**SINKAMBA v DOYLE****[\*](https://jutastat.juta.co.za/nxt/print.asp?NXTScript=nxt/gateway.dll&NXTHost=jutastat.juta.co.za&d=lrza/3/839&multi=1&pb=0&isrc=no&f=save&" \l "end_0-0-0-2155)  (1974) ZR 1 (CA)**

COURT OF APPEAL

BARON JP, GARDNER AND HUGHES JJA

16th MAY and 23rd JUNE 1972

(Appeal No. 4 of 1972)

\* Note by EditorThis case which should have been reported in the 1972 Zambia Law Reports has been left out inadvertently. The error is regretted.

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**Flynote**

**Constitutional**5 **law -  Constitution, s. 26A (1) (c) - Construction - "If he so requests . . . not earlier than one year . . ." - Whether a general limitation on review or a limitation applying only where review requested.**

**Statute - Construction - Dictionary or "ordinary" meanings of words - Must give way to meaning which context requires.**

**Statute**10 **- Construction - Later legislative provisions in conflict with earlier - Whether s. 26A (1) (c) of Constitution in conflict with sub-regulations 7 (ii) (a) and 8 of reg. 3 1 A of the Preservation of Public Security Regulations - Implied repeal.**

**Headnote**

The appellant was detained on the 20th September, 1971, pursuant 15 to an order made on the 19th September, 1971, by the President under regulation 31A of the Preservation of Public Security Regulations. On the 8th October, 1971, the appellant's legal adviser made a written request to the respondent to appoint a chairman of a tribunal established under sub-regulation (7). In his reply the respondent expressed the view that 20 s. 26A had by necessary implication repealed sub-regulation (7) and that he therefore had neither power nor duty to make the requested appointment. The appellant had made an application in the High Court for an order of *mandamus* directing the respondent in his capacity as Chief Justice to appoint a chairman of a tribunal under regulation 31A of the 25 Preservation of Public Security Regulations. This application had been dismissed. It was submitted on behalf of the appellant (subject to a concession as to the partial repeal of sub-regulation (7)) that s. 26A and sub-regulations (7) and (8) can co - exist and that, therefore, no repeal of the sub-regulations may be implied. 30

*Held:*

   (i)   S. 26A (1) *(c)* is a general limitation on review earlier than one year after the commencement of the restriction or detention; the words "if he so requests . . ." impart a condition precedent only to the actual review, a procedural provision not affecting 35 the nature of the right, which is to have the case reviewed after the expiration of a year.

   (ii)   Hence, the provision means that a man's case shall be reviewed not earlier than one year after the commencement of his detention or restriction, or after his last request for a review, provided 40 he asks for a review.

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   (iii)   In construing a statute dictionary meanings and "ordinary" meanings may properly be used as working hypotheses or starting points, but in the final analysis these must always give way to the meaning which the context requires.

   (iv)   S. 5   26A (1) *(c)* is in conflict with sub-regulations (8) and (7) (ii) *(a)* of regulation 31A of the Preservation of Public Security Regulations, both of which provisions must therefore be held to have been impliedly repealed.

Cases referred to:

(1)   *Attorney-General v H.RH. Prince Augustus* (1957) 1 All ER 49. 10

(2)   *Waugh v Middleton* (1853) 8 Ex. 352.

(3)   *Attorney-General v Sillem* (1864) 2 H. & C. 431, 515.

(4)   *Holmes v Bradfield R D.C* (1949) 1 All ER 381.

(5)   *Barnes v Jarvis* (1953) 1 All ER 1061.

(6)   *Liversidge v Anderson* (1941) 3 All ER 338. 15

(7)   *In re London Marine Insurance Association (Smith's Case)* (1869) LR 4 Ch. App. 611.

(8)   *Garnett v Bradley* (1878) 3 App. Cas. 944.

(9)   *The India* (1864) 33 LJ Adm. 193.  20

Legislation referred to:

*Constitution of Zambia*, s. 26 A (1) *(c).*

*Preservation of Public Security Regulations, regulation* 31A*, sub-regulations* 7 (11) *(a)*, 8.

