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The interpretation of policies in administrative law: the significance of audience

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Abstract
The interpretation of administrative policies is of great importance in contemporary public law. The correct approach to policy interpretation has, however, been subject to insufficient academic scrutiny. The effect of policies is to provide guidance: not only to decision-makers, but also to stakeholders in the decision. Obvious stakeholders include the applicant or the individual who is the subject of the administrative decision, but the scope of potential legitimate stakeholders may go far beyond this. In matters of general interest, the broader public may be guided by policy (for instance, whether to object to a proposal during a consultation exercise, or on what basis to object). When considering how policy should be interpreted, the court should have regard to the extent of the appropriate audience of the policy, specifically considering how the least expert reader of the policy would interpret it. This 'least expert reader principle' will assist in answering difficult questions, such as whether the court should have regard to the underlying evidence base when interpreting a policy. The courts should rely upon, and express their reasoning by reference to, the least expert reader principle, in order to increase the transparency of judgments in the field of policy interpretation.

Keywords: public law; administrative law; policies; interpretation

Introduction

The interpretation of policy is a matter central to contemporary public law.[1] Much administrative decision-making is structured around a policy framework. For instance, many immigration decisions turn on the application of the Immigration Rules. To similar effect, a decision as to whether to grant planning permission requires determining whether the application is in line with the statutory development plan, or whether material considerations indicate that the decision-maker should depart from the development plan.[2] By contrast with their approach to a number of other grounds of review, courts substitute their own judgement as to the correct interpretation of policies.[3] The courts have built up

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[1]Its importance is by no means novel, or restricted to technical or niche administrative law cases. The interpretation of policy featured in the important constitutional law case *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539.

[2]This is the combined effect of s 70(2) of the Town and Country Planning Act 1990, and s 38(6) of the Planning and Compulsory Purchase Act 2004.

[3]See eg *Raissi v Secretary of State for the Home Department* (SSHD) [2008] EWCA Civ 72, [2008] QB 836 (*ex gratia* compensation); *Mahad v Entry Clearance Officer* [2009] UKSC 16, [2010] 2 All ER 535 (Immigration Rules); *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983 (planning).

lists of what they call principles as to the correct legal interpretation of policies.[4] However, the courts' approach lacks depth, and has been subject to little scholarly analysis. Whilst there have been important contributions regarding the status and use of policies (particularly the doctrine that a public body should not fetter its discretion by an over-rigid use of policy),[5] how policies should be interpreted has been subject to less scrutiny.[6] There is no '*Bennion*' for the interpretation of policy.[7]

The courts stress that the interpretation of policies is an 'objective' one, in that the focus is on what the policy says, not what the policy-maker meant.[8] However, saying that a policy should be interpreted objectively is the start of the court's enquiry, not the end of it. There are instances where different judges, taking an objective approach, have reached different conclusions.[9] In seeking to reach an objective interpretation of policy, the courts have applied a number of techniques. These include that courts may consider the framework (of policy or statute) in which the contested text appears. The courts sometimes consider the purpose underlying a policy. On occasion, they apply a corrective interpretation to policy, in addressing obvious errors in how it has been expressed. These techniques are not, however, set within an adequate conceptual framework.

It is important to note the role of policies. Policies are to guide, and the court's role in providing a consistent interpretation of policy can support that guiding function.[10] However, the guiding function is affected by the audience of the policy. The policy may guide not only the decision-maker, but also stakeholders, including applicants or objectors. Where a policy has the effect of guiding not only the decision-maker but also the public, this should affect the interpretation to be given to it. The meaning of 'policy' for these purposes is not entirely straightforward. The courts on occasion distinguish policy from more practical guidance.[11] Full exploration of this question is beyond the scope of this paper. However, for present purposes, a policy is a statement in writing,[12] which purports to affect a public body's decision or the way in which it makes a decision.

This paper provides a critical examination of the case law where courts have sought to provide an objective interpretation of policies. Much of the case law can be reconciled with a proper understanding of the relevance of the audience of a policy, but there are a number of respects in which the case law could be improved, including rejecting the well-established idea that policies should not be interpreted as if they are contracts or statutes. The best approach to interpreting a policy, in most cases, is to give it the meaning which would be ascribed to it by the least expert reader who falls within the legitimate audience of the policy. This approach requires the court to decide, on an objective basis, whom it considers to be the apparent audience of a policy, and aim for the interpretation of the policy which the least expert member of that audience would reach. Using this method provides a framework

[4]Eg *Gladman Developments Ltd v Canterbury City Council* [2019] EWCA Civ 669, [2019] PTSR 1714 at [22].

[5]See eg K Chng 'Reconsidering the legal regulation of the usage of administrative policies' [2022] Public Law 76; A Perry 'The flexibility rule in administrative law' (2017) 76 Cambridge Law Journal 375.

[6]There has been some discussion in relation to planning policy, eg T Cosgrove and B Du Feu 'Interpreting planning policy: a judicial plea for simplicity and an end to excessive legalism that is likely to fall on deaf ears' [2019] Journal of Planning and Environmental Law 444. Fisher has observed generally that policies deserve more attention than they have been getting: E Fisher 'Why doctrinal administrative lawyers need to think more about policy' (2022) 29 Australian Journal of Administrative Law 254.

[7]D Bailey and L Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* (London: LexisNexis, 8th edn, 2020).

[8]Eg *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government* (SSCLG) [2014] EWCA Civ 1386, [2015] PTSR 274 at [17].

[9]A good example is the debate over the meaning of 'policies for the supply of housing' in the original version of the National Planning Policy Framework (Department of Communities and Local Government, 2012). In *Hopkins Homes Ltd v SSCLG* [2016] EWCA Civ 168, [2017] 1 All ER 1011 at [21], counsel had referred to six first instance decisions which had given rise to 'either two or three distinctly different possible interpretations of the policy'.

[10]See A Mills 'The interpretation of planning policy: the role of the court' (2022) 34(3) Journal of Environmental Law 419.

[11]See eg *R (Park Lane Homes (South East) Ltd) v Rother District Council* [2022] EWHC 485 (Admin), [2022] JPL 1100 at [90].

[12]Brian Simpson suggested that, in order for there to be a process of interpretation, there must be a settled formulation to be interpreted: AWB Simpson 'The *ratio decidendi* of a case and the doctrine of binding precedent' in AG Guest (ed) *Oxford Essays in Jurisprudence*, First Series (Oxford: Oxford University Press, 1961) p 158.

for determining difficult questions, such as whether underlying documentation should be taken into account in interpreting a policy.

