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Joint Committee on
Human Rights

The Human Rights Act: the DCA and Home Office Reviews

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2005–06

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Joint Committee on Human Rights

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Summary

Introduction

In May 2006 there was public controversy over the Human Rights Act 1998 (HRA). Three high-profile cases led some to argue that the HRA, or the way it was being interpreted, was preventing the Government from ensuring public safety, and that it should be repealed or amended. The Prime Minister asked the Lord Chancellor and the Home Secretary to conduct reviews of the impact of the HRA. He also asked the Lord Chancellor to “devise a strategy, working with the judiciary, which maintains the effectiveness of the HRA, and improves the public’s confidence in the legislation”, and asked the Home Secretary “to consider whether primary legislation should be introduced to address the issue of court rulings which overrule the government in a way that is inconsistent with other EU countries’ interpretation of the European Convention on Human Rights.” (paragraphs 1-2).

On 18 May the Joint Committee on Human Rights decided to conduct an enquiry into “the case for the Human Rights Act”. In October 2006 we also decided to inquire into the human rights implications of Home Office proposals drawing in part on its internal review of the impact of the Human Rights Act and the European Convention on Human Rights on decision making in the criminal justice, immigration and asylum systems. We also raised with the Home Secretary the *Chahal* judgment. We took oral evidence from the Lord Chancellor and Baroness Scotland on 30 October. The main purpose of this Report is to inform Parliament about the Government’s recent reviews of the Human Rights Act (paragraphs 3-8).

Events giving rise to the Reviews

In our view, none of the three cases which sparked controversy – the Afghani hijackers’ judgment, the Anthony Rice case and the failure to consider foreign prisoners for deportation – demonstrates a clear need to consider amending the Human Rights Act. The Lord Chancellor agrees and confirms it is the view of the Government as a whole that none of them justifies amendment or repeal of the HRA. We very much welcome the Lord Chancellor’s assurance that there is now an unequivocal commitment to the Human Rights Act across the Government, but, in our view, public misunderstandings will continue so long as very senior Ministers make unfounded assertions about the Act and use it as a scapegoat for administrative failings in their departments (paragraphs 9-41).

The DCA Review

We welcome the DCA Review which in our view makes a fair and balanced contribution to the debate, and the Home Office’s unequivocal acceptance that the HRA has not impeded in any way the Government’s ability to protect the public against crime. Although the Review does conclude that the HRA has had a impact on the Government’s counter-terrorism legislation, mainly because of the *Chahal* case, we also welcome the Lord Chancellor’s conclusion that the HRA has not significantly inhibited the state’s ability to fight terrorism. We believe the Government has policy options to counter the terrorist threat in a way compatible with the UK’s human rights obligations. We welcome the Lord Chancellor’s acceptance that the HRA has not had any adverse impact on the Government’s policy on

immigration or asylum (paragraphs 42-48).

The DCA review records a significant beneficial effect of the HRA on development of policy by Government. We welcome the Review's acknowledgment of the importance of good guidance on human rights compatibility in policy-making, the DCA's embrace of a championing role in relation to human rights and its publication of guidance for officials in public authorities. We also welcome the Lord Chancellor's commitment to consult us on draft human rights guidance in future (paragraphs 49-59).

The DCA Review concludes that the HRA has not significantly altered the constitutional balance between Parliament, the Executive and the Judiciary. We welcome the Lord Chancellor's acknowledgment that it should be possible to give fuller reasons explaining the Government's view of the compatibility with human rights obligations of proposed new legislation. We favour a free-standing Human Rights Memorandum based on the existing ECHR memorandum edited if necessary to protect the Government's legal professional privilege (paragraphs 60-66).

The DCA Review states that the HRA has been widely misunderstood by the public and seeks to debunk some myths. We agree that there clearly exists a public perception that the HRA protects only the undeserving, at the expense of the law-abiding majority. We welcome the Review's proposal to be proactive in debunking myths. In our view, the public's commitment to human rights, and to the HRA, depends on wider dissemination of positive examples the HRA is making in practice, e.g. for those in residential homes, the disabled, carers and council tenants (paragraphs 67-80).

The DCA Review rules out withdrawing from the ECHR or repealing the HRA but does not rule out amending the HRA. We welcome the fact that the Lord Chancellor sees no current need to amend the HRA as contemplated in the Review and are clear that there is no need to amend the HRA or introduce specific legislation to clarify that public safety comes first (paragraphs 81-85).

We asked the Lord Chancellor to consider primary legislation to clarify the interpretation of "public authority" under the HRA. Though not ruling out the possibility, he preferred a case-by-case-approach. We were disappointed by the Government's new concern about driving private providers out of the market by widening the definition of "public authority". It seems seriously at odds with the Government's avowed intention elsewhere in the Review to make a positive case for the HRA. We do not see insuperable obstacles to drafting a simple statutory formula which makes clear that any person or body providing goods, services or facilities to the public, pursuant to a contract with a public authority, is a public authority for the specific purposes of the HRA (paragraphs 86-92).

We were very surprised the DCA's "strategic review" of 2004 on implementing the HRA has not been published and welcome the Lord Chancellor's promise to think about making a copy available confidentially to the Committee (paragraphs 93-96).

The Home Office Review

This Review has not been published. Baroness Scotland drew our attention to the CJS Rebalancing Report.. Most agencies in the criminal justice system found the HRA helpful but also identified a "risk-averse culture" based on a "sometimes cautious interpretation" of the ECHR and HRA. But there are few concrete examples. We welcome proposals for

practical steps to improve understanding of how to implement the HRA and for a proactive approach to myth-busting. But in our view the Home Office Review should be published. (paragraphs 97-107).

Rebalancing the Criminal Justice System

The premise of many of the Government's proposals is that the HRA has led to public safety being treated as of less importance than the human rights of terrorists or criminals, or at least is perceived by the public to have had this effect. We welcome the acceptance by Baroness Scotland that rebalancing must not be unfair or unjust to the offender but better represent and support victims. Our concerns about the Government's attempt to overturn the *Chahal* case in the European Court of Human Rights remain unalloyed. Attempting to distinguish between inhuman and degrading treatment on the one hand and torture on the other is unlikely to find favour, is unattractive and fails to solve the Government's central problem. We welcome the Government's recognition that there is a question whether the criminal justice system contains any in-built discrimination on racial grounds. We also welcome the Government's recognition that too many non-dangerous people with mental health problems continue to be imprisoned (paragraphs 108-125).

Reforming the IND

We consider human rights issues raised by the Home Secretary's proposals, notably over the intention to bring in a presumption that various categories of foreign criminals will be deported. We are concerned by the Prime Minister's announcement of an automatic presumption of deportation, which raises the prospect of deportation to a country where there is a real risk of treatment contrary to Article 3 of the ECHR. On deportation of EU and EEA nationals, we are also concerned that the Home Secretary may be blaming the courts for something laid down by EU law. Finally, Baroness Scotland assured us there was no racial profiling in deciding IND activity on high risk routes (paragraphs 126-137).

Building a Human Rights Culture

We believe that a culture of respect for human rights is a goal worth striving for. We see the DCA Review as an important milestone in bringing one about. It cannot be achieved exclusively through the courts, but needs shifts in public perception. This in turn requires wider knowledge of the benefits of the HRA. But, with the establishment of the Commission for Equality and Human Rights pending, there remain unresolved questions about how far a culture of human rights is developing. We will pursue these issues during the remainder of this Parliament (paragraphs 138-146).

1 Introduction

Background

1. In May of this year there was widespread questioning, by Ministers, the Opposition and in the media, of whether the Human Rights Act 1998 (HRA) should be amended or repealed. This questioning arose primarily from three cases which, some argued, showed that the HRA, or the way it was being interpreted, was preventing the Government from ensuring public safety:

- a decision of the High Court on 10 May 2006 in relation to nine people from Afghanistan who arrived in the UK after hijacking an aeroplane and who the courts have found cannot be returned to Afghanistan because they face a real risk of torture or death;
- a report published on 10 May 2006 by HM Chief Inspector of Probation into the case of Anthony Rice, who murdered Naomi Bryant following his release from prison on licence, which says that the human rights aspect of managing offenders is posing increasing levels of challenge to those charged with delivering effective public protection;
- the controversy over the deportation of foreign nationals, in which the Government suggested that the Human Rights Act, as interpreted by our courts, has been an obstacle to such deportation.

2. In light of this public controversy about the HRA, the Prime Minister wrote to the Lord Chancellor and the Home Secretary, asking them both to conduct reviews of the impact of the HRA.¹ He also asked the Lord Chancellor to “devise a strategy, working with the judiciary, which maintains the effectiveness of the Human Rights Act, and improves the public’s confidence in the legislation”, and asked the Home Secretary to “consider whether primary legislation should be introduced to address the issue of court rulings which overrule the Government in a way that is inconsistent with other EU countries’ interpretation of the European Convention on Human Rights”.

3. On 18 May we decided to conduct an inquiry into “the case for the Human Rights Act”.² On 27 June 2006 our Chair wrote to the Prime Minister³ asking him for further explanation of the Government’s thinking in relation to the cases. The Lord Chancellor replied to our letter on 19 July on behalf of the Prime Minister.⁴ His reply did not respond to the specific questions in the Chair’s original letter to the Prime Minister, but explained the subjects to be covered by the DCA’s review of the implementation of the HRA, which was published soon afterwards.⁵

1 Letters dated May 2006 from the Prime Minister to the Lord Chancellor and the Home Secretary.

2 As a Committee both we and our predecessor in the last Parliament have always regarded it as an important part of our remit to inquire into and report on significant aspects of the institutional machinery for implementing human rights.

3 Appendix 1.

4 Appendix 2.

5 *Review of the Implementation of the Human Rights Act*, Department for Constitutional Affairs, July 2006.

4. The Home Office's parallel review of the impact of the HRA and the ECHR on decision-making in the criminal justice, immigration and asylum systems has not yet been published. The Home Office has, however, published two papers, on rebalancing the criminal justice system⁶ and reforming the Immigration and Nationality Directorate,⁷ which take forward the conclusions and recommendations arrived at in its review of the HRA. On 9 October 2006 we decided to inquire into the human rights implications of these proposals, along with two other Home Office papers concerning new powers against organised and financial crime⁸ and reforming the Prison and Probation Service.⁹

5. The Chair also wrote to the Chief Inspector of Probation, Andrew Bridges, on 11 October 2006 seeking further information on his report on the Anthony Rice case.¹⁰ Mr Bridges responded by letter dated 17 October 2006.¹¹

6. Our Chair wrote to the Home Secretary on 16 October 2006 on two points arising, on reported details in the Home Office's as yet unpublished review of instances where the HRA caused difficulties for decision-makers and on the Government's position on the *Chahal* judgment.¹² Baroness Scotland replied on behalf of the Home Secretary by letter dated 26 October 2006, appending a summary of the Home Office's review of decision-making in the Criminal Justice, Immigration and Asylum Systems.¹³

7. On 30 October we took oral evidence from the Lord Chancellor and Baroness Scotland.¹⁴ Following the session we asked for some additional information to be provided in supplementary memoranda. We have received a memorandum from the Home Office, which we also publish with this Report.¹⁵

Purpose of this Report

8. The main purpose of this Report is to inform Parliament, in time for the beginning of the new session, about the Government's recent reviews of the Human Rights Act and the substantive proposals which have emerged from those reviews. It reports on the events giving rise to those reviews, which form the essential context for understanding the scope and purpose of the reviews themselves; it considers and comments upon the outcome of those reviews; and it considers those aspects of the Home Office's implementing proposals which seem to us to raise the most significant human rights issues. Finally, the Report reflects on the considerable work remaining to be done in order to embed a "human rights culture" in this country.

6 *Rebalancing the Criminal Justice System in favour of the law-abiding majority*, Home Office, July 2006.

7 *Fair, effective, transparent and trusted – Rebuilding confidence in our immigration system*, Home Office, July 2006.

8 *New Powers Against Organised and Financial Crime*, CM 6875.

9 *Improving Prison and Probation Services: Public Value Partnerships*, Home Office

10 Appendix 3.

11 Appendix 4.

12 Appendix 5.

13 Appendix 6

14 All references to this oral evidence in this report are to the uncorrected transcript.

15 Appendix 7

2 Events giving rise to the reviews

The case of the Afghani hijackers

9. On 10 May 2006 the High Court overturned the Home Secretary's decision that it was not appropriate to grant discretionary leave to enter the UK to nine Afghan nationals who arrived in the UK on 7 February 2000 having hijacked an aircraft on an internal flight in Afghanistan in order to flee from the Taliban regime. The High Court ordered the Home Secretary to grant them discretionary leave to enter for a period of six months.

10. The Prime Minister responded publicly to the judgment on the same day, saying:

“We can't have a situation in which people who hijack a plane, we're not able to deport back to their country. It's not an abuse of justice for us to order their deportation, it's an abuse of common sense frankly to be in a position where we can't do this.”¹⁶

11. The Home Secretary, Rt Hon Dr John Reid MP, also responded publicly, saying on 11 May:

“When decisions are taken which appear inexplicable or bizarre to the general public, it only reinforces the perception that the system is not working to protect or in favour of the vast majority of ordinary decent hard-working citizens in this country.”¹⁷

12. On 12 May The Sun newspaper launched a campaign to persuade the Government to “rip up the Human Rights Act”.

13. The Home Secretary appealed against part of Sullivan J's judgment. In August the Court of Appeal dismissed the Home Secretary's appeal. The Court of Appeal noted that the case “has attracted a degree of opprobrium for those carrying out judicial functions” and expressly commended Sullivan J for “an impeccable judgment”.¹⁸ It also pointed out that there had been ample time, in the six years since the hijackers landed here, for the Home Secretary to obtain appropriate Parliamentary authority for the powers which he sought to give himself without parliamentary sanction.¹⁹

14. The Government's public reaction to the High Court judgment suggested that the High Court had just decided that the nine Afghan nationals could not be returned to Afghanistan and that this was based on a perverse interpretation of human rights law.

15. The decision that the Afghan nationals could not be returned to Afghanistan was a decision taken, not by the High Court on 10 May 2006, but by a panel of three Immigration Adjudicators on 8 June 2004. The adjudicators held that they found that the evidence was overwhelming that although the Taliban had been defeated and were no

16 Press Conference with the French Prime Minister, 10 May 2006, www.number10.gov.uk/output/page9443.asp.

17 *Government Appeal over Hijackers*, BBC News Online, 11 May 2006.

18 *S v Secretary of State for the Home Dept* [2006] EWCA Civ 1157 at para. 50.

19 *Ibid* at para. 51.

longer in control of the country, they were re-grouping and could pose a real risk to individuals if they wish to target them. They found as a fact that there was a real risk that the nine individuals would be targeted for assassination by the Taliban if returned to Afghanistan. They also found as a fact that there would not be sufficient protection for them there against that risk if returned. They therefore upheld their claim for humanitarian protection under Article 3 ECHR.²⁰

16. The Adjudicators made these factual findings after considering all the evidence in the case at a hearing which lasted for eight days, including evidence from each of the individuals who were cross-examined at length.

17. As the law then stood, the Home Secretary had a statutory right of appeal to the Immigration Appeal Tribunal against the adjudicators' decision on the ground that it was based on an error of law.²¹ For these purposes, reaching a decision based on perverse findings of fact is an error of law. The Home Secretary applied to the Immigration Appeal Tribunal for permission to appeal against the Adjudicators' decision. The Tribunal refused the Home Secretary permission to appeal, on the basis that the Adjudicators were entitled to reach the findings they did. The Home Secretary then had the further option of applying to the High Court for judicial review of the Tribunal's refusal of permission, but chose not to do so.

18. The Adjudicators' decision was not based on any controversial interpretation of either Article 3 ECHR or of the Human Rights Act. The decision of the Adjudicators was based on factual findings, arrived at after a full consideration of the evidence in the case. The appellate tribunal refused permission to challenge those findings. The Home Secretary did not avail himself of the further avenue of a challenge by way of judicial review. In other words, the judicial processes for the determination of the factual questions which are at the heart of an Article 3 ECHR claim have taken their course, and there appears to be no grounds on which to complain that the Adjudicators made perverse factual findings or applied a perverse interpretation of Article 3 ECHR. The judicial process of fact finding having run its course, we cannot see how it is possible to criticise the decision without at the same time advocating deportation to face a real risk of torture or death.

19. We think it is also important to point out that this is not a case about threats to national security or public safety. It was accepted by the Government at the hearing before the Immigration Adjudicators that there were no reasonable grounds for regarding any of the individuals as a danger to the security of the UK, nor as constituting a danger to the community of the UK. This was confirmed by the Home Office on the day of the High Court judgment. The nine individuals had all been convicted of various offences relating to the hijacking, but their convictions were overturned by the Court of Appeal on the basis that the jury had been misdirected on the issue of the defence of duress. All but two of the

20 What the High Court decided on 10 May 2006 was that the Home Secretary had acted unlawfully by deliberately delaying giving effect to the Adjudicators' decision, to give himself time to devise a revised policy which would purportedly justify not implementing that decision. It was in respect of this that the High Court said it was difficult to conceive of a clearer case of conspicuous unfairness amounting to an abuse of power by a public authority, and commented that it was particularly disturbing that this was not simply the conduct of a junior official, but was authorised at the highest level.

21 Under s. 101 of the Nationality, Immigration and Asylum Act 2002. Permission was required for such an appeal to proceed. Permission would only be granted if there was an identifiable error of law which made a material difference to the decision.

individuals had by then served their sentences in full and the Court of Appeal did not order a retrial.

20. In view of the criticisms made of the High Court judge by the Prime Minister and the Home Secretary, and the Lord Chancellor's statutory duty to uphold the independence of the judiciary,²² we asked the Lord Chancellor whether he regarded the decision of Sullivan J. in the High Court as "bizarre and inexplicable" or "impeccable". The Lord Chancellor said that the answer to the question whether people who hijacked should be able to remain here was that if they faced death or torture or something similar abroad then the law is that they should remain, and that the question of a balance did not arise because they posed no threat to this country.²³ He said he was not seeking to challenge the Adjudicators' decision in 2004, and that, although there may come a time when it was safe for them to return to Afghanistan, he was not aware of any evidence contrary to the previous findings.²⁴

21. We welcome the Lord Chancellor's unequivocal acceptance of the correctness of the original decision in the Afghani hijackers case as a clear application of the requirement of human rights law that prevents deportation where the person faces death or torture or "something similar". In our view high level ministerial criticisms of court judgments in human rights cases as an abuse of common sense, or bizarre or inexplicable, only serves to fuel public misperceptions of the Human Rights Act and of human rights law generally.

Deportation of foreign prisoners

22. When it came to light that a substantial number of foreign prisoners had been released at the end of their sentences without being considered for deportation, some of whom had re-offended, the then Home Secretary, Rt Hon Charles Clarke MP announced plans, in a statement to the House of Commons on 3 May 2006,²⁵ to change the system governing deportation of foreign prisoners.

23. The new Home Secretary, Dr Reid, said in a newspaper article on 7 May: "the vast majority of decent, law-abiding people ... believe that it is wrong if court judgments put the human rights of foreign prisoners ahead of the safety of UK citizens. They believe that the Government and their wishes are often thwarted by the courts. They want the deportation for foreign nationals [sic] to be considered early in their sentence, and are aware that this was overruled by the courts"²⁶.

24. Referring to the Government's proposals to change the system for deportation of foreign prisoners, the Prime Minister said in the House of Commons on 17 May: "in the vast bulk of cases ... there will be an automatic presumption to deport, and the vast bulk of those people will, indeed, be deported, irrespective of any claim that they have that the country to which they are returning may not be safe. That is why it is important that we consider legislating, if necessary, to ensure that such an automatic presumption applies. ...

22 Constitutional Reform Act 2005, s. 3.

23 Q1.

24 Q2.

25 HC Deb 3 May 2006 cols 969-973

26 "No more cock-ups Home Secretary", News of the World, 7 May 2006.

Yes; we will make sure that our human rights legislation does not get in the way of commonsense legislation to protect our country.”²⁷

25. Under the ECHR the UK is under obligations not to deport a foreign national to torture under Article 3 and not to deport where this would be a disproportionate interference with their family life under Article 8 ECHR (e.g. if they had lived most of their life in this country, all of their family and other connections were in this country, and they had no family or other connections in the receiving State). The Human Rights Act gives effect to these obligations by enabling a would-be deportee to challenge their deportation on those grounds in a UK court. We are not aware, however, of any examples in such cases of rulings by UK courts which overrule the Government in a way that is inconsistent with other EU countries’ interpretation of the ECHR,²⁸ which was the Prime Minister’s concern in his published letter to the Home Secretary, or which go further than the case-law of the European Court of Human Rights.²⁹ **We therefore do not accept that the Human Rights Act, or its interpretation by UK courts, present any greater obstacle to the deportation of foreign nationals than the limitations on such deportations which already exist under the ECHR itself.**

26. We asked the Lord Chancellor and Baroness Scotland whether they were able to provide any evidence that the Human Rights Act or its interpretation by decision-makers, as opposed to administrative error, were responsible for the failure to consider whether foreign prisoners should be deported on their release. Both were unequivocal that the Human Rights Act was not responsible for the failure to consider over 1,000 foreign prisoners for deportation.³⁰

27. We welcome the unequivocal acceptance of the Lord Chancellor and Baroness Scotland that neither the Human Rights Act itself nor any misinterpretation or misunderstanding of it by officials was in any way responsible for the failure to consider foreign nationals for deportation. However, we regret that the opposite impression was earlier given by both the Prime Minister and the Home Secretary. We repeat our view that unfounded criticism of the Act from a high level within Government only serves to perpetuate the misunderstandings and misperceptions about the Act amongst the wider public.

The Report on the Anthony Rice case

28. On 10 May 2006 HM Chief Inspector of Probation, Andrew Bridges, published the report of his review of the case of Anthony Rice, a life sentence prisoner who on 17 August

27 HC Deb 17 May 2006 col. 990.

28 The approach of the French Conseil d’Etat, for example, which has power to quash a decision of the administration about the country of destination, is that no alien may be sent back to a country “for which there are serious and established reasons to believe that the alien would be exposed there to a real risk for his person, coming either from that State’s authorities or from persons or groups distinct from public authorities, as long as the authorities of the country of destination are not able to avoid such a risk by providing appropriate protection”: *Prefet de l’Aude c. M. Belabdelli*, (12 May 2006). This seems, for all practical purposes, to be identical to the approach of the Immigration Adjudicators in the case of the Afghan hijackers.

29 Lord Lester of Herne Hill has asked the Minister in a series of PQs whether there have been cases in which the courts of other member states of the EU have interpreted and applied Article 3 ECHR more restrictively than British courts but compatibly with the case-law of the European Court of Human Rights; and if so, whether they will publish details of such cases (see e.g. HL Deb, 17 May 2006 Q for WA 3405). To date the Government has not identified any such case.

30 Q4.

2005 murdered Naomi Bryant following his release from prison on licence (“the Bridges Report”).³¹ The Report found that, on balance, Anthony Rice should not have been released on life licence in the first place, and that, once he had been released, he could and should have been better managed.³² It found a number of deficiencies, in the form of mistakes, misjudgments and miscommunications at various stages throughout the whole process of the case, amounting to a cumulative failure. For example, it found that the Parole Board did not have information before it of previous convictions (material on the basis of which it might have made a different decision) and there was a misunderstanding amongst those handling the case about the nature of the hostel and the level of supervision provided.

29. The Bridges Report also finds, however, that one of the reasons why the Parole Board underestimated the risk of harm to others when it decided that he was safe to release was that from the time of his transfer to open conditions in 2001 “the people managing his case started to allow public protection considerations to be undermined by its human rights considerations, as these required increasing attention from all involved, especially as the prisoner was legally represented.”³³ In a number of subsequent places in the report, further reference is made to it being an increasingly challenging task for people who are charged with managing offenders effectively to ensure that public protection considerations are not undermined by “the human rights considerations”.³⁴

30. The DCA’s review of the implementation of the HRA describes the Anthony Rice case as an example of a “misunderstanding of human rights considerations”, and claims that the Chief Inspector of Probation found in his report on the case that the HRA is being misapplied, notably by allowing a prisoner, whether himself or through his lawyers, to “shift the focus of consideration onto the proportionality of the restrictions to which he is subject, at the expense of assessment of the risk of harm he presents”.³⁵ The DCA Review attributes a clear causal link between these misunderstandings, misinterpretations and misapplications and the death of Naomi Bryant. It states, for example, that “the result of this [misinterpretation of the effect of the Convention rights] can either be simple inefficiency or frustration ... or tragedy, as in the case of Anthony Rice”,³⁶ and that “human rights considerations have perhaps nowhere been more tragically misapplied than in the case of Anthony Rice”.³⁷ In his major speech on human rights delivered to the Human Rights Lawyers Association on 29 September the Lord Chancellor repeated these assertions, saying, for example, that “The events surrounding the Anthony Rice case provide a very conspicuous and sobering example of the operational problems which have arisen for key agencies as a result of misconceptions and misunderstanding”.

31. We accept that it would be a matter of serious concern if there were evidence to demonstrate that those responsible for making decisions about the release of potentially dangerous prisoners, and for managing offenders, were interpreting the Human Rights Act

31 HM Inspectorate of Probation, *An Independent Review of a Serious Further Offence case: Anthony Rice* (May 2006).

32 Ibid., Para. 1.1.2.

33 Ibid, Para. 1.3.1

34 Ibid, Paras 1.3.5, 10.2.12, 10.2.17, 11.3, 11.26.

35 DCA review, p.27

36 Ibid p. 25.

37 Ibid p. 27.

in such a way as to undermine public safety. We therefore looked very carefully at the Chief Inspector's Report to identify precisely any evidence that this happened at the relevant decision-making points in relation to Anthony Rice, in particular at the time of his release on licence and when deciding the conditions to which he should be subject on release.

32. We were unable to find any concrete evidence in the Report itself that any decision concerning the release or management of Anthony Rice was affected in any way by human rights considerations being given precedence over public protection. There is nothing in the Report to indicate the role played by human rights arguments at the oral hearing of the Parole Board panel on 17 August 2004 at which the decision was taken to release Anthony Rice on licence once appropriate conditions had been finalised.³⁸ The Report mentions that in the period between that decision and his release on licence the Lifer Review and Recall Section of the Home Office were concerned that the conditions in his licence "might be excessively restrictive in terms of the Human Rights Act".³⁹ But, significantly, the Report goes on to state that "the advice offered to the Parole Board highlighted the fact that the Act allows for interference with the rights of an individual where this is necessary for public safety and the protection of the rights of others."

33. It therefore appeared to us that the concern repeated throughout the Report, that human rights considerations may be undermining public protection, is more in the nature of a general concern than one based on clear findings that human rights arguments were determinative of particular decisions leading to Anthony Rice being released on licence and managed in such a way that he was not prevented from murdering Naomi Bryant. Indeed, it seemed clear from the Report that it was a combination of a lengthy catalogue of *other* failures which was responsible for the mistaken decision to release Anthony Rice, rather than any prioritising of human rights considerations over public safety.

34. We therefore decided to write to Mr. Bridges for clarification.⁴⁰ We asked if he could let us know precisely what information contained in his report he considers supports his finding that from 2001 "the people managing [Anthony Rice's] case started to allow public protection considerations to be undermined by its human rights considerations, as these required increasing attention from all involved, especially as the prisoner was legally represented". We asked whether he had any further evidence, over and above that already contained in the report, to support that view. We also asked if he could provide any evidence that at the principal decision-making points in the management of Rice's case, including at the time of his release on licence and in deciding the conditions to which he should be subject on release, human rights considerations had the effect described in the report, and whether in Mr. Bridges' view this was because of a correct or incorrect interpretation of the requirements of the HRA by the relevant decision-makers.

35. In his reply Mr Bridges himself points out that his report "made no comment about the Human Rights Act itself" and that it was a huge distortion of his report's findings to say that Rice was released in order to meet his human rights.⁴¹ He also says, significantly, that

38 *Review of the Anthony Rice case*, Paras 8.3.1-8.3.3.

39 *Ibid*, Para. 8.3.11.

40 Appendix 3

41 Appendix 4.

he did not think that decision-makers are interpreting the Act wrongly, and that in his experience the great majority of case managers are either fully aware that the HRA does not prevent them from carrying out their public protection responsibilities or would at least know whom to consult to check. He has no doubt that Parole Board members and staff have a proper understanding, in principle, of how to implement their public protection duties while complying with human rights considerations. He says the report's comments on the impact of human rights considerations on the decision-making process were much more subtle, relating to the practical circumstances in which case officers found themselves. He says that

“In broad terms our Finding is based on us discovering plenty of evidence of [case officers] discussing the [proportionality of restrictions on Mr Rice], and relatively little of them discussing [how to manage them effectively]. Following our discussions with the people involved we took the view that the attention of the relevant officers was constantly drawn away from the latter towards the former. We used the term ‘distracted’ to describe this, and as it happens this appears to have been accepted by the people involved as a fair interpretation.”

36. We therefore asked the Lord Chancellor whether he now accepted, in the light of Mr. Bridges' letter, that his report does not demonstrate that the Rice case is an example of a tragic misapplication of human rights considerations, or of any misinterpretation or misunderstanding of the HRA or the European Convention on Human Rights (“ECHR”) by officials. The Lord Chancellor was very candid in his response, saying that he found Mr. Bridges' letter “very disappointing in the context of his report”.⁴² He accepted that Mr. Bridges' letter seems “difficult to align with what he says in his report”. In the Lord Chancellor's view, the Chief Inspector's report on the Rice case was clear that the Chief Inspector was “concerned that officials involved in the decision in the Anthony Rice release question were distracted by human rights considerations”. His letter, by comparison, was, in the Lord Chancellor's view, “opaque”, “very difficult to follow” and did not throw much light on the issue. The Lord Chancellor thought that the Government had to go on the basis of what the Chief Inspector had said in his report, not because what he had said in the letter should be ignored, but because the report raised a particular issue which needed to be addressed, namely the risk that officials were being distracted from public safety considerations by focusing too much on human rights considerations. He therefore did not resile from the Government's response to the Rice report, which was to issue proper guidance underlining that public safety comes first. **We welcome the Government's readiness to take action to correct apparent misunderstanding.**

37. However, in our view, Mr Bridges' letter raises serious questions about the reliance placed on his report in both the DCA Review and the Lord Chancellor's speeches and interviews. First, in our view it makes clear that there was no clear causal connection between any interpretation or application of the HRA and the death of Naomi Bryant, because Rice was not in fact released “in order to meet his human rights”. The assertion that the tragic death of Naomi Bryant was therefore caused by officials misinterpreting the HRA therefore is not made out. Second, in our view Mr. Bridges' letter also makes clear that the Rice Report does not demonstrate that officials misunderstood, misinterpreted or misapplied the Human Rights Act or the ECHR in any way. According to its author, the

42 Q8.

Rice Report raises much more subtle issues about the “practical processes” by which public safety considerations may be affected by human rights considerations.

38. In our view, if the Bridges report demonstrates anything, it is the need for fuller investigation, not of whether officials in the criminal justice system are prejudicing public safety through misunderstandings or misapplications of the Act, but of precisely what Mr. Bridges means by the “subtle processes” to which the HRA gives rise which somehow lead to public safety considerations being given too little weight. The precise way in which Mr. Bridges says that human rights considerations undermine public safety considerations is certainly subtle: it is far from self-evident that because the proportionality of restrictions was more discussed than management of Rice’s risk of harm the former must have distracted attention from the latter. It is possible that the passages in the Rice report which ignited the controversy are the product of a misunderstanding of the HRA by Mr. Bridges himself, in that he maintains a dubious antithesis between human rights considerations and public protection considerations, which does not acknowledge that, properly understood, public protection forms a crucial part of an overall human rights perspective in cases such as those of Anthony Rice.

