



European Scrutiny Committee

Oral evidence: [The Application of the EU Charter of Fundamental Rights in the UK](#), HC 979

Wednesday 22 January 2014

Ordered by the House of Commons to be published on 22 January 2014.

Written evidence from witnesses:

- [David Anderson QC](#)
- [Professor Paul Craig](#) ([supplementary evidence](#))
- [Professor Sionaidh Douglas-Scott](#)
- [Martin Howe QC](#)
- [Rt Hon The Lord Goldsmith PC QC](#)

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Members present: Mr William Cash (Chair); Mr James Clappison; Michael Connarty; Chris Kelly; Stephen Phillips; Jacob Rees-Mogg; Henry Smith; Mr Michael Thornton

Questions 35-93

Witnesses: **David Anderson QC**, Brick Court Chambers, Temple and Visiting Professor at King's College, University of London, **Professor Paul Craig**, Professor of English Law, St. John's College, Oxford University, **Professor Sionaidh Douglas-Scott**, Professor of European and Human Rights Law, Lady Margaret Hall, Oxford University, and **Martin Howe QC**, 8 New Square Chambers, Lincoln's Inn; Rt Hon Lord Peter Goldsmith PC QC, gave evidence.

Q35 Chair: Could I first of all say to the witnesses how grateful we are for you coming back, given the unexpected circumstances of last week? Parliament seems to be very busy at the moment. We also have a very contentious issue on the floor of the house. There may be some votes and there are procedural questions that we also will have to manoeuvre between. I am going to start with the first question, to pick up where we left off, and this is addressed to all of you. In the case of *Test-Achats*, did the applications of Articles 21 and 32 of the Charter, in your view, lead to an extension of the scope of EU law, given that an explicit derogation in the Directive was disapplied by the court?

Professor Douglas-Scott: I do not think it did, because the Directive itself quite clearly sets out a principle of non-discrimination between the sexes in Article 5(1). The Directive sets out a very clear principle of sex equality. One of the reasons why the court annulled Article 2 was because they found there was a lack of coherence in a Directive that sets out quite clearly the requirement for non-discrimination but then goes on to insert an exemption clause, which seems to have an almost unlimited applicability. The fact that the Directive made references to the Charter in its preamble strengthens that point, because it showed the urge of the European institutions to respect the principle of equal treatment. An important factor here was a poorly drafted instrument that suffered from a fatal inconsistency.

Professor Craig: I agree with what my colleague said. I do not think the result would have been any different whatsoever before the Charter from what it would have been after the Charter. In a sense, I do not believe that the Charter was instrumental in reaching a different conclusion from what otherwise would have been reached. Prior to the Charter, the ECJ would have applied general principles of law and they would have reached exactly the same conclusion. I do not, therefore, believe in that sense that the Charter has led to a different result from that which would have otherwise been reached.

David Anderson: I agree with both my colleagues. I do not think I can usefully add anything.

Martin Howe: I firmly disagree with all of my colleagues on this point. First of all, I do not think that internal inconsistency can be a sufficient basis of itself for knocking out derogation. By definition, derogation may well be inconsistent with the general scheme laid down in the Directive in that it makes a carve-out from its general provisions. I cannot see that itself, by any credible intellectual path, lead to the derogation being invalidated.

Secondly, I acknowledge that there was, before the Charter was given legal effect, the doctrine of principles of law common to the member states. I do not agree that in the absence of the Charter that would have been a credible or sufficient basis for the European court to knock out the derogation, since if you look at the time of the adoption of the Directive at the laws of the various member states, many member states had systems where differential premiums could be charged on insurance between genders on a statistical basis. It seems to me to say that there is a credible basis in that there is a sort of European consensus that this must be treated as a form of sex discrimination would be wrong and probably unsustainable. I do think that this is an instance where the Charter has resulted in a significant shifting of the goal posts.

Q36 Jacob Rees-Mogg: Is the reasoning of the Court of Justice in Fransson consistent with Article 51(1) of the Charter?

Martin Howe: The court would argue that it is consistent with it, in that it is an interpretation of it that gives a very wide meaning to when member states are implementing Union law. The issue is this: European Union law harmonises the levels of certain taxes, specifically the quantum of VAT. It does not seek to harmonise the

procedures that member states use for the collection of taxes, which remain a matter for national law.

The reasoning of the European court in that case was, because some of the taxes that the tax system collects are harmonised, the procedures employed by the tax system become within the scope of the implementation of European Union law. Again, this lacks intellectual credibility and it is an example of the court expanding the scope of its jurisdiction, albeit in that case they decided it was not contrary to the Charter. Nonetheless, having rolled the log out with this very wide-ranging interpretation, they are now in a position to apply the Charter over a wider field in future cases.

David Anderson: I do not think the *Fransson* case was in any way surprising. It is true that Article 51(1) says that the Charter applies to member states only when implementing Union law. But it was apparent right from the start, if one read the explanations, that phrase was to be understood as “in the scope of Union law”. In support of that, the explanations cited pre-Charter case law, for example the *ERT* case, on the scope of the general principle of fundamental rights, which did not only apply when member states were, strictly speaking, implementing, but applied also when they were derogating from or were otherwise within the scope of Union law.

Before *Fransson*, that was the line taken by the High Court in *Zagorski* and by the Supreme Court in Mr Howe’s Rugby Football Union case that he told us about last week. Therefore, it seems to me very unsurprising that the *Fransson* case came to the result that it did. As I mentioned in my written evidence, it is perhaps significant that, although some member states intervened in that case to oppose the reading that the court eventually came up with, the United Kingdom was not among them. You may or may not think that was wise, but in any event it does suggest that there was no great opposition to it. As Professor Craig says in his supplementary note, the reason why the court ruled as it did in *Fransson* was because it took the view Swedish law was being used to implement the obligations flowing from a Directive and, therefore, the Article 51(1) test was satisfied.

However, in support of the case that I was putting last week—which is that there is as yet, at any rate, no sign of this court being rights crazed in its approach—I would refer to the conciliatory statement towards the end of the judgment saying that, where the court of a member state is called on to review whether fundamental rights are complied with by a national measure in a situation where the action of the member state is not entirely determined by EU law, the courts remain free to apply national standards of protection, so long as the level of protection provided for by the Charter is not compromised. That suggests to me, if one reads the tea leaves, possibly a divided judgment—a judgment in which there was anxious debate about what the result should be. However, in any event, it was a cautious ruling, predicted in advance by the English courts, and it was a very long way from the much more radical idea that one saw suggested by the British Advocate General in the *Ruiz-Zambrano* case.

Professor Craig: I agree with pretty much everything that David Anderson has just said. I would add three points.

Firstly, I believe that the interpretation of member states implementing EU law in Article 51 to mean member states acting within the scope of EU law was the correct interpretation. Any other interpretation would have led to formalistic distinctions and,

moreover, the explanations had been there for over 10 years, making very clear that is what the EU and member states intended by the Charter. That is point one.

Point two is that I do not believe, in this particular instance, that the application of the idea of member states acting within the scope of EU law was, in any sense, excessive. I, with respect, differ from the opinion of the German Federal Constitutional Court, which regarded the judgment in this respect as excessive. The reason why I disagree is conceded by supplementary evidence and, to go to the heart of it, the point, as far as I can see, is this: the Court of Justice has made it clear in its early case law that the regime of VAT Directives imposes an obligation on member states to take all legislative and administrative measures appropriate for ensuring the collection of all VAT due on their territory. That obligation seems to me unexceptional and unarguable. The operative or determinative issue, therefore, is not whether the Swedish law in *Akerberg Fransson* was itself enacted to implement the VAT Directive, but whether it was being used to implement the obligations flowing from the Directive, which it clearly was. This was not, therefore, a case where someone was trying to tag on to European law through some incidental fact that was not really central to European law.

The third point is that I would reiterate the point that David Anderson made: I do not think it was a divided court. My understanding is that the court very specifically made clear at the end of its judgment that, although this fell within the scope of EU law, the member states would be given some real latitude as to the meaning of fundamental rights as applicable in this case. Therefore, the national conceptions of fundamental rights would be given all due weight. Finally, as part of that third point, even if the ECJ does find that the national law is inconsistent with EU law, that does not touch the ability of Sweden to have exactly the same tax enforcement regime in domestic law. It merely says that you cannot, insofar as you are using it to enforce this VAT Directive

Professor Douglas-Scott: You have heard very fulsome answers from Professor Craig and David Anderson, and I do not have anything to add to what they have said. I agree with both of them.

Q37 Jacob Rees-Mogg: What nexus of EU law do you think is required post *Fransson* to trigger the application of the Charter in a member state? Looking at VAT in the UK, the government collects over £100 billion a year but only 15% of it is our contribution to the EU. Is it that a little leaven leavens all the bread?

Professor Douglas-Scott: It is difficult to put a precise amount on that. The Advocate General in that case suggested a need for a more specific connection, but each case is going to turn on its own facts. Where you have a national measure that is playing a role in implementing a specific measure of EU law, there is a good case for saying that measure can fall within the scope of EU law.

David Anderson: The relevant factor, at least in the court's mind, is not what proportion of the revenue finds its way into the coffers of the European Union; their point is that the tax is required as a matter of EU law and the conditions for its application are required. The Committee is well familiar with The Sixth Directive, which goes in great detail through the things one can and cannot levy VAT on, at full rate and reduced rate and so

on. The reasoning is that because the tax is required by EU law and levied within the framework of EU law, measures that member states take in order to enforce liability for that tax must be consistent with basic standards of EU procedural fairness, including the right not to be criminalised twice for the same offence.