1. The objective interpretation of policy

The role of policy is to provide guidance, to the decision-maker, and possibly also to stakeholders in the process. For example, the Immigration Rules provide highly detailed provisions concerning 'specified evidence' which a non-British national may rely upon when demonstrating family life with a person within the UK.[13] These provisions will be relevant not only for the case worker deciding the application on behalf of the Secretary of State, but also to the applicant or her advisers in deciding what evidence should be provided.[14] A subjective interpretation of policy, ie one which was dependent on what the author of the policy actually thought, would be inconsistent with this guiding function. In the first place, the author of a policy may not be the same decision-maker as the person applying the policy.[15] More fundamentally, if the true legal meaning of a policy is dependent on information known only to the author of it, then it would be impossible for the policy to guide other readers of it. Subjective interpretations are commonly not publicly available. The courts' role in reaching a conclusive interpretation of policy should therefore be objective, focusing on the way in which a policy would be understood by a reader, rather than by the author.[16]

As is familiar from the interpretation of statutes and contracts, it is common to take an objective interpretation of legal instruments whilst nevertheless considering intention, either of Parliament or of the parties. However, when interpreting policies, it is safer for courts not to consider the intention of the drafter at all. In policy challenges outside of the planning context, there are a number of references to the intention of the author of the policy,[17] but this is unnecessary, and has risked causing confusion, as can be seen from the decision of the House of Lords in *Re McFarland*. This case concerned a challenge to the Home Secretary's refusal to award *ex gratia* compensation to a prisoner whose conviction had been quashed.[18] The Secretary of State's approach was set out in published policy. Mr McFarland was refused compensation, and challenged that decision, arguing that the Home Secretary had misinterpreted the policy. Lord Bingham, giving the leading speech, appeared to refer to what the Home Secretary intended: 'when [the Secretary of State, in setting the policy, referred] to "any action, or failure to act, by the police or other public authority" he was not meaning to refer to judges and magistrates'.[19] Dissenting, Lord Steyn stressed that the interpretative process 'must necessarily be approached objectively and without speculation about what a particular minister may have had in mind'.[20] The Court of Appeal again considered the question of *ex gratia* compensation in *R (Raissi) v SSHD*. According to the Court of Appeal, it could be said that Lord Bingham in *Re McFarland* 'was doing no more than interpreting the document in accordance with the presumed intent of the maker, with the courts deciding what that intent was'.[21] Even if Lord Bingham's

[13]See 'Immigration Rules Appendix FM-SE: family members specified evidence' available at https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-fm-se-family-members-specified-evidence (last accessed 11 August 2023).

[14]The approach in *R (All the Citizens) v Secretary of State for Digital, Culture, Media and Sport* [2022] EWHC 960 (Admin), [2022] 1 WLR 3748 at [122], that 'policy is primarily by, and for the use of, the public authority which devises it' is, with respect, too simplistic.

[15]For instance, a local authority making a decision regarding assistance to homeless persons may consider the Department for Levelling-up Housing and Communities' guidance on intentional homelessness: 'Homelessness code of guidance for local authorities', ch 9, https://www.gov.uk/guidance/homelessness-code-of-guidance-for-local-authorities/chapter-9-intentional-homelessness (last accessed 11 August 2023).

[16]See Mills, above n 10.

[17]For an early example: *R v Social Fund Inspector, ex p Ali* (1994) 6 Admin LR 205.

[18]*Re McFarland* [2004] UKHL 17, [2004] 1 WLR 1289.

[19]Ibid, at [15].

[20]Ibid, at [24].

[21]*Raissi v SSHD*, above n 3, at [121].

comments can be read in this way, it is clear that the approach of considering intention is liable to cause confusion.

In subsequent cases, the courts have expressly noted an objective sense of intention. In a case concerning registration of a higher education provider, the Court of Appeal described Lord Steyn's views in *McFarland* as being accepted as good law.[22] Lord Brown stressed in one case that, when interpreting the Immigration Rules, it is necessary to consider the Secretary of State's intention,[23] but in another case he held that 'intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations'.[24] In the recent Court of Appeal decision in *JB (Ghana)* regarding the interpretation of policy regarding financial support for asylum seekers and victims or potential victims of trafficking, the Secretary of State sought to argue in favour of a subjective interpretation.[25] Bean LJ rejected this approach, and criticised the Secretary of State's arguments as 'close to asking us to interpret the document in accordance with what the drafter would have written if he or she had thought about it more carefully'.[26]

In the planning context, authorities generally do not focus on the intention of the drafter (whether discerned objectively or otherwise).[27] In one challenge brought by a local authority, in considering the interpretation of the Secretary of State's policy, Coulson J rejected a submission as to what the Secretary of State intended to do. He stated that the 'policy is a function of the [policy] itself; not what counsel tell me that the [Secretary of State] intended it to say'.[28] To similar effect, in a case concerning the interpretation of policy discouraging the development of isolated homes in the countryside, Lieven J held that the Secretary of State's stated intention carried 'little if any weight'.[29]

The approach in the planning cases is superior: rather than seeking to apply an objective meaning of intention, the better approach would be simply to omit references to intention. Such references risk blurring the distinction between objectivity and subjectivity, and do not perform a useful explanatory function. However, to state that policy is to be interpreted objectively (without reference to the intention of the drafter) does not answer most of the difficult questions of interpretation which come before the court. The next question is *how* the courts should determine what is the correct, objective interpretation of policy. I argue that the law should note the apparent audience of a policy, and reach the interpretation of the policy which would be reached by the least expert reader of that policy.

2. The audience of policy, and the least expert reader

If the courts' interpretation of policy is to serve the aim of enhancing the guiding function of that policy, then it is crucial to consider who is being guided. It may be that the policy provides guidance not only to the decision-maker, but also to other stakeholders in the decision-making process.[30] These stakeholders may not be experts in this field. Considering the audience of a policy provides a steer as to the objective interpretation of the policy, and how the courts should be answering various questions which arise in the course of interpreting policy. The (correct) objective interpretation is how the policy would be interpreted by its audience. How does this apply to circumstances of a varied audience, where the policy will be read by a readership which includes both experts and non-experts?[31]

[22] *R (Bloomsbury Institute Ltd) v Office for Students* [2020] EWCA Civ 1074, [2020] ELR 653 at [56].

[23] *Odelola v SSHD* [2009] UKHL 25, [2009] 3 All ER 1061 at [33].

[24] *Mahad v Entry Clearance Officer*, above n 3, at [10].

[25] *R (JB (Ghana)) v SSHD* [2022] EWCA Civ 1392.

[26] Ibid, at [68].

[27] As a surprising exception, in *Good Energy Generation Ltd v SSCLG* [2018] EWHC 1270 (Admin), [2018] JPL 1248 at [85] Lang J stated that she had found helpful a witness statement from an official when considering the intended scope of the National Planning Policy Framework (the NPPF) and the Planning Practice Guidance (the PPG).

[28] *Forest of Dean DC v SSCLG* [2016] EWHC 421 (Admin), [2016] PTSR 1031 at [27].

[29] *Wiltshire Council v SSCLG* [2020] EWHC 954 (Admin), [2020] PTSR 1409 at [28].

[30] See Mills, above n 10.

[31] I am grateful to Dr Tim Sayer for raising this question.

The objective interpretation of the policy should be the one which would be reached by the least expert member of the audience who has decided to read it. The least expert reader is a construct, requiring consideration of a hypothetical reader of a policy, rather than considering how any person has actually interpreted it. A non-expert reader risks being disenfranchised from highly technical interpretation. An expert reader of a document would not be *prevented* from interpreting it in a way which a relative novice would. The idea that policies should be interpreted in the way that they would be understood by the least informed member of their apparent audience is referred to in this paper as the 'least expert reader principle'. This principle could guide the courts as to what material to take into account when interpreting the policy, and with what level of technicality the policy should be interpreted. Even a non-expert reader would be expected to be fully literate, and to read the policy carefully. However, they may lack the access to information and knowledge which may be available to a more expert readership, as well as lacking experience or particular skill in interpreting policy documents. They may also tend to be more likely to take the applicable sentence or paragraph of the policy at face value, rather than seeking to make it consistent with the rest of the policy document.

It may be argued that the least expert reader principle risks begging the question: how can the court know what is the legitimate audience of a policy without going through the process of interpreting the policy? However, such an argument is more theoretical than real. The audience of a policy is likely to be apparent from the face of the policy, and where and how the policy is published. The court will be influenced in determining the legitimate audience by considering the nature of the decision-making function to which the policy relates. But in any event, there is no injustice in a court taking into account material which may not be available to the audience of the policy when determining what that audience is. Potential unfairness arises in taking into account material unavailable to that audience when determining what the policy means.

