HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: Human Rights Act reform, HC 1033

Wednesday 2 February 2022

Watch the meeting

Members present: Joanna Cherry MP (in the Chair); Lord Brabazon of Tara; Lord Dubs; Florence Eshalomi MP; Lord Henley; Baroness Ludford; Baroness Massey of Darwen; Angela Richardson MP; David Simmonds MP; Lord Singh of Wimbledon.

Questions 12 – 29

Witness

I: Lord Wolfson of Tredegar QC, Minister, Ministry of Justice.

Examination of witness

Lord Wolfson of Tredegar QC.

Q12 **Chair:** Welcome to this meeting of the Joint Committee on Human Rights. We are a cross-party committee of Peers and Members of Parliament. Our Chair, Harriet Harman, is currently on bereavement leave after the sad death of her husband, Jack Dromey, the former Member of Parliament for Birmingham Erdington. I am the deputy Chair of the committee, Joanna Cherry MP, and I will be chairing the committee in Harriet's place this afternoon. Today, in the Chamber of the House of Commons, we heard a number of very moving tributes to Jack, and on behalf of the whole committee I extend our sincerest sympathies to Harriet and her family.

This afternoon, we continue our inquiry into reform of the Human Rights Act. In summer 2021, the committee published a report to respond to the independent Human Rights Act review panel chaired by Sir Peter Gross, and at that time we said that the evidence we had heard led us to conclude that there was no case for changing the Human Rights Act. Following publication of the independent Human Rights Act review panel's report in December, the Government published a consultation paper called *Human Rights Act Reform: A Modern Bill of Rights*, and that consultation will run for three months until 8 March.

We are very pleased to be taking evidence today from Lord Wolfson QC, the Parliamentary Under-Secretary of State at the Ministry of Justice, on the Government's proposals. You are very welcome, Lord Wolfson.

Perhaps I might kick off proceedings this afternoon with this. The report of the independent Human Rights Act review panel noted that the vast majority of submissions the panel received spoke strongly in support of the Human Rights Act and said that negative perceptions of the Act were "disproportionately fuelled and ventilated by negative media and political coverage". Why not tackle the negative perceptions rather than repeal or radically change the Human Rights Act?

Lord Wolfson of Tredegar: First of all, I thank you and the committee for inviting me this afternoon. Can I also take a moment to associate myself with your remarks about Ms Harman, to whom I express deepest sympathies?

Turning to the substance, I noted in the independent Human Rights Act review that quite a few of the responses that said, "We are in support of the HRA", were essentially saying "We are in support of the proposition that the UK should remain signed up to the convention". As has already been made clear by the Secretary of State, we are absolutely clear that it underpins our position that the UK will remain signed up to the European Convention on Human Rights.

As to negative perceptions, one of the many good results of the consultation is that there is wider, and I hope better, public discussion of human rights. I and other Ministers are engaged in a lot of meetings and

round tables in England, Wales, Scotland and Northern Ireland. Certainly, I will be beating the drum for reform of the HRA, but that does not mean a diminution or dilution of human rights; it means updating the regime to make sure that it fits with our current constitution and to reinforce the important delineation between courts on the one hand and Parliament on the other.

Chair: The independent Human Rights Act review panel held a number of round tables, and it also held seven online road shows in lieu of town hall-style meetings. It is on the basis of that evidence that it concluded that negative perceptions have been disproportionately fuelled by media and political coverage. Do you think there is some colour to that conclusion? Would you accept it?

Lord Wolfson of Tredegar: It is very unfortunate that sometimes people put human rights in the same basket as health and safety. People often say, "Health and safety means I can't do this and I can't do that". What we actually know is that health and safety is pretty important. Before we had health and safety legislation, people were being killed and maimed in factories up and down the country.

Human rights are also important. I want to make sure that they are really embedded not only in our legal culture but in our political culture. I really do not want to be critical, but, with hindsight, one of the problems may have been that the phrase the Labour Government used when they passed the Human Rights Act was "bringing rights home". We know that the vast majority of rights in the convention are rights that were in the common law anyway. I do not want people to see human rights as some sort of foreign implant. I want them to see human rights as an absolutely central part of UK law, to use that phrase. We know what we mean by that. The human rights apply across all our jurisdictions.

Chair: I prefer the phraseology "the domestic legal systems of the United Kingdom".

Lord Wolfson of Tredegar: I am very happy to say that. "UK law" is a bit shorter, but we are saying the same thing in different words.

Chair: We have had instances, have we not, of Ministers in the Government being very critical of the Human Rights Act? I wonder if I could put a couple to you. We all remember the former Prime Minister Theresa May's conference speech in which she alleged that an illegal immigrant had avoided deportation because of his pet cat. That was actually wrong; the man won his case because the Home Office had ignored its own Immigration Rules on unmarried couples. In September 2020, the Home Secretary gave a speech at the Conservative Party conference saying that activist lawyers were frustrating the removal of migrants from this country.

You will be aware that as a result of that the Law Society of England and Wales wrote to her warning her that inflammatory rhetoric can sometimes have consequences, and indeed an immigration solicitor was

the subject of a violent racist attack in his law firm's offices. After that, the Prime Minister doubled down and said that there was a problem with what he called "leftie lawyers", or activist lawyers, who were hamstringing the justice system.

In relation to that—I should declare an interest as a member of the Faculty of Advocates—the dean of the Faculty of Advocates wrote to the Prime Minister expressing concern and pointing out that no matter what the topic, whether it is immigration, crime or the constitution, lawyers who act against the state are not being "leftie" or activist; they are just doing their professional duty to represent members of the public without fear or favour. Would you agree with me that all those instances have been a bit unfortunate and maybe we ought to avoid them in future?

Lord Wolfson of Tredegar: Just to be clear, was that the letter from Roddy Dunlop QC?

Chair: Yes, the head of the Scottish Bar.

Lord Wolfson of Tredegar: Yes, I read the letter at the time. Two things are clear. First of all, everybody is entitled to representation. That is a fundamental tenet of our legal system. Secondly, a lawyer is not to be associated with their client. I am not sure that I would want to be associated with everybody I acted for when I was at the Bar. Indeed, if we did not abide by that principle, some pretty awful people would get no representation at all. As far as I am concerned, lawyers and the legal system are a fundamental part of any democracy, and that is probably understating it. Everybody needs to make sure that when comments are made in this area they do not impinge on the rule of law.

Q13 **Chair:** Thank you. That is very fair of you. Last week, we took evidence from Lord Mance, whom you will know well, and from a number of legal academics—Professor Alison Young, Professor Adam Tomkins and Dr Hélène Tyrrell. It is fair to say that three out of four of them did not agree that there is a lack of public confidence in the Human Rights Act. They thought that perhaps there was more a lack of awareness than a lack of public confidence, which seems to fit with the conclusions of the independent panel. Do you think that is right?

Lord Wolfson of Tredegar: I think it is both. If you are talking about awareness, it is fair to say that awareness of a number of areas of law, not just human rights law, is lower generally in the country than perhaps I would like it to be. It is a very good thing that the education system now focuses on things that I was not taught when I was at school but that are really important in knowing how a democracy works. I think it is both.

The Human Rights Act has been around for nearly a quarter of a century. I do not think it is wrong in principle. Indeed, I think it is right in principle for the Government to say, "We want to have a look at it to make sure that it is working as well as it could work, and where things can be improved they ought to be improved". Indeed, it is fair to say that when

the Human Rights Act was passed it was clear at the time that that was the first step, and that the issue was not, so to speak, put to bed in 1998 and never had to be revised. That is why we are looking at it now.

Chair: I can see the force of that argument, but there is something that puzzles me slightly. The Government set up the independent Human Rights Act review panel, and it produced a very substantial report, which I think runs to over 500 pages. As I said earlier, it followed taking a lot of written evidence with holding round tables, and holding online road shows rather than town hall meetings because we were in the middle of the Covid crisis at the time. It put a lot of work into it and it produced the report. Rather than responding to its points, the Government then rushed out a separate consultation paper. Do you not think it would have been courteous and sensible to have responded to the very substantial piece of work that Sir Peter Gross's panel produced?

Lord Wolfson of Tredegar: Chair, you used the word "substantial". It absolutely is. This is it. It is a phenomenal piece of work. It might put some textbooks out of business, because one of the things it does in addition to considering what the law is and making various recommendations—I will come back to that—is to set out in many areas the history of the jurisprudence, and that is really valuable. I cannot thank Sir Peter and his team enough. They have done a tremendous job.

