

The Supreme Court's judgment in *Adams* and the missing step of statutory construction

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Abstract

The Supreme Court's recent decision in R v Adams [2020] UKSC 19 was made partly on the basis of an assumption that the invalidity of the interim custody order made in respect of the appellant would automatically result in the quashing of his convictions for escaping detention on the basis of that order under paragraph 38(a) of Schedule 1 to the Northern Ireland (Emergency Provisions) Act 1973. However, to make this assumption is to skip a crucial step in the required reasoning: construction of the statutory offence the appellant was convicted of. Several arguments are put forward suggesting an alternative construction of paragraph 38(a). That construction holds that the paragraph 38(a) offence not only prohibits escape from detention under a valid interim custody order, but also from detention under an ostensibly valid, but nonetheless technically invalid, interim custody order.

Key words: statutory construction; parliamentary intention; criminal law.

Introduction

On 13 May 2020, the Supreme Court gave judgment in *Adams*,¹ an appeal of two 1975 convictions for prison-escape attempts contrary to paragraph 38(a) of Schedule 1 of the Northern Ireland (Emergency Provisions) Act 1973 (the 1973 Act) in conjunction with the common law of attempts.² The defendant had been incarcerated under an Interim Custody Order (ICO) made ostensibly by the Secretary of State for Northern Ireland under Article 4(1) of the Detention of Terrorists (Northern Ireland) Order 1972. The challenge to these convictions was based on evidence gathered from government papers released under the 30-year rule,³ namely advice given to the Attorney General in July 1974 to the effect that the ICO made in relation to the appellant may have been invalid. On the basis of that advice, the appellant argued that, since the Secretary of State had not personally issued the ICO, it was therefore void for unlawful delegation,⁴ and, in turn, the offence of attempted escape was not made out on either count.

* With thanks to Alex Iordache for comments on an early draft. All remaining errors are my own.

1 *R v Adams* [2020] UKSC 19.

2 The criminal law of attempts in Northern Ireland was later codified by the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 (which in effect mirrored the Criminal Attempts Act 1981).

3 Section 5 of the Public Records Act 1958, as amended by section 1 of the Public Records Act 1967

4 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560; *Vine v National Dock Labour Board* [1957] AC 488.

This line of argument includes an assumption that the invalidity of the appellant's ICO would necessarily result in his convictions under the 1973 Act being quashed. The Supreme Court, who found that the ICO was indeed void for unlawful delegation, also made this assumption; per the concluding paragraph of the judgment of the court:

The making of the ICO in respect of the appellant was invalid. It follows that he was not detained lawfully. *It further follows that he was wrongfully convicted of the offences of attempting to escape from lawful custody and his convictions for those offences must be quashed.*⁵ (emphasis added)

With respect to their Lordships, to make this assumption is to skip a crucial step in the reasoning required to deal with this appeal; namely, construction of the statutory offence of which (in conjunction with the common law of attempts) the appellant was convicted. This step is necessary in order to discover the essential elements of the statutory offence, and therefore also whether those elements were satisfied in light of the appellant's behaviour and other relevant circumstances.

Since there is no reference in the court's judgment to the 1973 Act at all, let alone to the words of the provision in question, it is doubtful whether the Supreme Court undertook such a process of construction. In fact, their Lordships' reference to the offence as that of 'attempting to escape from lawful custody' suggests an ignorance of the statutory basis of the convictions being appealed.⁶ With respect to their Lordships, it is here submitted that their approach is therefore flawed, and so also that their substantive decision is open to criticism.

First, it will be shown why the step of construing the statutory offence under which the appellant was convicted is crucial in dealing with this appeal; second, it will be shown that it is at least arguable that, properly construed, the paragraph 38(a) offence does not require that the ICO under which the defendant is being detained be strictly valid. Consequently, the quashing of the appellant's convictions under paragraph 38(a) did not automatically follow from the finding of validity that their Lordships made with respect to the appellant's ICO.

5 [2020] UKSC 19, [41].

6 Ibid; see also [3], where the first count is again labelled as 'the offence of attempting to escape from lawful custody', but the second is referred to as 'a like offence', further indicating a lack of engagement on their Lordships' part with the precise basis of the convictions appealed. This oversight is not inherited from the Northern Ireland Court of Appeal's judgment below, where Sir Ronald Weatherup delivering the judgment of the court is very clear at [2018] NICA 8 [1]: 'This is an appeal against convictions on 20 March 1975 and 18 April 1975 on counts of attempting to escape from detention contrary to paragraph 38(a) of Schedule 1 of the Northern Ireland (Emergency Provisions) Act 1973 ('the 1973 Act') and common law. ...'

1 Statutory construction as a necessary step

Where a case revolves around an Act of Parliament, two fundamental constitutional principles demand that it be properly construed by the adjudicating court.

The first is Parliamentary sovereignty.⁷ Under this fundamental of British constitutional law, '[a]n Act can create any legal result'.⁸ The consequence of this is that the words of a statute properly construed are capable of any meaning, notwithstanding any fundamental rights and other important principles of constitutional law (although the courts will naturally go to great lengths to uphold these).⁹ In order to ascertain a statute's meaning, it is necessary to undertake a process of statutory construction, involving interpretation of the very words of the statute in light of their statutory, common law and other contexts.¹⁰

The second principle is the rule of law, under which public law powers (including that of prosecution and conviction) should be subject to strictly defined legal limits. This need is particularly heightened when a criminal statute is at play; the liberty (or at least reputation) of the defendant is at stake, and so the line between proscribed and non-proscribed action should be as clear as possible. This clarification is only achieved by direct reference to and explicit construction of the relevant statutory words. Such direct reference to the words of paragraph 38(a) is missing in the Supreme Court's judgment, which is entirely focused on the issue of the validity of the ICO imposed on the appellant at the time of his escape attempts. Had their Lordships engaged with the words of the statutory offence in question, it is submitted that they may well have found that it did not require that said ICO be valid.

