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TAKEN BEFORE THE
JOINT COMMITTEE ON HUMAN RIGHTS

HUMAN RIGHTS JUDGMENTS

TUESDAY 13 MARCH 2012

SIR NICOLAS BRATZA AND ERIK FRIBERGH

Evidence heard in Public

Questions 136 - 165

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Oral Evidence

Taken before the Joint Committee on Human Rights

on Tuesday 13 March 2012

Members present:

Dr Hywel Francis (Chair)
 Baroness Berridge
 Lord Bowness
 Rehman Chishti
 Mike Crockart
 Lord Dubs
 Lord Lester of Herne Hill
 Lord Morris of Handsworth
 Mr Dominic Raab
 Mr Virendra Sharma
 Mr Richard Shepherd

Examination of Witnesses

Witnesses: **Sir Nicolas Bratza**, President of the European Court of Human Rights, and **Erik Fribergh**, Registrar of the Court, examined.

Q136 Chair: Good afternoon and welcome to the Joint Committee on Human Rights. For the record, could you introduce yourselves, please?

Sir Nicolas Bratza: Yes, I am Nicolas Bratza; I am the President of the European Court of Human Rights.

Erik Fribergh: I am Erik Fribergh and I am the Registrar of the European Court of Human Rights.

Q137 Chair: The acoustics are not brilliant in this room, so we will not be offended if you raise your voice to us. We will certainly be raising our voices to you, but do not be offended by that. Could I begin by saying that this is the first time that the UK judge at the European Court of Human Rights has given evidence to this Committee or to Parliament? We are particularly fortunate that this of course coincides with the UK judge also being the President of the Court. We warmly welcome this new avenue for dialogue. In that spirit, will you be encouraging your fellow judges to open a similar dialogue with their national Parliaments?

Sir Nicolas Bratza: I think when one speaks of dialogue, one more naturally refers to exchanges of views and ideas between the Strasbourg Court and judges of the national courts. This already happens frequently, both formally through judgments and informally through meetings. We have had meetings regularly with the UK judges, with the judges of the German Constitutional Court and with judges of courts beyond the shores of Europe as well. If I can put it this way, national judges are natural partners in the sense that their role is the essentially the same as ours—namely to interpret and apply the Convention rights.

I have more difficulty with the idea of dialogue or interaction with national legislatures, whose role of course is not the same as that of an international or indeed a national judge. On the other hand, I think it is entirely appropriate that parliamentarians

should be able and encouraged to follow developments and understand the work and problems that our Court faces. I think it is particularly appropriate that such meetings should take place with Committees such as yours, Mr Chairman, since you have a specific function of keeping abreast both with developments and fulfilling the function of scrutinising legislation for compliance, and following up the execution of the Court's judgment. For that reason, Mr Fribergh and I are very pleased to be here. I think your Committee sets a very good example, and it is an example that other states have been strongly encouraged to follow in the draft declaration for the Brighton conference.

Having said that, the independence of our judiciary, just like the national judiciary, is of vital importance. It is vital that we should be seen to be protected from political pressures that might come from Governments or Parliaments. I think it is entirely right that your Committee made clear in the document we were given in advance of this meeting that it did not intend to engage in a substantive debate on cases that are still pending or, indeed, cases on which we decided. Would I encourage my colleagues to do similar things? Yes, certainly if there is a body such as yours with a particular commitment to the protection and furtherance of human rights. Yes, I would.

Q138 Chair: Thank you. Then would you say that specific open dialogue should be explicitly recognised in the Brighton declaration at the conclusion of the next month's ministerial conference?

Sir Nicolas Bratza: No, I do not see the necessity for that. I think there is a suggestion that there should be further dialogue with national authorities, and I imagine that would include parliamentary authorities as well. But as I say, more naturally when we talk about dialogue, I have certainly gone in print in saying there should be further dialogue with national judges because, as I say, our role seems to be so similar.

Q139 Mr Raab: Mr President, welcome to our Committee. The Strasbourg Court has itself in its case law in the *Cossey* case summed up its role as "ensuring the Convention remains a living instrument to be interpreted so as to reflect societal changes and to remain in line with present-day conditions". Article 32 of the Convention mandates the Court to "interpret" and "apply" rights set out in the Convention. Which article mandates the Court to update those rights to reflect its view of societal changes?

Sir Nicolas Bratza: Can I say that I am and have always been puzzled by the criticism that has been made of the Court for using, for the past 35 or 40 years, the term "living instrument" to describe its approach to the interpretation of the Convention. I do not think there is any magic in the term, which I think means simply that when interpreting Convention rights you accept that those rights evolve with a change in time and with a change in social conditions. It is perfectly true that the words are not in the Convention itself, any more than other modes of aids of interpretation adopted by the Court—subsidiarity, proportionality, margin of appreciation, fourth instance doctrine or autonomous meaning given to Convention terms.

