In The House of Lords

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL

(ENGLAND AND WALES)

BETWEEN:

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-v-

HUANG

Respondent

AND BETWEEN:

KASHMIRI

Appellant

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

WRITTEN SUBMISSIONS ON BEHALF OF LIBERTY

INTRODUCTION

1. On 26th January 2007 your Lordships granted leave to Liberty to intervene in order to make written submissions.

2. Liberty is a company limited by guarantee and was formed in 1934. It is a respected and independent body whose central objectives are the protection of civil liberties and the promotion of human rights in the United Kingdom.

3. Liberty has had a legal department with employed staff for more than 30 years, although supporting cases in the courts has always been part of its work. Liberty acts for clients as solicitor and regularly practises in the courts in this country and in the European Court of Human Rights (the ECtHR). Liberty was heavily involved in campaigning for the incorporation of the European Convention on Human Rights (the ECHR), and was engaged by the government to train officials in the application of the Human Rights Act (the HRA) before it came into force. Liberty is now a recognised authority on the workings of the HRA and the ECHR. Its staff have published many related books and articles and are regularly involved in lecturing and teaching on human rights law.

4. In recent years Liberty has intervened in nearly 30 cases before the ECtHR and the domestic courts. The organisation has been praised by Strasbourg and domestic courts for the quality of its interventions. In *R v Crown Court at Manchester, ex parte McCann* [2002] UKHL 39 [2003] 1 AC 787, Lord Steyn commented that "the contribution of Liberty has helped to sharpen the focus of the debate on issues under the Human Rights Act 1998".

5. Cases before the House of Lords in which Liberty has recently intervened either orally or in writing include:

   - *R (Ullah) v Special Adjudicator* [2004] 2 AC 323;
   - *A v Secretary of State for the Home Department* [2005] 2 AC 68
   - *Secretary of State for the Home Department v Limbuela* [2006] 1 AC 396;
   - *Kay v London Borough of Lambeth* [2006] 2 WLR 570.

THE ISSUES

6. The judgment of the Court of Appeal raises three important legal issues in relation to an Immigration Adjudicator's decision (now Immigration Judge) to allow an appeal of a claim for leave to remain in the UK on the ground that a removal would be a disproportionate interference with the claimant's Article 8 rights:

    (a) whether the Adjudicator's assessment is limited to a review of the Secretary of State's (SoS's) decision that is within the range of "reasonable responses" or whether the Adjudicator is entitled to form his own view on whether the decision of the SoS met the standard of proportionality ('the reasonable responses issue');

    (b) whether the Adjudicator is entitled to form his own view of the proper content of proportionality, and the proper content of that standard ('the standard of review issue'); and

    (c) whether Laws LJ is correct in holding that the only principle which would justify concluding that the Adjudicator is confined to considering the range of reasonable responses is the principle of judicial deference or the discretionary area of judgment. ('the judicial deference issue').

7. In summary, Liberty submits that Court of Appeal was correct in deciding that:

    (a) the submission of the SoS that the correct standard is the "reasonable response" is, in effect, an application of the traditional *Wednesbury* test, and is contrary to the test considered applicable for such cases as set out by Lords Steyn and Bingham in *R(Daly) v Secretary of State for the Home Department* [2001] 2 AC 532;

(b) the Adjudicator is entitled to form his own view of the proportionality of the decision;

(c) there is no need to defer to the SoS in relation to adjudicatory decisions.

(1) THE REASONABLE RESPONSES ISSUE

8. It is, perhaps, important to note that the public law has now matured to the extent that there are now four tests the Court may apply when undertaking the substantive review of primary decisions:

(a) **Reasonableness review**. Eschewing review of the merits of a decision, the courts traditionally applied the *Wednesbury* formula (so reasonable that no reasonable body could so decide). The full rigour of the *Wednesbury* test (sometimes known as the test of "perversity") has however been softened recently (see eg Lord Cooke in *R v Chief Constable of Sussex ex p ITF* [1999] 2 AC 418 at 482); and reformulated into a test which asks whether the decision is "within the range of reasonable responses" under the relevant power. In some cases under this head the question is asked whether the decision-maker struck a "fair" or "proportionate" balance between competing considerations, or between means and ends. This kind of 'proportionality' is, however, different from the 'structured proportionality' discussed below.

(b) **Anxious scrutiny reasonableness review.** Where 'domestic' human rights are in issue (ie rights implied outside of Convention rights), the courts have applied stricter or more 'anxious' scrutiny of the primary decision than that applied under the pure *Wednesbury* formula: see *R v Ministry of Defence, ex p Smith* [1996] QB 517.

(c) **Constitutional rights review.** Where implied "constitutional rights" are engaged (based eg on the rule of law *(R v Secretary of State for the Home Department ex p Pierson* [1998] AC 539*)*) or free expression *(R*

v Secretary of State for the Home Department ex p Simms [2000] 2 AC 115) the "principle of legality" is applied. Under this principle the courts make the presumption that the rights will apply unless revoked by Parliament expressly or by necessary implication.

(d) **Structured justification proportionality review.** Here the courts apply a structured set of questions relating to the balance, necessity and suitability of the public authority's decision. This form of review has developed in relation to European Community Law, where a departure from a fundamental standard must be justified under this test. It has also been applied by the ECtHR to justify a departure from one of the 'qualified rights' set out in Articles 8 to 11 of the ECHR.

9. Liberty would respectfully submit that the contention (as advanced by the SoS)) that the principle of proportionality can be reduced to the question "is the decision of the SoS outside the range of reasonable responses?" is wrong. This is because it assumes that, within the so-called range of reasonable responses; the courts may not interfere as the decision is essentially one involving subjective judgment and the desirability of pursuing one route rather than another. On the contrary, under proportionality review the courts must themselves decide, on the basis of the particular facts and context of the decision whether the decision is objectively 'necessary' (rather than merely desirable). In addition the courts ask not whether the decision fulfils the very general requirement of reasonableness but whether the decision fulfils the requirements of a democratic society. This approach is supported as follows:

(a) In *R (Daly) v Secretary of State* [2001] 2 AC 532 it was clearly stated (see particularly Lord Steyn, paras 26 to 28) that the test of proportionality must be applied to justify an interference with a Convention right under the HRA. This approach has never been questioned: per Lord Bingham in *R(SB) v Denbigh High School* [2006] 2 WLR 719 para 30; and see also *R(Samaroo) v Secretary of State for the Home Department* (2001) UKHRR 1622.

(b) More specifically in the context of Article 8 and immigration control, the SoS's submission is contrary to the approach of your Lordships' House in *R(Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368.

(c) The SOS's submission fails to acknowledge that, unlike ordinary reasonableness *Wednesbury* review (where the burden falls on the claimant to establish that an administrative decision is unlawful), proportionality under the HRA requires the public authority to demonstrate that it can justify interferences with qualified Convention rights. It is well established that the exceptions under Article 8(2) are to be interpreted narrowly and the need for them in a given case must be convincingly established and properly justified: see eg *Klass v Germany* (1978) 2 EHRR 214 para 42; *Silver v United Kingdom* (1983) 5 EHRR 347 para 97; *Funke v France* (1993) 16 EHRR 297 para 55; and see similarly, in relation to Article 10, *Handyside v United Kingdom* (1976) 1 EHRR 737 para 49; *Lingens v Austria* (1986) 8 EHRR 103 para 31; *Jersild v Denmark* (1994) 19 EHRR 1 para 37; *Zana v Turkey*(1997) 27 EHRR 667 para 51.

(d) As Lord Hope observed in *R v Shayler* [2003] 1 AC 247 para 61:

> "it is not enough to assert that the decision that was taken was a reasonable one. A close and penetrating examination of the factual justification for the restriction is needed if the fundamental rights enshrined in the Convention are to remain practical and effective for everyone who wishes to exercise them."

See also Lord Bingham at para 33: "in any application for judicial review alleging a violation of a convention right, the court will now conduct a much more rigorous and intrusive review than was once thought to be permissible".