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- 7 R (*Miller*) v *Secretary of State for Exiting the EU* [2016] EWHC 2768 (Admin), at [20]: 'It is common ground that the most fundamental rule of UK constitutional law is that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme'; R (*Jackson*) v *Attorney General* [2005] UKHL 56, per Lord Bingham at [9]: 'The bedrock of the British constitution is ... the supremacy of the Crown in Parliament.'
- 8 Diggory Bailey and Luke Norbury, *Bennion on Statutory Interpretation* (7th edn, LexisNexis Butterworths 2017), section 2.2, page 25; see also A V Dicey, *An Introduction to the Law of the Constitution* (8th edn 1915) 38: '[Parliament has] the right to make or unmake any law whatever; and further, that no person or body is recognised by the law ... as having a right to override or set aside the legislation of Parliament.'
- 9 *Madzimbamuto v Lardner-Burke and George* [1969] 1 AC 645, Lord Reid at 723: 'It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the Courts could not hold the Act of Parliament invalid.' However, cf Bailey and Norbury (n 8) section 2.2, page 25: 'The doctrine of parliamentary sovereignty does not, of course, mean that Parliament is free from conventional, political or practical constraints.' On balance, some interpretations are less likely (e.g. because they would entail a violation of fundamental rights), but they cannot be ruled out point blank. The court must inspect the words of the statute and only then can it rule out interpretations.
- 10 Philip Sales, 'Legislative intention, interpretation, and the principle of legality' (2019) 40 *Statute Law Review* 53, 56: 'Statutory meaning is conveyed through the medium of statements of law, rather than particular individual words. Individual statements, and individual words, have to be read in the context in which they appear. It is not sufficient to take meaning from a dictionary, though it may be relevant to do so. The context broadens out, from the immediate (the section itself), to the fasciculus of provisions or the Part of an Act in which the section appears, to the statute as a whole, to the wider legal context into which the section and the statute is inserted. The wider context also has varying degrees of remoteness from the exercise of legislative authority by parliamentarians. It includes the immediate legislative history, such as statements in White Papers, Law Commission reports or by ministers in Parliament, and then extends to more background matters such as the legislative forebears of the provision in question.'

2 Statutory construction of the offence

Statutory construction requires the court to go beyond the words of the statute to find in them the intention of Parliament. This is an objective intention, arrived at by reference to various principles of interpretation and against a background of relevant common and statute law.¹¹

Although the Supreme Court neglected to do so, such an interpretive process should have been applied in *Adams* to the words of the statutory offence under which the appellant was convicted. A short demonstration of this process as applied to paragraph 38(a) to Schedule 1 of the 1973 Act is sufficient to show that the words of that provision are capable of more than one meaning, and so the offence proscribed therein of variable scope.

Paragraph 38(a) states that:

Any person who ... being detained under an interim custody order or a detention order, escapes ... shall be liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine, or both.

A relevant principle to the interpretation of paragraph 38(a) is the principle of legality,¹² which holds that law must be clear, as well as ascertainable and non-retrospective. An interpretation of paragraph 38(a) in line with the principle of legality might be as follows:

Any person who ... being detained under a **valid** interim custody order or a detention order, escapes ... shall be liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine, or both.

This is the interpretation implicitly adopted by the Supreme Court. Under this interpretation, the validity of the defendant's ICO or detention order is an essential condition of the offence, without which condition the offence cannot be committed.¹³ This is, because if the ICO or detention order is not technically valid, it is not technically an ICO or detention order, and so there is no escape from detention under an ICO or detention order. As such, under this interpretation, since the appellant's ICO was invalid, both counts of attempted escape contrary to the paragraph 38(a) offence are not made out, and so both convictions are liable to be quashed.

However, other principles of interpretation may be relevant. Furthermore, paragraph 38(a) does not explicitly refer to a '*valid* interim custody order' or a '*valid* detention order',

11 *R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd* [2001] 2 AC 349, per Lord Nicholls of Birkenhead at 349: 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. 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. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. 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.'

12 *Entick v Carrington* [1765] 95 ER 807, per Camden CJ: 'if this is law it would be found in our books, but no such law ever existed in this country'.

13 [2020] UKSC 19 at [41]: 'The making of the ICO in respect of the appellant was invalid. It follows that he was not detained lawfully. It further follows that he was wrongfully convicted of the offences of attempting to escape from lawful custody and his convictions for those offences must be quashed.' (emphasis added)

and so it is conceivable that the words of paragraph 38(a) might equally be read more widely as:

Any person who ... being detained under **an ostensibly valid** interim custody order or **an ostensibly valid** detention order, escapes ... shall be liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine, or both.

Under this interpretation, the strict legal validity of the ICO/detention order is not an essential criterion of the offence; thus, despite the invalidity of the appellant's ICO, he might still be guilty of attempting to escape detention under it.

Of course, it may be that the Supreme Court saw it as obvious that the paragraph 38(a) offence would require any associated ICO or detention order to be valid at the point of commission of the offence. However, it is submitted that this is far from obvious; the two opposing interpretations of paragraph 38(a) shortly illustrated above are testament to this. Since more than one interpretation of paragraph 38(a) is clearly possible, their Lordships should have dedicated space in their judgment to the construction process in order to show that the interpretation that they implicitly adopted was the correct one. In order to further demonstrate the possibility of an alternative, wider construction, paragraph 38(a) will be discussed by reference to five canons of interpretation; namely, the mischief rule, the rule against doubtful penalisation, the principle of purposive construction, the principle of construction as a whole and the principle of effectiveness.

2.1 THE MISCHIEF RULE

According to Bailey and Norbury in *Bennion on Statutory Interpretation*:

Parliament intends an enactment to remedy a particular mischief. It is presumed therefore that Parliament intends the court, in construing the enactment, to endeavour to apply the remedy provided by it in such a way so as to suppress that mischief.¹⁴

Authority for this approach to statutory interpretation, also called the 'mischief rule', can be found as far back as 1584, when the Barons of the Exchequer held:

That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered: (1) What was the common law before the making of the Act? (2) What was the mischief and defect for which the common law did not provide? (3) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And (4) The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.¹⁵

This approach has two limbs. First, the court must ascertain the mischief to which the statutory provision is addressed; mischief here doesn't just refer to wrongdoing committed by a defendant, but also to a normatively defective legal position which the

¹⁴ Bailey and Norbury (n 8) section 10.1, page 329'

¹⁵ *Heydon's Case* (1584) 3 Co Rep 7a.

statute aims to transform into a normatively superior one. Second, the court must then decide what Parliament intended to be the corresponding remedy; this is the means by which Parliament is to be taken objectively to have intended to transform the current legal position into the desired one.

In the case of paragraph 38(a), the second limb appears straightforward: the remedy which Parliament has introduced to resolve the mischief (whatever that may be) is to criminalise the conduct constituting the mischief. This is made crystal clear by the inclusion of the penalty: '[the defendant] shall be liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine, or both'.¹⁶

With regards to the first limb, it appears that the Supreme Court in *Adams* have accepted a narrow construction of the mischief to which paragraph 38(a) is addressed. This narrow construction is that the mischief addressed is the escape of people detained under either a *valid* interim custody order or a *valid* detention order. However, it is not clear that properly construed, the mischief at which the paragraph 38(a) offence is aimed is restricted to escape from detention under a strictly valid ICO or detention order. In fact, it is submitted that the order under which the defendant is detained at the time of his escape need merely be *ostensibly* valid. In other words, as long as a defendant, detained under an *ostensibly* valid detention order, escapes said detention, he commits the crime proscribed by paragraph 38(a).

