU law. Both cases involved judicial addition of language to the original statutory language to give effect to European Directives. It was in the context of such clear judicial legislation that *Litster* was approvingly used to illuminate the broad scope of expectations in relation to the use of section 3: '*This implication of appropriate language … shows the strong interpretive techniques that can be expected in Convention cases*.'[11] Indeed, this technique had been recognised as '*an established technique of judicial rectification*'[12] no later than by 1995 – long before the Act was passed. It is churlish to query the broad scope of this approach as applied in Human Rights cases, especially as the courts are under a double obligation – under both section 3 and section 6 of the Act – to give effect to Convention rights wherever and whenever possible.

Space prohibits discussion of all 25 cases annexed to Lord Steyn's judgment; however, their perusal substantiates his view that the law may have taken a wrong turn – and was

[6] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 per Lord Steyn para 44
[7] *R v A (No 2)* [2002] 1 AC 45
[8] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 per Lord Mustill para 74
[9] *R v Director of Public Prosecutions ex parte Kebilene* [2000] 2 AC 326, 373
[10] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 per Lord Mustill para 59
[11] Lord Irvine, 'The Development of Human Rights in Britain', *Public Law*, 1998, pp. 221, 228 in Zander 1999 p167
[12] Kavanagh 2005 p267

certainly being applied inconsistently. The tax cases[13] demonstrate a particular reliance on linguistic features reasonably described as excessive. Even the 1978 obligation[14] for the feminine to import the masculine (and vice versa) *unless the contrary intention appears* was not sufficient to confer widow benefits on widowers. Section 3 is not relevant where standard methods of interpretation involve no breach of convention rights.[15] On its face, the Interpretation Act 1978 is Convention compliant, suggesting that the absence of discussion of the impact of section 3 is should not be questioned.[16] However, was relying on the '*contrary intention'* exception to justify a non-compliant interpretation really 'giving effect' to the Interpretation Act 1978 in a Convention compliant manner?

The refusal to find a possible interpretation in *Hooper* is all the more questionable given that as early as 1965 it had been recognised that '*[w]henever the Court decides [a revenue appeal] it legislates about taxation*'[17] and it was by then well established that section 3 was not limited to interpreting statutory ambiguity.[18]

The declaration of incompatibility in *McR*[19] merits closer attention. Notwithstanding concern that the relevant statutory provision was still in force, unaltered, over twenty years after being condemned by Strasbourg,[20] this case related to alleged sexual offences against a mentally retarded woman. The restriction of private sexual acts is 'necessary' for the protection of the 'specially vulnerable' and lies within the scope of legitimate domestic

[13] *R(Hooper) v Secretary of State for Work and Pensions* [2003] 1 WLR 2623; *R(Wilkinson) v Inland Revenue Commissioners* [2003] 1 WLR 2683
[14] Interpretation Act 1978 s6
[15] *Poplar Housing and Regeneration Community Association Ltd v Donaghue* [2001] QB 259, per Lord Woolf CJ para 75
[16] *R(Hooper) v Secretary of State for Work and Pensions* [2003] 1 WLR 2623, per Lord Phillips of Worth Matravers MR para 28
[17] Lord Diplock, 'The Courts as Legislators', Holdsworth Club Lecture, 1965 in Zander 1999 p190
[18] *R v A (No 2)* [2002] 1 AC 45, 67 per Lord Steyn
[19] *R v McR* (2002) NIQB 58
[20] *Dudgeon v UK* (1982) 4 EHRR 149 para 61

legislation.[21] Strasbourg had provided plentiful opportunity for a restrictive, Convention compliant, interpretation of the relevant legislation - yet the Court chose to bypass its obligation under section 3 in favour of its power under section 4. Not only was this inconsistent with the Act, it also arguably denied the alleged victim her Convention rights – including respect for her private life and protection against inhuman and degrading treatment.

Judicial activism remains controversial,[22] constitutionally, politically and legally. However, inconsistent application of section 3 is itself problematic. It was suggested (in reference to Lord Hope's judgment in *R v A*) that '… *we should perhaps be cautious about endorsing a supposedly cautious approach which the proponent is too cautious to apply in the leading case of its use*.'[23] Lord Steyn correctly stated that the proper impact of section 3 cannot be discussed without reference to the will of Parliament in 1998.

