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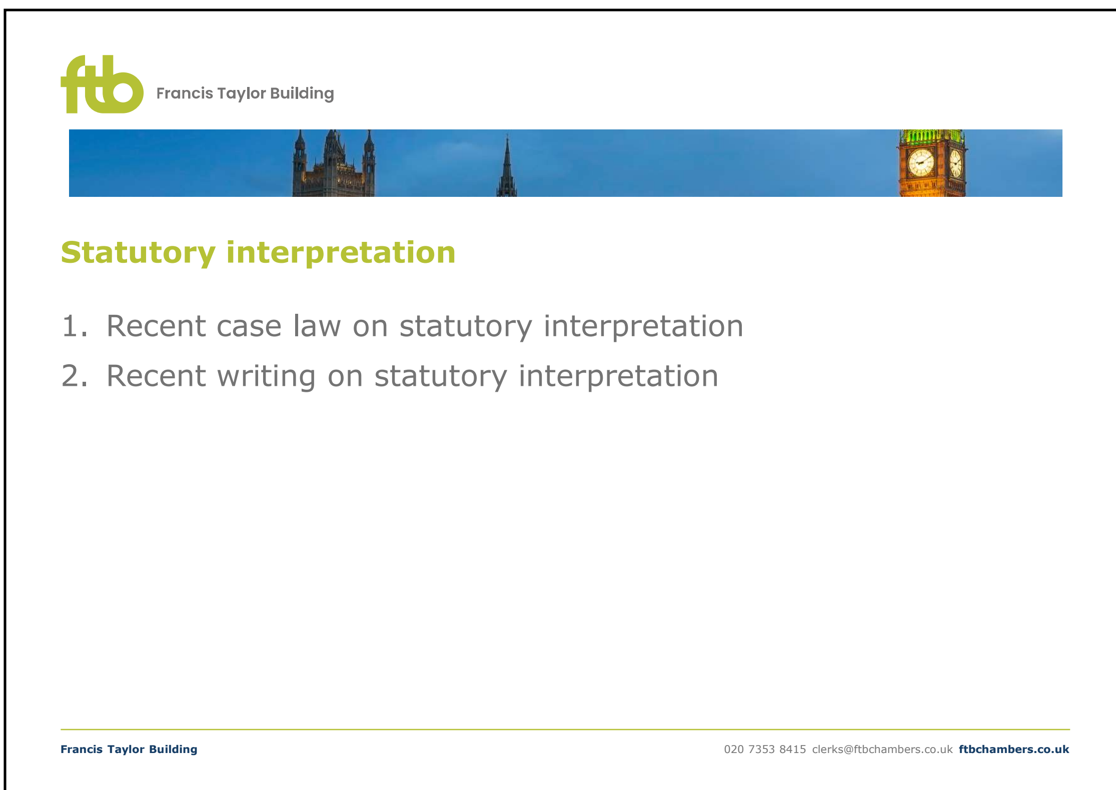

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R (O) v SSHD [2022] UKSC 3: background

- Can the Secretary of State lawfully make the exercise of a child's right to be registered as a British citizen conditional on their payment of £1,012?
- Statutory power in the Immigration Act 2014 to make subordinate legislation setting fees for applications to obtain British citizenship. Challenge to the Immigration and Nationality (Fees) Regulations 2018.
- Argued that did not have the power to set the fee at a level which rendered nugatory the underlying statutory right.
- Appeal dismissed and regulations upheld — question identified as one of *"statutory interpretation"* (see paragraph 27)

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The starting point is the wording of the statute read in context

29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:

> "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context."

(*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained.

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External aids are secondary assisting with purposive interpretation, but not displacing clear and unambiguous meaning

30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the

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Objective assessment of meaning from the perspective of a reasonable legislature

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme*, 396, in an important passage stated:

> "The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. … Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning."

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Lady Arden suggesting a greater role for pre-legislative background material

75. *Craies on Legislation*, 12th ed (2020), chapter 27 states that courts are increasingly prepared to look at any material that is likely to be genuinely helpful in illuminating the context in which legislation is to be construed but that they still start from the assumption that it is important that background material should not be allowed to take precedence over the clear meaning of the words used (para 27.1.1.2).