This wider interpretation is advanced as it is submitted that the real mischief which Parliament is addressing in paragraph 38(a) is not the escape of a person lawfully detained, but rather interference with the UK's programme of internment in Northern Ireland.¹⁷ Arguments to this effect are taken from the 1973 Act's statutory and historical contexts.

2.1.1 Statutory context

Useful context can be found in both the 1973 Act read as a whole and the background of statute law against which the Act was enacted.

The Act as a whole

The statutory context of paragraph 38(a) seems to support a wider construction. The 1973 Act gives the state wide-ranging powers in Northern Ireland, from a power to arrest without warrant on suspicion of terrorist activity¹⁸ to an unlimited power of entry for 'preservation of the peace'¹⁹. It is clear that when the Act was passed, high levels of interference with fundamental rights, and punishment in the event of non-compliance, were countenanced. Of course, a court tasked with interpreting the Act would most likely do all it could to read fundamental rights into the statute, but such a reading-in is more difficult when one appreciates the Act's cumulative effect of trading fundamental liberties for safety and security. In order to maintain order and peace in Northern Ireland, Parliament in passing the 1973 Act granted wide powers of control over the population of Northern Ireland to agents of the state. The need to exert tight control over everyday

¹⁶ Paragraph 38(a) of Schedule 1 to the 1973 Act.

¹⁷ In an operation codenamed 'Operation Demetrius', between 9 August 1971 and 5 December 1975, 1874 Republicans and 107 Loyalists were detained without trial. See further Jonathan Bardon (1992) *A History of Ulster* (Blackstaff Press 1992); Paul Bew and Gordon Gillespie, *Northern Ireland: A Chronology of the Troubles 1968–1999* (Gill & Macmillan 1999); Tim Pat Coogan, *The Troubles: Ireland's Ordeal 1966–1996 and the Search for Peace* (Hutchinson 1995); David McKittrick, *Making Sense of the Troubles* (Blackstaff Press 2000).

¹⁸ Section 10(1).

¹⁹ Section 17(1)(a).

life in the province explains the high level of generality of these powers.²⁰ For example, section 6(1) gives police and the armed forces the power to stop anyone for the purpose of ascertaining their identity. If the person stopped refuses to answer, they commit an offence under section 16(2). Since the police and armed forces have no way of telling the terrorist from ordinary citizen at first sight, they have a general power to question anyone; otherwise, their ability to control public areas would be seriously infringed. Likewise, the state's ability to control the movements of terror suspects through internment (detention without trial of suspected Irish Republican Army (IRA) members) would also be seriously infringed if the statutory support mechanism for internment – the paragraph 38(a) escape offence – were vulnerable to challenge based on the validity of the order authorising the defendant's detention. In summary, the mischief which paragraph 38 addresses is any interference with the state's ability to control the movement of terrorist suspects through internment. Furthermore, that mischief arises as much from escape from custody under an *invalid* ICO as it does from custody under a *valid* ICO.

This argument is not a novel one. It can be recognised in the reasoning of the England and Wales High Court in *The Queen v Davey*.²¹ In that case, an order requiring the removal to hospital of a child suffering from scarlet fever had been made by a magistrate *ex parte* on the application of a local council official, and the child's mother, who refused to allow the child to be removed to hospital, was charged with obstructing the execution of the order under section 124 of the Public Health Act 1875. The defendant sought to collaterally challenge the order by way of defence to the prosecution. The Divisional Court held that she could not, Darling J finding that:

... the subject-matter with which this legislation [the Public Health Act 1875] deals is the spread of infection among people who have cases of infectious disease in their own homes; and if the proceedings to be taken by a local authority are of a dilatory character the legislation becomes nugatory. The object of the legislation is to get people so suffering into hospitals, and if the removal of the patients may be obstructed and the whole question of their removal argued *de novo* before the justices, the summary remedy is gone altogether, and the danger to the neighbourhood continues until the justices give their decision. Such a result was certainly never intended ...²²

Darling J emphasised the importance of the local authority being able to act swiftly in order to combat the spread of infectious diseases. A parallel can be drawn between this case and *Adams*, the context of which is that it was vital that the authorities know the whereabouts and activities of terrorist suspects by bringing them into, and maintaining them under, custody. By inference, a further parallel can be made – that of the safeguarding against interference with a scheme of control. By obstructing the order made in respect of her child, the defendant in *Davey*²³ interfered with the council's scheme of control (of infectious diseases), and so was prosecuted for doing so – regardless of whether the order in question was valid or not. Likewise, regardless of whether the ICO made in relation to the appellant in *Adams*²⁴ was valid, by attempting to escape, he interfered with the state's system of control, as orchestrated through internment, and so committed the crime proscribed in paragraph 38(a).

20 See further below: '2.1.2 The historical context'.

21 [1899] 2 QB 301.

22 *The Queen v Davey* [1899] 2 QB 301, 304–305 (Darling J).

23 *Ibid.*

24 *R v Adams* [2020] UKSC 19.

Background statute law

Further support for this interpretation of the mischief aimed at by paragraph 38(a) is drawn from the background of statute law against which the 1973 Act was enacted. It is a principle of statutory interpretation that '[t]he text of an enactment must be read in its ... legal ... context'.²⁵ In the case of paragraph 38(a), it is arguable that the offence proscribed therein cannot be limited to escape from detention under a *valid* ICO, as that mischief is already adequately covered under section 26 of the Prison Act (Northern Ireland) 1953 (the 1953 Act), thereby making the paragraph 38(a) offence redundant.

Section 26(b) of the 1953 Act states that:

Every person who ... whether convicted or not, escapes from any prison or lock-up in which he is lawfully confined ... shall be guilty of felony and shall on conviction thereof on indictment be liable to imprisonment for a term not exceeding three years.

Reading into the paragraph 38(a) offence a requirement that the relevant ICO be valid would equate to a requirement that the defendant's custody be lawful, thereby making the paragraph 38(a) offence come entirely under the scope of the section 26 offence.

Such an interpretation of paragraph 38(a) would therefore make the offence proscribed therein redundant, as the appellant could have been convicted on exactly the same factual basis under section 26 of the 1953 Act. Two principles operate against such a redundancy: first, the '[p]resumption that [an] enactment be given a purposive construction'²⁶ and, second, the 'general presumption against implied repeal'.²⁷ Provided they are not rebutted, these presumptions would lead to an interpretation of Parliament's intention as being to create a new offence in paragraph 38(a) of the 1973 Act, with a distinct scope from that in section 26 of the 1953 Act. Furthermore, it is submitted that this distinction hinges on the lack of a requirement that the defendant's custody had been strictly lawful.