That said, I do not think it is fair to say that we rushed anything out. The consultation we have put out takes full account of the recommendations of the review. Sometimes we have consulted on things that go beyond their terms of reference. Sometimes, we have added options to options that they suggested. When you read our consultation against the backdrop of the review, you will see that we have considered everything they said extremely carefully.

Chair: When Sir Peter Gross gave evidence to the Justice Committee yesterday, he was asked about this, and he said that he did not consider the Government's consultation paper to be a response to his report as such. I accept what you are saying about the lengthy nature of the report, but, as you said, much of it is analysis and history. What Sir Peter Gross was probably expecting you to do, as the rest of us were, was to respond on a case-by-case basis to the recommendations they made, rather than producing a separate document that goes on to make its own recommendations. It would be normal for the Government, first of all, to respond formally to the panel's report and then produce a consultation with different recommendations if that is what the Government want, but surely the right thing to do would have been to respond, first of all, to the panel's recommendations.

Lord Wolfson of Tredegar: That may be, respectfully, putting the previous question in a different way. You might get the same sort of answer back. We are responding to the panel's recommendations and report in our consultation, which takes full account of it. You should also remember, of course, that although—this may be behind the word "rushed"—the timing of the publication of the report and the consultation

puts them close together, the Government had the review earlier, so we were able to take full account of it in our consultation. They are not two separate documents; they really ought to be read one alongside the other.

Chair: Sir Peter Gross said to the Justice Committee yesterday, "The simplest way I can put it is that if you compare this document"—your consultation—to the response to the Faulks review of administrative law, "you could put Faulks down and the response next to it and you run the one into the other. You cannot with this … in short form, you cannot put ours down here, the Government's consultation down there and say that the two work together". I think the point he is making is that in relation to Lord Faulks's review of administrative law the Government responded to his recommendations one by one, but here you have not done that. Why have you not done it?

Lord Wolfson of Tredegar: There are different ways of responding to reviews. I am not sure that one is necessarily better or worse than the other. We have taken full account of the work done by Sir Peter and his team. I say again what a tremendous job they did. This is not meant to sound obsequious. It really was tremendous. I encourage everybody who will respond to our consultation—and I want as many people, bodies and entities to respond as possible—to look at the consultation that we have put out but also to read as much as they can of Sir Peter's and his team's review.

Chair: Before I hand over to my colleagues, I want to ask you this. You said that one of the benefits of the work that has been done by the independent Human Rights Act review panel has been to improve understanding and awareness of the Human Rights Act. You will be aware that the panel recommended that the Government should implement a programme of public and civic education about human rights in schools and in higher education and adult learning. All our witnesses last week were in favour of that. Will the Government implement that recommendation of Sir Peter Gross?

Lord Wolfson of Tredegar: You will appreciate that matters of education are outside the remit of the MoJ. I am not sure it is for a fairly lowly Minister from the MoJ to bind the Government and other departments. What I can say is that the work we are doing in the MoJ going around the country, talking about the consultation and inviting people to respond is, I hope, part of the process of enabling people to understand what the ECHR is and what human rights are. I know that colleagues in other parts of government are looking at the education system. There are still too many people, I am afraid, who confuse Luxembourg with Strasbourg. There are still too many people who think the ECHR emanates from the EU. It may seem obvious in this room, but we all have an interest in making sure that the level of debate is raised and the quality of debate is higher than it sometimes is.

Chair: I accept that you cannot bind the Department for Education, but will the Ministry of Justice have discussions with the Department for

Education and ask the Department for Education to implement Sir Peter Gross's recommendation?

Lord Wolfson of Tredegar: I know that the Deputy Prime Minister has discussions with his Cabinet colleagues on this and other matters all the time.

Chair: Thank you very much. I hand over for our next question to Baroness Ludford.

Q14 **Baroness Ludford:** Thank you very much, Madam Chair. Minister, welcome. We have heard from previous witnesses, both in the course of this inquiry and for the report that we did last year, that there are no significant problems with the duty in Section 2 of the Human Rights Act to take account of relevant European Court of Human Rights judgments because of the margin of appreciation. What we have heard about from all quarters is the effective judicial dialogue in what appears to be an excellent relationship between our courts, particularly our Supreme Court, and the Strasbourg court, and that it works well. There are no real problems, and indeed the relationship has improved in recent years. Why are you proposing to weaken Section 2 of the HRA so that courts need only to "have regard" to Strasbourg case law? If the system ain't broke, why do you want to fix it?

Lord Wolfson of Tredegar: Respectfully, I do not accept the word "weaken". The history of Section 2 is an interesting one, legally. When a lawyer uses the word "interesting", it usually means long and convoluted. It is fair to say that the jurisprudence on Section 2, as I think the Deputy Prime Minister put it when he appeared in front of this committee, has ebbed and flowed; it has come and it has gone. Of course, it is very important that there is proper dialogue between our courts and Strasbourg. I note that the current president of the Strasbourg court has also said how important he sees that dialogue to be. I do not see our proposals, on which we are consulting, as weakening Section 2 at all.

We are saying that the court should start by saying what the position is under domestic law, and then the courts can, so to speak, raise their eyes and look around the world, including to Strasbourg jurisprudence, for helpful precedents. You have to remember in this context that the European convention is very close to other human rights conventions. When you have a similar provision, let us say, in Canada, why, I ask rhetorically, should our courts not look at the Canadian jurisprudence to assist them in the same way as they will be entitled to look, and no doubt will look, at the Strasbourg jurisprudence? I see no problem with that.

Baroness Ludford: Perhaps I can follow that up by asking what you think the impact could be on legal certainty and on the risk that you will generate more business for Strasbourg if there is not a thorough taking into account of Strasbourg case law in our domestic courts, also bearing in mind that upholding the ECHR figures in the trade and co-operation agreement with the EU, so that any sort of deviation could raise questions in that context. What could be the impact on legal certainty

and on the development of British constitutional rights separate from convention rights if you were to go ahead and make this change?

Lord Wolfson of Tredegar: There is quite a lot, if I may say, in that question.

Baroness Ludford: Sorry.

Lord Wolfson of Tredegar: I will try to deal with at least some of it, and I am happy to come back on other bits. It will lead to a development of jurisprudence in this country that will embed human rights and ECHR rights in our country in a way that is suitable for our different judicial cultures. I use that word in the plural, because we have different jurisdictions in the UK. It is not right, respectfully, to see Strasbourg jurisprudence as a one-size-fits-all approach. The Strasbourg court has made clear on repeated occasions that the way the convention is implemented in state A can be different from the way it is implemented in state B, and both can be consonant with convention rights. I do not see a contradiction between what we are consulting on in Section 2 and continuing to ensure that we remain fully committed to the convention rights. I do not know whether I have answered all the points you raised, but I am happy to come back if I have missed any.

Baroness Ludford: I will leave aside the EU dimension, although it would be a pity to put the TCA at risk. You appear to be saying, I think, that there is indeed sufficient flexibility in the current arrangements to take account of that law and not slavishly follow it, and that we have reached a point of understanding. You say that Section 2 has ebbed and flowed, but everyone seems to think from this side and from Strasbourg's side that it works well now. You appeared to say that there was that flexibility, so I do not really understand what you think will be gained by changing Section 2.

Lord Wolfson of Tredegar: What will be gained will be putting what we want to see Section 2 do on a clear statutory footing. The point about case law is that it ebbs and flows. You do not necessarily know where the case law will go. What we want to do, and we think it is the right thing to do, is to put in statute the approach that the courts ought to take. It will mean that it will be very clear that the UK Supreme Court is in the UK the supreme judicial arbiter of our human rights laws.

If you look at Lord Pannick's submission to the review, I do not think he saw anything wrong with the idea that the courts here should look around the world as part of their consideration as to how to apply a particular right in the UK. I am not in favour of judicial blinkers. It is very good for our courts to be able to look, and to be encouraged to look, first at the domestic context—you look at where you have come, you look at the common law—and then say, "Where else can I get assistance?" That might be Strasbourg and it might be Canada. We share a common-law tradition with Canada and with Australia. We can get a lot of benefit from reading decisions from those jurisdictions as well.

Baroness Ludford: The Chair will probably not allow me any more time, but I suggest that we are in a different position in relation to the ECHR, for various reasons, than we are to Canadian case law.

