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HOUSE OF COMMONS

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TAKEN BEFORE

JOINT COMMITTEE ON HUMAN RIGHTS

THE IMPLICATIONS FOR ACCESS TO JUSTICE OF THE GOVERNMENT'S PROPOSALS TO REFORM LEGAL AID

TUESDAY 26 NOVEMBER 2013

Rt Hon Chris Grayling MP

Evidence heard in Public Questions 26-50

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Oral Evidence

Taken before the Joint Committee of Human Rights

on Tuesday 26 November 2013

Members present:

Hywel Francis (Chair)
Baroness Berridge
Lord Faulks
Lord Lester of Herne Hill
Baroness Lister of Burtersett
Baroness Kennedy of The Shaws
Baroness O'Loan
Robert Buckland
Simon Hughes
Mr Virendra Sharma

Examination of Witness

Witness: **Rt Hon. Chris Grayling MP**, Lord Chancellor and Secretary of State for Justice, examined.

Q26 The Chairman: Good afternoon and welcome to this session of the Joint Committee on Human Rights, which is part of our inquiry into the implications for access to justice of the Government's proposed legal aid reforms. Just for the purposes of comfort, this is a very warm room and I have allowed gentlemen and ladies, if they wish, to take their jackets off. Lord Chancellor, for the record, could you introduce yourself please?

Chris Grayling: I am Chris Grayling. I am Secretary of State for Justice, and Lord Chancellor.

The Chairman: Could I begin with a general question, quoting back to you your memorandum and counterposing it with a quotation from Lord Hope? You say in your memorandum, "The legal aid reforms do not involve any fundamental right of access to the courts, rather the question of whether a person should receive legal aid funding". Now

then, put alongside that the words of Lord Hope in relation to access to legal advice being recognised by English courts as, in his words, "one of the fundamental rights enjoyed by every citizen under the common law", and one of the rights, "inherent and fundamental to democratic civilised society". Do you see any contradiction there?

Chris Grayling: I do not, because my view is that while it is absolutely essential, in a fair, free, and modern democratic society, that we should make sure that people, for example, who are accused of a crime are properly represented and have a right to a proper defence, and that there would be other circumstances in which we would want to ensure that people can afford to have access to the courts, in straitened times financially it is completely unrealistic to believe that we can provide legal aid support to give every person in all circumstances access to the justice system.

The Chairman: Implicit in that response, however, is the sense that there is a price to it, and I am reminded of what Oscar Wilde said about the definition of the philistine: knowing the price of everything and the value of nothing. Surely that does imply that it is only people with means that will have access to justice?

Chris Grayling: No, what it means is that there are limits to how much the state can provide in terms of financial support to individuals to do all things in all circumstances. Of course it is right and proper that the state should always help somebody who cannot find another means to defend themselves, and we provide, for example, legal aid to almost everyone in our criminal justice system who is not able to defend themselves; it is right and proper that we should do that. Across a broad range of activity—in our tribunals, in our civil justice system, in our family courts, in our criminal courts—there are some limitations on what the state can provide at a time when resources are straitened. As an example of that, we have taken the decision to move ahead with the limitations on the right of individuals who have a disposable income—and it is important to say disposable income; that

is after you have taken into account tax, national insurance, housing costs, council tax, and food provision. There are limits to how much we can provide to those people to defend themselves if they are charged with a criminal offence.

That is the equivalent of saying to somebody who is earning more than £100,000 a year, "If you are charged with a crime you are going to have to pay for your lawyer". That is an example where, in tough times, you have to take a difficult decision, and say, in some circumstances, people have to be responsible for themselves. It is equally the case, as I say, that across the whole of the tribunal system and across the whole of the court system, it is unrealistic to provide state support for every legal action in all circumstances.

Q27 Baroness Kennedy of The Shaws: I want to explore with you the tension between the roles that you wear. We reformed the role of the Lord Chancellor, because he wore three hats, and it seems to me that you wear two hats: a political hat, and then a hat as Lord Chancellor, which means that you are the guardian of our constitution.

Chris Grayling: Absolutely.

Baroness Kennedy of The Shaws: I want to understand: do you grapple with that tension? Are you alert at all times to the tension that there is there between your political agenda and your role, which is to guard the constitution and the rule of law?

Chris Grayling: Absolutely. I am well aware of that; it is something I take very seriously, and I do not believe that any of the proposals we have brought forward, and any that I would bring forward in the future, would undermine the principles that my office is supposed to represent. The truth is that of course it is the job of the Lord Chancellor to make sure that we have a successful, effective justice system in this country, but that does not mean that as Lord Chancellor I should argue that the state should, in all circumstances, pay for all forms of legal action by people who do not have the means to pay for that action themselves.

Baroness Kennedy of The Shaws: I just want us to pin that down, because you have statutory duties created as Lord Chancellor—it used to be conventions, but now it is statutory duties—and I just want to ask whether you see them as being engaged for you when you are involved with this business of reforming legal aid. Do you feel that, as the Lord Chancellor, you are having to wear that hat and think about whether you are doing this in a way that conforms to your duties as Lord Chancellor?

Chris Grayling: Yes, I do, absolutely. I take that very seriously. I have asked the questions of myself: is this a sensible balance to find between the needs of justice and what society as a whole would expect, and what should be right and proper in a modern democratic society; and the degree to which the state should provide financial support to ensure that people have access to justice, and the limitations that are always going to be placed on the state, and are particularly placed on the state at the moment in terms of the availability of resource.

Baroness Kennedy of The Shaws: You see that answer creates the very problem that I am trying to ask you to grapple with, which is that you are saying what the public might expect, but the rule of law is something that goes beyond populist concerns about how public spending might be divided up. It is about something more profound than that, because access to justice is fundamental to the rule of law, and that is your role—to be the guardian of that—but it seems to be competing with your ideological commitment to austerity.

Chris Grayling: I do not think that is right. If you look back, we have only had a legal aid system in this country for about 70 years; we have had 800 years of Magna Carta. Clearly it is a more recent decision by the state to make sure that financial support is available to provide a greater degree of access to justice than was there in the past.

Baroness Kennedy of The Shaws: It was ridiculous to imagine that there could be access to justice if people could not afford to go to the courts and could not have lawyers to represent them. It was meaningless to have access to justice.

Chris Grayling: Absolutely. That is why after 720 or 730 years of the existence of Magna Carta, the state rightly decided that it needed to provide people with financial support to secure access to justice, and it will continue to do so. Even after the package of changes that we are putting forward have been put into place, if they go ahead in their current form, we will still have, per capita, for a common law system of the kind that we have, by far the highest-costing system of legal aid in the world. You ask the question about my role as Lord Chancellor; my role as Lord Chancellor absolutely involves making sure that I am satisfied that we have a system that can do proper justice in this country, but I do not believe that role is in any way compromised by accepting that there are limitations on the ability of the state to provide unlimited financial support to individuals going for justice. I do not believe this contradicts the principles of the rule of law.

The Chairman: We need to make progress, but I would like to pause. There is almost a rhetorical question: if you were Lord Chancellor 60 or 70 years ago, given that the period of austerity and the economic difficulties then were far greater than now, what would you have done? Would you have introduced the legal aid advances that were achieved then?

Chris Grayling: Yes, I would, but I would not have envisaged the legal aid system that was introduced then becoming expanded to the degree it has been, and I think I would have believed that was probably unrealistic.

Lord Lester of Herne Hill: I think it is common ground; I think what you are saying is that you accept that at common law, as well as more broadly under European law, there is a fundamental right of access to justice, which includes legal aid with limitations required where it is necessary to do so. You are accepting that it is inherent in the rule of law, and in the common law, as well as under European law. That is how I hear you.