Martin Howe: I am comforted by the fact that where I am in disagreement with my colleagues on this point I am in agreement with the opinion of the German Federal Constitutional Court. It does seem to me this is an example where a tiny or indirect connection with European Union law is being used to widen the scope of application of the Charter.

I do not disagree with Professor Craig's remarks over the distinction between the scope of European Union law and actual implementation. My objection to this judgment is that I do not think this, on any reasonable basis, should be regarded as being within the scope of European Union law. Just because European Union law specifies the quantum and imposes a general obligation on member states to use their general tax-raising powers to collect the money, it does not follow that the details of the mechanisms member states use to collect that and other taxes therefore fall within the scope of European law, which is what this judgment says. The observations about the interaction with national law arise directly from the excessive scope of this judgment. Having cast the net so wide, they have cast the net to cover a tax system that also involves the collection of purely national taxes. They, therefore, necessarily enmesh themselves in the problem of having two parallel sets of fundamental rights standards applying to this scenario.

Q38 Mr Thornton: To what extent, if at all, has the court of justice clarified the horizontal effect of the Charter, particularly in relation to rights and principles found in Title IV, in its judgment in *Association de Médiation Sociale* delivered on 15 January?

Professor Douglas-Scott: Those who would prefer not to see a horizontal effect of the Charter might be quite comforted by the court's recent judgment, because they did not find a horizontal application of the Charter in that particular case. They did not find that the provision in the Charter could be used to super charge, as it were, a Directive that also covered the relevant law in that field. They found that the provision of the Charter was not sufficiently specific to give rise to a directly enforceable right that could be used in a horizontal situation between two private parties. In that respect, they did not go as far as the judgment of the Advocate General in the *AMS* case, nor did they continue down the line of some of their previous case law in *Mangold* and *Küçükdeveci*, where they seem to admit some sort of horizontal effect of general principles of law.

Q39 Mr Thornton: That was not able to overturn the French labour code in that case then?

Professor Douglas-Scott: No, it was not.

Professor Craig: I agree with that. I would add two things to what my colleague has said. Firstly, as a matter of principle, given that the court has held, in cases such as *Mangold* and *Küçükdeveci*, that general principles of law can have a horizontal impact, it would

seem to me, as a matter of principle, very odd if it held that Charter rights could never have horizontality. That does not work for me at all as a matter of first principle. I am merely saying that as a matter of legal reasoning. If you have a general principle such as non-discrimination, or something of that kind, you have a Charter right covering the same terrain. If you said that a general principle, such as non-discrimination on the grounds of age, can have a horizontal impact, which is basically what they said in *Kücükdeveci* and *Mangold*, then you have an applicable or an analogous Charter right covering the same subject matter, I cannot see how you would, in principle, deny all horizontality to the latter. That is the first point.

The second point that flows from that is while the court held this particular Charter right, Article 27, did not qualify for horizontality for the reasons that my colleague mentioned, they also did give a hint, particularly in paragraph 47 of the judgment, that things might be different if a different Charter right had been before the court. What they say in paragraph 47 of the judgment is that in this connection, the facts of the case may be distinguished from those that gave rise to *Kücükdeveci*, insofar as the principle of non-discrimination on the grounds of age, at issue in that case, laid down in Article 21(1) of the Charter is sufficient in itself to confer on individuals an individual right, which they may invoke as such. In that sense, they are excluding it in relation to Article 27 but they are not shutting the door. In fact, they are leaving the door quite wide ajar in relation to Charter rights that they think are suitable and complete, and therefore susceptible to horizontality.

David Anderson: I agree with both my colleagues. I might add one word of caution, for myself as much as anybody else: the issue of horizontality is an extraordinarily difficult one. It is not a binary issue. If you look at Charters of fundamental rights throughout the world, there is a very wide variation. The classic example of one that does not acknowledge horizontality is the Constitution of the United States and their Bill of Rights, where application is vertical only, although, even there, under the doctrine of state action, some constitutional guarantees are extended to some relationships between individuals.

At the other extreme, you have Ireland, in which constitutional guarantees are given direct application in horizontal litigation between individuals. A taxi driver, as I understand it, can rely on his right to earn a living in order to obtain an injunction against an unlicensed taxi driver. You might think it was horizontal litigation and all sorts of difficult situations in the middle. Professor Craig cited a very learned article on this subject, which may have been a little too much for my brain; I find Clayton and Tomlinson's treatment of the subject in their book on human rights is a very useful introduction.

Martin Howe: On this one, I agree with my colleagues' analysis of the judgment. Certainly, the court itself did not go nearly as far as was recommended by the Advocate General, who wanted to effectively create a gateway through the principle of Directives not to have horizontal effects. That does leave us, though, with the existing *Kücükdeveci* case, which is a judgment from 2010 where, although expressed in that judgment, the principle of non-discrimination on the grounds of age is based as a general principle of European Union law and as an exception to the rule against horizontal application. The interpretation of that judgment in the *Association de Médiation Sociale* judgment delivered last week is, in effect, to distinguish between the levels of precision of the articles of the Charter relating to these two principles. Therefore, it does open the door, perhaps, to a

wider rolling out of the *Küçükdeveci* principle on to other provisions of the Charter that are sufficiently precise.

Q40 Chris Kelly: Can parallels be drawn between the effects of the Charter on UK courts and the effects of section 6 of the Human Rights Act, which includes courts as “public authorities”, for example in the recent decision of the employment appeal tribunal in *Benkharbouche*?

David Anderson: Yes, you can draw a parallel. Section 6 of the Human Rights Act makes it plain that the courts are public authorities and are therefore bound by the requirements of the Human Rights Act. There is a vigorous academic debate, probably in fact more vigorous in its academic form than it has been so far in case law, as to exactly what that means and where along the almost infinite spectrum of horizontality the English courts are going to come out. The *AMS* case is very far from the last word of the European Court of Justice on horizontality. There are bound to be many more issues to work out. In working them out, I am sure they will have regard to Article 51 of the Charter, which also addresses the obligations to bodies, including the institutions of the Union and therefore including the courts of the Union, and addresses the obligations also to the member states. I would have thought—the professors may have other views—that according to the doctrine of the indivisibility of the state under international law, the reference to the member states is likely to include the courts of the member states, as well as their other institutions. Even after 10 or 12 years of the Human Rights Act, we are very far from understanding exactly how its horizontal application will work out. We are further still in the case of the Charter.

Martin Howe: Section 6 of the Human Rights Act is very interesting because, on the face of it, one would have thought the application of the Act to the courts is in respect of their own procedures. In other words, they are obliged to conduct their own procedures. Principally, the requirements of Article 6 regarding fair trial are the obligations which most relevantly impact on the way courts operate. What has happened is this has been used as an argument to introduce horizontality, most notably in the context of the creation of a new, horizontal right to privacy, which parliament itself has never decided to create through, among other things, the argument that, since the court is itself bound by Section 6 of the Human Rights Act, the court must adapt substantive doctrines of common law that apply as between citizens in order to create, in effect, new rights. Therefore, the act, in effect, has binding effects on private citizens, through that gateway, as well as on public institutions. Certainly, one can see a road for a parallel chained logic in the application of the EU Charter.

Professor Craig: I agree with what has already been said. I would add two points. Firstly, the basic problem faced in Section 6 and in Article 51, in terms of the horizontality issue, is the same. It is the point that David Anderson has already mentioned: to what extent do we think that fundamental or constitutional rights should only have a vertical application against the state, and to what extent do we believe that they should also be applicable between individuals? That issue is raised in the context of Section 6 of the HRA. It is raised in the context of Article 51 of the Charter as well.

I am one of those who take a rather more radical view of this kind of thing than, perhaps, some other people. Very briefly, it is this: the classic argument against horizontality is that it intrudes too far into personal autonomy. That is fundamentally what it is all about: that fundamental rights should only, in principle, have an application against the state and should not have an application horizontally as between private individuals; to do so would be too intrusive on their private autonomy. The problem with that argument is that, when you start thinking about it, it looks a good deal weaker than it did at the beginning. Parliament and the common law are making intrusions into private autonomy the whole time. They do so with legislation the whole time. They do so with common law doctrine the whole time.

One way at least—I am not saying it is the sole answer—of considering horizontality and standing back from the detail is to ask the fundamental question of principle, which is that if a right is felt to be fundamental, and hence included in a Constitutional Bill of Rights, why should it not, in principle, also be applicable as between private individuals? I am not saying that there are no circumstances in which one would reach a negative answer. There may be good reasons why particular constitutional rights should not apply as between private individuals. But if you pose the question in the way I just mentioned, it is not at all obvious that, for example, a private individual should be able to discriminate on the grounds of sex, gender, race or anything else—even in purely private dealings with other individuals. In many instances we have statute to regulate that terrain anyway but, even if we did not, if we think as a fundamental principle those kinds of discrimination are wrong if conducted by the State, I am not quite sure why we would think they were right if conducted by private individuals.

Professor Douglas-Scott: I would certainly agree with what Professor Craig has said, although I could add two short points. One would be that, if you look at the actual rights in the Charter, not every single one of them is capable of having horizontal effect, because some are directed only to the bodies of the Union. Article 42 on the right to access documents is one such; it is addressed only to EU agencies and institutions.

Secondly, I would say, as David Anderson has said, horizontality is an extremely complex subject. Related to it is the requirement that has been set down in EU law, that the courts interpret national law in the light of obligations under EU law, insofar as it is possible to do so—sometimes called indirect effect—which is often seen as an example of horizontality. It was because in the *AMS* case that it was not possible to interpret the French measure in the light of EU law that, in fact, the Directive could not be applied. But in many cases such a conform interpretation would be possible, and that would end up having a sort of horizontal effect on private parties.