(e) The shift to a proportionality review under the HRA has therefore resulted in a critical sea change: requiring the development of a public

law "culture of justification" which public authorities must now address and accommodate. Thus, the obligation now falls squarely upon public authorities rationally to support their decisions which the courts subject to careful scrutiny to decide whether or not that decision is justifiable on the basis of the evidence and reasoning. In other words, a "culture of justification" has now supplanted a "culture of authority": see Professor Mureinik,'A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 S.A. J of Human Rights 31; Mureinik and Dyzenhaus "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) SAHR 11; and Hunt "Why Public Law needs 'Due Deference' in Bamforth and Leyland (ed) *Public Law in a Multi Layered Constitution* at 351.

Intervener's Authorities Vol IV Tab 18

Int Auth Vol IV Tab 19

(f) The question of proportionality is always a question to be judged objectively by the Court: per Lord Bingham *R(SB) v Denbigh High School* [2006] 2 WLR 719 para 30.

(g) In considering that question the Court must be astute to acknowledge that the HRA has resulted in a discernible shift from form to substance: as Lord Irvine observed in "The Development of Human Rights under an Incorporated ECHR" [1998] PL 221 at 229 (see, also the discussion of the "shift to substance" at 235, 236) in explaining the practical implications of a change to a rights based system within the field of civil liberties:

Int Auth Vol IV Tab 20

> "The … point may be stated shortly but is of immense importance. The courts' decisions will be based on a more overtly principled and, perhaps, moral basis. The Court will look at the positive right. It will only accept an interference with that right where the justification, allowed under the Convention is made out. The scrutiny will not be limited to seeing if the words of an exception can be satisfied. The Court will need to be satisfied that the spirit of this exception is made out. It will need to be satisfied that the interference with the protected right is justified in the public interests in a free

democratic society. Moreover, the courts will in this area have to apply the Convention principles of proportionality. This means that the courts will be looking substantively at that question. It will not be limited to secondary review of the decision process, but the primary question of the merits of the decision itself."

[Original emphasis]

(i) The submission by the SoS that the role of the Court is confined to considering whether his decision falls within the range of reasonable responses therefore fails to meet (i) the obligation on a public authority properly to justify an otherwise unlawful interference with Convention rights; and (ii) the obligation of the Court to examine the substantive impact of the decision. when considering whether an interference to Convention rights has taken place (as illustrated by *R(SB) v Denbigh High School* per Lord Bingham at paras 27 to 31 and 34; and see Lord Hoffmann at para 68 who states that whereas the Court in judicial review is usually concerned with whether the decision maker has reached his decision in the right way rather than what the court thinks is the right answer, Convention rights (such as the right to manifest religious beliefs under Article 9) are concerned with substance, not procedure).

(j) In addition, the submission of the SoS fails to recognise the exercise of justifying such an interference requires a public authority to undertake a more structured and focused proportionality test which contains the following elements (per *R (Daly) v Secretary of State for the Home Department*; *R(Samaroo) v Secretary of State for the Home Department*):

- that the objective of the interference is sufficiently important to justify limiting the right;
- that the measures designed to meet the objective are rationally connected with it;

- that the means used to impair the right is no more than is necessary to accomplish that objective; and

- that the interference does not have an excessive or disproportionate effect on the affected individual.

10. In any event, the SoS's submission has no basis in the approach used by the ECtHR: which always looks at the particular factual circumstances of each case (rather than focusing on the question of whether the decision in question falls within the band of reasonable responses); and the SoS's approach therefore cannot be reconciled with the obligation on the English courts to apply ECHR case law; per Lord Bingham in *Kay v Lambeth LBC* [2006] 2 WLR 570 para 28:

> "it is ordinarily the clear duty of our domestic courts, save where and so far as constrained by primary domestic legislation, to give practical recognition to the principles laid down by the Strasbourg court as governing the Convention rights specified in section 1(1) of the 1998 Act. That court is the highest judicial authority on the interpretation of those rights, and the effectiveness of the Convention as an international instrument depends on the loyal acceptance by member states of the principles it lays down."

(2) THE STANDARD OF REVIEW ISSUE

11. Liberty would therefore submit that Laws LJ was correct to emphasise that s 6 of the HRA requires the court to be satisfied that the decision maker has conformed with Convention rights. As such:

(a) The reasoning in *Daly* and *Denbigh High School* (referred to above) confirms that the Court is exercising a review and not a merits exercise.

(b) The review issue to be addressed is the structured proportionality test (as set out in *Daly* and *Samaroo*).

(c) The intensity of review depends on the particular context: as Lord Steyn emphasised in *Daly* - "in the law context is everything".

12. Alternatively, if Liberty's submission on the standard of review is incorrect, it is submitted that the traditional reasonableness review now does or should require a degree of justification that brings it into greater convergence with the other standards of review (the 'anxious scrutiny' review and the 'structured justification proportionality' review, as set out above). This is so for two reasons:

(a) A divergence of standards of review makes the law incoherent and uncertain, and

(b) The law is and should require reasoned justification of all decisions taken by public officials in the public interest.

13. Liberty's alternative submission is exemplified by a recent case before the South African Constitutional Court, which demonstrates this change of approach. In *Bato Star Fishing Ltd v The Chief Director: Marine and Coastal Management* (2004) (4) SA 490 (CC) O'Regan J considered (at para. 48) that a decision on the allocation of fishing quotas and requiring 'an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with special expertise in that area must be shown respect by the Courts'. Nevertheless, she said that:

Int Auth
Vol I
Tab 1

> "this does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts, or is not reasonable in the light of the reasons given for it, a Court may not review that decision."

14. It is submitted that the approach of O'Regan J is appropriate in the UK, where a similar 'culture of justification' now prevails in public law. Even in cases where the courts are not disposed to question the balancing of considerations by the primary decision-maker, they nevertheless should require that the decision be properly justified in the light of the facts upon which it is based and the reasons given for it. Review on this basis takes

Wednesbury review a step further, not only in the formula that is applied (a decision 'within the range of reasonable responses' rather than a 'perverse' decision) but also in the quality of justification that ought today to be expected of public officials acting in the public interest.

(3) THE DEFERENCE ISSUE

Introduction

15. Liberty would respectfully submit that the identification of a proper approach to judicial deference is critical to the development of a principled understanding of the HRA; that there would be considerable benefits were the Courts to develop a more comprehensive analysis of the circumstances in which judicial deference is appropriate; and that it would be desirable for your Lordships to refine the analysis which was initiated in *R (Pro-Life Alliance) v BBC* [2004] 1 AC 185 per Lord Hoffmann at paras 75, 76; Lord Walker at paras 136 to 139.

Int Auth Vol I Tab 2

The role and scope of the principle of judicial deference

16. Liberty submits that the principle of judicial deference has no application in relation to unqualified rights like Article 3 - see *R (Limbuela) v Secretary of State for the Home Department.* [2006] 1 AC 396 per Lord Hope at para 53; and Baroness Hale at para 77. This limitation reflects the fact that the doctrine of the margin of appreciation has no role in the ECtHR in relation to interferences with unqualified rights.

Int Auth Vol I Tab 3

17. (By contrast, there may sometimes be a role for deference or the margin of appreciation in relation to positive obligations on public authorities to secure an unqualified right such as the positive obligation to secure the right to life in *R(Bloggs 61) v Secretary of State for the Home Department* [2003] 1 WLR 2724 to which the SoS refers in para 54 of his printed case; but this exceptional situation does not bear on the fact that the margin of appreciation has no application to cases where a public authority interferes with the right to life.)

Int Auth Vol I Tab 4

18. The function of the principle of judicial deference is to clarify the issues to be addressed when considering context in relation to proportionality issues, to which Lord Steyn drew attention in *Daly*.

A question of terminology

19. The courts have tended to use interchangeably the phrase "discretionary area of judgment" and the phrase "judicial deference".

20. The principle that that the legislature or courts have discretionary area of judgment was formulated by David Pannick in the course of arguing that the ECHR principle of the margin of appreciation had no application to the HRA: see D Pannick "Principles of interpretation of Convention rights under the Human Rights Act and the discretionary area of judgment" [1998] PL 545; his views were essentially reiterated in Lester and Pannick *Human Rights Law and Practice* (2nd ed, 2004, Butterworths), paras 3.18 to 3.21; and were discussed by Lord Hope in *R v DPP ex p Kebeline* [2002] 2 AC 366, 381.