Chris Grayling: It is right and proper I defend the existence of a legal aid system. I would in no way countenance the scrapping of the legal aid system; it is a necessary part of a modern

society. We will come back to the specifics of the package, but I will give you one point to illustrate that: I looked at the whole question of prison law. I personally regard it as being important that a prisoner has access to proper legal advice over a matter related to the length of their sentence and their release. Baroness Kennedy asked whether I had given due thought about access to justice; it would have been very easy to say there should be no legal representation for prisoners at all; I judged that to be not right. At the same time, I judged that the purpose of a legal aid system and the interests of justice are not necessarily compromised by saying that for matters of treatment within prisons that should be a matter for the prison complaints system and not for the legal system.

The Chairman: We will go into the detail of that in a moment. Can I ask one brief question before I move on, and Mr Hughes asks a more specific question about timetabling. What, in your view, is the relevance of human rights law in relation to the scrutiny that we have of legal aid reforms currently?

Chris Grayling: The interesting question is around how far within Article 6, for example, the provision of legal aid is required to be there. My own view in particular is that it is essential that people who are charged with a crime should be properly represented, and I think the core purpose of the authors of the convention originally was precisely to ensure that somebody who was charged with a crime was able to be properly represented and independently represented in our courts, and, indeed, in any courts.

If you look at the era in which the convention was written, in the late 1940s, at a time when you had seen show trials in the Soviet Union, at a time when you had seen all the terrible events in central Europe, it was absolutely understandable, and remains a sacrosanct principle, to my mind, to this day, that somebody who is charged with a criminal offence, who risks losing their liberty in a trial, should have the right to a proper defence. I see it as the duty of the state to make sure that that is always able to happen.

Q28 Simon Hughes: Lord Chancellor, good afternoon. Can I take you back to the prisoners question, please? Perfectly legally and properly, one of your Under-Secretaries laid before Parliament on 4 November the Criminal Legal Aid (General) Amendment Regulations 2013 SI 2790, which are to do with the rights of prisoners. Under the normal parliamentary procedure that will come into force on 2 December. An anomaly, which I have never fully understood, means that we can pray against it in either House until 18 December—I understand that will happen if it has not happened yet—so there will then be a debate, and in theory either House could vote down those regulations, but they will have come into effect on 2 December. Separately we are—and we are grateful that you are here—conducting our inquiry into legal aid and its implications, and one of the issues I am sure you know we have been taking evidence on is the effect on people in prison. Can I ask a direct question: given we have not been able to complete our report yet, but we are moving as quickly as we can, and we will have completed our report and hope to publish next month, would it be possible for you to withdraw those regulations to take into account, firstly anything that may have come up in your second round of consultation, though I know it is not directly relevant to it, but more importantly the evidence that we have heard and recommendations that we might wish, as a Committee, to make to you and to Parliament?

Chris Grayling: I always try to be helpful to House Committees, and to the House generally, but I am afraid, Mr Hughes, I would throw back at you a question, and this was a question that was raised with me in a letter from the Committee a couple of months ago. I published these proposals on 9 April, it is not 26 November; that is quite a big gap. I am afraid that when you bring forward reforms, when you consult on them, when you produce a timetable for change, you probably want to leave plenty of time for Parliament to have its say. However, I feel that this Committee has perhaps waited longer than it should have done to have its say if it wished to do so.

Simon Hughes: The Committee will form a view about that, so I deduce the answer to that is no, you do not think you can withdraw them?

Chris Grayling: Indeed.

Simon Hughes: We will have to take a view about that; thank you very much.

Q29 Mr Sharma: The question is a bit lengthy, so I will go slowly, so that you can answer it in one go, rather than I put the three separate questions. What is the Government's main rationale for introducing a 12-month lawful residence test, which is the test for eligibility for legal aid? How much public money will the introduction of the residence test save? As a form of residence test was proposed in 2008, at which point the then Government was able to estimate the number of cases that were likely to be affected, why have you made no estimate of cases affected, or likely savings from that proposal?

Chris Grayling: On the rationale, it is something that reflects a direction of travel in Government as a whole. You will be aware, Mr Sharma, that the Immigration Bill contains a number of measures to tighten access to public resource in this country for people arriving in the country. I take the view that the rationale for this is straightforward: that except in those cases, which we will come back to in a moment, where there is an acute need related to vulnerability, I do not believe that people should be able to come to this country and simply access our legal aid system within a few weeks. I think they should have been here for a period of time, to be settled here, to be resident here and ideally to be making a contribution here, and this measure is designed to secure that.

You asked a question about the savings, and, indeed, about our estimate of the number of people affected. The truth is we do not know, because we do not currently retain information about nationality and the right to access our legal aid system. We could discover it is not a large amount; we could discover it is quite a large amount. To me, it is a point of principle, and it is a point of principle that applies in a number of areas of public

service: I do not think you should be able to come to this country and, except in cases of significant emergency, be able to access legal aid system without having been here for a time and contributed to this country.

We have made a number of exceptions to that; those exceptions are very much in line with the exceptions that were agreed by the coalition and by the two sides of the Government at the time of the last LASPO Bill, and it is right that they are. We will not include asylum seekers in this provision. We have excluded cases of significant vulnerability related to trafficking and related to domestic violence, for example, but the overall principle of saying that you need to be established here and, ideally, to make a contribution here before you can access our legal system—in civil cases, not criminal—is absolutely right.

Q30 Baroness O'Loan: Lord Chancellor, the issue of justification for differential treatment in access to the courts requires objective and reasonable justification for us to be compliant. You have talked about your rationale for introducing the residence period, but what is your objective and reasonable justification for treating people differently in relation to eligibility for legal aid on the basis of length of lawful residence, and what is the actual rational connection between the stated aim of saving money and the length of the lawful residence?

Chris Grayling: As I say, we do not know for certain the financial scale. As far as I am concerned, this is as much about giving confidence in the system as anything else. I am treating people differently because they are from this country and established in this country, or they are not. I personally do not believe that we either should or can afford to, as a nation, simply provide access to public resource to people who have arrived in the country and have been here a very short period of time.

If you come to this country you should come to make a contribution before you can realistically expect to get something back. That will not always be the case in all

circumstances; if you arrive as a tourist, you are charged with a criminal office and you have no one to defend you, you will get someone to defend you, and that is right and proper. Generally speaking, you should not be able to access public resource without having been here for a period of time, been established, and having made a contribution. That underlies this plan and underlies some of the other things that are within the package currently before the House of Commons.

Baroness O'Loan: Just to follow that up, you say that you have to have been here some time to have made a contribution; how do you quantify the making of the contribution if that is the test?

Chris Grayling: The test we have set is the 12-month residency. What I would hope is that that, generally speaking, will mean people have come, worked in this country and made a financial contribution; they will have paid taxes, and will then be entitled to get something back for doing so.

Q31 Mr Sharma: You very kindly indicated that there were many categories that were exempted. One category was serving members of Her Majesty's Armed Forces and their immediate families; they are exempt from this test.

Chris Grayling: Yes.

Mr Sharma: Then why should military veterans, such as retired Gurkhas, or non-UK residents, nationals such as interpreters working for the Ministry of Defence, have to meet the residency test? Why is that—I will not say the discrimination—difference created between those two categories doing the same professional job?

Chris Grayling: It will depend. If it is a serving member of the Armed Forces who returns to this country then, whatever their background may be, if they have the right to be here, then it will be appropriate that they can access the legal aid system. In other cases of people who apply to come and live in this country permanently, then my view would be that we

should treat them and, indeed, legally we should treat them, and we are treating people in the system who have come from Crown dependencies for the first time to live in the UK in the same way. Serving in the Armed Forces, because you come from another country, does not carry an automatic right of residence in the UK. I do not think we should treat those people any differently to people who come from, for example, the Crown dependencies?

The Chairman: Why are you treating the Gurkhas differently? Do you consider that they are being treated differently?

