PERSONAL SUBMISSION TO THE

INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

Rt Hon Sir Stephen Sedley

Introductory

1. This submission is made to the Panel to illustrate why I support the papers submitted by ALBA, the Public Law Project and the group of Oxford academics whose names include mine.

2. I was called to the Bar in 1964. From about 1970 I 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).

3. On retiring from the bench, I was appointed a visiting professor at Oxford University. My Oxford lectures on the history of English public law (a neglected subject) formed the basis of my book *Lions under the Throne* (2015).

The common law and the rule of law

4. In a memorial lecture entitled 'Law as history', delivered in 2016 in Cambridge and Oxford[1] I paid tribute to the successive Treasury Devils (Nigel Bridge, Gordon Slynn, Harry Woolf, Simon Brown and John Laws) against whom I had argued a good many judicial review cases, for their principled approach to public law.

5. In particular, it was their policy (with the concurrence of successive Law Officers) not to take points which, although they might win the case for the

[1] Now published in *Law and the Whirligig of Time* (2018) , ch.1, pp. 3-9.

government, would impede or distort the principled development of public law. My understanding is that the Scottish Law Officers took the same approach. The Panel may wish to remind Ministers that it is largely for this reason that the modern body of public law in the United Kingdom, complex as it is, has both a foundation of principle and a coherence of substance which it may be extremely unwise to disturb for short-term ends.

Two general points

6. The Panel's postulated "right balance" is, with respect, founded on a false antithesis. Challenging the lawfulness of government action is not antithetical to allowing the business of government to be carried on. If administrative action is unlawful, it forms no part of the business of government.

7. In a democracy governments do not last for ever. Laws and procedures designed to prevent the courts invigilating one government's activities will sooner or later become a weapon in the hands of its political enemies.

Fixing what ain't broke

8. The Panel may find itself urged to treat one or more recent cases as evidence of a need for systemic reform. I would respectfully counsel caution about leaping from the particular to the general. For example, I am among those who doubt the correctness of the Supreme Court's decision in the *Evans* case; but to treat the outcome of the case by itself as evidence of dysfunction in the system of public law is to invite a cure worse than the disease.

9. Much the same is true of *Miller #1*. In contrast to *Miller #2,* the conclusion reached by a majority of the Supreme Court – that the giving of notice of withdrawal from the EU was a matter for Parliament and not the executive - was not the only tenable outcome. Reviewing the decision (London Review of Books, 2 March 2017, p.26) I drew attention to the cogency of Lord Reed's dissent. But to prefer the latter, as many lawyers may have done, is not to

stigmatise the majority decision as perverse. In fact the majority in *Miller #1* included the most vocal critic of judicial supremacism, Lord Sumption.

10. I will devote the rest of this memorandum, if I may, to a case which has been more than once held up as an example of judicial review illicitly invading governmental policy formation. My reason for doing so 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* [2]. I need to declare an interest since I presided in the Court of Appeal. Our judgment was upheld, Lord Brown dissenting, by the Supreme Court.

11. 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.

12. It was to fill this gap that the Home Secretary 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 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"

13. 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.

14. 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….."

[2] [2010] EWCA Civ 1482; [2011] UKSC 45

(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."

15. 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."

16. 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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