*R G  Care, Esq. and F G Sarah, Esq*., for the appellant.

*The Attorney-General (The Hon. Fitzpatrick Chuula, S C) and Mrs R N Ukeje*, for the respondent. 25

**Judgment**

**Baron JP:** This is an appeal from a decision of the High Court (Bruce - Lyle, J) dismissing an application for an order of *mandamus* directing the Hon. Mr Justice BA Doyle, in his capacity as Chief Justice, 30 to appoint a chairman of a tribunal under regulation 31A of the Preservation of Public Security Regulations. For convenience, I propose to refer to these regulations as "the Regulations", to regulations 31A and 15 thereof as "regulation 31A" and "regulation 15", to sub-regulations (7) and (8) of regulation 31A as "sub-regulations (7) and (8)", and to sections 35 of the Constitution simply by their numbers. (Since the 1st June of this year, when the Revised Edition of the Laws came into force, regulations 31A and 15 have become 33 and 16, respectively, but the matter was, of course, argued on the former numbers and I think it may be confusing to use the new numbers in this judgment.)

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The appellant was detained on the 20th September, 1971, pursuant to an order made on the 19th September, by the President under regulation 31A On the 8th October the appellant's legal adviser made a written request to the respondent to appoint a chairman of a tribunal established under sub-regulation (7); in his reply the respondent expressed the view 5 that section 26A had by necessary implication repealed sub-regulation (7) and that he therefore had neither power nor duty to make the requested appointment. It is submitted on behalf of the appellant (subject to a concession as to the partial repeal of sub-regulation (7)) that section 26A and sub-regulations (7) and (8) can co - exist, and that therefore no 10 repeal of the sub-regulations may be implied.

Section 26A (1) reads:

   "Where a person's freedom of movement is restricted, or he is detained, under the authority of any such law as is referred to in section 24 or 26 of this Constitution, as the case may be, the 15 following provisions shall apply:

      (a)   he shall, as soon as is reasonably practicable and in any case not more than fourteen days after the commencement of his detention or restriction, be furnished with a statement in writing in a language that he understands specifying in 20 detail the grounds upon which he is restricted or detained;

      (b)   not more than one month after the commencement of his restriction or detention a notification shall be published in the *Gazette* stating that he has been restricted or detained and giving particulars of the provision of law under which 25 his restriction or detention is authorised;

      (c)   if he so requests at any time during the period of such restriction or detention not earlier than one year after the commencement thereof or after he last made such a request during that period, as the case may be, his case shall be 30 reviewed by an independent and impartial tribunal established by law and presided over by a person, appointed by the Chief Justice, who is or is qualified to be a judge of the High Court;

      (d)   he shall be afforded reasonable facilities to consult a legal 35 representative of his own choice who shall be permitted to make representations to the authority by which the restriction or detention was ordered or to any tribunal established for the review of his case;

      (e)   at the hearing of his case by such tribunal he shall be 40 permitted to appear in person or by a legal representative of his own choice."

Sub-regulations (7) and (8) read as follows at the material time (they were revoked and replaced by Statutory Instrument No. 212/1971):

    "(7)   (i)   There shall be a Tribunal or such number of Tribunals 45 as the President considers necessary or expedient for the purposes of this regulation.

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      (ii)   A Tribunal shall consist of  -

         *(a)*   a chairman, qualified to be enrolled as an advocate in Zambia, appointed by the Chief Justice;

         *(b)*   such other persons as the President may appoint.

   (8)Where 5 a person is lawfully detained under this regulation his case shall be reviewed not more than one month after the commencement of his detention and thereafter during this detention at intervals of not more than six months by a Tribunal established under sub-regulation (7) of this 10 regulation."