Chris Grayling: It will depend on the right of status of an individual who comes to the UK. What we have done is sought to have those people who are serving members of the Armed Forces, who may have been out of the country for a lengthy period of time because of the nature of their work, are one of the exceptions. Everyone else who comes to this country for the first time, even those who are coming from the Crown dependencies, we are treating in exactly equal ways.

The Chairman: And retired Gurkhas?

Chris Grayling: It would depend very much on the circumstances of the individual; it is very difficult to give you an answer unless it is an individual case. Somebody may come here straight from the Armed Forces, may retire while in the UK serving with the Gurkhas, or they may not; it is difficult to give you a generic answer.

Mr Sharma: Do you not feel yourself that with this rule there is a space of discrimination, and there is a chance that different people will be treated differently?

Chris Grayling: The answer is yes; it does treat different people differently. It treats people who are British citizens, or who have come to the United Kingdom and have made the United Kingdom their home—

Mr Sharma: Are you categorically saying that non-British citizens will not be—

Chris Grayling: No, you did not let me finish. What I have said was that for British citizens and people who come to the UK to make this their home, it treats those two groups differently from immediate newcomers. It says that if you are coming to the United Kingdom then you will have to be here for a period of time, and, as I say, in most cases I would hope that involves you making a contribution, working, paying taxes, before you will get money back from our legal aid fund. Otherwise what we are saying to hardworking taxpayers in this country from all groups—those who have arrived here to work and pay taxes, as well as those who are born here and pay taxes—"Part of your tax is going to pay legal aid bills for people who have literally just turned up in the country three weeks ago", and that has certainly happened in the past.

Q32 Baroness Lister of Burtersett: Lord Chancellor, could I just go back to your answer to the previous question, which was very much emphasising the making of contribution to this country? Would you or not accept that there are many ways people make contribution, not simply by paid work or taxes. Is this not a group that perhaps would feel aggrieved because they feel they have made a contribution to this country?

Chris Grayling: Not if they have only been here three weeks.

Baroness Lister of Burtersett: No, but they have made a contribution as members of the military or interpreters?

Chris Grayling: As I say, it is difficult to give you a generic answer, because it will depend on the circumstances of the individual, but my view, and the principle that we have set, is that if you are going to access the legal aid system then you ought to be somebody who has actually been here for a period of time. It is the case that serving in the Armed Forces does not always convey with it a right to come and live in the United Kingdom.

Baroness Lister of Burtersett: It is about contribution. What I am simply arguing is that these are people who feel they have made a contribution to the country, albeit different from the kind of contribution you were talking about in answer to the previous question.

Sitting suspended for a Division in the House.

Q33 Simon Hughes: I will just pursue some residence questions with you, if I may. There are clearly some people who are here, with settled status or not, but who have rights by virtue of being here; there are some rights that come to you because you are within the jurisdiction of the United Kingdom. Do you accept that is the case, and do you accept that some of those may not have personal resources, and therefore will need support to be able to enforce their rights, even if residency is not a qualification that comes with them at that stage?

Chris Grayling: Of course; this is one of the reasons why we did not include asylum seekers in the mix; they get full protection. What we have got is a situation where some groups are entitled to receive support over matters related to their status here, so, for example, somebody who is a victim of trafficking will be able to get support related to that, but would not be able to get support related to something completely unrelated. In the case of asylum seekers, we would provide support in all circumstances.

One of the steps I took private advice from senior figures in the judiciary on was, for example, to make provision for children under the age of one, who are a particular problem; clearly they are not old enough to represent themselves in any way, shape or form. There are a very small number of babies. The argument was made to me that they should be exempt as well, and that is something we have done.

Clearly there are some people whose cases are difficult, but if you look at how they have arrived in the country, those who have entered the country illegally would not be entitled to access legal aid anyway; of course, after a particular point in time, if they have been here 20 years or so, then they will go to the Home Office and will be part of a process within the Home Office. In those circumstances they would be able to demonstrate that they had applied to stay, and the Home Office was considering their case, and they had been here for a length of time. Generally speaking, if people have entered the country illegally I do not want them to access legal aid at all; if people have entered the country as asylum seekers they will get access to legal aid, so I think we have got sensible safeguards in this.

Simon Hughes: Can I take a topical example? Let us imagine somebody found in a house in Brixton wanted to apply for habeas corpus effectively, because they were being held hostage or held prisoner.

Sitting suspended for a Division in the House.

Q34 Simon Hughes: Can you imagine circumstances that are not covered by your exceptions already agreed to, where somebody might not have passed the residence test, may or may not have settled status, but might need to go to the courts for very good human rights reasons without the resources, and, if so, how can they be accommodated given your proposals?

Chris Grayling: You made reference to habeas corpus, Mr Hughes, and one of the things that we have done is to protect habeas-corpus-related cases. The benchmark I have put in as an absolute is that where it is a matter of people's liberty, they should have the right of access to civil legal aid as well as to criminal legal aid, and that is protected in this. Of

course, we cannot do stuff for people in all circumstances, but in relation to habeas corpus and their liberty, we will continue to provide support.

Simon Hughes: In relation to children, can I ask you specifically: the Committee has taken a regular interest in making sure that our obligation under the UN Convention on the Rights of the Child are adhered to. How will people who want to enforce rights under international agreements, whether EU agreements or the Hague Convention, as children, be able to enforce them? They might not qualify under residence tests; there are lots of undocumented children and teenagers here, sadly, as you know, and under the Convention on the Rights of the Child there are certain rights that they may wish to enforce. Will they not at the moment fall through your system and not be eligible to have any help?

Chris Grayling: It is an issue we gave quite a lot of thought to in putting together the package, because we have to worry about the interests of children, many of whom will be refugees with asylum status. We modified the original proposal, provided an exception for some cases related to protection of children, so, for example, children party to family proceedings would not be subject to the residence test. Again, where we have got particularly vulnerable groups we have tried to keep some exceptions in place.

Of course, we have the exceptional funding route as well, if a case arises that is completely unexpected. There is always the improbable; there is always the unexpected; there is always the unconventional, and we have left an exceptional funding route in place. What we have tried to do effectively is say that there are a small number of categories of people who are extremely vulnerable, in very difficult circumstances—human trafficking being one example—where we need to continue to provide support. As a general rule, where people just simply arrive in this country and seek to stay in this country, for the first few months they have got to look after their own interests. That is not really any different to the way that we

approach other aspects of state support in saying that you have got to have your own means when you come here if you are going to stay here.

Simon Hughes: Except if you are a teenager with no resources.

Chris Grayling: That is why, in the case of children and the protection of children, we have left exceptions in place.

Q35 Simon Hughes: Can I ask one last question, which is to do with proving that you have been here lawfully? Firstly, nationals of other European Economic Area states, who do not need a visa, can be here, but they may not have any documents to prove they came on a particular day. They may find it difficult sometimes to show they have passed the test; I have had a constituent who has been here for years and years and years, came from the Caribbean, and could not find any papers to show that he had indefinite leave to remain granted, so proving he was here lawfully, as well as for the length of time, for him would be very difficult, especially at short notice, if you needed that for urgent court proceedings. How do they get helped and protected?

Chris Grayling: That is a very different issue; somebody who cannot prove they have a right to be in the country should be in conversation with the Home Office, because this is not an issue that is just going to affect them in relation to legal aid; it will affect them in a whole variety of other areas. For people who are established in the country, who have been working, who have been living somewhere, who have been paying rent, who have been paying bills, it ought to be relatively straightforward to prove that you have been in the country for—

Simon Hughes: It seriously is not always.

Chris Grayling: If people who have been here a long time have lost their paperwork and cannot prove they have a right to be in the country that is a broader issue; that is a matter for discussion with the Home Office. What I cannot do is put in place exceptions for people

who cannot prove they have the right to be in the country. I think you have a duty on yourself; if you are not a British national, if you are not a British passport holder, but you are living in Britain and you cannot prove you have the right to be here, but you do, then that is a different question, and you have a responsibility to yourself to make sure you can prove that you have got a right to be here, because this is not the only area where you are going to run into problems.