39. **In our view, while we agree with the Lord Chancellor’s view that it would have been completely wrong for the Government simply to ignore what was said in the Report of the Chief Inspector of Probation,⁴³ we strongly disagree that the Chief Inspector’s Report contains any real evidence that public safety is being prejudiced by officials’ misinterpretations or misapplications of the HRA.**

Conclusion

40. **In our view, whatever other arguments there may be about whether the Human Rights Act should be amended, repealed, or replaced by a UK Bill of Rights, none of the three cases we have discussed so far – the Afghani hijackers judgment, the failure to consider foreign prisoners for deportation, and the Anthony Rice case – demonstrates a clear need to consider amending the Act. In each case, the Human Rights Act has been used as a convenient scapegoat for unrelated administrative failings within Government. The Lord Chancellor expressed his complete agreement that not one of them justifies amendment or repeal of the HRA, which, he says, is the conclusion of the review published in July.⁴⁴ Moreover, that review, according to the Lord Chancellor, is not the view merely of one department, but expresses the views of the Government.⁴⁵**

41. We welcome the Lord Chancellor’s candour in acknowledging that “maybe we were not quite quick enough to spot the absence of human rights issues in relation to all three of the issues”.⁴⁶ We also accept that, in the circumstances, in which there was considerable public debate about whether the HRA was responsible for various failings, a thorough but expeditious review of the operation of the Act was “the right course for a responsible government.”⁴⁷ **We must, however, draw to Parliament’s attention the extent to which**

43 Q11.

44 Q10.

45 Q17.

46 Q16.

47 Ibid.

the Government itself was responsible for creating the public impression that in relation to each of the three highly contentious issues under consideration it was either the Human Rights Act itself or misinterpretations of that Act by officials which caused the problems. In each case, very senior ministers, from the Prime Minister down, made assertions that the Human Rights Act, or judges or officials interpreting it, were responsible for certain unpopular events when, as we have shown above, in each case these assertions were unfounded. Moreover, when those assertions were demonstrated to be unfounded, there was no acknowledgment of the error, or withdrawal of the comment, or any other attempt to inform the public of the mistake. We very much welcome the Lord Chancellor's assurance that there is now an unequivocal commitment to the Human Rights Act right across the Government but, in our view, public misunderstandings of the effect of the Act will continue so long as very senior ministers fail to retract unfortunate comments already made and continue to make unfounded assertions about the Act and to use it as a scapegoat for administrative failings in their departments.

3 The DCA Review

Background

42. On 25 July 2006 the DCA published its *Review of the Implementation of the Human Rights Act* (“the DCA Review”). The Review is described as the first stage in the DCA’s response to the Prime Minister’s request to lead a review looking at problems with the implementation of the HRA. The most significant outcome of the Review is that the Government remains fully committed both to the European Convention on Human Rights and to the way effect is given to it in the UK by the Human Rights Act 1998. The Review rules out both withdrawal from the ECHR and repeal of the HRA. As we shall see, it does not rule out altogether the possibility of amending the Act to try to ensure that sufficient weight is always attached to public safety.

43. **We welcome the DCA Review which in our view makes a very fair and balanced contribution to this important debate.** In this part of our report we consider some specific aspects of the Review.

Impact of the HRA on UK law

44. The Review’s account of the impact of the HRA on UK law is in our view a fair and balanced account of the legal impact of the Act. It concludes that decisions of the UK courts under the Human Rights Act have had no significant impact on criminal law or on the Government’s ability to fight crime. In her evidence to us Baroness Scotland confirmed that the Home Office accepted that conclusion.⁴⁸ **We welcome the Home Office’s unequivocal acceptance that the HRA has not impeded in any way the Government’s ability to protect the public against crime.** We consider the significance of this later in this report in the context of the Home Office’s proposals to “rebalance the criminal justice system in favour of the law-abiding majority”.

45. The Review does conclude, however, that the HRA has had an impact on the Government’s counter-terrorism legislation, mainly because of the decision of the European Court of Human Rights in *Chahal v UK*.⁴⁹ In his evidence to us the Lord Chancellor elaborated on this conclusion. Asked to what extent he thinks the ECHR is frustrating the ability of a democratically elected government to develop a public policy response to the problems of terrorism, he replied:

“I do not think it is. In the review that we published ... we said yes, there have been some changes that the Human Rights Act has caused - for example, the Belmarsh case - but it has not significantly inhibited the state’s ability to fight terrorism because the Human Rights Act has allowed proportionate measures to be taken to fight terrorism. Kofi Annan said not so long ago, “Human rights law allows a pretty robust response to terrorism even in the most exceptional circumstances.” Human rights law is not some rigid doctrine that can never be broken; it is something where a balance needs to be struck. If the state is threatened, it will allow the necessary steps

48 Q31.

49 (1997) 23 EHRR 413.

to be taken to protect the democratic society which those values serve. I do not accept it has had a significant effect on inhibiting the fight against terrorism.”⁵⁰

46. **We welcome the Lord Chancellor’s unequivocal conclusion that the HRA has not significantly inhibited the state’s ability to fight terrorism and his acknowledgment that human rights law permits proportionate measures to be taken in order to counter terrorism. In our view human rights law does constrain to some extent the range of policy choices available to the Government to counter terrorism, but at the same time it not only permits but requires proportionate measures to be taken to protect life against the threat from terrorism. In our most recent report on Counter-Terrorism Policy and Human Rights we have attempted to address the problems identified by the Review and to demonstrate that other policy options are available to the Government which will enable it to counter the threat from terrorism in a way which we believe to be compatible with the UK’s human rights obligations.**⁵¹

47. The DCA Review does not state any conclusion as to whether the HRA has had any significant impact on the law in relation to immigration and asylum. In evidence to us, however, the Lord Chancellor rejected the suggestion that Article 3 of the ECHR, as it has been interpreted by the judges, is frustrating the Government’s ability to deal with “mass immigration”.⁵² He pointed out that “Article 3 affects an extremely small number of people.” Again, **we welcome the Lord Chancellor’s unequivocal acceptance that the HRA has not had any adverse impact on the Government’s policy in relation to immigration and asylum.**

48. In other areas, the Review concludes, the impact of the HRA on UK law has been beneficial, and has led to a positive dialogue between UK judges and those at the European Court of Human Rights.

Impact of the HRA on policy formulation

Human rights in the policy making process

49. The DCA Review records a significant but beneficial effect on the development of policy by central Government, leading to better policy outcomes by promoting greater “personalisation” in the delivery of public services and ensuring that the needs of all members of the UK’s diverse population are appropriately considered. It says that the HRA has exerted a powerful influence on policy formulation in three ways:

- by formalisation of the process for ensuring compatibility with Convention rights, including through s.19 statements and scrutiny by this Committee
- in response to litigation which may force a change in policy or its delivery
- through changes in behaviour driven by the immediacy of the Act, which makes it unlawful for a public authority to act in a way incompatible with Convention rights.

50 Q59.

51 Twenty-fourth Report of 2005-05, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-charge Detention*, HL Paper 240/HC 1576

52 Q60.

50. The Review also states that “human rights proofing” is not simply an exercise to be carried out after legislation has been drafted. Questions of proportionality, and the identification of policy options that produce the least interference with Convention rights, should be embedded in the policy development process. In his speech to the Human Rights Lawyers Association on 29 September the Lord Chancellor repeated the assertion that the Act has “significantly improved the development of public policy. Every area of policy development in central government has been affected by the Act. All government policy must assess the potential for human rights impacts at an early stage”.

51. We welcome the Review’s acknowledgment that important questions concerning compatibility with human rights standards arise in the course of policy formulation, prior to the drafting of legislation. We agree. In our recent Report on our Future Working Practices we explained that in future we will be reconfiguring our mixture of work in order to enable us to report on any significant human rights compatibility issues which arise at a much earlier stage in the policy development process.⁵³

52. We also welcome the Review’s acknowledgment of the importance of detailed and accurate guidance to ensure that questions of human rights compatibility are embedded in the policy development process at an early stage. In our view, however, the Review rather overstates the extent to which current guidance and practice have succeeded in achieving this objective. We deal with this elsewhere in this report in the context of the role played by the JCHR and the adequacy of the explanations provided to Parliament for the compatibility of a particular measure or policy with human rights.

The role of the DCA

53. We asked the Lord Chancellor whether the DCA sees itself as actively working with other departments to help them put policies they are developing in a human rights framework. He replied that the DCA does see its role as helping other departments and, if asked, local authorities and other public authorities, with how to give effect to the HRA.⁵⁴ The DCA sees itself as having both an advisory role, providing guidance for example, and a championing role in relation to human rights, particularly in central government:⁵⁵

“we campaign actively now for human rights which we did not do before and we did not do before because perhaps we had not realised the extent to which human rights and human rights values had not been as embedded in the national and governmental consciousness as they perhaps needed to be.”

54. We welcome the DCA’s embrace of an explicitly championing role in relation to human rights, a role which both we and our predecessor Committee have been concerned is not adequately performed in the absence of a human rights commission.

53 Twenty-third Report of 2005-06, *The Committee’s Future Working Practices*, HL Paper 239/HC 1575

54 Q36.

55 Q37.

Improved guidance and training

55. The DCA review proposes a rigorous review by relevant Government Departments of all guidance and training programmes “to ensure that public safety is given its proper importance”, extending beyond central government to agencies, sponsored bodies and local authorities, under the leadership of a Ministerial Group. It also proposes the production by the DCA of a “Human Rights Toolkit” offering “generic guidance to public sector managers in the application and implementation of the Convention rights and the Human Rights Act.”

56. The DCA has acted swiftly on these proposals, producing two new guidance booklets for officials in public authorities, *Human rights: human lives: a handbook for public authorities* and *Making sense of human rights: a short introduction*. It has also produced a new (third) edition of its *Guide to the Human Rights Act 1998*.

57. We very much welcome the publication of this guidance. We wholeheartedly endorse the DCA’s intention to improve the guidance and training on human rights which is available to both the public and public officials. However, given the nature of our work and expertise, we were disappointed not to have been given an opportunity to comment on such guidance when it was still in draft form. We have considered the guidance and although we commend its accessibility there are matters on which we would have wished to make comment if we had been given the opportunity, such as the focus on negative obligations, preventing public authorities from taking certain steps, to the relative neglect of positive obligations which may require them to take action in order to secure or respect a Convention right.

58. In evidence to us the Lord Chancellor agreed that the DCA should have consulted us but explained that on this occasion he was extremely keen to follow up the July review with positive action in order to demonstrate that the DCA Review was not merely a statement of good intention.⁵⁶ **We welcome his commitment to consult us on draft human rights guidance in future and his indication that there is still scope to consider the content of the current guidance which he described as “but one stage on what is quite a long journey”.**

59. We also asked the Lord Chancellor to tell us more about the ministerial group monitoring the guidance and training being provided by individual departments. He told us that it will be chaired by the Lord Chancellor, will have representatives of each central government department on it, and will take a cross-government look at how to make sure that human rights values are inculcated into all that Government does, how to defend human rights and how to establish a human rights culture.⁵⁷

Impact of HRA on constitutional balance between Government, Parliament and the Courts

60. The DCA Review concludes that the HRA has not significantly altered the constitutional balance between Parliament, the Executive and the Judiciary. This view is

⁵⁶ Q64.

⁵⁷ Q66.

largely based on a review of court judgments which concern either the relationship between the Judiciary and the Executive or the relationship between the Judiciary and Parliament. Apart from a brief mention of this Committee in the context of a description of the formal procedures for ensuring ECHR compatibility, which are said to have improved transparency and parliamentary accountability, consideration of the impact of the Act on the relationship between the Executive and Parliament is largely missing from the Review. Given the central role accorded to Parliament in the scheme of the Human Rights Act, we consider this to be a significant omission from the Review.

61. In our view, one way of “moving forward” which is not mentioned by the DCA Review is the provision by the Government to Parliament of better and fuller explanations of its reasoning as to why in its view a particular policy proposal or specific measure is compatible with human rights obligations. Just as fuller scrutiny by domestic courts makes it more likely that measures will withstand scrutiny in Strasbourg (a fact acknowledged by the Review), so will fuller scrutiny of compatibility issues in Parliament make it more likely that legislation will withstand human rights scrutiny in our own courts. There is therefore a very powerful democratic justification for requiring the Government to provide much more detailed information to Parliament in support of its view that a particular measure is compatible with human rights obligations, to enable Parliament to exercise a more meaningful scrutiny role with a view to reaching its own, informed decision about compatibility.

62. To this end we have been pressing the DCA since the beginning of the Parliament to provide a Human Rights Memorandum on presentation of each bill. The most recent letter in a lengthy chain of correspondence is from the Lord Chancellor dated 2 June 2006 which repeated the fairly consistent Government view that it would prefer to improve the consistency and quality of treatment of the human rights implications of legislation in Explanatory Notes rather than through a new mechanism of a Human Rights Memorandum. In that letter Lord Falconer said he would “now write without further delay to seek the views of my colleagues on your proposal”.

63. The DCA Review refers to the ECHR Memorandum which is compiled for the Cabinet’s Legislative Programme Committee, as an example of how assessment of ECHR compatibility is now embedded in the policy formulation process.⁵⁸ It says that the memorandum must set out the Convention rights likely to be engaged by the policy embodied in the Bill and explain how the proposed legislative scheme ensures that any interference with the identified right does not result in a breach, and that it will do this by demonstrating that the interference is legitimate, necessary, proportionate and non-discriminatory. This is precisely the analysis that we usually wish to see in relation to clauses in Bills which raise significant human rights issues. If it were available as a matter of course we think it likely that it would reduce the need for us to write to Departments asking so many and such detailed questions when we are scrutinising Bills.

64. We therefore asked the Lord Chancellor whether he was now in a position to say that we will be provided with this information. He said that he could not give us that

58 DCA Review, p. 20.

commitment today, because it was still a matter of consultation across Government, but he was⁵⁹

“sympathetic to the proposition which says it must be more helpful than simply making a section 19 statement to say, ‘Here is where there was an issue on this Bill. This is the conclusion we came to. That is why we think it is compliant.’”

65. He also agreed that it should be possible to exclude matters of legal professional privilege and therefore to provide that information without going beyond what is proper.⁶⁰ He envisaged that it would be possible to say, for example, that “Clause 16 of this Bill raises this particular issue. We take the view that it is human rights compliant because A, B and C.”

66. We welcome the Lord Chancellor’s acknowledgment that it should be possible to provide fuller reasons explaining the Government’s view on compatibility without infringing any claim the Government has to legal professional privilege. We see it as extremely important that Government bills introduced from the beginning of next Session are accompanied by much fuller explanations of their human rights impacts and justifications. Provided we obtain the information which we seek we are not concerned about the precise form in which these explanations are provided. However, we favour a free-standing Human Rights Memorandum over an expansion of the existing section in a Bill’s Explanatory Notes because of the restriction that Explanatory Notes cannot contain argumentative material, a restriction which would inhibit the inclusion of the Government’s full reasons for its view that any interference with a Convention right was justified in the sense of being necessary to meet a pressing social need and proportionate. We cannot see any reasons in principle why the existing ECHR Memoranda already compiled for the Legislative Programme Committee should not be made available to us, edited by a Government lawyer where necessary to protect the Government’s legal professional privilege. We look forward to the Lord Chancellor following up our concern about this issue as a matter of some urgency.

Myths and misperceptions about the HRA

Public perceptions

67. The DCA Review states that the HRA has been widely misunderstood by the public, and has also been misapplied by officials in a number of settings, both phenomena having been fuelled by a number of damaging myths about human rights which have taken root in the popular imagination. It concludes that deficiencies in training and guidance have led to an imbalance whereby too much attention has been paid to individual rights at the expense of the interests of the wider community.

68. The review addresses a number of myths and misperceptions, classifying them as:

59 Q70.

60 Q71.

- cases never brought, such as Dennis Nilsen's challenge under the HRA to a decision of his Prison Governor to deny him access to gay pornography, which was refused by the judge at the permission stage
- "urban myths", such as the belief that the HRA would prevent teachers putting plasters on children who had cut themselves
- rumours and impressions, such as claims by local authorities and local media that the HRA is to blame when planning decisions go against them in cases involving Gypsies and Travellers.

69. In our view, the Review both correctly identifies and fairly addresses a number of common public misperceptions about the Act. **However, as we made clear above, we are also of the view that Ministers must themselves take responsibility for ensuring that they do not create public misperceptions or reinforce them by the way in which they respond to newspaper headlines or campaigns which are themselves clearly founded on misunderstandings about the Act.**

70. We think it is worth pausing to consider why misunderstandings about the Human Rights Act continue to be widespread. A number of such misunderstandings exist. It is often assumed, for example, that the Human Rights Act introduces new rights which did not exist before, whereas in fact the Act gives easier and more direct access to the rights which people in the UK already enjoyed under the European Convention on Human Rights, which has been binding on the UK for more than 50 years. It is also widely assumed in public discourse that the rights contained in the European Convention on Human Rights are a foreign import, foisted on our legal system from without. Many even believe, quite wrongly, that it is a product of the European Union. In fact, the European Convention on Human Rights was largely drafted by British lawyers, and for the most part contains rights which are in any event recognised in our English common law. A further common misunderstanding is that the Human Rights Act gives the courts the power to strike down Acts of Parliament. In fact the Act carefully preserves the central place of Parliament in our democracy by giving courts only a limited power to declare statutes incompatible with human rights, leaving it to Parliament to decide whether and how to legislate in response.

71. Most damagingly, it seems to us that there clearly exists a widely held public perception that the Human Rights Act protects only the undeserving, such as criminals and terrorists, at the expense of the law-abiding majority. Views differ as to whether responsibility for this perception rests with certain sections of the media, for inciting hostility to a statute to which they are opposed for reasons of self-interest; with our politicians for failing to provide the leadership necessary to demonstrate the benefits or potential benefits of the Human Rights Act to everyone; with lawyers and judges for appearing to suppose that the meaning and content of human rights are for exclusively legal rather than political decision; or with public authorities for failing to embrace the change of culture which the Act intended.

72. It is not for us to determine who is responsible for this negative public perception. Whatever the reasons for it, we start from the premise that it exists and we are concerned that, unless efforts are made to address it, there is a real risk that the Human Rights Act,

and indeed the very language of human rights, will become permanently discredited in the eyes of the public. On our recent visit to Canada in connection with our inquiry into counter-terrorism policy and human rights, we were struck by the contrasting perception of Canadian citizens of their Charter of Rights and Freedoms: as a Justice of the Canadian Supreme Court described it, the Charter was seen by the Canadian people as their part of the Constitution. We hope that this shows that the current negative public perceptions of the Human Rights Act are not necessarily immutable.

Proactively debunking myths

73. We welcome the Review's proposal to take a proactive approach to debunking myths and misperceptions about the HRA, and we hope that the DCA's communications strategy will promote the positive realities about the Act as vigorously as it debunks the myths.

74. We note however that the Review is thin in providing clear examples of ways in which the Human Rights Act has beneficially affected the development and implementation of policy. Indeed, three out of the four examples given of the impact of the Act on the delivery of policy are negative (delay caused in a court about installation of a video camera for a magistrate with sight difficulties; over-cautious decisions being made by local authorities; the Anthony Rice case). We therefore asked the Lord Chancellor if he was able to provide any better evidence of the claims he made for the Act's beneficial effects. He gave three examples:

“A couple who have been married for 50 or 60 years: the local authority seeks to separate them into two care homes when they cannot look after themselves. The Human Rights Act says they cannot be separated. Secondly, the adult children of the woman who is fed her breakfast while sitting on a commode say that is contrary to her human rights and that mistreatment stops. Thirdly, the practice of the state in making anybody who wished to apply to be released from compulsory detention in a mental hospital wait eight weeks, not before the application could be heard, not because there was any reason for the eight-week delay but simply because it was convenient administratively for there being an eight-week delay. Those are three specific examples of the hugely beneficial effects of the Human Rights Act. Very many of the beneficial effects come from the fact that the state, whether it be central government departments or local authorities, now have to consider things in the context of, “Does what I do affect people to the minimum in terms of infringing their human rights?”, and human rights in the examples that I have given means people's basic entitlement to dignity.”⁶¹

75. In our view, the public's commitment to human rights, and to the Human Rights Act, depends on the wider dissemination of such positive examples of the difference the Human Rights Act is making in practice. Without a wider appreciation of that fact, we are as concerned as our predecessor Committee that the ambitious goal of achieving a human rights culture in the UK will not be achieved. We therefore draw together here a few examples of tangible benefits which have accrued to groups such as the elderly, the disabled, carers and council tenants as a result of court decisions under the Human Rights Act. We think it is important to point out that by addressing this question we are not

suggesting that the Human Rights Act does not have an important role to play in protecting the rights of unpopular minorities and vulnerable or marginalised groups, such as prisoners, those suspected of crime or terrorism, Gypsies and Travellers, gay people, transsexuals and others. We hope that our reports speak for themselves in demonstrating that in our view the Act benefits such vulnerable and often unpopular people or groups. But we also think that there is a danger that the ways in which the Act benefits ordinary people in their everyday lives, which is an important part of the overall picture of human rights protection, does not attract the same public attention, with the result that the public often perceive that only the undeserving benefit from the protection of the Act, at the expense of the deserving majority. We think that the legitimacy of our human rights machinery in the eyes of the public depends on this part of the picture also being known.

76. Older people living in residential care homes run by local authorities have secured much better protection against home closure decisions which involve risks to their life, health, dignity or psychological well-being, or which disproportionately interfere with their right to respect for their home. As a result of the Human Rights Act, not only must residents of such care homes for the elderly be properly consulted about proposed closures, but the authorities running such homes must conduct proper investigations into the likely impact of closure on the elderly people in the home and be able to demonstrate that they have carried out a proper balancing exercise between the human rights of the affected residents and the reasons relied on to justify closure.⁶²

77. Disabled people who were having difficulty accessing a wide range of care services because of the effect of restrictive policies on manual handling which prevented their being lifted manually, for example on and off the toilet, have benefited from a judicial reinterpretation of the Manual Handling Regulations to make them human rights compatible.⁶³ The court read the regulations in such a way as to make blanket “no lifting” policies unlawful, and to require providers of services to disabled people to draw up more carefully balanced policies which seek to ensure that the rights of disabled people to dignity and to participate in the life of their community are not unduly interfered with.

78. Carers of other family members have obtained recognition of the importance of receiving assistance in the home of the person receiving care, rather than taking them from their home when the carers are no longer able to provide for all their needs.⁶⁴ Foster carers who were family members of the child being cared for have also secured recognition of their entitlement to benefits from the local authority at the same rate as non-family foster carers.⁶⁵

79. Council tenants have established that there is a positive obligation on local authority landlords, arising from the state’s duty to ensure respect for the right to home and family life, to maintain the condition of their housing stock in such a condition that they do not let out properties which are unfit for human habitation or prejudicial to health.⁶⁶ A

62 See e.g. *R (Coughlan) v North East Devon HA* [2001] QB 213; *Cowl v Plymouth City Council* [2001] 1 WLR 803; and *Goldsmith v London Borough of Wandsworth* [2004] EWCA Civ 1170.

63 *A and B, X and Y v East Sussex County Council* [2003] EWHC 167 (Admin)

64 *Rachel Gunter (by her litigation friend and father Edwin Gunter) v South West Staffordshire Primary Care Trust* [2005] EWHC

65 *R (L and others) v Manchester City Council* [2002] 1 FLR 43.

66 *Lee v Leeds City Council* [2002] 1 WLR 1488.

disabled council tenant has successfully used the Act to establish that a local authority is under a positive obligation to enable her to lead as normal a family life as possible, and to secure her physical integrity and human dignity, by providing the specially adapted accommodation which she was assessed as requiring.⁶⁷

80. As these examples show, litigation under the Human Rights Act has already brought very tangible benefits to ordinary people in their everyday lives, but these very seldom attract public attention.

Possible amendment of the HRA

81. The DCA review rules out withdrawing from the ECHR or repealing the HRA. It does not, however, rule out the possibility of amending the HRA in future, e.g. by requiring particular regard to be paid to the right to life in Article 2 in the same way as sections 12 and 13 of the Act already require in relation to freedom of expression and freedom of religion. In fact, sections 12 and 13 of the Act have made no difference in practice to the way in which the courts have interpreted those Convention rights, since the courts are still required to reach a Convention-compatible conclusion, so it is doubtful whether this would achieve what the Government appears to intend. We therefore asked the Lord Chancellor why it would make any difference to impose a new duty to have special regard to the protection of the public.

82. The Lord Chancellor agreed that there was no evidence that sections 12 or 13 of the HRA have in any way affected the courts' construction of the Convention.⁶⁸ In his view the value of such a provision would only be to send a message to officials or people working for public authorities dealing in a particular area, rather than to change the meaning or effect of the Convention. He thought that if it would help in relation to officials getting the balance right, because the legislature was in effect underlining the importance of public protection in those sorts of cases, then it might be worth doing. He did not think it inappropriate to use legislation to "send messages" in this way,⁶⁹ but on current evidence he was not persuaded that it was necessary: "we would need some evidence that it was worth doing on that basis."⁷⁰

83. We welcome the fact that the Lord Chancellor does not, on current evidence, see the need to amend the HRA in the way contemplated in the DCA Review. However, we do not agree that it would be an appropriate use of legislative power to introduce a duty to have regard to public safety solely in order to "send a signal" to officials about the law which already applies. In our view, legislation should be used to change the law, not to send messages about it. If there is evidence that officials are getting the balance wrong and giving too little weight to public safety considerations when making human rights decisions, the proper way to deal with such a problem would in our view be by way of improved guidance and training to ensure that the misunderstanding of the law is rectified.

67 *R (Bernard) v Enfield London Borough Council* [2002] EWHC 2282 Admin.

68 Q57.

69 Q58.

70 Q57.

84. In any event, public safety is already at the heart of the Convention on Human Rights. The Convention recognises that a person's right to liberty can be taken away for a number of reasons, including their detention following conviction of a criminal offence, or pending their deportation or extradition.⁷¹ The qualified rights in the Convention, such as the right to respect for privacy and family life, can be subjected to proportionate limitations in the interests of national security, the prevention of disorder or crime, and the rights and freedoms of others.⁷² Moreover, the Convention, as interpreted by the European Court of Human Rights, imposes positive obligations on the State to take various steps to protect people against crime, including by having adequate laws to protect people against threats to their life and physical integrity,⁷³ and by taking active steps to protect individuals whose life or physical integrity may be at risk from the criminal acts of somebody else.⁷⁴

85. We are therefore clear that there is no need either to amend the HRA or introduce specific legislation to clarify that public safety comes first. Properly understood, the Convention, as given effect by the Human Rights Act, already makes that abundantly clear. Misunderstanding of the requirements of the Act, if it exists, would not therefore require any amendment of the Act itself, or any other clarificatory legislation. What would be required, if such misunderstanding were demonstrated to exist, would be better training and guidance.

The meaning of "public authority"

86. The DCA review refers to the Government's intervention in the case of *R (on the application of Johnson and others) v London Borough of Havering* to seek to clarify the law following the *Leonard Cheshire* case on the meaning of "public authority" in the Human Rights Act. That intervention failed to achieve the Government's objectives: the High Court upheld the approach in *Leonard Cheshire*, refused permission to "leapfrog" to the House of Lords, and refused permission to appeal to the Court of Appeal.

87. In light of the failure so far of the Government's strategy to intervene in an appropriate case, we asked the Lord Chancellor whether the Government will now consider primary legislation to clarify the interpretation of "public authority" under the HRA. He said:

"Possibly. My own inclination is that this is the sort of thing that could be dealt with on a case-by-case basis. Every time you try and define what is meant by "public authority" you simply, as it were, spawn more litigation. The fact that we did not get into the *London Borough of Havering* case does not necessarily mean that there will not be another case in which the thing is looked at. I just feel that legislating to try and solve the problem may not work at the end of the day. I think the right thing to do is to try and get the courts to come to a decision. It is the sort of thing, frustrating as it is, where dealing with it on a case-by-case basis might be the right way to deal with it."⁷⁵

71 Article 5 ECHR.

72 Articles 8(2), 9(2), 10(2) and 11(2) ECHR.

73 *X and Y v The Netherlands* (1986) 8 EHRR 235; *Oneryildiz v Turkey* (2004) 39 EHRR 12.

74 *Osman v UK* (2000) 29 EHRR 245; *Edwards v UK* (2002) 35 EHRR 19.

75 Q39.

88. He went on to say that the Government would be looking for another opportunity to intervene in an appropriate case.⁷⁶

89. We also asked the Lord Chancellor about concerns expressed in the DCA Review that a wider re-interpretation of “public authority” could “increase burdens on private landlords, divert resources from this sector and deter property owners from entering the market to provide temporary and longer term accommodation to those owed a duty by the local authority under housing legislation”. These are concerns we do not recall having heard expressed by the Government before in relation to this question. The Lord Chancellor explained that widening the definition of “public authority” might drive a whole range of private providers out of the particular market, for example for residential care, and so make it harder to provide residential care for people.⁷⁷ He distinguished between private prisons which, in his view, “obviously” should be public authorities, and other areas such as housing and residential care where he thought the issue was more difficult. Before extending the definition of “public authority” he thought that the effect on who comes into the market for providing the service and who does not should be looked at.⁷⁸

90. We are extremely disappointed by the Government’s new concern about driving private providers out of the market by widening the definition of “public authority”. This was not a concern which the Government had at the time of our predecessor Committee’s report on *The Meaning of Public Authority*.⁷⁹ In our view it represents a serious dilution of the Government’s consistent position since the enactment of the Human Rights Act, that private providers of services which a public authority would otherwise provide are performing a public function and should therefore be bound by the obligation to act compatibly with Convention rights in s. 6 of the HRA. The more the trend to outsourcing the provision of public services increases, the greater the importance of private providers of such services being bound by the obligation to act compatibly with Convention rights. We find the Government’s position on this question to be seriously at odds with its avowed intention elsewhere in the DCA Review and in the Lord Chancellor’s evidence to make a positive case for the Human Rights Act: the more public services are outsourced, the less will people be able to enforce their human rights directly against those providing care or other services for them.

91. In our work on the scrutiny of legislation we increasingly find it necessary to raise with the Government the question of whether a private or voluntary sector body which will be exercising a power formerly exercised by a public body will be considered by the Government to be a public authority for the purposes of the Act. We also find it increasingly unsatisfactory to have to rely on the Government’s view on that question when there is a very real risk, in light of the *Leonard Cheshire* case, that the courts will take a different view.

92. In our view, although we do not seek to discourage the Government from pursuing its strategy of intervening in an appropriate case, the failure of that strategy to date and

76 Q44.

77 Q40.

78 Q41.

79 Seventh Report of Session 2003-04, *The Meaning of Public Authority under the Human Rights Act*, HL Paper 39/HC 382

the growing urgency of the problem mean that it is now time to give serious consideration to whether or not to introduce legislation to reverse the effect of the Leonard Cheshire decision and to seek to give proper effect to Parliament's intention at the time of the passage of the HRA. We do not think it would be advisable to try to prescribe a comprehensive list of persons or bodies who are public authorities for the purposes of the Human Rights Act, and we recognise that seeking to define "public authority" generally would not be desirable because of the knock-on effect on other areas of law. However, we think there may not be insuperable obstacles to drafting a simple statutory formula which makes clear that any person or body providing goods, services or facilities to the public, pursuant to a contract with a public authority, is itself a public authority for the specific purposes of the HRA. This is an issue to which we expect to return before long.