Chair: Could I now ask Stephen Phillips if you would be good enough to ask the first question in relation to Protocol 30? We have a problem, which is, in a nutshell, we could be just about to have a vote, if there is going to be one called.

Q41 Stephen Phillips: Protocol 30, I think you would all agree, and can we begin by confirming this, is not an opt-out protocol. I think that is the view of each of you; is that correct? I will record for the transcript that everybody is agreeing but we have to go and vote.

Chair: We will adjourn for 10 minutes and we will see how quickly we can get through the lobbies and come back as soon as possible. Thank you.

Sitting suspended for a Division in the House.

On resuming—

Q42 Stephen Phillips: Now, we are all agreed that Protocol 30 is not an opt-out. We established that just before we rose for the division. That is a conclusion to which our predecessor committee came, and one of the purposes of this report is to clarify that to the house. I think you also all agree, but tell me if I am wrong, that Article 1(1) of the Protocol is simply a reflection of Article 51(1) of the Charter itself. Is that common ground between the four of you at least? Yes, I see no dissent and, indeed, lots of nodding of heads.

What I want to explore a little is to what extent you think Article 1(2) gives any additional protection for the United Kingdom against, for example, the applicability of the solidarity rights, a protection that is not contained within the Charter or within any pre-existing general principles of EU law. What does Article 1(2) actually achieve? Does it go beyond Article 1(1)?

Professor Craig: It seems to me that it does add something. While 1(1) is certainly not an opt-out, for all the reasons we discussed last time, Article 1(2) does have the substantive content. It particularly has the substantive content in relation to those provisions of Title IV that do not have any condition about national laws and practices. The meaning of that phrase I will come back to in a moment. However, there are certain rights or provisions within Title IV, like Article 29, concerning the right to a free placement service, and Article 31, which, in the absence of Protocol 30 Article 1(2), could or might be interpreted by the court as being genuine rights. In relation to the UK, however, Article 1(2) of Protocol 30 would prevent that interpretation from being applicable. In that respect, my view is that Article 1(2) does add a substantive impact in particular in relation to those parts of Title IV where there is no condition of the right being found in a national law or practice.

Professor Douglas-Scott: I agree with what Professor Craig said but I would add one thing, which is that even if Article 1(2) of the Protocol does succeed in having that effect regarding certain rights, there may still be a problem with general principles of law, which might nonetheless be applicable because the Protocol does not apply to them. In that case, an interesting question would be whether rights, particularly those rights in Title IV, actually extend beyond general principles of law so that the Protocol does, as I call it in my evidence, a belt-and-braces job there. Otherwise, you are still left with the problem of general principles of law taking effect.

Q43 Stephen Phillips: Mr Anderson and Mr Howe, do you want to add anything to that?

David Anderson: Not really. I very much agree with Professor Craig. I could quibble on one point but I do not wish to take the Committee's time.

Stephen Phillips: Quibble away.

David Anderson: Perhaps implicit in what Professor Craig said was that the United Kingdom and Poland are placed in a privileged position by the Protocol; I am not sure whether he actually intended to say that or not. I would see the Protocol more as confirmatory of the general position, albeit expressed to be in the context of the UK and Poland. Therefore, one would expect that the added protection available in Article 1(2) ought to be available to others to argue as well, although I have not seen any sign in the case law so far of other member states taking that point.

Q44 Stephen Phillips: That does rather bring me on to my next question, which is this: what on earth do the words “in particular and for the avoidance of doubt” mean at the commencement of Article 1(2) if, indeed, it contains something substantive that is not to be found in Article 1(1) of the Protocol?

Martin Howe: The only way to square the circle is by looking back to the horizontal article, Article 52, paragraph five, of the Charter, which is the one relating to the distinction between principles and rights, and to regard Article 1 paragraph 2 of the Protocol as, in effect, classifying everything under Title IV of the Charter as falling in the heading of principles, rather than rights. If you do that, it does not mean they have no legal effect at all, because, as we discussed at our last session, they can be relied upon to both interpret legislative acts, and thereby indirectly affect the way the law applies on the ground as it were, or indeed potentially to invalidate them, even if they are not themselves great rights of their own.

I strongly suspect that this will be interpreted very narrowly, because it is a very odd instrument in the sense that, on the face of it, it creates special status for Poland and the United Kingdom. On the other hand, the European Court will be very anxious to interpret it in a way that results in no special status, because they are very keen on uniform application of European Law. I suspect the way they will do it is to treat it as declaratory of the underlying situation under the Charter and interpret it narrowly. The way you would interpret Article 1(2) narrowly is to focus on the word “creates”. Nothing in Title IV of the Charter creates justiciable rights. It does not follow that Title IV of the Charter does not alter the scope of rights that are present in other instruments.

David Anderson: I rather agree with that. For proponents of Article 1(2) and those who want to see it given some force, it is possibly troubling that the court, so far, does not appear to have had much regard to it—perhaps because it has not been pleaded before it. The *AMS* case was mentioned, which was decided a week ago today. Paragraph 45 sums up the effect of Article 27, which is one of the Title IV rights—I think the right of workers to be consulted—and the court said, “It is therefore clear from the wording of Article 27 of the Charter that for this Article to be fully effective, it must be given more specific expression in European Union or national law.” Perhaps if the United Kingdom had been there, they would have been pushing for wording more along the lines of, “It is clear from

the wording of Article 27 of the Charter, viewed in conjunction with Article 1(2) of the Protocol, that for this Article to be justiciable, it must be given specific expression in national law.” That opportunity was not taken.

Q45 Stephen Phillips: Can I move on to Article 2 of Protocol 30? What does that achieve for the United Kingdom and for Poland, if anything?

Professor Craig: Article two is interesting. It does reveal a genuine ambiguity in the Charter. When one looks at the particular articles in the Charter, the common phrase in relation to a number of the Charter articles in Title IV is “and under the conditions provided for by union law and national laws and practices”.

In a literal, textual sense, the phrase “and national laws and practices” could mean one of two things. It could either mean that the particular right in question must be recognised in the national law of France, Germany or Italy, i.e. whatever State is before the court at the time. That is one view and is probably the orthodox common view. It would also be textually possible, although I am not advocating this, to read the relevant phrase, “Provided for by union law and national laws and practices,” in a broad way, to mean the following: that provided the relevant right is there in 20 of the laws of the member states, it will suffice. The way I regard Article 2 of the Protocol is for abundance of caution. That is, it is recognising that might be a possible reading of this phrase in Title IV and it is saying the UK and Poland do not buy into that broader reading. Any time you mention national law and practice it has to be in the national law and practice of the UK and Poland.

Professor Douglas-Scott: When I first looked at Article 2 of the Protocol, I thought it might just be taken as confirming Article 52, paragraph 6, of the Charter, “Full account shall be taken of national laws and practices as specified in this Charter.” However, I will add something to what Professor Craig has just said, which is with those provisions in the Charter that refer to both national and Union law, there is the risk that Union law and national law may conflict. Then what should be done? In this case, Article 2 may be very useful, in that it would confirm the national law reading.

David Anderson: I agree with Professor Craig.

Martin Howe: To illustrate this point, let us take Article 27 of the Charter, which is the worker’s right to information and consultation. That states that the workers and their representatives are guaranteed information and consultation in good time, in the cases and under the conditions provided for by Union law and national law and practices. In a sense, the right is expressed as being not a general right, but only a right that arises to the extent that either Union or national law provides it. If Union law provides a right to information or consultation, it seems to me, under general principles, that overwrites national laws and you do not need a national law basis. Article 2 of the Protocol is irrelevant to that scenario. On the face of it, Article 2 says no more than—and it is implicit in the words of Article 27—“In the cases provided for by national laws and practice.” If there is no provision for information in a particular case under national law, then the Article 27 right is not envisaged. It might be, as Professor Craig said, to resolve an ambiguity that might

have arisen looking at a survey of national laws and practices across the European Union, rather than state by state.

Q46 Stephen Phillips: My final question on Protocol 30—I think I already know Mr Anderson’s answer—is how valuable do you assess Protocol 30 as being for the United Kingdom and Poland?

Martin Howe: I think it is of little or no value.

David Anderson: Article 1(2), in particular, is potentially valuable because it offers a way out of the morass of the right/principle distinction, which no one so far has made any sense of and gives at least a strong basis on which to argue that the solidarity rights do not apply in the United Kingdom unless given specific effect here.

Professor Craig: I agree with Mr Anderson.

Professor Douglas-Scott: I agree too.

Q47 Mr Clappison: Can I come in on another global question on the Charter of Fundamental Rights as a whole and ask the two practitioners what they think the impact of the Charter will be on human rights litigation in the United Kingdom in the years to come, say in five years’ time?

Martin Howe: By definition it is difficult to foresee, because the way these things work is that cases come along and new principles will be adopted. It can only be expansive, although perhaps in an unpredictable way. We slightly covered this at our last session, because there are instances where, from the point of view of the litigant, it is worthwhile to rely on arguments under the Charter, either in tandem with parallel arguments under the European Convention on Human Rights and the Human Rights Act, or as an alternative to them. The attraction of relying on them as an alternative is the different scope of the rights in the Charter and the greater effect, in that, if you can engage European Union law, you can effectively knock out primary acts of parliament, whereas under the Human Rights Act you cannot achieve that.