It is interesting to note that not only did the government intervene (successfully) for a Convention compliant interpretation in *Ghaidan*, it went on to intervene for Convention compliant interpretations of 'public authority'[24] in *Leonard Cheshire*, *Cameron v Network Rail* and *R (Johnson) v Havering LBC*. That the courts rules against the government in those cases arguably reversed the protection of rights at the very time they were most under threat[25]. It also supports Lord Steyn's assertion that section 3 had been inconsistently and incorrectly applied.

[21] ibid para 49
[22] Clayton 2004 p33
[23] Kavanagh 2005 p263
[24] Human Rights Act 1998 s6(3)(b)
[25] Clayton 2007 p16

Whilst government may render wholesale, and arguably ill thought-out, constitutional change in several areas, they do not cede power lightly – whether to Parliament, the People or the courts. It is submitted that the Act has made judicial activism a specific requirement of law – at least insofar as it relates to the protection of human rights. Quite simply, Parliament rightly recognised that the task of ensuring the entire statute book is and remains Convention compliant could only be properly undertaken by the courts. The government, as a client of legal services, was entitled to expect a more consistent approach in these cases.

However, Lord Steyn was not wholly consistent. Having asserted that a *reasonable* interpretation is not required, he posits a clear reference to the European Community model, which requires national courts to interpret national legislation *so far as possible* in light of the wording and purpose of European directives,[26] as a guide to the extent of what is possible under section 3. Although this is indeed a strong adjuration (a Spanish court had been obliged to interpret national legislation including the term 'lacking cause' as if that term was excluded) it is far from unambiguous.

Membership of the European Union *requires* primacy be given to directly effective EC law, whereas the Convention is not directly effective – either by national or international law. This distinction is specifically referred to, in the White Paper relied on elsewhere by Lord Steyn, to explain the *absence* of a judicial strike down provision in the Act.[27] However, European Union membership requires, and receives, just such a provision without explicit

[26] *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135

[27] Rights Brought Home: The Human Rights Bill (1997) (Cm 3782) para 2.13

Parliamentary approval.[28] It is not clear on what basis it is appropriate for the judiciary to cherry pick from the European Union model they have been asked to emulate.

Of even greater difficulty is the scope of the European obligation itself. The Spanish court was interpreting domestic law by analogy[29] so a broad margin for interpretation already existed. Further the reference to *Marleasing* invites comparison with *Wagner Miret*[30] where the obligation was reaffirmed - yet arguably emptied of any meaningful content. Having established that a redundant employee was entitled to a redundancy payment from the only national body set up to make such payments, it seems reasonable that it was at least *possible* for that body to be required to make the payment. However, the ECJ meekly accepted the national court's assertion that such an interpretation was impossible. The strength of the European Union model is itself arguably unclear.

Reliance on statistics is often unhelpful. The figures used by Lord Steyn suggest that approximately 40% of cases are incompatible, contrasting poorly with pre-legislative suggestions of 1%.[31] However, this presentation was disingenuous. A cursory look at the figures for 2001 – 2004 indicates that the House of Lords had considered 391 of nearly 1000 cases presented to it during that period. Add in the High Court and Court of Appeal and the figure rose to over 61,000 cases.[32] In the circumstances, ten to fifteen declarations of incompatibility would hardly be indicative of overuse – and may have been indicative of underuse. A more appropriate approach would be to ask why the House of Lords only

[28] *Factortame II* [1991] 1 AC 603
[29] *Marleasing SA v La Comercial Internacional de Alimentacion SA (Case C-106/89)* [1990] ECR I-4135 para 8
[30] *Wagner-Miret v Fondo de Garantia Salarial (Case C-92/334)* [1993] ECR I-6911
[31] Hansard (HC Debates) 16 February 1998 col 778
[32] Appellate Courts Summary Figures 2000 - 2006

had recourse to s3 fourteen times between 2002 and 2007[33], and to compare that with the number of section 4 declarations.