The DCA's 2004 strategic review

93. Partly as a result of the previous JCHR's Sixth Report of Session 2002-03, in May 2004 Sir Hayden Phillips, the then Permanent Secretary of the DCA, initiated a "strategic review" of the Departments' arrangements for implementing the Human Rights Act. He asked Departments to review a number of issues, including

- the incorporation of human rights in departments' strategic business objectives
- scope for exploiting synergies between human rights and equality/diversity
- delivery of basic human rights training and awareness training
- arrangements for communications about human rights matters within Departments, with associated public bodies, and more widely
- arrangements for ensuring appropriate awareness and practice in subsidiary public bodies such as NDPBs
- Departments' general commitment to Convention rights as an integral part of public administration and policy-making.

94. Sir Hayden asked for initial responses from Departments by 1 July 2004. We have repeatedly asked the DCA about the fate of this review and when it would be published. However, no outcome of the strategic review has so far been announced. Giving oral evidence to us in January 2006, the then Human Rights Minister Harriet Harman said "we are conducting a strategic review to inform ourselves of the progress".

95. We asked the Lord Chancellor about the conclusions reached by the 2004 review, whether it would be published and how it has informed the DCA review in July of this year. The Lord Chancellor told us that the 2004 review was not intended to be published and will not be published.⁸⁰ It had been drawn upon to some extent in the July DCA Review, but their purposes were very different. The purpose of the 2004 review had been to work out how human rights had been given effect across central Government departments

and the response in 2004 indicated that some departments were on top of implementation while others were not really focused on it at all.

96. We were very surprised to learn that the 2004 review will not be published. We have been chasing the DCA for a very long time for the outcome of this review and we have never before been told that it was conducted on a confidential basis and that the outcome will not be published. We welcome the Lord Chancellor's promise to "think about" making a copy confidentially available to this Committee and we urge him to do so to inform the work we do in monitoring the Government's implementation of the HRA.

4 The Home Office Review

Background

97. The Home Office has yet to publish the outcome of its own review of the implementation of the HRA. However, there were reports on BBC Radio 4 in July that the Home Office’s review of the impact of the HRA on Home Office decision-making had identified some twenty-five examples of the HRA causing difficulties for decision-makers.

98. In the absence of any more detailed information about the Home Office review in the public domain, our Chair wrote to the Home Secretary on 16 October 2006 asking him to provide examples of the cases where the Act had caused difficulties for decision-makers.⁸¹ Baroness Scotland replied on the Home Secretary’s behalf on 26 October 2006.⁸² The letter informed us, for the first time, that the BBC reports in July referred to a leaked discussion document drafted to inform initial discussions in the Home Office’s review about areas where legislation, regulations and administrative rules, or the interpretation or administration of such legislation and regulations may be impeding decision-making. It was “a starting point for discussion and was not identifying conclusive examples of where the HRA had been found to impede decision-making.”

99. Baroness Scotland’s letter also informed us that the conclusions and recommendations of the Home Office’s Review of decision-making in the Criminal Justice, Immigration and Asylum Systems had been published in “the CJS Rebalancing Review”,⁸³ but she provided us with a summary of the findings of that review “to inform this JCHR inquiry”. The Home Office Review is described as “complementing” the wider review undertaken by the DCA.

The Review’s conclusions

100. The Home Office’s Review found that in general human rights legislation is perceived by the majority of agencies in the Criminal Justice System as being helpful by providing a useful framework in which to operate. Many of the impediments to policy which were currently being attributed to the HRA often existed before the HRA was enacted (such as the decision in *Chahal*) and, even if it had not been enacted, would probably still have occurred under the common law or the UK’s long-standing obligations under the ECHR. The Review therefore concludes that radical amendment of the HRA will have little benefit in improving the effective and efficient delivery of policy objectives or make them more in line with public expectations because the UK is committed to remain a signatory to the ECHR.

101. However, the Review also claims to have identified a “risk averse culture” across the Criminal Justice, Immigration and Asylum systems, based on “some evidence” of a “sometimes cautious interpretation” of the ECHR and the HRA:

81 Appendix 5.

82 Appendix 6.

83 *Rebalancing the Criminal Justice System*, July 2006, considered in chapter 5 below.

“There is some evidence from the agencies of an occasionally cautious interpretation of the Human Rights Act and particularly those Articles of the Convention that require the rights of the individual to be balanced with public safety. A culture needs to be developed that is less risk averse to ensure that misconceptions around human rights are not in any way preventing the effective delivery of policy. To an extent this may arise from a lack of central co-ordination and consistency on messages being circulated to agencies on the approach to adopt when balancing rights. However, there may also be a fear of litigation that may encourage those who develop guidance to be cautious in their interpretation.”

102. This caution, it is said, can “on occasion” impede the successful delivery of policy, and the Review finds that action is therefore required to address it. The action proposed includes the establishment of a “Scrutiny Panel” to scrutinise legislation, practice and training in frontline agencies to ensure a co-ordinated robust approach is taken, and setting up a website and advice service available to front line staff.

The evidential basis of the Home Office Review

103. The summary of the Review’s findings provide very few if any concrete examples of cautious interpretations of the HRA or the ECHR, or any other examples of risk aversion in decision-making which is impeding effective delivery of policy.

104. In her evidence to us Baroness Scotland confirmed that, contrary to the BBC reports in July there were not in fact 25 examples of the Human Rights Act impeding Home Office decision-making: that was simply wrong,⁸⁴ based on a leaked discussion document which identified 25 areas for discussion, not 25 conclusive examples of where the HRA had been found to impede decision-making. We asked Baroness Scotland to give us some examples of cautious interpretations of the HRA, or other evidence of the existence of a “risk-averse culture” across the various agencies. We regret that we did not find much enlightenment in her answer, which referred in general terms to decision-makers’ under-confidence, without giving any specific examples of overcautious interpretations.⁸⁵ Nor were any examples given of the many myths which it is said have been improperly absorbed by practitioners.⁸⁶

105. We welcome the Review’s proposals to take a series of very practical steps (new guidelines, a Scrutiny Panel, a website and a helpline) to help practitioners on the ground better understand how they should implement the Act. On the evidence we have seen to date, however, we doubt whether it can credibly be said that there is “a culture of risk aversion” across the agencies dealing with criminal justice, immigration and asylum. The lack of evidence of actual examples of such cautious interpretations and the fact that the Review itself describes them as at most “occasional” suggests that the incidence of such overcautious approaches falls far short of being sufficient to amount to a culture of risk aversion.

84 Q30.

85 Q76.

86 Q25.

Myth-busting

106. The Home Office Review also found that media reporting of human rights issues, particularly by the tabloid press, is not always accurate or complete, and the recommendation that the Home Office should, working with the DCA, develop a proactive and reactive approach to myth-busting, involving immediate rebuttals of future news stories that misrepresent the Act coupled with efforts to disseminate positive messages around the Act to the wider public. **We welcome this conclusion.**

Publication of the Review's findings

107. The Home Office's Review, unlike the DCA's, remains unpublished. Baroness Scotland told us that the Review was an internal review and that there are no plans to publish any more than the *Rebalancing the Criminal Justice System* paper which seeks to implement the conclusions of the review, but that she was willing to think again about publishing the full Review.⁸⁷ In her letter dated 6 November 2006, however, Baroness Scotland said that after careful consideration she had decided that only the summary should be made publicly available as part of the evidence to our inquiry.⁸⁸

108. **In our view there are strong reasons for publishing the Review itself: first, to put into the public domain the evidential basis for its conclusion that there is a culture of risk aversion throughout the criminal justice, immigration and asylum systems, to allow that claim to be tested; and second, to rebut the BBC reports in July suggesting that the Home Office's internal review of decision-making had identified some twenty-five examples of the HRA impeding decision-making. We regard this as a good example of just the sort of rebuttal envisaged by the Review itself.**

87 Qq 25 and 29.

88 Appendix 6

5 Rebalancing the Criminal Justice System

Background

109. The proposals for implementing the conclusions and recommendations from the Home Office’s Review of decision-making in the Criminal Justice, Immigration and Asylum Systems were published on 20 July 2006 in the form of its Report entitled *Rebalancing the Criminal Justice System in favour of the law-abiding majority*. This Report contains the Government’s analysis of why in its view the criminal justice system needs “rebalancing in favour of the victim and the law-abiding majority”, and sets out the Government’s plans for doing so. Some of the proposals are clear proposals for action, together with a timescale for implementing them; others are proposals on which the Government intends to consult before deciding whether to implement them. In this part of our report we deal with those aspects of the proposals which in our view have significant human rights implications.

Perception or reality? The need for evidence

110. The premise of many of the Government’s proposals in its *Rebalancing* paper is that the Human Rights Act has led to public safety being treated as being of less importance than the human rights of terrorists or criminals, or at least is perceived by the public to have had this result. There is assumed to be, or perceived to be, an imbalance between the right of the public to be safe and the rights of individuals, and on the basis of this assumption or perception there is asserted a need to redress this imbalance. The Government does not always make clear whether the justification for its proposals for change is that public safety is *actually* being prejudiced, or that the public *perceives* that its safety is being prejudiced so that action is required to provide reassurance.

111. When we asked Baroness Scotland whether she thought that the criminal justice system is currently biased against the law abiding majority, she said “The perception is that it is.”⁸⁹ However, when asked whether she saw it as a perceived rather than an actual imbalance of the system, she said it was both, because traditionally the reality was that victims of crime were not well supported in the criminal process.⁹⁰ She made clear, however, that she was not suggesting that there is evidence that public safety is being prejudiced through some sort of imbalance, or that the rights of criminals and terrorists are being prioritised over the rights of victims.⁹¹ It was more a case of maintaining public confidence in the criminal justice system. **We welcome the fact that the Government does not appear to be asserting in this paper that there is an actual imbalance in the criminal justice system in the sense that public safety is in fact being prejudiced because the rights of offenders are being prioritised over the rights of victims.**

89 Q73.

90 Q74.

91 Q75.

The rights of victims

112. The *Rebalancing* Report proposes to enhance the involvement of victims in the criminal justice system, to ensure that victims' needs are at the heart of what the criminal justice system does. It makes a number of specific proposals to this end.

113. The rights of victims of crime are increasingly recognised by international human rights law. The case-law of the ECHR establishes that the effective protection of a number of Convention rights, including the right to life, the right not to be subjected to inhuman or degrading treatment, and the right to physical integrity, require States to provide the protection of the criminal law against violation of those rights by other private parties. The case-law also establishes that victims or their families are entitled to participate in the investigations required by Articles 2 and 3 ECHR to the extent necessary to protect their interests.

114. In addition, there now exist certain "soft law" standards concerning the rights of victims of crime. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), for example, recognising that the rights of victims of crime have historically not been adequately recognised, and that victims may suffer hardship when assisting in the prosecution of offenders, set out a number of basic principles to guide States when deciding how to protect the rights of victims of crime. These include, for example, ensuring that victims are treated with compassion and respect for their dignity, have access to judicial and administrative mechanisms, are informed of the progress and disposition of their cases, can present their views at appropriate stages of the proceedings where their personal interests are affected, have their privacy and safety adequately protected, and receive proper assistance and where appropriate restitution or compensation.

115. The Commonwealth *Guidelines for the Treatment of Victims of Crime* (2002) provide similar best practice guidance on the legal framework which should govern the treatment of victims of crime. In recognition of the growing importance of victims' rights in international human rights law, the draft Bill of Rights for Northern Ireland, drafted by the Northern Ireland Human Rights Commission after extensive public consultation, includes in Section 10 express provision for the rights of victims, drawing largely on the soft law standards outlined above.

116. Many of the specific proposals concerning victims in the *Rebalancing* paper are implementations of these emerging international standards and, as such, enhance the UK's compliance with human rights law. However, it is important to note that the relevant international standards all contain the important qualification that the rights of victims shall not be secured at the expense of the well established rights of suspects or offenders such as the right to a fair trial and the presumption of innocence. The language of the *Rebalancing* paper, which describes the need to prioritise the rights of victims over those of offenders, often seems to be at odds with this important qualification. Some substantive proposals also appear to risk protecting victims at the cost of possible interference with the right to a fair trial, for example the proposal to increase use of live television links for victims rather than live evidence in court, which may raise questions of compatibility with the right of the accused to confront and cross-examine those giving evidence against them.

While the administration of justice should command public confidence, justice should

be above placating the media and public opinion. We therefore welcome the acceptance by Baroness Scotland that rebalancing must be not in a way that is unfair or unjust to the offender but better represents and supports victims.⁹²

Chahal

117. The *Chahal* case is frequently referred to by the Government in these documents as the best example of how the ECHR hampers the Government's efforts to counter terrorism and frustrates deportations of those who threaten public safety. In our view there are three important points to make about the Government's position in relation to this important case.

118. First, in its *Rebalancing* paper,⁹³ the Government states that the Court in *Chahal* found "that the UK Government could not consider the protection of the public as a balancing factor when arguing the case for the deportation of a dangerous person." This is not an accurate description of the effect of the *Chahal*. In fact, the decision in *Chahal* does not prevent the Government in all cases from taking into account the threat to public safety or to national security posed by a particular individual when deciding whether or not to deport him or her. The Government is allowed to consider the protection of the public when considering whether to deport a dangerous person, and frequently does so. The only set of circumstances in which it cannot do so because of the *Chahal* judgment is where it has first been established as a matter of fact that the person concerned faces a real risk of death or torture or inhuman or degrading treatment on their return. That will only ever be a relatively small number of cases, as the Lord Chancellor acknowledged in his evidence.

119. Second, in her letter and her evidence to us Baroness Scotland has somewhat refined the purpose of the Government's intervention in the *Ramzy* case. The Minister says that the UK's position in relation to death or torture are clear: it would never deport or extradite a person where there are substantial grounds for believing that they face a real risk of death or torture. It is in relation to inhuman or degrading treatment that the Government now says that it wishes to be able to balance the risk to national security on the one hand against the risk to the individual of inhuman or degrading treatment on the other. Inhuman or degrading treatment, the Government argues, is a much broader bracket than torture, and the Government says that it is wholly unreasonable not to allow public safety considerations to be taken into account even where Article 3 ECHR is engaged because of a real risk of inhuman or degrading treatment.

120. Third, even if the Government is prepared to countenance deporting somebody to a real risk of inhuman or degrading treatment, which it appears prepared to do, it would presumably only be prepared to do so in a case where the evidence of the individual's threat to national security is overwhelming. In such a case there is likely to be sufficient evidence to support a prosecution for one of the many criminal offences concerning terrorism now on the statute book.

121. The Committee has expressed its concerns in the past about the Government's attempt to overturn the Chahal case in the European Court of Human Rights, and

92 Q73.

93 *Rebalancing the Criminal Justice System*, 20 July 2006, 2.13.

nothing in the Government's refinement of its position allays those concerns. In our view, attempting to distinguish between inhuman and degrading treatment on the one hand and torture on the other is unlikely to find favour with the European Court of Human Rights. Given that ill-treatment has to reach a certain minimum level of severity in order to qualify even as inhuman or degrading treatment within the scope of Article 3, and that inhuman or degrading treatment may easily cross the line into torture in the sorts of places where it is practised, we also think that the Government's argument is a deeply unattractive one which can only damage the UK's standing amongst countries which pride themselves on their respect for human rights. In any event, we find it difficult to see how the Government's argument can help resolve its central problem of how to deal with those individuals whom it suspects of involvement in international terrorism but who cannot be returned to their country of origin because of the ill-treatment they will suffer there. Inhuman or degrading treatment at the lower end of the Article 3 spectrum is not the sort of treatment of which those individuals are likely to be at risk. They are more likely to face a real risk of either torture or death.

Race discrimination in the criminal justice system

122. The *Rebalancing* paper recognises that certain ethnic groups are disproportionately represented amongst those being stopped and searched, arrested, convicted of a serious crime, and imprisoned, and that this raises a question as to whether the criminal justice system contains any built-in discrimination on racial grounds. It also recognises that one of the current obstacles to addressing this problem is that the statistics currently collected do not tell us enough about where in the system it occurs, or the extent to which it is due to direct or indirect discrimination. The Government proposes to "implement a fundamental reform of the current ethnicity statistics collected under s. 95 of the Criminal Justice Act 1991."

123. We welcome the Government's recognition that certain ethnic groups are disproportionately represented amongst those being stopped and searched, arrested, convicted of a serious crime, and imprisoned, and that this raises a question as to whether the criminal justice system contains any built-in discrimination on racial grounds. We look forward to receiving more details about the "fundamental reform" in data collection which is envisaged, and hope that consideration will also be given to whether current training and guidance for front-line officers is adequate in this respect.

Diversion from custody

124. In the *Rebalancing* paper the Government recognises that too many non-dangerous people with mental health problems continue to be imprisoned, and accepts the need to explore how they can be more effectively diverted into appropriate treatments at an early stage in the criminal justice process. This was repeated by the Home Secretary in his statement to the House on developments in the prison population on 9 October 2006. This is a disturbing issue and coincides with one of the previous Committee's principal recommendations in its report on Deaths in Custody.

125. We welcome the Government's recognition that too many non-dangerous people with mental health problems continue to be imprisoned and await receipt at an early date of the Government's estimate of the numbers involved.

6 Reforming the IND

Background

126. On 25 July 2006 the Home Secretary published his proposals to reform the Immigration and Nationality Directorate: *Fair, effective, transparent and trusted – Rebuilding confidence in our immigration system*. In this part of our report we consider some of the most significant human rights issues raised by the Government's outline proposals.

127. We wrote to the Home Secretary on 11 May 2006, to make him aware of our preliminary concern that the intention to introduce a presumption that various categories of foreign criminals will be deported, including those convicted of imprisonable offences even if not imprisoned, was likely to raise serious human rights issues. We asked for a memorandum of evidence with the pending consultation paper, explaining why any interference with Convention rights is justified.

Presumption of deportation for foreign nationals

128. In the *Reforming the IND* paper it is proposed that the Government will amend the law to introduce a legal presumption that foreign national prisoners will be deported. The Home Office did not, however, submit a memorandum to us as we had requested when it brought forward these proposals.

129. We are concerned by the Prime Minister's announcement of an automatic presumption of deportation for foreign prisoners, irrespective of any claim that they may have that the country to which they are returning may not be safe, and his suggestion that the Government will consider legislating to amend the Human Rights Act, if necessary, to ensure that such an automatic presumption applies. If the Prime Minister means that the presumption of deportation will apply even where the person faces a real risk of torture or other inhuman or degrading treatment, and that the Human Rights Act will be amended to achieve this, this will inevitably lead to violations of Article 3 ECHR by the UK. We would be concerned if that were what the Prime Minister intended, just as we would if, in the case of the Afghani nationals, he were to advocate returning them notwithstanding that the courts have found that they would be exposed to a real risk of torture or death at the hands of the Taliban.

130. We acknowledge that the Government is currently intervening in a case before the European Court of Human Rights to attempt to persuade the Court to overturn *Chahal* so that national security considerations can be balanced against the risk of torture. In our recent report on the UN Convention Against Torture, we expressed our concern that this intervention undermines the absolute prohibition on torture, by sending the wrong signal that deportation to face a risk of torture can sometimes be justified.⁹⁴ We also expressed the view that the Government was unlikely to succeed in persuading the Court of Human Rights to overturn its judgment in *Chahal*.

⁹⁴ Nineteenth Report of 2005-06, *The UN Convention against Torture (UNCAT)*, HL Paper 185-I/HC 701-I, at para. 26.

131. We would point out, however, that even if the Government were successful in that intervention, it would only cover national security, not public safety. **In our recent report on UNCAT, we also expressed concern that any dilution of the absolute prohibition on torture in cases involving national security considerations will have an impact beyond that category of cases, and lead to a further erosion of the absolute nature of the right to freedom from torture, in cases where other pressing policy considerations apply.⁹⁵ In our view the Prime Minister’s statement demonstrates this danger, because it raises the prospect of deportation of a convicted criminal to a country where there is a real risk of treatment contrary to Article 3 ECHR on grounds of public safety rather than national security.**

Strengthening the link between criminality and deportation

132. In his statement to the House of Commons on developments in the prison population over the summer recess, the Home Secretary said that IND has been taking a robust approach to the deportation of EEA nationals, which has been defeated consistently in the courts, and that the Government will be changing the law “to strengthen the link between criminality and deportation”. Baroness Scotland has undertaken to provide us with overall figures for appeal outcomes between April and October 2006, the nationalities involved and an analysis of the reasons why the appeals of some EEA nationals were allowed.⁹⁶

133. Legally, there is little, if any scope for changing the approach to the deportation of EU and EEA nationals, which is governed by EU law (Council Directive 2004/38/EC) and implementing Regulations (The Immigration (EEA) Regulations 2006), which impose a high threshold on the removal of EU and EEA nationals. Baroness Scotland accepted that there is less scope to change the legislation and indicated that the presumptions planned for the new legislation will focus mainly on non-EEA nationals.⁹⁷ **In light of this, we are concerned that the Home Secretary may be blaming the courts for something which he is powerless to do anything about because of the provisions of EU law, thereby helping to perpetuate the myth that it is the courts which are responsible for frustrating the Government’s wish to deport more foreign nationals.**

134. Even in relation to non-EU and non-EEA nationals, Article 8 ECHR also imposes a minimum requirement which prevents deportation of offenders where it is disproportionate having regard to matters such as the seriousness of their offence, their propensity to re-offend, the offender’s age, their length of residence in the UK, their degree of social and cultural integration in the UK and the extent of their links with their country of origin. Baroness Scotland confirmed that the Government will not be seeking to deport anyone in contravention of Article 8.⁹⁸

95 Ibid at para. 25. Human Rights Watch pointed out in oral evidence to that inquiry that the implications of a revision of *Chahal* would be likely to be widely felt, beyond cases involving questions of national security, and extending to deportations of non-nationals in general: Q37

96 Appendix 7

97 Q96.

98 Q99.

Racial profiling and risk assessment by IND

135. The *Reforming the IND* paper proposes to combine rigorous risk assessment with identity management to enable the Home Office to target activity on high risk routes and traveller profiles.

136. In the *Roma Rights* case, the House of Lords found the Home Office's policy of targeting Roma for pre-entry clearance at Prague airport to be inherently racially discriminatory and therefore unlawful. The proposal in the Government's paper raises the question of whether race or ethnicity will form any part of the traveller profiles envisaged.

137. We asked Baroness Scotland what steps the Government has taken in response to the decision of the House of Lords in the *Roma Rights* case to ensure that any future targeting of IND activity on high risk routes and traveller profiles will not be inherently racially discriminatory and therefore unlawful. She replied that there was no racial profiling in making such decisions, only lawful acting on data "where there is an evidence base for a certain nationality".⁹⁹

7 Building a human rights culture

The Human Rights Act and a “human rights culture”

138. The events leading up to the DCA and Home Office reviews of the HRA, and some of the proposals which have come out of them, have underlined for us the work which still remains to be done in order to build a true human rights culture in this country.

139. In its 2003 Report on The Case for a Human Rights Commission, our predecessor Committee made a number of observations about the nature of the Human Rights Act which we find equally compelling today. It reminded Parliament that the stated aspiration of the Government at the time the Act was introduced was that the Human Rights Act would be more than a merely technical instrument, creating domestic legal remedies for breaches of the European Convention on Human Rights, but would also bring about a gradual but fundamental transformation of the relationship between individuals and the state, a shift towards “a culture of human rights”. We are of course aware that the aspiration of building a “human rights culture” in the UK has its critics, particularly those who consider that such a culture is necessarily at odds with a culture of responsibility.

140. Our predecessor Committee anticipated this critique of the desirability of a human rights culture as a goal. It said that by a culture of human rights it meant, not one that is concerned with rights to the neglect of duties and responsibilities, but rather one that fosters basic respect for human rights and creates a climate in which such respect becomes an integral part of our way of life and a reference point for our dealing with public authorities and each other.¹⁰⁰ Properly understood as a culture in which there is a widely shared sense of entitlement to human rights, of personal responsibility and of respect for the rights of others, and in which all our institutional policies and practices are influenced by these ideas, the Committee considered that a culture of respect for human rights was a goal worth striving for.¹⁰¹ **We agree and we consider that the events of the last six months have demonstrated the need for renewed urgency in this task.**

141. However, the Committee rightly warned that this laudable goal would not be realised if the protection of human rights were regarded as the exclusive responsibility of the courts.¹⁰² Litigation is an essential tool to protect the rights of the individual or groups, but is not an effective means of developing a culture of human rights.¹⁰³ The building of a human rights culture over time would depend not just on courts awarding remedies for violations of individuals’ rights, but on decision-makers in all public services internalising the requirements of human rights law, integrating those standards into their policy and decision-making processes, and ensuring that the delivery of public services in all fields is fully informed by human rights considerations. We endorse these important observations about the nature of the Human Rights Act and what is required to bring about the cultural transformation which was envisaged at the time the Act was passed. **We see the DCA Review as an important milestone in this bringing about of a human rights culture. We**

100 Sixth Report of Session 2002-03, *The Case for a Human Rights Commission*, HL Paper 67-I/HC 489-I, at para. 2.

101 *Ibid.* at para. 9.

102 *Ibid.* para. 19.

103 *Ibid.* para. 238.

emphasise the importance of consistent positive leadership by Ministers towards this objective.

142. Analogies can be made with the legislation on race and sex discrimination introduced in the 1970s. That legislation provided an important spur for changes in public perceptions about the acceptability of discriminatory behaviour, but legal enforcement of it was only one, albeit important, aspect of effecting long term social transformation. In our view, shifts in public perception about the acceptability of sex and race discrimination have been at least as important in bringing about social and cultural change as the law itself. The challenge for those who would wish to see the firm and enduring establishment of a culture of human rights is to build on the legal basis provided by the Human Rights Act in such a way as to take concepts of human rights beyond the legal sphere and into the currency of everyday life.

143. Rt Hon Harriet Harman QC MP, the Minister of State at the Department for Constitutional Affairs, expressed such an objective very clearly when she gave evidence to us in January on the Government's human rights policy. She told us that in its third term in office the Government was intending to:

take the human rights issue beyond policymakers, lawyers and the courts. The acknowledgement of and respect for human rights should not be just in police stations and prisons but also in care homes, in hospitals, social services departments. Human rights protection is important for all who are vulnerable, not just where they are so by virtue of being a suspect in a police station or a criminal in prison but also if they are vulnerable because they are elderly or because they are elderly in a care home.¹⁰⁴

These commendable objectives appear to us to be consistent with the achievement of a successful culture of human rights as envisaged by the previous JCHR.

144. Our predecessor Committee concluded that much of the cause of the public's ignorance about what human rights can do for ordinary people in their everyday lives was due to the absence of an independent voice to promote and help protect human rights in the UK.¹⁰⁵ Its recommendation that there be a human rights commission has now of course been accepted and implemented by the Equality Act 2005. Until the new Commission comes into being in 2007, however, the problems caused by the absence of a Commission, identified by our predecessor Committee, remain.

The need for evidence

145. As we have said above, court judgments only tell a very small part of the story. We are all aware anecdotally of a number of examples of public authorities changing their policies in order to make them human rights compatible, or reversing a decision in order to avoid a possible legal challenge on Human Rights Act grounds. There have been a number of press reports, for example, about an elderly couple who had lived together for their entire 60 years of married life, relying on the Human Rights Act to persuade their local authority

104 Oral evidence on Human Rights Policy taken on Monday 16 January 2006, HL Paper 143/HC 830-I.

105 Sixth Report of Session 2002-03, op. cit., para. 240.

that they should not be separated but should both be admitted to a nursing home at the same time. There are other reports of important guidance being circulated which is designed to achieve greater human rights compatibility in the delivery of public services, for example, to hospitals concerning how to ensure that older patients are treated with dignity and respect.

146. But we are also keenly aware that there is very little evidence publicly available of such examples of the beneficial influence of the Act across the range of public authorities to which it principally applies. Certainly research commissioned by the previous JCHR and published in March 2003 as part of its inquiry into the case for a human rights commission seemed to show that the Act had not at that time, just over two years after it came into force, had sufficient practical impact on delivery of crucial public services to substantiate claims that it had brought about a culture of human rights.¹⁰⁶ Since that time, some further important research has been undertaken to examine the extent to which the Act has had an impact on the lives of ordinary people.¹⁰⁷ **However, with the establishment of the Commission for Equality and Human Rights impending, as well as the tenth anniversary of the passing of the Act, there remain fundamental and unresolved questions about the benefits brought by the Act, and the extent to which a positive culture of human rights is developing throughout British society as a whole. These are crucial questions which we consider will continue to exercise us over the range of our work during the remainder of this Parliament.**

106 *Human Rights and Public Authorities*, Jeremy Croft, January 2003, Appendix 70 to the Sixth Report of 2002-03, Vol. II.

107 See for example *Human Rights in the Community*, Rights as agents of C. Harvey, Editor, Change, Hart Publishing, 2005.

Formal Minutes

Tuesday 7 November 2006

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Judd	Mr Douglas Carswell MP
Lord Lester of Herne Hill	Mary Creagh MP
Baroness Stern	Nia Griffith MP
	Dr Evan Harris MP
	Mr Richard Shepherd MP

Draft Report [The Human Rights Act: the DCA and Home Office Reviews], proposed by the Chairman, brought up and read.

Draft Report [Why the Human Rights Act must be scrapped], proposed by Mr Douglas Carswell, brought up and read, as follows:

“Summary

The Joint Committee on Human Rights calls for the repeal of the Human Rights Act and recommends to the Government that the UK withdraw from the European Convention on Human Rights.

The Human Rights Act was passed with some degree of cross-party support. Such support can no longer credibly be regarded as cross-party, and there is in no sense an effective consensus.

Thanks to the Human Rights Act, UK courts have adjudicated with growing frequency on the basis of the ECHR to the point where they are beginning to actively prevent our democratically elected government from responding effectively to serious challenges that threaten our country.

However, it is not enough to simply repeal the Human Rights Act and unincorporate the ECHR from UK law. Rather, the UK must curtail the ability of the unelected and unaccountable Courts to adjudicate on the basis of the ECHR, which will necessarily mean withdrawing from the ECHR, not merely un-incorporating the ECHR from UK law.

We have assessed three recent cases of public policy failure:

- **failure to deport nine Afghan hijackers**
- **granting Anthony Rice freedom to commit murder**
- **failure to failure to deport foreign criminals**

Having considered the charge that it is the Human Rights Act that accounts for these instances of public policy failure, we conclude that it is not simple the Act that is at fault, but the ECHR and the courts' willingness to adjudicate on the basis of it. Not only should the Act be repealed, but the UK should withdraw from the ECHR.

It would, therefore, be largely meaningless to repeal the Human Rights Act without also withdrawing from the ECHR. Repealing the Act without withdrawing from the ECHR would limit the scope for the courts to refer to the ECHR but would not eliminate it as witnessed by the process of "creeping incorporation" which was taking place prior to the Act coming into force.

The Human Rights Act should be regarded not as a measure that empowers individuals against the State, but rather one that hands powers to judges that should rightfully rest with accountable parliamentarians through the ballot box. Moreover, we note with concern that the Human Rights Act, while specifically not giving judges *de jure* powers to strike down Acts of Parliament, creates the scope for this to happen *de facto*.