Lord Wolfson of Tredegar: With respect, I do not agree, because if you look at the Canadian human rights background there are very clear overlaps. They are not the same, but human rights conventions in different parts of the world often stem from a common place. In looking at jurisprudence, for example from Canada, of course a court would take into account any relevant differences—I underline the word "relevant"—between the convention background in Canada and the ECHR. That cross-jurisdictional jurisprudence is valuable. I know that from my own experience in commercial law, and I respectfully suggest that it is just as true in human rights law.

Chair: Thank you.

Q15 **Angela Richardson:** Good afternoon, Minister. I am the Conservative Member of Parliament for Guildford. The Government's consultation seems to propose two approaches to the Bill of Rights. The first would be more akin to a stand-alone Bill of Rights, and the other approach would incorporate the convention rights but take an originalist approach to interpretation, suggesting a return to how rights might have been conceived in the 1940s and 1950s. What do the Government see as the advantages and disadvantages of each approach? Do the Government have any initial preferences for either approach?

Lord Wolfson of Tredegar: Thank you. The short answer is that we will consider the proposals for legislation and, in particular, the form the legislation will adopt after we have received and considered the results of the consultation, which I think is the burden of your question. As you say, there are a number of ways of doing that. The critical point, and the point I want to underline, is that whichever way it is done as a form of legislation, the central point, which is that we will remain a signatory to and fully signed up to the ECHR, will be at the heart of whatever legislative form we decide to choose.

Angela Richardson: If the Government decided to opt for an originalist approach to convention rights, how do you think they would avoid a regression in human rights protections?

Lord Wolfson of Tredegar: I am not quite sure exactly what you mean by an "originalist approach". Are you getting at the living document approach that the Strasbourg court takes? That is at the heart of Strasbourg jurisprudence, although it is not in the convention itself.

We will make sure that the convention rights remain part of domestic law. You will see in the consultation that we are consulting on a number of things. We have discussed Section 2. We can discuss Section 3 and Section 4. I do not accept, if I may say respectfully, the word "regression". I am not interested in regression from human rights. That is different from the question of recognising that not all rights in the

convention are absolute. Some rights are qualified and have to be balanced. It is also different from the question of rights as opposed to remedies. That is a different question again. The word "regression" is not a word that I would use.

Angela Richardson: Thank you.

Chair: Can I follow up on that? I do not really understand why you would want a separate British Bill of Rights if it is essentially just going to reiterate the rights in the ECHR. What is the point?

Lord Wolfson of Tredegar: There are two ways of doing a Bill of Rights. You can amend the Human Rights Act and retitle it, or you can have a separate piece of legislation. You could do either. Why do either? As we said in our consultation, one of the things we want to do is consider whether we should actually be adding some rights to the rights set out in the ECHR. We are consulting on the right to jury trial. When I use the phrase "right to jury trial", I am conscious that we have different jurisdictions. The position in Scotland is different from the position in England and Wales, and the position in Northern Ireland is different again. I hope we have made that very clear in the consultation.

We have also talked about giving more support to the right of freedom of expression, which in the convention is a qualified right; it has to be balanced against other rights. We think there is a case that Section 12 of the Human Rights Act has perhaps not given the right of freedom of expression as much force and importance as it should, recognising that sometimes that right will have to be balanced against other rights, such as security, protection of journalists' sources and so forth.

Chair: We will come back to that. We have some specific questions about trial by jury and freedom of expression.

Before we go on to those and other questions, can I ask you a follow-up question to the questions that Sarah Ludford asked you? You talked about the benefits of our domestic courts and our domestic legal systems looking to other jurisdictions such as Commonwealth jurisdictions like Canada and Australia. The courts already do that, do they not? There is nothing in Section 2, as currently drafted, to prevent them doing that, is there?

Lord Wolfson of Tredegar: No. I accept that that is certainly one interpretation of Section 2. This gets us back to the jurisprudence, which shows that that interpretation of Section 2 was not an interpretation adopted by some courts at some times. It is absolutely fair and right for a Government to say that they want to embed—if I can use that word—in statute a particular approach. The fact that that approach may reflect the current approach of the court is not necessarily a reason not to do it, because the jurisprudence can change.

Q16 **David Simmonds:** I would like to say how much I appreciate your remarks earlier in respect of education and greater understanding about

the European Convention on Human Rights. The question I would like to put to you concerns the proposals for Section 3, which requires courts to interpret legislation compatibly with convention rights "so far as possible". The independent Human Rights Act review recommended quite modest changes to that. Why do you think the Government have gone further than that panel recommended? Do you have a view about whether those proposed reforms would result in human rights under the convention being more difficult to enforce? If so, why, and, if not, why not?

Lord Wolfson of Tredegar: Thank you first for your introductory remark. I am grateful for that. We are consulting on two options on Section 3, as you know. The first is repeal and the second is replace, although I think we have given a pretty good steer that we are, at the moment, certainly in the area of reform and replace, not the option of repeal. The whole point of a consultation is to listen to what people say, and I certainly will.

The problem with Section 3, we think, is that it has resulted in the courts, effectively, rewriting legislation. Let me be very clear; I am not criticising the courts for doing that, because that is what Section 3 requires the courts to do. That is what Parliament has told the courts to do. The question is whether it is right or good that Parliament should tell the courts to do that. We think, and this is what we want to consult on, that there is a good case to be made that, where Parliament has set out its intention in legislation, the courts should enforce and interpret that legislation; they should not be rewriting the legislation.

The committee may be interested in comparing, for example, the Section 3 jurisprudence with a decision of the Supreme Court that came out literally this morning in a case about paying for citizenship papers for children. There is a very interesting speech, I think by Lord Hodge, with whom three other members of the court agree, and then, if I may say respectfully, a very, very interesting speech from Lady Arden. I think it might be her last speech in the Supreme Court. What underlies those speeches, as the committee will see, is that normally when the court interprets legislation it seeks to interpret what Parliament has said and what Parliament intended. Section 3 asks the court to do something very different. We think that in this context, as in other contexts, the courts should be interpreting the legislation of Parliament, not rewriting it.

David Simmonds: Thank you. That is a very clear answer.

Q17 **Baroness Massey of Darwen:** Good afternoon, Lord Wolfson. I am Doreen Massey, a Labour Peer in the House of Lords. I am also a delegate to the Council of Europe.

Before I ask my question, could I add to what Joanna and David said about education? I realise this is not your brief at all, but there is a well-established and well-evaluated programme run by UNICEF called the rights respecting school. I do not know whether the Department for Education has knowledge of it. It is a very good programme and is very

popular in the UK and in parts of Europe. I wonder if someone could at least test out whether the department has knowledge of it. I can send you or them or anybody details of the programme, and they could talk to the people who run it. I do not want anybody to reinvent the wheel or go over old ground when it is not necessary. I do not need a response to that. It is an addendum to what others have said.

Would the proposed changes that were mentioned by David lead to an increase in the number of adverse rulings from Strasbourg and the number of declarations of incompatibility issued by UK courts? Given that both would require a legislative response, how would an increase be managed within the existing constraints on parliamentary time?

Lord Wolfson of Tredegar: You are right, if I may say respectfully, to the extent that there is necessarily a relationship between Section 3 and Section 4. I do not think it is a linear relationship in the sense that for every change you make to Section 3 there are necessarily more cases you would lose in Strasbourg or under Section 4.

Standing back, the proper way in which the system should work—indeed, this is really built into the Human Rights Act—is that under the Human Rights Act it is recognised that our courts do not strike down Acts of Parliament, primary legislation, and when Section 4 is triggered it is up to Parliament to decide how to respond to an adverse ruling. Whether our proposed changes to Section 3, in fact, lead to more adverse rulings in Strasbourg is a bit of a moot point, because you have to recognise, as I said earlier, that the Strasbourg jurisprudence gives a margin of appreciation, and there is also the concept of subsidiarity.

I think the current president has said that this is the age of subsidiarity, following on from the Brighton declaration. If an Act of Parliament is inconsistent with convention principles, it is right in principle that Parliament should confront that fact and deal with it. It should not be for the courts to rewrite the legislation using Section 3, so to speak, to avoid the problem. It comes back to the fact that we have in this country parliamentary supremacy. If Parliament has passed an Act that is inconsistent with the convention, that should be a matter for Parliament, ultimately, to confront and sort out.

Baroness Massey of Darwen: Thank you.