On the other hand, it could be countered that Parliament in enacting paragraph 38(a) was not creating a new offence, but merely specifying the appropriate punishment ('a term not exceeding five years or to a fine, or both') for a particular factual context constituting escape under section 26(b) of the 1953 Act – namely, escape of someone lawfully detained under a valid ICO or detention order. However, two rebuttals may be made against this point. First, the contention that, in enacting paragraph 38(a), Parliament had wished to specify the appropriate punishment for escape in this factual context is weakened by the fact that Parliament did not specify the value of the fine to be dealt in the case of conviction. Second, elsewhere in the 1973 Act where Parliament has specified the appropriate penalty for another pre-existing offence, rather than creating a new offence altogether, this has been drafted significantly differently to paragraph 38(a). For example, section 1(1) of the 1973 Act, which replaces the death sentence for murder with life imprisonment in Northern Ireland:

No person shall suffer death for murder and a person convicted of murder shall ... be sentenced to imprisonment for life.

Significantly, Parliament in section 1(1) did not feel the need to codify the requirements for murder, as the subsection's sole purpose was merely to change the penalty for an existing crime. Therefore, if the sole purpose of paragraph 38(a) were clarification of the

²⁵ Bailey and Norbury (n 8) section 9.2, page 287.

²⁶ Ibid section 11.1, page 341.

²⁷ Ibid (n 8) section 6.10, page 207.

appropriate penalty for a particular factual circumstance constituting escape under section 26(b) of the 1953 Act, one might expect it to be drafted in the manner of section 1(1), e.g:

A person convicted of escape from detention under an interim custody order or detention order shall be liable to imprisonment for a term not exceeding five years or to a fine, or both.

Rather, the wording used in paragraph 38(a) is similar to that used in other offence-creating provisions of the Act, e.g. section 23:

Any person who in a public place dresses or behaves in such a way as to arouse reasonable apprehension that he is a member of a proscribed organisation shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding £400, or both.

Parliament's intention in enacting paragraph 38(a) therefore seems to be offence-creating rather than punishment-specifying.

In consolidation of this argument, it is observed that, in addition to criminalising escape from detention under an ICO, the 1973 Act, under paragraph 38(b) of Schedule 1, also makes it a crime to

... rescue ... any person detained as aforesaid, or assist ... a person so detained in escaping or attempting to escape.

It is important to note that not only was there already a crime of escape in Northern Irish law prior to the enactment of the 1973 Act, but also a crime of assisting escape. Section 29 of the 1953 Act provides that:

A person who assists any person in escaping or attempting to escape from lawful custody, whether in prison or not, is guilty of an offence.

At face value the scopes of the two crimes under paragraph 38(b) of Schedule 1 to the 1973 Act and section 29 of the 1952 Act appear to be identical. Ultimately, both provisions criminalise the same conduct – assisting escape – and so as in the case of paragraph 38(a), it is arguable that in enacting paragraph 38(b), Parliament intended a difference in the elements of this new crime, i.e. that the detainee's detention need not have been strictly lawful.

Thus, the argument can be made that not only does Parliament in paragraph 38(a) create a new offence of escape whereby the lawfulness of detention is irrelevant, but in paragraph 38(b) also creates a new offence of assisting escape whereby the lawfulness of detention is likewise irrelevant. The inference can reasonably be made that Parliament's intention was to create a new set of offences mirroring those of escape and assisting escape already recognised in statute, yet without the requirement that the defendant's detention have been strictly lawful. This subtle distinction may not have been lost on those who prosecuted the appellant back in 1975, who elected to charge Mr Adams under paragraph 38(a) of Schedule 1 to the 1973 Act in conjunction with the common law, rather than under section 27 of the 1953 Act, under which:

Every person who attempts to break prison or who forcibly breaks out of any cell or other place within any prison wherein he is lawfully detained or makes any breach therein with intent to escape shall be guilty of felony and shall on conviction thereof on indictment be liable to imprisonment for a term not exceeding five years.

	Escape	Attempted escape	Assisting escape
The detention must be lawful	Section 26(b) of the Prison Act (Northern Ireland) 1953	Section 27 of the Prison Act (Northern Ireland) 1953	Section 29 of the Prison Act (Northern Ireland) 1953
The detention need not be lawful	Paragraph 38(a) of Schedule 1 to the Northern Ireland Emergency Provisions Act 1973	Paragraph 38(a) of Schedule 1 to the Northern Ireland Emergency Provisions Act 1973 + The common law of attempts	Paragraph 38(b) of Schedule 1 to the Northern Ireland Emergency Provisions Act 1973

Table 1

Altogether, the set of mirroring offences may be grouped as in Table 1 above.

2.1.2 The historical context

Further evidence for construing the mischief targeted by paragraph 38(a) as interference with internment can be garnered from the historical context of the 1973 Act. That history is one of bloodshed and disorder.²⁸ On 30 March 1972, the Northern Irish government was dissolved and direct rule from Westminster imposed. Despite this measure, chaos and disorder continued in Ulster; the ‘no go’ areas of Belfast and Derry, physically retaken from the Provisional IRA by 12,000 British Army troops supported by tanks and bulldozers in July 1972,²⁹ remained firmly under Provisional IRA influence for the rest of the Troubles (and beyond). The lack of order in Northern Ireland had even brought the Troubles across the Irish Sea. Less than three weeks before the White Paper to the 1973 Northern Ireland Bill was first debated in the Commons on 28 and 29 March, the Provisional IRA had planted four car bombs in London, succeeding in exploding one outside the Old Bailey.³⁰ In light of this very recent historical context, there is a strong argument for interpreting Parliament’s intention in passing the 1973 Act as first and foremost to exert overarching control over Northern Ireland and so, in turn, interpreting Parliament’s intention in enacting the paragraph 38(a) offence as criminalising escape from custody under an ICO, regardless of the validity of that ICO (or at least before the ICO’s validity could be determined under the proper procedure).

2.2 THE RULE AGAINST DOUBTFUL PENALISATION

As demonstrated above, application of the mischief rule might have led the Supreme Court to construe paragraph 38(a) widely, as covering defendants in custody under invalid as well as valid ICOs and detention orders. However, mitigating against the mischief rule, as well as such a wide interpretation of the paragraph 38(a) offence, is another important tenet of interpretation of criminal statutes with which their Lordships would have had to deal: the rule against doubtful penalisation.

²⁸ See Jonathan (n 17); Paul Bew and Gordon Gillespie (n 17); Coogan (n 17); McKittrick (n 17).

²⁹ Operation Motorman (31 July 1972).

³⁰ The Old Bailey Bombing (8 March 1973).

The rule, recognised as being of constitutional importance by Lord Esher MR and Lindley LJ in *Tuck & Sons v Priestler*,³¹ and as stated in *Bennion on Statutory Interpretation*, is that:

... a person should not be penalised except under clear law. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which penalises a person where the legislator's intention to do so is doubtful, or penalises him or her in a way which was not made clear.³²

Nonetheless, two counterarguments can be made against this point.