The least expert reader principle may seem similar to hypothetical or objective standards in other areas of law, which have been subject to criticism in the literature. It has been argued that the idea of an objective standard of 'reasonableness' is a 'fallacy', in the context of medical negligence.[32] The standard of a reasonable person has been subjected to feminist critique, the complaint being that it imposes a problematic standard of what is 'normal',[33] and raises equality concerns.[34] Alleged problems arise not only in the tort context, but also in the criminal law, such as in respect of the standard of the reasonable person for judging self-defence.[35] Many problems thus arise when the reasonableness test is used to set a standard of conduct. But that is not what the least expert reader principle does; rather than setting an objective standard, it is a guide to objective interpretation. Mayo Moran has, indeed, indicated that there may be a benefit to the reasonable person test, where it 'problematises' the role of the judge, in the sense of indicating to a judge that she may have difficulties in making an assessment.[36] This role is similar to that of the least expert reader principle, which reminds a court that a legitimate portion of the audience of a policy may not have the information, or analytical tools, available to a court. Due to its formulation, the least expert reader principle is unlikely to lead to judges simply equating the reader's perspective with their own. Problems which have arisen in relation to the 'fair minded and informed observer' in the law of recusal for apparent judicial bias,[37] leading to calls for the abolition of the test,[38] would therefore not apply.

[32]J Miola 'The standard of care in medical negligence – still reasonably troublesome?' in J Richardson and E Rackley *Feminist Perspectives on Tort Law* (Oxford: Taylor & Francis, 2012) p 142.

[33]M Moran *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford: Oxford University Press, 2003).

[34]M Moran 'The reasonable person: a conceptual biography in comparative perspective' (2010) 14 Lewis & Clark Law Review 1233.

[35]Ibid, at 1249 ff.

[36]Ibid, at 1275.

[37]*Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 at [103].

[38]A Olowofoyeku 'Bias and the informed observer: a call for a return to Gough' (2009) 68(2) Cambridge Law Journal 388.

A concern may be said to arise that if the least expert reader would not be aware of the potential risks which may arise from a particular interpretation of policy, this might mean that a decision-maker would be forced to adopt a decision which is not in the public interest. This concern would be misplaced, for two reasons. First, if the drafter of a policy does not approve of an interpretation which has been reached, then she could amend the policy for future cases. The courts have frequently made the point that, if the drafter of the policy had been meaning to say a particular thing, then that could have been made express in the text of the policy, or the policy could have been drafted differently.[39] As for existing cases, the decision-maker is not *bound* to follow the policy (as correctly interpreted), but can depart from it for good reason.[40]

The least expert reader principle has not yet been articulated or expressly adopted by the courts. However, courts have sometimes considered the audience of a policy. If the audience of the document includes the general public, this suggested to the Court of Appeal in the case of *TW Logistics Ltd* that the public should be able to take the document at face value.[41] The Court of Appeal has also found value in relying on a publicly-available source, so that the public could know where they stand.[42] The High Court has held that both the professional audience and the wider public audience should be taken into account when interpreting policy.[43] At first instance in *JB (Ghana)*, the High Court said that those subject to a policy should be able to understand the policy, 'from the document itself'.[44] In the Court of Appeal in the same case, Bean LJ stated that policy documents 'should be interpreted as they would be read by a reasonable claimant or support worker or advisor'.[45] By contrast, in a case concerning healthcare funding, Males LJ found that the 'primary readership' was 'the expert decision-making group together with medical professionals and persons engaged in the pharmaceutical industry'. This justified the Court departing from the natural and ordinary meaning of the words.[46]

3. The guidance which the least expert reader principle could provide

The courts have struggled to set out clear approaches to the interpretation of policy. Whilst they have on occasion expressly considered the audience of a policy, they have not generally grappled in detail with what the consequence of the readership of a policy might be for how the policy should be interpreted. This section explores difficult questions which the courts have faced in interpreting policies, and explains the advantages of the least expert reader principle.

(a) Wording and context

Lord Carnwath JSC has stated of the court's role in interpretation:[47]

> In summary, whatever the legal character of the document in question, the starting point—and usually the end point—is to find 'the natural and ordinary meaning' of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense.

The starting-point of the interpretation of policy is the wording of the text itself. This is consistent with the guiding function of policy, and is a hallmark of an objective approach: when looking for

[39] Eg *R (Gill) v Brent LBC* [2021] EWHC 67 (Admin) at [45(6)].
[40] *Mandalia v SSHD* [2015] UKSC 59, [2016] 4 All ER 189.
[41] See *R (TW Logistics Ltd) v Tendring DC* [2013] EWCA Civ 9, [2013] 2 P & CR 9 at [15].
[42] *R (Harvey) v Mendip DC* [2017] EWCA Civ 1784, [2018] JPL 419 at [39].
[43] *R (Holborn Studios Ltd) v Hackney LBC* [2020] EWHC 1509 (Admin), [2021] JPL 17 at [43].
[44] *R (JB) v SSHD* [2021] EWHC 3417 (Admin) at [30].
[45] *JB (Ghana)*, above n 25, at [68].
[46] *R (Cotter) v National Institute for Health and Care Excellence* [2020] EWCA Civ 1037, [2020] Med LR 572 at [60].
[47] *Lambeth LBC v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33, [2019] 4 All ER 981 at [19]. In *Lambeth*, the Supreme Court was not interpreting policy, but rather a grant of planning permission.

what the text objectively means, the best guide is what the wording says. A reader is guided best by a text which she is able to take at face value. Focusing on the wording of the text also serves to ensure that the court is carrying out a process of interpretation of policy, rather than the court in reality creating policy.[48] By way of example, the Divisional Court carried out a close reading of the wording of the Immigration Rules and an Instruction to Caseworkers in *R (W) v SSHD*:[49]

> We recognise that we have subjected paragraph GEN 1.11A of Appendix FM and the Instruction to a detailed logical and linguistic analysis. This is not because we expect the authors of instruments intended to be applied by non-lawyers to apply the same linguistic precision, or the same conventions, as statutory draftsmen. It is because any exercise whose aim is to discern the 'ordinary and natural' meaning of a text must start with a careful reading of the language used. That is true of a contract written by and for non-lawyers and it is no less true of the instruments we are considering here.

As Sir Keith Lindblom SPT has said, '[o]ften [a court] will be entitled to say that the policy means what it says and needs little exposition'.[50] That said, understanding the plain words of the text may not be straightforward. Whilst policies must be read as a whole, the courts have been sceptical of attempts to use a strained interpretation to reach false consistency.[51] However, it may make sense to give the same word appearing twice in one paragraph the same meaning.[52] It may be relevant to the interpretation of an element of policy that it constitutes an exception to the general approach.[53] However, Eyre J has made clear that this does not permit an interpretation which is inconsistent with a proper reading of the wording. In considering exceptions to the general position that new buildings constituted inappropriate development in the Green Belt, he held that the construction was 'to be narrow but not artificial'; the exceptions should not be applied by inference to categories beyond the language used. Nevertheless the interpretation was not to be 'artificially restrictive and excluding categories of development which are within the exception on a proper reading of that language'.[54]

It is well-established that the context may require courts to depart from the face-value meaning of the text. As noted by Lord Carnwath, context can be crucial to the proper interpretation of a document. This reflects the fact that a dictionary definition of the words used may not be sufficient to answer a question of legal interpretation.[55] Lord Hoffmann, a leading proponent of contextual interpretation, famously said '[n]o one has ever made an acontextual statement'.[56] This was applied by the Court of Appeal in interpreting policy in *Lloyd v SSCLG*.[57] Given the importance of context, the correct identification of the context is critical. As Jonathan Morgan has said in relation to the interpretation of contracts, what matters is how contextual to be, and what context to take into account.[58] The

[48]Dove J refused to fill a gap in planning policy in *Tewkesbury BC v Secretary of State for Housing, Communities and Local Government* [2021] EWHC 2782 (Admin), [2022] PTSR 340 at [42].