Int Auth
Vol IV
Tab 21

21. Thereafter the relevant underlying principle has more usually been described as a principle of judicial deference.

22. However, in *Pro-Life* at para 75 Lord Hoffmann expressed the view that although the word "deference" is now very popular in describing the relationship between the judicial and the other branches of government, he did not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening

23. Furthermore, as the former President of Supreme Court of Israel, Aharon Barak, has observed, the use of the term "deference" may not serve any useful purpose in any event: if an administrative decision is reasonable, the Court refrains from invalidating it not out of "deference" but because the decision is lawful; and if the decision exceeds the zone of reasonableness, it must be invalidated and there is no room for deference. The zone of reasonableness is determined by the scope of the public authority's power; this is an interpretative activity which is the responsibility of the judicial

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branch; and does not in fact implicate any principle of "deference": see Barak *The Judge in a Democracy* at 251, 252.

24. Liberty would respectfully submit, however, that the label of a "discretionary area of judgment" is even more misleading. The idea of a "discretionary area of judgment" focuses on the notion that a public authority has an area of judgment which may amount the suggestion that there is a zone of immunity beyond the reach of the HRA. (Such a proposition is incorrect: see para 31 below)

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25. But the underlying principle in play in the present case is <u>whether</u>, and to what <u>extent</u>, the Court should defer to particular special factors when considering the application of the proportionality principle in any particular case; and the process in question can be properly characterised by the term "judicial deference".

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The democratic legitimacy of the courts' role under the HRA

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26. Liberty submits that under the HRA there is no need for the courts to defer to Parliament or the executive on the ground that they are elected and thus responsible to the people. On the contrary, the HRA imposes a constitutional duty upon the courts to adjudicate on whether Parliament or public officials have complied with Convention obligations.

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27. The HRA gives the courts a very specific, wholly democratic, mandate; they have been charged by Parliament with delineating the boundaries of a rights-based democracy: per Lord Bingham *A v Secretary of State for the Home Department* [2005] 2 AC 68 para 42.

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28. In undertaking that exercise, it is important for the Courts to acknowledge that the HRA has been drafted so as to ensure that it is always open to Parliament to reverse its decisions: so for example, if Parliament disagreed with the interpretation of the Courts under section 3, of the HRA it is free to override it by amending the legislation and expressly reinstating the incompatibility: see *Ghaidan v Godin-Mendoza* [2004] 2 AC 557: per Lord Steyn at para 41; and see R Clayton "Judicial Deference and 'Democratic

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Int Auth
Vol IV
Tab 23

Dialogue': the legitimacy of judicial intervention under the Human Rights Act" [2004] PL 33.

29. The HRA is a statute of constitutional significance because the European Convention on Human Rights represents our Bill of Rights: see eg *Brown v Stott* per Lord Bingham at 703; and Lord Steyn at 708; *R v Offen* [2001] 1 WLR 253, 275 per Lord Woolf CJ; *McCartan Turkington Breen v Times Newspapers* [2001] 2 AC 277, 297 per Lord Steyn. For example, the effect of section 3 is to permit judicial review of Acts of Parliament; the unusual and far-reaching character of statutory construction section that section 3 enjoins (see, *Ghaidan v Godin- Mendoza*) represents a radical change to the conventional view of parliamentary sovereignty (as expressed by Lord Reid *Pickin v British Railway*,[1974] AC 765 at 782G). The status of the HRA therefore mandates close scrutiny of alleged departures from Convention rights in which the courts are effectively engaged in an exercise of constitutional review, namely, reviewing the boundaries of a constitutional democracy in which enumerated rights are expected to be protected, even where the popular will may require otherwise.

30. Thus, to carry judicial deference to the point of accepting Parliament's view 'simply on the basis that the problem is serious and the solution difficult' diminishes the role of the courts in a constitutional process: see McLauglan CJ stressed in *RJR-MacDonald v Canada (Attorney-General)* [1995] 3 SCR 119 para 136.

Int Auth
Vol I
Tab 5

31. Liberty therefore submits that the cases in which it has been suggested that there is a need for the courts to defer to Parliament or the Executive on the grounds of their superior constitutional status under the HRA are wrong eg. *Secretary of State for Home Affairs v. Rehman* [2001] UKHL 47, per Lord Hoffmann at para 62; *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 at para 27 per Laws LJ.)

Int Auth
Vol IV
Tab 24

(a) See Lord Steyn, "Deference: A Tangled Story" [2005] P.L. 346, and Lord Steyn, "2000- 2005": Laying the Foundations of

Human Rights Law in the United Kingdom" [2005] E.H.R.L.R. 349, 359 ff.

Int Auth Vol IV Tab 25

(b) Indeed, the idea that some legal questions are beyond the reach of the HRA is incorrect as a matter of construction: since section 22(5) of the HRA binds the Crown and the obligation on public authorities to comply with Convention rights under section 6(1) is expressed in unqualified terms so that the HRA does not give the court a discretion to refuse in principle to review the acts of a public authority.

(c) See also the approach under the Canadian Charter of Rights supports this view that there are no decisions of public authorities which will be outside the scope of the HRA on the ground that they are not justiciable. In *Operation Dismantle Inc v The Queen* [1985] 1 SCR 441 proceedings were brought by a peace organisation alleging that the government's decision to allow the United States to test cruise missiles violated the Charter. Although the claim itself failed, the Supreme Court rejected the suggestion that an issue might become non-justiciable because it was too political to be decided by the courts.

Int Auth Vol I Tab 6

32. Similarly, the following cases are wrong insofar as they suggest that the courts must defer to Parliament or the executive on the grounds of their constitutional status (namely, the fact that Parliament or the executve are elected by and responsible to the electorate). The cases include: *Poplar Housing and Regeneration Community Association v Donoghue* [2002] QB 48 para 69, where Lord Woolf CJ stated in relation to whether the grant of a possession order to a housing association on mandatory grounds was a disproportionate interference with Article 8:

> "There is certainly room for conflicting views .... However, in considering whether Poplar can rely on Article 8(2), the Court has to pay considerable attention to the fact that Parliament

> intended when enacting s 21(4) of the 1988 Act to give preference to the needs of those dependent on social housing as a whole over those in the position of the defendant. The economic and other implications of any policy in this area are extremely complex and far-reaching. This is an area where, in our judgments, the courts must treat the decisions of Parliament as to what is the public interest with particular deference."

In *Brown v Stott* [2003] 1 AC 681, 703.Lord Bingham said:

> "Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them. While a national court does not accord the margin of appreciation recognised by the European Court as a supra-national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies."

In *Brown* ibid, 711 Lord Steyn made similar observations:

> "Just as there are circumstances in which an international court will recognise that national institutions are better placed to assess the needs of society, and to make difficult choices between competing considerations, so national courts will accept that there are some circumstances in which the legislature and the executive are better placed to perform those functions."

Similarly, *R v Lichniak* [2003] 1 AC 903 (where the House of Lords held that mandatory life sentences did not breach Articles 3 or 5), Lord Bingham took the view, ibid para 14, that:

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> "the House must note that section 1(1) of the Murder (Abolition of Death Penalty) Act 1965 represents the settled will of Parliament. Criticism of the subsection has been voiced in many expert and authoritative quarters over the years, and there have been numerous occasions on which Parliament could have amended it had it wished, but there has never been a majority of both Houses in favour of amendment.
>
> The fact that section 1(1) represents the settled will of a democratic assembly is not a conclusive reason for upholding it, but a degree of deference is due to the judgment of a democratic assembly on how a particular social problem is best tackled. It may be accepted that the mandatory life penalty for murder has a denunciatory value, expressing society's view of a crime which has long been regarded with peculiar abhorrence."

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The role and scope of the principle of institutional deference

33. Despite the lack of need to defer to Parliament or the executive on constitutional grounds, the courts may respect the superior institutional competence or capacity of all decision-making bodies, and recognise their own limitations, to decide certain kinds of problems. Particular decisions which require institutional deference are those which involve utilitarian calculations of the public good, namely, consideration of macro-economic social, economic or political policy. Matters which do not raise such issues are required to be made by the courts without any due deference.