The first is that the rule does not apply in the immediate case, as the rationale underpinning the rule is not engaged here. That rationale seems to be that the scope of statutory offences must be clear enough to enable citizens to organise their lives around them. This principle is exemplified by *R v Dows*.³³ In that case, the defendant alleged that section 2 of the Homicide Act 1957, as amended by section 52 of the Coroners and Justice Act 2009, now provided for acute voluntary intoxication as capable of giving rise to the partial defence of diminished responsibility on an indictment for murder. Referring to the above rationale, Hughes LJ dismissed the relevance of the rule to the case, saying that:

There is simply no occasion which can be envisaged in which any citizen might order his affairs on the basis of a misunderstanding of the extent of the partial defence of diminished responsibility. The act of killing, with intent either to kill or to do grievous bodily harm and without justification (for example that of self-defence), must have taken place before there can be any question of the partial defence arising.³⁴

Likewise, it is submitted that it is not realistic that a terror suspect, brought into custody under an ICO, would order his affairs on the basis of a misbelief that he will be immune to prosecution for escape if it can later be shown that the ICO is, for whatever precarious reason, in fact null. On the contrary, such behaviour might be described as 'chancing one's arm', a concept famously expounded by the American judge Oliver Wendell Holmes J:

Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.³⁵

Glanville Williams said that 'people who chance their arms must take the consequences',³⁶ and this principle was endorsed by Thomas J (as he then was) in *Chigi v CS First Boston Ltd*.³⁷ Along these lines, it is argued that in attempting escape, the appellant in *Adams* chanced his arm. There is no indication that Adams knew that the ICO in relation to himself was vulnerable to challenge at the time of his attempted escape, so he chanced his arm in so doing. Even if he did suspect the ICO's invalidity, he still chanced his arm by attempting escape, since, short of a judicial review, he could not have been

31 (1887) 19 QBD 629, 638 (Lord Esher MR) and 644–645 (Lindley LJ).

32 Bailey and Norbury (n 8) section 27.1, pages 715–716.

33 [2012] EWCA Crim 281.

34 Ibid [38].

35 *US v Wurzbach* 280 US 396 (1930), 399.

36 Glanville Williams, 'Statute interpretation, prostitution and the rule of law' in C F H Tapper, *Crime, Proof and Punishment, Essays in memory of Sir Rupert Cross* (Butterworth 1981) 80.

37 [1997] All ER (D) 121.

sure that the ICO actually was invalid. Either way, by attempting to escape, Adams chanced his arm and so ought to take the consequences – i.e. a conviction under paragraph 38(a).

The second counterargument is that, even if the rule against doubtful penalisation is at play in *Adams*, it is not conclusive; per *Bennion*:

In some cases ... the court may find that the intention to impose the detriment was so strong as to require the doubt to be overridden.³⁸

This approach is reflected in the case law. In *Bogdanic v Secretary of State for the Home Department*, Sales J (as he then was) warns that:

[The principle against doubtful penalisation] is not an absolute principle. The overarching requirement is that a court should give effect to the intention of the legislator, as objectively determined having regard to all relevant indicators and aids to construction. The principle of strict interpretation of penal legislation is one among many indicators of the meaning to be given to a legislative provision. It is capable of being outweighed by other objective indications of legislative intention, albeit it is itself an indicator of great weight.³⁹

The fact that the statute deals with an '[e]mergency' situation in Northern Ireland and the importance of maintaining physical control over terrorist suspects are examples of such indicators. Furthermore, Hansard contains several speeches by members of both Houses alluding to the need to re-establish control in Northern Ireland through the Act. The opening speech of the Bill's second reading in the House, delivered by the Secretary of State for Northern Ireland, Mr William Whitelaw MP, suffices to demonstrate this pressing need.

At the start of his speech, Whitelaw stresses that

... there is no purpose to which [the Government] is 'more firmly committed than the restoration of the rule of law in Northern Ireland, and whatever means are necessary to that end will be made available'.⁴⁰

Later in his speech, Mr Whitelaw refers to how

... [i]t is the Government's intention that none of the provisions of the Bill, if it is passed, should continue in force a moment longer than it is needed.⁴¹

The Secretary of State also affirms that

... [i]t remains the Government's intention that whenever possible people should be dealt with under the criminal procedures rather than those which may lead to detention.⁴²

There seems to be at least the suggestion in the Secretary of State's comments that the government of the day was aware that the Bill's proposed detention scheme, as well as its other provisions, entailed curtailment of fundamental rights, but that this curtailment would be necessary in order to restore order to Northern Ireland, and that this and the other measures would only be used in so far as necessary to restore that order.

38 Bailey and Norbury (n 8) section 27.1, page 716.

39 [2014] EWHC 2872 at [48].

40 HC Deb 17 April 1973, vol. 855, col 276 <<https://api.parliament.uk/historic-hansard/commons/1973/apr/17/northern-ireland-emergency-provisions>>.

41 HC Deb 17 April 1973, vol 855, col 278 <<https://api.parliament.uk/historic-hansard/commons/1973/apr/17/northern-ireland-emergency-provisions>>.

42 HC Deb 17 April 1973, vol 855, col 285 <<https://api.parliament.uk/historic-hansard/commons/1973/apr/17/northern-ireland-emergency-provisions>>.

2.3 THE PRINCIPLES OF PURPOSIVE CONSTRUCTION, CONSTRUCTION AS A WHOLE AND EFFECTIVENESS

A final argument for a wider reading of paragraph 38(a) to include escape from detention under an invalid ICO or detention order is one not focused on the elements of the offence itself, but rather on the possibility of challenging the validity of an ICO or detention order in criminal proceedings (as the appellant has done in *Adams*). This argument is made in light of the principles of purposive construction, construction as a whole and effectiveness. Specifically, the argument is that the presence of a statutory means of challenging ICOs and detention orders within the 1973 Act precludes collateral challenge of such an order in criminal proceedings. It follows therefore that the validity of the ICO or detention order under which the defendant was detained at the time of his escape should not be read into paragraph 38(a) as a necessary condition of the offence therein proscribed.

The 1973 Act's procedure for appealing ICOs is set out at paragraphs 26 and 27 to Schedule 1:

26

- (1) Where a detention order has been made in the case of any person, he may within twenty-one days of the making of the order appeal by notice in writing to the Tribunal.
- (2) The Tribunal shall cause a copy of the notice of appeal to be sent to the Chief Constable and to the Secretary of State.

27

- (1) A notice of appeal shall indicate the grounds of appeal and, where appropriate, the nature of any fresh evidence which the appellant wishes to tender on the hearing of the appeal.
- (2) Where notice of appeal has been given there shall be transmitted to the Tribunal a copy of the detention order and a copy of the record of the proceedings before the commissioner, which shall be in such a form as to indicate any part of the proceedings which took place in the absence of the appellant.
- (3) An appellant shall be entitled to receive a copy of the record of the proceedings before the commissioner, excluding any part of the proceedings which under paragraph 17 above took place in the absence of the appellant.