There is a growing public perception that the Human Rights Act protects only the undeserving, such as criminals and terrorists, at the expense of the law abiding. We believe that this view is largely justified.

We would welcome a more detailed inquiry that would assess the extent to which individual liberty could better be protected by a second Bill of Rights than is currently the case with the Human Rights Act and the ECHR.

We believe that the Human Rights Act and the ECHR are creating the conditions for increased tension between Parliament and the judiciary. As a consequence of this, the Human Rights Act - far from guaranteeing the independence of the judiciary - in fact threatens an independence that has been in effect since the Act of Settlement. This concerns us greatly, and we believe makes a review of the process of making judicial appointments both inevitable and desirable.

Apologists for current Human Rights legislation have argued that in many cases it is not the law as it stands that is to blame for public policy failure, but misunderstandings and the law's misapplication. While such misunderstandings have undoubtedly arisen, this is not a valid excuse. Any law must be assessed on the basis of how it operates in practice. When it comes to our deeply flawed Human Rights legislation, even highly trained lawyers have got it seriously wrong, as the House of Lords indicated the Court of Appeal had done in the Begum Moslem school uniform case.

Introduction

Background

1. Public misgivings about the Human Rights Act have grown, and there have been calls for the Act's repeal. Even the political establishment in Westminster has started to acknowledge the mood of public hostility towards what is often now regarded as a "Criminal Rights Act", and both the Government and HM Opposition have begun to consider radically amending or repealing the Act. It is not enough to dismiss growing public misgivings on the basis that they are merely the consequence of misinformation and media inaccuracies. Rather than initiating a public relations programme of "Myth Busting", the government needs to prepare to dismantle the Human Rights Act.

2. The Joint Committee on Human Rights recognises this mood of justifiable cynicism about so-called human rights legislation, and now calls for the repeal of the Human Rights Act.

3. The catalyst for our inquiry is the fact that the Prime Minister has asked the Home Secretary to "consider whether primary legislation should be introduced to address the issue of court rulings which overrule the Government in a way that is inconsistent with other EU countries' interpretation of the European Convention on Human Rights".¹⁰⁸

4. In light of this need to consider such primary legislation, rather than confine ourselves to merely calling for the repeal of the Human Rights Act, **we also recommend to the Government that the UK go further and withdraw from the European Convention on Human Rights.**

5. As parliamentarians committed to defending the rights of the individual against the State, we believe that human rights can best be protected through a second domestic Bill of Rights. Moreover, we would like to see the rights of individuals protected through a system which reverses the present trends of growing political activism by some of the judiciary and increasing conflict between the courts and elected politicians.

1. The break down of consensus

6. The Human Rights Act was passed with some degree of cross-party support. Such support can no longer credibly be regarded as cross-party, and there is in no sense an effective consensus. This committee has failed to establish a sufficiently overlapping consensus on the importance and meaning of human rights, and about the institutional machinery necessary for their effective protection. We, therefore, recognise that as a committee we are not best placed, and perhaps lack the direct incentives, to consider the really radical alternatives to the existing Human Rights legislation that a disenfranchised and alienated public increasingly demands.

7. Indeed, there are those on this committee who were surprised that the committee has undertaken this inquiry in the way that it has. While reassessing the case for the Human

¹⁰⁸ Letter dated May 2006 from the Prime Minister to the Home Secretary

Rights Act is overdue, we are surprised by the sudden announcement of such a short inquiry that lacked either comprehensive terms of reference, or an array of witnesses that might give us sufficient perspective.

2. The case for repealing the Human Rights Act and withdrawing from the ECHR

8. The Human Rights Act gave the UK courts the ability to adjudicate directly on the basis of the ECHR. Prior to the incorporation of the ECHR into UK law,¹⁰⁹ the domestic courts only referred to the ECHR in limited contexts. Before the Act, the Strasbourg Court alone could directly adjudicate on the basis of the ECHR, normally when dealing with individual petitions. This was the only route by which an individual could directly seek to enforce the ECHR.

9. Since then, UK courts have adjudicated with growing frequency on the basis of the ECHR. In doing so, they have begun to actively prevent our democratically elected government from responding effectively to serious challenges that threaten our country. We believe that any responsible government, of whatever political persuasion, would need to be able to respond effectively to such challenges.

10. In order to enable our elected government to get on with the business of governing, it is not enough to simply repeal the Human Rights Act and un-incorporate the ECHR from UK law. Rather, the UK must curtail the ability of the unelected and unaccountable Courts to adjudicate on the basis of the ECHR. This must necessarily mean withdrawing from the ECHR, not merely un-incorporating the ECHR from UK law.

11. Indeed, it would be largely meaningless to repeal the Human Rights Act without also withdrawing from the ECHR. By incorporating the ECHR into UK law, the Act merely eases the ability of the Courts to cite the ECHR and refer to it in their rulings¹¹⁰.

12. Repealing the Act without withdrawing from the ECHR would limit the scope for the courts to refer to the ECHR but would not eliminate it as witnessed by the process of “creeping incorporation” which was taking place prior to the Act coming into force. More importantly, remaining in the ECHR would leave the UK exposed to rulings of the Strasbourg Court. Some of the most serious problems with the ECHR arise from the judicial activism of the Strasbourg Court which has devised doctrines which are not present in the wording of the Convention itself and which would have surprised the signatory states of the Convention at the time when it was drafted in the 1950s.

13. The Human Rights Act has conferred on UK judges powers to take what are in effect political decisions. Using the Act, the judiciary has acted not merely undemocratically, but anti-democratically, in effect imposing public policies that have been specifically rejected through the democratic process at the ballot box.

109 We use the term “incorporation” in this report for purposes of simplicity though we recognize that there is a debate over the extent to which the Human Rights Act can be said to have incorporated Convention rights rather than having given further effect to them in the UK context.

110 In the 21 years between 1975 and 1996, the ECHR had been considered in 316 cases and affected the outcome, reasoning or procedure in 16 of them. In the 18 months between October 2000 (when the Act came into force), and April 2002, the ECHR was substantively considered in 431 cases in the higher courts, and affected the outcome, reasoning and procedure in 318.

14. There are three recent cases where the Human Rights Act and the ECHR on which it is built account for public policy failure. As we shall see, however, it is not merely the Act that is at fault, so much as the ECHR itself:

- i. Failure to deport nine Afghan hijackers: the High Court decided that nine people from Afghanistan who arrived in the UK after hijacking an aeroplane could not be deported.
- ii. Granting Anthony Rice freedom to commit murder: Human rights aspects of managing offenders undermines public protection, according to a report by HM chief Inspector of Probation into the case of Anthony Rice who murdered Naomi Bryant following his release from prison.
- iii. Failure to deport foreign criminals: Human Rights and the judiciary's tendency to adjudicate on the basis of the European Human Rights charter, rather than primary legislation (which pre-dates the Act), has prevented the government from deporting foreign prisoners.

15. Apologists for the Human Rights Act would undoubtedly try to make the case – somewhat disingenuously – that the Act itself is not *per se* at fault. This is only correct in that it is the ECHR, with or without its incorporation into UK law, that explains why the nine Afghan hijackers were not removed, and why foreign prisoners were never deported.

i. Failure to deport nine Afghan hijackers

16. On May 10 2006, the High Court overturned the Home Secretary's decision that it was not appropriate to grant discretionary leave to enter the UK to nine Afghan nationals who arrived in the UK on 7th February 2000, having supposedly hijacked an aircraft that was apparently on an internal flight in Afghanistan. The High Court ordered the Home Secretary to grant them discretionary leave to enter for a period of six months.

17. The Prime Minister responded to the judgement on the same day, saying “We can't have a situation in which people who hijack a plane, we're not able to deport back to their country. It's not an abuse of justice for us to order their deportation, it's an abuse of common sense frankly to be in a position where we can't do this”.

18. The Government's reaction to the High Court judgement suggests that the High Court had somehow incorrectly interpreted human rights law. The implication seemed to be that the Human Rights Act was at fault, or at least being misapplied. This was not the case; it was the ECHR, as much as the Act that actually incorporated the ECHR into UK law that was responsible for the failure to remove the nine supposed hijackers.

19. The decision that the Afghan nationals could not be returned to Afghanistan was a decision taken, not by the High Court on 10th May 2006, but by a panel of three Immigration Adjudicators on 8th June 2004. The Adjudicators ruled that the Afghans be allowed to remain in the UK under Article 3 of the ECHR¹¹¹.

20. The Adjudicators' decision was not in fact made on the basis of any disputed interpretation of the Human Rights Act itself. Rather it was the interpretation of the

¹¹¹ On May 10 2006, the High Court was in fact deciding that the Home Secretary had acted unlawfully by deliberately delaying giving effect to the Adjudicators' decision.

ECHR by the Strasbourg Court which was responsible, since the hijackers were correctly refused asylum by the Adjudicators under the Geneva Refugee Convention, but were given what is in effect a backdoor asylum right under the ECHR.

21. The Human Rights Act does not itself directly account for why the nine hijackers were not removed from the UK; in fact it was the ECHR that the Act incorporates into UK law that is to blame. The decision not to deport the hijackers was made because such deportation would have breached Article 3 of the ECHR. The decision was made by a quasi-judicial body – the Immigration Adjudicators.

22. The case of the nine Afghan hijackers shows that it is not merely necessary to repeal the Human Rights Act, but to withdraw from the ECHR as well.

ii. Granting Anthony Rice freedom to commit murder:

23. On 10 May 2006, HM Inspector of Probation published a report of his review of the case of Anthony Rice, a life sentence prisoner who on 17 August 2005 murdered Naomi Bryant following his release from prison on licence.¹¹²

24. The report found that one of the reasons why the Parole Board underestimated the risk of harm to others when it decided that he was safe to release was that from the time of his transfer to open conditions in 2001, “the people managing his case started to allow public protection considerations to be undermined by its human rights considerations, as these required increasing attention from all involved, especially as the prisoner was legally represented”.

25. In place of shame, some apologists for the Human Rights Act might instead argue that the report failed to produce any concrete evidence that decisions concerning the release or management of Anthony Rice were affected in any way by human rights considerations being given precedence over public protection. We would find any such arguments put forward to be deeply offensive.

26. Public bodies, such as the Parole Board, are specifically covered by section 6(1) of the Human Rights Act, which makes it unlawful for a public authority to act in a way which is incompatible with the ECHR.

27. Moreover, at the time the Act was introduced, it was the stated aspiration of the Government that the Act would be more than a merely technical instrument to enable Courts to adjudicate on the basis of the ECHR. It was also hoped that the Act would bring about a fundamental transformation towards a “human rights culture”. The case of Anthony Rice suggests that the government has been all too successful in creating precisely such a culture.

28. While there is little specific evidence in HM Inspector of Probation’s report to show that detailed technical considerations of the Act were made, the report shows all too clearly how a vague “human rights culture” ensured that this public body, covered by the Act, set a convicted criminal free to commit rape and murder.

¹¹² HM Inspectorate of Probation, *An Independent Review of a Further Serious Offence case: Anthony Rice* (May 2006)

29. Granting Anthony Rice freedom to commit rape and murder did not come about because of any erroneous understanding of the Human Rights Act on the part of the Parole Board. Mr Rice was set free because the Parole Board feared that human rights legislation meant if it did not let him out under licence, the Courts would step in and do so anyway.

iii) Failure to deport foreign prisoners

30. On 3rd May 2006, the Home Secretary made a statement to the House of Commons setting out various proposals to change the system governing deportation of foreign prisoners. This statement followed the revelation that substantial numbers of foreign prisoners who would have been considered for deportation on their release had not in fact been so considered but instead had been released into the community – where some had committed more crime.

31. As with the nine Afghan hijackers and the case of Anthony Rice, the Government has once again cited this failure of public policy as a reason to amend the Human Rights Act. The Prime Minister told the House of Commons that “in the vast bulk of cases ... there will be an automatic presumption to deport, and the vast bulk of those people will, indeed, be deported, irrespective of any claim that they have that the country to which they are returning may not be safe. That is why it is important that we consider legislating, if necessary, to ensure that such an automatic presumption applies ... Yes; we will make sure that our human rights legislation does not get in the way of commonsense legislation to protect our country”.¹¹³

32. Apologists for the Human Rights Act will no doubt claim that it is not the Act itself, nor the decisions made by judges under it, that account for the failure to consider these foreign prisoners for deportation.

33. Again, it is deeply invidious to imply that human rights legislation is not at fault.

Article 3 of the ECHR places the UK under an obligation not to deport a foreign national to torture,¹¹⁴ Article 8 prevents deportation where there would be a disproportionate interference with their family life. The Courts have chosen to interpret these Articles of the ECHR – regardless of whether or not the ECHR is in fact incorporated into UK law – in such a way as to effectively prevent deportation to many third countries – including indeed, fellow signatories of the ECHR.

34. The fact that the ECHR is incorporated into UK law as a result of the Act means that would-be deportees are able to challenge their deportation on those grounds in a UK court.¹¹⁵ As a result of this, the Courts can and do frequently present an obstacle to the deportation of foreign nationals.

113 HC Deb 17 May 2006 col. 990

114 It is important to note that Article 3 ECHR does not as worded have anything to do with deportation. It prevents contracting states from engaging in torture or inhuman or degrading treatment or punishment, and the ECHR applies to the European territories of the contracting states. The Strasbourg Court extended the Convention by holding that it applied when someone is deported to a state where there is a risk of Article 3 mistreatment (not just torture, a wider category including e.g. inadequate medical services for AIDS patients as in *D v. United Kingdom*). It is historically and politically important to distinguish between the Convention itself which we signed in the 1950s and the overlay of judicial “interpretation” which has changed it greatly from its original meaning and intent.

115 It is interesting to note that the judiciary have yet to ever cite the ECHR as a basis on which to challenge the government so as to enforce a deportation that the government would not otherwise have carried out. The judges rulings only seem to apply one way.

35. The Human Rights Act might not of itself provide any greater obstacles to the deportation of foreign nationals than the limitations on such deportation which already exist under the ECHR. That, however, is a reason to withdraw from the ECHR in its entirety, rather than a reason to retain the Human Rights Act.

36. As with the case of Anthony Rice, there is also evidence that the Human Rights Act, in making it easier for courts to refer to the ECHR, is creating a “human rights culture”. There is some evidence that as with the Parole Board, this less tangible, but pervasive “human rights culture” is undermining the effectiveness of the Home Office.

37. The Prime Minister’s announcement of an automatic presumption of deportation for foreign prisoners would mean not only amending the Human Rights Act, but withdrawal from the ECHR. Unless the UK were to exempt herself from Articles 3 and 8 of the ECHR, judges would continue to rule that such an automatic presumption of deportation contravened the ECHR. Judges will continue to prevent the deportation of foreign nationals unless the UK withdraws from the ECHR, as opposed to merely repealing the Human Rights Act.

Conclusion

38. Having considered the charge that it is the Human Rights Act that accounts for the massive failures of public policy with regard to the three cases above, we conclude that it is not simply the Act that is at fault, but rather the ECHR and the courts’ willingness to adjudicate on the basis of it. Not only should the Act be repealed, but the UK should withdraw from the ECHR.

3. Alternative ways of defending individual liberty: a second Bill of Rights?

39. The Human Rights Act should be regarded not as a measure that empowers individuals against the State, but rather one that hands powers to judges that should rightfully rest with accountable parliamentarians through the ballot box.

40. It is often claimed by supporters of the Act that the Act gives easier and more direct access to those rights which people in the UK have enjoyed under the ECHR for the past half century. It would be more accurate to say that the Act in fact makes it easier for judges to directly cite the ECHR in order to overturn decisions made by Parliament.

41. Moreover, we note with concern that the Human Rights Act, while specifically not giving judges *de jure* powers to strike down Acts of Parliament, creates the scope for this to happen *de facto*. The Act enables courts to declare statutes incompatible with Convention rights, leaving it to Parliament to decide whether and how to legislate in response. On the face of it, this does not challenge the primacy of Parliament.

42. However, we note that the process for assessing whether a Bill conforms with human rights, as defined by judges, means that any legislation that is likely to be deemed incompatible is highly unlikely to even be authored, let alone debated in Parliament.

43. Moreover, that any offending law can be amended by Remedial Orders, meaning in practice that an Act judged incompatible can be amended with the most cursory scrutiny in Parliament, further suggests that the Human Rights Act can and will further diminish

the role of our Parliament. To adopt Bagehot's phrase, under the Act Parliament will become more the "dignified" rather than the "efficient" part of our constitution. Thanks to our Human Rights laws, the role of Parliament as our chief law-making institution is also being usurped by the judiciary's recently acquired habit of judicial law-making. Media freedom in Britain is now threatened by new judge-made law of privacy. This comes in place of any legislation from our elected Parliament, and its consequences on press freedom are far less predicatable than those that would arise on the basis on a primary law made in Parliament. Human Rights legislation has poisoned relations between the executive and the judiciary. As the unelected and unaccountable judges have acquired power without responsibility, they have exercised it in a way that has exercised democratically accountable Ministers. Scrapping the Human Rights Act and the ECHR would allow fresh legislation that prevented further unhealthy tensions between the executive and the judiciary.

44. There is a growing public perception that the Human Rights Act protects only the undeserving, such as criminals and terrorists, at the expense of the law abiding. We believe that this view is largely justified.

45. When not protecting the undeserving and making unreasonable and burdensome demands on the law-abiding, the Human Rights Act is resulting in some extraordinary judicial involvement in matters that ought to be of no concern to them. For example, local authority monopsonies as procurers of beds in residential care homes mean that old and frail residents all too often are forced out of the home of their choice. By any criteria, this is undesirable. Yet in pronouncing against it, courts have merely decreed that it should not happen, rather than tackle the underlying causes of the problem. Legal experts in wigs have shown extraordinary economic illiteracy in seeking to decree away a problem caused by an unfair market monopsonies.

46. By using the Human Rights Act to pronounce upon the running of public services, judges have made public services even more upwardly accountable – rather than downwardly accountable. It is a matter of great concern that unelected judges should be interfering in the running of public services in this way.

47. As a result of democratic deliberation and competition, all three political parties are beginning to look towards "new localism" solutions to enhance public services. Top down, judicial involvement in the delivery of public services should rightly be seen as an unwarranted and illegitimate interference in the political process.

48. Had our committee established comprehensive terms of reference for this inquiry, and had we had the opportunity to hear from a range of witnesses, we would like to have considered if there were better ways of safeguarding the rights of individuals and personal liberties.

49. *A new Bill of Rights*: In particular, we would like to have debated if our individual freedoms would be better protected by a new, domestic UK Bill of Rights. We would like to have had the opportunity to consider what such a Bill of Rights might entail, and how such a Bill of Rights could safeguard individual liberty, without enabling some judges to resort to political activism.

At the time that the Human Rights Act was passed, the debate focused on whether we should incorporate a statement of fundamental rights into our law. There was no real debate on whether if we were to do so the European Convention on Human Rights was the most appropriate text for the task. Creating a new Bill of Rights outside the ECHR would enable us to better protect the freedoms of the individual vis-à-vis the State:

- The ECHR was drafted to set minimum standards across European countries with widely different legal traditions. It therefore did not include, for instance, a right to jury trial. A new British Bill of Rights based on a text other than the ECHR could ensure such rights were guaranteed.
- The ECHR was drafted nearly half a century ago. A new British Bill of Rights free from the constraints of the ECHR would enable better safeguards against the ability of the State to collect and control vast amounts of data about individuals.
- The ECHR is extremely vague and under its wording almost anything is arguable. This is not surprising given that its original purpose was to safeguard a set of basic rights in an era after the Second World War to prevent a return to totalitarianism. It never was drafted in order to serve the purpose it now does. After quitting the ECHR, it would be possible to draft a text that guaranteed freedoms more effectively, using a text written with that role in mind.

The new British Bill of Rights could follow the same soft entrenchment mechanism followed by the New Zealand Bill of Rights Act in 1990. It would not bind any future Parliament that consciously choose to depart from it, but it would avoid the muddle and scope for future judicial activism implicit in the current Act.

50. *A new system of judicial appointments?:* We would also like to have considered if there might be a better system for senior judicial appointments than the system created by the Constitutional Reform Act 2005. Some might argue that this enabled a remote, unrepresentative and unaccountable body – the Judicial Appointments Commission – to make judicial appointments at a time when those so appointed are increasingly wielding political power and making political decisions. This has, and will continue to, create controversy between the democratically elected executive and the judiciary. Indeed, we believe that the growing scope for conflict between judges and government Ministers has come about as a direct consequence of the Human Rights Act.

51. This growing tension created by the Human Rights Act poses a threat to the cherished judicial independence enjoyed since, and underpinned by, the Act of Settlement. This concerns us greatly. Until the Judicial Appointments Commission is abolished and the process for appointing judges is subjected to greater democratic scrutiny, we believe that judicial activists will clash with democratically elected representatives with growing frequency. Moreover, we fear that their judicial activism will further corrode public faith in the political process, at a time when voter turnout is already in decline.

52. We would welcome one day having the opportunity to have a proper inquiry that could assess both the case for repealing the Human Rights Act, withdrawing from the ECHR and bringing about real reforms in order to guarantee the rights of the individual against the State.

53. It is a moot point whether or not withdrawing from the ECHR is incompatible with our European Union treaty obligations. Certainly, being part of the EU does oblige the UK to follow the principles of the ECHR. How we do so, is an open question, and it is conceivable that the UK could adhere to the principles found within the ECHR, without being a signatory. Notwithstanding, any suggestion that the UK withdraw from the ECHR will raise questions in some quarters about our continued membership of the EU. It is a debate that we would welcome.”

Motion made, and Question proposed, That the Chairman’s draft Report be read a second time, paragraph by paragraph. – (*The Chairman.*)

Amendment proposed, to leave out the words “Chairman’s draft Report” and insert the words “draft Report proposed by Mr Douglas Carswell. – (*Mr Douglas Carswell.*)

Question put, That the Amendment be made.

The Committee divided.

Content, 2

Mr Douglas Carswell MP
Mr Richard Shepherd MP

Not Content, 7

Mary Creagh MP
Mr Andrew Dismore MP
Nia Griffith MP
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Baroness Stern

Another Amendment proposed, to leave out the words “, paragraph by paragraph” and insert the words “on a future day”.— (*Mr Richard Shepherd.*)

Question put, That the Amendment be made.

The Committee divided.

Content, 2

Mr Douglas Carswell MP
Mr Richard Shepherd MP

Not Content, 7

Mary Creagh MP
Mr Andrew Dismore MP
Nia Griffith MP
Dr Evan Harris MP
Lord Judd
Lord Lester of Herne Hill
Baroness Stern

Main Question put.

The Committee divided.

Content, 8

Not Content, 1

Mr Douglas Carswell MP
 Mary Creagh MP
 Mr Andrew Dismore MP
 Nia Griffith MP
 Dr Evan Harris MP
 Lord Judd
 Lord Lester of Herne Hill
 Baroness Stern

Mr Richard Shepherd MP

Paragraphs 1 to 38 read and agreed to.

Paragraph 39 read.

Question put, That the paragraph stand part of the Report.

The Committee divided.

Content, 6

Not Content, 1

Mr Andrew Dismore MP
 Nia Griffith MP
 Dr Evan Harris MP
 Lord Judd
 Lord Lester of Herne Hill
 Baroness Stern

Mary Creagh MP

Paragraphs 40 to 91 read and agreed to.

Paragraph 92 read, amended and agreed to.

Paragraphs 93 to 115 read and agreed to.

Paragraph 116 read, amended and agreed to.

Paragraphs 117 to 146 read and agreed to.

Summary read and agreed to.

Resolved, That the Report, as amended, be the Thirty-second Report of the Committee to each House. —(*The Chairman.*)

Several Papers were ordered to be appended to the Report.

Ordered, That the Chairman make the Report to the House of Commons and Baroness Stern make the Report to the House of Lords.

Ordered, That the provisions of House of Commons Standing Order No. 134 (Select committees (reports)) be applied to the Report.

[Adjourned till Monday 20 November at 4pm.]

Witnesses

Monday 30 October 2006

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Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced
Session 2005–06

First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888
Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	HL Paper 122/HC 915
Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955

Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989
Sixteenth Report	Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 154/HC 1022
Seventeenth Report	Legislative Scrutiny: Eighth Progress Report	HL Paper 164/HC 1062
Eighteenth Report	Legislative Scrutiny: Ninth Progress Report	HL Paper 177/ HC 1098
Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume I Report and Formal Minutes	HL Paper 185-I/ HC 701-I
Twentieth Report	Legislative Scrutiny: Tenth Progress Report	HL Paper 186/HC 1138
Twenty-first Report	Legislative Scrutiny: Eleventh Progress Report	HL Paper 201/HC 1216
Twenty-second Report	Legislative Scrutiny: Twelfth Progress Report	HL Paper 233/HC 1547
Twenty-third Report	The Committee's Future Working Practices	HL Paper 239/HC1575
Twenty-fourth Report	Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention	HL Paper 240/HC 1576
Twenty-fifth Report	Legislative Scrutiny: Thirteenth Progress Report	HL Paper 241/HC 1577
Twenty-sixth Report	Human trafficking	HL Paper 245-I/HC 1127-I
Twenty-seventh Report	Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill	HL Paper 246/HC 1625
Twenty-eighth Report	Legislative Scrutiny: Fourteenth Progress Report	HL Paper 247/HC 1626
Twenty-ninth Report	Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 248/HC 1627
Thirtieth Report	Government Response to the Committee's Nineteenth Report of this Session: The UN Convention Against Torture (UNCAT)	HL Paper 276/HC 1714
Thirty-first Report	Legislative Scrutiny: Final Progress Report	HL Paper 277/HC 1715
Thirty-second Report	The Human Rights Act: the DCA and Home Office Reviews	HL Paper 278/HC 1716

Oral evidence

Taken before the Joint Committee on Human Rights

on Monday 30 October 2006

Members present:

Mr Andrew Dismore, in the Chair

Bowness, L
Judd, L
Lester of Herne Hill, L
Plant of Highfield, L
Stern, B

Mr Douglas Carswell
Nia Griffith
Dr Evan Harris

Witnesses: **Rt Hon Lord Falconer of Thoroton QC**, a Member of the House of Lords, Secretary of State for Constitutional Affairs and Lord Chancellor, and **Rt Hon Baroness Scotland of Asthal QC**, a Member of the House of Lords, Minister of State, Home Office, examined.

Q1 Chairman: Good afternoon, everybody. Can I welcome for the first time in this Parliament to the Committee Lord Falconer, Secretary of State for Constitutional Affairs and Lord Chancellor, and Baroness Scotland of Asthal, Minister of State at the Home Office. Thank you for coming. We are conducting two very closely related inquiries at the moment, one into the case for the Human Rights Act and the other into pre-legislative scrutiny of Home Office policy proposals. We initially propose to focus on the case for the first, so we will be firing questions to the Lord Chancellor, though not exclusively, and later on the Home Office aspects to Baroness Scotland, but, of course, if either wants to chip in on the other's answers please feel free to do so, because there is obviously a lot of overlap. We know you are both giving evidence tomorrow to the Commons Home Affairs and Constitutional Affairs Committees as well on similar but different subjects. There are a lot of very similar things going on but they are subtly different. Can I begin by asking you to think back to the various developments in the spring which gave rise to the current debate? We have identified three issues which appear to deal with this debate on whether the Human Rights Act should be amended or repealed or whatever: the Afghani hijackers, the Anthony Rice case and the foreign prisoners for deportation issue. We wrote to the Prime Minister asking for further details of the Government's thinking on these cases but, although, Lord Falconer, you replied to us on behalf of the Prime Minister, we did not get a response to the specific questions, so unless either of you wants to make an opening statement perhaps we can go straight on to those issues. We will start with the Afghani hijackers and remind everyone a little of the factual basis for this. It started with the findings of the Panel of Immigration Adjudicators in June 2004 that the nine individuals concerned would be targeted for assassination by the Taliban if they were returned and that there would be insufficient protection in Afghanistan if they were returned, and therefore it upheld their claim for protection under Article 3 of the ECHR. The Immigration Appeal

Tribunal refused the Home Secretary permission to challenge those findings and the Home Secretary did not apply for judicial review of the tribunal's decision. It was accepted that there were no reasonable grounds for regarding any of the individuals as a danger to the security of the UK. Their convictions were overturned in the Court of Appeal, by which time all but two had actually served their sentences anyway, and then ultimately your review, Lord Falconer, described the case as "at a heart a judicial review on the basis of abuse of executive power". The Home Secretary appealed against part of the decision on the sentencing. In August the Court of Appeal dismissed the Home Secretary's appeal. The Court of Appeal described the original judgment as "an impeccable judgment" but the Home Secretary described the decisions as "inexplicable and bizarre". The first question to you, Lord Chancellor, is, do you regard the decisions of the High Court in the case as "inexplicable and bizarre" or "impeccable"?

Lord Falconer of Thoroton: The Court of Appeal's conclusion has been accepted. The Court of Appeal's conclusion is nothing to do with the principle of whether people who hijack planes should be allowed to stay here. The Court of Appeal's decision was about whether there is something called "temporary admission" that the Home Office can grant, and the Court of Appeal concluded that there is not something called "temporary admission".¹ If you want to create a right to remain without leave then you need to legislate for it and that is the issue now for the Home Office. In the context of the reasoning of the Court of Appeal, I do not think their reasoning can be faulted. I think the bigger issue in relation to the Afghani hijackers was the proposition whether people who hijack should be allowed to stay here, and I think the answer to that is that if they face death or torture or something similar abroad then the law is that they should remain. The question of

¹ *Witness correction:* The Court of Appeal in fact concluded that it was wrong to grant "temporary admission".

a balance does not arise because, as you rightly say, Mr Dismore, it was held that they posed no threat to this country.

Q2 Chairman: Presumably, from your answer, there has been no new evidence to contradict the findings of the High Court that they would be targeted for assassination if they returned.

Lord Falconer of Thoroton: The decision that was made was one made in 2004. Whatever view you take about the basis of them staying here, everybody agreed that at regular intervals it would be possible to review what the situation was in Afghanistan and a point could well be reached where there was not a threat to them in Afghanistan, in which circumstances it would be for the state to apply back to the Immigration Appeal Authority² and they could then decide whether or not the threat had gone. I am not seeking to challenge the decision in 2004. At that time the position was that the Immigration Appeal Authority decided it was not safe for them to go back. It does not mean there might not come a time (whether it is now or in the future I do not know) when it was safe for them to return, and that would obviously depend on developments in Afghanistan and the state of the government there.

Q3 Chairman: At the moment there is no evidence contrary to the previous findings?

Lord Falconer of Thoroton: I have not got any, but I have not looked specifically at that issue.

Q4 Chairman: Can I go on to deportation of foreign prisoners? We will look at this in more detail later on in the session, but could you or Baroness Scotland provide any evidence that the Human Rights Act or its interpretation by decision-makers as opposed to a simple administrative error was responsible for the failure to consider whether foreign prisoners should be deported on their release in any substantial number of cases?

Lord Falconer of Thoroton: No.

Baroness Scotland of Asthal: And no, I have nothing to add either. The failure to consider just over 1,000 cases for deportation was caused really by a range of factors being addressed through the Home Secretary's priority areas of action and the Human Rights Act was not one of them.

Q5 Chairman: So when the Home Secretary said on 7 May, "The vast majority of decent, law-abiding people . . . believe that it is wrong if court judgments put the human rights of foreign prisoners ahead of the safety of UK citizens", that was nothing to do with this?