76. In my judgment it is realistic also to recognise that pre-legislative material, where available, may inform the court about an ambiguity which was not apparent simply on the face of the words, the mischief to which the legislation was directed and the purpose of the provision, and may in an appropriate case influence the meaning of the statutory provision. The use of pre-legislative material in an appropriate case in one of these ways, mindful always that statutory interpretation must be consistent with the courts' relationship with Parliament, is an integral part of modern statutory interpretation. Moreover, the use of pre-legislative material in the ways I have described supports and strengthens the task of giving the correct meaning to the words that Parliament has used.

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News Corp v HMRC [2023] UKSC 7: background

- Whether digital issues of The Times, The Sunday Times, The Sun and the Sun on Sunday were supplies of "*newspapers*" within the meaning of the Value Added Tax Act 1994?
- Appellant argued that they were relying, amongst other things, on the always speaking doctrine.
- Appeal dismissed. Not "*newspapers*" within the meaning of the legislation — extensive consideration of the principles of statutory interpretation in the judgments (see paragraphs 27 to 60; and 75 to 95)

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The starting point is again reading words in light of their context and purpose

27. It is clear that the modern approach to statutory interpretation in English (and UK) law requires the courts to ascertain the meaning of the words used in a statute in the light of their context and the purpose of the statutory provision: see, eg, *Quintavalle*, para 8 (per Lord Bingham); *Uber BV v Aslam* [2021] UKSC 5; [2021] ICR 657, para 70; *Rittson-Thomas v Oxfordshire County Council* [2021] UKSC 13; [2022] AC 129, para 33; *R(O) v Secretary of State for the Home Department* [2022] UKSC 3; [2022] 2 WLR 343, paras 28-29.

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The always speaking principle — the Lord Burrows summary

29. What is meant by the always speaking principle is that, as a general rule, a statute should be interpreted taking into account changes that have occurred since the statute was enacted. Those changes may include, for example, technological developments, changes in scientific understanding, changes in social attitudes and changes in the law. Very importantly it does not matter that those changes could not have been reasonably contemplated or foreseen at the time that the provision was enacted. Exceptionally, the always speaking principle will not be applied where it is clear, from the words used in the light of their context and purpose, that the provision is tied to an historic or frozen interpretation. A possible example (referred to by Lord

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The always speaking principle applied contextually, with reference to other principles of interpretation

48. Turning to the application of the always speaking principle that is at the heart of this appeal, it is clear that, in this case, that principle has to be applied having regard to the EU law constraints imposed by the standstill provision and the principle of strict interpretation of exemptions. As explained above, that is reinforced by a purpose of the law on VAT, as seen from the perspective of EU law, as being harmonisation with no derogations. Here these constraints mean that the always speaking principle is significantly limited so as to ensure that it does not conflict with the requirement for zero-rating for newspapers to be strictly construed and not extended.

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Using subsequent legislation to resolve ambiguity

59. Although unnecessary to our decision, it is also noteworthy that, subsequent to the specified period, both the EU Commission and the UK Parliament have made reforms explicitly dealing with electronically supplied newspapers in 2018 and 2020 respectively (see para 23 above). Applying a wide-ranging approach so that digital editions were already covered by the zero-rating for VAT prior to 2020 would entail accepting that, eg, Parliament was acting unnecessarily and indeed on a mistaken basis (see as evidence for this the explanatory memorandum referred to in para 23 above) when it explicitly "extended" the items (albeit with some exceptions) as from May 2020. That one can refer to subsequent legislation to resolve an ambiguity in earlier legislation has been accepted in several cases: see, eg, *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 2 KB 403, 414; *Commissioner of Inland Revenue v Hang Seng Bank* [1991] AC 306, 323-324; *Bennion, Bailey and Norbury on Statutory Interpretation* 8th ed, (2020) section 24-19.

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The always speaking principle — the Lord Leggatt skepticism

80. I did not question the general proposition - although I did question what it precisely means - in *R (on the application of ZYN) v Walsall Metropolitan Borough Council* [2014] EWHC 1918 (Admin), [2015] 1 All ER 165, paras 39-48. But, with the benefit of the arguments on this appeal, I would go further. It now seems to me that the general rule or presumption articulated by Bennion and others that statutes are to be interpreted as "always speaking" is stated at too high a level of generality to be meaningful. Rather, there are different types of change that may occur after a statute is enacted to which different considerations apply.