David Anderson: Probably the biggest effect I have noticed so far is in the application of the fair trial right to immigration cases, which are excluded from the scope of Article 6, which is limited to criminal and civil cases. Another possible application is in the area of criminal law, where there is a new principle in Article 49, since adopted by Strasbourg as well but not present in the original Article 7 of the European Convention, to the effect that if people are serving sentences for an offence and those sentences are subsequently reduced, they cannot serve any longer than the reduced sentence.

The third thing I would anticipate is that I have done a certain amount of litigation for little guys—small British companies or individuals who have fallen foul of the European institutions, which have behaved in perhaps an arbitrary or high-handed way—and generally this Charter is going to be useful for them. For example, rights like the right to

good administration are now given the same status as the treaty itself, which could be quite influential in the courts.

Professor Craig: I am not a practitioner but might I add one thought on this? There is an analogy here between the position in the UK pre the HRA and the position in the EU prior to the HRA. The courts had already developed the idea that fundamental rights were recognised and embedded in the common law, so they existed prior to the HRA. Nonetheless, when the HRA was enacted and the rights were then laid down definitively in an act of parliament, there was a transformation of judicial review in the United Kingdom. You have rights-based arguments pleaded in a great many cases in a way that you did not in the 1990s and 1980s.

My strong suspicion in the EU is that we are going to see the same thing. In the EU we had fundamental rights developed as general principles of law for many years, and they were used and pleaded. Nonetheless, in the post-Charter world, we are going to see very many more rights-based claims, both against EU institutions and member states when they act in the scope of EU law. In particular, because of the point that was mentioned by David Anderson, which is that in the post-Lisbon world, the area of freedom, security and justice has been rolled into the main treaty, many of the regulations and Directives passed in relation to immigration, asylum and that kind of thing—criminal procedure—are contentious. They naturally give rise to rights-based claims. The combination of concretising rights in the Charter on the one hand and then including new areas within the court's full jurisdiction is likely to lead to a very significant growth in rights-based claims.

Q48 Mr Clappison: Forgive me if you have already dealt with this and I have not taken it on board, which is quite possible, but what happens as far as the United Kingdom opt-out from parts of the area of freedom, security and justice is concerned? Would the Charter of Fundamental Rights apply notwithstanding that?

Professor Craig: No. That is a very good question. It is an extremely good question and my initial intuition is no, but actually I think that is too hasty. What we have in the opt-out from the AFSJ measures is the ability to opt out from selected AFSJ regulations directives if we so choose. However, the mere fact that we have or have not done that, but even assuming we have opted out of the relevant directive, does not in and of itself seem to me to lead logically to the conclusion that someone might not plead a charter right in relation to the UK. The difficulty that the claimant would have nonetheless, and I am genuinely thinking aloud here as this is quite a taxing question, is to show that there was some lock on to the UK from EU law in relation to the particular immigration concern of which they were complaining. If, in effect, the lock on to EU law was dependent upon the UK actually having signed up to a particular directive or regulation that they had not signed up to, I am straining to see how they would find the requisite lock on to EU law in order to use the Charter.

Q49 Chair: We have another witness coming and I am conscious of the fact that we need to move on to the final question. Mr Howe, you wanted to add something?

Martin Howe: Yes, there are two issues here. This is related to the block opt-out on Justice and Home Affairs measures. Under the current position, the United Kingdom does not accept the jurisdiction of the European Court over Justice and Home Affairs third pillar measures. There is no recourse to the European Court of Justice to those who would get to the Charter of Fundamental Rights in that context. If we block opt out and re-adhere to them, they will then become recourse. As a matter of international law, it is right that the EU Charter, on the international level, does apply to those measures, even though the European court jurisdiction does not. Therefore, if a relevant question arises, it would be for our courts, rather than the European court, to interpret how the Charter applies in that context.

Q50 Chair: I see Paul Craig nodding at that point, and I would like to move on because we have a very important question. We have given you notice of this because it is on parliamentary sovereignty and, in a broad sense, derives for example from Chapter 12 of Lord Bingham's book *The Rule of Law*. I will simply read out the question which you have in front of you and then I am going to ask each of you, if you would be kind enough, to give me your view.

In your view, would the following provision of primary legislation suffice to disapply the application of all EU fundamental rights in the UK, whether derived from general principles of EU law, legal bases within the EU Treaties, or the Charter? The following provision of primary legislation would be as follows:

"Notwithstanding any provision of the European Communities Act 1972, none of the rights, freedoms or principles referred to in Article 6(3) of the Treaty on European Union, or in the Charter of Fundamental Rights of the European Union, or deriving elsewhere from within the EU Treaties, or otherwise determined by the Court of Justice, shall form part of the law applicable in any part of the UK."

Professor Douglas-Scott: This, on the face of it, seems to be in direct conflict with EU law. However, if we take the view that EU law ultimately takes effect in the UK through the European Communities Act, what is presented is a conflict between two parliamentary statutes. Since the *Metric Martyrs* case, *Thoburn*, we have seen the growth of a doctrine of constitutional statutes, which suggest that an implied repeal would not be effective, but an expressed appeal might be so. So, a court that was seized with this provision and the European Communities Act would face a very, very difficult choice of which to follow.

Q51 Chair: I do not think Lord Bingham would have very much difficulty with it, would he?

Professor Douglas-Scott: I cannot speak for Lord Bingham. I also think: why would you want to do this in this case?

Chair: I cannot imagine.

Michael Connarty: I think we would, about 30 years ago, tell you you might want to do this.

Professor Douglas-Scott: To disapply those very constraints that operate on the European Union, which are ways of lessening the competences of the EU and keeping a break on it through the application of fundamental rights, strikes me as a rather curious thing to do.

Chair: I will pass on to the next professor at that point.

Professor Craig: This formulation is clearly a modification of the formulation that you had put forward earlier in the debates—

Chair: I would call it an improvement.

Professor Craig: I have two points. Firstly, we clearly place ourselves in straightforward violation of EU law by doing this. That is the first point. We, as the United Kingdom, cannot unilaterally alter EU law. We cannot unilaterally create a derogation for ourselves from any provision of EU law other than that which is already in the Lisbon Treaty. Insofar as this would be creating a unilateral derogation from the entire Charter and from Article 6(3) of the TEU, it would be in straightforward breach of EU law. The legal and political consequences of that are too complex to go into at the moment. That is from the perspective of the EU.

Q52 Chair: Does EU law not only apply to the United Kingdom because of the voluntary enactment of the European Communities Act 1972 by this parliament?

Professor Craig: Indeed it does. That is undoubtedly true from the perspective of UK constitutional law. From the perspective of UK constitutional law, the ECA of 1972 brought EU law, or EC law as it was then, into domestic law—absolutely. However, that does not lead to the proposition, logically, with respect, or in any other way, that allows us unilaterally to alter the terms of our membership of the EU. At present, the legal status quo is that we are bound by the Charter because we all agree that Protocol 30 of Article 1 is not a complete opt-out. We are also, at present, indisputably bound by Article 6(3) of the TEU, insofar as it talks about general principles of law, etc. Insofar as this provision—if enacted into a statute and recognised by our courts—were to alter that legal status quo from the perspective of UK constitutional law, it would still be indisputably in violation of the Treaty. We have no right, unilaterally, to alter the terms of our membership of that club. That is from the perspective of the EU.

Q53 Jacob Rees-Mogg: On that point, is that a general rule of international treaties—that one party to them cannot pull out of an individual aspect—or would it only apply to the European treaties?

Professor Craig: If a treaty that you have signed up to either, in general, has some right of unilateral variation or a particular state has created and read into the treaty when it signed up a particular right of derogation that would pertain to that particular state and no other state, then they can use that unilateral right. In the absence of such a provision, it is a general rule of treaty law that you cannot unilaterally vary or amend a treaty.

Q54 Jacob Rees-Mogg: Can you, therefore, either pull out entirely of a treaty or remain subject to all its requirements, unless the treaty says otherwise, and that would apply to any treaty and it is not a European issue?

Professor Craig: Yes, and indeed one of the interesting changes made by the Lisbon Treaty is that the Lisbon Treaty, by way of contrast to treaties that preceded it, does now have a set of provisions contained at the end of the Treaty of the European Union that deals specifically with the circumstances of pulling out completely. There were no detailed expressed provisions of that kind before. There is no doubt that one can, as it were, leave. Then there are steps that one has to go through that are laid down. Again, if one left, one is bound by the steps laid down in the Lisbon treaty for leaving. If you have a marriage breakup, as it were, these are the terms of the breakup.

David Anderson: My first comment on this that it seems to me wildly uncertain in its scope. Originally I read it as simply an attempt to opt out of the Charter and of the other fundamental rights that the court may from time to time declare. But I see, in fact, that it applies to all rights, freedoms or principles deriving from the EU treaties or otherwise determined by the Court of Justice. I wonder if, in fact, it is intended as an opt-out from the entirety of European law. Whatever its scope, whether broad or narrow, what would happen? I can only imagine the European Commission would commence urgent infringement proceedings against the United Kingdom, because whatever the position in domestic constitutional law, this would be a plain infringement of our treaty obligations.

Q55 Chair: Like the breach of the Stability and Growth Pact by Germany and France, for example, some 10 years ago?

David Anderson: Yes, but that was one thing. Who knows what the Commission will decide, but if ever one has seen a threat to the legal stability of the European Union, it would be this. Infringement proceedings would be begun; a judgment would, no doubt, be arrived at that we were in breach of the treaty; and then, thanks to the amendment inserted I think by Mrs Thatcher into the Maastricht Treaty, the fining provisions would come into play. If we failed to remedy our defect, we would be subjected to a daily penalty and/or a lump sum penalty, unless we have mended our ways.