Although the application referred only to sub-regulation (7), the real issue in this case - and it was argued on this basis in both the court below and this court - is whether section 26A (1) *(c)* and sub-regulation (8) are in conflict.. It was conceded by Mr. Care that there was a partial 15 repeal of sub-regulation (7) as to the qualifications of the Chairman of the tribunal, but this would not in itself be fatal to the appellant's case; if sub-regulation (8) is held to be capable of operating alongside section 26A (1) *(c)* then the respondent will be bound to appoint a chairman of the tribunal, already established by virtue of sub-regulation (7) (i), with the 20 qualifications prescribed in section 26A (1) *(c).*

The case reduces itself in the final analysis to one crisp issue: whether, on a proper construction, section 26A (1)*(c)* is a general limitation on review earlier than one year after the commencement of the restriction or detention, or a limitation which applies only in cases where the restricted 25 or detained person requests a review. In other words, does the provision mean that there shall be no review earlier than at the expiration of a year, but even then not unless asked for; or does it mean that in addition to any other right of review, otherwise than on request, a law might prescribe there shall be a further right of review on request being made not earlier 30 than at the expiration of a year. On the second construction the request is a condition precedent to the application of the entire provision, so that the provisions as to time and as to the composition of the tribunal require to be met only in cases where a request for a review has been made; on the other construction the request is a condition precedent only to the actual review, a procedural provision not affecting the nature of the right, 35 which is to have the case reviewed after the expiration of a year.

It will be as well to state at the outset what I conceive to be the correct approach to the construction of an enactment. It is trite that a statute must be construed according to the intention expressed in the statute itself, and it is a familiar facet of this rule that where the words 40 in question are clear and unambiguous "no more can be necessary than to expound those words in their ordinary and natural sense" (*Craies on Statute Law*, 6th Edition, page 66). But, to quote the learned author of Craies further, the meaning of a word "varies with its setting or context 45 and with the subject - matter to which it is applied, for reference to the abstract meaning of words, if there be any such thing, is of little value in interpreting statutes". Neither a section nor a phrase nor a word can

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be construed *in vacuo*; the same word or expression may have one meaning in one context and a totally different meaning in another. I know of no clear exposition of the proper approach than the following passages from the speech of Viscount Simonds in *Attorney-General v HRH Prince Augustus* [1]; at page 53 he said: 5

   ". . . the contention of the Attorney-General was, in the first place, met by the bald general proposition that, where the enacting part of a statute is clear and unambiguous, it cannot be cut down by the preamble, and a large part of the time which the hearing of this case occupied was spent in discussing authorities which were 10 said to support that proposition. I wish, at the outset, to express my dissent from it, if it means that I cannot obtain assistance from the preamble in ascertaining the meaning of the relevant enacting part. For words, and particularly general words. cannot be read in isolation: their colour and content are derived from their 15 context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context,, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari 20 materia, find the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy.

   Since a large and ever increasing amount of the time of the courts has, during the last three hundred years, been spent in the interpretation and exposition of statutes, it is natural enough that, 25 in a matter so complex, the guiding principles should be stated in different language and with such varying emphases on different aspects of the problem that support of high authority may be found for general and apparently irreconcilable propositions. I shall endeavour not to add to their number, though I must 30 admit to a consciousness of inadequacy if I am invited to interpret any part of any statute without a knowledge of its context in the fullest sense of that word. "

And at page 55:

   "On the one hand, the proposition can be accepted that 35 '. . . it is a settled rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms.'

I quote the words of Chitty, LJ.... On the other hand, it must often be difficult to say that any terms are clear and unambiguous 40 until they have been studied in their context. That is not to say that the warning is to be disregarded against creating or imagining an ambiguity in order to bring in the aid of the preamble. It means only that the elementary rule must be observed that no one should profess to understand any part, of a statute or of any other 45 document before he has read the whole of it. Until he has done so, he is not entitled to say that it, or any part of it, is clear and unambiguous. "

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Thus in one sense it could be said that there is little value in debating what is the "plain", or "ordinary", or "literal" or "grammatical" meaning of any word or phrase. Dictionary meanings and "ordinary" meanings are, however, properly used as working hypotheses, as starting 5 points, although in the final analysis these must always give way to the meaning which the context requires. As Pollock, CB said in *Waugh v Middleton* [2] at page 356:

   ". . . however plain the apparent grammatical construction of a sentence may be, if it be properly clear from the contents of the 10 same document that the apparent grammatical construction cannot be the true one, then that which, upon the whole, is the true meaning shall prevail, in spite of the grammatical construction of a particular part of it."