Per *Bennion*, the principle of purposive construction holds that:

In construing an enactment the court should aim to give effect to the legislative purpose.⁴³

The legislative purpose of paragraphs 26 and 27 is clearly to provide detainees with a means of challenging an ICO made in relation to them: the right to appeal the detention order is affirmed in paragraph 26(1), and the necessary steps to lodge an appeal laid out in paragraph 27(1).

Furthermore, according to the principle of construction as a whole:

An act or other legislative instrument is to be read as a whole, so that an enactment within it is not treated as standing alone but is interpreted in its context as part of the instrument.⁴⁴

⁴³ Bailey and Norbury (n 8) section 11.1, page 341.

⁴⁴ Ibid section 21.1, page 509.

Finally, per the principle of effectiveness:

... the interpreter must construe the enactment in such a way as to implement, rather than defeat, the legislative purpose.⁴⁵

The principles of construction as a whole and effectiveness require that an Act be interpreted holistically, in a way that gives effect to the Act's legislative purpose(s) and does not allow a legislative purpose found in one part of the statute to be undermined by another part. It is therefore necessary to interpret the rest of the 1973 Act (including paragraph 38(a) to Schedule 1) in a way that does not make the appeal procedure in paragraphs 26 and 27 redundant.

It is submitted that construing 'interim custody order' and 'detention order' in paragraph 38(a) as 'strictly valid interim custody order' and 'strictly valid detention order' would have that effect, as it would enable a means of challenging ICOs and detention orders extraneous to the statutory scheme. This alternative means would completely undermine the statutory scheme, as it would enable detainees to replace the risk of the Appeal Tribunal not deciding in their favour⁴⁶ with the risk of failing to escape, thereby obliterating any deterrent effect of the paragraph 38(a) offence. More than presenting attempted escape as a viable option, one might go as far as saying that interpreting paragraph 38(a) in this way would even encourage detainees to try to escape. If the attempt is successful, the detainee will have gained their freedom (however precarious that might be); if it fails, the detainee may still be able to gain their freedom in any event by collaterally challenging their conviction for attempted escape.

If this is so, as well as making the statutory appeal scheme in paragraphs 26 and 27 ineffective, such an interpretation would surely also be contrary to public policy, and so is not possible absent clear confirmatory words in paragraph 38(a).

2.4 NOT TOO WIDE-RANGING

It is submitted that the interpretation herein advanced of paragraph 38(a) of Schedule 1 to the 1973 Act is not too wide-ranging. However, it is understandable that it might at first glance appear to be so. A variation of the facts of *Adams* demonstrates this quite strikingly.

Imagine that back in 1973, Adams is taken into custody as per an ICO made in relation to him. Imagine then that when he asks to see this ICO, he is handed a piece of scrap paper, with the following words scribbled in crayon:

ICO of Gerry Adams.

Signed: FATHER CHRISTMAS

If we hold, as argued above, that paragraph 38(a) does not require that the ICO be valid, but merely ostensibly valid, and that the defendant has escaped from custody pursuant to it, then this Christmas-themed, yet clearly void, ICO is presumably sufficient to ground a prosecution if Adams attempts to escape. The ICO is ostensibly valid as it is being treated as valid by those holding Adams in custody. Surely this is too wide-ranging: the court might see the value in convicting Adams notwithstanding an invalidity of which he could not have known, but would likely be reluctant to attach criminal liability to a defendant who, handed an order apparently made by St Nicholas himself, is surely justified in thinking he is not in lawful custody.

⁴⁵ Ibid section 9.8, page 310.

⁴⁶ Paragraph 1 of Schedule 1 to the Northern Ireland (Emergency Provisions) Act 1973.

Two possible solutions to the problem are explored. The first is the adoption of a substantive/procedural invalidity distinction, under which some (substantive) invalidities will be fatal to the commission of the offence, whereas others (procedural) will not. The second is the inference into the paragraph 38(a) offence of a *mens rea* element as to the validity of the ICO or detention order. These two solutions will be discussed, and it will be shown that, while the first is ineffective, the second is quite satisfactory as a means of delimiting the paragraph 38(a) offence to within a reasonable scope.

2.4.1 Substantive/procedural validity distinction

The first solution – the adoption of a substantive/procedural invalidity distinction – was first endorsed by the High Court of England and Wales in *DPP v Bugg*.⁴⁷ In that case, two groups of defendants appealed against convictions for having entered military bases contrary to byelaw 2(b) of the RAF Alconbury Byelaws 1985, byelaw 2(b) of the HMS Forest Moor and Menwith Hill Station Byelaws 1986 and section 17(2) of the Military Lands Act 1892. Both sets of defendants raised the alleged invalidity of the byelaws for being made contrary to the requirements of section 17(1) of the 1892 Act as a defence to criminal proceedings in the Magistrates' Court. The Divisional Court held that the validity of a byelaw could be challenged in criminal proceedings if the invalidity resulted from a 'substantive' error, but where the error of law alleged was 'procedural', the byelaw remained effective until quashed in judicial review proceedings.

Woolf LJ described substantive invalidity as

... where the byelaw is on its face invalid because either it is outwith the power pursuant to which it was made because, for example, it seeks to deal with matters outside the scope of the enabling legislation, or it is patently unreasonable. This can be described as substantive invalidity. ... When the byelaw itself is alleged to be substantively invalid because of *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223), for present purposes what has to be attacked is not the decision to make the byelaw but the byelaw itself.⁴⁸

There seem to be two kinds of error described as 'substantive'; first, a straightforward error of law/illegality and, second, a *Wednesbury* irrationality error.

Woolf LJ in turn explained procedural invalidity as

... where there is what can be described as procedural invalidity because there has been non-compliance with a procedural requirement with regard to the making of that byelaw. This can be due to the manner in which the byelaw was made; for example, if there was a failure to consult.⁴⁹

Breaches of procedural fairness, therefore, such as the right to notice, would seem to come under 'procedural invalidity', as would a failure on the part of the decision-maker to comply with any statutory procedural requirements.

The substantive/procedural invalidity distinction could be adopted in the interpretation of paragraph 38(a) so that only substantive invalidity, but not procedural invalidity, of the ICO or detention order under which the defendant was being held could be raised as a defence. Accordingly, paragraph 38(a) to Schedule 1 of the 1973 Act would be construed thus:

47 *Bugg v DPP* [1993] QB 473.

48 *Ibid* 494 (Woolf LJ).

49 *Ibid*.

Any person who ... being detained under a **substantively valid** interim custody order or a detention order, escapes ... shall be liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine, or both.

As such, substantive validity of the ICO is a necessary element of the offence, but procedural invalidity is not fatal to it.