Baroness Scotland of Asthal: No, I think what he was talking about there in more loose terms was not the operation of the Act but the interests of foreign national prisoners above the interests of the people in this country. He was speaking far more colloquially than the technical way in which we would now consider it in this discussion.

Q6 Chairman: Could I go on to Mr Bridges' report on the Rice case?

Lord Falconer of Thoroton: Can I take my jacket off?

Q7 Chairman: Yes, sure, please feel free. In the previous comments that we saw on this in Mr Bridges' letter to the Committee he does not blame the Human Rights Act. In fact, he says in his recent letter to us that he does not refer to the Human Rights Act at all in his report, and he refers to a subtle impact on the decision-making processes. I think you have received a copy of that letter.

Lord Falconer of Thoroton: I have.

Q8 Chairman: Do you accept in the light of that letter that his report does not demonstrate that the Rice case is an example of a tragic misapplication of human rights considerations or any misunderstanding or misinterpretation of the Human Rights Act or the ECHR by officials?

Lord Falconer of Thoroton: I would like to agree with it. I think Mr Bridges' letter is a very difficult letter to follow. It is a very disappointing letter in the context of his report. However, his report appears to be saying—this is the report, not the letter, which is a pretty opaque document—that he is concerned that officials involved in the decision in the Anthony Rice release question were "distracted by human rights considerations". Nobody reading that could have come to any other conclusion but that what he, Bridges, was saying was that instead of focusing enough on public protection they were focusing too much on the arguments put of a human rights nature in favour of Rice. His letter saying he was not referring to the Human Rights Act at all seems difficult to align with what he says in his report. I think we have to go on the basis of what he says in his report, not because we should ignore what he said in his letter but because he raises a particular issue which we need to address, and if there is a risk that people are being so distracted we need to deal with it not by changing the legislation but by making sure that people are not so distracted. In this letter that he sent to you the evidence he produces for this is that there is lots of consideration of "fairness" to Rice by MAPPA, and similar in relation to the Parole Board, but not enough consideration of public protection, and some inference can be drawn from that. I do not want to resile from our response to what Bridges said because we were very worried by it, in my view rightly. We thought it was very important that proper guidance should be given and we thought it extremely important that it should be underlined that public protection comes first in relation to deciding when a life prisoner should be released, and if the life prisoner does constitute a threat to the public then he should not be released. I do not think Mr Bridges' recent letter threw much light on the issue.

Q9 Chairman: I think what he was saying was that whilst in theory everybody knows what the rules are and what the principles behind the Act are, in practice, when faced with a heavy workload and lawyers arguing the toss, people were looking, as you

² *Witness correction:* They would have another right of appeal to the Asylum & Immigration Tribunal.

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say, at the rights of Rice rather than at safety considerations. Is really what this comes down to the need for better investigation, not of whether officials in the system are prejudicing public safety through misunderstandings or misapplications of the Act, but rather whether the Act gives rise in practice to “subtle processes”, to which he refers, which lead to public safety considerations being given too little weight?

Lord Falconer of Thoroton: If I may say so, you have put his case a lot more clearly than he put his case in the letter, but assuming that that is what he was saying, yes, I can see a need for making it clear and underlining that there needs to be total clarity about the importance of public protection and the need to make it clear that people should not be—and this is overstating it—overwhelmed by the arguments of lawyers about where people’s rights lead to.

Q10 Chairman: I have dealt with three specific cases now, all of which have been part of this amorphous argument about repeal of the Act or amending of the Act, but would you accept that none of those three examples, which are some of the examples that have been used in some cases by ministers, demonstrates a need to consider amending the Act or repealing it, and is it really the case that in each of these three examples the Human Rights Act has been used as a scapegoat for unrelated, primarily ministers’ failings within the Government?

Lord Falconer of Thoroton: If and insofar as there are administrative failures that are to do with the Human Rights Act, as Bridges identified in his original report, we need to address them, but I completely agree with you that not one of them justifies an amendment or repeal of the Human Rights Act and that was the conclusion that the review that we published in July came to.

Q11 Dr Harris: Would it not have been easier if some of your senior colleagues, instead of adding fuel to the misunderstood fire in the press about how the Human Rights Act was to blame for Afghani hijackers being here unreasonably and our failure to deport foreign prisoners, had said clearly that there was no evidence that in those two cases the Human Rights Act was anything to do with it, whereas instead their comments seemed to feed the attack on the Human Rights Act, creating a lot of work for you?

Lord Falconer of Thoroton: I do not think you could possibly have ignored what Andrew Bridges, the Chief Inspector of Probation, said and, in the light of what Andrew Bridges, the Chief Inspector of Probation, had said in his report, in which he had specifically said that the decision-makers in MAPPA and the Parole Board had been “distracted by human rights arguments”, not then to look at what was going on in relation to it would have been completely wrong. I think we did the right thing by setting up a review. I think we did the right thing in coming back two months after we had set up the review with the conclusions of the review saying broadly what I have just said to Mr Dismore in answer to his questions.

Q12 Dr Harris: That is a very good answer to a question I did not ask. I did not ask about the Bridges case.

Lord Falconer of Thoroton: No, you did ask about the Bridges case, Dr Harris. You asked about the three particular things and that was one of them.

Q13 Dr Harris: No, I did not, actually. I said that in respect of the Afghani hijackers and the deportation of foreign prisoners—

Lord Falconer of Thoroton: I apologise; I did not realise you had excluded that.

Q14 Dr Harris:—would it have been helpful if your senior colleagues, instead of adding fuel to the fire about blaming the Human Rights Act for these alleged failures of policy in respect of the hijackers and the deportation of foreign prisoners, had pointed out that neither of those cases had anything to do with the Human Rights Act and therefore you would not have had to do all the work you had to do in respect of reclaiming, as it were, the justification for having human rights legislation in this country? Do you not regret that the comments were made by your senior colleagues that seemed to fuel the fire in that way on those two cases?

Lord Falconer of Thoroton: I think there was legitimate concern because I think, exactly as Mr Dismore put it to me, that it was those three issues together that led to there being legitimate concern. There were problems that arose from the third one, the one you did not ask me about. The right thing to do was to properly look at them all and review them.

Q15 Dr Harris: The Prime Minister did not say, “Right: these three, it is an abuse of commonsense”. He said specifically, “It is an abuse of commonsense to be in a position where we cannot deport people back who hijack a plane”, but that is because there had been no legislation in his Government over the preceding seven years to do it.

Lord Falconer of Thoroton: To do what?

Q16 Dr Harris: He was saying it was an abuse of commonsense, frankly, to be in a position where we cannot do this, “this” being that people who hijack a plane we are not able to deport back to their country. That was nothing to do with the Bridges case. That was a discrete comment he made, the implication being that there was a human rights issue preventing that, when in fact it was a failure to legislate to do that or something that was inappropriate. I do not think you can cite in aid of your senior colleagues the Bridges case when they were making specific comments about two other different cases. It just makes life difficult for the Human Rights Act.

Lord Falconer of Thoroton: From the point of view of the public and the debate at the time, there was a debate about what was the effect of the Human Rights Act. That debate covered all three issues. The right course for a responsible government, I think, was to ask how much are these problems to do with human rights, and people were saying in the press, and perfectly respectable people were saying, “Maybe this has got something to do with the

Human Rights Act”, so the review, which was conducted quickly, was the right response to it. You can put to me particular statements made by colleagues in the Government about it. They were reflecting at the time legitimate public concern. Six or eight weeks went by, and I cannot remember the precise date on which the review was started but by the 20-something of July a report was produced expressing the views of the Government which contained right across the Government an unequivocal commitment to the Human Rights Act. Maybe we were not quite quick enough to spot the absence of human rights issues in relation to all three of the issues but we came back pretty quickly in relation to it.

Q17 Lord Lester of Herne Hill: Lord Chancellor, Lord Falconer, could I say first of all that I think that the DCA review was admirable. I think that your lecture at LSE explaining the situation was also admirable, and I think you are doing your very best to remove misunderstandings from the public about the Human Rights Act, but there is, is there not, a worrying political problem about the extent to which the Human Rights Act has been woven into the consciousness and values of our fellow citizens, caused by constant attacks upon it by some sections of the media, especially those that fear the right of privacy, and, if I may say so, by some in the official Opposition who would like to tear it up? My question therefore is, can you persuade other colleagues within the Government to engage in a major public education programme in order to remove misunderstandings in the way that the DCA review and your lecture did, because as far as I am concerned, unless the Prime Minister and the Home Secretary and other senior colleagues join you, we will not succeed in removing misunderstandings?

Lord Falconer of Thoroton: The views expressed in the reviews are not the views of one department in the Government; they express the views of the Government. I think it is not something that can be achieved overnight because I think there are concerns among the public exemplified by the fact that the official Opposition contemplates, no matter how difficult it appears the moment you think about it, repealing the Human Rights Act. I think part of the difficulty in relation to this is not to do with day-to-day politics, though it is something to do with it. It is the fact that it appears to many people to be lawyerly and to be something to do with Europe and, for reasons I am quite unable to explain to you, neither lawyers nor Europe are that popular in this country. In fact, as you know and as everyone round this table knows, it comes from here. It does not come originally from Europe and it was never about some lawyers’ charter. It was about everybody’s basic freedoms in the wake of the Second World War and what happened to them. What we have to do, and we as a Government accept this, is persuade people that it is not about European lawyers’ views about what an appropriate set of law is. It is about basic values in this country.

Q18 Baroness Stern: Could I, if I may, come back to the sad case of the Anthony Rice matter and the Inspector’s report to say first of all that I think it is very gratifying that you pay so much attention to the findings of Chief Inspectors’ reports, and in this particular case I am sure you have read the report thoroughly.

Lord Falconer of Thoroton: I have.

Q19 Baroness Stern: As I understood it, and you may well wish to correct me, the Parole Board did not have information before it of previous convictions on which, if it had had that information, it might have made a different decision, and there was a misunderstanding amongst those handling the case on the nature of the hostel and the level of supervision provided. I think it is also the case, and I am sure you will also correct me if I am wrong, that the decision to give people legal representation before the Parole Board came in years before the Human Rights Act was passed. Have you any comments on any of those points which might slightly change the view you take about this case and the view you expressed on the BBC yesterday morning about it being a failure of the Human Rights Act?

Lord Falconer of Thoroton: First of all, I did not say it was a failure of the Human Rights Act. I said it was in relation to implementation. In relation to each one of your three points, yes, they are factually accurate. Secondly, in the light of the debate that is going on I do not think it was possible for the Government to ignore somebody of the reputation and standing of the Chief Inspector of Probation who, despite the fact that, as he knew, the Parole Board had not been told of Rice’s assaults on children before, despite the fact that Mr Bridges had been told about or knew that representation to the Parole Board had been something that existed for a very considerably long time and despite the fact that there were two or three other information failures that were all about administration and nothing to do with the Human Rights Act, specifically said in two or three places in his report that it was as a result of being distracted by human rights arguments that the result might have been reached. Mr Bridges is a man of great standing. It would be quite impossible and wrong for the Government to say, “We just ignore it”. If what you are trying to suggest to me is that we should reject those bits of Mr Bridges’ report that attack the Human Rights Act, I do not think we could because he knew all about the facts of the case, you have accurately identified the facts of the case, and even though he identified all those administrative failures he also made that point about human rights, so we felt we had to deal with it. He is no enemy of human rights. He said it as a result of having looked at the thing in detail, so we accept what he says.

Q20 Baroness Stern: We are going to consider the DCA review of the implementation of the Human Rights Act in more detail later, but before we do that could you tell us what became of the strategic review that the DCA undertook which was initiated by the

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DCA's then Permanent Secretary in May 2004? Could I ask you what were the main conclusions of that review, whether it will be published and how that review informed the review of the implementation of the Act that you published in July in response to the Prime Minister?

Lord Falconer of Thoroton: The 2004 review was not one intended to be published. It was one intended to work out how human rights has been given effect to across central government departments, for example, how were they dealing with the analysis of legislation, what were they doing in relation to non-legislative alternatives when they were thinking about whether or not what the particular department did complied with human rights, and we got a response in 2004 which indicated that some departments were right on top of implementation of the Act and others were not really focused upon it at all. The 2006 review, which was intended to be published, drew to some extent on the 2004 review because if you look at the review we published in 2006 it, for example, indicated how it affected policy implementation, and much that we had learned from 2004 we put into the 2006 review, but they were doing very different things. We will not publish the 2004 review.

Q21 Baroness Stern: To what extent did your latest review take into account the views of other government departments and the Government's law officers?

Lord Falconer of Thoroton: Extensively. We consulted certain government departments widely. If you look at the review that we have published it goes through in some detail how the law has been affected by human rights since 1999³ and how various departments have affected it. It is not just criminal justice departments; it is also, for example, the Department for Communities and Local Government in relation to planning, it is Health in relation to how you treat people in care, et cetera. So extensively is the answer.

Q22 Chairman: Can you tell us why you will not publish the 2004 review if it was partly as a result of recommendations of the previous Committee's Sixth Report of 2002–03 that the review was undertaken?

Lord Falconer of Thoroton: Because what we were doing in the 2004 review was saying, "What are you doing about implementation of the Human Rights Act? Can we have a discussion about how you might either tell us that you are doing it absolutely impeccably or how we might improve it?". For there to be a dialogue between us and these other departments it is far better I think that it be done on a confidential basis than on the basis that it be published.

Q23 Chairman: So we lack that?

Lord Falconer of Thoroton: You would be more frank, Mr Dismore, about how you would do it as a department if you thought it was a review in which

we were trying to help improve implementation rather than that it was one that was getting published.

Q24 Chairman: Bearing in mind it was as a result of our predecessor Committee's report would you make a copy confidentially available to the Committee?

Lord Falconer of Thoroton: Can I think about that?

Q25 Lord Lester of Herne Hill: I would like to ask Baroness Scotland about the Home Office. You provided us with a summary of the findings of the Home Office review on decision-making in the criminal justice, immigration and asylum systems which concluded that in general human rights legislation as perceived by the majority of agencies has provided a useful framework. Will the Home Office, like the DCA, be publishing that review?

Baroness Scotland of Asthal: The review is an internal review. We have already seen the consequences of the review that we published in the summer, which were the results of all the work that we had undertaken. The way in which we intend to implement the consequences of that review is to look at the practical things that we can do to help practitioners better understand how they should implement the Act, so, to take up the question you asked the Lord Chancellor earlier about how we are going to make this work better, one of the things that the LAB, the Legal Advisory Branch of the Home Office, have done is set up some guidelines and an opportunity for people to better understand how in practical terms they can apply the Act to often-asked questions. We have set up a Scrutiny Panel to which all practitioners will be able to bring their problems. The Scrutiny Panel is going to have lawyers and practitioners working together to review this. There is also going to be a website where practitioners can ask these questions together with a helpline. The website should be completed by the end of December and the helpline we hope by the spring of next year. What we have tried to do is not just publish the consequences of the review, which you hopefully have seen and the documents we have published, but take it a bit further and understand what the practical problems are that practitioners are having on the ground and try and do some myth-busting. One of the problems we have had is that there have been a lot of myths which have been absorbed by practitioners improperly and we want to try and get rid of them.

Q26 Lord Lester of Herne Hill: My question was whether you would publish the review and I think your answer was no, you will not publish the review. Is that right?

Baroness Scotland of Asthal: We have published the consequences of the review and I think you have had the documents which were produced in the summer as a result of our review. We do not propose to publish anything more about the review. We are going to get on and do something with the implementation.

³ Witness correction: 2000.

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Q27 Lord Lester of Herne Hill: Can I suggest to you why it would be a very good idea to publish the review? As you know, the BBC reported in July that the Home Office internal review of decision-taking had identified 25 examples of the Human Rights Act impeding decision-making and I think that you agree that that was misreporting about the true position.

Baroness Scotland of Asthal: Yes, it was.

Q28 Lord Lester of Herne Hill: Would it therefore not be a very good idea, in order to rebut that kind of misreporting, if the Home Office published a review finding that the system is working well and not impeding agencies in performing their vital task, and if the answer to that is no, you will not publish, then what else will you do to rebut that kind of misreporting?

Baroness Scotland of Asthal: What we can do is what we have done already. The Lord Chancellor is right: the document produced in relation to the Human Rights Act is a joint document. It was our joint conclusions as to how it should go forward. We published the rebalancing exercise and what we are doing now to further do the myth-busting is working with the Scrutiny Panel and the website and helping practitioners. All of that goes to rebut what was said and I think I should clarify for those who may not have read all our evidence that the 25 identified areas were not in fact 25 areas. This was part of a leaked document and all it encompassed was areas we had to look at. It did not identify that there were 25 areas which were so affected and I think it is very unfortunate when things are misreported. The documents that we have produced we think are very helpful documents. They emphasise that we are totally committed to the Human Rights Act, how it operates and that we think it will not inure people to the disadvantage of a proper rights culture and understanding in this country if they understand the proportionate nature of it and the way in which they need to balance individual rights and public security in an appropriate way.

Lord Lester of Herne Hill: I am sorry to press you but I think the Committee will still not understand what is the good reason for not publishing the review or a summary of the review so that the public can know what it contains.

Q29 Chairman: Bearing in mind that you have already given us the summary, why could the summary not be published more widely?

Baroness Scotland of Asthal: I am certainly happy to say that we will think about it again but we do think that the Lord Chancellor's review, which is the Government's review of the Human Rights Act, and the rebalancing documents that the Home Office have produced encapsulate the findings we have made and represent properly the Government's position. I will certainly look at it but we do not think there is anything further to add. There is no significant difference between our findings and those published by the Department for Constitutional Affairs on behalf of the Government. We are *ad idem*.

Lord Lester of Herne Hill: I think we would be grateful for any further thoughts.

Q30 Chairman: On the record, 25 examples is wrong?

Baroness Scotland of Asthal: There were not 25 examples. That was wrong.

Q31 Lord Lester of Herne Hill: Does the Home Office accept the conclusion of the DCA review that "decisions of the UK courts under the Human Rights Act have had no significant impact on criminal law or on the Government's ability to fight crime"?

Baroness Scotland of Asthal: We do accept that. There are issues that I know will come along later which will cause difficulties and those issues are being addressed.

Q32 Baroness Stern: To continue discussing the DCA review if I may, it does not provide many examples of the beneficial impact you say the Human Rights Act is having on policy formulation and decision-making in delivery of public services. A number of the examples in it point to uncertainties in the law or to negative effects arising from the Act and the way it is interpreted. Have you got or are you able to provide some better substantiation of the claims you make for the Act's beneficial effects?

Lord Falconer of Thoroton: Three examples. A couple who have been married for 50 or 60 years: the local authority seeks to separate them into two care homes when they cannot look after themselves. The Human Rights Act says they cannot be separated. Secondly, the adult children of the woman who is fed her breakfast while sitting on a commode say that is contrary to her human rights and that mistreatment stops. Thirdly, the practice of the state in making anybody who wished to apply to be released from compulsory detention in a mental hospital wait eight weeks, not before the application could be heard, not because there was any reason for the eight-week delay but simply because it was convenient administratively for there being an eight-week delay. Those are three specific examples of the hugely beneficial effects of the Human Rights Act. Very many of the beneficial effects come from the fact that the state, whether it be central government departments or local authorities, now have to consider things in the context of, "Does what I do affect people to the minimum in terms of infringing their human rights?", and human rights in the examples that I have given means people's basic entitlement to dignity.

Q33 Baroness Stern: If I were to ask you for another three would you be in a position to give us them or would you like notice of that question?

Lord Falconer of Thoroton: Could I give you another three? Yes, I probably could but do not press me too much on the detail of most of them. I can give you lots and lots of examples, and I would be more than happy to do that. I spend, as you know, quite a lot of time giving examples publicly in relation to it.

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Q34 Lord Lester of Herne Hill: Could I just give one example, the freedom pass? I do not know whether you are yet 60, Lord Falconer, but when you reach 60—

Lord Falconer of Thoroton: What a very insulting question. I am 43.

Lord Lester of Herne Hill:—at the same time as a woman of 60, as a result of the European Human Rights Convention, all men in this country in areas where there are freedom passes have the practical benefit of not being discriminated against in this vital help for elderly people like myself.

Chairman: The same goes for the winter fuel money as well.

Q35 Baroness Stern: The point I was making was, would you not agree that the more examples that could be provided that are as compelling as the ones you have just given the easier it is to help people to understand what this Act is and what it is not?

Lord Falconer of Thoroton: Yes, I quite agree with that.

Q36 Baroness Stern: Could I ask another question on this same point? Do you in the DCA see yourselves as actively working with other departments to help them to put policies they are developing within a human rights framework?

Lord Falconer of Thoroton: We do see our role as helping other departments and, if asked, local authorities and other public authorities how to give effect to the Human Rights Act. It is not our job in the Department for Constitutional Affairs to formulate health policy, education policy or otherwise, but we see ourselves as having an advisory and a championing role in relation to human rights, particularly in central government.

Q37 Baroness Stern: How do you do that?

Lord Falconer of Thoroton: We talk to other departments; we provide guidance. For example, today and last week we produced the third edition of a guide to the Human Rights Act 1998, another document, *Human Rights, Human Lives*, all in the wake of the review; another one, *Making Sense of Human Rights*, and we campaign actively now for human rights which we did not do before and we did not do before because perhaps we had not realised the extent to which human rights and human rights values had not been as embedded in the national and governmental consciousness as they perhaps needed to be.

Baroness Stern: That was very helpful. Thank you.

Q38 Lord Bowness: Lord Chancellor, you have just been referring to local authorities and public authorities in your answer to the last question. Following the *Leonard Cheshire* case the department has intervened in the *London Borough of Havering* case in an attempt to clarify the law on the meaning “public authority”. I think I am right in saying that so far that intervention has not proved successful?

Lord Falconer of Thoroton: You imply that at some later stage it might. The application for permission to leapfrog to the House of Lords was refused and permission to appeal was refused, so I am afraid the case is now a finished case.

Q39 Lord Bowness: That in a sense brings me to the second part of my question rather more quickly than it might have done. In view of the total failure of your intervention so far will you or the Government now consider primary legislation to clarify the interpretation of “public authority” under the Human Rights Act?

Lord Falconer of Thoroton: Possibly. My own inclination is that this is the sort of thing that could be dealt with on a case-by-case basis. Every time you try and define what is meant by “public authority” you simply, as it were, spawn more litigation. The fact that we did not get into the *London Borough of Havering* case does not necessarily mean that there will not be another case in which the thing is looked at. I just feel that legislating to try and solve the problem may not work at the end of the day. I think the right thing to do is to try and get the courts to come to a decision. It is the sort of thing, frustrating as it is, where dealing with it on a case-by-case basis might be the right way to deal with it.

Q40 Lord Bowness: On the same issue, in your review concerns were expressed, and I think I am quoting you correctly, that a wider re-interpretation of “public authority” could “increase burdens on private landlords, divert resources from this sector and deter property owners from entering the market to provide temporary and longer term accommodation to those owed a duty by the local authority under housing legislation”. I do not think those concerns have been expressed before by the Government in relation to this question and it does begin to widen the scope by you not defining “public authority” or leaving organisations and individuals outside the definition. It widens it very considerably.

Lord Falconer of Thoroton: The points that you have referred to indicate that you may have some perverse results about extending the effect of the meaning of “public authority”. If, for example, it means you dramatically reduce the private providers of residential care, that may well make it much harder to provide proper residential care for people. That is all that that point is saying. It does not in law affect what the definition of “public authority” is but if we widen the definition of “public authority” and then drive a whole range of providers out of the particular market I am not quite sure what effect that would have on residential care issues.

Q41 Chairman: But surely the real problem here is that we are increasingly having outsourced the provision of public services. In my area, for example, the local authority housing has now been passed over to an ALMO. Is an ALMO a public authority for the purposes of the Act or not? The old people’s homes are being privatised to private companies. They are pretty clearly not going to be covered by the primary legislation because of the *Leonard*

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Cheshire case. The fact is that those people who are recipients of those services one day are under a public authority and therefore protected by the Act; the next day they are not.

Lord Falconer of Thoroton: That is not quite right. If they are in *Leonard Cheshire* they have never been protected by the Act. That is the position. In relation to the ALMO, it depends if the ALMO, as I suspect, is a Freshwaters or a housing association that has set itself up as an ALMO. All I am saying is that to extend the definition of “public authority” will have an effect on a whole range of markets as to who comes into that market and who does not. Before we extend the definition of “public authority” we should look at that. Prisons are the best example. Prisons are a public authority if they are state prisons. Obviously, they should be public authorities as well if they are private prisons, but in these other areas, like housing, like residential care, it is more difficult, I think. I have set off a riot; I am sorry.

Q42 Chairman: We can have this debate later anyway. It is a good job you took your jacket off. Is not the key point this though, that if we are trying to make a positive case for the Human Rights Act the positive case comes out of helping people get their rights to the services to which they are entitled in large part from the public bodies we are concerned about, and if increasingly, because of privatisation, outsourcing, whatever, people start to lose those rights, so the case for the Human Rights Act becomes less strong as the sorts of things that you mentioned in your three examples become less likely because those bodies are no longer public bodies?

Lord Falconer of Thoroton: Yes, I see force in that but you can see the other side of the coin: if, as a result of the Human Rights Act being extended we drove this lot out of that particular market and it would be impossible to find a residential care place for your grandmother.

Baroness Scotland of Asthal: Also, if I may add, if we are talking about outsourcing it is now going to be incumbent on the local authority in their contracting to contract with the supplier the terms and conditions under which that supplier will have to operate. We would expect anyone so contracting out would build into their terms and conditions the protection that we would wish to see any agency who purports to perform a public duty undertaking, so I think there are many ways of guaranteeing that those who wish to encompass and undertake this work do so within a format which will now allow us to take advantage of the protections that we believe are fundamental for those people who are going to be introduced to those services.

Q43 Lord Bowness: Lord Chancellor, I do not mean this to be a debating point but perhaps you can help me. When you say that a private prison is obviously a public authority, why is not the landlord who takes over local authority housing obviously a public authority? As I say, I do not mean this as a debating point, but what makes one obvious and the other not?

Lord Falconer of Thoroton: Because I think in relation to a prison that the only people ultimately who can send people to prison and the people who are responsible for people in prison are the state. That is not the position in relation to the provision of housing where it can be provided either by a private landlord or by a public landlord, and I think people would recognise the difference between the responsibility of the state in relation to prisons on the one hand and housing on the other.

Q44 Lord Lester of Herne Hill: When we were debating the Equality Bill in the House of Lords Baroness Ashton explained, when some of us were arguing about this, that the Government would intervene because the *Leonard Cheshire* case was a very narrow view taken of the Court of Appeal and on that basis we did not press for amendments. I agree with you that it is much better to do it on the basis of case law than further statutory lists or something of that kind, but it is very important, is it not, for the Government to look for another suitable case and take it to the House of Lords because I think the *Leonard Cheshire* case is widely regarded as too narrow in its approach to “public authority”? This Committee published a rather learned paper explaining why that is so. Will the Government therefore be looking in the future for a suitable case to reach the House of Lords?

Lord Falconer of Thoroton: We will. You know what happened in the *Havering* case, which was that we were refused leapfrog, so they did not seem to think it was appropriate to go to the House of Lords, and we were refused permission to go to the Court of Appeal because they said the matter was concluded as far as the Court of Appeal was concerned by *Leonard Cheshire*, so we got a bit stuck there but we will certainly, as Baroness Ashton promised, look for an opportunity, and indeed the *Havering* case was in part seeking to discharge the promise that she had made in the House of Lords, but I make it clear that we will seek to find another opportunity. That is why I was not biting on the suggestion of legislation at this point.

Q45 Baroness Stern: I just wonder, Lord Chancellor, whether either you or Baroness Scotland would like an aged or loved relative of yours to be in an old people’s home which said, “If the Human Rights Act is going to apply to us we are going to get out of this business”.

Lord Falconer of Thoroton: I would not like myself or any of my aged relatives to be in such a home.

Q46 Baroness Stern: Would anyone?

Lord Falconer of Thoroton: No, I do not think they would.

Q47 Baroness Stern: So why have you suggested to us that you have to think about whether people would leave the market rather than complying with the Human Rights Act?

Lord Falconer of Thoroton: Because you have seen it in relation to, for example, private rental, where historically, for example, making homes fit for

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human habitation had the effect of reducing the number of people in the market and pushed the private rental market up to a point where homes just became much worse. That is what happened in relation to a whole range of Acts that were introduced there. We need to see what the consequences are.

Baroness Scotland of Asthal: We also need to be very clear, and the Government was very clear, about how we expect that term to be interpreted. It has been a matter of concern to us that it was not interpreted in the way that we intended. If you look at the debates that we had in *Hansard*, the Government was very clear, we thought, as to how we expected it to be interpreted by the courts. We are on a number of occasions surprised that our intent is not always interpreted in a way that we thought would flow from the debates that we have had, but that is a realistic position of where we are so there is no dispute, I think, about where the Government is in terms of our aspiration and what we hope to accomplish.

Q48 Dr Harris: Lord Falconer, this review is an excellent document, I think, and I like the myths and misperceptions section, and we got into that earlier. How is this myth-busting going to work? If someone writes to the paper or says in the paper that the courts can strike down primary legislation will there be a rebuttal?

Lord Falconer of Thoroton: Is that a trick question?

Q49 Dr Harris: I do not mean it to be a trick question. You tell me if it is a trick question.

Lord Falconer of Thoroton: The myths are not remotely to do with what you have said. There was one yesterday or the day before: the jewellery shop that had a CCTV picture of somebody stealing from the jewellery shop who was not apprehended by the police and the jewellery shop owner, quite legitimately, wanted to publish the picture of the thief stealing from his shop, for obvious reasons.

Q50 Dr Harris: Alleged.

Lord Falconer of Thoroton: You say "alleged". There was absolutely no doubt that a theft was going on. There was not even a question of who had done it. The question was, how do we help catch this person, and they wanted to publish the photograph and the local police, it is alleged, said, "You cannot publish that picture because it might infringe the person's human rights". That is nonsense.

Q51 Chairman: I think it was the local PC actually rather than the jeweller.

Lord Falconer of Thoroton: All right, sorry: I apologise to the local PC. It is nonsense. The other one is the Kentucky fried chicken for the man on the roof. There was a man on the roof who had either refused to come down or was holding somebody hostage and the paper said, "His human rights require that he be given Kentucky fried chicken", or cigarettes. No, that was not true. The police made a

perfectly sensible operational decision that in order to try to get him down they would give him some Kentucky fried chicken.

Dr Harris: That is not a criticism of Kentucky fried chicken.

Q52 Chairman: He might have stayed up if it had been.

Lord Falconer of Thoroton: The third great myth is Nilsen and hardcore porn in prison. It was alleged that the Human Rights Act required that he be given that and everybody knows that is not true, but he made an application which was dismissed even at the leave stage. The myths that damage the Human Rights Act are nothing to do with somebody saying, "Oh, you can strike down primary legislation", as opposed to saying, "You can make a declaration that it is incompatible". It is about people believing that sort of story.

Q53 Dr Harris: There are a number of people, and one not too far from me here, who believe that that would be a terrible thing if it were felt that the Human Rights Act could trump our democratically elected Parliament's decision in primary legislation. I think it is a serious myth to be promulgated, but my question was, how do you see this myth-busting being done? Is it just you or can we look forward to seeing the Home Secretary charging in ahead of you to bust myths around this issue since it is government policy, I now know, to do this myth-busting? Do you expect to see him? We can answer but I would like the Lord Chancellor to let me know if he expects to see that happen.