Simon Hughes: A Swiss citizen who might be married to a Brit, but has been here for a year, but has no paperwork in her own right, for example?

Chris Grayling: A Swiss citizen who has been in the UK for a year will have a record of travel and will have a record of economic activity of some sort. If people are going to ask the British state for support they have to demonstrate some degree of entitlement. I am simply not of the view that somebody from Switzerland should be able to walk into the country and access support immediately. There is a duty on your own shoulders to be able to demonstrate—

Simon Hughes: Sorry; I was not arguing they should have immediate rights, but proving their residence might be more difficult.

Chris Grayling: That is true, but if I was living as a foreign national in another country, and I was aware that some of my entitlements to access local support depended on me being able to prove my residence, then I would make sure I could. There is a duty on the individuals to look after themselves to make sure that when they come to the state asking for support they can prove they are entitled to it.

Q36 Baroness Kennedy of The Shaws: Lord Chancellor, you mentioned the exemption that has been made for the victims of trafficking, but it is a very narrow exemption, and there are real gaps, particularly in the civil legal aid area. They cannot access legal aid for judicial review and they cannot, for example, get legal aid for community care issues, so

young people are not going to be able to challenge issues around services by local authorities, or when age is disputed, which is a very common thing for young adolescents, as to whether they are a child or an adult, and there is no legal aid for that.

Chris Grayling: We are providing them with legal aid in relation to advice around their status in the country and advice around damages claims in relation to trafficking or exploitation. Of course, there are extensive support services available in this country and we are, as a nation, putting a lot of effort into helping victims of trafficking. That does not mean that we would provide victims of trafficking with access to legal aid for all other forms of legal action they could be involved in.

Baroness Kennedy of The Shaws: Why not make a general exemption, rather than the one that you have chosen to make?

Chris Grayling: Of course, if somebody ends up in this country and does not want to return to their home country for reasons of the nature of the country they have come from, they are freely able the apply for asylum and to make the case for asylum, in which case they are exempt from this. If it is somebody who has been trafficked from a country that it is okay for them to return to, frankly in a lot of cases what I would want us to be doing is providing them with the support to get back to their families.

Baroness Kennedy of The Shaws: Yes, but so often there are real problems about going back to their families, because of the threats from the traffickers.

Chris Grayling: That might indeed end up being grounds for refugee status.

Baroness Kennedy of The Shaws: I just wonder how you have squared this with your obligations under the European Convention on Trafficking. Article 12 requires that there is legal aid available in order to assist people.

Chris Grayling: There is.

Baroness Kennedy of The Shaws: Do you think there is compliance?

Chris Grayling: Yes, I do. We are providing legal aid for matters related to the trafficking, but what we are not doing is saying that somebody who is trafficked will get unfettered access to all areas in which legal aid can be provided to a British citizen. That seems to me to be a sensible balance.

Q37 Baroness Berridge: Lord Chancellor, I am sure you are aware that under Article 16 of the Convention relating to the status of refugees, we are obliged as a state to afford refugees the same treatment as nationals in matters relating to access to justice, including legal representation. Could you outline how the residence test complies with that international obligation, and in particular there are a small number—I think about 700—of refugees who come to this country under the Gateway Protection Programme. They now have to be resident here for 12 months in order to pass the residence test. Why is there not an exemption for them and how is that compliant with the international obligation?

Chris Grayling: We have taken the view in putting our planning together for this that we would exempt asylum seekers in all respects from the residence test.

Baroness Berridge: They are not asylum seekers; they are a very small group of people. It is quite confusing actually. They come through the UN process, so they are granted refugee status by the UN. We take this small number each year, so they do not engage with the asylum application process; they are already given that status. They come to the UK, and they are now going to have to wait 12 months to access anything, for instance, related to housing or anything like that. Could there not also be a small exemption for this group of people who already have refugee status bearing in mind our international obligation?

Chris Grayling: Okay. I will take a look at that. I am not aware of anybody in our plans that has refugee status who would not be exempted from the residence test, so I will check on that one.

Q38 Baroness Berridge: Thank you; that would be great. The second part—and I split the question, because they are different—is that legal aid will be available for preparing and submitting a fresh claim for asylum. Will this exemption to the residence test extend to all other areas of civil legal aid during the application process?

Chris Grayling: Asylum seekers will get general access in the same way that other British citizens do. Whereas there are limitations, as Baroness Kennedy rightly highlighted in the case of perhaps a victim of human trafficking who was provided with support related to their immigration status, for somebody who is covered by the international agreements on asylum seekers, they would be provided with the same access to civil legal aid as a British citizen would do, or somebody who was resident here would do.

Baroness Lister of Burtersett: Lord Chancellor, you will be aware in the last two years the High Court has found breaches of Article 3 in four cases involving the mistreatment of immigration detainees. Could you explain why you have chosen not to extend the detention exemption to claims of damages resulting from abuse?

Chris Grayling: As I said earlier, there are limits to how much support you can provide to people in all circumstances. We have got, within the detention system, pretty robust complaints procedures. Within our prison system, we are responsible within NOMS for detaining quite a lot of the people in immigration detention, some under the control of the Home Office.

The complaints procedure that we have in place has been audited by NOMS two years ago; recommendations for improvements were made. I have sought to draw what I think is a sensible dividing line, so that if it is a matter for the courts to decide or for a court decision about the length of time you are detained, then it is right and proper that we should provide support, but not in other cases, and that is the decision we have taken.

Baroness Lister of Burtersett: Where the state itself has been responsible for this abuse, does it not then have a responsibility to help?

Chris Grayling: We have. If you look at what we have, within our prison system at the moment we have internal complaints procedures; we have independent monitoring boards; we have an independent prison complaints procedure; and we have the ombudsman outside. In the end, we have got extensive mechanisms for people in detention in this country to raise concerns. Do we have to add a legal dimension to that too? My view is we do not.

Baroness Lister of Burtersett: The question of compensation, and the fact is that people have to go to the court, and the very fact that there have been these judgments shows that all these other procedures presumably have not worked.

Chris Grayling: Take prison legal aid: prison legal aid in quantity has risen from £1 million to about £24 million over the last two decades. We are, as a result of these changes, probably going to reduce it from £24 million to £20 million, so we already have a system that is much more generous in all respects than it was 20 years ago, and we will continue to have that. The question is just how far, in times of straitened resource, are we willing to go? If you look at the measures being considered by this Committee together, we are saving between £5 million and £10 million that would have to be saved in other areas, as well as taking steps that I think provide a degree of reassurance that we have a system where the balance is right. My own view is that, where it is related to a matter of liberty then it is right and proper that we should provide legal aid support, but otherwise we have extensive complaints procedures where things have gone wrong.

I would say, of course, it is perfectly open to the legal profession—and I am sure it will be the case—to take on cases on a no win, no fee basis.

Q39 Lord Lester of Herne Hill: I do not know whether what I am about to say will persuade you to think again about this. I assume that you share the wish to reduce unnecessary litigation in Strasbourg.

Chris Grayling: Yes.

Lord Lester of Herne Hill: I assume that you would like our own system to secure effective domestic remedies,

Chris Grayling: Yes.

Lord Lester of Herne Hill: So we do not have to go to Strasbourg unnecessarily. If you take the case of S, S was found to be the victim of inhuman and degrading treatment, so serious was the case. Under your policy, as I understand it, because it is not about liberty, there is no access to legal aid. That means that S will have an unanswerable case in Strasbourg, because there will be no effective legal remedy to obtain compensation. Surely that is not sensible?

Chris Grayling: I cannot comment on the individual case, because I do not know enough about the circumstances of it—

Lord Lester of Herne Hill: No, I am not asking about the individual case.