[49]*R (W) v SSHD* [2020] EWHC 1299 (Admin), [2020] 1 WLR 4420 at [66]. Other examples of a close reading of the text include *R (Kennedy) v Health and Safety Executive* [2009] EWCA Civ 25 at [38].

[50]*Corbett v Cornwall Council* [2022] EWCA Civ 1069, [2023] JPL 126 at [19(3)]. This approach is arguably undermined by the Court of Appeal finding in that case that 'immediately adjoining' did not mean 'touching', which is its more natural meaning.

[51]*Dartford BC v SSCLG* [2017] EWCA Civ 141, [2017] PTSR 737 at [7].

[52]*R v Immigration Appeal Tribunal, ex p Alexander* [1982] 2 All ER 766 at 771.

[53]Eg *R (Harvey) v Mendip DC* [2017] EWCA Civ 1784, [2018] JPL 419.

[54]*Warwick DC v Secretary of State for Levelling Up, Housing and Communities* [2022] EWHC 2145 (Admin), [2022] PTSR 1518 at [42].

[55]The Court of Appeal has held that it is not normally necessary to have recourse to dictionary definitions in interpreting planning policy: *Corbett*, above n 50, at [26].

[56]*Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2004] UKHL 46, [2005] 1 All ER 667 at [64].

[57][2014] EWCA Civ 839, [2014] JPL 1247 at [74].

[58]J Morgan, *Contract Minimalism* (Cambridge: Cambridge University Press, 2013) p 233.

answer to these questions, as they relate to the interpretation of policy, is provided by the least expert reader principle.

Two aspects of the context for the interpretation of policy include the statutory context, and the wider policy framework. The statutory context has sometimes given rise to successful arguments, but sometimes such arguments have failed. In terms of successful arguments, in a challenge concerning funding for medication under the National Health Service, Males LJ considered that if there are two possible interpretations of policy, one which fits well with statutory provisions and another which does not, then this is a 'powerful reason' for taking the former interpretation.[59] Holgate J rejected an interpretation of a National Policy Statement regarding energy production which suggested that an applicant seeking consent to develop a gas-fired power station must show quantitative need for that type of development. The Judge considered this would 'run counter to the thinking which lay behind the introduction of the [Planning Act] 2008'.[60] In a claim brought by a London borough against a decision by a planning inspector, the claimant local planning authority argued that policy provided support for the construction of buildings, but not for change of use of land on which those buildings would be constructed. That argument was rejected: it was necessary to take into account the fact that, when planning permission is granted for a new building, legislation also grants permission for a change of use to the use for that building.[61] Words which have an established definition in statute may be given the same meaning in a policy in the same sector.[62]

As for unsuccessful arguments relying on statutory context, in a challenge concerning entitlement to financial support for an asylum seeker who was a potential victim of trafficking, the Secretary of State had argued that her policy should be construed by reference to the Asylum Support Regulations 2010. The Judge rejected this argument, finding there to be 'no basis to interpret "financial support" as meaning "the sum due under Regulation 10(2)"'.[63] The High Court has held that the phrase 'major development' in the NPPF did not have the technical meaning ascribed by the Town and Country Planning (Development Management Procedure) Order 2010.[64]

Whilst the answers reached in these cases may well be justifiable, the law is nevertheless in need of a guiding principle. Taking the example of legislative meanings influencing the correct interpretation of policy, the least expert reader principle can assist a judge in answering that question: would the least expert reader think to take into account the legislation when interpreting the policy at hand? The principle could also serve to prevent the courts from going too far in reaching interpretations of policy which rely on detailed knowledge of the surrounding context, as they have arguably done on occasion. In the *Hawkhurst Parish Council* case, heard in the summer of 2020, the judge's interpretation included considering the legal position on 1 March 2006 when the Local Plan under consideration was adopted.[65] This involved taking into account secondary legislation which had subsequently been found to be partially unlawful.[66] Given that the legitimate audience of a Local Plan includes the general public, it is difficult to see that the least expert reader would be aware of the legislative context in this level of depth.

As well as the statutory context, the context formed by wider extant policy may be relevant. In *Preston New Road Action Group*, Dove J departed from the literal interpretation of policy. A policy appeared to suggest that features and landscapes must be 'protected from harm'. However, this did

[59] *Cotter*, above n 46, at [51].

[60] *R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 1303 (Admin), [2020] PTSR 1709 at [135].

[61] *Bromley LBC v SSCLG* [2016] EWHC 595 (Admin), [2016] PTSR 1186 at [36], [41]. The legislation is the Town and Country Planning Act 1990, s 75.

[62] Eg *R (Timmins) v Gedling BC* [2015] EWCA Civ 10, [2016] 1 All ER 895 at [6].

[63] *JB v SSHD*, above n 44, at [29]. This argument was not pursued by the Secretary of State in her appeal to the Court of Appeal: above n 25, at [58].

[64] *Aston v SSCLG* [2013] EWHC 1936 (Admin), [2014] 2 P & CR 10.

[65] *R (Hawkhurst Parish Council) v Tunbridge Wells BC* [2020] EWHC 3019 (Admin).

[66] The Town and Country Planning (Demolition – Description of Buildings) Direction 1995.

not mean that any harm beyond a *de minimis* threshold would be a breach of the policy. It was important to recognise that the policy in question was a high-level strategic policy within a policy hierarchy, which also contained more detailed 'development management' policies.[67] Further, the policy framework under or within which a policy is formulated may be relevant to its interpretation. In the *Pertemps Investments Ltd* case, Lindblom J noted that a policy of a Local Plan concerning the Green Belt had been examined by a planning inspector for consistency with the NPPF. Lindblom J therefore held that the Local Plan policy was meant to be consistent with national policy.[68] This approach may be correct: the NPPF is arguably better-known and more easily accessible than a local plan. If the least expert reader has decided to read the local plan, they might also be expected to know of the wider publicly-available policies.

(b) Documentation preceding the policy

An important subset of the context which has raised specific questions in relation to the interpretation of policy is whether the courts should take into account documentation existing prior to publication of the policy, either documentation or an evidence base underlying the policy, or a previous version of policy. The courts are generally reluctant to consider the material underlying a policy, at least where it is not referred to in the policy text itself. In support of an argument regarding the interpretation of a Local Plan, a claimant referred to the draft of the plan which had been prepared, and a planning inspector's comments on and revisions of that plan. Lewison LJ rejected this approach, describing it as 'forensic archaeology', and referring to the public nature of the document, such that the public was 'in principle entitled to rely on the public document as it stands, without having to investigate its provenance and evolution'.[69] This reflects values underlying the least expert reader principle. In a subsequent case, it was held that where a policy document cross-referred to another document, it was legitimate to refer to that document when interpreting the policy.[70] So long as that document is publicly available, this may also not be an infringement of the least expert reader principle. A major difficulty which a non-expert reader of a policy may face is not knowing of another document which the court deems to be necessary in order to interpret the policy. If the policy refers to an underlying document, then even the non-expert reader seeking to interpret the policy should know to look at the underlying document.