Chair: I think this might be a political decision at that stage, but anyway.

David Anderson: Yes, indeed it would. But one can only imagine that, with such a major threat to the Union legal order, that would, at least, be a possible consequence—I would say a probable consequence.

I will just add one other point, which might be on a more cheerful note. Since Metric Martyrs was mentioned—the German Federal Constitutional Court was mentioned—the Committee may already be aware that a judgment was handed down this morning by the United Kingdom Supreme Court of the very greatest constitutional importance, strangely enough in the HS2 case. The case of the protestors was rejected. May I direct the Committee's attention to paragraphs 206 to 208 of the judgment? I will give you a flavour from 207: "It is, putting the point at its lowest, certainly arguable (and it is for United

Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.” In other words, there may be cases in which Europe tells us to do something and our courts, rather in the manner of the German Federal Constitutional Court, will stand up and say, “Sorry, there are either constitutional principles here set out in statute or principles acknowledged by the courts that make it impossible for us to do that.”

Martin Howe: First of all, let me deal with the legal question: “Would this be legally effective?” In my view, this is not a difficult question. Purely as a matter of United Kingdom constitutional law, we can alter the scope of the 1972 Act by an expressly worded amendment. That was really put beyond doubt by the enactment of Section 18—the so-called sovereignty clause—of the European Union Act of 2011.

Indeed, I must say that I did not pick up that judgment myself this morning, but David Anderson kindly showed it to me while we were sitting in the corridor. That, interestingly, reflects a judicial understanding at the highest level that the 1972 Act, even though it says in terms that it prevails over any other Act, may implicitly be limited by certain other fundamental constitutional provisions of United Kingdom law, in particular, in that context, in relation to Article 9 of the Bill of Rights 1689 on the non-review by the judiciary of the proceedings of Parliament. Even if European Union law would purport to require the courts to review the proceedings of Parliament, they are precluded by constitutional norms from doing so.

Therefore, it can be limited. There may then arise a disconformity between international obligations on the international plane and the internal law of the United Kingdom. If that arises, that is primarily a diplomatic and political matter, rather than, as it were, a legal matter. As politicians, you need to think about the consequences of that, but it can legally be done. Despite Mr Anderson saying that this sort of measure would immediately attract Commission direct action, Germany, of course, has, in a sense, had a similar provision under its own law, in that it adheres to the position of the primacy of its basic law and the rights enshrined in it over European Union law, and indeed other aspects of its constitution. So far, that has not attracted a Commission direct action for disconformity and nor is it likely to. That question depends on the context of such a provision, the way it is framed and the circumstances in which it is put forward.

Finally, there is, in a sense, a point regarding the way this is phrased, in that does it leave European Union actions in the United Kingdom free of any review from a fundamental rights perspective? If, for example, we were to couple it with a provision requiring review of such actions by reference to our own constitution—national constitutional rights standards—that would close that gap. Also, it would make it more analogous to the German scenario.

Q56 Michael Connarty: But that is my point. I was going to ask this, Martin, when you started to talk about Germany. This is not the same as the German constitutional challenges; this is a complete opt-out and abrogation of all rights given to our citizens by the EU on the basis that it will then free us up to have any draconian laws we wish with no outside body—maybe apart from an appeal to the United Nations—to stop it. It could be seen as a very

dangerous thing to say we opt out of all these agreements that have been signed up to since 1972. It is not the same as what the Germans are challenging when they go to their constitutional court about the application of EU regulations. It is oranges and apples you are comparing. You said change it into apples, so that it will be similar to Germany, but I do not think it would be. I do not think you will find these contents in the countries more generally. To plead Germany as a possible support case for this kind of unilateral action is not fundamentally sound.

Martin Howe: I agree with the point you put about the difference between this: that this is eliminating the rights, rather than having your own national set of rights that take primacy, which is the German scenario. I agree that that is different.

Chair: I think we are going to have to move on because Lord Goldsmith has been waiting for some time. By all means do ask another question if you would like to, but I do think that we need to move on.

Professor Craig: One very final observation on that is that, in terms of practical consequences, not only would you have the possibility of the Commission suit and daily damages, you would have the potential for multiple Francovich damages actions brought by private individuals.

Chair: Well, Mr Howe disagrees. We have to leave it at that. Thank you all very much indeed for coming, and we will be giving careful consideration to all your arguments as we proceed.

Examination of Witness

Witness: **Rt Hon the Lord Goldsmith PC QC**, gave evidence.

Q57 Chair: Lord Goldsmith, thank you very much for coming. I am sorry we have been rather delayed, partly because of the vote. I think the sooner we get on, the better. I have, first of all, an introductory question to put, apart from thanking you very much for coming today. In order to save time, can I ask you, first of all—to try to clear some of the undergrowth—whether you agree with the following five general propositions, which we believe summarise your written evidence, before we turn to any more detailed questions? Firstly, the Charter does not create new EU fundamental rights, but consolidates existing rights in a more visible form.

Lord Goldsmith: Yes.

Q58 Chair: Secondly, it distinguishes between rights, freedoms and principles, the last of which are not directly enforceable.

Lord Goldsmith: Save to the extent that they are then enacted into national law or possibly international law through specific EU legislation.

Q59 Chair: Thirdly, the horizontal articles clearly restrict the application of the Charter.

Lord Goldsmith: Amongst other things, yes.

Q60 Chair: Protocol 30 is not an opt-out protocol; it is an interpretive protocol, which underscores the limited application of the Charter and applies equally to all member states.

Lord Goldsmith: Yes, but let me just clarify that. It certainly was not intended as an opt-out but as a guarantee. It is a guarantee of what the Charter is supposed to do, but because it is legally binding, if the Charter were to be interpreted as going beyond what the Protocol envisages, then it would have legal effect.

Q61 Chair: Lastly, in the unlikely event that courts do interpret the Charter to create new or extend existing rights, the Protocol may provide the UK and Poland with additional safeguards.

Lord Goldsmith: I think that is what I have just said. That is a summary of the last point I was trying to make.

Q62 Mr Clappison: Lord Goldsmith, you represented the Government in the Convention that drew up the Charter. Can you explain how you were able to satisfy yourself that each of the articles reflected pre-existing rights, freedoms or principles that apply to all EU member states, so that nothing new was established by the Charter?

Lord Goldsmith: Well, essentially, because that is set out in the explanations. Can I just say something about the history of the explanations? The political framework in which this was happening was that there was a strong call for an EU-wide statement of fundamental rights for several reasons: one, some people wanted it just because they wanted to see a statement of fundamental rights at the European Union level. Other people believed it was important—and I shared this view—that the EU institutions, and member states therefore when they were implementing Union law, should be constrained in what they did by exactly the same sorts of fundamental principles regarding the protection of individuals that apply to national governments.

Now, the EU was not subject to the ECHR. Strictly speaking, it was not a party to the ECHR, although European jurisprudence had grown up the idea that the ECHR was a part of the general principles that apply to the European Union. Otherwise, the consequence was that individuals might find themselves subjected to abuses of power by Brussels, which would not be constrained in the same way that abuses of power by a national government would be by a domestic constitution that protected fundamental rights, or indeed by the ECHR.

Q63 Mr Clappison: Can I just ask about one point arising directly out of that? I understand that, but it is the case, is it not, that the Lisbon Treaty does contain provision that the European Union shall accede to the European Convention on Human Rights?

Lord Goldsmith: That is true. At the time the Charter was being drafted, there was some discussion about the possibility of meeting these objectives—or some of these objectives, because we could not have met all of them—by the EU acceding to the ECHR, which it could not do at the time because it did not have the power to do so. Eventually, the decision was made to do that as well, but, by that stage, the Charter had been drafted and it had been dealt with in the intergovernmental conference, so that really became an addition.

Of course, just to underline the point I made a moment ago, the rights we are talking about are not simply ECHR rights; they are fundamental rights that derive from other instruments. And the idea behind the explanation I am going to explain is that what we were faced with is that many people wanted a broadly stated Charter of Rights. I have described it occasionally as a sort of poetic statement, in the way that constitutions often are. Everyone is entitled to liberty, freedom, the pursuit of happiness and so forth.

From a legal point of view, it is very nice to have that, but it is very dangerous to have that. The risk is that you do not know what it is that you have created, because a court can interpret that in a particular way. My proposed solution to that was to have the Charter in two parts. Originally I called it part A and part B. Part A would have this nice statement of rights, as indeed the ECHR has itself, because it expresses things in a short, clear, poetic way, but there would be a part B that told you what the detail was. The part B became the explanations, which tied the individual statement of rights back to the underlying right that it was, as it were, reflecting—was making more visible. That was what the Cologne conclusion said: “Make these rights more visible.” That is part of the reason why it was not creating new rights. That is why the explanations were important.

The first time around, of course, the Charter was declared simply in a solemn but non-binding way, so it did not matter. The status of the explanations was a bit ambiguous. Then, when we came to possibly including them in the draft constitution—when that episode took place—more attention was paid to the explanations and a form of words was agreed that would give the explanations a force.

Then, in the Lisbon Treaty, they are given a force in Article 6, but they are given, in a sense, almost even more force in Protocol 30. Article 6 talks about due regard to the explanations, whereas the Lisbon Protocol—Protocol 30—talks about strict compliance with the explanations. That was what we wanted in order to underline the importance of the explanations—tying the rights back to the existing rights.

Q64 Mr Clappison: One issue—one of the rights—that has caught my eye purely because it is something that is subject to quite a lot of public interest at the moment is Article 34 on social security and social assistance. I do not know if you have got it there in front of you.

Lord Goldsmith: I have, yes.