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34. Another area in which the courts should recognise the superior institutional competence of other bodies is where a degree of specialist expertise is involved.

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35. When considering the question of institutional competence, consideration should take account of the following non exhaustive factors (which may conflict in particular cases):

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- the nature of the right eg whether the right in question is unqualified or qualified;
- whether proportionality requires weighing competing rights or is primarily a dispute between the individual and the state;
- the importance of the rights at stake;
- the extent of the interference with the right
- whether the interference impairs the very essence of the right;
- the subject matter of the decision; :
- whether the reason for interfering with the right is sufficiently important to justify the interference;
- the subject-matter of the decision made by the public authority

36. The context in which proportionality will be assessed is thus often decisive. However, as has been said above in relation to the developing role of *Wednesbury* review (paras 8 above) even where deference is due to the decision-maker by the court, the court is nevertheless bound to insist on an appropriate justification of the decision. As O'Regan J said in *Bato Star* (above, para. 16-17) "A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker".

37. The nature of the review exercise was emphasised by Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at para 19 :

> "arguments based on the extent of the discretionary area of judgment accorded to the legislature lead nowhere in this case. As noted in *Wilson v First County Trust Ltd (No 2*) Parliament is charged with the primary responsibility for deciding the best way of dealing with social problems. The court's role is one of review. The court will reach a different conclusion from the legislature only when it is apparent that

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> the legislature has attached insufficient importance to a person's Convention rights. The readiness of the court to depart from the view of the legislature depends upon the subject matter of the legislation and of the complaint. National housing policy is a field where the court will be less ready to intervene. Parliament has to hold a fair balance between the competing interests of tenants and landlords, taking into account broad issues of social and economic policy. But, even in such a field, where the alleged violation comprises differential treatment based on grounds such as race or sex or sexual orientation the court will scrutinise with intensity any reasons said to constitute justification. The reasons must be cogent if such differential treatment is to be justified."

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The nature of the court's role under the HRA

38. Even in cases where the decision-maker has special expertise or where matters of macro-economic policy are in issue, the Courts are still required to fulfil their democratic obligation to safeguard Convention rights; and also to fulfil their own obligation under s 6 of the HRA not to act incompatibly with Convention rights.

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39. As Lord Irvine has pointed out in "Constitutional Change in the United Kingdom: British Solutions to Universal Problems" in his book of essays *Human Rights, Constitutional Law and the Development of the English Legal System* (Hart Publishing, 2003) at p 52:

Int Auth Vol IV Tab 26

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> "Britain and America are not alone in having experienced, particularly during the latter part of this century, the 'constitutionalisation' of the judicial function. It is the massive expansion of the administrative state which, more than any other factor, has prompted the judges to reassess their constitutional role. As the comparative lawyer, Mauro Cappelletti has observed, the courts in many jurisdictions are 'becoming themselves the "third giant" to control the mastodon legislation legislator and the leviathan administrator.

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> It is this emerging view of the judicial function which the British human rights legislation not only intersects but also legitimises. The United States Constitution permits- and requires- the American courts to recognise that the duties of a constitutional character inform the nature of their judicial function. United Kingdom law has hitherto possessed no analogue. It is the Human Rights Bill which will capture the current *zeitgeist* of British public law, favouring the constitutionalisation of the judicial function. By conferring democratic legitimacy upon this development, the new legislation will allow the judges to fulfil a stronger constitutional role in a wholly constitutional way."

40. It is therefore submitted that the obligation on the court under s 6 of the HRA requires it to undertake a transparent and properly reasoned conclusion when resolving proportionality issues:

    (a) it is inherent to the Courts applying a structured proportionality test (as required under the ECHR) that they undertake an intense and penetrating analysis: and to set out clear reasons in consequence; and

    (b) even where the Court accepts that a public authority is more institutionally competent to consider the questions in issue in a particular case, a Court will always be <u>both</u> institutionally and <u>constitutionally</u> competent to discharge its own obligations to ensure the public authority has a cogently reasoned basis for justifying interference with fundamental human rights.

41. In this context it is particularly instructive to examine the analytical approach taken by the Courts to the Canadian Charter of Rights and Freedoms: since the proportionality principles to be applied to the HRA are said to be based on the Canadian case law see *De Freitas v Ministry of Agriculture* [1999] AC 69.at 80 per Lord Clyde as applied by Lord Steyn in *Daly* at para 26; and the Canadian approach to judicial deference is therefore illuminating: see Edwards, "Judicial Deference under the Human Rights Act" (2002) 65 MLR 859

Int Auth
Vol IV
Tab 27

(discussed by Lord Walker in *Pro-Life* at para 138) and see Appendix A to Liberty's written submissions which appears below.

Summary of conclusions

42. Accordingly, Liberty respectfully submits that:

(a) The correct approach in this case is to adopt the test of a structured proportionality principle.

(b) Alternatively, even if the test of reasonableness is appropriate, such a test requires the reviewing bodies to require a cogent justification of the decisions of the primary decision-makers.

(c) The function of the principle of judicial deference is to identify from the context the particular factors in a particular case which are relevant to the consideration of the proportionality principle. The Court must always identify the particular factors which are relevant to the consideration of the proportionality principle- irrespective of whether the Court goes on to consider the question of judicial deference.

(d) In particular, the Court must consider whether the decision-making body has superior institutional competence or expertise.

(e) Having identified the particular factors relevant to the particular case and the question of whether the decision maker has superior institutional competence or expertise, the Court must consider whether and to what extent it is appropriate to defer to that decision maker when applying the structured proportionality test.

(f) It accordingly submitted that the three stage process described at paras (c), (d) and (e) above (taken cumulatively) constitute the principle of judicial deference.

(g) Furthermore, the Court should not defer to Parliament or the executive on the ground of the latter's superior constitutional status.

(h) The Court may defer on grounds of institutional competence but here too the complexity of a decision should not excuse a cogently reasoned basis for justifying interference with fundamental human rights.

(i) In this context it is particularly instructive to examine the analytical approach taken by the Courts to the Canadian Charter of Rights and Freedoms: since the proportionality principles to be applied to the HRA are said to be based on the Canadian case law and the Canadian approach to judicial deference provides valuable guidance to the analysis of the HRA: see Appendix A to Liberty's submissions.

(j) The Court under s 6 of the HRA remains under its own duty to safeguard and make effective Convention rights by undertaking a transparent and properly reasoned conclusion when resolving the proportionality issues in the circumstances of a particular case.

APPLICATION OF THE PRINCIPLES OF JUDICIAL DEFERENCE TO THE CLAIMANTS' ARTICLE 8 CLAIMS

43. Liberty submits that no question of institutional competence arises in relation to the application of Article 8 to immigration claims.

44. It is accepted, however, the question of immigration control engages consideration of macro-economic social, economic and/or political policy.

The status of the Immigration Rules

45. Liberty would further submit that, having regard to their history and content, the Immigration Rules do not in themselves amount to deliberate decision by Parliament or the executive to create a precise and comprehensive code which prescribes proportionate interferences with Article 8 rights; that issue must depend on identifying the purpose for which the Immigration Rules were created; and for the reasons set out in para 48 below, Liberty submits that the Immigration Rules were concerned with immigration control and hence immigration policy, not an exercise in balancing rights under Article 8. Accordingly, the Court of Appeal erred in law in appearing to make such a finding.

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46. Liberty respectfully submits that the contrast between the scheme created by the Immigration Rules and the proportionate statutory scheme endorsed by your Lordships in *Marcic v Thames Water Utilities* [2004] 2 AC 42 serves to emphasise the difficulties involved in acceding to such a radical proposition.

Int Auth
Vol II
Tab 7

B

47. Nor can any analogies be made by comparing the Immigration Rules with the approach taken by your Lordships to Article 8 in relation to domestic housing legislation in *Kay v Lambeth LBC*. There are obvious differences between the nature and effect of the Immigration Rules with the detailed, comprehensive and prescriptive statutory scheme which regulate housing and property rights, a legislative code created over many years which Parliament has overlaid on complex common law and equitable rights.