Q18 **Lord Dubs:** My name is Alfred Dubs. I am a Labour Member of the House of Lords, as you know, Minister. My question is again about Parliament. Your consultation makes lots of references to reasserting the role of Parliament. What ideas do you have for how Parliament, or this committee, might do more to hold the Government to account on human rights issues, such as addressing declarations of incompatibility or in scrutinising Bills?

Lord Wolfson of Tredegar: Thank you. One of the proposals that we are consulting on is to have a procedure whereby Parliament would be informed and there would be a debate, as you will see in the draft clause, whether it is on the Motion of a Minister or otherwise; we are consulting

on how it might best be done. It would be a procedure for Parliament to be engaged in the process of dealing with the consequences of an adverse Strasbourg ruling. Of course, in a dualist system, the UK, under Article 46(1) of the convention, has an obligation to abide by judgments of the Strasbourg court to which the UK is a party, but domestically we have parliamentary supremacy. We are consulting on a way for Parliament to be involved in considering how best to respond to any adverse rulings of the Strasbourg court.

The second part of your question referred to the role of this committee. I am conscious that the review said a few things about how this committee could work in the future and the different functions it could have. With respect, I will dodge that, and I hope on proper grounds. This is a committee of Parliament. It is right for Parliament to discuss and consider the remit of this committee, and it is not for a government Minister to get involved in that. Please take that with respect. It is respect for Parliament and the committee. It is not because I do not give regard to the work of this committee. I hope what I have said so far today shows that I certainly do. It is a matter for Parliament and not the Government.

Lord Dubs: Thank you.

Chair: Thank you. With regard to those last two questions, whether it is an increase in the number of adverse rulings from Strasbourg or an increase in the number of declarations of incompatibility, or both, it will mean that we will need more parliamentary time to deal with the consequences of your proposed amendments to Section 3 and possibly Section 4. How would an increase in the parliamentary time required be managed within the already existing constraints on parliamentary time?

Lord Wolfson of Tredegar: It is not for me to tell the business managers what ought to be prioritised and what ought not to be prioritised. This is a question of much broader application. One of the consequences of Brexit and a renewed focus on the rights and privileges of Parliament is that there may well be more work for Parliament to do. One of the things that may have to be thought about—I am moving well away from human rights only—is parliamentary procedures and how they can best be reformed, or at least rethought, to be effective in the 21st century and in a situation where the UK is not part of the EU and where Parliament is, and perhaps ought to be, doing more than it has done in the past.

Chair: Would you agree that it would be unfortunate if the outcome of this was to be that a huge amount of work went through the delegated legislative process and was essentially done by the Executive? It would hardly be a renewed focus on the rights and privileges of Parliament, would it, if it was just all left to the Executive?

Lord Wolfson of Tredegar: That depends on what we are talking about. I know there was an interesting discussion with the Deputy Prime Minister about articles in the newspaper about Ministers having the power to overturn court judgments. I hope he made it clear—I think he did—

that the way you overturn a court judgment, if you are talking about primary legislation, is the traditional way; that Parliament considers it.

Chair: Parliament passes primary legislation rather than a Minister passing a statutory instrument.

Lord Wolfson of Tredegar: If what you need to do is to pass primary legislation, you need to pass primary legislation. It depends on the problem you are trying to cure.

Chair: I am not saying that there are not some problems that could not be cured by secondary legislation. I am just trying to get you to agree with me, Minister, that if we are talking about a renewed focus—to use your words—on the rights and privileges of Parliament, we need to make sure that Parliament is given adequate time in future to debate the consequences of adverse rulings from Strasbourg or declarations of incompatibility if there are more of those.

Lord Wolfson of Tredegar: I am not going to dissent from the proposition that Parliament ought to debate things properly, and people need to be given adequate time. I am very conscious that there are different procedures in the different Houses as to how that is done. Having sat through literally hours and hours in Committee in my House, I am conscious that a lot of Peers put real thought and care into scrutinising legislation line by line.

Chair: Indeed, but equally you will be aware that, post Brexit, there is a concern—I do not think it is a partisan concern; I think it is held by MPs in all parties in the Commons—that perhaps too much is being done by secondary legislation and not enough by primary legislation. If the point of Brexit was for Parliament to take back control, that has not necessarily worked, so I would not want that to transfer to human rights.

Lord Wolfson of Tredegar: If I may say so, that is a very broad point. We would both agree that some things have to be in primary legislation. We would both agree that some things can properly be in delegated legislation. Even when I was at university, there was a discussion as to the proper balance between the two. It is a very healthy debate. I can certainly agree with the proposition that parliamentary engagement in the human rights area is important, and indeed many of our proposals are designed to increase the role of Parliament. What I have been saying about Section 3 and parliamentary intent goes directly to that. What I have been saying about Section 4 and Parliament's responses to any adverse Strasbourg rulings goes to that as well.

Q19 **Lord Brabazon of Tara:** Good afternoon, Lord Wolfson. I am a Conservative Member of the House of Lords. Turning to human rights litigation, the consultation proposes that a claimant will be able to bring a human rights claim only if they are found to have suffered a "significant disadvantage", asking whether this will ensure that courts focus on "genuine human rights matters". Can you give us an example of the type of human rights breaches that would not meet the threshold of

"significant disadvantage", and which human rights matters might not be "genuine"?

Lord Wolfson of Tredegar: Thank you very much. What I think you are focusing on is the proposed permission stage, which is designed to ensure that public bodies do not have to apply for summary judgment, effectively, in frivolous or fanciful claims, and that only claims where the claimant can show that they have suffered a significant disadvantage would go to court for a full hearing.

I will make a number of points. First, I do not think it is helpful for me to give examples of what may not be a significant disadvantage and what is. Those are terms on which we are consulting. There are cases where the infringement has, frankly, been trivial and where a court may well conclude that it is a matter for the court and not a government Minister, and that there has been no significant disadvantage.

Secondly, the concept of having to show a significant disadvantage is not novel. Article 35 of the convention also has admissibility criteria, so I think you can see in the thrust of the convention as well the idea that trivial breaches do not entitle you to your day in court.

Thirdly, we are consulting on a second test, which is effectively an override, in that even if the claimant cannot show that the claimant has suffered a significant disadvantage, the court should consider whether, none the less, the case should proceed to court. That might be because the claimant has suffered a disadvantage that is not a significant disadvantage, but none the less the case should go to court, or because, although this claimant has not suffered a significant disadvantage, other people might have done, and therefore the case should go to court. We are seeking to remove the trivial and the fanciful, and I do not think there is any problem in that. There are permission stages in other areas of our jurisprudence as well.

Lord Brabazon of Tara: Thank you. On what basis have the Government concluded that this proposed change is compatible with the right to an effective remedy in Article 13?

Lord Wolfson of Tredegar: The short answer is that the Article 13 effective remedy is a remedy for a breach, and if the case is utterly spurious or fanciful or utterly trivial, I do not see any contradiction between a permission stage and your Article 13 right. I invite the committee to look back at Article 35 of the convention. I am not saying that it does exactly the same thing, but it is a similar approach.

Lord Brabazon of Tara: Thank you.

Chair: Thank you, Lord Brabazon. Could I come in on that question? What I do not understand about this idea of a permission stage is this. Already in the Human Rights Act, under Section 7, individuals have to demonstrate that they are the victim of an unlawful act before proceedings can be brought. Secondly, in judicial review cases, there is an initial stage where the claimant is required to show that they have an

arguable case. Is that really not enough to be going on with? Why do we need an extra permission stage, and how would the proposed extra permission stage interact with the current requirements contained in Section 7 and the current requirements contained in procedures for judicial review north and south of the border?

Lord Wolfson of Tredegar: I am pleased that you mentioned judicial review, because you are absolutely right; a lot of human rights claims are brought by way of judicial review where there is a permission stage. Of course, you can bring a human rights claim outside judicial review as well.

Chair: Then you would be governed by Section 7.

Lord Wolfson of Tredegar: You are governed by Section 7, but Section 7 does not stop the claim being instituted; it means that there has to be a strike-out or a summary judgment application. We are saying that, as I think your question implicitly accepts, just as there is nothing wrong, in convention terms, with having a permission stage in JR claims, so too, I would suggest, there is nothing conceptually wrong, in convention terms, with having a permission stage generally for HRA claims.

Chair: Can you give us an example of the mischief that this new permission stage is designed to deal with? Can you give us an example of cases where there have been findings in relation to what you consider to be trivial breaches of human rights?