But I think one has to bear in mind a number of things. Firstly, the Convention confers on our Court the power to interpret its terms, and the rights that are set out are broad and somewhat abstract in nature. This interpretive function is at the heart of the Court's function; it was why we were set up in the first place. The substantive provisions, therefore, have to be translated so as to apply to the specific sets of facts raised in particular applications.

Secondly, this is a human rights Convention, and it seems to me entirely in accordance with the principles set out in the Vienna Convention on interpreting treaties that the Court should interpret and apply those rights in accordance with the object and purpose of the

Convention. The object and purpose of the Convention, as the preamble makes clear, is that the further realisation of individual rights is at the heart of the Court's function.

To take what I may call an originalist stance to the meaning of the Convention I think would be quite contrary to the purpose and deprive it, to some extent, of its relevance today. One could illustrate that by examples. If I may, we have words like "private life", "home", "correspondence" and "family life", and I think it is very difficult to confine the interpretation of those words to the meaning they had in the 1950s. Doubtless, the founders did not have in mind issues such as transsexuality, retention of DNA samples, severe noise pollution, same-sex marriages, in vitro fertilisation, electronic means of communication and the like. These are new phenomena and one has to adjust the interpretation of the Convention to meet them.

It is not possible to make the Convention an effective instrument without having regard to contemporary standards. The first time the word was used was probably not in *Golder*; I think it was in the *Tyrer* case about the judicial corporal punishment in the Isle of Man. I doubt if the founders would have regarded in 1953 the use of judicial corporal punishment as inhuman or degrading. Was the Court really to ignore the change in social attitudes that had occurred by the time this did come up for determination only in the 1970s? I doubt it.

Q140 Lord Lester of Herne Hill: Is there any real difference between that approach and the approach of our common law courts in using what they call an "updating interpretation"?

Sir Nicolas Bratza: I do not think there is, and that was the point made by the President of the Supreme Court when he gave evidence to this body. It does not seem to me that the interpretive exercise that we carry out is different in substance from the role of national courts, either in developing the common law or indeed in updating statutes, as Lord Lester has said, to make them fit modern conditions.

I should say that just like the development of the common law, our development has equally been incremental, and that is why I do not like the word "dynamic", which has sometimes been used, because dynamic suggests something sudden, whereas I prefer the term we also use which is "evolutive", which I think is exactly what we are doing. We have built into that certain safeguards, if I can call them that. Namely, we have a doctrine of precedent; it is not as strict as here. We have also made it quite clear in a number of cases that it is not our function to create new rights that are not there. We have the margin of appreciation; we look for consensus before we narrow the margin of appreciation, so I think that safeguards are there to prevent any rapid and arbitrary development of the Convention rights.

Q141 Mr Raab: You have articulated a very clear view for a doctrine that effectively amounts to judicial legislation, and certainly far more than happens at other international courts like the ICJ, the ICC and even the ICTY. But assuming that you accept there is a creative function in what you have just described, can I put it to you that there is a fundamental difference with the common law? If Parliament does not like the common law, it can overrule it with an Act of Parliament, whereas there is no such means of democratic accountability where you create new law in Strasbourg.

Sir Nicolas Bratza: I am not sure that Parliament overrules. It is bound by what the Supreme Court says. It can change the law, having reflected on what was said. Our convention is, as you say, different in the sense that our judgments under the Convention are made binding by the terms of the Convention itself. They are binding so far as the individual state is concerned—that only—and they are binding, of course, at international level. Sometimes one is asked about which is the Supreme Court: is it the Supreme Court here or is it the Supreme Court in Strasbourg? I think it depends very much what question you are

answering. If you are answering domestically, of course it is the Supreme Court here. If you are arguing internationally, it is our Court.

Q142 Mr Sharma: You partly answered the question, but I will still put the question to you. Do you accept that there are serious questions about the separation of powers and democratic accountability raised by the doctrine of the living instrument?

Sir Nicolas Bratza: I must say that I do not, for the reasons that I have given. I think our function is to interpret, and when we say that it is a living instrument all we mean is that the interpretation we give will evolve with circumstances, with time and with the change in social conditions.

Q143 Mr Sharma: Can you explain in which article of the Convention or Protocol there is expressly set out a right of prisoner voting? Are you aware of the travaux, which demonstrate clearly that states agreed to retain narrow exemptions to the franchise?