I begin then by considering the "apparent grammatical construction" 15 of section 26A (1) *(c)*. The limitation as to time - "not earlier than one year" -  is expressed to relate to the words "if he so requests" and not to the review; hence, it may be said, there is no limitation as to the time within which a review may take place, but only limitation as to the time within which a request for a review may be made, and a review otherwise than on 20 request is not within the ambit of the provision. On the other hand, the first meaning of "if" given in the Oxford English Dictionary is "on the condition that"; as I read the provision, the apparent grammatical meaning is "on the condition that he so requests . . . not earlier than one year . . . his case shall be reviewed". The legislature has stipulated a 25 condition precedent to the review and added a limitation in point of time to the performance of the condition. But I stress that, however strongly the words themselves might suggest this meaning, the context might dictate another, which must prevail; if, however, to quote *Maxwell on Interpretation of Statutes*, 12th Edition, at page 28, "there is nothing to 30 modify, alter or qualify the language which the statute contains. it must be construed in the ordinary and natural meaning of the words and sentences. " I proceed then to consider the context.

The Regulations in their original form were promulgated on the 27th July, 1964, by Government Notice No. 375 of 1964. They contained 35 provision (in regulation 15) for restriction, but no provision for review. On the 28th July, by Government Notice No. 377 of 1964, they were amended by the insertion of, *inter alia*, regulation 31A; sub-regulations (7) and (8) then read:

   "(7) For the purposes of this regulation there shall be a Tribunal 40 consisting of -

         *(a)*   a chairman, qualified to be enrolled as an advocate in the Territory appointed by the Chief Justice,

         *(b)*   such other persons as the Governor may appoint.

   (8) Where any person who is lawfully detained under this 45 regulation so requests at any time during the period of his detention not earlier than six months after he last made such a request during that period, his case shall be reviewed by the Tribunal established under sub-regulation (7) of this regulation."

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The Constitution came into operation on the 24th October, 1964. Restriction continued to be treated differently from detention. The latter is an infringement of the right to personal liberty protected by section 15, and in terms of section 26 was permissible only when a declaration under section 29 was in force. Restriction, on the other hand, is not such an 5 infringement, and was permissible in normal times within the limits prescribed by section 24, which also made provision, not made in regulation 15, for review; the formula was "if he so requests . . . not earlier than six months after the order was made or six months after he last made such request . . .", a formula similar to that previously applicable to 10 detention.  A new provision, section 26 (2) *(c)*, was introduced in the case of detention:

   "not more than one month after the commencement of his detention and thereafter during his detention at intervals of not more than six months, his case shall be reviewed by an independent and 15 impartial tribunal established by law and presided over by a person appointed by the Chief Justice."

Thus the structure at this stage was a constitutional provision for automatic review of detentions within a month and thereafter at intervals of six months, and another constitutional provision for a review of restrictions 20 on request not earlier than six months and thereafter at intervals of not less than six months. On the face of it there was also a provision in the Regulations for a review of detentions on request not earlier than six months and thereafter at intervals of not less than six months; this provision remained until March, 1965, when it was expressly revoked and 25 replaced by sub-regulation (8) in the form set out at the commencement of this judgment. If the legislature at that time thought that the automatic review provision and the review on request provision were in conflict, this amendment was simply for the purpose of expressly bringing the Regulations into line with the Constitution (the repugnant provision 30 having already, of course, been repealed by implication if the legislature's belief was correct). If, on the other hand, the two provisions were not thought to be in conflict the reason for the amendment must have been that the legislature no longer wished to provide a review on request in addition to the new automatic review. 35

By Act No. 33 of 1969 the Constitution was amended by the deletion from sections 24 and 26 of the provisions relating to review, and the introduction of a new section 26A containing provisions applicable to both restriction and detention. These provisions are on lines similar to those contained in the repealed section 26, save that the former provision for 40 automatic review was replaced by the present sub-paragraph (1) *(c).*

Mr Care argued that section 26 does not itself derogate from the fundamental rights and freedoms but simply authorises such derogations that section 26A must therefore be regarded as setting out only the minimum rights to which the subject is entitled, and that therefore other 45 legislation could, without being *ultra vires* the section, give greater rights.