Lord Wolfson of Tredegar: We put some of those in the consultation. A case comes to mind about a prisoner with his food. It is paragraph 127: "One prisoner made a claim for religious discrimination … after he was excluded from communal worship after allegedly trying to kick a prison officer. Although the claim failed, this cost the government £28,000 in legal fees". In fact, I meant the next one: "a prisoner with medical dietary requirements claimed a breach of his human rights in 2012 when a substitute meal was offered to him. Although the meal met his medical needs, it was not the specific meal he had wanted. The court struck out the claim", but it cost the Government five grand to do it.

We are saying that in other areas of law—for example, in judicial review—you do not get your day in court unless you can show that you have something sensible to argue. That is what the permission stage is designed to do. I underline that what we are consulting on is a second limb, and that is really important. It is specifically designed to make sure that questions where there is a proper point to be argued even if the particular claimant has not suffered significant disadvantage can still go to court.

Without getting into the legal weeds, you may find it helpful to recall the summary judgment test where the general test can perhaps be phrased this way. First, has a defendant shown that they have a real prospect of success? "Real" has been glossed as "not fanciful". That is the normal test. Secondly, even if the defendant cannot show that, is there some

other reason for a trial? That is specifically designed to make sure that claimants who cannot show that they have suffered a significant disadvantage can argue that they fall within the second limb of what we are consulting on.

Chair: I asked you for examples of trivial breaches, and you have given us an example of cases that failed. I am concerned about what the evidence base is for the requirement for this permission stage. Can you give an indication of what percentage of cases you found were trivial?

Lord Wolfson of Tredegar: There are plenty of cases that are trivial. I am very happy to write to the committee with further information on that.

Chair: That is very kind of you. It would be really helpful to have an indication of the scale of the mischief that this permission stage is designed to deal with and a bit more colour about what the problem actually is.

Lord Wolfson of Tredegar: You sometimes have to be careful in this area not to forget that legal systems can have an effect on the conduct of public authorities even without claims being brought. One of the important things that a permission stage can do is to underline the fact that human rights are serious. Saying that your human rights have been breached is an important allegation. We want to make sure that the cases that come before the courts are those where the claimant can show that they have suffered significant disadvantage or there is some other reason for it coming to the court.

I underline again that these are matters of consultation. We are having a very useful discussion now, but I do not want to lose sight of the point that we are consulting on this, and we will certainly consider very carefully the results of the consultation. That is why we are consulting.

Chair: Having an indication of the scale of the mischief will help to inform people's responses. Thanks.

Q20 **Lord Henley:** I am a Conservative Member of the House of Lords. Can I continue on a similar theme? In the consultation, the Government ask whether damages in a human rights claim should be reduced or removed based on the "wider conduct" of the claimant. How can the Government's proposals be reconciled with the obligations in Article 1 to secure human rights to everyone, and in Article 13 to provide an effective remedy for breaches of convention rights? In what kinds of cases do the Government envisage that a reduction in damages will be justified?

Lord Wolfson of Tredegar: Thank you very much. Let us first remember that we are talking about remedies and not rights. We are talking about the factors that the court should consider when granting a remedy. We are consulting, first, on whether the court should consider damages in other claims before looking at human rights damages, and, secondly, on requiring applicants to pursue any other damages claims they have first.

Going on from that, we are consulting on a proposition that the courts should expressly take into account a claimant's previous conduct when that claimant pursues a human rights remedy. So far as not being inconsistent with the convention, that, I suggest, is absolutely consistent with Strasbourg jurisprudence. From memory, I think the case is McCann. I have not been corrected, so I think I am right. The Strasbourg court—

Chair: Give us a moment, Lord Wolfson. We have not read the case yet.

Lord Wolfson of Tredegar: I was pointing behind my left shoulder. If I did not get a mutter from behind my left shoulder, I would take it that I was right.

The Strasbourg court expressly said that a court is entitled to look at a claimant's past conduct. We think the court should also be entitled to look at the effect that a damages award might have on the public authority that has to pay the damages. I do not see any contradiction between these proposals and Article 13 for the reasons I have set out.

Lord Henley: Thank you.

Q21 **Angela Richardson:** You mentioned public authorities briefly. Section 6 of the Human Rights Act makes it unlawful for public authorities to act in a way that is incompatible with the convention right. However, as you know, they have a defence where legislation requires them to act incompatibly with human rights. Given the importance of Section 6 in enabling individuals to enforce their rights, why do the Government believe that the defence for public authorities needs strengthening?

Lord Wolfson of Tredegar: It is important that public authorities effectively know where they stand. If what a public authority is doing is giving effect to primary legislation, they ought to have the comfort of knowing that they will not be held to be acting unlawfully. That is one of the options that we are consulting on.

The other is linked but slightly different. They will not be acting unlawfully if they act in accordance with legislation that could not, given the wording of that legislation, be interpreted compatibly with the convention right. You will see immediately that there is an overlap, obviously, between the Section 6 proposals and the Section 3 approach. There is necessarily an overlap there. We are also consulting on providing a clearer definition of what we mean by a public authority. We have set it out in the consultation. There has been some quite confusing jurisprudence sometimes as to what is and what is not a public authority for these purposes, and that is the other point we are consulting on.

Angela Richardson: Thank you very much.

Chair: Going back to the issue of looking at the conduct of claimants affecting their damages, as I understand it the McCann case was about individuals who were killed while they were trying to plant a bomb. Is that not right?

Lord Wolfson of Tredegar: I think that is right.

Chair: It was not so much looking into their past conduct of a general kind. Was it not more looking at their conduct at the time of the acts they complained of as having breached their rights? It is a bit different, is it not? It is a pretty egregious example. Somebody is trying to plant a bomb, they get killed in the process, and then it is said that their human rights have been breached.

Lord Wolfson of Tredegar: I am not hanging my hat solely on the McCann case. I gave that as an example, because the point being put to me was whether it was inconsistent with the convention, and I said it is not inconsistent with the convention because it is found in Strasbourg jurisprudence.

We deal with this in paragraph 306 of our consultation: "Currently, the Strasbourg Court allows compensation to be reduced for 'undeserving'"—the word is in quotes in the case—"claimants, acknowledging the responsibility that a claimant has towards others". We have also cited a number of domestic cases where the courts have acknowledged the possibility of taking a claimant's conduct into account.

For example, we dealt with the decision in Downing in paragraph 306: "the claimant challenged delays by the Parole Board in considering his case, arguing it amounted to a breach of Article 5. The claimant had been convicted of murder and sentenced to life in prison. In dismissing the claim, the Court had regard to the seriousness of the original offence which the Court held was a matter which 'must be taken into account' in considering the public interest in the exercise of the discretion to award damages". There is a proper basis both in domestic and in Strasbourg jurisprudence for this.

Chair: Thank you.

Q22 **Baroness Ludford:** The Government do not seem to be very keen on positive obligations to implement human rights standards. They say they want to restrain or constrain some of the positive obligations contained within convention rights. You said earlier that you wanted human rights embedded in our legal and political culture. If positive obligations require authorities to take active steps in some circumstances to protect people's rights against interference, is that not part of that embedding in our political public culture, and, as is said in the consultation document, that that content can make for common-sense policy and guidance?

We have seen lots of scandals, for instance in hospitals. Is it not less expensive in the long run and less disruptive if there is a positive obligation, for instance to protect the right to life, so that decisions are taken that avoid recourse to litigation or inquiries and so on? Which convention rights do the Government want to constrain, and why?

Lord Wolfson of Tredegar: The short answer to your last question is none. We are not intending to constrain—in the way I think you are using that word—any convention rights. I have made it absolutely clear from

the outset that we remain signed up to the ECHR. Convention rights will remain at the heart of the Bill of Rights.

When we talk about positive obligations, what we really mean—we have set this out pretty clearly in the consultation, albeit in a short section, between paragraphs 229 and 231—is that the convention rights have been incrementally expanded by the courts to move from a situation of, "You cannot do X", to, "You must do Y". The central question is: who should be telling our public authorities in a democracy to do Y? We think that, as a matter of principle, decisions on the allocation of resources should be determined by elected lawmakers and the operational professionals who are answerable to the public or in the way in which whatever area of life we are talking about—police, hospitals, whatever it is—is answerable.