Sir Nicolas Bratza: I think I must confine myself to saying that, although it has been suggested that the *Hirst* case was the first case in which the right of a person or an individual to vote was established, that is not in fact so. This is a right that has been interpreted since the 1980s certainly and perhaps even further back than that in a case called *Mathieu-Mohin v Belgium*. It is not something that one has invented for the first time in the *Hirst* case. As you will appreciate, I do not want to go into the details of the *Hirst* case because, as you are probably aware, the judgment of the Grand Chamber there is currently under challenge in a case against Italy in which the UK intervened on behalf of the respondent state in raising a similar issue to that raised in the *Hirst* case, and in which the UK Government are arguing that the *Hirst* case was wrongly decided. That case is still pending before us and I am involved in it, so I would rather not go further in talking about the *Hirst* case.

Q144 Mr Raab: Can I just put it to you that regardless, and obviously wanting to respect matters that are sub judice, Article 3 of Protocol 1 sets out very clearly a right to free elections in a general sense, but no right to vote whether for prisoners or anyone else for that matter? In the travaux to the Convention, which are available on your website, it is very clear why. The UK representation made very clear arguments, which were accepted, that nation states wanted to retain discretion over the franchise. Therefore, whether we call it judicial creativity or innovation, here is a very clear example of the living instrument at work.

Sir Nicolas Bratza: As I say, if there was creativity, it was creativity 30 years ago. Again, we were accused in the *Hirst* case of having invented for the first time the right of individual suffrage. That was a right that was long since established.

Q145 Mr Raab: It was invented a bit before the *Hirst* case, but it was invented nonetheless by the Court.

Sir Nicolas Bratza: In the 1970s. You say invented—this was a matter of interpretation. But as I say, we were accused of introducing this concept for the first time into Convention law. It was not that. It was an interpretation that took place in the judgment against Belgium, and has been followed ever since, that however Article 3 was expressed—and it is drafted in a curious way—it did grant a right of individual suffrage.

Q146 Baroness Berridge: Just on this issue of prisoner voting, do you understand the concern that was raised about this particular area and also the argument that one had reached an area that was a political, legislative decision-making realm, not one for the judiciary? Do you understand those concerns?

Sir Nicolas Bratza: I certainly understand it. What I am saying is that I do not think I can say whether I agree with it. This is the very argument that is being advanced before us that this is a matter that falls within the exclusive domain of national Parliaments and is not a matter for our Court. That is the very issue that we have to determine in the case of *Scoppola*.

Q147 Lord Lester of Herne Hill: Am I right that the Vienna Convention on the Law of Treaties, which your Court uses as a general source, itself refers to the need of a purposive approach and not just a literal approach, and makes clear therefore that, just as the right of access to court is not expressly stated in Article 6, so in the context of Article 3 of the first Protocol on voting it does not say voting, but the Court years ago implied, as I understand it, that if you have free elections that must include a right to vote?

Sir Nicolas Bratza: Exactly that.

Q148 Rehman Chishti: Mr President, in the *Abu Qatada* case the Strasbourg Court applied Article 6 to frustrate a deportation order for the first time. Do you accept this is judicial expansion of the Convention and the aims of those who drafted it?

Sir Nicolas Bratza: First of all, as I was a party to that, I do not think I can accept that. Secondly, that case I am afraid I also really do not think I should comment on. That case was decided by a Chamber. There is still a possibility, which exists for three months from the date of the judgment, for either the applicant to apply to take the matter to the Grand Chamber or for the Government to do so. That is either for the applicant to say that we were wrong in saying that Article 3 was not violated or the Government to say that we were wrong in saying that Article 6 gave rise to such a right or that it was violated in the particular context of Mr Abu Qatada. Again, I hope you will forgive me if I do not comment specifically on that case, because if it goes to the Grand Chamber, I again will have to sit in the case.

Q149 Lord Dubs: Sir Nicolas, you wrote an article for *The Independent* not long ago in which you suggested that MPs were mirroring criticisms of the Strasbourg Court as found in the popular press. Are you aware that overreach of the Strasbourg Court, as it has been described, has been criticised by senior members of the UK judiciary, including the Lord Chief Justice, the Master of the Rolls and Lord Hoffmann?

Sir Nicolas Bratza: Yes, I am well aware of that. I am particularly aware of Lord Hoffmann's very strong criticism of the Court made in his lecture to the Judicial Studies Board. Can I respond to it in this way? It is true that much has been said by the press, by judges and by politicians about the extent to which we are said to interfere with the decision making of national authorities, legislatures, the executive and the judicial bodies in this country.

I have to say, I think there is a particularly mischievous report that since 1966 dealing with the UK alone we have found violations against the UK in three out of four of all cases brought against the country. To my mind, this is a gross distortion and I think one that was clearly designed to undermine the standing and reputation of our Court. The allegation is simply not borne out by the evidence. I do think it is important to bring home that in 2010, just dealing with the UK, only 23 cases out of 1,200 even reached a judgment. That is something like 2%, of which in only about half we reached a finding of a violation. In 2011 there were eight violations found out of 955 applications. That is less than 1% of the cases brought against the UK. The vast bulk of the cases, far in excess of the average—something like 90%—against the UK are declared inadmissible. I must say, this is in large part due to the high standard of compliance with the Convention in this country.

