

APPELLANT REPLY IN RESPECT OF NZBORA

Respondent point	Reply
Not an area for the courts; challenge to parliamentary sovereignty.	• Compliance with ss 8 and 20 positive obligations re adverse impacts of climate change not a question of “wisdom” but question of compliance with the legal standards affirmed in NZBORA. The Court in <i>Chisnall</i> was (AA [7]) not being “wise” when it applied legal standard to determine that ESP/PPO fell short of rights standard. Rather, that was the squarely in the Court’s role. • <i>Chisnall</i> at [252]: “...Parliament has imposed on the courts the duty to undertake the s 5 analysis, and the courts cannot shirk the responsibility to address issues of rights consistency” – the Attorney-General is asking you to shirk this duty. • Legal questions may arise in context of social, economic, political debates but that does not mean the Courts do not answer the legal questions. • Spectra not useful tools of analysis. Tipping J in <i>Hansen</i> at [116] referred to “spectrum which extends from matters which involve major political, social or economic decisions at one end to matters which have a substantial legal content at the other” but then acknowledged “reality ... that a particular matter may partake of a number of different elements involving different aspects of this spectrum. For example, the allocation of scarce public resources can often intersect with questions which, from a different standpoint, may seem more legal than political”.
<i>KlimaSeniorinnen</i> was about the art 8 right to home and private life, not the right to life	• This is not entirely accurate; the key discussion in <i>KlimaSeniorinnen</i> about the content of the obligation in relation to climate change applied to <u>both</u> arts 2 and 8: ○ At [538] (“To a great extent the Court has applied the same principles as those set out in respect of Article 2 when examining cases involving environmental issues under Article 8”). ○ At [540] (“It is with these principles in mind that the Court will proceed by identifying the content of the State’s positive obligations under Articles 2 and 8 of the Convention in the context of climate change”).

“Margin of appreciation” applies to narrow the scope of the right; referred to (among other things) <i>Nicklinson</i> at [164] and [231] (quoting [45] of <i>Countryside Alliance</i>)	• There is no authority that concepts of margin of appreciation, deference, institutional competence (whatever the phrase) operate on the interpretation of rights to narrow the content and scope of the right. • <u>Revolutionary</u> proposition that would upend the entirety of NZBORA jurisprudence – no authority supporting this approach; advanced as expedient answer by Attorney-General to this case: purpose of margin of appreciation not to let Attorney-General successfully seek a strike out of rights claim based on rights scope. • Submission disrupts how the NZBORA ecosystem works (and cf s 3 NZBORA) ○ If Attorney-General is right then, contra CA judgment, ss 8 and 20 could not be invoked in CCRA-related JR challenges (NZBORA cannot switch on / off depending on the width of a claim that relates to life or culture). ○ If Attorney-General is right, then ss 8 and 20 can have no role to play within the legislation design process, ie vetting). ○ If Attorney-General is right then ss 8 and 20 cannot be factored into advice that Climate Change Commission provides to Govt / reports it produces for public consumption. • Correct answer: rights in the context of climate change are the same for all purposes; their scope cannot be reduced just for this case. • Resp referred to <i>Nicklinson</i> at [164] but see at [163] <i>Nicklinson</i>: “Under the Human Rights Act 1998, it is the courts’ role to consider United Kingdom legislation in the light of the Convention rights scheduled to that Act. Where a “considerable” margin of appreciation exists at the international level, <i>both</i> the legislature <i>and the judiciary</i> have a potential role in assessing whether the law is at the domestic level compatible with such rights. That means considering whether a blanket prohibition is in accordance with law, in the sense that it not only meets a
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	legitimate aim, but does so in a way which is necessary and proportionate. <i>The legislator's choice is not necessarily the end of the matter...</i>" (emphasis added). • [45] of <i>Countryside Alliance</i> was also discussing democratic processes and parliamentary choice expressly in the context of justification of limits on rights: see [43]-[45] of <i>Countryside Alliance</i> (<u>R Supp A [55]</u>). • <i>Nicklinson</i> and <i>Countryside Alliance</i> were about issues on which there was little or no social agreement (assisted dying and the banning of fox hunting); here there is little disagreement about the risk and extent of harm that climate change causes and what temperature goal is required to avoid that. • Consideration of Parliament's institutional competence (in terms of the adequacy of its response(s) to the risks noted above) is to be taken at the s 5 justification stage, and is therefore a trial matter. In any case, <i>even if</i> the Crown's argument were accepted, that would just mean the question of the scope of the right becomes a trial question, because questions about what margin of appreciation to give Parliament cannot be determined in the abstract.
In the alternative, the deference reasons are so strong under the s 5 analysis that the case is untenable	• Section 5 justification must be "demonstrated". It is impossible to assess whether "deference" reasons are strong or not without having a trial and assessing the relevant proportionality questions, because "deference" cannot be given in the abstract. • Analytically it must be clear on what question in the legal analysis Parliament's view is being given weight, and whether has been shown that whatever quality Parliament said to have that makes it better place is in fact implicated in what it has done. • See <i>KlimaSeniorinnen</i> at [543] illustrates variable deference: States have a narrow margin of appreciation on the necessity to combat climate change and the setting of requisite aims and objectives to so combat it; the margin is only wide in respect of its choice of means to achieve them.

	• A DOI would alert the Crown/Parliament that, e.g., its targets are not enough to combat climate change and protect the relevant rights, but would not tell the Crown/Parliament which means should be adopted to achieve the target that <i>is</i> sufficient to protect those relevant rights.
This type of assessment should not be allowed to be done as part of adjudicative function	• In its decision in <i>IHC v AG</i> (handed up by the Human Rights Commission), the Human Rights Review Tribunal invited to strike out wide-ranging challenge to provision of education for students with special learning needs. The AG's strike-out application was based on similar grounds to those advanced here, and rejected by HRRT. Of note, the HRRT emphasised the importance of giving plaintiffs a forum to test their discrimination claim (ie illustrates <i>pro actione</i> principle at work) and noted that the claim didn't purport to challenge Appropriation Acts (but rather sought declarations that available resources be allocated differently in order to achieve non-discrimination). The same is true here.