



**The Government's Human Rights Policy and  
Human Rights Judgments  
Oral Evidence HC 1726-i**

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**Rt Hon Kenneth Clarke MP**

**Oral Evidence, 20 December 2011, Q 1–36**

*EVIDENCE SESSION NO. 1. HEARD IN PUBLIC*

Members Present

Dr Hywel Francis (Chairman)

Baroness Berridge

Lord Bowness

Lord Dubs

Lord Lester of Herne Hill

Lord Morris of Handsworth

Mr Dominic Raab MP

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**Examination of Witnesses**

**Rt Hon Kenneth Clarke MP**, Lord Chancellor and Secretary of State for Justice

**Q1 The Chairman:** Good afternoon and welcome to this session of the Joint Committee on Human Rights, dealing with the Government's human rights policy and human rights judgments. For the record, Secretary of State, could you introduce yourself, please?

**Rt Hon Kenneth Clarke MP:** I am Kenneth Clarke, the Member of Parliament for Rushcliffe, Lord Chancellor and Secretary of State for Justice.

**Q2 The Chairman:** Thank you. I begin by thanking you for coming along. It is a year since we had the privilege of having you before us. There have been a number of outspoken criticisms of the European Court of Human Rights by Government Ministers and calls by the Home Secretary and the Prime Minister for the Human Rights Act to be repealed. Does the Government remain committed to the European Convention on Human Rights and the Human Rights Act?

**Rt Hon Kenneth Clarke MP:** The Government's policy, which I have always adhered to myself, is that we remain fully committed to the European Convention on Human Rights. We think it is a very important international obligation for all 47 member states to commit themselves to. We are awaiting the advice of a commission on the best way of implementing our obligations under the Convention in this country. We have the Human Rights Act on the statute book and we have asked a commission to advise us on the possibility of replacing that with a Bill of Rights. We have one member of the commission on your Committee, Lord Lester. We await the results of that commission, but meanwhile, the Government's highest priority during our chairmanship of the Council of Europe is to seek to achieve reform of the European Court of Human Rights. We have no intention of interfering with the right of individual application to the court. We have no intention whatever of weakening the court. Indeed, we believe that we would strengthen it by bringing to a head the long-expected demands for reform, which many people in Strasbourg agree is desirable. We wish to see it operating properly as an international court, dealing with those matters that require an international judgment to make sure that all 47 member states comply with their obligations. The last time that it was most authoritatively set out on behalf of the Government was by the Foreign Secretary when he made his first speech upon taking up the

chairmanship of the European Council. He spoke for the Government as a whole. I am sometimes accused of being slightly off message. I am not one of those who always rigidly adheres to what I should do by reading out the line to take, but on this occasion I have always stuck impeccably to the policy of the Government and I see not the slightest prospect of this Government having any other policy in the foreseeable future.

**Q3 The Chairman:** Reflecting on what you said last year and what Lord McNally said, do I take it that a Bill of Rights would simply be the Human Rights Act plus? Have you departed from that view?

**Rt Hon Kenneth Clarke MP:** The position really is that I am waiting for the advice of the commission now. We set up a commission because there is a range of views inside the Government about the best way of proceeding. From left to right, there are both supporters and opponents of a Bill of Rights, so we have asked this expert commission, who again represent a range of views, to give us their expert opinion on this proposal. On the face of it, you could have a Bill of Rights that restated the rights in the Convention and was then adhered to by the British courts. That would not change anything from where we are at the moment. Once it gets debated, then there are people who wish to have different features in a Bill of Rights and use it as the basis for a reform of how we would implement our obligations. There is no point in anticipating the advice. I have never seen the need for a Bill of Rights in the past, but I genuinely have an open mind. I have every respect for the people we have asked to advise us. Between them, they have more knowledge of the subject than most people I know, and I wait to see what they will recommend. I have the terms of reference for the commission here, if you want to put them into the record. They are quite clear about the direction in which we are going.

**The Chairman:** We are familiar with the terms of reference.

**Q4 Mr Raab:** Secretary of State, we have had the interim recommendations from the Bill of Rights commission. Recommendation 1 talked about limiting Strasbourg to the most serious cases before it and respecting the national institutions—legislative, executive and judicial—of member states. Recommendation 3 talked about a new and effective screening mechanism that allows the court to decline less serious cases. I wondered whether you agreed with that advice and whether you welcomed the emergence of a cross-party consensus on Strasbourg reform. Obviously, it is international, but I am referring to the domestic consensus.

**Rt Hon Kenneth Clarke MP:** I did agree with the advice, as it happened, and I agree with both those points that the commission made. We asked for an interim report in order to have their advice about how we should tackle the chairmanship and what approach the Government should take to reform of the court. There was a very happy coincidence of views. All the advice was extremely welcome. The two points where you have described the commission's views are two that we are advocating strongly now. They are two of the features that I would like to see, if possible, put into a declaration by the end of our chairmanship. That would be a programme for reform. People have been talking about reform of the court for the last 10 years. The need for it has been acknowledged frequently in the Council of Europe. I hope that the United Kingdom chairmanship and the British Government will get it nearer to some finality, with some definite proposals that are signed up to, at least in principle, by the other member states.

**Q5 Mr Raab:** In relation to that, as you have raised it, what signs or indications of international support are there for those two measures at this early stage?

**Rt Hon Kenneth Clarke MP:** It is early, although it is going to get more intense after Christmas. There is quite widespread support. The principle of reform is accepted. The Interlaken declaration emphasised the need for some reform. The Izmir declaration built on that. I would like the London declaration, if we can get one, to be more precise and have a programme that will lead to change. We are lobbying individual Governments, but we have some quite strong supporters and there are people in Strasbourg who have high hopes that the British chairmanship might be the occasion when all this expectation of reform is turned into action.