As I indicated in an article that I wrote, I think we are particularly respectful of judgments of the courts in this country, and in many cases we do no more than simply almost

rubber stamp the views and the opinions that have been expressed in those cases. Where there is disagreement we have, I hoped, explained exactly why we disagree and on what basis we disagree. Those have been relatively rare; they have been in cases like *S. and Marper*—the case about the retention of DNA samples, where we thought that the House of Lords in that case had not given sufficient importance to the interference with private life that we thought existed—and the case of *Gillan and Quinton* about stop and search powers, where again we thought the House of Lords underplayed the interference of the stop and search powers with private life.

Perhaps most recently was the *Al-Khawaja* case, which I think is a very good example of judicial dialogue, if I may put it that way. In a case relating to hearsay, the Chamber judgment applied the so-called sole and decisive test, for which we were criticised by the Supreme Court, who said that this was effectively too inflexible a test. The case went to the Grand Chamber and we accepted the criticism that had been applied by the Supreme Court. Again, this is an example of dialogue, so I am afraid I do not think these criticisms are borne out that we are constantly interfering with the way that matters are dealt with domestically.

Q150 Rehman Chishti: Mr President, just linking to this question and also the one prior to that, can you understand why people in this country get frustrated with the European Court when you get people who are dangerous to our security not being able to be deported to their countries? This is not necessarily in terms of the specific case before, but generally where you have criminals who pose a danger and threat to our country, they cannot be deported back to their countries. Can you not understand why that frustrates people?

Sir Nicolas Bratza: I can certainly understand it, but our function is to determine—and I do not believe anyone would say that we were wrong in doing so—whether if somebody is sent back to a country they face a substantial, real risk of death or ill-treatment in that country. I think there is nothing exceptional in our Court saying that there is a responsibility on the country that is actually returning somebody to those conditions. I do not believe that anyone in the Government of this country would dispute that. Of course, there are cases where there would be a debate about whether in the particular circumstances the case or the person does face the ill-treatment that is threatened, and that is a matter of judgment that we have to make. We are greatly benefitted in this country by the matter having been assessed by various tribunals, who on the whole do a very thorough job.

This is reflected also in the fact that we have, as you know, a very large number of applications for what are called interim measures. In other words, what we call Rule 39, which is applied to the Government to prevent somebody being returned while we investigate the case. It is significant that I think we had something like 776 such applications last year alone, and I think we only applied Rule 39 in 34 of those cases. Again, that is a very small proportion—something like 4%. We do examine very carefully the situation, but the case law is clear that, where there is a genuine risk that somebody will be ill-treated—and I should say in *Abu Qatada* we did not find that Abu Qatada himself would be ill-treated—I think it is right that Rule 39 should be applied and it is right that we should be able to say, “This is a case where to return somebody would violate Article 3.”

Q151 Mr Raab: Sir Nicolas, I think one of the points about overreach from your article is that many parliamentarians will feel slightly aggrieved that you have suggested this is just something being led by the popular press. Others have referred to senior members of the judiciary; can I put to you a quote from Lord Sumption, a member of the Supreme Court, that “the Strasbourg Court has treated the Convention not just as a safeguard against arbitrary and despotic exercises of state power, but as a template for most aspects of human life”. Do

you recognise that there are serious constitutional and legitimate questions, and this is not all just some tabloid bandwagon?

Sir Nicolas Bratza: Of course I recognise that. I am not suggesting it is all down to the press, although undoubtedly some of the most extreme statements about the Court and about our competence have come through the press if not from the press. I have to say that I do not agree with the suggestions made that we are micro-managing cases or somehow overreaching our powers. I do think that the statistics that I have quoted really do belie that.

Q152 Mr Raab: Do you recognise that legitimate questions are being raised by parliamentarians and senior members of the judiciary, and this is not all just some sort of tabloid or populist campaign, whether you disagree with them or not?

Sir Nicolas Bratza: Yes. I have said I agree with that.

Q153 Lord Morris of Handsworth: In evidence to the Lords Select Committee on the Constitution, the Lord Chief Justice stated that, where there is a clash between the opinion of the Supreme Court and Strasbourg—I pause here to quote the Lord Chief Justice—“I would like to suggest that maybe Strasbourg should not win and does not need to win”. Do you agree?