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48. In relation to the Immigration Rules, Liberty would make the following additional submissions:

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(a) The SoS has general power to grant leave to enter or remain under section 3 and 4 of the Immigration Act 1971.

(b) The Rules set out the SoS's practice for the time being of regulating entry and stay in the United Kingdom: see section 3(2) of the 1971 Act. They are subject to a form of negative resolution procedure: see section 3(2).

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(c) There is a limited duty on the SoS to make Rules for the particular circumstances of persons coming for employment, study purposes, visitors and as dependants of persons lawfully in or entering the UK: see section 1(4) of the 1971 Act.

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(d) But otherwise, it is a matter of <u>discretion</u> if SoS makes Rules. There is no <u>duty</u> to have Rules to deal with respect for family life.

(e) It is important to note that the Rules do not represent a <u>complete</u> code for entry and stay in the United Kingdom. In particular, it is

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acknowledged that the SoS has a discretion to allow people to enter or stay who do not qualify under the Rules. There are also policies

outside the Rules that the SoS has adopted to deal with article 8 type issues:

i. There is a family reunion policy which provides exceptionally for other members of the family (not a spouse/minor child) such as elderly parents if there are exceptional compassionate circumstances. The policy tells caseworkers to bear in mind Article 8 (This policy is in an API and is currently removed from the IND website because it is being updated).

ii. There is a policy known as the 7 year child concession policy (DPO69/99 previously DP5/96) which provides that enforcement action will not normally proceed against families with children born here and who have lived here continuously to the age of seven or over, or where having come to the UK at an early age, children have accumulated seven years' or more of continuous residence. There is a list of considerations to be taken into account including the length of the parents' residence without leave, whether removal has been delayed by protracted and repetitive representations or parents disappearing, age of children, whether either parent has leave to remain, whether return to parents' country would cause hardship to children or put health at risk, whether either parent has history of criminal behaviour or deception.

iii. In October 2003, a one-off concession was announced to benefit asylum seeking families with children where an application for asylum had been made before 2 October 2000 and a dependent child aged 18 at the date of announcement had been living in the UK since 2 October 2000 (announced by HO press release). Those qualifying families were allowed to stay in the UK. A further one-off concession was subsequently granted on 12 June 2006.

(f) The SSHD has decided to incorporate some of the policies concerning the exercise of his discretion outside the Rules into the immigration rules but not others– for example, the long residence rule (paragraph 276A) was formerly a HO concession. The HO concession originated in the UK's ratification of the European Convention on Establishment which provided that nationals of any contracting state who had been lawfully resident for over ten years in the territory of another party could only be expelled for reasons of national security or for particularly serious reasons relating to public order, public health or morals.

(g) Furthermore, it must not be overlooked that there is a large amount of discretion within the Rules and so it is wrong to regard them as setting out a rigid yardstick as to where the balance lies between public and private interest (see for example the rule concerned with deportation – paragraph 364).

(h) It is inevitable that not all circumstances can be predicted by the Rules. They deal only with general types of situations. The facts of the case of H illustrate this. For example, if H had still been intending to live with her husband, she could have lawfully entered the UK (para. 281 onwards). The dependant relative Rules only apply to parents aged over 65 (see para. 317). The dependant relative Rules are very restrictive in their terms (see para. 317). It is difficult to say that the driving force in this Rule is family reunion (which is ultimately the rationale for the right of respect under Article 8 in this particular context). In fact, there will be many cases where a person misses coming within the scope of the Rules by a very narrow margin. The distinction between a person who meets the requirements of the rules and a person who does not can therefore be very small indeed.

(i) The Rules of course pre-date the coming into force of the HRA. Although various amendments have been made to the Rules over time, there is no evidence that as a body of rules they have been reviewed to make them compatible with Article 8 or so as to represent the fair balance between the interests of the individual and the state. The Rules are not stated in terms to be compliant with Article 8. No consolidating change has been laid before

Parliament. Further, in some rules, obligations under the HRA are expressly referred to (see para. 2 and para. 364 about deportation as amended in July 2006 (the latter draws a distinction between exceptional circumstances to resist deportation and cases where deportation would be contrary to the ECHR – see para. 110 of case for respondent in H).

(j) Accordingly, Liberty would submit that the Immigration Rules are concerned with immigration control and hence immigration policy- not the balancing of rights under Article 8.

49. In any case, the Court of Appeal has recognised that, even when applying the truly exceptional test, there are circumstances where the question as to whether a person qualifies under the Rules has to be disregarded when considering whether removal breaches Article 8.

Int Auth
Vol II
Tab 8

(a) In *SB v Secretary of State for the Home Department* [2007] EWCA Civ 28, the Court of Appeal followed the reasoning in the earlier decisions of *Ekinci v Secretary of State for the Home Department* [2003] EWCA Civ 765 and *Chikwamba v Secretary of State for the Home Department* [2005] EWCA Civ 1779 to hold that a Tribunal in considering an Article 8 claim had to disregard the question as to whether or not the applicant would be able to satisfy the requirements for entry clearance under the Rules upon return to his or her home country.

(b) This was because, paradoxically, the stronger the applicant's perceived case for entry clearance under the Rules, the more likely that he would be removed.

(c) In these circumstances, eligibility under the Rules is not allowed to influence the Article 8(2) balancing of interests.

(d) In such cases, the Rules do not form the starting point of the Article 8 enquiry and in fact, the formulation of the question in terms of whether or not the case is truly exceptional so as to justify departure from the Rules does not actually make sense

because no consideration is being given as to whether or not the Rules apply in that case.

(e) This difficulty shows that the Immigration Rules should not be taken as the starting point of the Article 8 enquiry: but rather that the question for the Adjudicator should be whether or not a fair balance has been struck between the rights of the individual and the public interest.

50. Furthermore, it is difficult to see how requiring the applicant to establish exceptional circumstances beyond the Immigration Rules sits with the two stage test under Article 8. The applicant has to establish family life under 8(1) but the burden is on the SoS to justify under Article 8(2).

51. Although it is likely (as a matter of fact) that Article 8 will only prevent removal from the United Kingdom for persons who do not qualify under the Rules in the more unusual type of case, the issue for the Adjudicator in each case is not to ask whether or the case is truly exceptional to justify departure from the Rules when dealing with Article 8(2). Instead Article 8 requires the Adjudicator to decide whether on the facts of the case a fair balance has been struck between the rights of the individual and the public interest in immigration control.

The role of the Immigration Adjudicator

52. The test adopted by the ECtHR in relation to Article 8 and immigration claims is whether or not the state has struck a fair balance between the right of the individual and the interests of the state: see *Boultif v Switzerland* (2001) 33 EHRR 50. That question is for the Court to determine: see *Boultif* para 47.

53. The relevant immigration legislation very clearly gives the specific function of assessing whether immigration decisions breach human rights to adjudicators (see section 65 of the Immigration and Asylum Act 1999, schedule 4, part III, paras 21 and 22) ("the 1999 Act"). There is also the general duty to consider human rights issues under section 6 of the HRA.

Immigration Judges under the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") also have this function (see sections 82 and 84(1)(g)).

54. Furthermore, the institutional competence of the Tribunal system means that the Adjudicator is just as well placed as the SoS to assess the extent of the prejudice to the policy of immigration control; and the Adjudicator's power of review and fact finding role makes him peculiarly well placed to assess whether interference with Article 8 rights are proportionate when adjudicating on claims before him. Indeed, he is an expert tribunal.

55. The Adjudicator can hear oral evidence and they can hear evidence post-dating the decision of the SoS in human rights appeals: see section 77 of the 1999 Act.

56. The duty of the Adjudicator duty is to decide on the particular circumstances of an individual case whether or not there has been a proportionate interference with Article 8 rights.

CONCLUSION

57. Liberty would accordingly submit:

    (a) The "reasonable responses" contention as advanced by the SoS is incorrect. It is not supported by domestic or ECtHR law and fails to provide a structured and "close and penetrating" examination of an alleged breach of Convention rights.