Baroness Kennedy of The Shaws: It is just an example.

Chris Grayling: What I would say is if somebody is dissatisfied with the way they are being treated in our prisons, then we have a Prisons Ombudsman whose job it is to highlight, recommend, criticise and arrest. That is what we have got the Prisons Ombudsman there for.

Lord Lester of Herne Hill: Here is somebody, hypothetically, who is the victim of gross abuse at the hands of the state while in detention. That person is found by a British court to have suffered something really horrible—ill treatment amounting to inhuman or degrading treatment—that person is entitled to claim damages, but not able to get legal aid to do so in

our system. That person goes to Strasbourg and says, "Clear breach of Article 13". We then get yet another judgment in Strasbourg that we could have avoided if our own system allowed this sensible change, whereby you could apply for legal aid. Would you mind thinking more about that?

Chris Grayling: The point is that my view is that if it is a matter of internal treatment within our prison system, that is what we have a Prisons Ombudsman for, and it is right and proper that NOMS, in response to a damning report by the Prison Ombudsman saying that we were maltreating a prisoner, would take appropriate action to discipline, to reform, and the rest, and that of course should happen. I have little doubt in a case like that, that if there was a gross and blatant example of abuse, there would be no shortage of lawyers willing to take the case on a no win, no fee basis.

There are exceptional cases like that; they are not the norm. I have to say that my view is that the standards of professionalism in our prisons are pretty high. We have a team of pretty dedicated, hardworking people who do their best for the country in what can be sometimes very difficult and trying circumstances, and I do not want a situation where complaints about the actions of people within our prisons, the routine actions in our prisons, where the conditions in our prisons, or where the choice of which prison someone is detained in, is readily a matter for the courts funded by legal aid.

The Chairman: Could I make a ruling? From now on when there is a supplementary it will be one supplementary and you have to have my agreement to have that supplementary, including the chosen questioner.

Q40 Baroness O'Loan: Lord Chancellor, the Official Solicitor told us of his considerable concerns about the impact of the proposals on people with impaired mental capacity. The essence of his concern was that without a solicitor they would lack the capacity to conduct the proceedings, but if there is no legal aid there is no solicitor. Could I ask you, if those

persons are much less capable of providing the necessary evidence to satisfy the residence test, and are not entitled to conduct their own litigation, how are their needs to be cared for? Why are they not exempt from the residence test?

Chris Grayling: Are you talking about the residence test here or are you talking about prison law detention?

Baroness O'Loan: I am talking about individuals who lack sufficient mental capacity.

Chris Grayling: You have got two categories of people here; are you talking about somebody who turns up in the country who is mentally ill at the start?

Baroness O'Loan: Maybe.

Chris Grayling: Or who has got learning disabilities at the start?

Baroness O'Loan: Mental illness is not the same thing as lacking mental capacity, though, is it?

Chris Grayling: It can mean a variety of things: we may be talking about people with learning disabilities; we may be talking about people with mental illness, so there are a variety of different circumstances in which that is the case. I would like you to consider that what you are saying is that somebody who arrives in the country, who has a learning disability, would immediately be able to access our public services. Is that really what you are saying?

Baroness O'Loan: No, I am just asking you the question about impaired mental capacity.

Chris Grayling: I am afraid that the reality is that, at a time of straitened finances, we cannot simply offer public services to anybody who arrives in the country and requires them immediately. We need people to have been here for a period of time, to have made a contribution in whatever form that is—ideally to be doing a job and paying taxes. I do not think we are in a position of simply being able to say, if you arrive in the country, you have a learning disability, you do not have refugee status, you are not somebody who is covered by one of the special exemptions, but none the less you will be able to access legal aid support.

Q41 Lord Faulks: Lord Chancellor, I wanted to ask you about exceptional funding, Section 10 of LASPO. During the passage of the Bill, certainly through the House of Lords, the Minister frequently answered questions where there were apparent difficulties in funding by saying, "There is the exceptional funding provision, which may provide the answer", and I notice that you came up with a similar answer to Baroness Lister in respect of children. By September 2013 only 15 applications for exceptional funding had been granted, and there was a lot of criticism about the difficulty in obtaining exceptional funding. Are you satisfied that this has really delivered in the way that it was suggested that it would in providing funding in cases that should be provided funding?

Chris Grayling: What exceptional funding was not intended to do was to simply replicate all the existing funding streams; it is, by definition, meant to be exceptional. The truth is I am not surprised that the numbers are relatively low; equally I am not surprised that there are still a lot of people who are applying for funding in the hope that they will get it. Of course, this is decided independently by the Legal Aid Agency and the Director of Legal Aid Casework, to a set of guidance that we provide. It is something that we will have to look at carefully; it is all very new in terms of the process and the data that is available. We will certainly take a look at it as time goes by and make sure there is nothing untoward happening, but I am not surprised that the number of cases granted funding are exceptional, because that is what it was intended to be, really.

Lord Faulks: You said that the Legal Aid Agency decides these things on the basis of guidance that you provide. Do you not think there is the potential for a conflict of interest in the sense that, supposing there is a refusal of legal aid on the basis that this does not come within the exceptional funding guidelines, there is always the possibility of judicial review of that decision, but that itself has to receive exceptional funding, and the guidelines presumably will determine that this is not an appropriate case for exceptional funding?

Chris Grayling: The real danger in all of this, and the thing I would challenge in some of the questions underpinning it, is there is always a default sense that only the court can sort these things out, and that is where I have a difference. Baroness Kennedy asked me the question about access to justice and the rule of law, and I guess the point of difference between us is I genuinely think that the courts should not be involved in all circumstances, and that, leaving aside the issue of the limitations on funding availability, there are certain circumstances in which it is better if other mechanisms are used to resolve disputes.

I am personally of the view, having taken the decision that we need to exclude some areas from legal aid, which is the decision taken by my predecessor and enacted by these Houses in the LASPO Act, that where we have excluded people we have left in place the opportunity for the unexpected to get funding, because there is always the unexpected case—the one that nobody has thought of, the one that you think, "That should have had funding". With regard to Lord Lester's question, that route will always exist if there is something that really is the unexpected, but I do honestly expect these cases to be exceptional rather than the routine, so I am not at all surprised that a relatively small number have got access to legal aid.

Baroness Kennedy of The Shaws: I am tempted to explain to you that I do not think there is anything wrong with having interim things, like ombudsmen, and so on, but at the end the rule of law means ultimately access to the courts. I think that you are seeking to supplement something instead of ultimate access to the courts, but I am not going to take us down that road, because we are running out of time and I think we would just disagree.

Chris Grayling: We will have a long debate about it if we do.

Q42 Baroness Kennedy of The Shaws: I am going to put another fly in your ointment, which is that I just want to suggest to you that actually the residence test is not within your statutory powers under LASPO, under the last legal aid Act, where you were given statutory

powers. I would suggest to you that their purpose was so that you could, if the circumstances were necessary, add categories of work that might be covered by legal aid, that it gave you an enhancing power, whereas you are using it as a reducing power, and that that was not what was intended in giving you those statutory powers. Do you see the point that I am making?

Chris Grayling: I do. I do not agree with it. I have taken advice from First Treasury Counsel who tells me I am fully within my powers to do it.

Baroness Kennedy of The Shaws: Can you show me where in LASPO it says that you have the power to introduce a residence test?

Chris Grayling: I have not got LASPO in front of me, but I have the legal advice from First Treasury Counsel that LASPO permits me to do that.

Baroness Kennedy of The Shaws: One of the things is that here we have an instrument that is not going to be laid before Parliament, is it?

Chris Grayling: It will come in the form of secondary legislation, and both Houses will therefore have a right to vote on it.

Baroness Kennedy of The Shaws: Yes, but that is one of the concerns: that when we had the full debate about the powers that you would have under LASPO, the idea of a residence test was never part of that full debate about the powers that would be contained within that legislation.