Jointly with the Swiss, we have put in a particular proposal on the filtering mechanism, which would reduce the arrears and get rid of the obviously multiple cases quickly and would start to pave the way for how admissibility should be judged in future. They just happened to agree with us and we drew up a joint proposal. At this stage it is specific, but quite tentative, because we do not expect that everybody will just agree to the Anglo-Swiss proposal. At the moment we are working very closely with the Swiss and others. I am going to have some more meetings with Ministers—I have had quite a lot already—to get political acceptance of the idea that we are genuinely committed to reform. It is an international court and it should not have arrears of 150,000 applications, many of which are repetitive or are personal complaints about some process that they have been involved in and are not the kinds of things that an international court in Strasbourg should be laying down rulings on, affecting national Governments and Parliaments.

**Q6 Mr Raab:** Would you be able to submit that proposal in evidence to our Committee?

**Rt Hon Kenneth Clarke MP:** That is why I was turning anxiously to my officials. I was not sure whether we have made it publicly. I am not always so forthcoming about it, because the level of debate in Britain is not very elevated, so anything that you put into the public domain immediately gets reported in a quite astonishing way in sections of the press. I will consider that and write to the Committee. I had better ask the Swiss whether they mind us exposing our memorandum to the British press.

**Q7 Lord Dubs:** I think you have partly answered my question about what you would judge as the success of the British chairmanship of the Council of Europe. Are there any other elements that you would like to put into that?

**Rt Hon Kenneth Clarke MP:** I have dealt with the bit that has to do with my Department. We have a list of aims in the Council of Europe, but the Foreign Office is in the lead. David Lidington, the Minister of State, does the day-to-day work of the chairmanship. William Hague obviously leads on behalf of the Foreign Office. My Department and I are most directly involved on the reform of the court. The Prime Minister has asserted that that is the Government's major priority during our chairmanship, and the Prime Minister himself will be taking part in some of the diplomacy, and probably making a speech on the subject during our chairmanship.

The other priorities of the chairmanship are to support the Council of Europe reform process, led by the Secretary General, to help the Council of Europe to increase its impact by better focusing on the most important challenges that we face today. Secondly, to strengthen the rule of law the United Kingdom will host a meeting of the Venice Commission and member states to discuss the recently adopted Venice Commission report on the rule of law, and will present the conclusions of the meeting to the Committee of Ministers. There are a whole lot of proposals on internet governance and how to deal with the problems that cyberspace can raise. I will not read all that out unless you want me to do so. On combating discrimination on the grounds of sexuality and gender identity, the United Kingdom is working on a programme that will complement and support the excellent work already under way in the Council of Europe to combat discrimination on grounds of sexual orientation or gender identity. Then there is local and regional democracy. Our aim is to

reach agreement on the creation of a single programme of Council of Europe activity on local and regional democracy during our chairmanship, where the activities of numerous actors are streamlined into a single coherent programme of work, overseen by the Committee of Ministers.

**Q8 Lord Lester of Herne Hill:** Lord Chancellor, as I prefer to refer to you, the British-Swiss paper is already in the public domain, I think.

**Rt Hon Kenneth Clarke MP:** I was unsure about that. I have certainly seen it myself.

**Lord Lester of Herne Hill:** One of the troubling thoughts I have is that what you put forward, which would work with the UK, would not work in the same way with some of the states, where the rule of the law and the independence of the judiciary are, to say the least, problematic. One of the ideas in that paper, as I understand it, is that you change the admissibility criteria essentially so that where the national court had carefully looked at a subject, the European court would interfere only if the national court had acted in a way that was manifestly unreasonable, or some such thing. Do you agree that, although that might work very well with the UK, the dangers will need to be thought about? First, if the Strasbourg court were to start looking in a hard-nosed way at what other national courts do, it would create friction and would disturb the comity that needs to exist between the two systems. Secondly, it might well lead to more litigation, since more and more would be questioning what the national courts had done. Thirdly, it would very much weaken European supervision in countries where human rights protection at the moment is inadequate. Can those kinds of things be thought about? I know that the Swiss-British paper came out some time ago and I think it is still fairly green. That is why I am asking those questions.

**Rt Hon Kenneth Clarke MP:** It is very green because we are having to address precisely the questions that you put forward. The Anglo-Swiss paper contains all kinds of things. For the straightforwardly inadmissible, trivial or repetitive, I seem to recall that it suggests a sunset clause. If the court has decided that it is not going to take a case up for a certain time, it just fails. The court can have a process whereby it decides that it is not going to take up cases that just deal with an old issue or one that is simply not important enough to require the judgment of an international court.

The admissibility test is a very serious point. We are advocating that the court should not act as a further court of appeal where the national courts have plainly addressed the Convention and applied it to what they judge to be the facts of the case. That does not mean, for the reasons that you give, that all 47 member states would be able to say, “Oh, that has been decided by our Supreme Court, so there is no further role”, but a judgment would have to be made about whether the national court had properly addressed itself to the issues under the Convention. I am not drafting at this session, but there are drafts scudding about and there are going to be more that we will have to try to agree with other member states. For example, the court could decide whether the national court had manifestly failed to apply the principles of the Convention. It might have to argue whether the test should be that it is prima facie the case that the court had manifestly failed to apply them, and then bring them forward. You could apply that to the Supreme Courts of all 47 member states. That is what we are canvassing, because we think that it gets the workload of the court down to a manageable level, which can be dealt with properly and will cover serious issues. It requires very careful drafting and very careful negotiation to draw that line between somebody trying to have a fourth instance appeal, having argued the point between the High Court, the Court of Appeal and the Supreme Court, all of which had sought to apply the principles of the Convention, but they want to have a fourth go because they think the other courts have got it wrong; and those cases where it has certainly been addressed in

Rt Hon Kenneth Clarke MP

the national court, but there is a feeling in Strasbourg that it has not been addressed properly or has been misapplied, and therefore there is a matter of principle that requires an international judgment.

**Q9 Lord Dubs:** Could I turn to the Wilton Park conference, which you have referred to already? Did any further ideas for reform of the court emerge from the Wilton Park conference, which you would then want to feed into the Anglo-Swiss paper?