Lord Falconer of Thoroton: Can I read the conclusion of the review, Dr Harris, which says, "The Government remains fully committed to the European Convention on Human Rights and to the way in which it is given effect in UK law by the Human Rights Act". We all as a Government are committed to it and we are all committed to it. In government you will find that the people who talk on particular subjects tend to be the people who are associated with them, so I have, not deliberately but generally, avoided talking about the economy that much because I am not the Chancellor of the Exchequer. The people who talk about particular topics are those who are involved in them, but we are all committed to it and you are wrong, Dr Harris, to try to draw distinctions between us.

Dr Harris: I am keen not to. I am keen for you to say, you and the Home Secretary jointly, that—

Q54 Chairman: Let us ask Baroness Scotland, the Home Office Minister, to explain why catching jewellery thieves is not anything to do with the Home Secretary.

Baroness Scotland of Asthal: Can I just say first of all that the Home Secretary is very interested in myth-busting. That is why we have set up the Scrutiny Panel, that is why we have got the website, that is why we are trying to help promote guidance in a way that practitioners really understand. This whole issue about police officers being worried that they cannot issue photographs of people is just wrong.

That is part of the myths that we are starting to bust. Recently frequently asked questions are going to be there. We are going to have on-line help so that if people do have these concerns they will be able to raise them and we will be able to dispel them. None of us has a magic wand to stop the press writing things which are wonderful for headlines but do not actually have much substance for very long or in fact, and you get them writing about the claim but they do not write anything about the fact that it was quashed immediately. That is a perennial problem. What we want to make sure is that practitioners, who are actually responsible for making these judgments, are not misled by some of the nonsense that is spoken about and that we get it right.

Q55 Dr Harris: My final point is that, in line with the recommendation in the document you sent us, it says, and I agree with this, “Working with the Department for Constitutional Affairs, the Home Office should develop a proactive and reactive approach to myth-busting around the Human Rights Act”, so should we be entitled to measure that by the number of interventions of Home Office personnel, including ministers, who are engaged in the myth-busting and hope that the ratio of myth-busting to myth-creating, which we are all possibly capable of; I am not trying to make a point here, is a high one rather than a low one?

Baroness Scotland of Asthal: I think you could certainly look at the work that we are doing because I have to be clear: it is the Home Office that is going to have the website, the Home Office is doing the outline, the Home Office has set up this Scrutiny Panel. This is core work for us for the whole of the criminal justice practitioners group. That is work which we think is important and it is work that the lawyers’ part of the Department started more than a year ago. This is work we are speeding up and intensifying, so you can certainly ask to see the consequences of the website, of the advice line, how much it is being used, and indeed the work of the Scrutiny Panel. The first Scrutiny Panel meeting will be on 3 November, so it is very soon and it is a broad-based group of practitioners together with lawyers and others who are responsible for operational matters on the ground which we hope will make a difference in busting some of these myths.

Q56 Chairman: Will we see some of the myth-busting in other departments through their websites?

Baroness Scotland of Asthal: One of the things that the Lord Chancellor has made clear and we certainly agree with is that there has to be a general better understanding of what the Human Rights Act demands. Some of us believe that the Human Rights Act—well, ECHR—is merely a distillation of what is our common law and it could have been written down by a common lawyer in very clear terms.

Q57 Lord Plant of Highfield: I would like to echo the positive things that have been said about the review, but one thing that the review does not rule out is the possibility of amending the Human Rights Act, for example, by requiring particular regard to be paid to

the right to life in Article 2 in the same way as sections 12 and 13 of the Act require special regard to be paid to freedom of expression and freedom of religion. I think it would be agreed that in practice the special privileges, as it were, freedom of expression, freedom of religion, have made really very little difference, if any at all, to the way the courts have interpreted those rights, so if an amendment were to be made to establish duties to ensure agencies give priority to public protection, given the experience of the special consideration for religion and freedom of expression, do you think it would actually make any difference, because the courts have to interpret what they interpret in a way that is compatible with the Act, so why would it make any difference to have as a duty having special regard to the protection of the public?

Lord Falconer of Thoroton: I agree with your analysis about sections 12 and 13. There is no evidence I have that they have in any way affected the construction given by the courts on any part of the Convention. The value of such a provision would only be to send a message to officials or people working for public authorities dealing in a particular area. It would not be to change the effect of the Convention and a judgment would have to be made as to whether or not that would have an effect. It comes back to the estimable Mr Andrew Bridges. If Mr Bridges believes that officials are being “distracted” by human rights arguments, and explicitly he was saying they got the balance wrong, and if it would help in relation to them getting the balance right because the legislature was in effect underlining the importance of public protection in those sorts of cases, then it might be worth doing but we would need some evidence that it was worth doing on that basis. It would not be, as Lord Plant’s question implies, in order to change the meaning of the Convention.

Q58 Lord Plant of Highfield: This is a general philosophical point, I suppose. Do you think legislation should be used to send messages as opposed to telling you what the law is?

Lord Falconer of Thoroton: I think it quite often is used to do that and I think it is quite often beneficial for the legislature to say, “We put a high priority on getting this particular balance right”, and if the concern, which is the concern that Mr Bridges expressed, was that people were getting distracted, then if it helped to throw a light on where the problem was it might be worth doing.

Q59 Mr Carswell: There has been a lot of attention focused on the Human Rights Act when often, in fact, it is the ECHR that has been responsible for a lot of what the Human Rights Act has been blamed for. For example, the decision that the Afghani nationals should not be returned to Afghanistan was taken by a panel of immigration adjudicators who ruled that the Afghans be allowed to remain in UK under Article 3 of the ECHR. In as far as it is the fault of all those ghastly journalists and the media creating these myths, is not the failure really that they made a mistake by citing the Human Rights Act

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as the problem whereas in fact they should be blaming the European Convention on Human Rights? My question is, to what extent do you think the European Convention on Human Rights is curtailing the ability of a democratically elected government to govern and frustrating the ability of a democratically elected government to develop a public policy response to the problems of terrorism, mass immigration and crime?

Lord Falconer of Thoroton: I do not think it is. In the review that we published, we specifically came to two conclusions. One, that in relation to criminal law the Human Rights Act has had no real effect at all and, in relation to counter-terrorism, we said yes, there have been some changes that the Human Rights Act has caused—for example, the Belmarsh case—but it has not significantly inhibited the state's ability to fight terrorism because the Human Rights Act has allowed proportionate measures to be taken to fight terrorism. Kofi Annan said not so long ago, "Human rights law allows a pretty robust response to terrorism even in the most exceptional circumstances." Human rights law is not some rigid doctrine that can never be broken; it is something where a balance needs to be struck. If the state is threatened, it will allow the necessary steps to be taken to protect the democratic society which those values serve. I do not accept it has had a significant effect on inhibiting the fight against terrorism.

Q60 Mr Carswell: Do you think Article 3 of the ECHR as it has been interpreted by the judges is frustrating the ability for us to deal with mass immigration?

Lord Falconer of Thoroton: No. Article 3 affects an extremely small number of people. The issue in relation to Article 3 is the number of deportations the state is seeking to make which the Special Immigration Appeal Commission is currently hearing. As it happened, they had one from Algeria quite recently and they allowed the deportation to take place.⁴

Q61 Mr Carswell: In your report you said that nothing in the European treaties expressly obliges Member States to be party to the European Convention on Human Rights but the European Convention on Human Rights is in practice fundamental. Are you of the view that without the ECHR our government could not be trusted on human rights?

Lord Falconer of Thoroton: I take the view that without adhering to the European Convention on Human Rights we could not stay for very long in the European Union because I think it is broadly accepted that adherence to the specific commitments of the European Convention on Human Rights would now be regarded as in practice a condition of membership of the European Union. I do not think we would not be trusted. In practice, it is just a condition for membership and indeed adherence to

the principles of the Convention has rightly been regarded as a necessary condition before eastern European states can join the European Union.

Q62 Mr Carswell: If we could only quit the ECHR by coming out of the EU, are you not strengthening the case for people like myself who campaign for us to quit the EU completely? If we can only reform the ECHR by coming out of the EU, does that not strengthen the case for coming out of the EU entirely?

Lord Falconer of Thoroton: That is a bewildering question.

Q63 Mr Carswell: You are saying we can only quit the ECHR if we are outside the EU.

Lord Falconer of Thoroton: No. If we leave the European Convention on Human Rights in practice we could not stay very long in the European Union. We could leave the European Union and stay in the European Convention on Human Rights if that is what was wanted but I do not want to leave either and neither does the government. I think they are good things to be members of. There may be a bit of underlying disagreement between us on those two points.

Lord Judd: An awful lot of the exchanges so far seem to me to have underlined the need for a culture which understands and is positively for the implementation of the Human Rights Act. You have drawn our attention to the booklets that you have issued as guidance for local authorities as well as government departments.

The Committee suspended from 5.27 pm to 5.35 pm for a division in the House of Lords

Q64 Lord Judd: It seems that we are talking a lot about the need for a positive culture about the Human Rights Act, a context of which we are all aware. You have told us about the guidance you recently published and I think I can say for all my colleagues that we greatly welcome that. However, we do just wonder whether, as the sort of Committee we are, doing the work that we are doing, it would not make sense to let us see such a booklet and some of that information in draft form so that we can comment before it is published.

Lord Falconer of Thoroton: I agree. In a sense, we should have done that and we will do it in future. We were keen to get on with taking physical, positive steps to do it. This is my responsibility and nobody else's. I was extremely keen that when we came back in September from doing a review in July there would be tangible things happening to indicate that the review was not just simply a government announcement and there is then a long series of events that goes on. These booklets are not the beginning or the end of the story; they are but one stage on what is quite a long journey.

Q65 Lord Judd: As part of that, as I understand it, you have a ministerial group monitoring the guidance and training being provided by individual departments.

⁴ Note by witness: They dismissed the appeal.

Lord Falconer of Thoroton: Correct.

Q66 Lord Judd: Can you tell us a bit more about how that is going?

Lord Falconer of Thoroton: Yes. It has not yet met. It is chaired by me. It will have representatives of each central government department upon it. There is considerable enthusiasm for people to be on it and it is about taking a cross government look at how you make sure that human rights is inculcated into all government does and also how you defend human rights and establish exactly what you said. This is a human rights culture.

Q67 Lord Judd: You would agree that we will be on the way to having that culture when every department of government sees its commitment to human rights as an integral, central part of all that it is about. We must not be in the situation in which government departments see you and your lot as a sort of human rights police: "Oh my God, they are coming. How are we going to square our policy with them?" You should not have to do that.

Lord Falconer of Thoroton: Absolutely. I completely agree with you in relation to that. The world is very fractionally imperfect at the moment. Therefore, I am absolutely sure that efforts should be taken, not because my colleagues are remotely hostile or critical but because talking about it in a way that establishes it is an absolutely normal and given part of the way that we operate.

Q68 Lord Judd: Would you not agree that all the training and the rest, seminars and so on, make it all the more necessary that there is consistent and positive leadership from all the ministers who you say are on board? You say all the ministers are on board. Should they not therefore all be singing enthusiastically from the same hymn sheet and not from time to time feel tempted to keep *The Daily Mail* at bay?

Lord Falconer of Thoroton: Yes. We should all be singing from the same hymn sheet. Yes, inevitably it matters more to the particular department than to the other departments because they have focused, quite legitimately, on the particular, main policy areas that they are in. Yes, I agree with what you are saying.

Baroness Scotland of Asthal: What we are trying to do is to make sure we do not reinvent the wheel. For instance, there may be one department that has created a very good tool kit. Instead of each department creating a new tool kit, we are looking at how we can share intelligence and make sure that there is consistency. What one department is saying may be nuanced in a way which is perfectly sensible from their point of view but may seem to bring inconsistencies. We are trying really hard.

Q69 Lord Judd: Would you not agree it is not either/or? You need good management and that is good management. You also need to capture the public imagination and that calls for leadership.

Baroness Scotland of Asthal: I think it is. You will see that leadership right throughout. That is why every Bill, no matter which department brings it forward, still has to be compliant.

Q70 Lord Lester of Herne Hill: The question I am going to ask you now is of great practical importance to the working of this Committee and it is about information the government can give us about Bills that they introduce and their compatibility with the Human Rights Act. In your admirable review of the implementation of the Human Rights Act, you tell us about LP memoranda and you explain that as part of the process leading to Cabinet Committee approval of a Bill the relevant department compiles a memorandum for the Cabinet Committee setting out Convention rights likely to be engaged, explaining how the proposed legislative scheme ensures that any experience does not result in a breach and so on. As you know, the Committee have been pressing for some time to be given this kind of information in order to make our scrutiny work, not extracting teeth from ministers but doing it in a much more efficient way. You told us in a letter of 2 June that you would consult your colleagues about this and what we are hoping is that, having consulted, you will be able to provide us with more information, making it less necessary for us to be involved in interrogating ministers and their departments. Can you give us an update?

Lord Falconer of Thoroton: I cannot give you the commitment that you are after today. It is a matter of consultation across government. I am sympathetic to the proposition which says it must be more helpful than simply making a section 19 statement to say, "Here is where there was an issue on this Bill. This is the conclusion we came to. That is why we think it is compliant." It means, if there is a Bill with no human rights considerations of any reality at all, we simply send this Committee a note that says, "No human rights considerations arose." Assuming the situation worked well, I think that would ease both our position in government as a whole and yours. Assuming that a trusting relationship grew up, you would just cast to one side those Bills where you were told there were no human rights considerations.

Q71 Lord Lester of Herne Hill: It would be common ground, would it not, that you could exclude matters of legal, professional privilege? We are not asking for matters of legal advice and that kind of thing but it should be possible, should it not, to provide that information without going beyond what is proper?

Lord Falconer of Thoroton: Yes. I envisage it would be possible to say, "Clause 16 of this Bill raises this particular issue. We take the view it is human rights compliant because A, B and C." That would not require us to disclose to you that advice from one lawyer said this; it was not. A lawyer said that; it was not. We then took either advice from the law officers or advice from outside counsel and as a result of the advice we got we took the view it was compliant. Assuming that was taken as a *bona fide* view, which

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it would be, we could then tell you why we took the view that it was without going through the ins and outs.

Lord Lester of Herne Hill: We would like you to give us a Christmas present of good news before we break up for Christmas. Is that possible?

Q72 Chairman: I would prefer it before the Bill is published in the Queen's Speech. Bearing in mind we have been talking about this for over a year now, it would be nice to try and get some conclusions. It would mean we would have to do less work and you would have to do less work.

Lord Falconer of Thoroton: Exactly.

Q73 Chairman: Perhaps we could turn to the Home Office Policy Review, reforming the IND, rebalancing the criminal justice system in favour of the law abiding majority. Do you think criminal justice system is currently biased against the law abiding, bearing in mind that the prisons are full to bursting?

Baroness Scotland of Asthal: The perception is that it is. If you look at the policies that we have put out, it is quite clear that the public believe that we are definitely on the side of the offender, that their rights are properly looked after in a way that is robust and correct and that the system looks after them well. That is what all the surveys that we have had demonstrate to us. What is quite worrying is that is not how people feel about victims, witnesses and those who come to the court seeking redress. Therefore, rebalancing that is really important, not rebalancing it in a way that is unfair or unjust to the offender but better represents and supports victims. If you look at the things we have been able to do to give voice to that, the witness care units, the ability to make victim statements and those issues have better supported victims and those who wish to come to court than before. Those issues are very important. When we are talking about rebalancing, it is very important to remember that and to remember too that many of those who become engaged in the criminal justice system as offenders were at one stage victims. For example, if you look at the women who are currently in our prison estate, I went to visit Holloway and I was told by the governor there that 83% of the women in Holloway were at one stage victims of sexual assault or domestic violence. If we better care for victims, we genuinely believe that we will help to rebalance and reduce the amount of crime which is committed. That is something which the research bears out. This rebalancing is very important.

Q74 Chairman: The problem as you see it is a perception rather than actual imbalance of the system?

Baroness Scotland of Asthal: It is both because the perception is based traditionally on how the two are seen. If you look at what we now do to support victims, before we introduced the victim and witness care units, victims were not routinely kept in touch with precisely what was happening. The needs assessment that we now make in terms of how to

enable them to come to court was not dealt with in a coordinated way. In terms of the support they now receive it is significantly different from the fragmented system that we used to have. Many victims will say, "We come to court. We see defendants being looked after, not just in the criminal justice procedure but being given support in other ways to enable them to deal with this process. We do not receive the same care and attention." That was not just a perception; that was based on the reality so redressing that has been something of real importance.

Q75 Chairman: You are not suggesting that there is evidence that public safety is being prejudiced through some sort of imbalance or that the rights of criminals and terrorists are being prioritised over the rights of victims?

Baroness Scotland of Asthal: No. We have clearly seen in the last few years that there is more that we can do to care both for victims and offenders so that that rebalancing is clearer. We have to remember that confidence in the criminal justice system is extremely important. If people do not feel confident that the system is fair and proportionate and on their side, we will be doing a great disservice to the system itself because people have to have the confidence that what we are doing in the criminal justice system works and it works for the law abiding majority.

Q76 Chairman: In relation to the IND review, the paper suggests there is a risk averse culture across immigration, asylum and criminal justice based on "some evidence" of a "sometimes cautious interpretation". Can you give us some examples of that?

Baroness Scotland of Asthal: In terms of the sort of practical issues which people think they have to take into account, sometimes we have heard examples of people thinking that physical things had to be put in place. What is the quality of accommodation? Are they entitled to take into account the views that people may have about each other, a whole series of things which could distort the way in which judgments are made. We are coming back to this myth busting idea. People are just under-confident: "Can I do this? Is it a proportionate thing for me to do? Am I entitled to take into account past behaviour?" What we seek to do is to give better advice. We are coming back to the advice I was talking about in terms of the panel, in terms of the website and also looking at the programme. We have four projects of e-learning and an e-learning programme so that people can look at the frequently asked questions, get reassurance and know and have the confidence to know that what they are doing is in the right framework.

Q77 Lord Judd: Would you not agree that in this approach what is also very necessary is public education and understanding about the issues with which the system is dealing, because if you go very fast in this direction while public understanding is pretty superficial and informed by the tabloid press, if you are going to enable the public to feel that the

system is on their side, you may find yourself doing things which you just know ultimately are not going to be helpful at all.

Baroness Scotland of Asthal: Public education is very important. We have to find ways of engaging the public in the issues with which we and certainly this Committee are dealing all the time so there is a better understanding. We have spoken earlier today about some of the misunderstanding that there has been in relation to the way in which things operate and it is very important to address that. That background is one against which we will look for the work we are trying to do now to make sure these myths can be dispelled, and I think we agree with this Committee that there are a number of myths.

Q78 Lord Judd: It is also very important, is it not, that judges, for example, are not worrying whether they are on the side of this person or the other but they are deciding what is just and right in the cases before them?

Baroness Scotland of Asthal: I would absolutely agree with you.

Q79 Lord Judd: We have to watch that, do we not, in the context of this new culture?

Baroness Scotland of Asthal: Getting the balance right is not something we have to be worried about because what do the courts do? They are supposed to be just, fair and transparent. They are supposed to behave proportionately. I am not so much concerned about judges not having the robustness to deal with this sort of situation. I think they do have. It is getting an understanding of the process that they are engaged in for the general public which is going to be a real challenge for us.

Q80 Lord Judd: I would never accuse you of this at all but there is a danger of populism if this is not handled in the right way.

Baroness Scotland of Asthal: I can certainly see that that is so but if you look at what we have done and the way in which it has been expressed I hope the Committee will feel that it has been proportionate, measured and sensible in terms of the approach that we have taken. I think that is the way in which we continue to want this issue to be looked at.

Q81 Lord Judd: You would agree that anything that is done must not be at the expense of the well established right of suspects and offenders such as the right to a fair trial and the presumption of innocence. In that context, how happy are you really with a specific proposal to increase the use of live television links for victims rather than live evidence in court, because this raises the question of compatibility with the right of the accused to confront and cross-examine those giving evidence against them.

Baroness Scotland of Asthal: We have used live links very successfully for those vulnerable witnesses who would find it very difficult to meet their alleged perpetrator face to face. We have done that in relation to children, rape and other cases, all of which have been a proportionate response to make

sure that the imbalance that quite often happens between the victim and the perpetrator in those circumstances is addressed, because many victims in those circumstances feel very threatened and very worried about coming before a court. One of the things we have to address is to encourage more people to feel enabled to take that step of seeking justice and coming to court. The other issue about live links is that we are making that possibility available more for those defendants who wish themselves to take advantage of that as an appropriate way of disposing. For instance, in the Bill that we have just been dealing with, the Police and Justice Bill, we were looking at using live links for bail applications, where the defendant consents. All of that is perfectly sensible and proper.

Q82 Baroness Stern: This is a question about how victims are treated. Is it still the case—I may well be completely wrong about this—that people with a criminal conviction are not entitled to go to the Criminal Injuries Compensation Board for compensation if they have been a victim of a crime and would otherwise qualify for compensation?

Baroness Scotland of Asthal: They are entitled to go but it depends on the nature of the criminal offence and it depends on the quantum. It may be a factor which we have taken into account. At the moment they can still go but for certain offences it may materially reduce the amount they receive or indeed expunge it in its entirety.

Q83 Baroness Stern: Even if the criminal conviction was absolutely nothing to do with the reason that they were victimised?

Baroness Scotland of Asthal: It depends on the nature of the offence for which they were convicted.

Chairman: There is a tariff by which they are discounted depending on the nature of the sentence and the offence.

Q84 Lord Lester of Herne Hill: May I ask you about the *Chahal* case and its implications? In paragraph 2.13 of the unfortunately phrased *Rebalancing the Criminal Justice System in favour of the law abiding majority*, you describe *Chahal* in a way that I think is inaccurate. I just want first of all to clarify that. What you suggest is that the case goes against the fundamental principle in the Human Rights Act that individual and collective rights can and should be balanced against each other. You say that the Court of Human Rights decided that the UK government could not consider protection of the public as a balancing factor when arguing the case for the deportation of a dangerous person. May I suggest to you, and see if you agree with me, that what the court in fact decided in *Chahal* was that states may of course deport dangerous people on grounds of public safety which the United Kingdom frequently does and that the only exception which *Chahal* and Article 3 of the Convention impose is that, where there are substantial grounds to believe that the person concerned faces a real risk of death or torture or inhuman or degrading treatment on their return, they cannot be returned in those circumstances. In

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other words, that is the true finding in *Chahal* and it is not a question of balancing, is it, in that case because prohibition against torture is an absolute prohibition and there is nothing to balance when there is a substantial risk of torture.

Baroness Scotland of Asthal: That is correct but that is one of the issues which causes difficulty. I think you and the Committee will accept that there are now different gradations of inhuman and degrading treatment. We are quite clear about what torture is but, in terms of the way in which Article 3 has been interpreted and the jurisprudence in relation to it, there is quite a broad bracket of what would now fall properly within Article 3. In those circumstances, the argument goes in *Chahal*, should it be right that the public safety considerations should never be taken into account at all once Article 3 is engaged? The whole point is about whether it is ever right to balance public safety in relation to those issues which fall within Article 3.

Q85 Lord Lester of Herne Hill: Does it follow from what you have just said that what the government is seeking to persuade the Grand Chamber to do is to dilute its finding in *Chahal* so that, even though the government has substantial grounds for believing that someone will face torture or inhuman and degrading treatment or punishment in another country, they will nevertheless be free to deport that person to that country? Surely that cannot be the position of Her Majesty's Government?

Baroness Scotland of Asthal: I think it is in relation to the degrading treatment. Coming back to what I said earlier, there are clear cases. For example, if we were talking about torture, if we reasonably believe this person would either face death or be tortured, in those circumstances even if you had an ability to put into the balance the issue of public safety it is likely that, taking that balance into account, you could only come to one conclusion. That is likely to be no return. If we go to the other end and look at the jurisprudence in relation to what can be described as degrading treatment, you have a much broader spectrum. The way in which this has evolved has rightly taken into account the way a number of countries have been brought into line so that their general behaviour has been improved. Article 3 has been expanded. The question that we raise is: bearing in mind that when one compares it to threats to public safety which may mean significant numbers of people in this country will be put at risk, is it right that in those circumstances there is a total prohibition to even thinking about whether that balance should be put into the scales or not? That is a very real issue. I will give you some examples. You may have seen the submission we have made in relation to *Chahal*. Suppose, for example, that a person had just surmounted the substantial grounds for believing that there was a real risk of, say, corporal punishment on a single occasion. For example, the case of *Tyra v the United Kingdom*. There was judgment on 25 April 1978: “. . . or any physical force by a person in authority that might not be strictly necessary.” That too is Article 3—that is the case in 1995—or that you might be detained

for a relatively short period in prison in conditions that might be considered degrading. That is a Moldovan case in October 2005. In those cases, would it be right not to be able even to consider the public safety ramifications if that person was to remain in this country? That is the outer edge of where Article 3 is but it may correlate directly to some of the real concerns we have on public safety.

Q86 Lord Lester of Herne Hill: This all arose, did it not, out of nothing to do with corporal punishment or one-off situations which might be degrading treatment at the other end of the scale. It arose because of the desire to deport people perceived as dangerous terrorists, locked up indefinitely and held not to be, to countries which have practised torture in the past. I am not asking about memoranda of understanding. That is the context. As I understand it, maybe this is right: you are not suggesting we should water down the *Chahal* case in cases of torture because you accept that in cases of torture the prohibition is absolute. You are saying that there are some cases of degrading treatment that are relatively trivial but to take one example, take the *East African Asians* case: “Inherently degrading to subject fellow citizens to racial discrimination on the basis of their colour.” The government's position surely is not that you would wish, under Article 3, to deport Jews to Nazi Germany or black people to face race discrimination in Rhodesia or something of that kind? Surely there are cases of inhuman or degrading treatment so serious that the same must apply under Article 3 and there must be no exception for balance?

Baroness Scotland of Asthal: That is the question as to whether there should be no exception. If you have a threat which is very serious indeed to this country and to the safety and security of this country, is it right that where you have for example one issue of degrading treatment—I am not suggesting for a moment that any issue of degrading treatment is right—but, when one compares it to what may be a very significant risk to the safety of our nation, is it right that that cannot be even held in the balance? There can be no consideration of it whatsoever?

Q87 Lord Lester of Herne Hill: If you lose in your intervention in the European Convention on Human Rights and the Court sticks to its jurisprudence and says that Article 3 is absolute in international covenants, in the Torture Convention, in customary international law, you cannot water it down, would you then seek to dilute the Human Rights Act to instruct judges to give a different interpretation from that of Strasbourg?

Baroness Scotland of Asthal: It is really important to take this one stage at a time. You have already alluded to the fact that we are looking at memoranda of understanding and other steps that we can properly take in order to resolve that situation. I think it would be quite wrong and precipitous to prejudge where we would be at that stage. There is a very strong feeling that, the way in which the Article 3 jurisprudence has developed means there is a question we need to ask, now that we are facing some

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of the most severe difficulties we have ever faced: where are the boundaries? How should we balance that?

Q88 Lord Lester of Herne Hill: The problems about suspected terrorists are not about being caned at school or something of that kind, are they?

Baroness Scotland of Asthal: No.

Q89 Lord Lester of Herne Hill: Therefore, the heart of the matter is whether there should be an exception for torture or inhuman or degrading treatment of the most serious kind.

Baroness Scotland of Asthal: The truth is the way in which *Chahal* currently rests would mean that if there were such a case for saying, if they were to go back, they were at real risk of having one occasion when they might be held in custody for a period of days, which we think would be degrading—let us suppose we think that—*Chahal* would mean that even in those cases because of the absolute prohibition there is we would be unable to consider what was in the best interests of this country, security and safety. That is the reality of where we would be left on *Chahal*. You may say that it is nonsensical for us to be in that position. I would respectfully agree with you.

Q90 Chairman: Are you not creating misconceptions? Lord Lester is right. We are not talking about somebody being put in the stocks for an hour or something. We are talking about people who are facing potentially quite serious torture because they have offended the regime from which they have fled. The best example recently would have been the case of *Arar* where the chap was kidnapped from one place to another and ended up in appalling conditions in Syria. Those are the sort of things we are talking about. It is a very interesting, academic, fine legal argument as to whether you could have some minor, little bit of inhuman or degrading treatment but that is not really what we are addressing. The whole debate is about can we send terrorists back or not. The problem with sending terrorists back or not is not that they are going to face getting dressed in a funny uniform; it is because they face real risk of torture or imprisonment. That is the cutting edge here, not the fiddly bits around the edges. Are you not really supporting the myth or creating a misconception about what the debate is really about?

Baroness Scotland of Asthal: I do not think we are. There is now, we believe, a real debate as to whether it is right not to be able to put it in the balance—not that the balance would not go in favour of the person remaining here, but we cannot even consider public safety as an issue. That is in effect what *Chahal* says. With the full ambit of Article 3 we would not be able to because once you have established Article 3 there is a total prohibition.

Q91 Chairman: It comes back to the basic principle that you would not send somebody back to be tortured.

Baroness Scotland of Asthal: We have been very clear in relation to torture.

Q92 Lord Judd: I am a bit bemused and I would appreciate clarification. I do not understand that you are debarred from considering public safety.

Baroness Scotland of Asthal: We are.

Q93 Lord Judd: The issue is: does the danger of what may happen to the person who is sent back override your anxiety about public safety? It is not either/or. You are able to take it very seriously. You might come to the conclusion that this is a terrible threat but in terms of discharging our commitment on another front we cannot send that person back.

Baroness Scotland of Asthal: The way that Lord Lester put it to me to start off with was the correct way. That leaves us in a position that if an Article 3 case is established there is no balancing exercise. There is a total prohibition.

Q94 Lord Judd: Do you accept that for many people who know the sort of countries we are talking about there is a kind of disbelief, because of what the Chair referred to as a rather academic approach, that there is a sort of dividing line between degrading treatment and torture? Somebody who may start off with degrading treatment may well in effect become tortured and indeed may well die. These things are not isolated. In those sorts of countries, in those sorts of situations, those things run together. If you have so much evidence that you are contemplating the return of a person in this situation, why not just have a prosecution and a case in this country?

Baroness Scotland of Asthal: Wherever possible, we would always prefer to prosecute. If there is evidence to prosecute someone for an act of terror, we would always wish to do that. However, it is not a very comfortable position to be in but we have to face the fact that the European Convention on Human Rights has made it absolutely clear that the rights of individuals to be protected under Article 3 are paramount. They could not be weighed against any other factors, even in a case involving national security, even if we were to establish that this would cause huge risk to national security. Let us put it at its most extraordinary. It is likely that the retention of this person, because of the rules that we have, would cause real harm. Even if that were the case, because the rights of the individual are paramount, we would not be able to even consider those risks.

Q95 Nia Griffith: If we can turn to the approach to deportation of EU and EEA nationals, perhaps you could enlighten us in some way as to what cases the Home Secretary was referring to when he said in the House of Commons in a statement that the IND's robust approach to the deportation of EEA nationals has been defeated consistently in the courts. Were there particular cases that he was referring to?

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Baroness Scotland of Asthal: I am very happy to give you those shortly. The IND management are collating those and I am very happy to write to the Committee and I will try and do that as quickly as we can.

Q96 Nia Griffith: Would you accept that there is little opportunity to change the law in respect of EEA and EU nationals because they are governed by EU law?

Baroness Scotland of Asthal: I think we agree that there is less scope to change the deportation legislation for EU and EEA nationals than others because we have had to comply with specific regulations in addition to the ECHR and the Refugee Convention. There is some room for manoeuvre but I absolutely accept this is limited and the presumptions planned for the new legislation will focus mainly on the non-EEA nationals.