Sir Nicolas Bratza: As I say, I think it depends from which angle you are looking at that. I indicated this in an article that I wrote. I do think it is very healthy that the Supreme Court should occasionally say—and I think it would be occasionally, and I think the Lord Chief Justice accepts that—“Strasbourg got it wrong”. I think *Al-Khawaja* is a very good example of that, where they told us why they thought we had got it wrong and we took account of that and re-examined our case law in light of that, and changed our case law to accommodate the view that had been expressed very powerfully by a unanimous Supreme Court. Both Lord Phillips and Lord Judge accept that, where the Strasbourg Court, certainly in its Grand Chamber formation, has laid down a very clear rule—as I say, in *Al-Khawaja* it was only the Chamber, not the Grand Chamber—of course it is right that in principle, even though the Supreme Court is required only to take account of the case law, they will follow that case law. Otherwise, the UK will find itself before our Court again.

Q154 Lord Lester of Herne Hill: One of the glories of the British system is the genius of the common law, of which many of us are very proud. Only four of the 47 member states of the Council of Europe are based on a common law system. What reassurance can you give us that, although we are in a small minority of states, our common law system has significant influence on your European continental jurisprudence, as it would be put?

Sir Nicolas Bratza: I think it has a profound influence, largely through the Convention itself, which I think a lot of my continental colleagues find more difficult to see fitting their own systems than I find to fit the common law system. It is a very different system, but it is one where I think a responsibility does rest on the shoulders of the judge from the UK, from Ireland, from Cyprus or from Malta to explain, so far as there is a difficulty in understanding, how the system works. Again, I think perhaps *Al-Khawaja* was a very good example of this, in the sense that in a very well-reasoned judgment the Supreme Court explained why the use of the “sole and decisive” test simply did not work in the common law context. We were able to accept that this was something that was far too rigid and inflexible a rule to be applied.

Q155 Baroness Berridge: The draft Brighton declaration proposes that the Court should be enabled to give advisory opinions and the Court in its preliminary opinion has not ruled that out. Could you outline for us the arguments for and against the Court having this power and whether it strengthens or undermines the principle of subsidiarity?

Sir Nicolas Bratza: I hope you have been provided with a paper that was prepared by our Court—we were asked to do it. I do not think we analysed the arguments for and against, but we did examine questions such as which authority should be able to request advisory opinions, the types of case for which advisory opinions should be allowed, and various procedural aspects, such as how the requests should be treated by the Court, whether there should be third party interventions, whether it should be binding on the state that requested it, and so on.

I think one can say that there are still concerns about the advisory opinion, and first and foremost for the implications for the Court's workload. Would it lead, as it is intended to, to a decrease in the number of cases, or would it lead effectively to an increase in what is already a very heavy workload? Would we be swamped with requests from courts from 47 different states for advisory opinions that probably would not be binding on the court that had requested it? Would it assist or undermine the principle of subsidiarity? I have to say I think that is an open question. We had a seminar on this topic in Strasbourg in January of this year, and I think it could be said that there is no common view. In fact, the President of the Supreme Court, Lord Phillips, attended, and I think he felt that what had happened in *Al-Khawaja* was a much better way of preserving subsidiarity, in the sense that Strasbourg expresses its view, the domestic court expresses its own contradiction of that view and then Strasbourg has the ultimate voice, but with the benefit of the views of the national court.

Q156 Lord Lester of Herne Hill: If by subsidiarity one means that the prime responsibility for securing fundamental rights lies with the states and their judicial and political branches rather than an international court, which is a court of last recourse, why is the Court, as I understand it, not keen on the British proposal to write the principle of subsidiarity into the Brighton declaration and, if necessary, into the Convention?

Sir Nicolas Bratza: I do not think we have a strong objection to writing it in. We feel it is not necessary, and I think we would need to see how it was actually expressed, because I think the word “subsidiarity” has been given a number of different meanings. For us, it is based on the premise that member states have fulfilled their primary obligation under Article 1 to secure the rights and freedoms of those within the jurisdiction, and their obligation, effectively, under Article 35 to provide an effective remedy where those rights have been violated.

We would have more concern still about the suggestion that somehow the margin of appreciation should be legislated for as well. There I think there would be real doubts in attempting to legislate for something that, as is clear from our jurisprudence, varies very much depending on the nature of the particular article of the Convention invoked, the breach of that article, and whether it is for reasons of national security or for morals, in which case you give a wider margin, or in circumstances such as interference with political speech, where you would give a narrower margin. It would be extremely difficult to legislate for a margin of appreciation that would inevitably vary.

Q157 Lord Lester of Herne Hill: The British Government have also proposed adding a new admissibility criterion against a background where, if their figures are right, once you have eliminated the backlog of about 150,000 cases, there will still be 25,000 cases that are non-repetitive and sufficiently serious to be admitted by the Court. The Government's argument is something must be done to enable the Court to deal with those 25,000 cases. As I understand it, as part of their solution they put forward that there should be a new admissibility criterion, which is that you would only interfere where the national court had failed to have due regard to Convention standards and case law, or where the case

raises an issue of principle of interpretation or application, a view which I share. As I understand it, you do not like that proposal. What is wrong with it? By you I mean the Court.