**Rt Hon Kenneth Clarke MP:** Alas, I was unable to get to the Wilton Park conference. My Minister of State, Lord McNally, was there, but alas he is not able to get to this Committee this year, which he would normally have expected to do. From my own recollection, I cannot directly feed across which of the ideas that we are canvassing now may have come from Wilton Park. The Wilton Park conference had a very big attendance. It drew the right people and it was obviously a very valuable way of canvassing opinion and collecting ideas. There is no doubt that we are going to have to take on board the propositions of other Governments and experts from other countries if we are to have any hope of getting consensus among 47 member states.

**Q10 Lord Morris of Handsworth:** Could you tell us the Government's position on proposals for a so-called democratic override? Have any proposals on this subject been tabled by the UK for discussion in any of the Council of Europe working groups or committees that are considering reform of the court?

**Rt Hon Kenneth Clarke MP:** The Government has no proposals for a democratic override. The commission put forward its interim report, recommending to us its approach to the reform of the Court of Human Rights in Strasbourg. The commission also forwarded to us a document that set out the agenda of items that it intended to consider in due course. You only have to turn to Lord Lester on your left for confirmation, but I do not think that the commission as a whole signed up to that second document, which was an agenda, not a list of policy suggestions. If a democratic override means that a national Parliament is going to be able to set aside the judgments of the court, it raises huge questions about whether you are complying with your obligations under the Convention. I await the advice of the Commission, when they get round to debating it. They may have started—I have no idea—but eventually you will discover when they come back whether they are proposing that idea. I repeat clearly that the commission is not being asked to consider things that will break our obligations under the Convention. I have now found the terms of reference. I will only quote the relevant bit. They are asked to investigate the creation of a Bill of Rights, “which incorporates and builds on all our obligations under the European Convention on Human Rights, ensures these rights continue to be enshrined in UK law and protects and extends our liberties”. The commission will decide whether a democratic override fits within that.

**Q11 Lord Morris of Handsworth:** A lot of senior politicians are asking who rules—the judges or Parliament?

**Rt Hon Kenneth Clarke MP:** We have the rule of law in this country. We have the separation of powers and the judiciary are totally politically independent when it comes to their decision on matters that they are properly charged with. We do not have a position where Parliament appoints the judges or can start setting aside judgments. If Parliament disagrees with a judgment, it is open to Parliament to consider reforming the law, but as long as we remain bound by the Convention on Human Rights, we cannot reform the law in a way that does not conform with our obligations under the Convention.

I rather defend the independence of judges at just about every level. Of course, judges give their judgments in public and they are quite rightly open to public commentary and debate. It is a free country. Anybody can say what they like about judgments, although as Secretary of State for Justice I do not think that I should do so myself as long as I am in office. We do not

have courts giving judgments and then seeing what an opinion poll has to say about that, or having a parliamentary debate to consider setting the judgment aside. Democratic override has to be altogether more sophisticated than that if it is even to be considered. It is not just a question of who rules—Parliament or the courts. Any liberal democracy needs both.

**Q12 Baroness Berridge:** It is interesting that the Secretary of State should have raised that at this point, because we had a line of questioning when the Lord Chief Justice was in front of us on the point of separation of powers and the public comment flowing from those two distinct roles. The context was whether the Human Rights Act had blurred the roles. You might have seen that Michael Howard had commented on whether there was a blurring of the distinction—

**Rt Hon Kenneth Clarke MP:** Michael is not a member of the Government. I am a member of the Government, so I do not reply to Michael when he makes his comments.

**Baroness Berridge:** I appreciate that. Lord Judge, in response to a question from Lord Lester, said that it is simply not part of the way in which our system is run that politicians should criticise judges for their decisions. They should appeal them, and then appeal them further if they are still unhappy, without comment. There is a quid pro quo for this, though, that judges should not be making speeches or giving lectures about political questions. Could you give the Committee your view on this boundary of public comment, particularly bearing in mind Lord Judge's very public comments after that evidence on reform of sentencing for the law of murder? He called very openly for a free vote in Parliament. Do you think that strayed into the political role rather than the judicial role?

**Rt Hon Kenneth Clarke MP:** In principle, the separation of powers means that Ministers do not normally comment on the decisions of courts. I also think in principle that judges do not start making political speeches or commenting on decisions in Parliament. I think you get on better if that is so. You would have to be a bit of a pedant to think that that was going to be strictly adhered to. It has never been strictly adhered to in my time, but these conventions get weaker if you are not careful. Other things being equal, I think that should be the rule. Any Minister who thinks about commenting on a judgment should count to 10 first and wonder whether there is any point in doing so, apart from anything else, because the Minister cannot change the judgment. The Minister should think whether it is going anywhere. The judges normally are very careful to keep out of political things. Indeed, I get frustrated sometimes because they will not give me advice on policy when I ask for it privately. They very soon draw the line and say that this is not a matter on which a judge should be giving advice to the Government of the day. That is up to me to decide. Of course, they will discuss with me the practicalities of some hypothetical suggestion that I put to them and what problems it might pose. They do not mind me consulting them, but they will not give me what they regard as policy or political advice. That is a good starting point. It depends what office you are in. In my office, I have to be particularly careful. I do not bridge the gap—I am on the political side of the divide—but it would be particularly hopeless if you had a Secretary of State for Justice who kept second-guessing the judges in high-profile public cases.

**Q13 Baroness Berridge:** Do you think that on that basic point, the Human Rights Act has slightly blurred that distinction? Do you agree with that as a principle?

**Rt Hon Kenneth Clarke MP:** The Human Rights Act has become extremely controversial. It is a very high-profile issue and it gets debated vigorously, shall we say, in the public media, so it tends to draw out more comments than the rest of the law does. I can tell you on what subjects there will be a media-based debate. I do not blame the media. Everybody rushes to the media with their comments on judgments on particular subjects, and the Human Rights

Act is one. The media themselves are very sensitive about the Human Rights Act, because the tabloid press know that it has been used by British judges to try to build a law of privacy, using the Convention. Since we have had the Human Rights Act, British judges have been more adventurous, or taken more initiative, in using the Convention to apply it to local cases. I would normally expect right-wing tabloids to be against a European court having jurisdiction and to be in favour of more cases being heard in London. Since the cases have been heard in London, we have had more injunctions and super-injunctions on the law of privacy, and so on, so the right-wing tabloids have decided that it should all go back to Strasbourg and they do not like the Human Rights Act. I think that colours the way in which a lot of the comments are received.