The flaws in the procedural/substantive invalidity distinction

Notwithstanding its application in *Bugg*, there are significant problems with the procedural/substantive invalidity distinction, which was powerfully disapproved of by Lords Steyn and Irvine of Lairg in *Boddington*.⁵⁰

One issue raised by their Lordships in that case was the distinction's incompatibility with post-*Anisminic* administrative law orthodoxy. Per Lord Irvine:

In my judgment the reasoning of the Divisional Court in *Bugg's* case, suggesting two classes of legal invalidity of subordinate legislation, is contrary both to the *Anisminic* case and the subsequent decisions of this House to which I have referred. The *Anisminic* decision established, contrary to previous thinking that there might be error of law within jurisdiction, that there was a single category of errors of law, all of which rendered a decision ultra vires. No distinction is to be drawn between a patent (or substantive) error of law or a latent (or procedural) error of law. An ultra vires act or subordinate legislation is unlawful simpliciter and, if the presumption in favour of its legality is overcome by a litigant before a court of competent jurisdiction, is of no legal effect whatsoever.⁵¹

The second issue is the unworkability of the procedural/substantive invalidity distinction due to its unclarity. Per Lord Steyn:

There is also a formidable difficulty of categorisation created by *Bugg's case* [1993] Q.B.D. 473. A distinction between substantive and procedural invalidity will often be impossible or difficult to draw.⁵²

Lord Irvine demonstrates this difficulty in his judgment:

[In] my judgment the distinction between orders which are 'substantively' invalid and orders which are 'procedurally' invalid is not a practical distinction which is capable of being maintained in a principled way across the broad range of administrative action. This emerges from the discussion of *Wandsworth London Borough Council v. Winder* [1985] A.C. 461 by the Divisional Court in *Bugg v. Director of Public Prosecutions* [1993] Q.B. 473, 495-496. The court regarded it as a case of 'substantive invalidity,' i.e. in which either the decision to increase rents or the rent demands themselves were on their face invalid. I disagree. The rent demands appeared perfectly valid on their face. The decision was said by the tenant to be *Wednesbury* unreasonable, because irrelevant matters had, or relevant matters had not, been taken into account, as set out in his pleading. At trial, he would have had to adduce evidence to make out that case. It was not an error on the face of the decision. ... Many different types of challenge, which shade into each other, may be made to the legality of byelaws or administrative acts. The decision in *Anisminic* freed the law from a dependency on technical distinctions between different types of illegality. The law should not now be developed to create a new,

50 As outlined by Professor Forsyth: Christopher F Forsyth, 'Collateral challenge and the foundations of judicial review: orthodoxy vindicated and procedural exclusivity rejected' (1998) Public Law 364.

51 *Boddington v British Transport Police* [1999] 2 AC 143, 158 (Lord Irvine of Lairg LC).

52 *Ibid* 170 (Lord Steyn).

and unstable, technical distinction between 'substantive' and 'procedural' invalidity.⁵³

Thus, not only does Lord Steyn refute the workability of a substantive/procedural error distinction, but he also hints at a fundamental misunderstanding of the distinction between the two types of errors. Specifically, does the differentiating factor concern to what part of the decision-making process (procedure or substance) the error relates, or does it concern the patency or latency of the error? If the latter, then why use the terms 'substantive' and 'procedural'? The distinction itself seems to be imprecisely conceptualised, as well as difficult to make for certain errors.

A third issue with the distinction is an echo of the argument mentioned above regarding interpreting statutory offences in a way which would encourage contravention. The issue was raised by Lord Nicholls in *Wicks*, where His Lordship said:

Further, it would seem to follow that in the case of procedural invalidity the defendant could be convicted even after the order was set aside as having been made unlawfully, so long as the non-compliance occurred before the order was set aside. In cases of substantive invalidity the citizen can take the risk and disobey the order. If he does so, and the order is later held to be invalid, he will be innocent of any offence. In cases of procedural invalidity, the citizen is not permitted to take this risk, however clear the irregularity may be.⁵⁴

In some cases, therefore, a subsequent finding of invalidity will exonerate the defendant, whereas in others, it will make no difference. Thus, perhaps worse than simply encouraging citizens to risk committing crimes in contravention of challengeable administrative orders, the substantive/procedural invalidity distinction also arbitrarily discriminates between such risk-takers based on the type of alleged invalidity – a factor which is far-removed from the defendant's conduct, perhaps to the point of irrelevance.

In summary, since it is doctrinally dubious and both unworkable and arbitrary in practice, the substantive/procedural invalidity distinction should not be employed with respect to paragraph 38(a).

2.4.2 *Mens rea* requirement as to the validity of the ICO

The second, and preferred, solution involves introducing into the paragraph 38(a) offence a *mens rea*⁵⁵ element concerning the defendant's knowledge as to the ICO's validity. This would mean that the prosecution would have to prove that, at the point of his escape, the defendant either knew that the ICO/detention order under which he was being detained was valid, or that he was reckless/negligent as to its validity. This approach has two advantages. First, unlike the procedural/substantive distinction, a *mens rea* test is simpler, and any uncertainty in its determination is left to the jury to decide as a question of fact. Second, a *mens rea* test fits better with the criminal law status of statutory offences as it focuses on the defendant's psychological guilt rather than the validity of an administrative act. Ultimately, paragraph 38(a) should be used to punish those who act criminally by negligently, recklessly or knowingly contravening ICOs/detention orders. Statutory

53 Ibid 159 (Lord Irvine of Lairg LC).

54 *R v Wicks* [1998] AC 92, 108 (Lord Nicholls).

55 David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law* (14th edn, Oxford University Press 2015) 115: '*Mens rea* is simply the label for the mental element required by the definition of a particular crime – typically, intention to fulfil the elements of the actus reus of that crime, or recklessness whether they be fulfilled.'

crimes are presumed to have a mental element,⁵⁶ so determining that mental element is simply the next step for the court when interpreting the provision in question.

The expedience of this approach is evident when it is applied to *Adams*. Paragraph 38(a) would be presumed to include a fault element rather than be a strict liability offence, and so the interpreting court would then decide what exactly that fault element is. The Supreme Court was assumedly aware of one fault element: the appellant's intention to escape custody. However, the court does not appear to have considered a secondary fault element; namely, the appellant's state of mind vis-à-vis the validity of the ICO/detention order under which he was in custody at the time of his escape attempt. In fairness to the court, this fault element was not submitted to them by either party, although it perhaps went without saying that their Lordships, in construing a statutory offence, ought to have envisaged the possibility of a secondary fault element.

Assuming for the sake of argument that there is a secondary fault element to the paragraph 38(a) offence, and that that secondary fault element is recklessness as to the validity of the ICO or detention order, it could then be applied rather neatly to the facts of the case.