We have given the example of the Osman judgment, where the issuing of "threat to life" notifications has put a real strain on various police forces. We think that police forces should decide how to allocate their resources. Therefore, that is a matter that we have put in the consultation. You will see it at question 11: "How can the Bill of Rights address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights legislation? Please provide reasons". That is precisely the point, although I do not like "impacted" as a verb. Forgive us for that.

Baroness Ludford: A lot of inquiries and investigations are costly. It seems to me that it is better to invest up front. The positive obligations include not only a requirement to investigate deaths in custody under Article 2 or allegations of inhuman and degrading treatment under Article 3, but things like putting in place effective systems to protect patients from professional incompetence and to prevent ill treatment, violating Article 3, such as child abuse.

When you think of the problems that have been caused when things have gone wrong in hospital treatment or in social services departments, requiring long-running and very costly inquiries, not to mention the impact of those deficiencies on the individuals concerned, is it not better to invest up front in those positive obligations to avoid further problems down the line? It seems to me that this is quite a short-sighted take by the Government on the benefits of implementing a culture of positive obligations. You avoid being tripped up down the road.

Lord Wolfson of Tredegar: I wonder if we might be a little at cross-purposes. There is a danger of saying, for example, that it is good to make sure that we are focused on matter X, because if we do not there could be problems down the road, and the quite separate issue as to whether the Strasbourg court should be telling you to do that.

In other words, I am not suggesting, to take the Osman case, that if we did not have positive obligations, in no circumstances would the police feel it appropriate to issue "threat to life" notifications or to act appropriately. I suspect they would. The question is: who should the

decisions be taken by? Should they be imposed by way of positive obligations by the jurisprudence, or should they be taken by elected officials and operational professionals? That is the issue. It is not whether it is a good idea for hospitals to conduct inquiries or for the police to put those systems in place. It is the genesis of the obligation: should it come from Strasbourg jurisprudence, or should it come from democratic accountability?

Baroness Ludford: I would suggest that one point of the human rights framework is to encourage public authorities to make decisions on the way they use their resources, protective decisions, in a way that avoids cutting across human rights interests, and thereby trying to avoid getting into problems further down the road. It is not Strasbourg imposing it; it is the whole body of human rights law—the convention; the Act; case law, both domestic and Strasbourg—that ought to mean that public authorities take decisions, including about allocation of resources, qualifications and their duties, in a way that avoids conflict with human rights, which in the long run is less disruptive and less expensive.

Lord Wolfson of Tredegar: Let us be clear; we all agree with that last point. The whole point of bringing the convention into domestic law, which we are not changing, is to make sure that public authorities abide by the convention rights. The critical question, though, is where the buck should ultimately stop. I am suggesting that there is a very good case to be made in a democracy that the buck ultimately stops with Parliament and elected officials. What I do not want to see is that this, to use your phrase, cuts across Parliament. I do not want Parliament to be left out of the picture. On the contrary, I want Parliament to have a greater role for the reasons we have discussed, Chair, in this area.

Chair: There have been some pretty high-profile cases where the state, in the form of state agencies such as the police, has failed to investigate serious crimes, or the state has failed to hold a proper inquiry into loss of life and has done so only because it has been forced to do so as a result of people taking those state agencies to court to impose positive obligations under Article 2, the right to life, or Article 3, the right not to be subject to inhuman and degrading treatment. We all know of a number of very high-profile cases in the last decade or two where that has happened. Are you saying that the Government think that that should have just been left up to Parliament?

Lord Wolfson of Tredegar: No, I am certainly not. I am not quite sure of the burden of the question.

Chair: We can all think of examples where members of the public have had to go to court to force a state agency to do its job, to force the police to investigate serious sexual assault, to force the police and the state to investigate the death of ordinary people—loved ones—in disasters or indeed in custody. There were a number of high-profile cases about that over the last decade or so. Are you suggesting that that opportunity to go to court to enforce a positive obligation should be taken away from people and they should be left simply to rely on Parliament to enforce it?

Lord Wolfson of Tredegar: What we are saying is that when it comes to positive obligations there has to be a real question—this is what we are consulting on—about the source of particular positive obligations. It is fair to say that there has been an incremental expansion by the court forcing the state to discharge various positive obligations. That can cause real problems. We have set that out in the consultation, and that is what we are consulting on. That is not to say, and I certainly would never say, that we want to prevent any citizen from ensuring that the state lives up to its obligations under law. That is what the rule of law is all about. The rule of law is very simple: everybody in the country, everybody in the state and the state lives under the law.

Chair: One of the most effective ways to do that is to be able to take a case to court to force the state or a state agency to uphold the right to life or the right against inhuman and degrading treatment.

Lord Wolfson of Tredegar: Right, but we are now discussing the content of the right that you are seeking to enforce. I have said all along that we are seeking to make sure that there is absolute clarity that the rights set out in the convention remain rights in domestic law. In so far as the state or any public authority has infringed those rights—putting to one side the permission stage discussion we have had—there is a right of access to the court to ensure that those rights are upheld.

Chair: Thank you.

Q23 **Lord Singh of Wimbledon:** Good afternoon. I am Indarjit Singh, a Cross-Bench Member of the House of Lords.

The consultation notes that trial by jury has a "significant historical place in our legal traditions" and could be enshrined in the new Bill of Rights. Do the Government intend to make any changes to the existing right to jury trial, or will it remain exactly the same? If it remains exactly the same, what is the point in including it within the Bill of Rights?

Lord Wolfson of Tredegar: Thank you. As to the first question, we are not proposing any changes—I am using the plural again, because I am conscious that it is different in different jurisdictions—to the right to jury trial. In Scotland, it may actually be inapt to talk about a right, although I am not going to get into a discussion of Scots law, especially with the Chair for today of the committee.

Your second question is: what is the point? The point is this. There have been challenges to the right to jury trial in Strasbourg. Although those challenges have failed, certainly so far, we think that the right to jury trial—to use that phrase—is a pretty fundamental right, differently applied across the UK. When we are putting forward a Bill of Rights, that is a candidate for inclusion that does not appear in the convention, and we are consulting on it.

One has to remember that, in many of the convention states, the concept of a jury is somewhat unusual. A lot of lawyers in other convention states would find it unusual that people without legal qualifications decide on

guilt or innocence, that they do so secretly, and that they do not provide reasons. Yet when one does research in this country it is fair to say that the right—I use that word loosely—to jury trial is very widely supported by very large majorities of the public. I am a firm supporter of the right to jury trial as well.

Lord Singh of Wimbledon: Thank you. In spite of your reservations about discussing Scotland in the presence of our Chair, I would like your advice. If, as you mentioned earlier, in Scotland trial by jury is not considered a right as it is in England and Wales, and a Bill of Rights is introduced, how will the Government manage that divergence across the two jurisdictions?

Lord Wolfson of Tredegar: We have made it clear in the consultation itself. In paragraph 203, we say: "The right could apply insofar as trial by jury is prescribed by law in each jurisdiction, under the control of Parliament for England and Wales, and of the Scottish Parliament and the Northern Ireland Assembly for Scotland and Northern Ireland respectively". We are absolutely aware that the right to jury trial is differently applied. This is very much an area where we absolutely respect the different legal traditions of different parts of the UK.

Lord Singh of Wimbledon: Thank you, Lord Wolfson.

Chair: To follow up on that, you will be aware that at present there is a discussion in Scotland, prompted by a review by Scotland's second most senior judge into sexual offences cases and prompted by comments of Scotland's senior law officer, the Lord Advocate. There is to be a pilot to look at removing juries from rape trials. It is quite a controversial topic. I am not convinced it is the way to go, but I understand the level of concern about the low conviction rate and the feeling that something has to be done about it. I take from your answer that you would agree that that is a matter that should be left to the Scottish Parliament.

Lord Wolfson of Tredegar: It is a matter that one would have to consider carefully and see how it fits under the general devolution settlement. If it is within the competence under the devolution settlement of the Scottish Parliament, almost necessarily it follows that it is a matter that it can consider. If it is not, it cannot.

You will be aware, Chair, that we had a disagreement with the Scottish Parliament about the UNCRC, and that matter went to the Supreme Court. One point I want to underline is that nothing in the human rights consultation is intended to disturb the devolution settlement, whether that be in Scotland, Wales or Northern Ireland. Different considerations apply in each of those settlements. We have taken real care—officials really have worked very hard on this—to make sure that what we are doing is consistent with those settlements and that, at the same time, we can properly legislate for the whole of the UK.

Chair: Thank you.