**Q14 Lord Dubs:** One of the priorities for our chairmanship of the Council of Europe is to strengthen implementation of the Convention at national level. What steps could be taken to assist and encourage national implementation of the ECHR by other countries?

**Rt Hon Kenneth Clarke MP:** It is very important that we address that. It is one of the issues that we are addressing. It is one of the most difficult and I am not sure how much progress we will make in getting total agreement among all member states to doing that. There are a whole range of suggestions that broadly range from getting the Council of Europe to take a more active role in addressing the implementation of judgments by member states to, on the other hand, putting a process in place inside member states whereby they address implementation and perhaps report back on what they are doing to implement judgments. It is a sensitive area, but plainly it would strengthen the Convention and make the judgments of the court of more practical importance if we had the best possible system for enforcing judgments. We go cautiously because all that has to respect the individual constitutional position in each member state.

**Q15 Lord Bowness:** Lord Chancellor, 70% of the cases that come before the Strasbourg court are against six of the 47—I think they are Italy, Poland, Romania, Russia, Turkey and Ukraine. When we have the chairmanship, will the UK propose that an expert body, or some body, should be set up with a specific mandate to help these countries that have poor records of implementation?

**Rt Hon Kenneth Clarke MP:** I do not think we can start identifying countries and saying that we are going to have a different process for their cases. The Convention exists on the basis that all member states are equal. It is true that there is quite a big variation in cases between various countries, but this goes back to the last question from Lord Dubs. We have to see whether there is some process that we could all have in common to seek first of all to reduce the number of breaches. Sometimes the administrative process inside the country needs to be addressed so that there are fewer complaints. It is rather like somebody attempting to reduce the number of planning appeals in this country by improving the planning process. I throw that out as an entirely random example, because nothing will stop people appealing planning decisions in this country, but that is the sort of situation that you are in. Sometimes you have to address social security appeals to tribunals. Could something be done to make sure that fewer mistakes are made by officials in the first place so that we do not have so many successful appeals? It is very difficult when you are talking about the Government of the nation state and trying to introduce some process whereby they seek to minimise the number of complaints coming out, which could sometimes be done by some administrative reform or simply having some set process to address it. You are quite right to point out that we have comparatively few cases here. A great deal of excitement is caused by the Convention on Human Rights, but we do not lose many cases at the court.

**Q16 Lord Bowness:** So you do not rule out the possibility not of treating cases from some countries differently in the process, but perhaps of there being scope for assistance to

countries that identify themselves by the number of their cases, to try to reduce those numbers.

**Rt Hon Kenneth Clarke MP:** We are canvassing, purely tentatively, a slight variant of that, which might enable countries that wanted of their own volition to avail themselves of the advice of the Council of Europe about why there are so many cases and how they might address it and reduce the flow. There can be no question of compromising the national sovereignty of any member state.

**Q17 Lord Lester of Herne Hill:** I wonder whether you might consider building on two good things that happen already, but need to be given a push. The first is that the Committee of Ministers of the Council of Europe has publicly asked the court to be more specific about changes that are needed to comply with judgments, to help them in supervising execution. They have asked the court to give them more guidance to deal with systemic and structural weaknesses. The second thing is that the Committee of Ministers have a new action plan programme, where they tell a defaulting state that it has three months to come up with a detailed action plan on what general and individual measures to take. It seems to me—I do not know whether you agree—that those are positive developments that could be built on during the six months of the presidency to encourage those tendencies.

**Rt Hon Kenneth Clarke MP:** I am told that it was a United Kingdom idea when it was put forward, in part, and that we strongly support it. We will build on anything of that kind. If we all agree that we are going to do that, you have to brace yourself for the first time that we are on the receiving end of such an action plan. There is at least one case pending where eventually we might be required to take some action to comply with a judgment.

**Q18 Baroness Berridge:** In a speech last week, the European Commissioner for Human Rights, Thomas Hammarberg, said, “Any weakening of the human rights protections in the Human Rights Act would be noted outside the UK, and welcomed by less democratic states as tacit encouragement to weaken their own human rights protections. What the UK does today will send a powerful signal to other states about what they can do tomorrow”. Do you agree with the comments of the Commissioner?

**Rt Hon Kenneth Clarke MP:** I agree. I have met the Commissioner twice and sought to assure him that the British Government is not interested in weakening the European Convention on Human Rights, and nor are we interested in weakening the court. I think I met him very shortly before he made those comments, so he was probably banking my assurances and underlining that we felt strongly on the matter. If we entered into our chairmanship with the intention of weakening obligations under the European Convention on Human Rights, we would be completely wasting our time. If we were to attract another Government as an ally, it would probably be a Government that we did not wish to be allied with.

**Q19 Baroness Berridge:** In another recent speech—I seem to have the questions about recent speeches—the Attorney-General suggested that a mechanism be introduced for a right of rebuttal, where the domestic courts feel that the Strasbourg court has not made the principle clear on various issues, has not applied the principle consistently or has misunderstood national law or the impact of its legal decisions on the UK. What is the Government’s position on that issue? How would you prevent the right of rebuttal being used by those less democratic states to avoid taking action on breaches of the Convention?