The High Court has suggested that it may be legitimate to refer to documents underlying a Local Plan, where the interpretation of the Local Plan is otherwise ambiguous.[71] This is the wrong approach, for two main reasons. The first is that whether a document is ambiguous is not a binary question: there are degrees of ambiguity, and most policies subject to judicial scrutiny as part of an interpretation challenge are likely to be ambiguous to some extent. The second is that the High Court's approach privileges the position of an expert reader, which the courts should seek to avoid. Even for an ambiguous policy, the court should take into account only that information which the least expert portion of the legitimate audience of the policy could be expected to be aware of and to read.

The courts have taken an inconsistent approach to whether previous versions of policy can be relevant to interpretation. The Court of Appeal has held that it may not be appropriate to refer to a previous version of policy with different wording, and to how the courts interpreted it.[72] Some cases, however, suggest that it may be relevant whether the author had been proposing to change the content of policy, and whether there was any indication by the drafter of the policy of an intention to change

[67] *Preston New Road Action Group v SSCLG* [2017] EWHC 808 (Admin), [2017] Env LR 33. Holgate J took a similar approach in *Dignity Funerals Ltd v Breckland DC* [2017] EWHC 1492 (Admin) at [57].

[68] *Pertemps Investments Ltd v SSCLG* [2015] EWHC 2308 (Admin).

[69] *TW Logistics*, above n 41, at [13]–[15].

[70] *Ashburton Trading Ltd v SSCLG* [2014] EWCA Civ 378 at [26].

[71] *Phides Estates (Overseas) Ltd v SSCLG* [2015] EWHC 827 (Admin) at [56].

[72] *Paul Newman New Homes Ltd v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 15, [2021] PTSR 1054 at [35]–[36].

the policy in the way described.[73] In the immigration context, Lord Neuberger has suggested that, when one policy is amending another policy, when the second policy is being interpreted, the approach in the original policy can be taken into account.[74] The Divisional Court has considered differences between different versions of Instructions to Caseworkers.[75] Lieven J has considered the difference between a consultation draft of a policy, and the final version of it.[76] In circumstances where the audience of a policy includes non-expert readers, it is doubtful, however, that preceding versions of the policy should be taken into account in the interpretation of the extant policy. Members of the general public, for instance, are unlikely to be aware of how a policy has developed over time.

(c) Documentation and conduct following the adoption of the policy

The courts have sometimes had to consider arguments made based on documents published after the policy in question, or they have been provided with evidence as to how policy has been applied. Taking such material into account risks providing an advantage to an informed readership above a less-informed one.

Ouseley J has suggested that it may be more acceptable to take into account subsequent plans or conduct when interpreting a policy, than it would be when interpreting a contract or a statute.[77] In the education context, the Court of Appeal took into account that a particular interpretation of policy was supported by Technical Guidance, post-dating the policy.[78] The approach in these cases is questionable. Ouseley J was interpreting planning policy, for which the readership includes the general public, which might not be expected to know about documents or behaviour published after a policy has been released. The Court of Appeal was considering policy regarding education funding, in a situation in which the parents were involved in the process; the Technical Guidance was aimed at the public body,[79] and so readers in the position of the parents may not have been expected to know about it. It is unfair to hold them to a wording which takes into account material of which they could not be expected to be aware. In interpreting one of the Health and Safety Executive's policies, Rix LJ considered how the policy had been interpreted, in that the claimant could not demonstrate that the policy had been previously interpreted as she suggested that it should be.[80] This decision is more likely to be correct: the Health and Safety Executive policy (which concerned exemptions to health and safety legislation) may properly be viewed as having solely an expert audience, which may be expected to know about the way in which policy has been applied.

The Secretary of State has questioned whether the NPPF (for which he is responsible) should be interpreted by reference to the more recent PPG, for which he was also responsible.[81] Lindblom LJ held that this point did not need to be determined, since the interpretation of the NPPF was clear; he nevertheless indicated that the PPG was potentially relevant.[82] Given the significance of both the NPPF and the PPG to determining planning applications, and given that they are both public documents, readily available, one might expect even a relatively inexpert reader of the NPPF to be

[73] *Redhill Aerodrome Ltd*, above n 8, and *Warwick DC*, above n 54, at [34], where it was also noted that the claimant's argument would mean that a newer policy was more restrictive, which would appear 'to run counter to the more expansive tenor' of the new policy, at [45].

[74] *Odelola*, above n 23, at [61].

[75] *R (W) v SSHD*, above n 49, at [23].

[76] *Wiltshire Council*, above n 29, at [28].

[77] *R (St James Homes Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 30, [2001] PLCR 27 at [61].

[78] *R (DJ) v Welsh Ministers* [2019] EWCA Civ 1349, [2020] PTSR 466 at [76].

[79] Ibid, [34].

[80] *Kennedy*, above n 49, at [40].

[81] *Braintree DC v SSCLG* [2018] EWCA Civ 610, [2018] 2 P & CR 9.

[82] Ibid, at [36].

aware of and to consider the PPG.[83] On the other hand, the PPG is a lengthy resource, and so a court might conclude that a non-expert might not be expected to be aware of all of it, when interpreting the NPPF.

(d) 'Technical' interpretations of policy

It is sometimes said that a policy should be given an untechnical meaning.[84] Likewise, the courts often indicate that an overly-strict interpretation of policy should be avoided.[85] It is also said that policy should be interpreted flexibly.[86]

One example of a technical approach is an argument that a particular interpretation would render words in a policy otiose. This has been raised in some cases, albeit usually unsuccessfully. In *Ex p Schofield*, Lord Parker CJ considered that an argument based on surplusage was not sufficient to support the plaintiff's argument, 'bearing in mind that we are not construing the words of a statute'.[87] In a dissenting speech, Lord Steyn has acknowledged that one point against his position might be that some wording was left without a meaningful interpretation, he however said, '[o]n the other hand, superfluous language is a familiar feature even in primary or subordinate legislation'.[88] To similar effect, the Court of Appeal in *Ashburton Trading* rejected an argument from surplusage, but then said that arguments from surplusage are usually not very helpful in interpreting contracts or statutes in any event.[89]

Whilst the least expert reader may be expected to be careful, he or she may not be experienced or skilled. Technical interpretations of policy, such as arguments from surplusage, risk disenfranchising the non-expert readers of the policy, and may therefore be incorrect.

(e) A purposive approach to interpretation

The courts have frequently stressed the relevance of the purpose of a policy when considering its interpretation. In the social security context, Woolf LJ said that a Direction under the Social Security Act 1986 should not be interpreted in a way which would conflict with the obvious policy of the Direction.[90] The idea that policies should be interpreted in line with their purpose or rationale is often expressed in the planning context.[91] To be consistent with the general approach to the interpretation of policies, the purpose of a policy must be objectively construed, and it is not legitimate to consider what the drafter's private, or subjective, purpose was in drafting the policy.[92] In order to be relevant to interpretation, the purpose of the policy would need to be one which was apparent to the least expert reader of it.

[83]The webpage which provides the NPPF also has a link to the PPG: https://www.gov.uk/government/publications/national-planning-policy-framework--2, (last accessed 30 August 2023).

[84]Eg *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2017] EWHC 442 (Admin) [58] (the concept of openness in the Green Belt is an open-textured one).