Sir Nicolas Bratza: I think there are a number of hesitations, if I can put it that way. First of all, is it necessary to have an additional inadmissibility criterion at all where we already reject 90% of the applications and where, of the 10%, about 60% of those are repetitive cases—cases that could not be rejected on this basis because they reflect a systemic or endemic problem within the country concerned? That is the first reason, and having regard to the statistics I have given, I think that is particularly applicable in the case of the UK itself, where, as I say, only about 1% or 2% of cases even get through the existing admissibility criteria.

Secondly, we can and already do reject cases that have been duly examined using the well-established criterion of manifestly ill-founded. If the matter has been properly looked at by the national courts, we are able to reject it on the basis that it is manifestly ill-founded. Thirdly, unlike the current criteria, which are very well known to us and to the members of the registry who process the cases, the new criteria will have to be interpreted by the Grand Chamber. It is far from clear what would constitute a manifest error, which I think is the word that is going to be introduced, in interpretation. Once it has been interpreted, for 20 different judges to apply it as single judges I think would be fraught with difficulty.

Fourthly, I think it would require the Court to go in much greater depth into the merits of the case, which were normally not for the admissibility stage. It would effectively require us to focus on whether the arguments were properly dealt with at national level or not. Finally, I do not quite know how to put this, but I think there is a risk of friction or divisiveness because there would be a danger in our Court being forced to say that cases brought against certain states disclose manifest errors on the part of the national judiciary. It could be quite unfortunate if we were forced into that situation, because this criterion would undoubtedly be invoked by national authorities and we would have to decide whether there was a manifest error or not.

Q158 Lord Lester of Herne Hill: If one then did not accept the British Government's approach—this is a very filthy question to ask you, because it may well be there is no answer—how then can the Court solve the problem identified by the British that you will still have 25,000 non-repetitive admissible cases in your docket, which, even though you work so hard, is far more than this Court can deal with? What other solution would there be rather than changing admissibility criteria, margin of appreciation and so on?

Sir Nicolas Bratza: That is the crucial question that is facing our Court. We will be able to cope with the clearly inadmissible cases and, as has been said, we would hope with certain additional resources we would be able to eliminate the backlog of something like 92,000 cases by 2015. So far as repetitive cases go, with 30,000 to 35,000 of those, there must be some solution—better execution or some more effective way of returning the cases to the national authorities to deal with. So far as priority cases are concerned, again, with additional resources I think we are coping pretty well with those. It is the 20,000 to 25,000 substantial cases we cannot currently cope with.

A number of ideas have been suggested, and one of them is that we develop this well-established case law principle, which is currently being applied only in the case of repetitive cases. We broaden the words “well-established case law” and, where we identify that a particular case or particular cases raise a very similar problem to one that has been raised and where a violation has been found against another state, we simply send the case back to the state concerned with a note pointing out the number of times this point has been decided, asking them to try to resolve the matter, and if it is not resolved, we will give it a

very light treatment by our committee, who would find a violation in short order and in fairly summary procedure.

Q159 Mr Raab: You focused on the practicability of these reforms, whereas in fact we have a perfectly good model out there that could at least be adapted. The International Criminal Court adopts and enshrines the principle of complementarity, which is effectively subsidiarity; it operates as a court of last resort; it only intervenes when national states or parties are unable or unwilling to address the justice of the case. Is there a reputational risk for Strasbourg that, because of either vested interest or because you enjoy the very broad mandate that you have written for yourselves, you look like you are obstructing reform that is actually in the interests of the Court and its state parties.

Sir Nicolas Bratza: I hope I am not seen to be obstructing this. I am not strongly opposed to the idea of legislating on subsidiarity, but as I say, this is a concept that the Court itself has devised and applied, and it has used the expression very frequently. I do not particularly see the need of legislating on that, but as I say I find much greater difficulty with the idea of legislating on margin of appreciation than I do on subsidiarity.

Q160 Rehman Chishti: Mr President, one of the UK's leading scholars of the European Court of Human Rights, Ed Bates, has described the draft Brighton declaration as an "attempt to relegate the role and function of the Court to a sort of irrationality review" and to "water down its substantive jurisdiction". Do you agree with his concerns about the overall effect of the draft Brighton declaration?

Sir Nicolas Bratza: No, I do not. I think it is a welcome initiative on the part of the Government. Having said that, it is the third high-level conference that we have had on the Court in two years, and there comes a time when we should be able to concentrate on following up the measures that have already been taken. These have achieved, frankly, an enormous amount in two years through pilot judgments, through prioritisation policy, through the use of the single judge—which has had a really dramatic effect on increasing the number of cases that we have finally disposed of, bringing it up now to over 52,000 last year—and further development of the friendly settlement and unilateral declaration.