Chris Grayling: I cannot speak for the debate that happened at the time. All I can tell you is that the guidance of First Treasury Counsel is very clear that the LASPO Act gives me the power to do this, so whether or not it was debated at the time I cannot control, but I can assure you that the legal advice I have is very clear that this is absolutely within the powers set out in LASPO.

Baroness Kennedy of The Shaws: For the purposes of those who are watching this from their living rooms, there is a difference between a Bill going through Parliament and something being done as a secondary legislation.

Chris Grayling: What we have is a situation that an Act of Parliament, passed by both Houses of Parliament, creates a power that enables me to introduce a residence test.

Baroness Kennedy of The Shaws: I suggest that it did not.

Chris Grayling: That residence test now has to be laid before both Houses of Parliament in the form of secondary legislation and both Houses of Parliament have the right to vote against it if they choose to do so.

Baroness Kennedy of The Shaws: And given very limited time in which to discuss the matter.

Chris Grayling: It is the normal timetable of secondary legislation. There is nothing untoward on that; it is the principles that underpin the way that both Houses of Parliament work.

Lord Lester of Herne Hill: I wonder whether you have looked at the Parliamentary record to see what assurances Ministers gave in order to get this provision through, because if they gave an assurance that they are going back on, that would obviously raise a serious public law problem.

Chris Grayling: I am not aware of any commitments made that would have excluded the introduction of a residence test at the time of that debate.

Q43 Mr Buckland: Lord Chancellor, I want to come back to prison law legal aid, which you have already discussed in brief, and to first of all look at the rationale of the proposals you have set out. In previous evidence to the Justice Select Committee, you said that as a matter of principle you do not think that it is right that prisoners in jail should be able to use legal aid to debate which prison they are in, but there is also a cost implication. Which

would you say is the driving motive for these changes: is it cost, or is it a principle issue relating to prisoners and their rights?

Chris Grayling: The honest truth is that it is both, but I suppose I started from the point of principle: that I think it is important, at a time when we are taking some very difficult financial decisions, to have a legal aid system that people look at and say, "That is fair, and I can have confidence in it". I struggle personally to believe that it is sensible to have a system where we have prisoners able to access the courts, and access public funds, to argue that they should be detained in a different prison.

We will not have the debate this afternoon, but where Baroness Kennedy and I disagree is I think it is necessary to have non-judicial complaints procedures that have a final say, and that is what I believe should happen in our prison system. Prisoners should have the right to complain about the conditions they are kept in, but there should be an independent element to assess those complaints; that is absolutely what will continue to happen in the future.

There are limitations to how much you can use the courts as a backstop, with all the costs that carries with it. It is very noticeable that this is not a long-standing problem; the amount of prison legal aid has risen 20-fold in a relatively short number of years, and there is no doubt that there are members of the legal profession out there who make quite a good living from doing prison law work, and will no doubt continue to do so, but that does not mean that there should be no limits on the scope of that work.

Mr Buckland: Can I deal with the question of transfer first of all? I want to put this case scenario to you: a prisoner, who is in need of a particular rehabilitation course that is not available in Prison A, wishes to go to Prison B, where that course is available. Do you think there is a danger that we may be crossing over to affecting rehabilitation if we exclude all transfer cases from legal aid?

Chris Grayling: I do not think so, because my view is that having an effective Prison and Probations Ombudsman does that job equally well. My issue is that it is not always necessary to take these things to the courts. In many ways we are too apt to look upon the courts as the only solution. I think a sensible, independent, experienced ombudsman is perfectly capable of forming a view over whether a prisoner is being appropriately treated or not.

Q44 Mr Buckland: I was going to ask you later about the Ombudsman, but it may well be easier if I ask now, Chairman, to avoid duplication. I hear what you say about the Ombudsman, Lord Chancellor, and you are right to make that point, but there are two problems with the Ombudsman: it is their lack of statutory basis, and their lack of ability to order redress. Do you think that there therefore is a case for putting the Prison Ombudsman on a proper statutory footing with enhanced powers, so that they can provide that alternative means of dispute resolution that you raise?

Chris Grayling: We do intend to put the Prisoner and Probation Ombudsman on to a statutory footing when legislative time permits. The challenge, as always, particularly at the tail end of a Parliament, is finding the time to put everything in. It is something that is very much on our agenda and we will do it as soon as we can.

Mr Buckland: You have the full support of this Committee, I think I can say safely. Can I ask then finally about treatment issues? Of course you are aware that back in July 2010 the criteria on treatment cases were really tightened up, and the Legal Aid Agency now can only grant legal aid in exceptional circumstances. Putting it bluntly, is there a problem there, bearing in mind the fact that three years ago we tightened up the criteria?

Chris Grayling: This is, as I say, partly a point of principle. The biggest change here will clearly be around where someone is imprisoned, and my view is that can be dealt with through the complaints procedures that are there. Of course, it does also save £4 million a

year. At a time when we are taking some very difficult decisions around other areas of legal aid, that £4 million would have to be clawed back somewhere else. We are being forced by circumstance to look across the range of public sector activities for savings that add up to the challenge we have got to meet.

The Chairman: I have to say, Lord Chancellor, every question you answer seems to come back round to the cost of it. Would you reflect on that? Perhaps when the next question comes you will not come back to the cost of it all the time.

Chris Grayling: Can I just respond to that, Mr Francis? Baroness Kennedy asked the question about the twin hats of Lord Chancellor and Secretary of State for Justice. It is not possible to be in Government today in any guise without being focused on the financial challenges that we face. We have £100 billion deficit and we simply do not have the ability to spend all the money we would like on everything we would like to spend it on. Part of the task of any Secretary of State, and any Lord Chancellor in my situation, would be to try to find the best balance between a lot of competing priorities in a way of finding a system that is as just as I possibly can deliver within the resources that are available to me. It may be a more challenging time for that, but I do not think that is particularly unusual.

Lord Faulks: Lord Chancellor, I entirely understand what you say about the vast increase in legal aid spending on prison law. When you were giving evidence before the Justice Committee, when asked about this you said your approach was, in part, ideological. I wonder if you could explain to the Committee what you mean by that?

Chris Grayling: It is very much what Mr Buckland asked me; it is the point of principle. I personally do not believe that we should be spending legal aid resource on providing the ability for prisoners to argue in court that they are entitled to be in a different prison. I think, if they have a concern about where they are being kept or about whether they are being transferred in time, there are internal complaints procedures and the external

reference point of the Ombudsman. I personally think this is an area where the courts should not come into play. I personally do not believe the courts are the answer to all issues in our society, and I think there are some areas where we just have to say that this is better dealt with in a different way.

Q45 Baroness Kennedy of The Shaws: I want to pull out of that this question: wearing these two hats, does one of those roles trump the other?

Chris Grayling: I do not think they have to conflict or do conflict. The role of the Lord Chancellor is to ensure that we protect the independence and the integrity of our judicial system, that we maintain a proper court system in this country, and that we make sure that people have access to justice. What I have said is that I do not believe those principles mean that automatically the role of the Lord Chancellor is to support the principle of everyone in all circumstances always having access to the courts, because I do not think that is right.

Baroness Kennedy of The Shaws: In the end, the idea in the Cabinet of having a Lord Chancellor, and somebody who then dealt with law and order, or dealt with the business of prisons, was that law in our system should have a value of its own that was somehow of greater importance than doing sums. What I am saying to you is: do you see yourself, when you are being Lord Chancellor, as that trumping your ideological position with regard to saving money?

Chris Grayling: The ideological position is not in regard to saving money; it is about what is right and proper. The other thing the Lord Chancellor has to make sure, I believe, is that we have a justice in which our whole society has confidence; that is very important as well. The basic principle underlying this and some of these changes is that I do not believe that the courts can and should be the answer in all circumstances.

