Submission to the Independent Human Rights Act Review

The Rt.Hon. Sir Stephen Sedley

1. I was called to the Bar in 1964, and from about 1970 had the good fortune, first, to play a part in the rediscovery and revival of public law remedies, and from 1992 to administer them as a judge until my retirement from the Court of Appeal in 2011. In these years I also wrote and lectured about the theory and practice of law, in particular in my 1998 Hamlyn Lectures and as a regular contributor to the London Review of Books (a more demanding forum than it sounds). On retiring from the bench, I was appointed a visiting professor at Oxford University. My Oxford lectures on the history of English public law formed the basis of my book *Lions under the Throne* (2015).

2. This submission relates to the Review's Theme Two. Its purpose is to look at one particular human rights case – on which, as it happens, Sir Peter Gross and I sat in the Court of Appeal, and in which our decision was upheld by the Supreme Court. It is worth revisiting because it has been more than once cited as an example of the courts tampering with ministerial policy and failing to respect the autonomy of departmental government. My reason for returning to it is not only to refute the critique; it is to show how both the Court of Appeal and the Supreme Court handled the evidence about immigration policy in a forensically correct and constitutionally appropriate manner. The case is reported as *R (Quila) v Home Secretary* [1].

3. The case, it will be recalled, concerned a young couple, she British, he Chilean, who had fallen in love and married here, only to find that rule 277 of the Immigration Rules, introduced to deter forced marriages, prevented the husband from joining the wife in the United Kingdom (where she was hoping to embark on a degree course) because they were both under 21. Most of the Immigration Rules are self-explanatory; this one was not, and without an explanation the age-bar was an apparently arbitrary interference with the couple's Article 8 right to respect for family life and their Article 12 right, subject to national law, to marry.

4. It was to fill this gap that the Home Secretary (I stress this) placed before the court the research and other materials which, she submitted, showed the rule to be justifiable. This submission required the court to evaluate the material. In

[1] [2010] EWCA Civ 1482; [2011] UKSC 45

doing so, none of the judges asked whether they would themselves have introduced the rule. I said in the Court of Appeal at paragraph 60:

> "While therefore we must be careful to refrain from substituting our judgment for that of the Home Secretary on policy issues, we are not entitled to refrain from evaluating the strength of the policy imperative and its rationale in deciding whether its impact on innocent persons is proportionate"

5. Lord Justice Pitchford agreed with my view that the rule operated disproportionately. Lord Justice Gross concurred in our consequent conclusion that it could not lawfully be used to exclude the appellants but, significantly, did so on the ground that the rule's operation was irrational. He may well have been right. What matters for present purposes is that neither set of reasons involved trespassing on the proper sphere of government: on the contrary, all three judgments were careful to render to the Home Secretary what was the Home Secretary's, but to require that she in turn respect the law, including the HRA.

6. In the Supreme Court, Lord Wilson, albeit by a slightly different route, reached the same conclusion as the Court of Appeal. Lady Hale, Lord Phillips and Lord Clarke agreed with him. I would respectfully commend Lady Hale's concurring judgment as the clearest exposition of principle.

7. As to the totality of the evidence, Lady Hale said (at 77):

> "None of it amounts to a sufficient case to conclude that the good done to the few can justify the harm done to the many, especially when there are so many other means available to achieve the desired result….."
> (and at 79) "….The delay on entry is not designed to detect and deter those marriages which are or may be forced. It is a blanket rule which applies to all marriages, whether forced or free. And it imposes a delay on cohabitation in the place of their choice which may act as at least as severe a deterrent as a large fee….. [T]hese factors lend weight to the conclusion that it is a disproportionate and unjustified interference with the right to respect for family life to use that interference for the purpose of impeding the exercise of another and even more fundamental Convention right in an unacceptable way."

8. Lord Brown alone dissented. The nub of his dissent was this:

> "[91] The extent to which the rule will help combat forced marriage and the countervailing extent to which it will disrupt the lives of innocent couples adversely affected by it is largely a matter of judgment. Unless demonstrably wrong, this judgment should be rather for government than for the courts."

9. I doubt whether there would be any disagreement with this as a statement of principle. The problem was that, in the view of the majority, it was a judgment which the Home Secretary had either failed to make or, if she had made it, had got demonstrably wrong. It was a long way from a usurpation of the role of government for the CA and the Supreme Court majority to conclude that in amending the rule the Home Secretary had failed, on the evidence she herself had provided, to weigh against the legitimate but unquantified aim of deterring forced marriages the extensive collateral damage the rule was going to inflict on bona fide young couples.

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3 February 2021