**Rt Hon Kenneth Clarke MP:** It is an interesting idea that the Attorney canvassed. Quite rightly and predictably, the Committee is trying to draw me into the details of what might

emerge with the process. I want to emphasise that this is very green and very consultative. We are tentatively floating things. You can look at the way in which national courts might refer matters to the European Court for advice on a contentious issue. For example, if you go across to EU law, it is by no means unusual for a British court to refer to the European Court in Luxembourg to get an advisory opinion. I think I am correct. One could have some process of that kind here, if people wanted it. Then there is a whole debate going on, which we have not touched on, about the extent to which we are bound by decisions of the Strasbourg court. We are bound to comply with the judgments, but to what extent are we bound to regard it as a precedent? Our Act says that our courts should have regard to the judgments of the court in Strasbourg. This interesting academic, not political, debate has gone on between the Lord Chief Justice and some other senior judges about exactly what that means. There is a live argument about whether our courts have perhaps been too slavish in their adherence to the literal precedent of a Strasbourg judgment when really the judgment applied only to the facts of that case. Parliament has asked our courts to have regard to the Strasbourg court. The jurisprudence of our Supreme Court is as good as the jurisprudence in Strasbourg. I do not want Strasbourg just to be a court of appeal. The Supreme Court should feel free to analyse a judgment from Strasbourg and to decide how far it should regard it as a binding precedent and how far not.

**Q20 Lord Lester of Herne Hill:** Baroness Hale of Richmond and other members of the Supreme Court and the Court of Appeal have, in lectures and judgments, expressed concerns that the common law system should be fully respected. As you know, in the exceptions to the hearsay rule cases, with names such as *Horncastle* and *Khawaja*, they effectively asked the Grand Chamber to sort the subject out. The Grand Chamber gave a judgment the other day, setting out very clearly the common law position and their position, and so on. We were told in evidence from the Lord Chief Justice that she thought there would be a constitutional crisis if the Grand Chamber did not accommodate our system. Do you think, as a result of the Grand Chamber decision, that those concerns can be put to rest, because the Grand Chamber has effectively shown respect for our system?

**Rt Hon Kenneth Clarke MP:** First, I think it is important that they have respect for the common law system. I have a similar problem in the Council of Ministers in the European Union, where a lot of the draft directives and regulations are drafted with the civil law in mind. The British, the Irish, the Maltese and the Cypriots have to weigh in to try to get it revised to reflect our system. Fortunately—I do not want to divert here—the Commission is handling that better. We are still handling the problem and getting some English draftsmen in, and that sort of thing.

On the particular question, I was aware of the Lord Chief Justice's view and I therefore hoped that the Strasbourg court would not take it upon itself to start rewriting the rules of criminal evidence in this country. I have not had a chance to talk about this with the Lord Chief Justice, so I will catch up with his views, but I am obviously aware of the two judgments and have read them. I cannot see that they pose any problem at all. They came to a different conclusion in one of the cases, on grounds that I do not find altogether surprising, and the test that they said should be applied seemed to me to be pretty well in line with what the British courts are already doing. Whether or not we ever faced a constitutional crisis, I think it has been averted. The Lord Chief Justice's view of the law on these matters is better than my own, so I will wait to see. He has not reacted and I suspect that he is much reassured, as it seems that you are as well, by the basis of the judgment.

**Q21 Lord Lester of Herne Hill:** Just to clarify, my understanding of what the Grand Chamber has done is to say, "Look, Parliament has written in safeguards for the exceptions to the hearsay rule, and provided that Parliament's safeguards are sensibly applied, we think that is fine".

**Rt Hon Kenneth Clarke MP:** Sure. As long as it does not set aside the overwhelming right to a fair trial, as expressed by Parliament and applied by our courts, there is no problem. They came to a different view on the facts of one of the cases, but I do not think anybody thinks that caused us a particular crisis. It is just a case that we have lost, but not on grounds that I would have thought cause any concern, but I cannot prejudge the position of the Lord Chief Justice. The fact he has not contacted me about it leads me to believe that he takes pretty well the same view as you and I.

**Q22 Mr Raab:** In the same recent evidence to us, the Lord Chief Justice said that Parliament ought to be concerned about the implications for EU accession to the ECHR, and in particular that the triplication of interpretation of human rights law would create “much less legal certainty”. To what extent are you concerned about this and what, if anything, can the UK do to mitigate exposure to such legal uncertainty?

**Rt Hon Kenneth Clarke MP:** That problem has been anticipated in taking forward the discussions on EU accession to the convention. There are proposals whereby the Luxembourg and Strasbourg Courts would consult each other and seek to avoid the conflict that the Lord Chief Justice fears. I personally think that when the proposals are finally formulated and we move to EU accession to the Court of Human Rights, that problem will have been addressed and avoided, because the Lord Chief Justice will not be the only lawyer across the European Union who thinks that might arise. There should not be too great a conflict, because convention rights are already enshrined in EU law. The European Union is not meant to pass legislation that conflicts with the convention now. The main benefit of the EU acceding to the convention, as I think we discussed when I gave evidence to this Committee 12 months ago, is that EU’s own institutions would be answerable to the Strasbourg Court and an individual applicant could go straight to the institution that has caused him or her offence without having to go through a rather convoluted process of going against a nation state, with the EU being added as the third party and the nation state being obliged to defend the EU institution if it wanted to be defended. Before we move on, I am told that the Luxembourg Court has always looked to the Strasbourg Court’s judgments when interpreting these rights, so in one view accession will merely formalise the present position.

**Q23 Lord Lester of Herne Hill:** In the admirable report that you published yesterday to the Committee of Ministers and the Council of Europe on Interlaken and Izmir and implementation at national level, it says on page 11 that, “Primary responsibility for identifying significant cases against other states which are relevant to the UK lies with the department which leads on the relevant policy area”. Is that realistic? The real expertise about European convention law lies mainly within your department and the Foreign and Commonwealth Office. It would seem much more sensible if you and the Foreign Office were given lead responsibility and did not spread it right across Whitehall to departments that really will not have that expertise. You say primary responsibility should be with the departments—

**Rt Hon Kenneth Clarke MP:** Because they have the expertise in the subject and if any agencies get involved it is usually the agencies of that department. A department in this situation that is not used to it would automatically go to the Attorney-General and get law officer advice about how to handle the human rights implications. The Attorney-General and the law officers provide advice to the whole of Government, and they are accessible. If I was in the Department of Health and suddenly had a human rights case, I would get my lawyers to get the Attorney-General’s office involved fairly early on, to start handling any human rights implications.