Q97 Nia Griffith: Do you think there might be a tendency for the Home Secretary to blame the courts, knowing he is powerless to change the law?

Baroness Scotland of Asthal: I do not think it is an opportunity to blame the courts. What the Home Secretary was seeking to do was to identify the difficult situation we have and he was seeking to address that robustly. This has been an issue of some concern for a while and it is quite clear that we have to deal with it.

Q98 Nia Griffith: Obviously you may have a situation where a prisoner has been in this country for very many years and has perhaps very little knowledge of the country of origin. Do you accept that we really have to work in a compatible way with Article 8 of the Convention?

Baroness Scotland of Asthal: Absolutely.

Q99 Nia Griffith: And treat these cases sensitively?

Baroness Scotland of Asthal: We will not be seeking to deport anyone in contravention of Article 8. There are some sensitive issues in relation to this and this is something that we have to take fully into account.

Q100 Nia Griffith: Would you be able to publish in, say, six months' time a list of where deportation has been suggested and carried out, where it has been suggested and has not been carried out and the reasons for that?

Baroness Scotland of Asthal: I would certainly be happy to look at that. I do not think I can give you a guarantee that we will be able to do that in the next six months. As you know, Article 8 does enable us to do that but I will certainly look at that and come back to the Committee with what, if anything, we can do in relation to it.

Q101 Lord Lester of Herne Hill: I should declare an interest because I was in the *Roma Rights* case all the way through. As you know, that case decided that it was unlawfully discriminatory on grounds of race to practise ethnic profiling by making broad assumptions, in that case about Roma seeking to

come to this country. The Law Lords relied upon customary international or Convention law. What steps has the government taken in the wake of the decision in the House of Lords in the *Roma Rights* case to make sure that any future targeting of IND activity on high risk routes and traveller profiles will not be inherently racially discriminatory and therefore unlawful by acting upon broad racial stereotypes that do not apply to each individual?

Baroness Scotland of Asthal: I can certainly assure you that we took those matters very seriously indeed. We developed minimum data sets setting out the data and we issued guidance defining the quality of the data. Those issues have been very fully taken on board in relation to making sure that the way in which we monitor is now compliant with the Act and not unlawfully discriminatory.

Q102 Lord Lester of Herne Hill: Does that mean that therefore the Home Office Immigration and Nationality Department officials will be instructed firmly not to engage in racial profiling in their making of decisions?

Baroness Scotland of Asthal: There is not racial profiling in making decisions. What is lawful is in relation to acting on data where there is an evidence basis for a certain nationality and responding in that way. We have made sure that those issues are far better understood.

Q103 Baroness Stern: We all welcome the government's recognition that certain ethnic groups are disproportionately represented amongst those stopped and searched, arrested, convicted of a serious crime and imprisoned; and this raises a question as to whether the criminal justice system contains any built-in discrimination on racial grounds. Could you give us more details about the fundamental reform in data collection under section 95 of the 1991 Criminal Justice Act which is envisaged and whether you are also thinking about whether current training and guidance for front line officers is adequate?

Baroness Scotland of Asthal: You will probably be familiar with what we are doing in relation to stop and search because we have identified that there is a level of disproportionality right the way through. The question has always been on what is that disproportionality founded. Is it improper or is it not proper? What we were seeking to do was to try and find practical ways of testing out how this had occurred because one of the most frustrating things is the stubborn way in which, notwithstanding the various strategies that have been taken to address these issues, we were not getting a material change.

The Committee suspended from 6.18 pm to 6.25 pm for a division in the House of Lords

Q104 Chairman: Can I go on briefly to the question of people with mental health problems who are still in prison? The government has recognised that there are far too many non-dangerous people who are in

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that category. How many people do you think are still imprisoned and what are you doing to try and take steps to divert them into treatment?

Baroness Scotland of Asthal: I do not have the number at my fingertips. I have the percentage and the number of prisoners with serious mental health problems transferring from prison to the National Health Service has increased by about 24% between 2002 and 2005. I will certainly seek to get you the overall number. I think we all know that that has historically been a big issue. One of the advantages of having an opportunity to work much more closely with the National Health Service in delivering change in prisons is that we have been able to better target individuals who suffer from mental illness and we have also been able to get them through more quickly. One of the other issues that we have clearly come to appreciate is of course that a number of those who enter with drug or alcohol dependency sometimes mask underlying mental health and psychotic illnesses which we are picking up once they withdraw, either from drugs, drink or from those other aberrant effects. There is a huge amount that we are now trying to put together for better training, so that we can better identify people early in the criminal justice system to look at how best we could perhaps divert those whose primary issue is mental illness and not criminal activity. There is quite a lot of work that we are doing with the mental health team in health. We have a joint mental health team with the Home Office now doing some very good work.

Q105 Lord Plant of Highfield: Given that two people managed to abscond from or evade control orders which were imposed on them, in the light of that your colleague, Mr McNulty, speaking to both the press and television media, suggested that the government might need to think very carefully about derogating from Article 5 of the ECHR, the right to individual freedom, on the grounds that it needed to be able to impose more onerous control orders than Article 5, according to the Court, seemed to allow. Is the government seriously contemplating derogating from Article 5?

Baroness Scotland of Asthal: What we are looking very seriously at is how control orders operate and the legislation in relation to them. You will know that we intend to appeal against the most recent order. I think it would be once again premature to talk about where we would go if that appeal was not successful, but we are looking at what further or other measures we could proportionately put in place which would enable us to operate control orders in a way that would avoid derogation. Of course, there is within the Terrorism Act provision for derogation if we were to find that the other measures were insufficient to meet the needs of security, but I think we are not at that stage at the moment.

Q106 Chairman: Could I remind you about our paper which we published just before the summer recess on counter-terrorism policy and in particular as to how we thought the circle could be squared in

producing a human rights compliant system of counter-terrorism? Does the government accept what we said in the report that we do not need to extend the possibility of pre-charge detention beyond the current 28 days in the light of the threshold test operated by the Director of Public Prosecutions, which they tell us is in most terrorist cases now? There is scope for more active judicial oversight of the post-charge timetable and we should adopt a rather more robust approach to the defence aspect and the possibility of drawing adverse inferences from a refusal to answer post-charge questioning, all suggestions that we think are procedurally very helpful towards securing prosecutions and convictions and overcoming some of the reservations that have been put to us by the police and others that require a longer detention period.

Baroness Scotland of Asthal: We were very grateful to receive those comments and recommendations. Those issues, I can assure you, will be taken into account. You will also be aware that on the 28th of last month the Home Secretary announced that he was going to undertake a review in terms of capabilities and resources for counter-terrorism and all the issues you have just addressed will be considered during that review. I cannot tell you what the outcome is. I can certainly assure you that the government is trying to think very creatively about what steps could properly and proportionately be taken to make it easier for us to prosecute those who are suspected of terrorism or indeed where there is evidence which would indicate that they are engaged in terrorist activities. Some of the issues that we have had in the past are well known and these issues are by no means simple. They are complex, but I can certainly assure you that very active consideration is being given to how we address the current situation in which we find ourselves.

Q107 Lord Judd: Both the Attorney General and the Director of Public Prosecutions have now made clear that they favour the relaxation of the prohibition on the admissibility of intercept evidence. Will the government now treat this as a priority and urgently bring forward a legal model making it possible? When will the work currently being done on the public interest immunity plus model be made publicly available? Does not all this in reality relate pretty closely to what we were discussing about deportations?

Baroness Scotland of Asthal: The position of the government in relation to the use of intercept evidence has not materially changed from that which we have expressed for quite a considerable time. We have constantly and consistently said that it was possible to safely and appropriately use intercept evidence we would be minded so to do. The devil has always been in the detail as to how that could be done in a way that did not infringe upon our security and safety issues, would enable us to prosecute and would not improperly undermine the security which we have so hard won. Those issues, I can assure the Committee, have been given a huge amount of time and energy and that is certainly continuing. I cannot

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give you a date upon which that work will conclude but I can certainly assure the Committee that we are working on this matter in a very pressing way indeed.

Q108 Lord Judd: It is difficult for some of us to understand how we are such an exceptional country in this respect and others have found a way. I am sure the DPP and the Attorney General take the issues you have mentioned extremely seriously and we all take it extremely seriously. I do. I find it peculiar that we find ourselves absolutely unable to move so far.

Baroness Scotland of Asthal: You and I and a number of Members of the Committee have enjoyed this debate across the House for a considerable amount of time. I will not tire the Committee with all the reasons that the government has given in the past as to why it is difficult. All I can do is to assure you that urgent attention is being given, not just by the Attorney General and the DPP, to find a way. If a safe and secure way can be found, obviously that is something that will be done but if it cannot be found then the government will be in a position to appraise the Committee and indeed the House of what our conclusions are as soon as we have identified them.

Q109 Lord Judd: Is not all this relevant to deportations?

Baroness Scotland of Asthal: It is certainly an issue. I have made clear today and you have made clear on a number of occasions that our preferred position, wherever possible, is to prosecute because prosecution in relation to these offences is always the better course. It is only those cases where prosecution is not possible that an alternative is ever considered. Therefore, if there could be a way of using intercept evidence which was public interest immunity plus or whatever, of course that is something the government would be minded to do. The question is: is it possible? I am not in a position to tell you today as to the conclusion to which we will come.

Q110 Lord Lester of Herne Hill: Could you let us have one answer though when you do come back to the Committee? Why is it possible in the United States and not possible in this country when both countries have a common law adversarial system and they have a strong Bill of Rights? Why is it not

possible for us to do what they do in the United States? I would not ask you to answer that now but I would be grateful to know the answer in due course.

Baroness Scotland of Asthal: I am certainly happy to give the Committee that answer. I think we have given it on a number of occasions but I am delighted to write to the Committee with our full answers as to why we differ significantly in our jurisprudence and our structure from other countries, the problems that we currently have and how we are seeking to address those.

Q111 Chairman: I get the impression from your answer that we have moved from “whether” to “how”. Is that right?

Baroness Scotland of Asthal: I think it has always been “whether” and “how”.

Q112 Dr Harris: Can I ask if you are considering a new specific criminal offence of flag burning or whether you will consider it?

Baroness Scotland of Asthal: I am not aware of consideration being given to a specific offence of flag burning. It would be quite wrong for any minister of any government to say there would never be any circumstances when any government of a different complexion in the future may not consider banning it. I have no idea whether this will be something that is considered. I do not believe it is on anybody's agenda at the moment.

Q113 Dr Harris: Do you recognise that there is a freedom of expression issue, if I want to burn an EU flag and my colleague wants to burn the Union Jack?

Baroness Scotland of Asthal: Or the other way round.

Q114 Dr Harris: Without threatening anyone and without a public safety issue, that is a freedom of expression issue.

Baroness Scotland of Asthal: There is no reason for me to believe that that is within anyone's contemplation at the moment.

Lord Lester of Herne Hill: It does cause carbon emissions.

Chairman: It may well be in breach of the Health and Safety at Work Act. Can I thank you both for coming along to a very informative session for us. We have had a very robust exchange and we are very grateful for the time you have spent with us.

1. Letter to the Rt Hon Tony Blair MP, Prime Minister and First Lord of the Treasury

THE HUMAN RIGHTS ACT

I am writing on behalf of the Joint Committee on Human Rights to seek clarification of the Government's intentions in relation to the Human Rights Act following recent comments by you and other Ministers that it would be desirable to give consideration to amending the Act, primarily to seek to ensure that considerations of public safety and protection are given greater weight by decision-makers and courts. As the Committee charged by both Houses of Parliament with considering matters relating to human rights in the UK, this is an issue which is of great importance and interest to us. We think it is essential that proposals of this kind are subject to close examination to ensure that they are based on supporting evidence, and would therefore be grateful for a fuller explanation of the Government's reasons for considering that the Act may require amending.

We have noted your comments in your 23 June speech on the criminal justice system, in which you described repeal of the Human Rights Act as a "false solution" but said that there were issues under examination by Government to do with the way the Act is interpreted and its case-law. As we understand it, there have been three recent developments which the Government has put forward as demonstrating a need to consider amending the Human Rights Act:

- the High Court judgment of 10 May overturning the Home Secretary's decision that it was not appropriate to grant discretionary leave to enter the UK to nine Afghani nationals who arrived in the UK on 7 February 2000 having hijacked an aircraft on an internal flight in Afghanistan in order to flee from the Taliban regime;
- the report published on the same day by HM Chief Inspector of Probation of his review of the case of Anthony Rice, who murdered Naomi Bryant following his release from prison on licence; and
- the Government's own proposals to introduce an automatic presumption of deportation of foreign prisoners.

In relation to the case of the Afghani hijackers, we note the original factual findings of the panel of Immigration Adjudicators on 8 June 2004 that the nine individuals would be targeted for assassination by the Taliban if returned to Afghanistan and that there would be insufficient protection for them there against that risk if they were returned, findings which led the panel to uphold the individuals' claim for humanitarian protection under Article 3 of the ECHR. We also note that the Immigration Appeal Tribunal refused the Home Secretary permission to challenge those findings, and that the Home Secretary did not apply for judicial review of that decision. We would be grateful to know whether or not, since deciding not to challenge the Adjudicators' findings in the High Court, the Government has come into the possession of any new evidence which would contradict those findings. We would also be grateful to know whether the Government still accepts, as it did at the hearing before the Immigration Adjudicators, that there are no reasonable grounds for regarding any of the individuals as a danger to the security of the UK, or as constituting a danger to the community of the UK.

In relation to the report by Andrew Bridges on the Anthony Rice case, we would be grateful for further information on the Government's reasons for considering that this report demonstrates that the Human Rights Act, or interpretation of that Act by decision-makers, was responsible for any of the cumulative misjudgments throughout the process leading up to and following Anthony Rice's release on licence. If the Government considers that there is anything in the Human Rights Act or domestic or Convention case-law which prevents decision-makers from striking a proper balance between the human rights of an individual prisoner and public safety considerations when deciding on whether or not to release prisoners on licence we would be grateful to receive an explanation of what this is.

In relation to proposals to change the system governing the deportation of foreign prisoners, we have already written to the Home Secretary to ask him, when he produces his consultation paper on the proposals, to provide us with evidence on why any interference with Convention rights which could arise, in particular from the introduction of a presumption of deportation, would be justified. For the present we would be grateful for any evidence the Government is able to provide to us which would show that the Human Rights Act or its interpretation by decision-makers, as opposed to administrative error, has been responsible for the failure to consider whether foreign prisoners should be deported on their release in a substantial number of cases.

In addition to the specific information requested on the three cases above, we would of course welcome any other information about them, or indeed other matters, which you consider bears on the question of whether there is a need to consider amending the Human Rights Act, including the Government's reasons for considering that the Act and the ECHR, or their interpretation by UK courts and decision-makers, do not permit a proper balance to be struck between the human rights of individuals and public safety, as referred to by Baroness Ashton of Upholland on 8 June (columns 1132–1136 House of Lords Official Report).

Finally, it would be helpful for us to know precisely how the Government is currently taking forward consideration of whether the Act should be amended or legislation might be introduced to address the alleged problem of UK court rulings which are not consistent with other EU countries' interpretations of the ECHR. We would therefore like to know what work is currently being conducted on these matters within Government, including the nature and terms of reference of any internal reviews of the subject such as those which we understand you have asked the Home Secretary and Lord Chancellor to undertake, and an indication of when announcements might be made and any legislation might be brought forward.

In seeking these clarifications, in no way is my Committee making any suggestion at this stage that the Human Rights Act should or should not be amended. Nor would we wish this letter to be construed as support for or criticism of existing human rights legislation.

My Committee would be most grateful to receive your response to this letter by 14 July.

27 June 2006

2. Letter from the Rt Hon Lord Falconer of Thoroton, Secretary of State for Constitutional Affairs and Lord Chancellor

The Prime Minister has asked me to reply to your letter of 27 June.

As you know, the Prime Minister has asked me to devise a strategy which maintains the effectiveness of the Human Rights Act, and improves the public's confidence in the legislation. As part of this strategy, I have initiated a review looking specifically at problems with the implementation of the Human Rights Act, covering three areas:

- firstly, the need for clearer cross-government guidance on the balance that needs to be struck by officials when making decisions with human rights implications, ensuring that public safety is at the forefront of decision making;
- secondly, whether primary legislation is needed either to amend the Human Rights Act 1998 or other legislation; and
- thirdly, how to improve public confidence in the Human Rights Act and its operation.

The review will comprise both a comprehensive analysis of caselaw involving the Human Rights Act and evidence provided to DCA by departments about their experience of operating the legislation. In parallel, the Home Secretary has been asked to lead a review of the impact of the Human Rights Act and the European Convention of Human Rights Articles on decision making in the Criminal Justice, Immigration and Asylum Systems. Both reviews will pay careful account to the review conducted by Andrew Bridges into the release of Anthony Rice.

The Government expects to make announcements concerning these reviews shortly. We will look forward to discussing them with your Committee.

19 July 2006

3. Letter to Andrew Bridges, HM Chief Inspector of Probation, HM Inspectorate of Probation

My Committee is very interested in your report on the Anthony Rice case in the context of work it is undertaking on the Human Rights Act and the impact it is having on the formulation of policy and the delivery of services, including in relation to the important question of whether the Act, or the way it is being interpreted by decision-makers, is affecting protection of the public. At the end of this month we intend to take evidence from the Lord Chancellor on these matters, focusing on the DCA's review of the implementation of the Act.

Before that session takes place we would be grateful if you could let us know precisely what information contained in your report on the Anthony Rice case you consider supports the view you expressed in it that from 2001 "the people managing his case started to allow public protection considerations to be undermined by its human rights considerations, as these required increasing attention from all involved, especially as the prisoner was legally represented" (Principal Finding 1.3.1). It would also be helpful if you could let us know if you have any further evidence, over and above that already contained in the report, to support that view. In particular, we would be grateful for any evidence you are able to provide that at the principal decision-making points in the management of Mr Rice's case, including at the time of his release on licence and in deciding the conditions to which he should be subject on release, human rights considerations had the effect you describe, and whether in your view this was because of a correct or incorrect interpretation of the requirements of the Human Rights Act by the relevant decision-makers.

I would be grateful if you could provide a response by 23 October.

11 October 2006

4. Letter from Andrew Bridges, HM Chief Inspector of Probation, HM Inspectorate of Probation

Thank you very much for your letter of 11 October, inviting me to provide more information to support what we said in our review of the Anthony Rice case.

First, I am grateful that you have referred to what we actually said in the report, and not to what some people think we said in the report. I confirm that we made no comment about the Human Rights Act itself. And it was a huge distortion of our findings when some newspapers said that Rice was released in order to “meet his human rights”.

Indeed our findings were much more subtle, and in my view they merit serious, sober attention, based on careful analysis rather than ideological position-taking. Hence I welcome your letter.

You ask why we said that the people managing this case started to allow its public protection considerations to be undermined by its human rights considerations. This in turn links directly with one of our Key Recommendations: *When managing a high Risk of Harm offender in the community, although proper attention should be given to the human rights issues, the relevant authorities involved should maintain in practice a top priority focus on the public protection requirements of the case.*

This is what we felt had not been achieved in the case of Anthony Rice.

If I answer your secondary (final) question first: I don’t think it is a question at all of some decision-makers sitting down and carefully examining the legislation and then interpreting it wrongly—we certainly did not find evidence of such a thing in this case. Indeed I would add as a general observation from my experience that if you sit case managers down and ask them whether current human rights legislation prevents them from carrying out their public protection responsibilities the great majority are either fully aware that it doesn’t, or would at least know who to consult to check.

The problem in this instance was much more subtle, and human, and in my view almost certainly not unique to this case. It needs to be thought about in the context of what it is like for the people carrying out these duties day by day. Such staff have perhaps three or more dozen cases to manage, all different, with managers (and yes, Inspectors) ready to criticise them if they do the wrong thing with any of those cases at various key points. They do not have a very high status within the whole process even though they have (or should have, in my opinion) lead responsibility for managing the case.

At the point of an oral Parole hearing, as an officer if you are not proposing release you will be cross-examined by a barrister to challenge your assessment, as well as by the Board, but if you are proposing release you will only be questioned by the Board. And then when you are managing the case on Licence you might receive letters from the licensee’s solicitor continually challenging the Licence conditions and other requirements as being excessive, accompanied by the prospect of judicial review. Your attention is constantly being drawn to the question of whether you are treating the offender *fairly*.

What we found in the Rice case was a lot of evidence of the case manager, and the MAPPA meetings, giving plenty of careful consideration to the issues of treating Rice *fairly*, and responding accordingly to the solicitor’s letters. Usually (but not always, unfortunately) they took the correct view and maintained the restrictions that Rice and his solicitor were complaining about. All this discussion of issues of *fairness* was all quite well documented. What we then did not find in the records was evidence of sufficient discussion of their continuing assessment and management of Rice’s *Risk of Harm* to others. We summarised our analysis in Chapter 10.3 of our report.

The key statement answering your main question is in 10.3.12 where we say that the MAPPA in their deliberations “gave more attention to justifying the proportionality of the restrictions than to planning how to manage them effectively”. In broad terms our Finding is based on us discovering plenty of evidence of them discussing the former, and relatively little of them discussing the latter. Following our discussions with the people involved we took the view that the attention of the relevant officers was constantly drawn away from the latter towards the former. We used the term “distracted” to describe this, and as it happens this appears to have been accepted by the people involved as a fair interpretation.

The issue with the Parole Board’s decision to release has some parallels. I have no doubt that Parole Board members and staff have a proper understanding, in principle, of how to implement their public protection duties while complying with human rights considerations. But something much more subtle happens as a result of the fragmentation of the process of making decisions concerning a Life Sentence prisoner over a period of years. We aimed to capture that in our report, and summarised it in Chapter 10.2.

Overall I would take this opportunity to reiterate our point in 11.3: “. . . it is increasingly difficult for those charged with managing offenders through their sentences to ensure that public protection considerations are not undermined by the human rights considerations of each case.”

It is not about the principle; it is about the practice of carrying it out in real life. It is not that it is impossible; it is just that it is becoming increasingly difficult in practice. Experienced staff have commented to me in relation to release from indeterminate sentences, especially for those who have passed the “tariff date”: they comment informally that in the past officials arguably had too much power to continue to hold the prisoner in custody without real challenge; nowadays one effect of prisoner representation for prisoners is that their job is now more about justifying keeping the prisoner in than it is about making a clear case about why he or she is now safe to let out.

I hope it is clear that my perspective arises from the overall pattern of the evidence in this case, and also from what I hear informally during other inspections and visits to areas. I believe that these are subtle issues, which need discussing in a calm and open-minded manner—I would welcome such a discussion if you would find it helpful.

17 October 2006

5. Letter to the Rt Hon Dr John Reid MP, Secretary of State for the Home Department

As I hope you are aware, the JCHR has decided to undertake an inquiry into the human rights implications of various Home Office policy proposals with a view to producing a report to inform both Houses of Parliament by the beginning of the 2006–07 Session, during which a number of the proposals are expected to be translated into legislation. This is part of our new approach to human rights scrutiny, which aims to report on Government policy and proposed legislation at an earlier stage than we have achieved in the past by scrutinising bills only once they have been presented.

We are particularly interested in the human rights implications of Home Office proposals on rebalancing the criminal justice system, reforming the IND, introducing new powers against organised and financial crime, and reforming the Prison and Probation Services. We have been in contact with the Home Office at official level about the possibility of you giving oral evidence to us on these matters in the near future, and we hope it will be possible to agree a date and time soon. In the meantime, it would be very helpful for us if you could respond in writing to us on a couple of points:

- According to BBC reports in July, the Home Office’s internal review of the implementation of the Human Rights Act had identified 25 examples of the Act causing difficulties for decision-makers. Unlike the DCA’s review of the implementation of the Act, the Home Office’s review has not been published. We would be grateful to know if this review will be published and, if so, when, as well as for details of the 25 examples apparently identified in the course of the review.
- We remain unclear about how the Government’s wish to reverse the *Chahal* judgment can be reconciled with the frequent statements by Ministers that the Government would not be prepared to send somebody back to a country when there are substantial grounds for believing that he or she would face a real risk of being tortured or killed. On 25 July you said in the House in reply to me that “It is wildly wrong to suggest . . . that opposition to the *Chahal* judgment means support either for complicity or for sending people to be tortured; that is an outrageous suggestion” (Hansard 25 July 2006, col 736). As the *Chahal* judgment only applies in cases where it has *first* been established that substantial grounds have been shown for believing that a person faces a real risk of torture or death on their return, we cannot see that a reversal of the judgment, allowing the Government to deport on national security grounds despite such a risk, could lead to anything other than an undermining of the absolute prohibition on torture in the ECHR and the UN Convention against Torture. We would be grateful if you would explain why you do not agree with our analysis, if indeed that is the case.

Assuming we are able to organise an oral evidence session with you in the near future, it would be very helpful for us to have your written response to these two points in advance of that session, and in any event by the end of October.

16 October 2006

6. Letter from the Rt Hon Baroness Scotland of Asthal QC, Minister of State, Home Office

You wrote to the Home Secretary on 16 October inviting written evidence to be submitted to your committee in advance of a Ministerial appearance before your committee to provide it with oral evidence. Our offices have been in contact and agreed a date of 30 October. As I shall be attending, I am also replying on the Home Secretary’s behalf.

You asked specifically about two issues; the first that of a BBC report earlier this year regarding our internal review, and secondly the Government’s intervention in the case of “*Ramzy*” in order to reconsider the principle laid down in the “*Chahal*” case. I will deal with these in turn.

The BBC reports in July referred to a leaked discussion document that formed part of the work on the “Review of decision-making in the Criminal Justice, Immigration and Asylum Systems”. The document was drafted to inform our initial discussions around areas where legislation, regulations and administrative rules or the interpretation and administration of legislation and regulations may be impeding decision-making. The document was a starting point for discussion and was not identifying conclusive examples of where the Human Rights Act had been found to impede decision-making.

The conclusions and recommendations from the “Review of decision-making in the Criminal Justice, Immigration and Asylum Systems” have been published in the CJS Rebalancing Review. However, to inform this JCHR inquiry please find attached at Annex 1 the summary of the findings from the Review of decision-making in the Criminal Justice, Immigration and Asylum Systems.

The second point you raise relates to the Government’s decision to intervene in the case of *Ramzy v the Netherlands* and invite the European Court of Human Rights to reconsider the principle established in the *Chahal* judgment.

You say in your letter that “the *Chahal* judgment only applies in cases where it has *first* been established that substantial grounds have been shown for believing that a person faces a real risk of torture or death”. Further, that any reversal of the judgment which allowed us to deport someone despite such a risk would risk undermining the absolute prohibition on torture in the European Convention on Human Rights (ECHR) and in the United Nations Convention Against Torture (UNCAT).

In fact, it is not the case that *Chahal* applies only to cases involving the possibility of torture or death. The judgment applies to any treatment that would be contrary to Article 3. The full wording of the Article states that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”, and the concept of inhuman and degrading treatment or punishment encompasses substantially more than just torture. More importantly, however, what we are asking the court to reconsider is the process by which the assessment of “substantial grounds of a real risk” is made, rather than what should happen once that conclusion has been reached.

As far as the death penalty is concerned, our position is quite clear. We will not deport or extradite someone if there is a real risk of their being executed. Our intervention in *Ramzy* does not alter this.

I believe the JCHR will have seen the observations which we, and the Governments of Lithuania, Portugal and Slovakia, have made in *Ramzy*, but I am enclosing a further copy for ease of reference, attached as Annex 2. As that document makes clear, the position of the intervening Governments is that:

- no challenge is made to the absolute nature of the prohibition in Article 3 against a Contracting State itself subjecting an individual to Article 3 ill-treatment;
- however, the context of removal involves assessments of risk of ill-treatment, and needs to afford proper weight to the fundamental rights of the citizens of Contracting States who are threatened by terrorism;
- it is necessary and appropriate for all the circumstances of a particular case to be taken into account in deciding whether or not a removal in the situation set out above is, or is not, compatible with the ECHR, and that national security considerations cannot simply be dismissed as irrelevant in this context.

We take the view that, in judging whether substantial grounds exist to believe that the person faces a real risk of ill-treatment, it ought to be both necessary and appropriate to have regard to the fact that both (a) the degree and nature of any risk in the receiving State and (b) the degree and nature of the threat posed by an individual, are relative.

As I have said, Article 3 does not apply just to cases at the extreme end of seriousness, such as torture. Treatment falling within Article 3 exists in a spectrum of seriousness. It is true that a minimum level of severity must be reached for a case to fall within Article 3. However, at the lower end of the spectrum, the concept of degrading treatment is a relatively broad one, as the cases referred to in paragraph 24.2 of the joint observations illustrate. The greater the reach or coverage of Article 3, the more pressing becomes the issue whether a terrorist threat should be wholly left out of account. This is one of the reasons we have intervened as we have.

We are not seeking to argue that national security considerations will inevitably permit removal of a person believed to present a threat on national security grounds. The point is a narrower one: national security considerations cannot be dismissed as irrelevant, and Contracting States should be able to take them into account in considering whether a particular removal would be contrary to Article 3.

A second consideration where we are seeking clarification is the standard imposed by the “substantial grounds for believing there is a real risk” formula enunciated in *Chahal*. In practice, the Court appears to apply a lower test than “more likely than not”. In a case in which there is a material indicating a national security threat, we believe it would be appropriate to require it to be shown more clearly, or to a higher standard, that a person might be ill-treated before deciding that removal would contravene Article 3.

I hope this clarifies the Government’s reasons for intervening.

As the JCHR is aware, within the constraints of the present definition of Article 3, we have been negotiating Memoranda of Understanding and agreeing other procedures for seeking assurances on a case-by-case basis that allow us to satisfy ourselves that the removal of certain individuals is compatible with our obligations under the ECHR. Although the focus recently has been on assurances in respect of people we wish to deport on grounds of national security, we have, in the past, obtained assurances in respect of individuals we wish to deport on other grounds. Depending on the circumstances of the particular case, I think it likely that we will continue to obtain assurances in individual cases even if we are successful in securing a modification of the current caselaw.

I hope this is helpful in addressing the points you raised in your letter.

Annex 1

SUMMARY OF THE HOME OFFICE REVIEW OF DECISION MAKING IN THE CJS, IMMIGRATION AND ASYLUM SYSTEMS

1. BACKGROUND

This paper details the key findings of a Home Office review of decision making in the CJS, Immigration and Asylum Systems which was initiated by the Prime Minister and complements the wider review undertaken by the Department for Constitutional Affairs.

Objective of the review

The objective of the review is examining the impact of the Human Rights Act and the ECHR articles it enshrines on decision making in the criminal justice, immigration and asylum systems. In doing so, three areas have been considered:

- Legislation, regulations and administrative rules.
- Interpretation of existing legislation and regulations.
- Administration and competent application of legislation and regulations.

Methodology

This report is based on evidence that has been provided to the review team by the relevant agencies across the Office for Criminal Justice Reform and the Home Office. The evidence has been gathered in a number of stages:

- Agency leads were asked to provide details of any areas within their policy responsibilities which the review should address.
- Once the areas had been agreed, further detailed information was requested from officials and Home Office legal advisers.
- Meetings were held with those agencies whose returns indicated the greatest areas of concern.
- Focus groups and semi-structured interviews were held with front-line CJS staff to ensure that all relevant decision-making processes had been identified.