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Chapter III of the Constitution, comprising sections 13 to 30, is designed to protect the fundamental rights and freedoms of the individual; its form is aptly described in section 13:

   ". . . the provision of this Chapter shall have effect for the purpose 5 of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions . . . "

Thus the various sections state in general terms the rights and freedoms protected, and then proceed to spell out the extent of the permissible 10 interference with those rights and freedoms. Section 26 is a further extension of this approach, and permits even greater interference when the country is at war or when a declaration under section 29 is in force, i.e. when there exists a state of emergency or threatened emergency. Section 26A (1) is in a different category; it is designed to enable a restricted or 15 detained person to make representations for the purpose of obtaining relief, a comment which applies equally to sub-paragraph *(b)* which, although it also has the effect of ensuring that no one will be whisked away and never heard of again, was directed to ensuring that relatives or friends would be able to arrange for legal advice and representations 20 to the detaining authority.

I accept that section 26 simply authorises the enactment during a time when a declaration under section 29 is in force of laws which derogate from the rights protected by (*inter alia*), sections 15 and 24; but section 26A proceeds to say in explicit and mandatory terms what provisions shall 25 apply when a person is restricted or detained under any such law. I am unable to read this section as merely setting out general limits of permissible derogation; this description can hardly be applied to sub-paragraphs *(a)*, *(b)*, *(d)* or *(e)* of subsection (1), and  I see no warrant for the assumption that sub-paragraph *(c)* was intended to be different in 30 character.

I turn then to consider the meaning of sub-paragraph *(c)* of section 26A (1) against the background of this legislative history and structure.

The former section 26 (2) read:

   "Where a person is detained by virtue of such an authorisation as 35 is referred to in subsection (1) of this section the following provisions shall apply:

   *(a)*   he shall, as soon as reasonably practicable and in any case not more than five days after the commencement of his detention, be furnished with a statement in writing in a 40 language that he understands specifying in detail the grounds upon which he is detained,

   *(b)*   not more than fourteen days after the commencement of his detention, a notification shall be published in the *Gazette* stating that he has been detained and giving particulars 45 of the provision of law under which his detention is authorised;

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   *(c)*   not more than one month after the commencement of his detention and thereafter during his detention at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the Chief 5 Justice;

   *(d)*   he shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the tribunal appointed for the review of the case of the detained person; 10

   *(e)*   at the hearing of his case by the tribunal appointed for the review of his case he shall be permitted to appear in person or by a legal representative of his own choice."

As I have said, Act No. 33 of 1969 also repealed subsection (4) of section 24, which was in broadly similar terms to the new section 26A (1) *(c)*, 15 save that the period was six months.

It is important to see precisely what was effected by the amendment. First, all the new provisions were made equally applicable to restriction and detention, a matter of great importance to restricted persons, who previously were not entitled to be furnished with the grounds on which 20 they had been restricted or to be afforded any of the other facilities to which detained persons were entitled, and whose tribunal was as clearly administrative as that for detained persons was judicial. Second, the time for furnishing grounds (sub-paragraph *(a)*) was extended from five to fourteen days; third, the time for publishing notice in the *Gazette* 25 (sub-paragraph *(b)*) was extended from fourteen days to one month; fourth, the provision for automatic review within one month was repealed and a provision for review on request within one year was substituted (subparagraph *(c)*); and fifth, the right was added to sub-paragraph *(d)* to make representations to the authority which had ordered the restriction 30 or detention.