Rt Hon Kenneth Clarke MP

**Lord Lester of Herne Hill:** I am sure that you would, but they are not all necessarily as wise or experienced.

**Rt Hon Kenneth Clarke MP:** That is not what they were saying when I was Secretary of State for Health.

**Lord Lester of Herne Hill:** Would it not be a good idea for you to have a conversation with the Attorney-General to try to ensure that there is a system in place, regardless of who is the Minister?

**Rt Hon Kenneth Clarke MP:** I cannot think of any circumstance where this has caused any great problem. Usually the complaints come in via the department, but I will reflect on the question. I do not think in practice it has caused any problems, as far as I am aware. Obviously, it lies like that because the department knows more about the subject matter and practice that is suddenly getting engaged in some human rights action.

**Lord Lester of Herne Hill:** But we are talking about judgments of the Strasbourg Court that have implications here. That way round, it requires the kind of knowledge that your department and the Foreign Office have, which would not be widely shared. That is really what my question is aimed at.

**Rt Hon Kenneth Clarke MP:** Yes, but if you ask what this means for a department's policy, my first thought is that you would go to the Attorney-General's office. My department does not spend most of its time giving legal advice to other departments. That is what the law officers are for. The law officers are obviously as engaged in all the problems that arise from the convention as either the Foreign Office or the Ministry of Justice.

**Q24 Baroness Berridge:** Perhaps I may ask you about the EU accession point concerning applicability into domestic law. Do you think there are any implications for the convention coming into domestic law—not the judgments of the court being taken into account but direct applicability such as with Factortame? If we had a situation such as the prisoner rights case, how would that leave us if it has come in through direct applicability, which would be supreme? Do you think there is any effect that way?

**Rt Hon Kenneth Clarke MP:** I do not think that EU accession to the convention would have much bearing on that. It is the Human Rights Act that has mainly governed the direct applicability by British courts since it was introduced. My off-the-cuff reply is that I cannot think of any way in which EU accession, once it is completed, will have much bearing on that subject. The EU will have some of the rights of a member when it comes to appointing judges and things, which is one thing that has been decided, but mainly it will be accountable itself directly for its obligations under the convention. It already has obligations, in that it should only make proposals that are compliant with our obligations under the convention, but it is not at the moment directly accountable for the consequences. In future it could be, particularly if a member has taken some particular action directly on behalf of the EU as a whole.

**Q25 Mr Raab:** We have had evidence from the president of the Supreme Court and the Lord Chief Justice, and the Immigration Minister talked in the House yesterday about the problems of the shifting goalposts in judicial interpretations of Article 8 as it relates to the deportation of foreign-national criminals. We now have something like 400 cases a year in which Article 8 is being used successfully to challenge them. The Home Office is consulting on a review to balance the law in favour of the deportation of foreign-national criminals. I wonder whether that is something that you would support.

**Rt Hon Kenneth Clarke MP:** I do support that. Some of the cases that have been reported as being to do with Article 8 have been immigration cases. As least some of them have turned out not to depend upon human rights or the convention but to be the consequence of the Home Office's own Immigration Rules. The Home Secretary is persuaded that she needs to reform the Immigration Rules to get more clarity and to reduce the number of

times that this can be challenged. They are British cases brought under the Human Rights Act and so rely on compliance with the convention. I still think that the Home Office wins the vast majority of them, but it does lose quite a number. The Home Secretary's present view, which the Government wholly support, is that she needs to revise the Immigration Rules to reduce the risk of so many cases occurring.

**Q26 Mr Raab:** One of the things that the president of the Supreme Court and the Lord Chief Justice gave evidence on is that while that might be the way in which we are implementing our Immigration Rules, there is also an issue about expansive interpretations of Article 8.

**Rt Hon Kenneth Clarke MP:** But is it British courts more than Strasbourg, usually, that are doing this expansion?

**Mr Raab:** That point was made by the Immigration Minister. Given the way in which the Human Rights Act itself works and its structure, dynamic, and relationship with case law and primary legislation, would you agree—and this is a point made by the Lord Chief Justice—that any reform in that area would need to be done by primary legislation? If it was, presumably, therefore, it would be some kind of amendment to the UK Borders Act 2007 rather than secondary legislation or a declaration of Parliament, which has also been mooted in other quarters.

**Rt Hon Kenneth Clarke MP:** The British courts will always have regard to legislation and will seek to comply with it. We could go back to the separation of powers. British courts understand that they are not there to start challenging Parliament in areas in which Parliament is perfectly entitled to take a policy view. There would have to be a blatant defiance of rights under the convention before the courts started setting aside legislation. I do not think that I should just express an opinion, because I have not been consulted by the Home Office, so I will suddenly find, if I am not careful, that I am venturing some opinion that counters that of people in the Home Office who have had longer to consider it. I suspect that it requires legislation of some kind. The Lord Chief Justice says that the courts would have more regard to primary legislation than to secondary legislation. No doubt the Home Secretary will consider that, because you would not just dismiss that opinion lightly. I think the Home Secretary is right to try to restrict family rights under the convention to what everyone else regards as common sense, which means pretty strong cases whereby you are destroying the legitimate expectations of someone to family life and not just where it would cause a bit of upset, such as someone no longer being able to stay with their girlfriend or something of that kind. I make my usual mistake of choosing a frivolous example, but these things can happen. I am sure that greater clarity in either the regulations or in legislation, if it is possible to legislate, would help.

**Q27 Lord Lester of Herne Hill:** I declare a spousal interest, since my wife sits as an immigration and asylum judge. I am not sure whether I need to do that, or whether it is sexist even to make that declaration, but I do so. Unlike my colleague, Dominic Raab, I see no reason why there could not be a change in the Immigration Rules or the regulations to clarify what might be an over-extensive interpretation of Article 8 in the context of immigration. Do you have any particular view on whether it would have to be primary rather than subordinate?