According to Ormerod and Laird, the recklessness 'test involves assessing two issues: (i) whether D foresaw a risk of the proscribed result or circumstances in the *actus reus* of the crime in question; and (ii) whether it was reasonable for D to take the risk in the circumstances known to him'.⁵⁷ With respect to Ormerod and Laird, limb (i) must be slightly adapted, as it is submitted that there need not be an exactly corresponding *actus reus* element (in this case, it is submitted that the strict validity of the ICO under which the appellant was detained is not an *actus reus* condition of the offence). Taking a risk that does not can be just as legally culpable as taking a risk that does; that is especially the case for paragraph 38(a), whose true mischief, it is submitted, is unjustifiable interference with the internment scheme. Such interference is done when a detainee escapes from detention, lawful or unlawful alike. Therefore, limb (i) of 'whether D foresaw a risk of a particular result or circumstances' is preferred.

There is no indication that Adams knew of the possible defect in the making of his ICO. That possible defect was recorded in a July 1974 opinion of JBE Hutton QC (later Lord Hutton of Bresagh), an opinion which only became public in July 2004. Furthermore, according to the Supreme Court's judgment, Adams only 'became aware of Mr Hutton's opinion in October 2009'.⁵⁸ Therefore, limb (i) is very clearly established; since the appellant had no reason to believe that his ICO was invalid, he very clearly foresaw a risk that it was valid. Furthermore, since he attempted to escape from prison thinking that he was being held under a valid ICO, he acted unreasonably in taking the risk that the ICO was valid, and so also satisfied limb (ii). Therefore, Adams satisfied the *mens rea* requirement of the paragraph 38(a) offence.

Now turning to the Christmas-themed scenario above, we can see how the additional *mens rea* requirement operates satisfactorily there to vitiate against an absurd result. If Adams had been taken into custody and, on asking to see the ICO authorising his custody, had been shown a piece of scrap paper signed in crayon by 'Father Christmas', a jury might conclude that, even if Adams still foresaw a risk that the crayon-written ICO was

56 Lord Reid in *Sweet v Parsley* [1970] AC 132, 148: 'whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea'.

57 Ormerod and Laird (n 55) 129.

58 *R v Adams* [2020] UKSC 19 at [5].

valid (and thus satisfying limb (i)), he was still reasonable in taking the risk in assuming that it was a nullity, therefore not satisfying limb (ii). As a result, Adams would not have been reckless as to the validity of the ICO and the paragraph 38(a) offence would consequently not be made out.

This approach does in a way resemble the procedural/substantive invalidity distinction. For one, a substantive invalidity is more likely to be patent than a procedural one, and so a defendant who assumes that an act is substantively invalid is less likely to be found to be reckless in doing so than a defendant who assumes the presence of procedural invalidity. For example, the alleged *Carltona* defect in Adams – a procedural invalidity – was not at all clear to Adams until the release of government papers some 30 years later, whereas a decision so absurd as to satisfy the *Wednesbury* test – and so substantively invalid – might be sufficiently absurd for a defendant to assume it to be a nullity without being reckless as to its validity.

However, as demonstrated above, it is not always the case that procedural errors are latent and substantive errors patent, and so by cutting out the middle-man and directly focusing on the risk the defendant took in assuming the invalidity, the additional *mens rea* element approach does not fall into that conceptual quagmire, nor does it encourage citizens to risk offending.

Furthermore, whereas the procedural/substantive validity distinction suffers from issues both of doctrinal untenability and unclarity, there are no such issues with introducing a *mens rea* requirement as to validity of the challenged ICO. There is no clash with *Anisminic*, nor any need to engage in 'questionable'⁵⁹ categorisation of errors of law. In fact, any doubt as to the latency/patency of an error is integrated into the mental element of the offence and so, as a question of fact, left to the jury to decide. This approach also fits well with the decision of the House of Lords in *Head*.⁶⁰ In that case, the defendant had been convicted of having carnal knowledge of a mental 'defective' contrary to section 56(1)(a) of the Mental Deficiency Act 1913. However, it was accepted by both the England and Wales Court of Appeal and the House of Lords that the certificate of two doctors certifying that the victim was a defective and the Secretary of State's order transferring her to an institution were themselves defective and likely to be quashed. Consequently, the defendant's conviction was quashed. We might say that assuming the defendant's knowledge of the likely invalidity of the relevant orders concerning the mental state of the alleged victim, the defendant did not run a sufficiently high risk in ignoring the order so as to be reckless as to its validity, and so the quashing of his conviction was justified. The court might arrive at this result by finding that the strict validity of the order of the Secretary of State was not a necessary part of the offence under section 56(1)(a) of the Mental Deficiency Act 1913, but that recklessness as to its validity is a part of the *mens rea* of the offence, and that the defendant did not satisfy that recklessness requirement.

In conclusion, the reading into paragraph 38(a) of a *mens rea* requirement of recklessness as to the validity of the ICO, whose ostensible validity forms part of the *actus reus* of the offence, would be sufficient to abate any concern that the reading of paragraph 38(a) advanced here would be too far-reaching from a criminal-law perspective.

59 As described by Lord Steyn in *Boddington v British Transport Police* [1999] 2 AC 143 at 170.

60 *DPP v Head* [1959] AC 83.

2.5 THE CONSTRUCTION PROCESS – CONCLUSION

In summary, considerable arguments can be proffered in favour of a wider interpretation of the paragraph 38(a) offence under which (in conjunction with the common law of attempts) the appellant was twice convicted. Specifically, this interpretation would hold that the strict validity of the ICO or detention order under which a defendant is detained at the time of his escape is irrelevant to his commission of the offence proscribed in paragraph 38(a). Consequently, it should not have been so readily assumed that the invalidity *simpliciter* of the appellant's ICO for unlawful delegation would result automatically in his convictions being quashed.

Conclusion

The aim of the article has been to highlight that the Supreme Court skipped a crucial step in their reasoning – the step of construing the very statutory provision under which the appellant was convicted. In fact, the article goes further than this, by using well-established canons of statutory interpretation to build a considerable case for a wider interpretation of the offence proscribed by paragraph 38(a) under which the validity of the defendant's ICO or detention order is not a necessary element of the offence. Regardless of whether the Supreme Court would agree with this interpretation (which it tacitly does not), by not explicitly engaging in the construction process, the court might be criticised for risking running afoul of both parliamentary sovereignty and the very rule of law which, ironically, many are bound to see their decision as upholding. Furthermore, by skipping the construction step, their Lordships forewent an opportunity to dispose of the case at a prior stage to determination of the lawfulness of the challenged ICO – a manoeuvre which might have allowed for a less politically charged conclusion to their judgment. Fault might more fairly be laid at the door of respondent counsel for not bringing arguments concentrating on proper construction of the 1973 Act to the forefront of their submissions; but it is certainly regrettable that a Supreme Court that has been in the past so willing and able to depart in its reasoning from parties' submissions when lacking would let itself be so restricted now.