Q24 **David Simmonds:** I want to turn to the issue of freedom of expression. Broadly, the proposal suggests that a Bill of Rights would give greater protection to freedom of expression, balancing that against things like privacy rights. Could you share with us any examples that, in your view, support that proposition? Do you think, more specifically, that the Government's position is compatible with the fundamental principle that the qualified rights in the convention—private family life, freedom of thought, freedom of expression, et cetera—are of equal importance, or do you think it is right that we give greater weight to freedom of expression, and, if so, why?

Lord Wolfson of Tredegar: Can I deal with the second question first? It is only that I am afraid I did not quite pick up the first question, so I may respectfully have to ask you to repeat it.

Let me come to the second question. Qualified rights are rights that are not absolute. That is what a qualified right means. Therefore, you have to balance that right against other important factors. In freedom of expression, you may have to balance it against public security and the right to privacy. When we look at freedom of expression and where freedom of expression has got to—in particular, Section 12 of the Human Rights Act 1998—we think there is a case to be made that freedom of expression has not perhaps been given the real weight it needs. That is why we are consulting on it.

In a democratic society, freedom of expression is absolutely fundamental. People need to be able to say things. People need to be able to say things that other people regard as offensive. The fact that something is offensive does not mean that it cannot be said. I accept that it is all about context. In this building, we have parliamentary privilege because we have recognised that over the years there are some places like Parliament where, frankly, anything can be said with impunity, even defamatory things. There is a case for looking again at the balance we currently give to freedom of expression and perhaps putting a bit more weight on the side of the scales that says, "freedom of expression".

Could you please repeat the first question, which I did not get?

Chair: David, I think you are on mute.

Lord Wolfson of Tredegar: I am not going to get it that way either.

David Simmonds: Sorry, Chair. The joys of technology. The first part of the question was about the Government's proposal that the Bill of Rights gives greater protection to freedom of expression. Do you have examples that support the proposition that Strasbourg has given undue priority to privacy rights at the expense of freedom of expression?

Lord Wolfson of Tredegar: I do not want to get into the position of looking at particular cases, because our proposals are not a reaction to particular decisions; they are matters of principle.

There was a very interesting case recently, ML v Slovakia—it was not the full court—in which the initial ruling was that a newspaper had infringed a mother's Article 8 rights when it published an article about her deceased son who had done some rather unsavoury things even though that deceased son was dead. Let me choose my words carefully. I doubt whether our courts would have reached that balance as between freedom of expression and Article 8.

Certainly, we are very firmly of the view that freedom of expression is absolutely fundamental in a democracy. We have seen over the last couple of years that there is a danger of silencing, either actively or passively, in different parts of our culture, whether that be universities or elsewhere. People must be free to say what they think. Obviously, there will be limits, but the starting point should be freedom of expression. Even if it is offensive and even if it is unpopular, you must be able to say what you think.

David Simmonds: Thank you very much indeed.

Q25 **Florence Eshalomi:** Thank you, Lord Wolfson, for quite an informative session so far. This is an issue that is really important to me, representing a diverse inner-London constituency where my case load is quite heavy on immigration policies. I want to ask you about deportations.

The Government consultation proposes changes to deportations of foreign national offenders that would seek to curtail their rights to make it virtually impossible for them to challenge those deportation orders. I have spoken in the Chamber about some of these deportation orders already. Does that not contravene the fundamental principle that the rights are for everyone?

Lord Wolfson of Tredegar: Thank you. I know that there is a lot of debate at the moment about immigration, and in particular deportation orders, because we have the Nationality and Borders Bill going through Parliament at the moment. With respect, I do not want to get side-tracked into a discussion on that Bill, because the issues there deserve their own consideration. I am speaking on it tomorrow in Committee. What I can say is that rights are for everyone, but when it comes to Article 8, for example, that is also a qualified right, and we firmly believe that what we are consulting on is absolutely consistent with the convention.

Q26 **Chair:** I suggest we move on to the next question, as Florence seems to have lost her connection. We will make inquiries to see whether she has slipped off the call and bring her in to go back to her question.

I was pleased to hear you say a moment ago, Lord Wolfson, that nothing in this is intended to disturb the devolution settlement. You will appreciate that sometimes statements like that are taken with a pinch of salt, and sometimes there is a degree of disagreement between the Government here in Westminster and the Governments of the devolved nations about whether something disturbs the devolution settlement or

not.

We have had written and oral evidence from the Northern Ireland Human Rights Commission and the Scottish Human Rights Commission, which have expressed the view that reforming the Human Rights Act could lead to a divergence in human rights protections across the four nations. Do you accept that that could happen, and how do the Government plan to mitigate any adverse consequences of such divergence?

Lord Wolfson of Tredegar: I do not accept that that could happen in the sense in which they are using the phrase. At the moment, the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly can legislate in human rights areas within their fields of devolved competence. They cannot, however, amend the Human Rights Act itself. I certainly do not see that anything we are consulting on will upset that current balance or the current system or framework or structure, whatever word we want to use.

I absolutely accept that there are differing views in England, Wales, Scotland and Northern Ireland as to whether our proposals are good, bad or indifferent, but that is a separate question from the devolution question. Sometimes, there is a danger that people frame their opposition in terms of devolution, whereas really the opposition is a principled opposition, a principled political disagreement, to what we are proposing to do, or what we are consulting on.

Chair: I am pleased to hear you recognise that there is the competence, for example in the Scottish Parliament, to legislate in the space of human rights for the devolved competences. In the report we issued last summer on the Human Rights Act, we recommended that the United Kingdom Government should not pursue reform of the Human Rights Act without the consent of the Scottish Parliament, the Welsh Senedd and the Northern Ireland Assembly. Will you do that? Will you seek the consent of the devolved Parliaments and not proceed without their consent?

Lord Wolfson of Tredegar: There are two questions there. Regarding the first question on whether we will seek their consent, I do not wish to be flippant—I hope you will understand that I am not being flippant—but the real point is consent to what. We are saying consent to legislation, but we are at the stage of consultation. We first have to see what the legislation we are bringing forward is, and then in light of that legislation what is the proper way to proceed. Beyond that, I do not think it is wise for me to go at the moment. It would just be to anticipate the results of the consultation, and I do not want to do that.

Chair: I will hand back to Florence to pursue a follow-up on her question. We lost you briefly, Florence. I imagine that you want to come back on Lord Wolfson's answer, so I will hand the floor back to you. I think you are muted. You will have to unmute yourself, Florence. We cannot unmute you at this end. We will let you sort out the problem at your end.

I will hand over to Lord Dubs to ask what would have been our final question, and then we will come back to Florence. Lord Dubs will pursue

some more issues about the devolved nations.

Q27 **Lord Dubs:** Given that the proposals would place limitations on remedies, can you explain how the Government have concluded that it is compatible with the requirement in the Belfast/Good Friday agreement to provide "direct access to the courts, and remedies for breach of the Convention?

Lord Wolfson of Tredegar: The short answer is that we have looked at this extremely carefully. We see no inconsistency whatsoever between, first, remaining absolutely a committed party to the ECHR; secondly, remaining committed to all the provisions of the Belfast/Good Friday agreement; and, thirdly, the proposals on which we are consulting. We do not see any undermining of or contradiction to the Belfast/Good Friday agreement in any of the matters we are consulting on.

Lord Dubs: Thank you for that. Of course, you are still consulting, so you have not reached the end of the road on this. It is at least a solemn warning that there is a potential risk there, is there not?

Lord Wolfson of Tredegar: I do not accept that there is a potential risk. The terms of the Belfast/Good Friday agreement are firmly in our mind. We will be astute in ensuring that anything that comes out of the consultation is fully consistent with our obligations under that agreement.

Lord Dubs: Thank you.

Chair: It is fair to say that a number of civic bodies, academic bodies and lawyers' bodies across Northern Ireland have expressed very trenchant concerns about the potential impact of the reforms you are talking about on the Belfast/Good Friday agreement. You are saying that you do not accept that there is a risk, but, clearly, a lot of people in Northern Ireland think there is a risk.

Lord Wolfson of Tredegar: It depends on what you mean by risk. What I am saying is that, if we did not completely have in our minds the terms of the Belfast agreement and we just proceeded willy-nilly, of course in those circumstances there is a risk that you might do something inconsistent with that agreement, but that is absolutely not the way we are approaching it.