Mr Clappison: Article 34(2) says: “Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.” Can you be sure that Article does not give rise to more rights than were in existence at the time the Charter was framed?

Lord Goldsmith: If you take into account the Protocol, it does become important at this stage. Whether it was necessary is another issue, and that is one of the reasons one starts to say things like “for the avoidance of doubt” because you think the Charter already does provide something. This appears in Title 4, and in Title 4 they are called solidarity rights, but they are really social and economic rights. That was one of the biggest issues for the United Kingdom. A lot of countries want to see social and economic rights made justiciable. It is a very live issue in terms of human rights. The social charter, of course, was very much in existence at the time.

The UK did not want to go further than we were already at that stage, and it was quite a neuralgic issue. This was the area particularly where principles came in. What the Protocol was doing, and I know you have it very clearly in mind from the questions I have heard already, was to say that in relation to Title 4, which is what Article 1(2) relates to—solidarity rights; the social and economic rights—it is made very clear in Protocol 30 that does not create justiciable rights applicable here or, indeed, in Poland, except to the extent that we have provided for those in our national law. If we provide, therefore, for social security rights in our national law, which may be as a result of implementation of Union law, then the Charter is saying, “Well, those rights are there.” However, insofar as we have not created them, they are not in existence other than by virtue of a general statement in the Charter. The Charter does not create any further rights.

Q65 Mr Thornton: Some of that bears directly on the next question. Some of the articles are not derived from pre-existing EU obligations. Let us take, for example, Article 3 (2)(b) which prohibits eugenic practices and is derived from the Rome Statute of the International Criminal Court. What consideration was given to the effect of placing non-EU obligations such as this in a Charter of EU fundamental rights?

Lord Goldsmith: I do recall the debate. Bearing in mind the genesis of the ECHR in the horrors of the Holocaust, there were certainly views that certain of the prohibitions that had been accepted as applicable in international law subsequently should be reflected. Therefore, some of these came in for that reason. But they are obligations that applied to the national states in any event. I think you could ask the question—I cannot remember whether we did ask the question and what answer we gave ourselves—as to whether or not those have, in any event, become principles of international law that are binding in customary international law and, therefore, would have applied to the EU as well. I hope that we would all take the view that, if the EU were suddenly to set up some laboratory for carrying out eugenic practices of that sort, we would want to know that there was something to stop them doing it.

Q66 Mr Thornton: These sort of non-EU ones were ones that would have been generally accepted anyway internationally, like eugenics law.

Lord Goldsmith: Yes, certainly. I am not sure how many there are. You have obviously found one.

Q67 Mr Thornton: That would be an exception rather than the rule?

Lord Goldsmith: Would you permit me just to look at the explanations for a moment to see what we actually said about that? That is the explanations as they were updated. It is quite interesting that the President of our Convention was President Roman Herzog, who had been President of the German Constitutional Court and also President of Germany. He—I hope he would not mind me saying so—for reasons which were understandable had some pretty strong views on some of these very basic issues, no doubt drawn a little bit from history. Forgive me. This is Article 2...

Mr Thornton: That was Article 3(2)(b).

Lord Goldsmith: I am so sorry—thank you. Yes. I see there is a reference in the explanations to the Convention on Human Rights and Biomedicine, which had been adopted by the Council of Europe and all EU members of the Council of Europe in Protocol ETS no. 168. There is also a reference to acts deemed to be international crimes in the statute of the International Criminal Court, to which all members of the EU had subscribed. In any event, it is regarded generally as setting out principles of customary international law, insofar as it sets out prohibitions at least.

Mr Thornton: I notice under Title 1 we also have prohibition of slavery and stuff like that.

Lord Goldsmith: That is ECHR.

Q68 Mr Thornton: Would you say these are mostly internationally accepted rights that would be generally accepted?

Lord Goldsmith: That is an ECHR prohibition. So, essentially, the idea was that the most important single body of law setting out what the prohibitions were that generally apply to member states and ought to apply to the EU institutions was the European Convention on Human Rights. There were other areas, too—some of them in EU law specifically and others in the general principles of international law. We, as a Convention, determined which of those we thought were appropriate to be described as visible. The point I am trying to emphasise is that none of them were rights that we created; they were all existing rights. There was some discussion about minting new rights, but we moved quite quickly to the position that we were not going to mint new rights; we were going to make use of the existing rights.

Q69 Michael Connarty: We have touched on the attitude of President Herzog and his attempt to make this something that could be transferred into the treaties. What difference would have to be made to that Charter to make it such a thing? I am conscious that the comparison was made by one of our previous witnesses with the German Constitutional Court, notwithstanding the suggestion that was made in our last question to them. How did he propose that the Charter could have been amended to make it a part of a binding treaty? I remember the debate at the time.

Lord Goldsmith: Historically, what happened was that I did not think at the time we were doing the negotiation we would end up saying it was legally binding. Indeed, we did not; eventually it was declared in a solemn way. But President Herzog said that we ought to draft it as if it was going to be legally binding, and that was a good legal principle to apply. Getting everyone to follow that principle was much more difficult. The political debate would sometimes be, “But this is a statement; this is a declaration. So what is the problem?” I think I irritated a lot of people by trying to focus in often on the detail of it.

I thought it was essential to have the horizontal articles and the explanations and to try to write the Charter as closely as possible to existing rights, and not to rewrite ECHR rights, even though it made modern sense. The risk is that if you give a lawyer the same right described in two different ways, they will find a difference. That is what I wanted to try to avoid.

When it came to making it legally binding, there were adjustments made to the horizontal articles and to the explanations. I do not think there were any changes made to the substantive articles themselves. I was not personally involved in that, but the horizontal articles and the explanations were changed in order to make it more fit to be part of a treaty. Originally it was going to be the constitution, and then it came into Lisbon.

Q70 Michael Connarty: You described it in an answer as a political statement. You said at the time it was a political statement. I recall interrogating Ministers; it was stated it was a political statement and that it was not, in fact, a binding new set of rules. I want to quote to you from the question I asked the Prime Minister at the time. It is in the evidence of 2 October 2007, when we had the European Minister at the time, the Member for East Renfrewshire, before us. I asked the Prime Minister about what the red lines would be, and the first one he said was: “First, we will not accept a treaty that allows the charter of fundamental rights to change UK law in any way.” Do you think that is still a tenable position given the recent comments in the UK courts?

Lord Goldsmith: I think it is. We had certain objectives, which were: no new rights and that we were not going to make social and economic rights justiciable except to the extent that we put them into law. That was the slightly complicated principles thing. I noticed some of the witnesses said that is a bit difficult to follow in the Charter. That is a fair criticism, which is why I think Article 1(2) of the Protocol gets that right. It really picks up on Title 4, which is about the socio-economic rights, which are the ones that really matter. We did a good job in relation to that and it is still the case. We did it against quite a lot of difficult opposition, because people wanted to go further and there was a lot of anxiety about it.

Q71 Michael Connarty: In the evidence we heard earlier, a word was used a few times, particularly by our academic colleagues. The word “implementing” was to be judged as “within the scope of”, which seemed to extend the power of the Charter—the rights within the Charter. Do you think that the use of “implementing” rather than “within the scope of” in Article 5(1) of the Charter reflects an intent to limit the scope of the ECJ’s rights of review, or is it to be read as consistent with the ECJ’s previous approach in reviewing EU measures on the basis of fundamental rights as a general principle of EU law?

Lord Goldsmith: The ECJ has now in *Fransson* dealt with that debate—whether or not the words “implementing Union law” should have a narrow or a broader meaning. They said that really it is the broader meaning. I have seen evidence from the academics, of whom at least one has said, “I think that is right.”

At the time of drafting, we were a little bit unsure in our own minds quite how that would work. We wanted it to be focussed definitely on Union law. I do not regard it as a problem that *Fransson* has given us somewhat the broad interpretation, because it is still a question of the application of EU law. I look at it from the point of view of the protection of people against abuse of power, if Brussels is imposing a tax, you want them to be bound by rules that are fundamental protections for all of us. Equally, if a member state is doing it, that is what you want as well. I am not sure, from that point of view, it matters enormously if it is the narrow or the broad interpretation. Either way, it is producing very important protections for the average individual.

That is why I said, if you will forgive me saying so, in my written evidence that it seems illogical and paradoxical that people who are obviously concerned about potential overreach of power by Brussels—by the European Union—are complaining about a document whose very purpose is to constrain what Brussels does, not to extend it. Everyone agrees that it does not extend what Brussels does. That has been said about six times in different instruments.

Could I just also say this? You prefaced your previous question by saying, “See what the UK courts have said.” If, with respect, that was a reference to Mr Justice Mostyn’s decision, with all respect to him, he got that wrong. I have explained why I say he got that wrong in my written evidence, but others have said that as well. I think even where he quotes from the *NS* case, he quotes paragraph 120, whereas the paragraph that matters is paragraph 119, which has the ECJ saying that it does not create new rights. As to the effect of Protocol 30, the Charter does have to be interpreted in accordance with the explanation. If anything, that case does not suddenly show that this is all terrible; on the contrary, it is the ECJ saying that the Protocol does what it says on the tin.

Q72 Jacob Rees-Mogg: Following on from that and your view that it does not extend the competence of the EU, it does include many rights that touch on areas beyond the EU’s competence. What are the risks that this will inform EU policies or court decisions and thereby as a side-wind extend the EU’s competence?

