year or six-month "relevant time" restriction (depending on whether an "associate", i.e. a connected person, is involved: s. 51, Bankruptcy Ordinance) does not apply to the common law claim. Lastly, since the common law right is vested in the company before the winding-up proceedings, the common law claim is a property of the company that can be assigned, while a statutory preference claim is not (*Re Oasis Merchandising Services Ltd.* [1998] Ch. 170). The funding issue that troubles many liquidators can be more easily resolved. Accordingly, the court's decision is to be welcomed.

Tom K.C. Ng*

*Address for correspondence: Brasenose College, Oxford. Email: ngkacheunghk@gmail.com.

THE FUTURE IS A FOREIGN COUNTRY

IN *R. (Lord Carlile) v Secretary of State for the Home Department* [2014] UKSC 60; [2014] 3 W.L.R. 1404, the Supreme Court held by a four to one majority (Lords Sumption, Clarke, Neuberger and Lady Hale, Lord Kerr dissenting) that the exclusion of an Iranian dissident from the UK was a proportionate interference with the Article 10 ECHR right to freedom of expression of both the dissident herself and the cross-party group of parliamentarians litigating on her behalf. The parliamentarians had wished to invite Mrs. Maryam Rajavi, the exiled leader of the former terrorist group the People's Mojahedin Organisation of Iran, to the Palace of Westminster to speak about democracy and human rights in Iran. The Home Secretary had excluded the invitee on the basis of a risk assessment formulated in cooperation with the Foreign Office. The risk assessment had concluded that admission of Mrs. Rajavi might endanger foreign relations between Britain and Iran, and British national security because of the potential risk to the safety of British diplomatic personnel based in Iran. Lord Sumption put the matter succinctly: "the future is a foreign country" and the Courts should therefore be reticent to interfere with Executive predictions in the realm of "high policy" (at para. [46]). The judgment is of great interest not only for its background facts, which concern the often fraught and complicated diplomatic relationship between the UK and Iran, but principally because the decision engages central constitutional questions regarding the institutional competence of the courts in judicial review.

The majority held that in judicial review of ministerial decisions which engaged Convention rights the court must give the decision-maker's conclusion appropriate weight, but remained entitled to reach an independent, final, and determinative decision according to the standard of proportionality. This judicial autonomy remained in matters of "high policy" such as making treaties, making war, dissolving Parliament, mobilising the armed

https://doi.org/10.1017/S0008197315000173 Published online by Cambridge University Press

forces, and the conduct of foreign affairs (*R (Abbasi and Another) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2002] EWCA Civ 1598; [2003] U.K. H.R.R. 76, at [37]). The majority also rejected a prior "threshold" argument, which sought to argue that the Home Secretary's reliance upon the possible (as opposed to actual) consequences of Mrs. Rajavi's admission to the UK amounted to an irrelevant consideration at common law (Lord Sumption, at para. [18]). This concise statement of the ratio, however, belies the persistence of significant disagreement between the judges regarding the constitutional role of the judiciary in human rights disputes, and the appropriate intensity of review in the realm of "high policy", which is explored in the remainder of this note.

For Lord Sumption, the constitutional role of the Court was dictated by both principle and pragmatism. In essence this amounted to the influence of the constitutional principle of the separation of powers, and more specifically, the pragmatic constraints involved in the judicial scrutiny of an executive decision of a sensitive and predictive nature (i.e. of a risk assessment concerning the potential impact upon national security and foreign policy). This caused His Lordship to reject the role of the doctrine of deference on two grounds. First, the fact-sensitive nature of decisions subject to judicial review prevented the creation of general principles of deference. To support this critique Lord Sumption relied upon the writings of T.R.S. Allan in "Human Rights and Judicial Review: A Critique of 'Due Deference'" [2006] C.L.J. 671 (Lord Sumption, at para. [22]). Secondly, Lord Sumption ruled that cases concerning foreign relations and national security decisions of the executive were to be recognised as questions of "judgment and policy" as opposed to questions of law (at para. [23]). His perspective on constitutional principle differed from the rest of the majority because he did not automatically view the judicial role as being modified by the Human Rights Act 1998: "The Human Rights Act did not abrogate the constitutional distribution of powers between the organs of the state which the courts had recognised for many years before it was passed." Moreover, the nature of the executive's decision should be respected because it was subject to sufficient scrutiny through the democratic mechanism of ministerial accountability to parliament (at para. [28]).