- Linguistic changes
- Changes in values
- Changes in scientific knowledge
- Technological changes

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R (PACCAR) v CAT [2023] UKSC 28: background

- Are litigation funding agreements pursuant to which the funder is entitled to recover a percentage of any damages recovered "damages-based agreements" within the meaning of the legislation which regulates such agreements?
- The case concerns the proper interpretation of a definition first used in one statutory context and then adopted and used in another context. Considers whether later legislation throws any light on the proper interpretation of the earlier legislation.
- Appeal allowed by majority — agreements were damages based agreements.

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The role of explanatory notes and other external aids

42. It is legitimate to refer to explanatory notes which accompanied a Bill in its passage through Parliament and which, under current practice, are reproduced for ease of reference when the Act is promulgated; but external aids to interpretation such as these play a secondary role, as it is the words of the provision itself read in the context of the section as a whole and in the wider context of a group of sections of which it forms part and of the statute as a whole which are the primary means by which Parliament's meaning is to be ascertained: *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, paras 29-30 (Lord Hodge). Reference to the explanatory notes may inform the assessment of the overall purpose of the legislation and may also provide assistance to resolve any specific ambiguity in the words used in a provision in that legislation. Whether and to what extent they do so very much depends on the circumstances and the nature of the issue of interpretation which has arisen.

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The presumption against absurdity

43. The courts will not interpret a statute so as to produce an absurd result, unless clearly constrained to do so by the words Parliament has used: see *R v McCool* [2018] UKSC 23, [2018] 1 WLR 2431, paras 23-25 (Lord Kerr of Tonaghmore), citing a passage in *Bennion on Statutory Interpretation*, 6th ed (2013), p 1753. See now *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), section 13.1(1): "The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature". As the authors of *Bennion, Bailey and Norbury*

a particular construction produces an unreasonable result". I would add that the courts have to be careful to ensure that they do not rely on the presumption against absurdity in order to substitute their view of what is reasonable for the policy chosen by the legislature, which may be reasonable in its own estimation. The constitutional position that legislative choice is for Parliament cannot be undermined under the guise

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Subordinate legislation as an aid to the interpretation of a statute (1)

44. In certain circumstances, subordinate legislation made pursuant to powers in a statute can be an aid to interpretation of the statute. There is an issue as to how far this principle extends. The parties are agreed that the Scope Order is an admissible aid to interpretation of the 2006 Act. It was promulgated at a time roughly contemporaneous with the 2006 Act itself, and in *Deposit Protection Board v Dalia* [1994] 2 AC 367 the House of Lords held that it is permissible to refer to such contemporaneous subordinate legislation as an aid to interpretation: p 397 per Lord Browne-Wilkinson. In my view, on this basis and in line with the position for explanatory notes, the Scope Order is admissible as an aid to interpretation both for such light as it might throw on an assessment of the purpose of the primary legislation and to assist in resolving any identified ambiguity in a provision in that legislation.

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Subordinate legislation as an aid to the interpretation of a statute (2)

Where the primary legislation and the subordinate legislation are drafted by or on the instructions of the same government department at about the same time, as would be normal in this type of case, it is reasonable to suppose that they are inspired by the same underlying objective and are intended to reflect a coherent position as understood at the time the primary legislation is presented to Parliament. In that situation, it has been observed that the subordinate legislation made under a power in the primary legislation can be regarded as a form of parliamentary or administrative contemporanea expositio (exposition of contemporary understanding) in relation to the primary legislation which may provide some evidence of how Parliament understood the words it used in the primary legislation, even though this does not decide or control their meaning: *Hanlon v The Law Society* [1981] AC 124, 193-194

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Lord Burrows, 'Statutory Interpretation in the Courts Today' (March 2022) (1)

In line with this, I can confirm that, since I started on the Supreme Court in June 2020, over two thirds of the cases that I have sat on in the Supreme Court have involved some issue of legislative interpretation. In many of the cases I have been in on the Supreme Court, the decision has turned almost entirely on statutory interpretation. This was the position in, for example, *TW Logistics Ltd v*

Thirdly, although it has been suggested, for example by Lord Hoffmann, that the same basic approach applies to the interpretation of all legal documents, whether they be statutes, contracts, articles of association or wills, I regard that, with respect, as unhelpful. Of course, all questions of interpretation of written words, including the interpretation of a novel or a play, share some similarities. But there are distinct features of the interpretation of statutes that differ from, for example, the interpretation of contracts and I think it is incorrect to think that they can simply be assimilated.