On the face of it the new structure effected two main changes; thenceforth restriction and detention were to be treated alike so far as review was concerned, and the time before such review took place was increased. The appellant contends that the legislature did not intend to 35 treat restriction and detention alike in all respects, but intended in the case of detention to leave the automatic review procedure while providing an additional right of review on request, and to provide in the case of restriction the right of review on request as the only right. If this were the intention I can only describe the method chosen to give effect to it as 40 obscure, not to say tortuous. The legislature is assumed to have used the clearest way of expressing its intention; as Pollock, CB said in *Attorney-*Ge*neral v Sillem* [3]*:*

   "If this had been the object of our legislature it might have been accomplished by the simplest piece of legislation; it might have 45 been expressed in language so clear that no human being could entertain a doubt about it, instead of the awkward difficult and doubtful clause which . . . we have to deal with."

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I can think of at least two methods which would have achieved the result contended for by the appellant with simplicity and absolute certainty. For instance, the review on request provision could have been added to section 26 (2), and section 24 amended to correspond to section 26 (2) 5 but omitting the provision as to automatic review. Or, more simply and neatly still, the new section 26A (1) could have included both review on request and automatic review, with the latter provision being prefaced by the words "in the case of detention only" and with suitable words in the preamble limiting its generality to that extent. Either of these methods 10 would have put the matter beyond doubt. Instead, the legislature chose to delete the one - month automatic review provision from the Constitution and insert a new provision for review on request. It might be said that the legislature deleted the automatic review provision because it appeared in the Regulations and it was unnecessary to leave it in the Constitution. 15 By the same token, however, it was unnecessary to take it out, particularly since the history of the legislation reveals a pattern of duplication of the constitutional provisions in the Regulations; and in fact there would be a positive advantage in retaining the provision in the Constitution, since there it would endure, irrespective of the provisions which might from 20 time to time be contained in subordinate legislation. Had the legislature intended the two provisions to operate side by side, the obvious thing to have done would have been to place them side by side either in the Constitution or in the Regulations or in both; I am unable to accept that the legislature deliberately deleted the automatic review provision from 25 the Constitution, yet intended that this procedure should still operate.

It is difficult to accept also that the time for publication of a notice in the *Gazette* should be increased to one month if an automatic review within that period was to take place. Section 26 (2) and the new section 26A (1) both set out a series of provisions designed to enable the individual 30 to seek relief, and sub-paragraph *(b)* in each provision is designed to enable friends and relatives to assist him to do so; it would be strange to provide for publication of a notice which could in fact be published after the first review had taken place.

The amendment to sub-paragraph *(d)* is also significant. There is 35 now specific provision for representations to be made to the restricting or detaining authority, namely the President, and there is no limitation as to time; nor is there anything in the wording to suggest any limitation on the grounds on which such representations may be made. Thus, in addition to such obvious matters as mistaken identity or alibi, a restricted or detained 40 person would be entitled to make representations as to the merits, and to do so immediately.

Further light is thrown on the intention of the legislature when one considers the qualifications of the chairman of the tribunal. In terms of sub-paragraph *(c)* the tribunal must be established by law; assuming for 45 the purposes of this argument that the sub-paragraph comes into operation only when a request has been made, when that happens its provisions apply to "any such law", which must include regulation 31A The tribunal has been established by sub-regulation (7) (i) and its composition prescribed by sub-regulation (7) (ii); but the latter provision is in direct

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conflict with the new section 26A (1) *(c)*, and cannot stand. To this extent at least, therefore-and this was conceded by Mr Care-there has been an implied repeal of sub-regulation (7), which further weakens the argument that the legislature's failure to amend regulation 31A was deliberate. 5

In the result, I am in no doubt as to the meaning of section 26A (1) *(c)* in its context. In my judgment it means that a man's case shall be reviewed not earlier than one year after the commencement of his detention, or after his last request for a review, provided he asks for a review.

But if there were a doubt, this would very quickly be resolved by a 10 consideration of the results which would follow the adoption of the other construction. If an automatic review is still to take place there would be such a review in the first, seventh and thirteenth months, and so on, in addition there would be a review on request after twelve months. Thus there could be two reviews by the same tribunal at virtually the same 15 time, the one taking place not earlier than the beginning of the thirteenth month and the other not later than the end of that month. I regard such a result as absurd; as Finnemore, J, said in *Holmes v Bradfield RDC* [4] at page 384:

   "The mere fact that the results of a statute may be unjust or absurd 20 does not entitle this court to refuse to give it effect, but, if there are two different interpretations of the words in an Act, the court will adopt that which is just, reasonable and sensible rather than one which is none of these things. "

As Lord Goddard, CJ said in *Barnes v Jarvis* [5]*:*25

   "One has to apply a certain amount of common sense in construing statutes and to bear in mind the object of the Act . . ."

