

Judicial review: going the extra mile

Ned Westaway explains how to use background materials to aid interpretation in judicial review but warns not all are equally accepted by the courts



Ned Westaway is a barrister at Francis Taylor Building www.ftb.eu.com

It is more than 20 years since the House of Lords affirmed in *Pepper v Hart* [1993] AC 593 that the courts “now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted ...”

There are three main ways in which extra-statutory materials may be relevant in public law: to understand the meaning of statutes and the purpose of statutes, and to assess whether the exercise of powers under statutes is justified in general or particular circumstances.

The safeguards laid down in *Pepper v Hart* – that the legislation to be interpreted is ambiguous or obscure, that the material to be relied upon is from an authoritative source (i.e. a relevant minister or other promoter of the bill) and that the material to be relied upon is itself clear – are not consistently applied.

In *R (Westminster CC) v National Asylum Support Service*

[2002] UKHL 38 Lord Steyn took the opportunity to clarify that explanatory notes to a Bill are part of the “context” and will generally be “admissible aids to construction”. Significantly he rejected the contention “that the court may only resort to evidence of the contextual scene when an ambiguity has arisen”.

Impact assessments

Explanatory notes are often not the most helpful documents: they are iterative, partial summaries. Far more useful in understanding the intention of the legislature are likely to be impact assessments (formerly regulatory impact assessments) that accompany nearly all new regulatory proposals. Impact Assessments now contain a mandatory ministerial declaration and follow a uniform format.

In *9 Cornwall Crescent London Ltd v Royal Borough of Kensington & Chelsea* [2005] EWCA Civ 324 Arden LJ confirmed the modern purposive and contextual approach: Law Commission reports, explanatory notes, travaux préparatoires generally and Hansard may all be admitted. In *Page v Plymouth Hospitals NHS Trust* [2004] EWHC 1154 (QB) Davis J expressly accepted that “some regard may properly, in a context such as the present, be had to such materials (as RIAs and consultation papers emanating from the Lord Chancellor’s Department ...)” although he considered them in that case to be of limited weight.

Some caution is necessary: for example, pre-Bill publications will rarely assist in the

interpretation of subsequently introduced amendments. Similarly, more weight may be given to documents that were drafted to accompany a Bill and were available to parliamentarians in their subsequent consideration and debates. Post-legislative context will rarely assist.

There is no doubt that the courts are comfortable admitting relevant extraneous materials when engaged in statutory construction. In doing so, the courts take a purposive approach and engage with the intention of parliament. However, the courts are more conservative when considering the scope of a statutory power.

In *National Asylum Support Service* Lord Steyn said that what was required was “a clear assurance by the executive to parliament about the meaning of a clause, or circumstances in which a power will or will not be used” before that assurance could be admitted against executive exercise of power. In *R v SSE ex p. Spath Holme Ltd* [2001] 2 AC 349 Lord Hoffmann said a “categorical assurance to parliament that a power would not be used in a given situation” was required “such that parliament could be taken to have legislated on that basis” before extraneous material would be admissible.

Human rights

Human rights arguments may broaden the inquiry. In *International Transport Roth GmbH v SSHD (2002) 99(2) LSG 27* Sullivan J referred at length to a regulatory impact assessment in

concluding that a regime of immigration control for international hauliers relying upon a new criminal offence had not been considered by ministers or parliament, so was incompatible with Art.6 of the ECHR (the decision was overturned on appeal, but not criticised for referring to the background documents ([2002] EWCA Civ 158). In the recent case of *R (Newhaven Port & Properties Ltd) v East Sussex County Council (No 2)* [2013] EWCA Civ 673 the Court of Appeal considered a claim of unjustified interference with property rights under Art.1 of the First Protocol to the ECHR with reference to a policy statement and a previous consultation exercise on which changes to the system for registering town or village greens were brought about.

What is clear is that extra-statutory material offers considerable opportunities to solicitors and advocates seeking to persuade courts as to the meaning and intention of statutes against which the lawfulness of public authorities’ actions fall to be assessed. **SJ**

EXTRA-STATUTORY MATERIALS

- Debates in parliament
- Law Commission reports
- Historical context for legislation
- Explanatory notes
- Impact assessments
- Consultation documents
- Other guidance produced during or after the legislative process.