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Lord Burrows, 'Statutory Interpretation in the Courts Today' (March 2022) (2)

Sometimes students are taught that there are three rules of statutory interpretation which the courts can choose between. The literal rule, the golden rule and the mischief rule. I think that is very misleading because there is only one correct modern approach – that one must ascertain the meaning of the words in the light of their context and the purpose of the provision – and none of those three rules quite captures that approach, albeit that the mischief rule perhaps comes the closest.

There is no doubt that it has historically been very common, and remains so, to refer to statutory interpretation as being concerned to effect the intention of Parliament. Whether applying the old literal or the modern contextual and purposive approach, the cases are full of references to this being the ultimate aim of statutory interpretation and most of us will have used this language at some stage. Although some of my colleagues on the Supreme Court disagree with me on this (see, e.g., Lord Sales who has written an article to the contrary,[25]) I am somewhat sceptical about the reliance by the courts on Parliamentary intention. I have three main reasons for scepticism.

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Lord Sales, 'In Defence of Legislative Intention' (November 2019)

However, democratic principle requires that the inquiry should be framed as one into the presumed intention of the legislature. It is relatively simple to posit the legislature as a unified person exercising its own agency, and to look for clues in the properly available evidence as to how it would have been likely to have intended to resolve the particular case.

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Lady Rose, 'Oxford Union Talk' (May 2022)

8. When judges are called upon to interpret an ambiguous section in an Act of Parliament, they often describe what they are doing as trying to discern the will or intention of Parliament. This means that if one of the possible interpretations put forward by one of the parties to the dispute leads to a result that appears to go against the purpose for which the legislation was enacted, the judges will reject it on the basis that that could not have been what Parliament intended. As Lord

10. Judges have also found a way of updating old legislation if it is clear that the words used then should now encompass a new situation that did not exist when the legislation was enacted. This is known as the 'always speaking' doctrine. It means that terms used in legislation are not frozen to the meaning at the date when the legislation was enacted but can change as society and technology changes. For example, in 1880 the term "telegraph" in the Telegraph Act 1869

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Public Law Webinar - Legislation

Challenges to Secondary Legislation

Esther Drabkin-Reiter

Esther Drabkin-Reiter

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What I'll cover

1. Challenges to secondary legislation – back to basics
2. Key principles from three recent cases
3. UK Internal Market Act and devolved legislation
4. Judicial Review and Courts Act 2022 and suspended quashing orders

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Challenges to secondary legislation – back to basics

Erskine May, para.31.4:

While the courts cannot strike down primary legislation, they may declare secondary legislation invalid. If the exercise of power by delegated legislation should be *ultra vires*, ie beyond the powers clearly authorised by the enabling Act, the validity of that delegated legislation can be contested in the courts.

The other grounds on which delegated legislation may be challenged in the courts are that the purported exercise of the power is unreasonable, or insufficiently certain; or that there has been procedural deficiency or irregularity.

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Key principles from three recent cases

- ***R (Bailey) v Secretary of State for Justice (No 1*) [2023] EWHC 555 (Admin)**
- ***Re Hughes' Application for Judicial Review* [2023] NIKB 5**
- ***R (Kellogg Marketing and Sales Co (UK) Ltd and another) v Secretary of State for Health and Social Care* [2022] EWHC 1710 (Admin)**

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R (Bailey) v Secretary of State for Justice (No 1) [2023] EWHC 555 (Admin)

Background to the challenge

- Amendment to Parole Board Rules (a statutory instrument)
- Sought to prohibit prison and probation service staff from including in their reports to the Board views or recommendations as to a prisoner's suitability for release or move to open prison conditions and in certain cases, provide a single SoS view on suitability
- Challenged on grounds (among others) that amendment was *ultra vires* the enabling Act, was contrary to Article 5(4) ECHR and was irrational