Reference has also been made to the rule of strict construction where the liberty of the subject is involved. *Halsbury,* Volume 6, puts the matter thus at page 415: 30

   "It is a general rule that penal enactments are to be construed strictly, and not extended beyond their clear meaning. At the present day, this general rule means no more than that if, after the ordinary rules of construction have first been applied, as they must be there remains any doubt or ambiguity. the person against 35 whom the penalty is sought to be enforced is entitled to the benefit of the doubt . . . On the other hand, even where there is an ambiguity, if one construction is clearly the more reasonable and better calculated to give effect to the expressed intention, it ought to be adopted even though it leads to the penalty being enforced." 40

Of course, the subject of this case is not a penal statute in the sense envisaged in the foregoing passage, but I would think that a similar approach should be adopted. But while, to borrow the words of Lord Macmillan in *Liversidge* v *Anderson* [6] at page 370, "I yield to no one in my recognition of the value of the jealous scrutiny which our courts have 45 always rightly exercised in considering any invasion of the liberty of

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the subject" and while I yield to no one in my defence of the liberty of the individual and my dislike of detention without trial, I do not allow myself to forget that the function and duty of the court is to administer the law, including laws which it would prefer were not on the statute book.

A 5 court may not, through its dislike of particular legislation, substitute for what parliament has enacted its own concept of what the law should be. Nor is it the duty of a court, as Selwyn, LJ, put it in *In re London Marine Insurance Association (Smith's Case)* [7] at page 614, "to be astute to find out ways in which the object of an Act of the Legislature may be 10 defeated''.

Mr Care advanced further arguments in support of his submission that the two provisions under review are not in fact in conflict. He argued that they were both in affirmative language and could therefore stand together; he argued also that regulation 31A was a particular enactment 15 which should not be held to have been repealed by section 26A, which is a general enactment. It seems to me that these rules, while they are well established by authority and are of great assistance in construing the enactments in question are, in truth, simply aids in arriving at their proper meaning. They are of assistance in determining whether two 20 enactments which are apparently in conflict are in fact in conflict. Thus the rule that an affirmative enactment will not repeal an earlier affirmative enactment is not universal; if the two are contrary in matter the earlier will be repealed. In any event, I find the greatest difficulty in reading the language of section 26A (1) *(c)* as affirmative, it seems to me essentially 25 negative in character, and particularly in point of time.

Again, a later general enactment is said not to repeal an earlier special enactment; this is only another way of saying that, looking at the later enactment within the context, of the whole legislative structure, Parliament did not intend it to apply to the particular area covered by 30 the earlier special enactment. Mr. Care submitted that regulation 31A was such a special enactment; this proposition is not, however, supported by the authorities. The rule is stated by Lord Blackburn in *Garnet v Bradley* [8] at page 970:

   "That it should be taken that the object of the Legislature is not, 35 by mere general words, to repeal special laws is a perfectly true, good, and sound canon of construction, and if this was a case of special laws giving a privilege, or a property, or a right, to a particular class, the canon would be applicable. But it is not applicable when that special law affected every one of Her Majesty's 40 subjects, just in the same way as the general Statute of Gloucester giving costs to all persons who were Plaintiffs who recovered damages in a real action, applied to all His Majesty's subjects and not to any particular class."

To the same effect is the dictum of Lord Hatherley in the same case at 45 page 953:

    "Now, my Lords, . . . let us see in the first place what the special Act of James did. That Act can hardly be said to have contemplated a special class of persons; it only says that anybody bringing

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   an action of slander who does not recover more damages than 40s. shall not recover more costs than damages. It can hardly be said that persons disposed to bring actions for damages for slander, can be held to be a class of persons who are to be struck at on the one hand, or on the other hand to be regarded, and who must be held 5 as not to be within the generality of another Act, which would embrace all classes of persons whatsoever. It is simply a general Act striking generally at all persons who bring this class of action, but they do not form any particular class of the community who are entitled to any special observance, care, or regard in the 10 framing of a subsequent Act."