[85]Eg *R v Criminal Injuries Compensation Board, ex p K* [1998] 1 WLR 1458, 1461 (the meaning of 'directly attributable' in the Criminal Injuries Compensation Scheme should not be interpreted 'in a complicated or excessively analytical way').

[86]Eg *Telford and Wrekin Council v SSCLG* [2013] EWHC 1638 (Admin) (policy in Practice Guidance was more flexible than legislation).

[87]*R v Criminal Injuries Compensation Board, ex p Schofield* [1971] 2 All ER 1011 at 1013.

[88]*R v Investors Compensation Board, ex p Bowden* [1996] 1 AC 261 at 283.

[89]*Ashburton Trading Ltd*, above n 70, at [24].

[90]*R v Secretary of State for Social Services, ex p Stitt*, Divisional Court, 21 February 1990, unreported.

[91]Eg *Dignity Funerals Ltd*, above n 67, at [36].

[92]The reference to the purpose of the policy can be distinguished from the intention of the author of it. By analogy with the interpretation of legislation, Lon Fuller spoke of the 'intention of the statute': L Fuller *The Morality of Law* (New Haven: Yale University Press, revised edn, 1969) p 87, described by Allan as a 'useful metaphor': T Allan *The Sovereignty of Law* (Oxford: Oxford University Press, 2013) p 203.

The purpose of an individual element of policy may be apparent from the language of that policy.[93] The discursive nature of policy means that the purpose of a policy may be expressed in the document itself; this is more likely to be the case for policy than for primary legislation. Where a policy document sets out its objectives, these can be taken into account.[94] Where the purpose of the policy can be gleaned from reading the policy text itself, it is likely consistent with the least expert reader principle that such purpose can be taken into account in interpretation. Where the purpose is not so obvious, use of it as an interpretative tool may be questionable where the audience includes non-experts: such a 'purpose' might be apparent only to someone familiar with the field.

(f) The implications of interpretation

The courts have, on a number of occasions, considered the implications of particular interpretations when deciding how a policy should be understood. For instance, in *R (Kennedy) v Health and Safety Executive*, the question arose in relation to the HSE's policy on importing asbestos: does the requirement that there be no alternative to importation mean no alternative available to the applicant, or no alternative available to anybody at all?[95] Rix LJ held that the latter interpretation was not workable:[96]

> … the claimant's construction would be an impossible one to police, or at least an extremely difficult one. The HSE, which is concerned with its responsibilities in the UK, would have to assess the position potentially anywhere in the world: and the applicant would have to prove a worldwide negative. This is all to my mind highly improbable and improbable to consider to have been intended.

Reasoning bearing in mind the consequences of an interpretation can be consistent with the least expert reader principle, but must be shaped by that principle. If the consequences could be discerned only with the benefit of knowledge which would not be available to a non-expert reader of the policy who was nevertheless a legitimate member of the audience of that policy, then such consequences should not be taken into account in the question of interpretation. Whilst this may seem to risk potentially impractical interpretations of the legislation, this problem would only arise where the drafter of the policy had allowed such an impractical consequence to follow from the wording of the text, which the court, and a reader, would take as the starting-point. If the drafter considers that the interpretation of the policy would have impractical consequences, then for future cases the drafter could amend the wording of the policy. If the decision-maker considers that following the policy, correctly interpreted, would lead to a harmful outcome, then this can constitute a reason for departure from the policy.

(g) Corrective interpretation

Authors of policy, as with any document, may make errors. Questions arise as to how courts should respond to possible errors in the drafting of policy. As with other difficult questions regarding interpretation, they can be guided by the least expert reader principle.

Where it is clear that there has been a slip in the expression of policy, the courts have applied an interpretation which seeks to correct the error. In *Euro Garages*, Jefford J added some words to the NPPF to make it make sense.[97] The Divisional Court has read 'an' as a misprint for 'no' in an immigration Operational Process Instruction.[98] Ouseley J held that the court can take a corrective interpretation to obvious errors, although it would need to be clear not only that there was an error, but also

[93] *Canterbury City Council v SSCLG* [2018] EWHC 1611 (Admin), [2019] PTSR 81 at [33].
[94] *Telford and Wrekin Council*, above n 86, at [35].
[95] Above n 49.
[96] Ibid, [38].
[97] *Euro Garages Ltd v SSCLG* [2018] EWHC 1753 (Admin), [2019] PTSR 526 at [18].
[98] *R (W) v SSHD*, above n 49, at [31].

how the error should be corrected.[99] In the *JB* case, the Court of Appeal considered that it was not obvious that there was a drafting error in a policy document, and in any event it was not obvious what the policy would have been without the alleged error.[100]

There is nothing necessarily objectionable about this in terms of the least expert reader principle, so long as one does not need to be particularly well-informed in order to work out how a policy containing an error should be read. If an error, or the solution, could be discerned only by an expert reader, then to take such an interpretation would mean holding less informed readers to a meaning of the document different to what they would legitimately read it as saying.

(i) The meaning of policy over time

The least expert reader principle can also assist in answering a question which has hitherto remained unresolved: namely, whether the sense to be given to policy is immutable over time. In the context of statutory interpretation, the circumstances to which wording in legislation applies may change over time.[101] One of the concepts which arises in the interpretation of legislation is the so-called 'always speaking principle'. An explanation of this was provided by Leggatt J, as he then was:[102]

> It is not difficult to see why an updating construction of legislation is generally to be preferred. Legislation is not and could not be constantly re-enacted and is generally expected to remain in place indefinitely, until it is repealed, for what may be a long period of time.

In his dissenting opinion in *Re McFarland*, Lord Steyn applied an 'always speaking' method to the interpretation of policy.[103] Hooper J has referred to the 'always speaking' principle in the context of the interpretation of policy, albeit he considered it did not apply on the facts.[104] Likewise, in *Raissi*, the Court of Appeal considered that the always speaking principle did not apply in that case.[105] Lord Bingham in *Re McFarland* did not refer to the principle, but his analysis appears to be based on the interpretation at the time the policy was formulated, not subsequently.[106]

The rationale for the always speaking principle provided by Leggatt J may apply to the interpretation of some policies, but not others. Policies can be of varying duration. The Immigration Rules are varied many times per year, and some versions of the Rules survive for less than a month before being amended.[107] By contrast, the policy wording being considered by Lords Steyn and Bingham in *Re McFarland* had not been amended in nearly 20 years by the time of their decision.

Whether an updating interpretation should be taken to the interpretation of policies should be answered, as with other difficult questions arising in relation to the interpretation of policies, by reference to the least expert reader principle. It might be assumed that the uninformed audience of a policy might be surprised by the idea that the understanding of the policy might be different to that when it was originally promulgated. But this does not mean that an originalist interpretation should always be taken to a policy. Indeed, the opposite may be true: if a member of the public would understand a policy to have a particular contemporary sense, and would be unaware of the different original sense, that is a reason for the court to take an updating approach to interpretation. Further, rejecting an updating interpretation risks encouraging the (erroneous) subjective

[99] *St James Homes Ltd*, above n 77, at [60]–[62].

[100] *JB (Ghana)*, above n 25.

[101] Eg *Yemshaw v Hounslow LBC* [2011] UKSC 3, [2011] 1 All ER 912, cited in A Burrows *Thinking about Statutes* (Cambridge: Cambridge University Press, 2018) pp 25–27.

[102] *R (ZYN) v Walsall MBC* [2014] EWHC 1918 (Admin), [2015] 1 All ER 165 at [45], cited in Bailey and Norbury, above n 7, para 14.1.

[103] *Re McFarland*, above n 18, at [25].