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R (Bailey) v Secretary of State for Justice (No 1) [2023] EWHC 555 (Admin)

Key principles from the judgment

- Crucial to ascertain correct interpretation of secondary legislation and consider purpose of enabling statute
- Procedural and substantive dimensions to challenge both relevant
- Reasons for promulgating the secondary legislation must reflect its correct interpretation
- Negative resolution procedure does not exclude a duty to consult arising

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Re Hughes' Application for Judicial Review [2023] NIKB 5

Background to challenge

- Article 17(1) and (8) of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order: prohibition on private individuals or companies from providing and maintaining crematoria
- Challenged on grounds that:
  - (i) legislation did not operate in a manner that was logically connected to its purpose, but rather served to frustrate that purpose;
  - (ii) legislation operates in a manner lacking in ostensible logic or comprehensible justification.
- Issue of public concern given relative lack of crematoria in Northern Ireland and the slow progress of the government in this area – justified grant of extension of time

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Re Hughes' Application for Judicial Review [2023] NIKB 5

Key principles from the judgment

- Northern Ireland Orders in Council approved by resolution of both Houses of Parliament are amenable to judicial review
- High threshold for establishing irrationality
- Relevant that steps in place at Ministerial level to review and consider the legal framework of the provision of crematoria
- Also relevant that relief sought would not resolve the applicant's concerns

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R (Kellogg Marketing and Sales Co (UK) Ltd and another) v Secretary of State for Health and Social Care [2022] EWHC 1710 (Admin)

Background to the challenge

- Food (Promotions and Placement) (England) Regulations 2021: restrict the promotion, in supermarkets or other large outlets and online, of food classified as high in fat, sugar or salt and therefore "less healthy"
- Breakfast cereals included where they have a particular nutrient profile score in line with government's technical guidance
- Challenged by Kellogg on a number of grounds, including:
  - (1) reg.10 of the 2021 Regulations, which provides for food authorities to be able to issue "improvement notices" for failure to comply, was *ultra vires* the enabling Act
  - (2) impermissible for reg.3(4) to incorporate technical guidance for determining whether a product is "less healthy"

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R (Kellogg Marketing and Sales Co (UK) Ltd and another) v Secretary of State for Health and Social Care [2022] EWHC 1710 (Admin)

Key principles from the judgment

- Principles of parliamentary scrutiny and supremacy of Parliament as decision-maker are important for the interpretation of subordinate legislation
- Form of words used in the enabling Act is of limited relevance given objective approach to lawfulness of secondary legislation
- Possible – if enabling Act permits it – to incorporate by statutory instrument rules set out in an extraneous document
- Incorporated document must be in existence when the statutory instrument is laid before Parliament, and cannot then be changed without following legislative process required to amend or replace the statutory instrument itself

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UK Internal Market Act and devolved legislation

- Aims to preserve the UK's single market following Brexit
- Principles of mutual recognition (s.2) and non-discrimination (s.5) disapply local requirements that would prevent sale of or discriminate against goods originating in a different part of the UK
- Concern that this cuts across ability of devolved legislatures to legislate in devolved areas including food safety and environmental regulation
- Request for clarification of relationship of UKIMA and Government of Wales Act dismissed by courts on grounds of prematurity – *R (Counsel General of Wales) v Secretary of State for BEIS* [2022] EWCA Civ 118
- Single-use plastics now excluded from UKIMA's "market access principles"
- Something to watch!

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Judicial Review and Courts Act 2022 and suspended quashing orders

- Suspended quashing orders: new remedial power in s.29A of the Senior Courts Act 1981
- Permits a court to order that quashing will not take effect until a specified date or to remove or limit any retrospective effect of the quashing
- Increasingly requested by unsuccessful defendants – e.g.in *R (Bailey) Secretary of State for Justice (No 2)* [2023] EWHC 821 (Admin)
- Not possible to suspend or limit retrospective effect of *declarations* – so not possible to both suspend quashing order and issue a declaration that challenged act was unlawful
- Court may assume greater supervisory role (e.g. by ordering follow-up hearing) where suspended quashing order made

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Thank you for listening!