Baroness Kennedy of The Shaws: You are suggesting that the lawyers who do prison work are somehow living the life of Riley on legal aid, and I want to know whether there is evidence of abuses of legal aid by such lawyers.

Chris Grayling: What I have said is that there are many law firms which have got a successful business based around doing prison law; they will undoubtedly carry on having a successful business based around prison law, because our forecasts are that the amount of money that we spend will fall from about £24 million a year to about £20 million a year. This is not eliminating this whole area of prison law legal aid spend, but I am simply making the point it has increased something like 24-fold over the course of a relatively short period of our history, which also suggests to me that perhaps things have gone a bit too far.

Baroness Kennedy of The Shaws: I want to ask you about judicial review. You have on other occasions said that access to the court will still be available, by virtue of judicial review. There is a limit on the number of cases a firm with a public law contract is going to be able to start; it is limited to 15. Are you intending doing anything about that limitation on numbers?

Chris Grayling: I think we have got a sensible balance. What I do not want is a situation where every case where legal aid is not available is ending up as a judicial review. It is about a sense of proportion. If you start with the premise that I believe in: that in almost every case prison law issues—not issues in relating to sentence length, where we have not changed the situation in terms of access to legal aid—should be dealt with by an internal complaints procedure and an Ombudsman. In a very small number of cases where something very untoward happens, of course, JR remains an option, but I am not saying that I want suddenly to replace all the prison law cases with judicial review cases.

The Chairman: We really do need to make progress now, and I am not going to take any more supplementary questions, other than those who are asking questions.

Q46 Baroness Lister of Burtersett: Lord Chancellor, the Committee have received evidence that the proposals to deny legal aid to mothers who are challenging a decision not to grant them a place in a mother and baby unit could breach the human rights of women and children under Articles 6 and 8. Such decisions can involve information from outside agencies which cannot, in this case, be challenged through the internal prison complaints system that you have been talking about, or can require urgent action. Do you agree that the removal of legal aid from these cases could lead to breaches of the rights of mothers and children?

Chris Grayling: I do not think so. We have looked at this one quite carefully, and the process will be that initially the decision to admit a mother and child to a mother and baby unit is taken by the governor; it is taken on the advice of an independent admission board, chaired by an independent chair. The independent chair has to be a certified social worker. The board's job is to take into account the best interests of the child, and what is best: is it best for the child to be with the mother in prison or is it not. There is also the issue of the health and safety of other mothers and children within the unit. If a mother is refused a place she can go through the independent prisons complaint systems. She can also, in extremis, access civil legal aid for judicial review, if there is a real issue around the case. I think there are plenty of safeguards there.

Baroness Lister of Burtersett: Just on the judicial review point, this is something that has to be decided very quickly, and judicial review is not really appropriate there, is it? It is going to be too late; it will be after the event.

Chris Grayling: Again, I am not really convinced that this should be a legal matter. What we are doing is taking a decision in the interests of a child. It is being taken by an independent board, chaired by a social worker, done thoughtfully and carefully considering what the best interests of the child is. If the decision is that the child cannot join the mother, it may well

be the mother is very unhappy about that, and she has the right to go through the complaints procedure, she has the right, in extremis, to go for judicial review, but the professionals involved are trying to take the right decision in the interests of a child, whose interests must be foremost, surely.

Baroness Lister of Burtersett: Legal aid currently funds resettlement work for children, ensuring that accommodation and a support package is in place before and after their release. We have a couple of questions in relation to this, and I will ask them separately for ease of replying. Again, resettlement issues often involve outside agencies, whose decisions cannot be questioned through the internal prison complaints system. Why have the proposals made no adjustments for young offenders?

Chris Grayling: In relation to young offenders, they of course have got an extra element in the system of the right of advocacy, but we are looking to put in place, I hope and believe, much more comprehensive motions to provide for the resettlement support of prisoners, initially adults, but also the youth offending teams have got quite careful work taking place with young offenders when they leave prison. I think we have got, and are looking to step up and improve, the quality of support provided to people after detention. I do not think the question of resettlement should be a legal matter; it is about providing smart and wise support, mentoring, and guidance to people when they leave prison to get them stabilised and settled and sorted out.

Baroness Lister of Burtersett: The second question is that there is an advocacy service currently provided by Barnardo's, as you will know, but an advocacy service cannot give legal advice and cannot enforce rights against the local authority if necessary. How will young people's access to the services they are entitled to be enforced?

Chris Grayling: As you rightly say, with advocacy for youth offenders, that is an extra dimension for the complaints procedure I discussed earlier. Again, you have got within the

system quite a comprehensive range of support available for youth offenders: the advocacy service, the conventional complaints procedures, and of course there are complaints procedures with local authorities when they are no longer in prison.

My experience is that local authority professionals work pretty hard to try and make sure that people are sorted out when they leave. The youth offending teams—I have visited many youth offending teams—make a real effort to try to sort out people when they leave prison. I worry that the courts are always the backstop for this.

Q47 Mr Buckland: Thank you, Lord Chancellor. I listened carefully to what you said about prison complaints procedures. I do not know whether you were aware about the evidence of Nick Hardwick, Her Majesty's Inspector of Prisons, who gave evidence to us about a particular case, where a woman who lacked mental capacity was kept in frankly inhuman and degrading conditions for many years, and was not able to make a complaint. What about the rights of those sorts of prisoners? How do you see the complaints system being really able to deal with people without capacity and with a disability? Are you confident the system is going to be able to do that?

Chris Grayling: I think so. It is a very valid point: what do you do when people are not able to articulate for themselves? Of course, that issue applies just as much in relation to the internal complaints procedure as it would to briefing a solicitor, for example. My view is that, if somebody is in that situation I would want the independent monitoring boards, the internal complaints procedures, and the Ombudsman, where necessary, to make some pretty strong recommendations about change. Of course, there is money available, and scope available, for judicial review in an extreme case, but, of course, the real challenge to somebody in that position is how they articulate a complaint in the first place to anyone.

One of the untapped frontiers of change in our prison system is around how we deal with people with mental health problems. At the moment we are going through a huge amount

of change as a department, with the rehabilitation reforms as well as meeting the financial challenges elsewhere. If you were to ask me where I personally think, if I were there to pursue it, I would want to take the department next, it is into the whole area of mental health and the criminal justice system, particularly mental health in our prisons, where I think there is an as yet significantly unaddressed challenge.

Mr Buckland: Nip the problems in the bud before we get to these sorts of circumstances.

Chris Grayling: Yes.

Mr Buckland: Can I ask you a final question relating to the next item about exceptional funding. Exceptional funding is available for civil legal aid; however, prison law is a criminal legal aid criterion, and there is no exceptional funding. Do you think there should be, just to allow some discretion in the system for those cases that genuinely would fall into such a category?

Chris Grayling: One of the things that we have done is to broaden the availability of legal aid—it has not all been one-way traffic—for Parole Board cases where liberty and release are at stake. There is a big difference, from the point of prison law, between making sure that everyone has the right of access to a lawyer, to determine when and how they are released, which I think is extremely important, and those who are simply debating whether they are going to get a transfer from a Category B to a Category C prison. We have slightly extended the provisions around Parole Board hearings, so there is no question that people, who are going through what is a latter part of a criminal procedure to say, "Are you now fit to be released back into society?" are properly represented to go through that process.

Mr Buckland: Governors have a discretion under the so-called Tarrant test, but it is very seldom used. Would your message to Governors be, "Do not be frightened to apply those criteria where you think there is a genuine need for representation in exceptional circumstances?

Chris Grayling: When it is a matter of someone's release, yes. What I do not want to do is to use that as a vehicle to get back into the areas we are trying to change, but I am very clear that when it is a matter of somebody's liberty, that is a very different question. I would not wish to change the legal aid system when it applies to somebody's liberty.