    (b) The correct standard of review to be applied in any given case depends on the context. The function of the principle of judicial deference is to clarify the issues to be addressed when considering context in relation to proportionality. There is no need to defer to Parliament or the executive on constitutional grounds; however, the courts may respect the superior institutional competence or expertise of other bodies,

    (c) When considering the question of deference, the courts should take account of a variety of factors and provide a transparent and properly

reasoned conclusion in accordance with their obligations under s 6 of the HRA.

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NICOLA GREANEY

14th February 2007

APPENDIX A

The relevance of the Canadian case law on proportionality

1. In *De Freitas v Ministry of Agriculture* [1999] AC 69 your Lordships were obliged to consider whether restrictions on the freedom of expressions of civil servants breached their constitutional rights. Lord Clyde stated at 80 that the restrictions:

> "would still have to satisfy the second requirement of being "reasonably justifiable in a democratic society.
>
> Their Lordships were referred to three cases in which that phrase has been considered. In *Government of the Republic of South Africa v. The Sunday Times Newspaper* [1995] 1 L.R.C. 168 Joffe J. adopted from Canadian jurisprudence four criteria to be satisfied for a law to satisfy the provision in the Canadian *Charter of Rights and Freedoms* that it be "demonstrably justified in a free and democratic society." These were a sufficiently important objective for the restriction, a rational connection with the objective, the use of the least drastic means, and

no disproportionately severe effect on those to whom the restriction applies. In two cases from Zimbabwe, *Nyambirai v. National Social Security Authority* [1996] 1 L.R.C. 64 and *Retrofit (Pvt.) Ltd. v. Posts and Telecommunications Corporation* [1996] 4 L.R.C. 489, a corresponding analysis was formulated by Gubbay C.J., drawing both on South African and on Canadian jurisprudence, and amalgamating the third and fourth of the criteria. In the former of the two cases [1996] 1 L.R.C. 64, 75, he saw the quality of reasonableness in the expression "reasonably justifiable in a democratic society" as depending upon the question whether the provision which is under challenge "arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual." In determining whether a limitation is arbitrary or excessive he said that the court would ask itself:

(i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

Their Lordships accept and adopt this threefold analysis of the relevant criteria."

2. In *R v A(No 2)* [2002] 1 AC 45 at para 38 Lord Steyn expressed the view that:

proportionality has a role to play. The criteria for determining the test of proportionality have been analysed in similar terms in the case law of the European Court of Justice and the European Court of Human Rights. It is not necessary for us to re-invent the wheel. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 Lord Clyde adopted a precise and concrete analysis of the criteria.

In *Daly* Lord Steyn again stated that the contours of the principle of proportionality are familiar; and again adopted the *de Freitas* formulation: see para 27.

3. Liberty would accordingly submit that the elements of the proportionality test under the HRA appear to be based on the approach taken to the Canadian *Charter of Rights*; and that the analysis developed by the Supreme Court of Canada is highly pertinent to the development of principle under the HRA.

4. The principles applied by the Supreme Court when addressing the proportionality principle are well established. Section 1 of the Canadian *Charter of Rights* states that *Charter* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

5. The standard interpretation of section 1 remains that of the Supreme Court in *R v Oakes* [1986] 1 SCR 103, 137, 138; see also *R v Chaulk* [1990] 3 SCR 1303 where Dickson CJ set out the general principles to be applied:

Int Auth
Vol II
Tab 9

> "To establish that a limit is reasonable and demonstrably justified, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be of 'sufficient importance to warrant overriding a constitutionally protected right or freedom' ... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain section 1 protection. It is necessary, at a minimum, that the objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important.
>
> Second, once a sufficiently significant objective is recognised, then the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified. This involves a form of proportionality test. ... Although the nature of the proportionality test will vary depending on the circumstances, in

> each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to meet the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the first sense, should impair 'as little as possible' the rights or freedoms in question . .. Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the *Charter*'s right or freedom and the objective which has been identified as of 'sufficient importance'."

6. In formulating the elements of the proportionality principles, Dickson CJ drew, in particular, upon the principles applied by the ECtHR: see Sharpe and Roach *Brian Dickson: a Judge's Journey* (Osgoode Society for Canadian Legal History, 2003) at p 332.

Int Auth Vol IV Tab 28

7. It should be noted, however, that the fourth element of the proportionality test in *Oakes* has subsequently been modified by the Canadian Supreme Court in *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835 where it decided that there must be proportionality both between the objective and the deleterious effects of the restriction and between the deleterious and salutary effects of the restriction.

Int Auth Vol II Tab 10

General principles of Canadian administrative and constitutional law

8. The Canadian cases law demonstrates that there is no jurisprudential contradiction between the courts adopting a deferential approach to administrative law and a more rigorous hard edged one to constitutional rights.

9. Thus, in its seminal administrative law decision *CUBE v Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 2 SCR 227 the Supreme Court held that a hands off approach should be taken when an administrative body interprets ambiguous statutory language where the ambiguity relates to matters within that body's expertise and asks whether the administrative

Int Auth Vol II Tab 11

body's interpretation is so patently unreasonable that its construction cannot rationally be supported by the relevant legislation and demands intervention by the court on review.

10. This principle of patent unreasonableness remains the touchstone in Canadian administrative law; but inevitably, this approach has been difficult to maintain: see eg D Dyzenhaus "The Politics of Deference: judicial review and democracy" in M Taggart (ed) *The Province of Administrative Law* (Hart Publishing, 1997).

Int Auth Vol IV Tab 29

11. By contrast, Canadian constitutional law has developed the need to police the boundaries established by its written constitution concerning whether legislation is properly enacted in federal or provincial sphere. As Lamer J observed in *Reference re s 94(2) of the Motor Vehicle Act (British Columbia)* [1985] 2 SCR 486 para 12:

Int Auth Vol II Tab 12

> "The novel approach of the Constitution Act 1982 [ie the *Charter of Rights*]… is not that it has suddenly empowered the courts to consider the content of legislation …. The truly novel features of the Constitution Act 1982 are that it has sanctioned the process of constitutional adjudication and has extended its scope so as to encompass a broader range of values."

The Canadian approach to deference

12. It is striking feature of examining the Canadian case law to see how <u>little</u> the issue of deference features in the *Charter* analysis.

13. Liberty would, however, like to draw attention to several of the leading Supreme Court decisions under the *Charter* which have examined the principle of deference in some detail.

Int Auth Vol I Tab 5

14. In *RJR-McDonald v A-G of Canada* [1995] 3 SCR 199 the Supreme Court struck down federal legislation which banned advertising of tobacco products; and McLachlin J made some important observations in the context of considering how proportionality should be addressed.

(a) She stated that the proportionality principles should be applied flexibly, having regard to the factual and social context of the case: see paras 133, 134:

> "…. The s 1 [proportionality] inquiry is by its very nature a fact-specific inquiry. In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the court must examine the actual objective of the law. In determining proportionality, it must determine the actual connection between the objective and what the law will in fact achieve; the actual degree to which it impairs the right; and whether the actual benefit which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right. In short, s. 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions.
>
> However, while the impugned law must be considered in its social and economic context, nothing in the jurisprudence suggests that the contextual approach reduces the obligation on the state to meet the burden of demonstrating that the limitation on rights imposed by the law is reasonable and justified. Context is essential in determining legislative objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge. This would be to undercut the obligation on Parliament to justify limitations which it places on *Charter* rights and would be to substitute ad hoc judicial discretion for the reasoned demonstration contemplated by the *Charter*."

(b) McLachlin J immediately went on to deal with judicial deference at paras 135, 136:

> "Related to context is the degree of deference which the courts should accord to Parliament. It is established that the deference

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accorded to Parliament or the legislatures may vary with the social context in which the limitation on rights is imposed. For example, it has been suggested that greater deference to Parliament or the Legislature may be appropriate if the law is concerned with the competing rights between different sectors of society than if it is a contest between the individual and the state.[1] However, such distinctions may not always be easy to apply. For example, the criminal law is generally seen as involving a contest between the state and the accused, but it also involves an allocation of priorities between the accused and the victim, actual or potential. The cases at bar provide a cogent example. We are concerned with a criminal law, which pits the state against the offender. But the social values reflected in this criminal law lead La Forest J. to conclude that "the Act is the very type of legislation to which this Court has generally accorded a high degree of deference".[2] This said, I accept that the situation which the law is attempting to redress may affect the degree of deference which the court should accord to Parliament's choice. The difficulty of devising legislative solutions to social problems which may be only incompletely understood may also affect the degree of deference that the courts accord to Parliament or the Legislature. As I wrote in *Committee for the Commonwealth of Canada v. Canada*[3] some deference must be paid to the legislators and the difficulties inherent in the process of drafting rules of general application. A limit prescribed by law should not be struck out merely because the Court can conceive of an alternative which seems to it to be less restrictive".