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The Illegal Migration Act 2023

1. Background
2. Overview of the core regime
3. International law

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Background

- The New Plan for Immigration (March 2021)
- The Nationality and Borders Act 2022
- Rwanda policy announced 14 April 2022
- Pledge to *"stop the boats"*
- Illegal Migration Act receives royal assent on 20 July 2023

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The Purpose of the Act

Illegal Migration Act 2023, section 1(1):

"The purpose of this Act is to ***prevent and deter unlawful migration, and in particular migration by unsafe and illegal routes****, by requiring the removal from the United Kingdom of certain persons who enter or arrive in the United Kingdom in breach of immigration control."*

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The Main Provisions

The Duty to Make Removal Arrangements (s.2)

The SoS "***must make arrangements for the removal of a person"*** from the UK if:

1. The person has entered the UK in one of the means listed in s.2(2), including where a person has **entered the UK without leave** to enter or has **obtained leave by deception**.
2. The person entered or arrived in the UK **on or after 20 July 2023**.
3. The person **did not come directly to the UK** from a country in which the person's life and liberty were threatened by reason of race, religion, nationality, membership of a particular social group or political opinion.
4. The person **requires leave to enter or remain** in the UK but does not have it.

The SoS must make removal arrangements ***"as soon as is reasonably practicable"*** (s.6(1)(a)).

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The Main Provisions

The Duty to Make Removal Arrangements (s.2)

Limited exceptions to the duty to make removal arrangements apply:

- Unaccompanied children (until they turn 18)
- Where the ECtHR has indicated an interim measure and a Minister has determined that the individual concerned should not be subject to the s.2 duty
- Victims of modern slavery or trafficking who are cooperating with law enforcement agencies in connection with a criminal investigation
- The SoS has made regulations providing for further exceptions

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The Main Provisions

Where will entrants be removed to?

Section 6 provides that a person (P) may be removed to:

1. A country of which P is a national
2. A country/territory for which P has obtained a passport/ID document
3. A country or territory in which P embarked for the UK
4. A country or territory *"to which there is reason to believe P will be admitted"*

Specific options differ depending on whether P is a national of a safe country or not.

Nationals of any country may be returned to a **Schedule 1 third state**.

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The Main Provisions

Inadmissibility (s.5)

- Any asylum claim made **must be declared inadmissible** by the SoS.
- Effectively – any person who enters the UK "*illegally*" cannot make an asylum claim, even if they entered the UK due to trafficking/modern slavery.

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The Main Provisions

Suspensive Claims (s.8)

- The only way to suspend or prevent removal from the UK is by making a *"suspensive claim"*
- Two types: (1) **serious harm** suspensive claims and (2) **removal conditions** suspensive claims (s.38)
- Serious harm = P would face a *"real, imminent and foreseeable risk of serious and irreversible harm if removed from the United Kingdom"* to a third country
- Removal conditions = the s.2 conditions
- Claims must include prescribed evidence, be made in time, and be made in the prescribed form/manner
- All other claims (JR, Human Rights claims etc.) – must be made from abroad

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The Main Provisions

Permanent bars on leave and citizenship (ss.30-37)

- A person who has ever met the s.2 criteria may not be granted leave to enter or remain in the UK (s.30), save in limited circumstances.
- A person who has ever met the s.2 criteria cannot obtain British citizenship (save in limited circumstances).
- So – the bars apply regardless whether the person was removed from the UK.

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Summary of the core provisions

- Significant curtailment of ability to claim asylum, unless *"safe and legal"* routes are used, even for victims of modern slavery and trafficking.
- Duty on SoS to make arrangements to remove those who enter the UK via irregular routes, inc. by removal to third countries.
- Very short time-period in which to challenge removal, and challenges will only prevent removal in limited circumstances.
- Bar on citizenship / future grants of immigration status where s.2 criteria have been met.

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Compliance with International Law

- SoS made a s.19(1)(b) HRA statement.
- Freedom From Torture has identified various potential breaches of international law
  - Non-refoulement obligations (Art.33 Refugee Convention)
  - Risk of torture or cruel, inhuman or degrading treatment (Art.3 ECHR)
  - Removal to third countries with a risk of Arts.3-5 breach
  - Risk of arbitrary detention (Arts.5-6)
  - Penalising asylum seekers? Art.31 Refugee Convention
- Likely to lead to litigation (from abroad)

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