**Rt Hon Kenneth Clarke MP:** I think I will refer both of these expert opinions to the Home Secretary. I think we are all agreed that the problem needs to be addressed. She is addressing it. There is a feeling that it has got a bit lax. No one is intending to abandon our obligations under Article 8; it is just a question of whether they are being applied sensibly in all these immigration cases.

**Q28 Mr Raab:** Whatever the outcome of *Scoppola v Italy*, it is clear that any replacement of the current prohibition on prisoner voting is more likely to withstand judicial scrutiny, at least in Strasbourg, if there has been full parliamentary debate. That was one of the things required in *Hirst*. Do the Government plan to introduce legislative proposals, pending the *Scoppola* judgment, to provide that opportunity to extended parliamentary consideration of the options?

**Rt Hon Kenneth Clarke MP:** As you say, we are waiting for the judgment in this Italian case. Pending the outcome of that case, the Government are not proposing to take this matter any further. We have debated it in Parliament, and we could have a full parliamentary debate. It is a matter for the business managers to see whether they can get time for more debate on the subject. I would have thought that further parliamentary debate would most sensibly await the outcome of the Italian case, the name of which I cannot remember off the cuff.

**Mr Raab:** *Scoppola* and *Frodl*, I think, but *Scoppola* is the one that we are waiting for.

**Rt Hon Kenneth Clarke MP:** *Scoppola*, where the Attorney-General has actually been appearing before the court, arguing the British position.

**Q29 Mr Raab:** Following on from that, if *Scoppola* is upheld and the line in *Frodl* is upheld as well, it would seem that the previously mooted ideas of a one-year or four-year deal, where prisoners serve more than those sentences, would be ruled out under the terms of the judgments in both those cases. What contingency planning have you done for that eventuality, and do you think that you could get a one-year or four-year deal though the House of Commons?

**Rt Hon Kenneth Clarke MP:** I think we would be very well advised not to start speculating about how we would respond until we have a judgment in *Scoppola*. Once we get a judgment, we will just have to consider it in a legal and political context. I would be most unwise to go beyond that. At least it will be more considered than on the first case. We had certainly reached the conclusion on the first case that we could not get anything through Parliament because there was such a great deal of feeling on the issue. If this turns out to be the final judgment on the subject, we will take a considered view and come forward with our proposals in due course, I am sure.

**Q30 Lord Lester of Herne Hill:** I am sure you know that the Irish and the Cypriots implemented *Hirst*, even though they were not parties, by immediately giving postal votes to all convicted prisoners in custody. Would you agree that, given the judgments of the Strasbourg court, including *Hirst*, that court has made it clear that provided that Parliament has properly considered legislation, a very wide range of legislative choices is open with which the court will not interfere unless it is manifestly irrational or arbitrary.

**Rt Hon Kenneth Clarke MP:** That is certainly my understanding of *Hirst*. That being the case, the next question arises: what will Parliament agree to? How can we do something that is not arbitrary or irrational? We already give votes to prisoners who are on remand in prison, so the organisation of postal votes in prison is not an innovation in Britain. The question of those who have been sentenced is highly controversial. We will address it in the light of whatever is said in *Scoppola*. There is no European rule. The court has never said that every member state should give the vote to people who are serving more than two years, less than two years or anything like that. Other cases raise troublesome issues about whether you give the vote to everyone who did not get themselves convicted of electoral reform or fraud, but I do not think that that is likely to last as the final outcome of this legislation. If that were to happen, I do not think that Parliament would remotely consider giving the vote to murderers, rapists and so on. In the British Parliament, you would not find a Member of Parliament who would vote for that.

**Q31 Lord Lester of Herne Hill:** Perhaps I could move on to the *Justice and Security Green Paper*. As you know, this Committee has called for evidence on the difficult issues that are raised by the Green Paper. Are you able to assure the Committee that the Government will not introduce legislation on the options raised in the Green Paper until they have had the chance to consider the report that we make, obviously provided we make it within a reasonable time?

**Rt Hon Kenneth Clarke MP:** I will have to check before I can give you a firm undertaking, but I think that I am set to give evidence to this Committee shortly after Christmas. We certainly await the advice of this Committee, especially if it raises strong points and we are trying to get Parliament to agree to our reactions to Gibson. We would very much hope to take your views into account. When we came in, we were very anxious to draw a line under all these matters and get on to a new footing so that it was perfectly clear how one should handle intelligence evidence and other evidence that affects the national interest in civil proceedings. I will try to ensure that we have your report before we legislate, but perhaps in turn I could take you up on your suggestion that you do not take too long before producing the report, because we will not be able to stay indefinitely some action on the subject.

**Q32 Lord Bowness:** Lord Chancellor, you know that we have asked for, and indeed have received, human rights memoranda from departments when we come to consider legislation. We have had some very good memoranda from some departments but it is fair to say that the record is patchy. Can you give us any assistance or commitment to making the provision of a comprehensive human rights memorandum the norm and amending the Cabinet Office guide to legislative procedure accordingly so it is clear that that is what we will get?

**Rt Hon Kenneth Clarke MP:** I am not sure that there is an overwhelming case for it to be made an overriding rule in all cases, but when significant human rights issues are raised, departments should consider them and I would expect them to produce a suitable memorandum. I do not quite see that the case is yet made for a rule for all pieces of legislation but I welcome the Committee's views on the subject. I am certainly not resistant to the idea of producing human rights memoranda in all those cases where they are of significance and relevance. The difficulty that we have now with all the reports that we produce on legislation is trying to avoid them all becoming expensive, difficult, burdensome and copious. There is no doubt an excellent case for impact assessments—in fact, there certainly is and I have argued that in the past. There is an excellent case for quality assessments and all the rest of it, but I find that we are producing vast quantities of paper and I am sometimes a little dubious about the readership of this stuff we produce and it occupies quite a lot of manpower in the department. I would like us to be selective on human rights memoranda.