We have the terms of the agreement firmly in mind. It is a very important agreement. As I hope the consultation actually sets out in a number of places, we have specifically thought of and taken into account the position in Northern Ireland to make sure that what we are consulting on, and anything we come to propose by way of legislation, is absolutely consistent with the Belfast agreement.

Chair: I am looking at the evidence the independent Human Rights Act review panel took. Quoting from one of their round tables, they say that the Law Society of Scotland said: "Amendment [to the HRA] raises complicated devolution questions, particularly in terms of how to handle interactions between the reserved powers and devolved competences.

The position raised [by Policy Exchange] in respect of devolution re Northern Ireland and the HRA was straightforwardly wrong".

The Law Society and Bar of Northern Ireland said: "a significant dilution of human rights protections will impact on the delicate ecology of the Agreement. There is a need to benchmark any proposals in the review alongside the GFA [Good Friday Agreement] and the 'no diminution commitment'".

Professor Jeff King of UCL said that his conclusions were that "weakening the overall scheme of the Act risks upsetting devolution arrangements at an already delicate time". Those are all valid statements, are they not?

Lord Wolfson of Tredegar: They are matters that I have read. None of them says that there will be a breach of the Good Friday agreement. I have read them before. To say that it might impact on the delicate ecology of the Belfast/Good Friday agreement is not a lawyer saying that there was a breach of it. I am absolutely aware that the Belfast/Good Friday agreement was reached after much trouble and difficulty. None of us wants to go back to the position before that agreement. That is why I and my officials are totally focused on making sure that anything that comes out of this consultation will be consistent with that agreement.

Chair: Okay. We have Florence back on the call. Let us go back to the important issue of the implications of this government consultation for the deportation of foreign offenders. Florence, it is your area of expertise, so I will hand the floor over to you.

Q28 **Florence Eshalomi:** Thank you, Chair. My apologies. Thank you, Lord Wolfson, for your reply. I think you confirmed that you do not believe that this contravenes the basic right for foreign nationals and basic human rights.

Would you not argue that some of the deportations we have seen in recent months where people essentially were separated from their family life here—people who have built a life; people who, yes in some cases, have committed a crime and served their time—and are still being denied the basic human right to a family life and are being deported? Would you not say that is contravening their basic human rights?

Lord Wolfson of Tredegar: No, with respect. Article 8, the right to family life, is not an absolute right. I think we can all agree on what the legislative position is, whether we agree that it is good or bad. I appreciate political views will differ. The legislative position is this.

The Immigration Act 2014 provided that the deportation of foreign national offenders, for example, will be required by the public interest except where specific exceptions are met. The figures show that between April 2008 and June 2021, for example, of the foreign national offenders who had their deportation appeal allowed at the First-tier Tribunal, about 40% did so on human rights grounds. Between April 2016 and November 2021, of the appeals against deportation by foreign national offenders

that were allowed on human rights grounds at the First-tier Tribunal, about 70% were allowed solely on Article 8 grounds.

It is against that background that we are consulting on three options: first, restricting the rights available to those subject to deportation, for example, based perhaps on the length of imprisonment; secondly, strengthening the legal framework on deportations, to ensure that deportations can be prevented only in accordance with that framework; and, thirdly, limiting the grounds on which a deportation decision can be overturned. I underline the point that although there might be perfectly proper political arguments as to whether that policy is good, bad or indifferent, we are convinced that it does not entail any contravention of convention rights.

Florence Eshalomi: One of the options that the Government are putting forward would essentially hand the powers to determine those deportations to the relevant Home Secretary. My understanding is that, where the Home Secretary has failed to take human rights into account when deciding that those deportations are in the public interest, the courts would simply not be permitted to substitute their own views for those of the Home Secretary.

Lord Wolfson of Tredegar: I am not sure what the question was. Forgive me.

Florence Eshalomi: Coming back to the issue of guaranteeing and protecting a person's basic human rights, if that power and authority is granted to one individual, multiple questions could be put forward on that.

Lord Wolfson of Tredegar: It is not necessarily a breach of any human right to have what you might call an ouster clause. Ouster clauses raise their own issues. Each needs to be considered in its own circumstances. I respectfully do not agree with the proposition as broadly as you have put it: that it necessarily involves a breach of convention rights. I suspect we might be getting into the details of the Nationality and Borders Bill, which I accept is very important and can raise human rights issues, but it is a separate issue from the Human Rights Act consultation. Of course, I absolutely understand why it is being raised in this forum.

Florence Eshalomi: Would you not agree that there is an overlap with what is being discussed there in response to people's basic human rights?

Lord Wolfson of Tredegar: I certainly would agree that any reforms or changes to immigration policy have to be consistent with convention rights. You will know that all Bills have a signature and a statement at the front, under Section 19(1)(a) of the Human Rights Act, to set out that in the view of the Minister they are consistent with convention rights—I paraphrase. Of course, the Nationality and Borders Bill has such a statement. I know from having to sign a statement myself in relation to a different Bill that Ministers take that obligation very seriously.

Florence Eshalomi: Thank you. I will leave it there, Chair.

Chair: Thanks, Florence. There are a couple of things arising from those questions, Lord Wolfson. You said that anything you do would have to be consistent with convention rights, but, on the deportation issue, is not one of your proposals that you should simply remove Article 8 rights from certain classes of foreign national offenders? It seems to me that that would not be consistent with the fundamental principle that convention rights apply to everyone.

Lord Wolfson of Tredegar: Respectfully, I do not agree. The Article 8 right is a qualified right. It seems to me that there is a perfectly proper argument—indeed, I think it is right to say—that when the Article 8 right is balanced against other factors, those other factors will win out. It depends where you are drawing the line as to what the other factors are.

Chair: You are supposed to look at it on a case-by-case basis when you balance the rights. If you are removing the Article 8 rights from a class of foreign national offenders, you are removing from the court the balancing exercise that should be carried out by the court, so you are not making that Article 8 right available to everyone.

I am not saying that it is an absolute right; I am saying that the balancing exercise should be available to everyone to determine whether it has been breached. If one of your proposals is simply to remove Article 8 rights from foreign national offenders or a class of foreign national offenders, you are preventing the court from looking at the right at all.

Lord Wolfson of Tredegar: Respectfully, I do not agree. It is perfectly proper to say that Parliament is entitled to balance the Article 8 right against other factors. I am confident that provided Parliament balances that appropriately there will not be a breach of underlying convention rights.

Q29 **Chair:** That is a point on which I have to differ with you.

Finally, before we let you go—you have been very generous with your time—a moment ago when you were answering Florence's questions, you mentioned some statistics on deportations. When you are writing to us in relation to the earlier matters, could you include those stats for us?

Lord Wolfson of Tredegar: Absolutely.

Chair: Or point us to the part of the report where they are set out. I am not sure that they are in the report. If they are not, perhaps we could have them. It is quite interesting for us to see the evidential base for the mischief that you say needs to be tackled.

Lord Wolfson of Tredegar: I am very happy to write. To save my officials including it, if the committee looks very quickly at page 45 of our consultation, you will see there the box "Public protection: foreign national offenders". What I cited were the second and third paragraphs. I

am happy to repeat it in a letter, but all I would be doing is resetting out what is there. I do not think I said anything beyond what was there.

Chair: Let me find page 45.

Lord Wolfson of Tredegar: I am pleased to see, Chair, that you do all this electronically.

Chair: I try, but I am not exactly Speedy Gonzales when I am doing it electronically. This is the box; "Public protection: foreign national offenders".

Lord Wolfson of Tredegar: Yes, Chair. If you look at the paragraph beginning, "Home Office internal data", and then, "Furthermore, a review", those are the statistics I quoted earlier.

Chair: Would it be possible to see the data that underlies that statement? It says that "internal data shows that, from April 2008 to June 2021, 21,521 appeals against deportation were lodged by FNOs. Of these, 6,042 FNOs had their deportation appeal allowed at the First Tier Tribunal, with around 40% (2,392) of them doing so on human rights grounds". The footnote says: "The estimate is based on … a random sample". Is that something different?

Lord Wolfson of Tredegar: I am informed that, as you see, Chair, from the footnote, this is Home Office data, and I am told that it will be published shortly. Can you leave that with me?

Chair: Yes.

Lord Wolfson of Tredegar: You will appreciate that it is not MoJ data. My understanding is that it will be put into the public domain.

Chair: Thank you. Thank you very much for your evidence this afternoon. We are very grateful to you for coming. I suspect there will be more to say about this in due course.