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1 *Irwin Toy v Quebec* [1989] 1 SCR 927at pp. 993-94; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, at p. 521

2 Above at para. 70.

3 [1991] 1 S.C.R. 139, at p. 248

> As with context, however, care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.

Int Auth
Vol III
Tab 13

15. McLachlin CJ returned to the question of deference in prisoner vote case, *Sauve v Canada (No 2)*[2002] 3 SCR 519. *Sauve* concerned a complaint that the legislation restricting prisoners from voting breached the *Charter*. The complaint was upheld and the legislation subsequently amended. A second complaint was made; and again upheld by the Supreme Court.

    (a) The original Canadian legislation prohibited all prisoners from voting in federal elections regardless of the length of their sentences; but the Supreme Court held in *Sauve v Canada (No 1)* [1993] 2 SCR 438 that the restriction was an unjustified restriction on the right to vote. The statute was then amended to deny the vote to any prisoner who was serving a prison sentence of two or more years.

    (b) The Supreme Court again decided that the right to vote had been unjustifiably restricted by the new legislation. The majority judgment was given by McLachlin CJ rejected the suggestion that the case required deference because the court was dealing with

philosophical, political or social consideration or democratic dialogue: see paras 8 to 17.

> My colleague Justice Gonthier proposes a deferential approach to infringement and justification. He argues that there is no reason to accord special importance to the right to vote, and that we should thus defer to Parliament's choice among a range of reasonable alternatives. He further argues that in justifying limits on the right to vote under s. 1, we owe deference to Parliament because we are dealing with "philosophical, political and social considerations", because of the abstract and symbolic nature of the government's stated goals, and because the law at issue represents a step in a dialogue between Parliament and the courts ….
>
> I must, with respect, demur. The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination. This is not a matter of substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by logic and common sense.
>
> At the s. 1 [proportionality] stage, the government argues that denying the right to vote to penitentiary inmates is a matter of social and political philosophy, requiring deference. Again, I cannot agree. This Court has repeatedly held that the "general claim that the infringement of a right is justified under s. 1" does not warrant deference to Parliament.[4] Section 1 does not create a presumption of constitutionality for limits on rights; rather, it requires the state to justify such limitations.

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[4] [1999] 2 S.C.R. 3, at para. 78, per Iacobucci J

The core democratic rights of Canadians do not fall within a "range of acceptable alternatives" among which Parliament may pick and choose at its discretion. Deference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights. This case is not merely a competition between competing social philosophies. It represents a conflict between the right of citizens to vote -- one of the most fundamental rights guaranteed by the *Charter* -- and Parliament's denial of that right. Public debate on an issue does not transform it into a matter of "social philosophy", shielding it from full judicial scrutiny. It is for the courts, unaffected by the shifting winds of public opinion and electoral interests, to safeguard the right to vote guaranteed by s. 3 of the *Charter*.

Charter rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside. This is manifestly true of the right to vote, the cornerstone of democracy, exempt from the incursion permitted on other rights through s. 33 override. Thus, courts considering denials of voting rights have applied a stringent justification standard.[5]

The *Charter* charges courts with upholding and maintaining an inclusive, participatory democratic framework within which citizens can explore and pursue different conceptions of the good. While a posture of judicial deference to legislative decisions about social policy may be appropriate in some cases, the legislation at issue does not fall into this category. To the contrary, it is precisely when legislative

[5] *Sauvé v. Canada (Attorney General)* (1992), 7 O.R. (3d) 481 (C.A.) and *Belczowski v. Canada,* [1992] 2 F.C. 440 (C.A.).

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choices threaten to undermine the foundations of the participatory democracy guaranteed by the *Charter* that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system.

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Nor can I concur in the argument that the philosophically based or symbolic nature of the government's objectives in itself commands deference. To the contrary, this Court has held that broad, symbolic objectives are problematic, as I discuss below.[6] Parliament cannot use lofty objectives to shield legislation from *Charter* scrutiny. Section 1 requires valid objectives and proportionality.

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Finally, the fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court should defer to Parliament as part of a "dialogue". Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of "if at first you don't succeed, try, try again".

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16. As a result of *Sauve No 2* there is no statutory restrictions in Canada on the rights of prisoners to vote.

17. The *Sauve* litigation also shows the extent to which cross fertilisation of international human rights law is now a feature of cases before the ECtHR. In *Hirst No 2 v United Kingdom* the restrictions on the ability of prisoners to vote was rejected both by the ECtHR and the Grand Chamber. In the decision of

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Int Auth
Vol III
Tab 14

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[6] See *U.F.C.W., Local 1518 v. KMart Canada Ltd*., [1999] 2 S.C.R. 1083, at para. 59, per Cory J.; *Thomson Newspapers Co. v. Canada (Attorney General),* [1998] 1 S.C.R. 877, at para. 87, per Bastarache J.; *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199, at paras. 143-44, per McLachlin J. (as she then was).

Int Auth
Vol III
Tab 15

the ECtHR on 30 March 2004 emphasis was laid on the analysis adopted in *Sauve*: *No 2*: see paras 25 to 26, para 43 ("*the Court has found that the Canadian Supreme Court judgment in Sauvé No. 2 provides a detailed, and helpful, examination of the purposes pursued by prisoner disenfranchisement"*), 45, and 46. The Grand Chamber in its decision of 6th October 2005 again discussed *Sauve No 2* but did not expressly address the case in its reasons: see paras 35 and 46.

Int Auth
Vol III
Tab 16

18. The approach taken by the Supreme Court in *Newfounland (Treasury Board) v NAPE* [2004] 3 SCR 381 is also of interest. In that case the Supreme Court considered whether the discrimination provisions of the *Charter* had been breached where a provincial Government deferred the commencement of pay increases for female workers in the health sector because of a financial crisis unprecedented in Newfoundland's history. The Supreme Court held that the Courts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints. However, the government's response to its fiscal crisis was proportional to its objective.

    (a) First, as the pay equity payout represented a significant portion of the budget, its postponement was rationally connected to averting a serious financial crisis.

    (b) Second, the government's response was tailored to minimally impair rights in the context of the problem it confronted. Despite the scale of the fiscal crisis, the government proceeded to implement the pay equity plan, albeit at a slower pace. In addition, the government initiated a consultation process with the union to find alternative measures. There were broad cuts to jobs and services. The exceptional financial crisis called for an exceptional response. In such cases, a legislature must be given reasonable room to manoeuvre.

    (c) Third, on a balance of probabilities the detrimental impact of a delay in achieving pay equity did not outweigh the importance of preserving the fiscal health of a provincial government through a temporary but

serious financial crisis. The seriousness of the crisis, combined with the relative size of the $24 million required to bring pay equity in line with the original schedule, are the compelling factors in that respect. The fiscal measures adopted by the government did more good than harm, despite the adverse effects on the women hospital workers.

(d) While the separation of powers is a defining feature of the Canadian constitutional order, it cannot be invoked to undermine the operation of a specific written provision of the Constitution like s. 1 of the *Charter*. Section 1 itself reflects an important aspect of the separation of powers by defining certain express limits on legislative sovereignty. Judicial review of governmental action long predates the adoption of the *Charter*. Since Confederation, courts have been required by the Constitution to ensure that legislatures comply with the division of legislative powers. The *Charter* has placed new limits on government power in the area of human rights, but judicial review of those limits involves the courts in the same role in relation to the separation of powers as they have occupied from the beginning, that of the constitutionally mandated referee. It is not the courts which limit the legislatures. It is the Constitution.