[104] *R (Daghir) v SSHD* [2004] EWHC 243 (Admin) at [35]–[38].

[105] *Raissi*, above n 3, at [116].

[106] *Re McFarland*, above n 18, at [15].

[107] See https://www.gov.uk/government/collections/archive-immigration-rules (last accessed 11 August 2023).

interpretation of policy. Complaining that a modernising approach could not reflect what the author of the policy actually thought when the policy was drafted is irrelevant, since the purpose of the exercise is not to find the author's actual intentions.

4. Are there limits to the least expert reader principle?

Where the audience of a policy is such that it will be read exclusively by specialists, then this entitles the court to interpret the policy as a specialist would read it. This may involve giving words meanings other than their ordinary sense, taking into account underlying documentation not referred to in the policy, and requiring detailed awareness of the underlying legal framework. In such a case, even the least expert reader would have a high degree of expertise. An example of this is the *Cotter* case, where the audience of the policy was a specialist one.[108] This is consistent with the least expert reader principle, and is, in truth, an application of it rather than a limit to it.

The principle flows from the idea of the guiding function of policy. There are, however, policies where the audience may include those who are not expert, but that element of the audience has no legitimate interest in using the policy to guide their behaviour, or one would expect them to have legal advice when considering the policy. A good example of this is the CPS Director's Guidance on Charging. Individuals do not have a legitimate interest in considering such Guidance to work out whether they could commit a criminal offence without being charged.[109] If they are faced with issues regarding the Guidance following being charged, they could be expected to be legally represented. This would justify a more technical[110] approach to the interpretation of such Guidance than would be appropriate for the interpretation of, for example, planning policy, which should be comprehensible by the general public without advice.[111]

5. Less useful tools: the negative instruction, and criticism of legalism

The courts have not yet expressly adopted the least expert reader principle. They have provided two explanations for the approach which they have taken hitherto to the interpretation of policy, both of which are, with respect, unhelpful.

(a) The negative instruction

One phrase which the courts frequently use is to state that policies are not to be interpreted as if they are statutes, or that they are not to be interpreted as if they are contracts or statutes.[112] The proposition that policies are not to be interpreted as contracts or statutes, or not to be interpreted as statutes ('the negative instruction') appears well over a hundred times in the case law, including in the Supreme Court.[113] Whilst many of the cases concern the interpretation of planning policy, the approach appears in contexts as diverse as immigration detention,[114] accommodation of army personnel,[115] and a decision to abolish two parish councils.[116]

[108] *Cotter*, above n 46.

[109] Sixth edn, December 2020, see https://www.cps.gov.uk/legal-guidance/charging-directors-guidance-sixth-edition-december-2020 (last accessed 11 August 2023). Another potential example is Home Office guidance regarding dishonesty: 'Suitability: false representations, deception, false documents, non-disclosure of relevant facts', version 3.0, 1 June 2023, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1160299/Suitability_false_representations.pdf (last accessed 23 August 2023).

[110] 'Technical' in this sense being a relative concept, increased technicality referring to being less constrained to the strict words at hand, and reference to material beyond the text of the policy.

[111] Eg *Nixon v SSCLG* [2020] EWHC 3036 (Admin) at [7].

[112] For a recent use of examining a concept by reference to what it is not, see E Lui 'What administrative law is not' [2022] Public Law 361.

[113] Eg *Hopkins Homes Ltd v SSCLG* [2017] UKSC 37, [2017] 4 All ER 938 at [74].

[114] *R (O) v SSHD* [2016] UKSC 19, [2016] 4 All ER 1003.

[115] *R (Brigadier Timothy Lai) v Secretary of State for Defence* [2011] EWHC 145 (Admin).

[116] *R (Britwell Parish Council) v Slough BC* [2019] EWHC 998 (Admin), [2019] PTSR 1904.

The negative instruction appears to mean that there are differences between the way in which policies are interpreted, by contrast with contracts and statutes. To a degree, this is true, and is unsurprising. One would not expect the interpretative techniques applied to administrative guidance to be exactly the same, and applied in exactly the same way, as those for legislation drafted by Parliamentary Counsel, or for lengthy commercial agreements. The purposes of the types of instrument are different.

That said, and notwithstanding its wide and common usage, the negative instruction is not useful. It has become an incantation which obscures as much as it reveals. It is usually not explained what the courts mean by the negative instruction, or how it is actually applied in a case where it is cited. There are a number of cases referring to the negative instruction, in which there is very little reasoning to justify the interpretation which was reached.[117] The negative instruction gives the impression of explaining how a court has reached its conclusion, without actually explaining the analysis. The courts should explain what interpretative techniques that they are using, and why. Saying that the interpretation of policies should *not* be like that of statutes and contracts sheds very little light on how they should actually be interpreted, particularly given that the interpretation of statutes and contracts has given rise to a highly sophisticated body of law.[118] Further, there are a number of similarities between the interpretation of policies, and the interpretation of statutes and contracts.[119] The negative instruction would be useful only if the courts say *how* the interpretation of policy should differ from that of contracts or statutes.

The negative instruction has been used in two very different types of cases: those where the courts did not determine for themselves the correct interpretation of policy, and those in which they did. Particularly in the planning context, the negative instruction has previously been applied in a number of older cases where the court considered that its role was only to check whether the decision-maker had given the policy a legitimate meaning.[120] The role of the court in the interpretation of planning policy was, at that stage in the development of administrative law, thought to be a limited one.[121] It was said that the interpretation was to be scrutinised by the court only on the basis of irrationality or perversity.[122]

If a court is only reviewing whether a decision-maker's interpretation of policy is reasonable, this is an obviously different exercise from the interpretation of a statute or contract. The courts will decide for themselves what a contract or statute means. In a number of cases, the court explained that its role was limited to checking whether the policy was given a meaning of which it was capable, in the same breath as saying that a policy was not to be interpreted as if it were a statute.[123] In *Re Findlay*, Lord Hodge drew a distinction between the interpretation of documents which have the force of law (such as legislation or contracts), where the court was to give 'a legal meaning to the words used',[124] and the interpretation of statements of policy. In the latter situation, the 'meaning to be given to such documents [was] a question of fact, so long as the decision-maker gives the words a meaning that is not perverse or irrational'.[125] This suggests that the negative instruction in such cases may be understood as referring to the court's role, rather than anything regarding the techniques of interpretation. The

[117] *Dawn Developments Ltd v Scottish Ministers* [2013] CSOH 154; *Britwell Parish Council*, above n 116.

[118] See Bailey and Norbury, above n 7; Sir Kim Lewison *The Interpretation of Contracts* (London: Sweet & Maxwell, 7th edn, 2021).

[119] For instance, that the interpretation requires a close reading of the words: *R (W) v SSHD*, above n 49, at [66].

[120] *R v Derbyshire County Council, ex p Woods* [1998] Env LR 277.

[121] *R (JA Pye (Oxford) Ltd) v Oxford City Council* [2001] EWHC Admin 870, [2002] 2 P & CR 35.

[122] *Standard Life Insurance Company v Scottish Ministers* [2005] CSIH 33 at [78].

[123] *Persimmon Homes (North West) Ltd v Secretary of State for the Environment, Transport and the Regions*, High Court, 4 December 2000 (unreported) at [33]; *JA Pye (Oxford) Ltd*, above n 121, at [72]–[73]; *Cranage Parish Council v First Secretary of State* [2004] EWHC 2949 (Admin), [2005] 2 P & CR 23 at [49].

[124] [2006] CSOH 188 at [29].

