



European Scrutiny Committee

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

29 January 2014

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Members present: Mr William Cash (Chair); Andrew Bingham; Nia Griffith; Chris Kelly; Stephen Phillips; Jacob Rees-Mogg; Henry Smith.

Questions 94-131

Witnesses: **Rt Hon Chris Grayling MP**, Secretary of State for Justice, **Tim Jewell**, Deputy Director, Legal Directorate, Ministry of Justice, and **Abigail Culank**, Head of European Union Human Rights Policy, Ministry of Justice, gave evidence.

Q94 Chair: Welcome, Secretary of State, Lord Chancellor, and your advisers. I will start by making a statement as an introduction.

This inquiry has been triggered by recent comments of a High Court Judge in a case in the Administrative Court, expressing surprise that the UK did not have an opt-out from the Charter. Secretary of State, you commented on the judgment in an article in the *Evening Standard* the following week, saying the Charter “should only apply when European law applies within the UK. But last week’s ruling suggests the possibility of something more than that. I am determined that we challenge this idea and will seek to do so in our courts as soon as possible.”

The issue was subsequently debated in the Commons on 19 November 2013 in response to my urgent question. When asked whether the Government was “advocating a policy of doing nothing about the Charter”, you informed the House, “I am absolutely not suggesting that we do nothing, and that is why we need to get this point clarified in law at the earliest opportunity.” You went on to say that you were “absolutely clear that the Charter should not apply in UK law, and we would take serious action if there were any suggestion that it could do.”

It struck the Committee at the time of the debate that there was confusion on all sides of the House about the national impact of the Charter. Accordingly, in the previous sessions of this inquiry, where we have had many experts from the law and from other fields, we have examined the extent to which the Charter applies in the UK in the light of Protocol 30 and the case law of both the European Court of Justice and the national courts. In this, our final session, we shall concentrate firstly on the Government’s view on the extent of the

application of the Charter in the UK in the light of Protocol 30 and the relevant case law, then its intentions to find a suitable case to clarify the Charter's application to the UK and what you intend to do in practice.

We will now turn to the Government's views on the Charter and Protocol 30. I will ask Stephen Phillips if he will kick off.

Q95 Stephen Phillips: Secretary of State, good afternoon. What the Committee wanted to look at first, therefore, is the Government's understanding of the application of the Charter in the UK and how it applies. I would like to explore with you some of the conclusions that might be drawn from some of the evidence that this inquiry has heard so far and ask for your comments on them and whether or not you agree with each of the conclusions that we might come to. First, we have heard evidence that could lead to the conclusion that the Charter does not create new EU fundamental rights, but consolidates existing EU and non-EU obligations in a more prominent form. To what extent do you agree with that? Do you have any comment on it?

Chris Grayling: Legally, that is the current position. The role of the Charter in EU law is that it draws together rights that existed and were inserted into different parts of EU law over a period of decades. It puts them into one single place. It sets them out in a form that is designed to be a reference point for European law. It has to be seen as operating closely in conjunction with the Lisbon Treaty. The position around the Charter is that it is designed to apply purely to European law and European law matters; it is not designed to create new rights or to allow the creation of new rights in European law. Strictly speaking, that legal position is absolutely right.

Of course, as I will say over the course of this evidence, one of the concerns will always be that you can read quite a lot of things into both the Charter and the Lisbon Treaty, and you can go to quite a lot of places, legally, within the framework that both of them create. For example, if you look at the case that the Chair made reference to, the legal position as far as I, my Department and the Government are concerned is first that the Charter does not create new rights in UK law. It does not create new rights; it does not apply today in UK law; and the protocol, which was sold to us by the last Government as an opt-out, is not an opt-out at all. The legal position is as you have described it.

Q96 Stephen Phillips: I want to press you on the second part of that question. Do you think the rights that have been consolidated in the Charter have achieved greater prominence by virtue of the Charter's existence? Is that the Government's understanding?

Chris Grayling: My view is that would be the case. My view is that it has created a reference point for those whose vision is around the creation of a much more unified European state. For example, Commissioner Reding, the Vice-President of the Commission, recently argued that the Charter should apply to national law as well as European law. It is clearly seen by some as a reference point for the European Union and a vehicle for greater union in the future.