Int Auth
Vol III
Tab 17

19. In *Chaoulli v Quebec (A-G)* [2005] 1SCR 791 the claimants argued that the legislative prohibition on private health insurance breached both the Canadian and the Quebec Charter of Rights and Freedoms. The Supreme Court held that this is not a case where the Court must show deference to the government's choice of measure. The courts have a duty to rise above political debate. When, as in the case at bar, the courts are given the tools they need to make a decision, they should not hesitate to assume their responsibilities. Deference cannot lead the judicial branch to abdicate its role in favour of the legislative branch or the executive branch. Deschamps J expressed the view at paras 86 to 98 that:

"Under the charters, the government is responsible for justifying measures it imposes that impair rights. The courts can consider

evidence concerning the historical, social and economic aspects, or any other evidence that may be material.

It cannot be said that the government lacks the necessary resources to show that its legislative action is motivated by a reasonable objective connected with the problem it has undertaken to remedy. The courts are an appropriate forum for a serious and complete debate. As G. Davidov said in "The Paradox of Judicial Deference" (2000-2001), 12 *N.J.C.L.* 133, at p. 143, "[c]ourts do not have to define goals, choose means or come up with ideas. They do not have to create social policies; they just have to understand what the other branches have created. No special expertise is required for such an understanding." In fact, if a court is satisfied that all the evidence has been presented, there is nothing that would justify it in refusing to perform its role on the ground that it should merely defer to the government's position. When the courts are given the tools they need to make a decision, they should not hesitate to assume their responsibilities. Deference cannot lead the judicial branch to abdicate its role in favour of the legislative branch or the executive branch.

The question submitted by the appellants has a factual content that was analysed by the trial judge. One part of her findings must be adapted to the context of s. 9.1 of the *Quebec Charter*. The other findings remain unchanged. The questions of law are not complex.

The courts have a duty to rise above political debate. They leave it to the legislatures to develop social policy. But when such social policies infringe rights that are protected by the charters, the courts cannot shy away from considering them. The judicial branch plays a role that is not played by the legislative branch. Professor Roach described the complementary role of the courts *vis-à-vis* the legislature as follows (K. Roach, "Dialogic Judicial Review and its Critics" (2004), 23 *Sup. Ct. L. Rev.* (2d) 49, at pp. 69-71):

> [Some] unique attributes of courts include their commitment to allowing structured and guaranteed participation from aggrieved parties; their independence from the executive, and their commitment to giving reasons for their decisions. In addition, courts have a special commitment to make sense of legal texts that were democratically enacted as foundational documents.
>
> . . . The pleader in court has a guaranteed right of participation and a right to a reasoned decision that addresses the arguments made in court, as well as the relevant text of the democratically enacted law. . . .
>
> Judges can add value to societal debates about justice by listening to claims of injustice and by promoting values and perspectives that may not otherwise be taken seriously in the legislative process.

From this perspective, it is through the combined action of legislatures and courts that democratic objectives can be achieved. In their analysis of the Quebec secession reference, Choudhry and Howse describe this division of constitutional responsibilities accurately (S. Choudhry and R. Howse, "Constitutional Theory and The *Quebec Secession Reference*" (2000), 13 *Can. J. L. & Jur.* 143, at pp. 160-61):

> [I]nterpretive responsibility for particular constitutional norms is both shared and divided. It is shared to the extent that courts are responsible for articulating constitutional norms in their conceptually abstract form. But interpretive responsibility is divided because beyond the limits of doctrine, constitutional interpretation is left to the political organs. The image which emerges is one of "judicial and legislative cooperation in the molding of concrete standards through which elusive and complex constitutional norms . . . come to be applied."

To refuse to exercise the power set out in s. 52 of the *Quebec Charter* would be to deny that provision its real meaning and to deprive Quebeckers of the protection to which they are entitled.

In a given case, a court may find that evidence could not be presented for reasons that it considers valid, be it due to the complexity of the evidence or to some other factor. However, the government cannot argue that the evidence is too complex without explaining why it cannot be presented. If such an explanation is given, the court may show greater deference to the government. Based on the extent of the impairment and the complexity of the evidence considered to be necessary, the court can determine whether the government has discharged its burden of proof.

The court's reasons for showing deference must always reflect the two guiding principles of justification: the measure must be consistent with democratic values and it must be necessary in order to maintain public order and the general well-being of citizens. The variety of circumstances that may be presented to a court is not conducive to the rigidity of an exhaustive list.

In past cases, the Court has discussed a number of situations in which courts must show deference, namely situations in which the government is required to mediate between competing interests and to choose between a number of legislative priorities (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 993-94). It is also possible to imagine situations in which a government might lack time to implement programs or amend legislation following the emergence of new social, economic or political conditions. The same is true of an ongoing situation in which the government makes strategic choices with future consequences that a court is not in a position to evaluate.

In short, a court must show deference where the evidence establishes that the government has assigned proper weight to each of the

competing interests. Certain factors favour greater deference, such as the prospective nature of the decision, the impact on public finances, the multiplicity of competing interests, the difficulty of presenting scientific evidence and the limited time available to the state. This list is certainly not exhaustive. It serves primarily to highlight the facts that it is up to the government to choose the measure, that the decision is often complex and difficult, and that the government must have the necessary time and resources to respond. However, as McLachlin J. (as she then was) said in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 136, ". . . care must be taken not to extend the notion of deference too far".

The instant case is a good example of a case in which the courts have all the necessary tools to evaluate the government's measure. Ample evidence was presented. The government had plenty of time to act. Numerous commissions have been established (Commission d'étude sur les services de santé et les services sociaux (Quebec) (Clair Commission), 2000; Comité sur la pertinence et la faisabilité d'un régime universel public d'assurance médicaments (Quebec) (Montmarquette Committee), 2001; Commission on the Future of Health Care in Canada (Canada) (Romanow Commission), 2002), and special or independent committees have published reports (Quebec, *Emerging Solutions: Report and Recommendations* (2001) (Clair Report); Quebec, *Pour un régime d'assurance médicaments équitable et viable* (2001) (Montmarquette Report); Canada, *The Health of Canadians — The Federal Role*, vol. 6, *Recommendations for Reform*, Final Report (2002) (Kirby Report); Canada, *Waiting Lists and Waiting Times for Health Care in Canada: More Management!! More Money??* (1998)). Governments have promised on numerous occasions to find a solution to the problem of waiting lists. Given the tendency to focus the debate on a sociopolitical philosophy, it seems that governments have lost sight of the urgency of taking concrete action. The courts are therefore the last line of defence for citizens.

> For many years, the government has failed to act; the situation continues to deteriorate. This is not a case in which missing scientific data would allow for a more informed decision to be made. The principle of prudence that is so popular in matters relating to the environment and to medical research cannot be transposed to this case. Under the Quebec plan, the government can control its human resources in various ways, whether by using the time of professionals who have already reached the maximum for payment by the state, by applying the provision that authorizes it to compel even non-participating physicians to provide services (s. 30 *HEIA*) or by implementing less restrictive measures, like those adopted in the four Canadian provinces that do not prohibit private insurance or in the other OECD countries. While the government has the power to decide what measures to adopt, it cannot choose to do nothing in the face of the violation of Quebeckers' right to security. The government has not given reasons for its failure to act. Inertia cannot be used as an argument to justify deference.
>
> In the instant case, the effectiveness of the prohibition has by no means been established. The government has not proved, by the evidence in the record, that the measure minimally impairs the protected rights. Moreover, the evidence shows that a wide variety of measures are available to governments, as can be seen from the plans of other provinces and other countries."

Conclusion

20. Liberty submits the it is apparent from Canadian case law shows that:

(a) the principled basis for the principle of judicial deference is the institutional competence;

(b) that there is no need for the courts to defer to Parliament or the Executive on the grounds of their superior constitutional status;

A

(c) there is no need for the courts to defer to Parliament or the executive because Parliament or the executive is elected by and responsible to the electorate;

(d) the nature of the proportionality exercise is an intensive fact specific inquiry; and

B

(e) the Canadian courts give detailed and transparent reasoning in explicating its conclusions on whether an interference with *Charter* rights is proportionate.

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RICHARD CLAYTON QC

JEFFREY JOWELL QC

NICOLA GREANEY

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14th February 2007

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