The sharpest contrast to Lord Sumption's perspective on the constitutional settlement came from Lord Kerr's dissenting judgment. Lord Kerr concluded that if the "system is functioning properly" it is for the courts to have the final word where Convention rights are at stake (at para. [150]). This meant that although the Court should recognise the Home Secretary's "special institutional competence" in matters such as national security and foreign policy, there was no requirement to acknowledge a similar competence in respect of assessing the importance accorded to human rights (at para. [155]). The rest of the majority had some

https://doi.org/10.1017/S0008197315000173 Published online by Cambridge University Press

sympathy with Lord Kerr's characterisation of the constitutional issue (Lady Hale, at para. [105], and Lord Clarke, at para. [115]). Lord Neuberger appropriately opined that: "[T]he court cannot simply frank the decision, but it must give the decision appropriate weight, and that weight may be decisive" (at para. [68]). The recognition that the Human Rights Act 1998 constitutionally modifies the role of the Court so as to definitively authorise an independent evaluation of the balance between policy aims and Convention rights is to be welcomed. Even though such recognition did not alter the outcome of the case it cements the Court's position in the context of fundamental rights review as mandated by Parliament. The danger in Lord Sumption's approach is that it elides proportionality with the common law standard of reasonableness, which demands less intense scrutiny. Moreover, the rejection of deference as a doctrine fails to mitigate against this. Lord Sumption's conception of the standard of review fails to take on board the constitutional mandate given to the courts by Parliament under the Human Rights Act 1998.

The majority also disagreed about the standard of review applicable to the ministerial decision. It has long been acknowledged that proportionality is the standard of review applicable in cases where Convention rights are at stake (*R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26; [2001] 2 A.C. 532). Lords Neuberger, Clarke, and Lady Hale agreed that proportionality was in principle the applicable standard of review, and that the decision of the Home Secretary was subject to scrutiny using the four-part test in *R. (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 A.C. 621, at [45]. However, Lord Sumption disagreed: although Article 10 ECHR enshrined a "core right" in the European Convention (Lord Sumption, at para. [13], Lord Kerr, at paras [164]–[165], *Sürek v Turkey* (1999) 7 B.H.R.C. 399), this did not necessarily cement proportionality in its fullest form as the applicable standard of review.

Lord Sumption reasoned that some executive decisions were entitled to increased judicial respect because of their subject matter. This, in turn, had consequences for the intensity of review. He concluded that "rationality is a minimum condition of proportionality but it is not the whole test. *Nonetheless, there are cases where the rationality of the decision is the only criterion which is capable of judicial assessment*" (at para. [32], emphasis added). To support this proposition, he relied upon *R. (Corner House Research and Another) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] 1 A.C. 756. In this case the House of Lords upheld the legality of a decision to abandon a prosecution in the face of a threat from the Saudi Arabian government to withdraw intelligence cooperation with the British authorities. For Lord Sumption, this demonstrated that in the face of strong enough countervailing interests by the executive no constitutional values, not even Convention rights or the rule of law,

https://doi.org/10.1017/S0008197315000173 Published online by Cambridge University Press

were immune from compromise. Lord Kerr took the opposite position: "We do not ask whether the Secretary of State's view is tenable; we ask whether it is right" (at para. [58]). In his view, *Corner House Research* was inapplicable because it involved an explicit threat, as opposed to a risk assessment, and it was inappropriate to interfere with a Convention right on the basis of a prediction. Lady Hale distinguished *Corner House Research* in the most astute manner: it was not a human rights case, but a judicial review based on common law grounds (at para. [85]). In short, most of the justices recognised that review under the Human Rights Act 1998 materially differed from judicial review on common law grounds.

Whilst notable examples of national security decisions failing the rationality dimension of the proportionality test are readily identifiable, it would be unwise to create a category of ministerial decisions in relation to which the content of the proportionality test is automatically eviscerated to encompass rationality alone (*A v Home Secretary (No. 1)* [2004] UKHL 56; [2005] 2 A.C. 68, *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 39; [2014] A.C. 700). This is principally because the areas of "high policy" are far from hermetically sealed. In view of this, the commitment to proportionality review proper shown by the rest of the majority (and Lord Kerr in dissent) is to be favoured, even if it did not alter the fact-specific outcome of the case. In cases like the present, which engage both difficult areas such as foreign policy and involve risk assessment, proportionality review will be inevitably diluted. But such difficult cases are not an appropriate altar upon which to sacrifice general principles.

This decision reflects a divergence of opinion amongst the senior judiciary over both constitutional fundamentals and the practical mandate of the judiciary in human rights judicial review. Whilst this author shares Lord Clarke's scepticism regarding the executive's case, it must be admitted that in such matters "the cost of failure can be high": second guessing the executive without evidence would be unwise (*R. v Secretary of State for the Home Department, ex parte Rehman* [2001] UKHL 47; [2003] 1 A.C. 153). But it would be equally unwise to extrapolate general principles from such curious instances as this case. Parliament, via the Human Rights Act 1998, has constitutionally tasked the courts with independently scrutinising of all areas of policy. Areas of "high policy" are difficult to define, and risk assessment is a pervasive task in modern administration. Therefore, to "roll back" both the constitutional position of the courts and the general intensity of rights review in relation to risk assessment potentially undermines a much greater sphere of operation of human rights law than the province of the present case.

HAYLEY J. HOOPER*

*Address for correspondence: Homerton College, Hills Road, Cambridge, CB2 8PH. Email: hjh46@cam.ac.uk.

https://doi.org/10.1017/S0008197315000173 Published online by Cambridge University Press