Of course we will always react constructively to proposals made, but I have to say I accept at face value the Government's assurances, which were made through the Lord Chancellor before this very Committee, that it is committed to the Convention system, that there is no intention of interfering with the individual right of petition, which I think is described as a cornerstone of the system, that there is no intention of weakening the Court but rather strengthening it, and that there is no proposal, as he put it, for democratic override in the sense of leaving it to a parliamentary body to determine whether to give effect to the Court's judgments, which are binding under the Convention.

With those assurances, while I do not say that we will not have queries about certain parts of the draft declaration, I think it is to be welcomed. There are specific proposals in there that we warmly welcome, in particular the focus on the importance of more effective implementation at national level and the recognition, as I say, that the right of individual petition was a cornerstone of the system. I think the role of the Council of Europe to assist and encourage better national implementation is a good idea; the need for additional resources in terms of registry staff is a good idea; the proposal to remove the ability of parties to oppose relinquishment of jurisdiction to the Grand Chamber is a very good idea; and we are very pleased that the idea, which was originally mooted, of a so-called sunset clause has been dropped, as has the sanction for so-called futile cases, the idea of fees and the ideas of compulsory legal representation. I think it is a very good thing that the Government has reacted and abandoned those.

Q161 Rehman Chishti: Can I just move on to a different topic? My colleague Lord Lester has touched upon this, with regard to the Court's backlog of cases. It is a three-part question for the sake of clarification. One, the Court is often criticised for not focusing on the cases that really matter. Can you describe the Court's prioritisation policy and how it operates in practice? Linked to that, can you please explain to us what a pilot judgment is and how that affects the reduction of backlog cases? Linked to that, has the coming into force of Protocol 14 had any real, measurable difference in reducing the Court's backlog?

Sir Nicolas Bratza: I wonder, Mr Chairman, whether you would allow me to pass the ball—I was going to say pass the buck—to my colleague, the Registrar of the Court, to perhaps respond to the question.

Erik Fribergh: Thank you. Your first question related to the priority policy and the prioritisation that was introduced by the Court in 2009. Immediately when an application comes into the Court, the registry identifies to which category in terms of priority the particular case should be allocated. We work on the basis that there are seven different categories of cases. Three of them we call priority cases, and those are the cases where, firstly, life or health is at stake; or secondly, there is a very important issue of principle in the case; or thirdly, where there is a core rights issue—right to life and so on. I am not going to describe all the categories for you, but then it goes down through seven categories, and the last categories are those that are the least important. By doing this identification the Court can from the beginning easily put the application on the right procedural track.

Coming to your last question, what we try to do now is something that was made possible by Protocol 14 and the introduction of the single judge formation. This means that, once the registry has identified a case as a non-priority case to be declared inadmissible straightaway, this is immediately put before a single judge so that we can dispose of that case. Our statistics for last year bring out very clearly that this system has brought about a much higher output in terms of dealing with these inadmissible cases. We had an increase just last year of 37% concerning these inadmissible cases, and looking at the statistics for the first two months, there is the same pattern. There is a considerable increase in that. This means that by putting the applications on the right track from the beginning, we are able to reduce the backlog.

The second point was pilot judgement procedure, and how that can be used to reduce our backlog. Our biggest problems are the cases that are of a repetitive nature. I think Lord Lester mentioned the figure: today we have something like 35,000 applications that we have identified in the first selection as repetitive applications. What we wish to do with pilot judgement procedure is to take one or several of these similar cases and then proceed to a judgment that would identify what is the structural problem in the country concerned and also give indications of how that problem can be solved. One of the solutions that we provide for in that situation is also to create a domestic remedy to settle all the follow-up cases. By doing that and having a state that implements the judgments following such a pilot judgment procedure, we could repatriate, so to speak, many of these repetitive cases to the state concerned. We could reduce the backlog considerably that way. I think I have answered the question.

Chair: Your answer was so comprehensive you have anticipated our final question.

Q162 Baroness Berridge: What are the main advantages of EU accession to the European Court of Human Rights? Is the Lord Chief Justice right that parliamentarians ought to be concerned about it? I hope you are aware the Lord Chief Justice expressed those views to this Committee.

Sir Nicolas Bratza: By way of introduction, of course, the Lisbon treaty creates a legal obligation for the Union to accede and the language is clear. Secondly, accession will not as I see it change the nature of the obligations of the member state under the Convention or under the Union treaties. The benefit is perhaps twofold: it will remove what I think is an anomaly, whereby all Union member states are party to the Convention but the Union itself is not, which means that the acts of its institutions escape the external scrutiny to which member states themselves are subject. Convention rights are, in reality, already recognised by the Luxembourg Court, and they are now enforced under the Charter. In principle, the Luxembourg Court has been very respectful of the Strasbourg jurisprudence, but I think it would be—and I think this is the general feeling—very helpful to avoid the emergence of divergent standards or potentially divergent standards by having a single source for the final interpretation of the Convention rights.