Equally, the annexed cases were not unequivocally in support of Lord Steyn's argument. For example, it is difficult to criticise the declaration of incompatibility in either *R v D*[34] or *Anderson*[35] as the Home Secretary was so heavily involved in their respective legislation that it was not possible for him to be 'interpreted' away. Further, the reference to *Bellinger*[36] as an *obviously* correct decision causes problems in reading the rest of his speech.

Having been invited to accept a broad interpretation of section 3 whose boundary is no more than a elephant shaped Rubicon (deliberately mixed metaphor: we will know it when we see it), we are then informed that it is *obviously* not possible to read female, in a provision expressly unlimited by the time of marriage,[37] as including a post-operative transsexual despite knowing that such a reading is not compatible with the Convention.[38] There may be many powerful arguments in favour of *Bellinger* including: the supremacy of Parliament; judicial deference;[39] the need for wide consultation for such a massive change to domestic law; and Parliament already being seized of the matter. However, the *impossibility* of a Convention compatible interpretation of the Matrimonial Causes Act 1973 is not a powerful argument. It has been argued[40] that the significant factor distinguishing the use of section 3 and section 4 is desirability; however, this merely begs the question. It is also inconsistent with the Act itself, which provides no exception to the obligation to find a compliant interpretation *wherever* it is possible to do so.

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[33] Clayton 2007 p13
[34] *R(D) v Secretary of State for the Home Department* [2003] 1 WLR 1315
[35] *R(Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837
[36] *Bellinger v Bellinger* [2003] 2 AC 467
[37] Matrimonial Causes Act 1973 s11(c)
[38] *Goodwin v UK* 35 EHRR 447
[39] Clayton 2004
[40] Fenwick p185

Conversely, the right in question may not be so clear. '*Possible*', like '*appropriates*',[41] is neutral. A convention compliant reading may well be possible with a narrow interpretation of the relevant right. Thus, it is *possible* to define 'severe pain' in a way that renders international prohibitions on torture virtually meaningless.[42] Failure to address this issue arguably contributes to a lacuna in human rights protection.

Excessive faith in section 3 as a remedial provision is misplaced. It has the potential to allow the lazy (but human rights minded) legislator to ignore the issues; he knows the courts will strive to plug any gaps for him. Equally, the draconian (but respectability minded) legislator may be tempted to threaten human rights at every turn; he knows the courts will strive officiously to create a compliant interpretation[43].

The control order cases illustrate this danger all too well: despite having '*difficulty … accepting that … the very essence of a fair hearing has not been impaired*' Lord Bingham nevertheless concurred in the result.[44] The mischief to be corrected by the Act is the infringement of human rights. Compatible interpretations are the most likely manner in which this can be achieved; however, in some circumstances a declaration of incompatibility may well be more likely to provide real and effective, not theoretical or illusory,[45] protection as it will require Parliament to address the relevant issue head on.

[41] Theft Act 1968 s3; *R v Hinks* [2001] 2 AC 241 per Lord Steyn at 253
[42] Memorandum for Alberto R. Gonzales Counsel to the President, Re Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A, from Jay S. Bybee, Assistant Attorney General, US Department of Justice August 1 2002 in ed. Greenberg & Dratel 2005 p183
[43] The Hostile Environment in the Immigration Acts 2014 and 2016 and associated case law
[44] *Secretary of State for the Home Department v MB* [2007] UKHL 46 per Lord Bingham para 41
[45] *Airey v Ireland* 2 EHRR 305

A few minutes allegedly differentiate between a lawful and an unlawful control order,[46] as the distinction between restriction and deprivation of liberty is one of degree, not substance.[47] Is tinkering with a few minutes here and there (section 3) the most effective way to protect all our human rights? Or is it better to identify a whole scheme as incompatible (section 4)?

To pretend the impossible is possible legitimises further abuse of human rights in a way that is not conducive to the public good. Whilst section 3 of the Act is focussed on implementation and accessibility[48], sections 4, 8 and 10 of the Act are the specifically remedial provisions. Section 3 can and should be used robustly to advance human rights protection; however, it should not be abused in an attempt to convert an elephant into a sheep.

[46] *Secretary of State for the Home Department v JJ* [2007] UKHL 45 per Lord Brown para 108
[47] *Guzzardi v Italy* 3 EHRR 333
[48] Rights Brought Home: The Human Rights Bill (1997) (Cm 3782) para 1.19

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