Q97 Stephen Phillips: Some of the other evidence we have heard suggests that the increased prominence that you agree the Charter has in terms of the rights that it contains, might lead to those rights being invoked more frequently before national courts and the ECJ. Is that also something which you agree with and/or fear?

Chris Grayling: It has not happened to date, with the possible exception of the case involving Sweden that we will probably return to during the course of the discussion of the case involving Sweden. As we sit here today, I have no evidence to suggest that the Charter is playing a more substantive role in legal decision-making in this country than would have been expected. The judge in the case that prompted this Inquiry got it wrong—and I will talk a bit more about that—but that is because he misunderstood the protocol.

It is certainly the case that the Charter is a factor in decision-making in UK courts, but only when European law matters are being decided. That said, it is my concern that in the Charter in the form that it is and in the way it sits alongside the Lisbon Treaty, I can see ways in which it could become a vehicle for European law mission creep in a way we would not wish to happen.

Q98 Stephen Phillips: In a sense, that is consistent with much of the evidence we have also heard. From that, does it follow, in your view, that if there is an increase in Charter-based rights litigation, that would also lead to existing EU competencies being interpreted more widely than has hitherto been the position by both national courts and the European Court of Justice?

Chris Grayling: That is a danger. We have certainly seen it in areas in relation to the Lisbon Treaty. It is not clear to me why that should be impossible in relation to the Charter as well. In particular, the issue of free movement—and the way in which the ECJ tends to make free movement the paramount legal reference point—does create a genuine issue around where and how European law is to be applied.

Let me give you a practical example of how that has worked to date. In the field of social security, the Lisbon Treaty was very clear that social security is a national competence. However, over the last few years, increasingly, the European Union and the European Commission have been playing a more and more active role in the field of social security. The legal justification for doing so has been that freedom of movement trumps all, effectively.

We have found ourselves in what I would regard as the legally absurd position where we have ECJ rulings saying to us that we must provide welfare support to UK citizens who have moved elsewhere in the European Union, but we must also provide welfare support to citizens of other European Union member states who move to the UK. Logically, both of those cannot be right, but that is the position that has come out of the ECJ. The implication of that, quite clearly, is that, where freedom of movement is involved, the ECJ will tend to say that freedom of movement comes first.

We have an interesting case, literally from today. The Commission—Commissioner Reding again—has put forward a formal request to five member states,

including the United Kingdom, that we should look again at the rules that limit the right of access to vote in national elections after people have spent a certain amount of time outside of the country. The rules are different across those five member states. In some cases, you have to be resident just before the election; in the case of the UK, if you disappear for 15 years, after those 15 years you lose the right to carry on voting.

Now, it is a theoretical question at this moment in time, but if that issue were to be raised in the ECJ, which takes primacy? There is nothing in the Charter that requires the UK Government to provide a right to vote in national elections at all. The Charter simply refers to European elections and local elections. National elections are quite clearly left as a competence of the member states. However, if that particular situation were to be challenged in the context of today's announcement under freedom of movement rules, I do not know what would happen. Certainly, the Court has tended in the past to say that freedom of movement is more important than other things.

That is an area where you could see the freedom of movement rights enshrined in the Charter and in the Lisbon Treaty being used to argue for a broadening of EU competences. I am not saying it would happen, but it is an area where past experience in the field of social security suggests that at the very least there is a risk.

Q99 Stephen Phillips: With that behind us, can I turn to Protocol 30? The unanimous evidence of the experts from whom we have heard is that Protocol 30 is not an opt-out protocol, which is indeed the view that this Committee reached in a previous report in a previous Parliament. I would just ask, first: is that also your view?

Chris Grayling: That is my view. It is the position of my legal advisers. It is very clearly not an opt-out. It was sold to us as an opt-out, and politicians in this place will remember a number of comments made by members of the previous administration saying that we had an opt-out to the Charter. We do not. The protocol simply says, "This only applies to EU law." It quite clearly does not give us a right to opt-out of the Charter.

Q100 Stephen Phillips: The evidence that we have had might lead to the conclusion that it is purely an interpretative protocol, which underscores the limited application of the Charter, but is of very little if any value to the UK or Poland. From what you have said, is that something you would agree with?

Chris Grayling: I would agree with it. Tim, I do not know whether there is anything you want to say about that.

Tim Jewell: Perhaps the only gloss I would add is that, of course, as the Lord Chancellor rightly said, it does not operate as an opt-out. It is a clarification, but that clarification serves for all purposes—and not just ours.