Lord Goldsmith: The EU's competence ultimately can only be extended through the instrumentality of the member states, as I understand it. Obviously, the EU has been a changing institution and, as a result, its powers have changed. Each time that there is a new treaty or an intergovernmental conference, the likelihood is that people will be arguing for a change and a change in competences. Sometimes people may think it is a very good thing that the EU is taking on certain additional competences in relation to fighting terrorism, for example; others may take a different view. I do not think the Charter does it; it is the political dynamics of Europe that change the competences of the EU.

Q73 Jacob Rees-Mogg: Do you think that court decisions under the Charter could extend the competence? You are confident that is the case.

Lord Goldsmith: It says very clearly in the horizontal articles that it does not. That was not a matter of controversy so far as the Convention members were concerned.

Q74 Jacob Rees-Mogg: Could I go back to something Mr Connarty was asking you about regarding the Charter being drafted as a political declaration? How differently would you have approached the negotiations in the Convention if the intention had been for the Charter to be a legally binding one from the outset?

Lord Goldsmith: I suppose I would have said, "If you are going to do this, you need to draft a longer document." In a sense, that is what I did. People will not accept long documents for bills of rights. What I was doing, therefore, was to say, "Let's have a general statement of right, but let's have a part B that is all the detail." That is what then became the explanations. I might have found it easier to argue some of these points if everyone had known that it was going to be legally binding, but I am not sure it would actually, at the end of the day, have made much difference.

Q75 Jacob Rees-Mogg: Following on from that, you wrote for the *Common Market Law Review* in 2001, which you sent us with your evidence, where you said:

"My own view is that the political declaration route was the right approach. There are two reasons for that. First, it is easier in a political declaration to show a clear statement of values which people can understand without the qualifications and exceptions necessary in a written law. The second reason is that in the end I believe the Charter lacks the precision of language necessary to allow it legal force. President Herzog wanted us to draft so that the Charter could be integrated into the Treaties if that was subsequently decided. In this respect I believe we have not succeeded. Even with the helpful commentary produced by the Presidium, the Charter will lack the precision necessary for a law. So whilst it should be acceptable and valuable as a political statement, my own view is that this text is not suitable for incorporation into the Treaties whether directly or by cross-reference."

Do you tell us now that the helpful commentary you referred to became the explanations for the Charter?

Lord Goldsmith: It did, but it was amended, and quite a lot of work was done negotiating. One of the difficulties in getting everyone to sign up to the explanations was that the secretariat for the Convention did not want to ask—I may make a revelation here—member states to agree the explanations, no doubt because they thought it would be a very complicated process. It was complicated enough as it was. It was not a very popular thing that I had done, to create this second part. We did not have that degree of consensus on it.

The status of the explanations has changed from the commentary that was specifically described as non-binding to the position we now have in Article 6 following Lisbon and in Protocol 30. The commentary has been given a very specific legal status, which is even stronger so far as the UK is concerned because of Protocol 30. But it is still a strong legal status as far as other member states are concerned. That was a very important part of the negotiations—the difficult negotiations—that took place at the time of the negotiation on the draft constitution.

Q76 Jacob Rees-Mogg: Can I just clarify? Do you think that the explanations have the same status as the Charter legally?

Lord Goldsmith: No, the explanations are a tool for the interpretation of the Charter. The dispositive provisions are in the Charter, if you will. The explanations identify what those are, but they are now rather more than just a sort of commentary. The wording of the preamble to Protocol 30 is that “Article 6 requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that Article”. I would say, “Well, that’s what Article 6 says,” though it does not actually use the word “strictly”. There is a bit more there. However, it gives them a much stronger legal effect than they had at the time of the Nice Declaration, because then it would have been said, “Oh, they’re just a commentary that has been published.”

Q77 Jacob Rees-Mogg: To what extent can your concerns in 2001 about the lack of precision necessary for the Charter to become law have been overcome by making the explanations a binding interpretive tool and amending the horizontal articles? Do you now move away from what you said in 2001?

Lord Goldsmith: You judge a situation, as a lawyer says, where you are. This, broadly speaking, has worked. I cannot rule out that there will be some area that gives rise to some interpretation I was not anticipating, but in relation to the big issues, for example, whether the rights corresponding to the ECHR are to be interpreted that same way as they would be by a court in Strasbourg and, therefore, now by our courts under the Human Rights Act, I believe that has succeeded.

As I mentioned—I may not express it terribly well—in my written evidence, it is interesting to note that the point that gave rise to the reference in the *NS* case, which included the question “Does the Charter do something differently?” was the fact that, at the time the case was referred by the UK court, the European court in Strasbourg had made an interpretation in relation to rights of extradition. Some people thought it was too narrow and therefore wondered if the Charter could give a more generous interpretation. This is explained by the Advocate General in her opinion. What subsequently happened was that the European Court of Human Rights I would say amended—they may say modified or developed—their understanding of what that right actually meant, so that you ended up with a situation where the reference would not have been necessary because nobody would have said that the Charter says anything different from the ECHR on that particular point.

Q78 Chris Kelly: There is confusion among academics and practitioners alike about the meaning of Article 52 subsection 5. Would you give us your explanation of its meaning, please?

Lord Goldsmith: I underline, of course, that I am not speaking for the Government, in which I no longer have any role. They may have different views about whatever this means. What this was intended to do was to say there are, in this Charter, things that are not justiciable rights so let us call them principles, and those inform the way that the EU may legislate. What the paragraph is trying to do is to say that they are not justiciable as they stand, but they may be implemented by legislative and executive acts. When it comes to interpreting the acts that purport to implement them, then you can have a look at the general principles.

The end result is that it is, in fact, expressed more happily in the Protocol by Article 1(2) simply saying that they are only justiciable rights to the extent that they are created in national law. What we added in 52(5) was these words: “These shall be judicially cognisable only in the interpretation of such acts and in ruling on their legality.” That means you can only have regard to the Charter in this area—the area of principles—when you are looking to see what the legislative act purporting to make that principle into binding law is, when you are interpreting that, or when you are ruling on its legality.

In other words, if you have a principle in relation to minimum wage, that does not mean there is a minimum wage. But once states implement a minimum wage or if the EU were to implement a minimum wage, when it comes to interpreting what the legislation means when it says “minimum wage”, you can look at the principles in the provisions of the Charter to understand it, to interpret it and also to see whether it is lawful. That was the intention. Protocol Article 1(2) actually has a narrower effect as far as the UK is concerned because that is saying “in that field”. If it is not implemented in the UK, it is not justiciable.

Q79 Chair: What was the Government’s policy on the EU accession to the European Convention on Human Rights?

Lord Goldsmith: I cannot fully recall. We certainly had some discussion of it at the time that we were doing the Charter. The Government had already signed up in Cologne to the setting up of the body, as it was then called—it then became a Convention—to set out these rights more visibly. Accession to the ECHR would not have solved the whole of the problem, because it would not have dealt with any rights that did not derive from the ECHR. As you rightly pointed out, there are quite a number that do not derive from the ECHR. It is one of the errors that Mr Justice Mostyn made in thinking that the Charter was only dealing with the ECHR. It is not; that is very clear.

I cannot recall precisely what the policy was, but it would not have been an adequate solution to what was being done. You might have argued, “Well, if you’ve got the ECHR rights in by an accession, you don’t need them in the Charter.” But it would have been a very odd Charter in those circumstances. Evidence was taken on this, I recall, by the House of Lords scrutiny committee. I know that they thought accession was one of things that should happen and ultimately it did. The short answer is I cannot recall precisely what the policy was, but it would not have been an adequate solution to the issue we were faced with.

Q80 Chair: On that point, did you personally think it was necessary for the EU to accede to the European Convention on Human Rights?

Lord Goldsmith: No, I did not. Indeed, I could see a problem with that because then you do end up with two courts interpreting the same instruments, and that gives rise to potential difference. We have seen that. There have been one or two cases where the ECJ and the ECHR have reached different views. I was not a particular proponent of it and I know we did quite a lot of work on what the implications would be. I apologise that I cannot recall precise details.

Q81 Chair: In relation to the Charter, the whole question turns ultimately on the fact or the law that, because it is within the framework of the Luxembourg court, for practical purposes it has implications in relation to sovereignty, which we were discussing with the professors and practitioners before you came in. Therefore, it does have a relevance to the question of how you end up interpreting the impact of that Charter through Section 3 of the European Communities Act if the court—the European court—has made a decision and we then end up finding that we have got a position in which the European court has said one thing and an act of parliament has said another.

Lord Goldsmith: That, of course, happens, and I hope you are not going to ask me about prisoner voting rights, because that is obviously an area where that particular conflict arises. I thought, if I may say so, that David Anderson put it well in his written evidence, or perhaps it was his oral evidence. I noted that he said that one really ought to see that the Charter is not some sinister inroad into our sovereignty but is there particularly to provide protection against abuses by the European institutions against us. That is how I see it. I see it as a good thing. I am glad that we did it. I regret that Mr Justice Mostyn has raised a number of hares—I do not blame him; it is a difficult area—by his misapplication.

Q82 Chair: No one is in any serious doubt that there are constitutional implications if you end up in a position in which you have something adjudicated by the European Court of Justice in conflict with an act of parliament. That is an important question, is it not?

Lord Goldsmith: With respect, that does happen. It happens with many international obligations that we assume. It may turn out that the international obligations that we have assumed are in conflict with existing national laws. So far as the European Convention is concerned, the Human Rights Act produced quite an elegant solution to that. But the fact remains that, if there is a British act of parliament that says A and the Strasbourg court—never mind Luxembourg—says, “No, it’s not A; it’s B,” we are in breach of our international obligation. Prisoner voting rights demonstrates what the dynamics are about how those two positions get reconciled, if they do.

Q83 Chair: Moving to Article 52(3) of the Charter, can you explain what intention lies behind that Article?