Lord Lester of Herne Hill: Lord Chancellor, looking at your evidence as a whole, you have set up an Aunt Sally: what you call your ideology is no more than the case law in Strasbourg; it is completely clear under the Strasbourg case law that prisoners do not have a basic right of access to courts in all cases. It is perfectly plain in Strasbourg that questions of the transfer of prisoners, or the treatment of prisoners, other than after three terms, are matters for Ombudsmen and for other non-judicial remedies. You make it sound as though you have an ideological position that is somehow different from all that. Look at a case like *Boyle and Rice* afterwards, and you will see exactly what I mean.

Chris Grayling: What I would say, Lord Lester, is that that is not the way we have been doing in this country. I am delighted to discover my ideology is in line with Strasbourg case law, but it does not always happen.

Lord Lester of Herne Hill: It is the way we do it in this country; it is exactly the way, because in those cases that have gone to Strasbourg, prisoners have always lost on those kinds of issues. I know you do not like Strasbourg, but I am simply explaining that there is no ideological point about this at all, it is just common sense.

Chris Grayling: In that case, I would be delighted; I hope the Committee will endorse the reforms that simply bring our system back into line with Strasbourg case law.

Lord Lester of Herne Hill: I am talking only about things like transfers.

Q48 Simon Hughes: Just another linked prisoner question. I know, again, from constituency experience that if you are in Category A, then by definition you are not going to be eligible for parole in certain circumstances, so your categorisation affects your liberty.

It seems to me, therefore, that where you end up in category terms may have an Article 5 implication, and I am somebody who comes to this saying that you should not have paid for lawyers in prisons unless you need them. Is there first not a case that those sorts of cases may merit legal aid and advice, and secondly, may it not be cheaper to the taxpayer to have a lawyer paid for to get somebody out of Category A down to Category B, which would save half the cost of the two categories—£64,000 and £32,000, or something? Therefore, the public purse will be saved as well as somebody's rights guaranteed.

Chris Grayling: I am well aware of the issue, and we did think quite carefully about this. We also ought to offer some discretion within the system to the professionals who are taking decisions about these matters, but I do think that categorisation was a matter that should go through the internal complaints procedure and to the Ombudsman. If somebody has got a legitimate case we have got a pretty good complaints procedure; it has been audited, and recommended changes to it have been made. I have no reason to believe that somebody with a genuinely legitimate case for transfer would not get a sensible response from the complaints system, and if they do not you have got the backstop of the Ombudsman. My issue is: why does it always have to go to court?

Simon Hughes: My last questions would be about cases sometimes taking much longer if you do not have a lawyer. Has somebody done an assessment of how many cases the Parole Board would get through with lay representation?

Chris Grayling: The Parole Board will not have lay representation of a matter in relation to detention and release; in fact, we are expanding the number of Parole Board cases where a lawyer can be represented—it is not a massive amount—so there will be better access to a lawyer in Parole Board meetings related to liberty.

Baroness Berridge: The Parole Board rules of 2011 provide that in certain circumstances, disclosure to the legal representative of sensitive material that prisoners themselves cannot

have, and, in addition, when victims attend those hearings to give impact statements prisoners normally withdraw, and that information is provided just to the lawyer in these cases. In those cases, do you not see there is a disadvantage of not having a legal representative? How are those cases going to work if there is not legal representation?

Chris Grayling: There would be; when it is a matter of deciding whether a prisoner is going to be released or not, and you are taking into account sensitive information from a victim, we are not changing the system; there would be a lawyer present.

Baroness Berridge: The rules are quite complex, but as I understand them, there can be certain hearings where it is not about liberty, but maybe recategorisation, where you have got information that has maybe been provided by other prisoners in the Category A block, that obviously you are going to disclose to the lawyer, not to the prisoner. If you have not got a lawyer there, is there not perhaps a case for another small group of cases where legal representation is going to be required for the hearing to be conducted?

Chris Grayling: First, I think the number of cases that would arise would be very small, but I will let the Committee know if that is different. If it is a matter of categorisation, take into account information secured within the prison, so a prisoner's status, how well behaved they are, what kind of threat they represent, and so forth; it is and should be an operational matter. If we started to get into legal representation about decisions we are taking about categorisation, people challenging their categorisation, problem people being put back from a Category C to a Category B prisoner—if all of those led to full legal cases with the arguments being made by lawyers, we would be in a very difficult place.

Baroness Berridge: If I may, I still do not understand how those hearings would work; maybe you could write to us with details. I know they are a small number, but you are trying keep the intelligence that you need to make proper decisions coming through, so you have got to guarantee that confidentiality, but without the lawyer to hear it there. Perhaps

you could write to us. I still have failed to understand how those particular hearings will work in practice.

Chris Grayling: Okay. Normally a recategorisation decision is not taken by a Parole Board hearing; it is an internal operational decision: somebody has been moved from a Category B prison to a Category C prison, has misbehaved, has been brought back into a Category B prison or has lost their right to be in open conditions. Normally those are operational decisions taken with NOMS.

Q49 Baroness Kennedy of The Shaws: I want to ask you about borderline case, because there is a lot of concern about where you are drawing the lines, and that you are driving down possibilities of people bringing cases, which are deemed to be borderline. It is often borderline cases where key points of law that need testing in the higher courts are particularly important. It is about resolving issues that, in many ways, stop there being more cases in the lower courts—in the county courts, for example. The real fear is that your proposals are putting at risk and damaging the development of the common law. That is one of the things we pride ourselves in; we are looked to by other common law nations around the world, that here we are, we develop law, and it is then a source of sustenance to other places. What you are going to create is that the people who will be taking borderline cases will be the state, so you are going to create a system that will be institutionally pro-Executive, pro-Government, and the ordinary folk are not going to get legal aid, and the law will not develop in ways that are important to the people of this country.

Chris Grayling: I do not think that argument is right. It is interesting; I think that the decision on borderline cases is another example where it is absolutely in line with Strasbourg case law.

Baroness Kennedy of The Shaws: Lucky you; happy days.

Chris Grayling: Two examples in the same afternoon does not usually happen, but this is another case where we have looked very carefully at what the legal position is, we have looked to Strasbourg case law, and we have formed a view this is a sensible measure. It is a balance: you are absolutely right that there are interesting cases debated in law, but we have only so much money. The most important thing, from my point of view, is to ensure that the legal aid system provides for access to justice where it is necessary to do so, and that I use the resources we have available, which are still per capita far more than any other common law system in the world.

If you look at New Zealand, which is an interesting comparator with us, where you have a very similar legal system, our cost per capita is twice what it is in New Zealand. I think there is quite a lot of investment going there into the common law case development anyway.

Q50 Lord Faulks: Lord Chancellor, I agree. I always find it rather strange that where a private individual would not take the case, because their chances of winning were not very good, it is perfectly all right for the legal aid board to fund such a case. However, there are some circumstances, I would suggest to you, that, even in privately funded cases, the decision whether or not to litigate would be determined by the importance of what is in issue: for example, losing your house. In those circumstances do you not think there is still scope for a borderline case to be funded by legal aid?

Chris Grayling: Of course, we will still have judicial review remaining in the scope of civil legal aid and that will not change, but you have to draw a line somewhere. We have looked quite carefully at what the test should be, and how we find the right balance between ensuring that support is available for cases that are strong cases, but accepting that there are limits to how many cases we can provide for. We have sought to put in this test; we have done so, in our view, in line with the case law that is there. It is a pragmatic decision, and it

is about finding the balance. Baroness Kennedy is not wrong; there is a balance to find between the resource we have available, and the duty to uphold the law and the duty to ensure that important matters are heard in the courts. However, I still think, if I look at the full scope of what we are doing and what we are spending, that there is a proper and sensible balance between the two.

The Chairman: On that note, I think we can end. I do not suppose that Oscar Wilde would have approved, but we are where we are.