2. LEGISLATION

The review has found that the Human Rights Act (1998) and other legislation are felt by the majority of agencies to be helpful in providing a framework in which the work of the Criminal Justice System can be operated. A review of cases that were heard in the last 18 months has demonstrated that the Human Rights Act is being robustly applied by the courts in many areas. In addition, it has been highlighted that many of the impediments currently being attributed to human rights issues often existed before the Human Rights Act was enacted, or would have still occurred if it had not been enacted under common law, if not the UK's 50 year old obligations under the European Convention for Human Rights.

There is evidence however that in a minority of cases judgements or considerations on Human Rights have inhibited the delivery of Home Office policy in a few areas. The adverse judgements identified by agencies have been managed by putting in place procedures that ensure that the policy is delivered but possibly in a slightly different way to, or slightly altered from, what was envisaged. For example, an ECtHR judgement resulted in the loss of Prison Governors' power to award added days to a custodial sentence as a penalty in disciplinary adjudications. This has been resolved by introducing a system of independent adjudicators for serious cases where added custodial days may be a possible penalty.

That said however, an area where the impact of the interpretation of the Convention is problematic and presents a blockage to the effective delivery of policy relates to the pre-Human Rights Act case of *Chahal*. In this case the European Court of Human Rights found that the absolute protection provided by Article 3 prevents a State from considering the protection of the public as a balancing factor when deciding whether

or not to deport a dangerous person. The European Court has always recognised that the European Convention is a “living Instrument”, and we are therefore working with our partners in Europe to challenge this judgement.

3. INTERPRETATION

There is some evidence from the agencies of an occasionally cautious interpretation of the Human Rights Act and particularly those articles of the Convention that require the rights of the individual to be balanced with public safety. A culture needs to be developed that is less risk averse to ensure that misconceptions around human rights are not in any way preventing the effective delivery of policy. To an extent this may arise from a lack of central co-ordination and consistency on messages being circulated to agencies on the approach to adopt when balancing rights. However, there may also be a fear of litigation that may encourage those who develop guidance to be cautious in their interpretation.

The findings from the police focus groups and interviews support this assertion. There was a view that some guidance that is produced is not specific enough in relation to human rights and how to strike a balance. It was felt that the onus can sometimes be placed on junior officers to apply tests and make decisions when the guidance on how they should do this is limited. This was felt partly to be due to officers over-reading new legislation and seeing it as being more restrictive than it really is.

The impact of adverse judgements on policy and practice would also benefit from more central co-ordination. An adverse judgement may not mean that the policy is unworkable but rather than adjustments to how it is applied will enable the policy to still be operated effectively.

Recommendations:

- That a panel to scrutinise legislation and practice in frontline agencies is established to ensure a co-ordinated robust approach is taken.
- That a secretariat is established in support of the “Scrutiny Panel”.

4. ADMINISTRATION

It would seem from the review that decision-making can sometimes be carried out at the individual level with little reference to managers or legal advisers. This may lead to a general nervousness about pursuing a particular course rather than working on a more risk based approach balancing the policy objectives against the risk of an adverse judgement and its consequences. A lack of consultation in relation to decision making could stem from an unawareness of where advice and guidance on Human Rights Act issues can be accessed.

The participants in the focus groups suggested that where specific police operations were concerned the administration of the Convention rights is very clear as specific guidance is produced that is tailored to the operation that outlines the powers available to the officers and how these should be interpreted in relation to human rights including where the rights are not absolute. It was felt that this empowered officers at the constable level to apply their duties in a confident way whilst not riding roughshod over the rights of the individual. Where it was felt that policies may occasionally be impeded is in situations where the decisions are more subtle and there is less specific and clear guidance to constables on the application of rights.

A specific example of a misinterpretation of administration of human rights relates to the treatment of prisoners.

There is a misconception amongst some prison staff and the public that the Human Rights Act inhibits authorities from carrying out mandatory drug testing or applying blanket sanctions or security measures to all prisoners or visitors where the Prison Act and Rules, Prison Service Orders or Instructions convey an element of discretion. In fact, the exercise of discretion is judicially reviewable without recourse to the Human Rights Act and the growth of these challenges owes more to the growing litigation culture than to the impact of the Human Rights Act. On the point of mandatory drug testing the Home Office has in fact won a challenge to this policy so there does not appear to be any grounds for the fears in relation to breaching human rights.

There is limited central co-ordination of training in relation to Human Rights Act and the balancing of rights, although last year the Home Office Legal Advisers Branch launched a co-ordinated Legal Awareness Programme which provides a good platform to be built upon.

Recommendations:

- That the Scrutiny Panel will as part of its remit review training to ensure that it is advocating a robust approach and is fit for purpose.

- The direct advice to Immigration and Nationality Directorate, prison service and OCJR should be supplemented by a web site hosting an advice service available to probation, police and courts practitioners, the Youth Justice Board, parole board etc.

5. MYTH BUSTING AND COMMUNICATING THE REALITY OF THE HUMAN RIGHTS ACT

An analysis of the accuracy of media reporting of Human Rights issues was undertaken as part of the review. It was evident from the results that the stories promulgated by the press and in particular the tabloid press are not always accurate or are incomplete. This finding is supported by the Department for Constitutional Affairs review which identified four types of “myths”: urban legends; false attributions of unpopular decision to the Human Rights Act; partial reporting of the launch of cases but not their outcomes and rumours about the requirements of human rights that arise through pure speculation or poor decision making.

Changing media reporting is challenging, however this does not mean that it should not be done. A “myth-busting” exercise involving immediate rebuttals of future news stories that misrepresent the Act coupled with efforts to disseminate positive messages around the Act to the wider public might go some way to redressing public perceptions of the Human Rights Act as promulgated by the press.

Recommendations:

- Working with the Department for Constitutional Affairs the Home Office should develop a proactive and reactive approach to myth busting around the Human Rights Act.

6. CONCLUSIONS AND NEXT STEPS

The evidence gathered in the process of this review would suggest that in general human rights legislation is perceived by the majority of agencies as providing a useful framework in which the work of the Criminal Justice System can be operated and indeed some officers have felt that it has given them more discretion in their decision making. Radical amendment of the Human Rights Act will have little benefit in improving the effective and efficient delivery of policy objectives or make them more in line with public expectations since we are committed to remain signatories to the European Convention.

Where action is required however is in addressing a sometimes cautious interpretation and administration of the Convention rights by agencies across the Criminal Justice, Immigration and Asylum systems. This caution can on occasion impede the successful delivery of policy and a number of strategies have been recommended throughout the Review to tackle this risk adverse culture. Alongside the work to drive up the robust interpretation and administration of human rights across agencies action needs to be taken to drive up public confidence in the application of human rights across the CJS. The review has identified that the stories promulgated by the press are not always accurate. A “myth-busting” exercise involving immediate rebuttals of future news stories that misrepresent the Act coupled with efforts to disseminate positive messages around the Act to the wider public should be instigated.

The recommendations from this Review are being taken forward as part of the wider Rebalancing the Criminal Justice System Agenda.

July 2006

Annex 2

OBSERVATIONS OF THE GOVERNMENTS OF LITHUANIA, PORTUGAL, SLOVAKIA AND THE UNITED KINGDOM INTERVENING IN APPLICATION NO 25424/05 RAMZY v THE NETHERLANDS

INTRODUCTION

1. This case is illustrative of a problem faced by Contracting States that is increasingly acute. A person is present in the territory of a Contracting State. The Contracting State wishes to remove the person on the basis that he poses a threat to the citizens and security of the State because of involvement in terrorist activities. Yet the person who is judged to pose this threat claims that he faces the possibility of ill-treatment prohibited by Article 3 in the only State to which it would be possible to remove him.

2. The question the Governments of Lithuania, Portugal, Slovakia and the United Kingdom (“the Governments”) invite the Court to consider is whether, recognising the increased and major threat posed by international terrorism, it is appropriate of justified to maintain the principle that in the situation outlined above there is only a single relevant issue, namely whether or not substantial grounds have been shown for believing that the person concerned would face a real risk of being subjected to treatment contrary to Article 3 in the receiving State. On that basis, it can never be appropriate even to take into account as relevant the fact, nature or degree of the national security threat posed by an individual. That appears to have been the

conclusion of the majority of the Court in *Chahal v the United Kingdom*, Judgment of 25 October 1996 (paragraph 81). The practical difficulty encountered by Contracting States is caused both by the absolute nature of the prohibition against removal and by the relatively low threshold of risk that needs to be demonstrated before it arises.

3. The Governments' position is that:

- no challenge is made to the absolute nature of the prohibition in Article 3 against a Contracting State itself subjecting an individual to Article 3 ill-treatment;
- however, the context of removal involves assessments of risk of ill-treatment, and needs to afford proper weight to the fundamental rights of the citizens of Contracting States who are threatened by terrorism;
- it is necessary and appropriate for all the circumstances of a particular case to be taken into account in deciding whether or not a removal in the situation set out above is, or is not, compatible with the Convention—national security considerations cannot simply be dismissed as irrelevant in this context.

THE RIGHTS IN ISSUE

4. It is necessary to start by identifying the Convention rights and obligations that are in play in this situation.

5. The first set of rights comprises those of the citizens of the Contracting State. The threat posed by individuals who choose to involve themselves in terrorist activities strikes at the heart of the Convention scheme and at the core values the Convention is designed to protect. The right to life is the necessary foundation for the enjoyment of any human rights. It is that right, as enjoyed by members of the public, which is destroyed by the actions of terrorists when they carry out attacks, often with the object of indiscriminately killing as many people as possible. More generally, terrorism seeks to attack the foundations of life in a democratic society by terrorising all those living in it and dislocating daily life to the maximum extent possible.

6. The corresponding obligation on Contracting States, and their democratically elected Governments, to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially those threatening the right to life, is a heavy one.

7. It is important in considering the rights of the citizens of the Contracting State to have regard to the nature of the threat currently posed by terrorism, notably by organisations such as Al Qaida. Three particular matters are to be noted:

- The threat is a real one. Terrorists, including those supporting extremist organisations such as Al Qaida, have shown the willingness and the capacity to kill and maim members of the public.
- The threat is also of a particularly serious kind. It involves concerted efforts to cause terrorist outrages by well-organised groups and networks. It involves the use of individuals who are prepared themselves to die in perpetrating such outrages. For obvious reasons, that makes the threat all the more difficult to protect against. It also involves the well-publicised threatened use of chemical, nuclear, radiological or biological material—in other words of atrocities of the most serious and appalling kind.
- There has been a significant increase in the level of threat in recent years with no current sign of its diminishing.

8. The second set of rights comprises those of an individual whose removal is contemplated. It is acknowledged that the Convention rights of such persons may be engaged by removal. No challenge is sought to be made to this principle, or to the development of the principles applicable in this field in cases in which terrorism threatening the Convention rights of citizens of the Contracting State is not in issue (eg *Soering v the United Kingdom*, Judgment of 7 July 1989; *Vilvarajah v the United Kingdom*, Judgment of 30 October 1991).

9. However, it needs to be clearly recognised that such rights represent a significant extension of the provisions of the Convention.

- Traditionally, States have been entitled under international law to protect themselves against threats to national security from outside by the use of immigration laws (ie controlling entry, removal etc).
- The Convention includes no right to asylum. That was evidently not an accidental omission. Rather, asylum was dealt with at the time the Convention was first entered into in the 1951 Convention on the Status of Refugees, the negotiations leading up to both Conventions occurring at the same time.

- The 1951 Convention, negotiated in that way, is explicit that the right of asylum does not extend to cases where there is a risk to national security. The protections afforded by the 1951 Convention were expressly made unavailable to those who acted contrary to the very purposes and principles of the United Nations, for example by choosing to engage in terrorism (see further paragraphs 26.3 and 26.4 below). In those circumstances, it is difficult to see how those who negotiated and agreed both Conventions can have intended that that position under the 1951 Convention should effectively be reversed by interpretation of Article 3 of the Convention.

10. In considering the rights of the individual whose removal is contemplated, the basis for the engagement of a Contracting State's responsibility needs to be recognised. It does not follow from the fact that Article 3 is "absolute" in the context of treatment by a Contracting State of those within its jurisdiction, that the same approach is appropriately to be transposed into the very different context in which removal to another State is contemplated in order to protect national security.

- The right not to be removed to such a State, corresponding to the State's obligation not to remove, is "inherent" or implied, not expressly set out, in Article 3.
- Moreover, the State is not itself subjecting the person to Article 3 ill-treatment. Such ill-treatment, if it were to eventuate, would be at the hands of a foreign State or the citizens of a foreign State. In most instances, this State will be another State (not a Contracting State) outside the norms of the ECHR. Further, reliance on Article 1 of the Convention is needed in order for the responsibility (not to expose a person to the risk of ill-treatment) to be engaged. The engagement of responsibility is therefore analogous to a positive obligation to prevent Article 3 ill-treatment.
- As is well established in the Court's jurisprudence, the principle of striking a fair balance between the interests of an individual and the interests of the general community underlies the whole of the Convention. The need to do so has been particularly acknowledged and applied in the field of inherent or implied obligations and of positive obligations imposed on Contracting States (see eg *Ilascu v Moldova and Russia*, Judgment of 8 July 2004, at para 332).

THE DIFFICULTIES CREATED BY THE MAJORITY'S JUDGMENT IN *CHAHAL*

11. The majority's judgment in *Chahal* creates real difficulties for Contracting States in the context of protecting their citizens effectively against the threat of terrorism. The Governments have a long-standing history and policy of support for the Convention; and seek by this intervention to address those difficulties in a way that properly balances the various Convention rights in issue.

12. If that judgment is accepted as currently understood, in a case in which substantial grounds are shown for believing that there is a real risk of ill-treatment in a receiving State, it is not possible to remove a person believed to threaten the Contracting State and its citizens through terrorism. That is despite the fact that expulsion is the classic method by which Contracting States have sought to protect themselves against foreign nationals on their territories who are judged to be a threat to national security (a procedure recognised by Article 5(1)(f) of the Convention). The potential impediment to removal is likely to arise in a significant number of the cases of those who currently pose a major terrorist threat.

13. It may or may not be possible to overcome the difficulties in practice, and so remove the individual.

- The Contracting State can obtain governmental assurances as to proper treatment of the individual if returned to his home State. However, as *Chahal* itself makes clear, Article 3 requires examination of whether such assurances will achieve sufficient practical protection. Different conclusions on the same material, as *Chahal* itself demonstrated, are likely (compare the majority and minority judgments in that case).
- A State other than the home State of the individual concerned may be prepared to take him. However, in almost all cases, this is unrealistic and so does not meet the problem. If an individual is suspected of involvement in terrorism, it is highly unlikely that any third State will be willing to allow him to enter its territory.

14. If the individual commits a criminal offence, there may be some scope for the Contracting State to protect itself by trying him in the criminal courts for that offence, and by the imposition of a criminal sentence for that offence. But this does not offer a sufficient or effective route to ensure that the terrorist threat posed by the individual is properly dealt with. This is for a number of reasons:

- An individual concerned in terrorism may take great care not to commit any criminal offences until the time comes for him to strike or provide material assistance to his cause;
- Any criminal offences he commits may be only tangentially related to his terrorist intentions (eg petty theft or fraud), and the sentence imposed must be appropriate for the crime rather than based upon a preventive principle to safeguard the public against a quite different activity and risk, namely terrorist action;

- Even if criminal offences are committed, there may be insuperable impediments in the way of the authorities in the Contracting State being able to rely upon secret intelligence information in criminal proceedings in order to secure a conviction (eg it may be impossible to rely upon evidence from an informant, where the disclosure of that evidence would necessarily reveal the informant's identity and place him at serious risk of harm or murder); and
- The evidence available to the authorities may amply indicate that the individual in question does pose a serious risk to national security through involvement in terrorism, without enabling them to establish that he has engaged in such activity to the level of proof beyond reasonable doubt, sufficient to secure a criminal conviction. See also *Lawless v Ireland (No 3)*, Judgment of 1 July 1961, paras 35 and 36.

So recourse to the criminal law cannot provide adequate protection for the public against the serious risk of harm which the presence of the individual amongst them may pose.

15. A further way in which a Contracting State may seek to ensure that there is adequate protection against the risk of terrorism when dealing with such an individual is by subjecting them to preventive measures of some kind. Detention will unquestionably be the best and most effective safeguard for the protection of the public and national security. That in itself raises serious Convention issues as the derogation cases recently decided by the House of Lords in the United Kingdom indicate. It may or may not be that such detentions would be permissible under Article 5(1)(f). In *A & Others v the United Kingdom*, Application No 3455/05, the Government of the United Kingdom have made submissions about the scope and effect of Article 5(1)(f). Those are not repeated here. There may be other lesser measures, such as surveillance or a system along the lines of control orders restricting the movement and/or activities of particular individuals. However, these provide at best partial protection for the public.

16. In these circumstances, it is understandable that there should be serious concern about the point to which the Court's jurisprudence has developed when viewed alongside the risks currently posed by terrorism to the lives of citizens of Contracting States.

THE RELATIVE NATURE OF THE FACTORS IN ISSUE

17. It is necessary, in judging whether the *Chahal* approach is necessary or appropriate, to have regard to the fact that both (a) the degree and nature of any risks in the receiving State and (b) the degree and nature of the threat posed by an individual, are relative.

18. The degree of risk faced in the receiving State in almost all cases will depend on a series of judgements and evaluations. A necessarily uncertain prediction about future events is required. The test of "substantial grounds for believing that there is a real risk" is (a) (at least on one view) a relatively low threshold, that is not requiring proof beyond doubt or even on the balance of probabilities; but (b) also inherently difficult to apply with consistency. In a case which meets the test, there will still be questions of degree involved—some risks or threats being far clearer than others.

19. In considering the nature of the risk faced in a receiving State, it is to be borne in mind that Article 3 applies not merely to cases at the extreme end of seriousness, such as torture. Treatment falling within Article 3 exists in a spectrum of seriousness. As is well established, a minimum level of severity must be reached for a case to fall within Article 3. However, at the lower end of the spectrum, the concept of degrading treatment is a relatively broad one. The greater the reach or coverage of Article 3, the more pressing becomes the issue whether a terrorist threat should be wholly left out of account.

20. The nature of the threat posed by an individual to the citizens of the Contracting State, and the clarity with which that threat is made out, may also vary. However, there may be cases in which the threat is clear, imminent and extremely serious.

21. It is legitimate to test the validity of the approach in *Chahal* against examples at the ends of the spectrums involved. Take, as but one example, a case in which (a) there were substantial grounds for believing that there was a real risk of a form of degrading treatment that would just cross the Article 3 minimum level of severity; but (b) there was powerful intelligence from an informer of imminent involvement in a terrorist attack of the most serious kind.

THE SUBMISSIONS

22. The Governments submit that the approach in *Chahal* needs to be, and consistently with fundamental Convention principles can be, adapted or clarified to meet the threat posed by international terrorism. Two submissions are made as to how that should be done:

- First, it is submitted that, in the context of removal of a person who poses a national security risk, the threat posed by the person whose removal is being considered can and should be a relevant factor to be weighed against the possibility and nature of any feared ill-treatment.
- Secondly, it is submitted that national security considerations can have an impact on the threshold to be overcome by a person who is to be removed.

23. Five particular matters are relied on in support of the first submission.

24. First, an approach that recognises the relative nature of the issues, and does not exclude one set of rights as irrelevant, would allow all the human rights in play to be properly weighed and respected. As to this:

- The absolute approach affords no weight whatever to the rights of those whose lives (and thus Article 2 rights) might be significantly protected by the removal of a person believed to pose a terrorist threat.
- The fact that both the degree and nature of the risks faced in the receiving State and the degree and nature of the risks posed in the Contracting State exist in a spectrum indicates that it is likely to be difficult if not impossible properly to balance the competing rights in play without having regard to the particular facts of the case. Suppose for example that a person had just surmounted the substantial grounds for believing that there was a real risk of say corporal punishment on a single occasion (eg *Tyrer v the United Kingdom*, Judgment dated 25 April 1978) or any physical force by persons in authority that might not be strictly necessary (eg *Ribitsch v Austria*, Judgment dated 4 December 1995) or that he might be detained for a relatively short period in prison conditions that might be considered degrading (*Becciev v Moldova*, Judgment dated 4 October 2005). On the absolute approach national security and the particular risks to life posed by that person would become irrelevant. Suppose then that the facts indicated substantial grounds of a compelling kind for believing that there was a real risk that the person concerned would involve himself in bombing the London Underground during rush hour. It may fairly be asked how the Convention rights of all concerned could be said to be properly balanced and protected by an absolute prohibition on removal. The Governments submit that the risk of such treatment could not suffice to override the right of the State to protect its citizens from serious risks involving the potential for injury and death.
- There are circumstances in which it might be contended that removal is incompatible with other obligations imposed by the Convention, for example that on return to his home state the person concerned would face a flagrant denial of justice (as contemplated in *Soering*). The Court has not yet confronted a case where it has had to decide whether there is an absolute prohibition against removal in such circumstances or whether risks to the Contracting State posed by, say, a person engaged in terrorist activities can be balanced against his Article 6 rights. The Governments would submit that in such a case there would be no credible argument against engaging in a balancing exercise.

25. Secondly, the absolute approach is inconsistent with the nature of the obligation on a Contracting State in this context.

- It is accepted that the obligation on a State not itself to subject a person to Article 3 ill-treatment is absolute. However, as set out in paragraph 10 above, the obligation not to return an alien to a place where there are substantial grounds for believing that a real risk of such treatment exists is an obligation that is (a) inherent or implied and not express and (b) in substance a positive obligation (or at least closely analogous to one). Inherent or implied obligations have consistently been recognised as permitting implied limitations if warranted having regard to the context and case. Positive obligations have also consistently been treated as involving a balanced consideration of all the circumstances and an assessment of how it would be reasonable for a Contracting State to act: *DP & JC v the United Kingdom*, Judgment dated 10 October 2002.
- Moreover, where, as here, the context involves competing Convention rights (ie the Article 3 rights of the person to be removed and, amongst others, the Article 2/3 rights of members of the public), an appropriate balancing exercise is needed.
- The Court in *Soering* reiterated that “inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights” (para 89). It is submitted that the recognition was all the more apt in a context involving an inherent obligation which was positive in nature and in a context in which rights of equal seriousness both need protection. The approach of the Court in *Chahal* is hard to reconcile with that paragraph.
- The approach sits uneasily with the Court’s approach to claims of torture and other expressly forbidden behaviour under Article 3, where a complainant must establish the alleged ill-treatment beyond reasonable doubt.

26. Thirdly, the absolute approach is not supported by universally applied international law. International law has long recognised that the right of an alien to refuge is subject to necessary qualifications.

- The right of states both to control immigration and, more specifically, to protect their citizens by expulsion of aliens who pose a threat to national security is long recognised (see eg *Chahal v the United Kingdom* at para 73).
- Grotius in “*De Jure Belli ac Pacis*” (1623) stated that asylum is to be enjoyed by people “who suffer from undeserved enmity, not those who have done something that is injurious to human society or to other men”.

- Recognition of such qualifications is to be found in the express terms of Articles 32 and 33 of the 1951 Convention. The benefit of the rule against return may not be claimed “by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is . . .” (Article 33(2)).
- Further, Article 1F(c) of the 1951 Convention provides that: “The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that . . . [h]e has been guilty of acts contrary to the purposes and principles of the United Nations.” UN resolutions (eg UN Security Council Resolutions 1373 (2001), paragraph 5 and 1368 (2001)) make clear that acts, methods and practices of terrorism, and knowingly financing, planning and inciting acts of terrorism, are contrary to the purposes and principles of the United Nations.
- It is acknowledged that the Torture Convention has been interpreted as imposing an absolute approach. However, (a) it is by no means clear that the drafting of the relevant part of the Torture Convention supports such an interpretation; (b) the interpretations of the Committee Against Torture are not legally binding; and (c) in any event, it is to be noted that that approach applies only in the case of torture.

27. Fourthly, the absolute approach does not reflect a universally recognised moral imperative.

- In principle, it is legitimate to ask: why should it be irrelevant, in considering whether removal would amount to inhuman or degrading treatment, that the person to be removed himself posed a real risk to the lives of the citizens in the Contracting State? It is also to be noted, if it is suggested that to take any account of national security would be contrary to a clear moral paradigm, that seven of the judges in *Chahal* dissented on the Article 3 issue, holding that it was legitimate in the context of removal for a fair balance to be struck taking into account national security considerations. The Governments submit that the dissenting judges were correct in their approach.
- International law has recognised not merely that national security can be a relevant factor, but that national security can preclude a right to asylum altogether. It would be surprising if the words of Article 33(2) of the 1951 Convention were found to fly in the face of such moral paradigm.
- There are states in which the absolute approach is not followed. In Canada, for example, national security and the threat to citizens posed by the person to be removed are treated as relevant: see, for example, *Suresh* [2002] 1 SCR 3, [2002] SCC 1 and *Sogi* (2004) FC 853. As appears below, in the United States a higher standard of proof of torture is required—an express understanding having been made by the United States on entering into the Torture Convention.
- The need for a balancing of the various interests involved has been recognised in *Soering* (see paragraph 24.3 above).

28. Fifthly, the absolute approach is not supported by, and is inconsistent with, the evident intentions of the original signatories to the Convention. It is doubtful whether a right of asylum of any kind is appropriately to be implied into Article 3 in circumstances in which asylum appears to have been intentionally left to be dealt with in another Convention (the 1951 Convention which was signed in 1951 by 26 mainly western states). However, be that as it may, it is a significant further step to interpret Article 3 as having inherent or implied within it a right to asylum of a kind that requires national security considerations to be ignored. There is no warrant for concluding that that was intended, or would have been agreed to, by the Contracting States involved.

29. It is stressed that the Governments do not submit that national security considerations will inevitably permit removal of a person believed to present a threat on national security grounds. The submission is a narrower one: national security considerations cannot be dismissed as irrelevant, and may be taken into account, in considering whether the removing, Contracting State’s responsibility should be engaged and it should be held in violation of Article 3 by reason of removal. A considered judgement, weighing all the circumstances, would need to be made in any particular case.

30. The Governments’ second submission, as set out above, is that national security considerations can have an impact on the threshold to be overcome by a person who is to be removed. In a case in which there is material indicating a national security threat, it would be appropriate for it to be shown more clearly, or to a higher standard, that a person might be ill-treated.

31. It is to be noted that the Commission’s delegate in *Chahal* (Sir Nicolas Bratza) sought to explain and give effect to para 89 of *Soering* by suggesting that “where there were serious doubts as to the likelihood of a person being subjected to treatment or punishment contrary to Article 3, the benefit of the doubt could be given to the removing State whose national interests were threatened by his continued presence” (see para 78 of *Chahal* recording this position).

32. However, it is submitted that, if national security is to affect the standard to which risks in the receiving State need to be demonstrated, it would be appropriate (a) for the standard of proof to be significantly higher (rather than seeking to introduce a concept of “serious doubts” into the already fluid concepts of “substantial grounds for believing” and “real risk”); and (b) for this to be made clear.

33. There is doubt as to precisely what standard is currently imposed by the “substantial grounds for believing real risk” approach.

- In *F v the United Kingdom* (Admissibility Decision dated 31 August 2004) the Court equated it with likelihood (p 23).
- However, in practice, it appears that a lower standard is applied by the Court than “more likely than not”.

34. It is to be noted in this context that an understanding was made by the United States on entering into the Torture Convention, to the effect that it understood the phrase “where there are substantial grounds for believing that he would be in danger of being subjected to torture” in Article 3 of the Torture Convention as meaning “if it is more likely than not that he would be tortured”. There have been no objections to the understanding.

35. It is clearly established under Convention jurisprudence (see for example *H. v Sweden*, Decision of 5 September 1994, 79-A D.R. 85) that the burden of establishing the risk of ill-treatment is upon the applicant. He is required to do so by the production of cogent grounds and not mere assertion.

36. It is submitted that the test, in a case in which national security concerns arise, should at least require the person to be removed to show that it is more likely than not that he would be subjected to ill-treatment contrary to Article 3. The formulation of a “more likely than not” test would make clear that a different approach was to be followed in national security cases. A considered judgement would then need to be made having regard to the particular facts of individual cases, and not by reference to generalisations. It is submitted that such a test and such an approach would not set the standard at a height likely to undermine the practical and effective protection and safeguarding of applicants Article 3 rights; and would not be inconsistent with a recognition of the importance of Article 3 in the hierarchy of Convention rights.

CONCLUSION

37. For these reasons, the Governments submit that the Court should reconsider, and change, the approach and principles set out at paras 79–82 of the majority’s judgment in *Chahal*. The need for a reconsideration of that approach is especially evident in a context involving a heightened threat of the most serious kind to the Article 2 rights of members of the public.

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21 November 2005

7. Supplementary Letter from the Rt Hon Baroness Scotland of Asthal QC, Minister of State, Home Office

THE CASE FOR THE HUMAN RIGHTS ACT, EVIDENCE SESSION ON MONDAY 30 OCTOBER 2006

Thank you for your letter of 31 October and for allowing us the opportunity to check the accuracy of the transcript from the above hearing. I attach a track changed version with some minor corrections on matters of fact which I hope you will be able to incorporate.

The Committee also asked for supplementary information on the following points.

- Any further consideration of whether it would be possible for the Home Office to publish in full its review of decision making in the criminal justice, immigration and asylum systems (questions 25–29 refer);
- Details of cases where, according to the Home Secretary, IND’s robust approach to deportation of EEA nationals has been defeated consistently in the courts (question 95 refers); and
- Whether the Home Office will publish a list of cases where deportations of foreign criminals at the conclusion of their sentences have been suggested and carried out, or where they have been suggested and not carried out, with reasons (question 100 refers).

I will deal with each of these in turn.

PUBLICATION OF THE HOME OFFICE REVIEW

I have carefully considered your request for the Home Office to publish its full review of decision making in the criminal justice, immigration and asylum systems. As I explained at the hearing, the review was an internal one. The conclusions and recommendations were published as part of the CJS rebalancing review in the summer and this, along with the Lord Chancellor's review, encapsulates the findings we have made and properly represents the Government's position.

I provided a summary of the review to the Committee as part of the written evidence and I am happy for this summary to be made publicly available as part of the evidence from your inquiry.

DEPORTATION OF EEA NATIONALS CASES IN THE COURTS

My officials in IND are currently undertaking an exercise to scope out this information by examining the cases brought before the Asylum and Immigration Tribunal (AIT) between April and October 2006. We will write to you by the end of November once a more comprehensive analysis of these cases is available. Our policy is not to disclose details of individual cases, but we will be able to provide, with case details anonymised, overall figures for appeal outcomes, the nationalities involved and an analysis of the reasons why the appeals of some EEA nationals were allowed.

PUBLISH A LIST OF DEPORTATION CASES

It is not our practise to provide case by case breakdowns. The IND Director General, Lin Homer, wrote to the Home Affairs Committee on 9 October and provided the latest and most accurate figures the Department has on deportation of FNPs. I attach a copy of her letter. Since April 2006 approximately 3,800 new FNPs have been referred for deportation consideration and action is now being pursued against around 1,750 individuals. From May 2006, our records also show that in total over 1,000 FNPs have been removed or deported from the UK.

The Immigration and Nationality Directorate is currently putting in place new processes to improve its data collection systems for the future in this area and, as we overhaul, we will consider publication accordingly of information providing it is sufficiently accurate and robust to the standards which Parliament and the public expect.

Finally, at the hearing I offered to look for additional information in relation to the number of people with mental health problems remaining in prison. I have asked my officials to investigate whether it is possible to provide such information.

6 November 2006