Lord Goldsmith: The horizontal articles changed between the time that we drafted the Charter and when it was attached to the draft constitution. I think that is how it came about. In any event, I can tell you that the intention was to deal with an issue that some of us thought was significant: not to create a disconnect between what the ECHR required and what the Charter might be saying was applicable to the EU simply—“simply” is the wrong word because it is an important point—for the reason that I gave earlier. You do not want to have the same right expressed differently in two instruments because that only encourages lawyers to say these differences are deliberate. For example, let us consider Article 8 of the European Convention on Human Rights, which talks about privacy of correspondence. At the time, in 1950, it made sense. Today, of course, correspondence, if you interpreted that as meaning letters, would be wholly inadequate, so that was changed to “communications”. But that is actually what the European court in Strasbourg would say it means now in any event. The point was to try to tie the statement of the corresponding ECHR right back to the ECHR and its jurisprudence.

Q84 Chair: Last year, in December 2013, the European Commission proposed a draft directive on the presumption of innocence to apply to criminal offences in the member states; in fact, we looked at it today in our earlier proceedings. The standards that it sets are higher than those in the European Convention on Human Rights, with the effect that there will be two separate standards: one under the EU and the other under the ECHR law. Was that the intention behind the last sentence of Article 52(3) of the Charter and do you think this is a positive development?

Lord Goldsmith: That last sentence was obviously deliberate, which is to say that the Charter established a floor, not a ceiling. It is true, with respect, so far as the ECHR is concerned. I believe that this country provides in a number of areas that are covered by the ECHR more extensive protections than the ECHR provides. I regard that as a good

thing. But there is nothing inconsistent in saying, “You must be bound by these provisions but you can have more extensive protections if you want.”

Q85 Michael Connarty: I have been puzzling over this. You described the Protocol as giving Poland and the UK additional safeguards. In our original comment in the IGC report that we did, we said specifically: “If, as the Foreign Secretary assured us, every part of the Charter is sourced back to existing rights ‘with no right for the ECJ or anyone to extend their reach’ it is hard to see why the Protocol is necessary,” etc. You said it gave us an additional safeguard. Can you give me an instance where the Charter has been used in any other country other than Poland and the UK to extend the rights? In other words, has something happened outside? Was it really necessary for Poland or the UK? Was it not just more about comfort—for the political comfort—rather than safeguards?

Lord Goldsmith: That is absolutely fair. The Protocol came as quite a late development. I am not sure I am at liberty to disclose how it came about, but it came on the cusp of the move from one Prime Minister to another, as it happened. If I may direct your attention—I know you have got it. I have looked at it. I have tried to describe the Protocol in the address I gave to the British Institute of International and Comparative Law: “In brief, the Charter Protocol is not an opt-out but a guarantee. An explicit confirmation that in relation to the UK and UK law, the limitations and constraints on what it is and what it will do will be strictly observed.” Was it necessary? No, it was not necessary, so long as the Charter was interpreted in the right way. I understand people want additional protections—bootstraps—to make sure there are safeguards. That is the flavour.

Q86 Michael Connarty: That is what my analysis was coming to: that it was more of a comfort than a safeguard and we have not, in any way, been advantaged or disadvantaged against other countries by not having it.

Lord Goldsmith: I do agree with that. But subject to this limitation, if—this is what I was carrying on to say in the address—somebody were to say, “Well, that’s what you think the Charter means. Actually, you’re wrong; it goes further,” then the Protocol is legally binding, so it would pull that back.

Q87 Michael Connarty: Just to have a clear record, can you list any concessions the UK has sought or achieved in return for agreeing that the Charter would become legally binding?

Lord Goldsmith: If I may, that is a question probably better addressed—if you can—to the Government, I suppose. My involvement was that I was the UK representative negotiating the Charter. Subsequently, I became Attorney General. As Attorney General, I gave advice on EU law, of course, but I was not responsible for negotiating. I did not negotiate in 2004.

Michael Connarty: The political deal.

Lord Goldsmith: I certainly did not negotiate that. In 2004, I was not the person who negotiated the amendments to the explanations or the way it was going to be incorporated into the Treaty. I did have an involvement in the Protocol.

Q88 Chair: I was going to ask that question myself. It bears directly on what you have just said because we are interested to know who drafted Protocol 30. Was it agreed by the Government as a matter of policy?

Lord Goldsmith: Who drafted it? It was drafted by a combination of people within the UK Government.

Q89 Chair: We had Mr Thomas, for example—Michael Connarty will remember—who gave evidence with David Miliband, or was it with Jim Murphy? The moment we got on to this subject, immediately the ball was passed to Mr Thomas, and we then had about 15 minutes with the Legal Adviser in the Foreign Office. Basically, we are just trying to get a sense of who drafted it. Was it a collective job and if it was, did it ultimately, for example, go in front of the legislation committee? Was it then endorsed as a matter of Government policy that this was the way to go forward?

Lord Goldsmith: I cannot tell you how it was endorsed. I told you that I personally had some involvement at a late stage in the drafting.

Q90 Chair: We had rather an interesting moment of what I would not call truth, but it was certainly a moment of curiosity. Just as Prime Minister Blair was about to leave office, in his last Prime Minister's Questions he was asked the question about the Charter amongst other things, and he specifically stated that, on the Charter, we got an opt-out. It was quite clear. It is there in the transcript. He resigned two days later. I do not think it was to do with that. Perhaps you can give the exact quote, Jacob.

Jacob Rees-Mogg: He says, "It is absolutely clear that we have an opt-out from both the charter and judicial and home affairs. Those were the reasons why people like the right honourable gentleman were saying that they wanted a referendum." So, because we had an opt-out from the Charter, we did not need a referendum. It seems from your evidence that you are saying that Mr Blair's view of the Charter is just as good as that of Mr Justice Mostyn's.

Lord Goldsmith: No, I am obviously not saying that. The way that Mr Blair described it is for him to decide. I would not have described it in those terms. I did not describe it in those terms when I did come to describe it; I described it in different terms. I can understand how in a common-sense, broad way one could say, "Well, it's an opt-out," because it means that we are protected and it cannot go any further than we are already bound by. I can understand that entirely.

Q91 Jacob Rees-Mogg: I think that is magnificently loyal after some years of leaving office, when all your evidence denies it is an opt-out.

Lord Goldsmith: You may think that. Genuinely, these are very difficult areas. Your questions are very pointed, and absolutely rightly so. These are very tricky areas, and sometimes I have seen politicians from both parties using language that is legally, in my view, inaccurate, but I understand entirely why that is done. On the basic point, I do not regard it as an opt-out, and I have said that.

Chair: You may be relieved to hear this is the last question. Michael Connarty is going to be the one to ask it.

Q92 Michael Connarty: In your speech you referred to the British Institute of International and Comparative Law in 2008 you said, “Were the courts to disregard the clear provisions in the horizontal articles and explanations ... In such remote circumstances the Protocol would indeed become an opt-out.” Given recent statements and judgments, do you still believe these circumstances to be remote and in what way would the Protocol become more than a safeguard and an actual opt-out?

Lord Goldsmith: I am having some difficulty. I am not sure I know what the recent circumstances are. If the recent circumstances are Mr Justice Mostyn’s judgment or the case that he relies on, *NS*, as I said, in paragraph 13 of his judgment he quotes paragraph 120 of the European Court of Justice’s judgment in *NS*. However, if I can draw attention to paragraph 119, which he does not quote, that deals specifically with the effect of the Protocol and says: “According to the third recital in the preamble to Protocol (No 30) Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article.” In addition, according to the sixth recital in the preamble the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles. That is the ECJ speaking. That essentially is the point I have been making. The European Court of Justice has accepted that is the effect. To some extent, they are relying on the Protocol to say that.

Michael Connarty: Given what we have observed in this Committee—I have been on it for 15 years and some Members have been on it for longer—regarding the competence creep of the European Commission, we had a few examples we gave to our witnesses in the session last Tuesday or Monday. We gave them some examples where it seemed that competence creep was pushing laws that were to do with rights from the Commission’s directives—pushing in that direction. The question is if they seem to be disregarding the provision of the horizontal articles and explanations, would the Protocol really become an opt-out? Would it be strong enough?

Lord Goldsmith: Maybe I was using language so as to—

Michael Connarty: I am not a lawyer I must add. I am a politician and an economist.

Lord Goldsmith: At the time I gave this address, which was early in 2008, I had relatively recently stood down from Government. With that address, I was trying to explain what had taken place. There was a debate going on as to whether this was an opt-out and I thought it was important to say that it is not an opt-out but, nonetheless, to acknowledge that the Protocol could have legal effect. In a sense, if properly interpreted that the Charter meant x in relation to other member states, then so far as the UK is concerned, because of the Protocol, it would mean x minus. You can describe that as an opt-out at least from that piece—the difference between x and x minus.

Q93 Chair: I had thought we had finished, but there is just one last point of clarity. To be clear, does Protocol 30 apply as much to other member states as it does to the UK and Poland? In other words, it does not distinguish between the application of the Protocol for the UK and for Poland.

Lord Goldsmith: My understanding is that it applies only to Poland and the UK. It is not common, but there are protocols that do apply from time to time simply to particular members states. This only applies to Poland and the United Kingdom. If, of course—sorry to complicate it—it does no more than the Charter does anyway, those aspects of the Charter will apply to all other member states as well. The Government may take a different view, but my view is that Protocol 30 just applies to the UK and Poland.

Chair: Thank you very much, Lord Goldsmith, for coming along, and that brings this particular session to an end. Thank you very much.