Chris Grayling: It does not really do anything except to say, "This is what it does."

Q101 Stephen Phillips: It says what it says, but, for substantive purposes, for the UK and Poland it does absolutely nothing. Is that right?

Chris Grayling: It is probably best described as, frankly, no different to the explanatory notes that accompany a Bill, saying, “This is what the Bill does.” That is fair.

Q102 Chair: I have one last point on that. On 25 June 2007, in the last Prime Minister’s questions, when Tony Blair as then Prime Minister responded to some questions on matters relating to this, he actually specifically did state that it was an opt-out, just for the record, because that is something that is very clearly in disagreement with the statements that have been made in all of the evidence we have and, of course, your own and your legal advisers’ assessment as well.

Chris Grayling: The legal advice I have had, Chair, is that anybody who stood up in the House of Commons and said that the protocol was an opt-out would be giving inaccurate and false evidence to the House.

Q103 Henry Smith: If I may, I would like to ask an initial question and then a follow-on question. Lord Chancellor, welcome. You mentioned the ECJ *Franzen* decision. That strikes this Committee as particularly important, because of the expression of Article 51(1) of the Charter, which states to member states that the gateway for application in member states is “only when they are implementing Union law”. To what extent does the Government support the Court’s interpretation of Article 51(1) in *Franzen*, given that it did not intervene?

Chris Grayling: We think it is a legally accurate ruling. Tim is the legal expert, but we did not believe this was a case that was legally unfounded. However, it highlights the problem. I am on the record as saying I do not believe this country should have signed up to either the Charter or to the Lisbon Treaty. The problem with the two is that they contain something for everyone. The Lisbon Treaty contains so much that, actually, if you are pushing an integrationist agenda, there are different ways of legally delivering your outcomes.

The reality is that we would believe that matters of tax enforcement should be a matter for national authorities. Certainly, neither the Government nor, indeed, either of the parties within it have ever seriously argued that we should have tax enforcement moved to a European level. Technically, however, because VAT is something that is covered by EU directives and EU rules, because it was the founding tax underpinning of the EU, this is somewhere where, legally, the truth is the EU does actually have competence. When you have a treaty that is so wide-ranging, it gives the Commission—as we have discovered over social security—very broad-ranging powers to assert competence, even though it might not actually have been the intention of the member states that originally shaped the European Union that that should have been the case.

Tim Jewell: I wonder if I might add a small gloss, which is simply to say that, of course, what the case very plainly confirms is that the Charter only applies within the scope of EU law, as the Lord Chancellor has said. It is important, of course, not to take one case in isolation. As Mr Martin Howe said in his evidence, litigation strategy is challenging because one can only fight the cases that emerge. In that regard, it is important to observe that there are, of course, lots of other cases where the European Court of Justice and, in fact, the domestic courts, have been very clear about what the limits are of the scope of EU

law. For example, there are any number of cases where it has been sought to run Charter points and the courts have not entertained them, because the issues to which they relate are outside EU law.

Q104 Henry Smith: If I may follow on, Chair, from paragraph 46 of the *NS* judgment, which, of course, predates *Franzén*, it appears that the Government accepted that the test to be applied was “within the scope of EU law”, rather than a narrower interpretation of “implementing EU law”. Are you able to explain why the Government took this approach?

Chris Grayling: I will pass you that one for legal advice on that.

Tim Jewell: In a sense, it is simply the conclusion I have just described. In that case, of course, which began life as *Saeedi* in the UK, there was no detailed argument in the High Court about the status of the protocol. It was only *NS* itself that became—and has become so far, at least—the leading authority on the effect of the protocol. The court in that case domestically—it was Mr Justice Cranston—nonetheless drew some conclusions about the effect of the Charter, with which the government did not agree. It was in the Court of Appeal that the issue arose as to the position on the protocol itself. It was at that point that the Government position was asserted in the way you have just described.

Q105 Stephen Phillips: I just want to follow on from that, Mr Jewell, if I may. The position that, as I understand it, the Lord Chancellor and, indeed, the Government are now urging as the correct position is that the Charter only applies when EU law is implemented. The question that Mr Smith is driving at is that this does not appear to have been the Government’s position back in 2011, at least as recorded by the Grand Chamber in *Saeedi* in the paragraph to which he has drawn attention. Why has there been the change of position?