[125] Ibid, at [30]. He found, however, that there was no 'complete dichotomy' between the interpretation of instruments having legal effect and the interpretation of policies, as statutory criteria might sometimes be imprecise, just as policies are often open-textured: at [33].

meaning of the negative instruction, at least in the planning context, changed considerably in *Tesco Stores Ltd v Dundee City Council*.[126] In *Tesco*, the Supreme Court made clear that the interpretation of planning policy is a question of law for the courts. Lord Reed nevertheless referred to the negative instruction.[127] The negative instruction following *Tesco v Dundee* can be understood as referring only to how a policy should properly be understood. There is no acknowledgement in the case law of the shift in the role of the negative instruction.

Further confusion arises from the fact that, during the period when many planning cases indicated that the interpretation of planning policy was primarily for the decision-maker, the courts in other contexts indicated that the interpretation of policy was an objective matter of law, whilst still employing the negative instruction. In *R v Criminal Injuries Compensation Board, ex p Webb*,[128] the Court of Appeal considered a challenge to the interpretation of a non-statutory scheme[129] regarding *ex gratia* payments to the victims of crime. Lawton LJ stated that 'the court should not construe the scheme as if it were a statute'.[130] However, this formulation (a version of the negative instruction) did not mean that the court's role was limited to checking that the Board had not reached an unreasonable interpretation. The court was to consider 'what would be a reasonable and literate man's understanding' of the scheme.[131] In a number of non-planning cases, the courts have referred to the negative instruction whilst applying this test.[132]

In those cases where the courts have sought to give some indication of what is actually meant by the negative instruction, the approach is unpersuasive or otherwise unhelpful. One possible trend running through these cases is that policy is more informal, less prescriptive, and less well-drafted than legislation or statutes. This is true in some cases, but not in others. The Immigration Rules stand at well over 1,000 pages long, often with highly prescriptive provisions. It is perhaps unsurprising that in *R (W) v SSHD*, a case concerning the interpretation of the Immigration Rules, the Divisional Court rejected an argument based on the negative instruction.[133] It is no doubt true that policies sometimes deal with grey areas and may not take 'bright line' approaches.[134] However, this arises more from the fact that policies address administrative discretion, than from the nature of policies themselves: legislation may create a grey area,[135] and in some cases might not require the exercise of the burden of proof.[136] Whilst policies may have slips in drafting, it is also the case that the drafting of some legislation is poor.[137] There are some surprises in those cases which seek to explain the use of the negative example. In *Euro Garages Ltd*, Jefford J considered that the negative instruction meant that the word 'preserved' meant 'not harmed', rather than 'not changed'.[138] This is ironic: in heritage planning legislation, 'preserve' means to make a positive contribution or to do no harm.[139] Far from suggesting that the policy interpretation should be different to that of legislation, the interpretation was the same.

The Court of Appeal has suggested, very briefly, that the negative instruction may follow from the fact that a policy concerning *ex gratia* payments was addressing a matter which the government had

[126] *Tesco Stores Ltd*, above n 3.

[127] Ibid, at [19].

[128] [1987] 1 QB 74.

[129] A scheme familiar to students of English constitutional law from the significant case of *R v SSHD, ex p Fire Brigades Union* [1995] 2 AC 513.

[130] Above n 128, at 78.

[131] Ibid. This is an approach similar to the least expert reader principle.

[132] *Raissi*, above n 3; *Kennedy*, above n 49.

[133] Above n 49, at [62]–[63].

[134] *JA Pye (Oxford) Ltd*, above n 121, at [94], *Telford and Wrekin Council*, above n 86, at [35].

[135] *Jenson v Faux* [2011] EWCA Civ 423, [2011] 1 WLR 3038 at [17].

[136] Discretionary exercises may lead to the concept of the burden of proof being inappropriate: see *Granatino v Radmacher* [2010] UKSC 42, [2011] 1 AC 534 at [160] (Lady Hale JSC, dissenting).

[137] See JR Spencer 'The drafting of criminal justice legislation – need it be so impenetrable?' (2008) 67(3) Cambridge Law Journal 585.

[138] Above n 97, at [22]–[23].

[139] *South Lakeland DC v Secretary of State for the Environment* [1992] 2 AC 141 at 150.

taken on voluntarily.[140] This is doubtful: it is unclear that there is a necessary logical connection between voluntariness and interpretation, and the Court of Appeal does not explain what such a connection may be. But even if that were right, this reasoning would not apply to circumstances outside those in which the government was administering an *ex gratia* scheme: it provides no justification for the negative instruction as a general principle.

For these reasons, despite being frequently intoned by the courts, the negative instruction is not helpful in providing an indication as to how policies should actually be understood. Much more useful is for the court to consider what the audience of the policy is, and how the text of the policy would be understood by the least expert member of the audience. There may yet be interesting lessons regarding the relationship between interpretative techniques applicable to policies as compared to statutes and contracts, but this lies beyond the scope of the present paper.

(b) The least expert reader principle and legalism

In a number of cases, the courts have indicated that the correct approach to interpretation is to avoid legalism,[141] or have criticised a party for advancing an interpretation which is (too) legalistic.[142] It is generally not clear what is meant by an overly-legalistic meaning. In a first instance decision, the charge of legalism was levelled at an interpretation of policy which sought to make it more prescriptive than the judge considered the policy to be, when read in context.[143] In another case, Dove J considered the consequence of an application failing to comply with a policy couched in permissive terms. He considered that if the requirements of such a policy were not met, that might indicate a conflict with policy, rather than the effect being neutral. He decided that it would be overly legalistic to require a policy to address all potential locations for development of land: if a proposal falls outside the area in which development was supported, this would be inconsistent with the policy.[144]

The concept of legalism is an opaque one. The criticism of a legalistic approach may ring hollow when that criticism is made by a judge having heard arguments by lawyers for each of the parties. There is a risk that an allegation of legalism risks being a cloak for where the judge does not agree with a particular interpretation which is being advanced. It has little explanatory value. By contrast, the least expert reader principle steers a court (and parties to litigation, stakeholders in applications, and the decision-maker) as to how a policy should actually be interpreted. This is not, however, to deny that there may be an overlap between the principle, and approaches which would cause judges to be concerned about legalism: an approach taking a highly technical reading of a policy, or comparing the wording of policies in minute detail, may well be something which would not occur to a non-specialist interpreter of such a policy. The least expert reader principle, however, provides a clearer steer when answering interpretation questions.

Conclusion

If the courts were to apply the least expert reader principle, this would provide increased clarity to their reasoning, giving a framework within which to address controversial questions about how to approach policy interpretation. This clarity may serve to reduce the number of challenges based on the interpretation of the policy, as there would be common ground between stakeholders and decision-makers as to the general approach to interpretation. The principle has the benefit of enfranchising those who may seek to rely upon, or make representations based upon, the policy. If applying such an interpretation of the policy would be contrary to the public interest, then a decision-maker is entitled to depart from it. The least expert reader principle would provide a steer to judges and to

[140] *Ex p Webb*, above n 128, at 78.
[141] Eg *Hopkins Homes Ltd*, above n 113, at [59].
[142] Eg *Nixon*, above n 111, at [7].
[143] *Dignity Funerals Ltd*, above n 67, at [57].
[144] *Canterbury CC v SSCLG*, above n 93, at [34].

litigants, and indeed to those drafting policies. Many decisions of the courts are consistent with the principle, such that adopting it would not lead to a sea change in the approach to policy interpretation, or be liable to overturn large swathes of interpretation decisions. The least expert reader principle should be expressly adopted by the courts.

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