The concerns expressed, as I understood it, were that somehow by a side wind the decisions of the Strasbourg Court will become directly binding on national courts through its rulings on EU legislation. I do wonder whether these concerns are really justified when already, as I say, the Luxembourg Court applies Strasbourg case law as a matter of course on the issue before them. Where what is proposed is to have a mechanism that will allow the Luxembourg Court to express a view on applications affecting European Union law, it will be given an opportunity to do that, which will involve also the opportunity to involve itself in the view that the Strasbourg Court ultimately takes. I do not think that there is really a real risk of accession changing substantially or at all the way in which the system currently functions.

Q163 Mike Crockett: If we can turn finally to the appointment of judges to the Court, the draft Brighton declaration recognises in paragraph 29 that “the authority and credibility of the Courts depend in large part on the quality of its judges and the judgments they deliver”. With that in mind, are you content with the current arrangements for the selection and election of judges to the Court?

Sir Nicolas Bratza: I have been on the Court for 14 years, and I can say that they have hugely improved in that time. I agree that the quality and independence of the judges of our Court is fundamental to the proper functioning of the Convention system. A number of improvements have been introduced over the years. Firstly, there has been strong encouragement to a more transparent procedure domestically for the choosing of the three names that go forward as candidates for election as a judge. The UK has always adopted a very transparent system since I was first elected—advertising the job, having a shortlist prepared, having a detailed hour-and-a-half-long interview by an independent body, and then having recommendations made by the independent body to the Government to put up those names. Other states now have very much fallen in line. It is a much more transparent system generally than existed in 1998.

Secondly, as you know, there is now an advisory panel of distinguished judges or former judges that has been set up to assess the qualifications of the candidates, and this has worked very well. If I have a problem with it, it is that they make their assessment basically on paper, not on seeing the candidates. I do think it would be an improvement if they were able to see the candidates as well. It has had the very useful effect, at least in one case, of rejecting a list that in various respects was inadequate—or, rather, advising the rejection of the list—and the state concerned did actually withdraw the list it had put forward.

Thirdly, the interview of all the candidates that takes place in Paris by the sub-group of the Parliamentary Assembly has greatly improved. When I first went there, the questions were very unfocused. The second time it was a longer interview and the questions were very much better focused and better equipped to decide the quality of the various candidates.

Fourthly, I think the nine-year, non-renewable term, which has replaced the six-year, renewable term, should help independence, in the sense judges will be less reliant on their states to re-nominate them for the position that they hold. Overall, the system has improved.

Q164 Mike Crockart: You mentioned transparency, which is obviously very important. You mentioned an advisory panel made up of judges. The one thing that you do not specify there is that anyone appointed should have been a practising judge before joining the Strasbourg bench. Do you think that is something that should be looked at, or do you think that is less important?

Sir Nicolas Bratza: Coming from a jurisdiction where the judges are drawn from the Bar, I favour the members of the Court who perhaps are practitioners and have had judicial experience at home. In fact, about half the judges of our Court do have sometimes very extensive judicial experience at home. The other half do not, but they are from mixed backgrounds—some prosecutors, some officials, and a significant number of very experienced academic lawyers. That is the tradition on the continent. There is nothing strange in having academic lawyers sitting either on national courts or indeed on international tribunals such as ours. I must say, some of the best judges that we have do come from an academic background.

Q165 Mr Raab: Sir Nicolas, given some of the concerns that we have been discussing about the constitutional concerns about the doctrine of the living instrument—and you have talked again about judicial appointments—and the feeling certainly in this country or at least certain quarters that we need stronger democratic accountability, do you have any objection or concerns about the idea or the suggestion that there should be some scope for parliamentary scrutiny of your successor's appointment, and his successor or her successor's appointment in due course, in this country, whether it was hearings, a Joint Committee like this or some other form of oversight, or at least consideration by parliamentary members?

Sir Nicolas Bratza: I personally would not have an objection to it. Can I say two things? One is that I would hope if it did take place—and I think it must be a matter essentially for the national authorities to decide how they go about the selection of the three names—I hope it would not become something equivalent of some confirmation hearings, because I do think asking detailed questions of a judge on their views on various topics is not advisable.

The second thing is we are sometimes misrepresented; we are constantly described as being unelected. We are about the only judges who actually are elected; we are elected by the Parliamentary Assembly of the Council of Europe, having been scrutinised by a committee, a committee in fact that is presided over at the moment by Mr Christopher Chope, who is a leading figure in Strasbourg. We are elected, admittedly not by a national Parliament.

Chair: Could I thank you both for being present today and the comprehensive way in which you have answered our questions? We have opened a dialogue and I hope that we can continue that dialogue.