**Q33 Lord Bowness:** I am now quite nervous about asking the next question. We are told that the new Australian Joint Committee on Human Rights—personally, I think it is quite difficult to cherry-pick things from different jurisdictions, but never mind—is going to receive from the federal Government reasoned statements of compatibility covering all human rights treaties to which Australia is a party. Some of the memoranda that we get from departments do this and others do not, and this Committee has criticised a number for not doing so. I have to ask you the same question even if the answer is the same.

**Rt Hon Kenneth Clarke MP:** I will have a look. Already, a Minister has to certify that the legislation is compliant with our obligations under the Act. That can be challenged if the Minister's opinion is not agreed with, but we do address the subject in all our legislation here and you have to put in the certificate.

**Lord Bowness:** But the Australians are getting a certificate, or a memorandum, about compatibility with international obligations, not just domestic ones.

**Rt Hon Kenneth Clarke MP:** I will consider the Committee's opinion and take further advice on how far it is necessary to go beyond our present practice. I would expect a memorandum to be provided with every piece of legislation from whatever department where significant human rights issues are raised. An automatic rule would just mean that all kinds of rather extraordinary pieces of legislation would have the obligatory memorandum attached, and that would devalue the whole thing.

**Q34 Lord Morris of Handsworth:** Sticking with other jurisdictions, the Scottish Human Rights Commission is carrying out some pioneering work with public authorities to develop some helpful methodology for assessing the impact of policies on human rights. Will the Ministry of Justice agree to consider that work to see if it holds any useful lessons for the way in which Whitehall departments assess the human rights impact of laws and policies?

**Rt Hon Kenneth Clarke MP:** I am sure that we will consider it. If the Committee develops views on it, I will be happy to consider them. My first reaction is that if we are not careful we will have yet another formal requirement for every piece of legislation. On the other hand, if the Committee is able to demonstrate that there are departments that fail to produce anything other than a certificate when there are quite serious judgments to be made about the human rights implications, we will have to address that. I do not think that in principle there is anything between us; it is just a question of whether we should introduce another formality into the process. In my personal opinion—not that of the Government—there are some pieces of legislation now where the documents you now have to produce are really a formality because nobody really thinks that they go to the heart of the debate on equalities or business costs or whatever it might be.

**Q35 Lord Lester of Herne Hill:** This is a matter that I raised in a debate last Thursday on a challenge to some equality regulations concerning religious ceremonies for civil partnerships. I do not know whether your officials have told you about it.

**Rt Hon Kenneth Clarke MP:** I have been following the debate through the press only.

**Lord Lester of Herne Hill:** The system broke down. The Merits of Statutory Instruments Committee is supposed to identify human rights issues and then draw them to our attention so that we can scrutinise the particular regulations. On this occasion, that did not really happen. The Committee had received a couple of opinions in one direction suggesting that the regulations might be bad. It passed them to us at the very last minute and we had no chance to scrutinise. The House of Lords in the debates was not helped by an opinion on the implications under the human rights convention of the challenge to the regulations. I mentioned in the debate that this was something that we wanted to raise with you. The problem is that we are a very keen Committee with very scarce resources. We cannot scrutinise all 2,000 statutory instruments every year. We have enough to do with primary legislation. As you said in your response to the Committee of Ministers of the Council of Europe, each department has its own prime responsibility. It must get legal advice before regulations are introduced on whether they are compatible with the convention. We are not asking for any new work to be done other than for the summary of the position, where it is relevant, to be published at the same time as the Explanatory Notes on each regulation. There will not necessarily be very many of those, but the point is that in terms of efficiency and cost-effectiveness, if the government department does that, it will enable us to do our job better and therefore avoid the situation of Parliament not having the benefit of a considered view. If Parliament had had the benefit of our Committee's view, I have no doubt that the debate would have been much shorter—well, that is an overstatement—and it would have meant that a lot of misunderstanding about freedom of religion and equality might have been averted. That is why it is a practical question.

**Rt Hon Kenneth Clarke MP:** I will try to ensure that my officials draw that to the attention of whoever is responsible for presenting the department's responsibility with regard to the regulation. I would expect to have a memorandum or some advice on a statutory instrument of that kind, which quite obviously raises human rights considerations. I have no doubt your House heard arguments from both sides about the impairment to the human rights of same-sex couples being denied a religious ceremony and the impairment of the human rights of ministers if they were obliged, contrary to their conscience, to carry out a same-sex ceremony. I cannot think of a statutory instrument that is likely to raise more human rights arguments than that, so I would agree with you, subject to a very good explanation coming in from whoever was responsible, that that is one where I would expect a memorandum to be produced. Certainly, that far I think it ought to be the practice when it is obvious that you are going to face human rights arguments in both Houses of Parliament when the statutory instrument gets debated.

**Lord Lester of Herne Hill:** And it should be done when the instrument is being laid for approval?

**Rt Hon Kenneth Clarke MP:** Yes, surely, so that you narrow the debate by giving some informed advice.

**Q36 The Chairman:** I shall ask the last question. Are you happy with the current architecture of national human rights institutions? For example, what are your views on a different arrangement for Wales?

**Rt Hon Kenneth Clarke MP:** Different arrangements on international institutions?

**The Chairman:** National human rights institutions within the United Kingdom. Wales has a different arrangement from Northern Ireland and Scotland.

**Rt Hon Kenneth Clarke MP:** I do not recall that I have so far engaged with the Welsh Assembly Government on the subject, which presumably means both Governments are satisfied with their respective arrangements. I am quite often in touch with Carwyn Jones, but I do not think this has so far given rise to any problems. I am not aware of any problems in Scotland, Wales or Northern Ireland from the different arrangements we have for engaging human rights issues. Obviously, the Welsh have their own arrangements for engaging when it is Welsh legislation that is being contemplated.

**The Chairman:** On that happy note, I thank you for your co-operation. We look forward to seeing you again in the new year. I wish you Nadolig llawen a blwyddyn newydd dda.

**Rt Hon Kenneth Clarke MP:** If I understand that correctly, I wish you a very merry Christmas and happy new year as well.