Equally, it seems to me, regulation 31A is not a particular enactment in the sense explained in the foregoing dicta; it is a general enactment applying to anyone who is detained.

I think the whole question of conflict between enactments was very 15 succinctly put by Dr Lushington in *The India* [9]:

   "What words will establish a repeal by implication it is impossible to say from authority or decided cases. If, on the one hand, the general presumption must be against such a repeal on the ground that the intention to repeal, if any had existed, would have been 20 declared in express terms, so, on the other it is not necessary that any express reference be made to the statute which is to be repealed. The prior statute would, I conceive, be repealed by implication, if its provisions were wholly incompatible with a subsequent one; or, if the two statutes together would lead to wholly absurd 25 consequences; or if the entire subject - matter were taken away by the subsequent statute. Perhaps the most difficult case for consideration is where the subject - matter has been so dealt with in subsequent statutes that, according to all ordinary reasoning, the particular provision in the prior statute could not have been 30 intended to subsist, and yet if it were left subsisting no palpable absurdity would be occasioned."

I have already expressed the view that the two enactments together would lead to absurd consequences; in my judgment the entire subject - matter has been taken away by the subsequent enactment, so that the next of 35 Dr Lushington's tests also applies. And on the last test also the appellant must fail; Dr Lushington, in *The India* [9], proceeded to consider the legislative history and concluded:

   "If that be so, not only have all possible reasons for the prohibition . . . ceased to exist, but the continuance of that statute would 40 be inconsistent with the state of trade as established by a subsequent statute. I, therefore, am of opinion that the statute . . .is repealed by implication.''

Counsel for the appellant submitted also that the apparent conflict between the two provisions could be resolved if one were to read into the 45 preamble to section 26A (1) words such as "Other than regulation 31A" or "passed after the date hereof". This argument cannot be sustained, it begs the very question which is the subject of the inquiry, since one cannot

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resolve an inconsistency between two enactments by inserting words in the one specifically excluding the other from its operation.

Finally, I must make reference to an argument which was advanced, but without, I suspect, any great confidence. It was submitted that the 5 fact that in November, 1971, and after the commencement of these proceedings, sub-regulations (7) and (8) were revoked and replaced demonstrated that the legislature acknowledged that they were in force up to that moment. A similar argument was advanced in *Attorney-General v H.RH. Prince Augustus* [1]; Viscount Simonds had this to say at page 55: 10

   "I ought to mention, because the Attorney-General attached a modest weight to it, an Act of the 4th year of George III . . . the Act was unnecessary if the respondent's construction of the Act of 4 Anne is right . . . But I cannot allow this matter to weigh with me at all. I do not know why the Act was passed, whether 15 because the earlier Act had, after sixty year, been forgotten, or because a doubt had been expressed and *ex majore cautela* it was desired to pass a special Act, or because Parliament flatly misinterpreted the earlier Act. I cannot regard it as a legislative interpretation of the earlier Act, operating to give a meaning 20 which it would not otherwise bear."

In the result, in my judgment section 26A (1) *(c)* is in conflict with sub-regulation (8) and sub-regulation (7) (ii) *(a)*, both of which provisions must therefore be held to have been impliedly repealed. I would dismiss this appeal.

**Judgment**

**Gardner JA:** I have had the advantage of reading the judgment which has just been delivered by the learned judge president; and I concur with that judgment.

**Judgment**

**Hughes JA:** I 25 have had the opportunity to read the judgment delivered by the learned judge president. I concur fully with what has 30 been said and I have nothing useful to add. I would dismiss this appeal.

**Judgment**

**Baron JP:** In all the circumstances of this case, the Attorney General does not press a claim to costs. The order of the court will therefore be that the appeal is dismissed and there will be no order as to costs either in this court or the court below.

*Appeal dismissed*35