Tim Jewell: It is for the reasons I have explained. The European Court of Justice, in *NS*, confirmed our understanding and, in fact, agreed with the submissions we had made as to the scope of EU law in that case. Your previous witnesses have considered the point about the distinction, if there is one, between the phrase “implementing EU law” on the one hand and “the scope of EU law” on the other. Of course, that is the point that arises on *Franzén*, where scope might, on one view, be taken to be a broader idea than implementation.

For example, in *NS*, the court concluded that, where a member state derogates from EU law, that too is within the scope of EU law. It is in that point that the discussion perhaps lies. *Franzén*, of course, was a case on its own facts, and the Lord Chancellor has described the VAT context there. We are aware of the controversy of it, of course. The German constitutional court have looked at it, and they have expressed the view very clearly that it is because of the particular context of the VAT that one has to give a narrower view to *Franzén* than some might.

Chris Grayling: The key issue here is there is no legal doubt about the fact that what is a purely UK legal matter cannot, as we sit here today, have the Charter principles applied to it in a court of law. My point is that the Charter is sufficiently vaguely worded and the Lisbon Treaty is sufficiently broad-ranging that, actually, all this provides the scope for

European law and hence the Charter to be applied much more widely than we would ever have wished.

Q106 Stephen Phillips: That is the point, is it not? Something can be within the scope of EU law, even though it is not a decision that is actually implementing EU law. Therefore, for the British Government to have urged that position upon the Grand Chamber, as it did in the *Saeedi* case, has opened up this can of worms, has it not?

Chris Grayling: You will often find the situation where our lawyers look at the case—they are lawyers; their job is to identify what the correct and accurate legal position is—and say, “Actually, what signing up to both the Lisbon Treaty and the Charter has left us with is the position where European law has a broader reach than we might wish.”

Q107 Chair: You have mentioned the Lisbon Treaty several times. Just for the record, as a political party, the Conservative Party of course opposed the Lisbon Treaty and the Act to implement it. What you are saying is that, in the context of this particular inquiry, in relation to the Charter and the confusion that has been generated about it, that in many respects it has been like opening Pandora’s box and we are not quite sure what is going to come of it. Is that more or less the position?

Chris Grayling: That is the central issue. It is not that there is a legal mechanism for the Charter—whatever Commissioner Reding might like—to be applied in national member state law. The question is this: what is the boundary between European law and national member state law? To my mind, the trouble is that, when you have something like the Charter—it is the same critique I have of the Convention—which is a pretty loosely worded reference point document, jurisprudence will actually tend to grow. There are no limits on the jurisprudence, save those that could be applied by the European Parliament and by the European Commission, if they chose to do so in order to stop the expansion of EU legal competence. However, I do not see a tight fence around the ECJ and around European law created through the Charter and the Protocol. It is just the opposite: I see great grey areas between EU and national law.

Chair: Yes, you have been very clear on that. We will now move on to the parallel rights under the ECHR, the European Convention on Human Rights.

Q108 Chris Kelly: Secretary of State, many of the civil and political rights in the Charter correspond to those in the ECHR and its protocols. Does the Government think it was necessary for these ECHR rights to be incorporated into primary EU law in this way? If so, why does it think so?

Chris Grayling: It was not necessary. The Charter was not needed. Clearly, they are not the same document. You have new rights that are not in the Convention; there are varied wordings of individual rights that are in the Convention; there are footnotes to the Charter that make it clear that, even if things are worded differently, they should be treated in the same way, but there are places where the two diverge quite significantly. My view is I do not really understand why, if the Convention wording was seen as a blueprint for this, it

was necessary to rewrite them in a different form, with different wording, through the Charter.

Q109 Chris Kelly: Given that the Charter contains ECHR rights, which bind the EU institutions, why is there a need for the EU to accede to the ECHR?

Chris Grayling: It is something that was agreed to by all of us in the Lisbon Treaty. I can separate my fairly strong views about the Court in Strasbourg here. If you accept the principle that a citizen of an EU member state should be able to individually petition the Court in Strasbourg about something that has happened in their own country and, equally, if something is done by the Commission that is seen to infringe the Convention, it is not illogical to say they should be able to take that to the Court in Strasbourg and say, “This will not do.” That would be the logic of what is happening.

Where we have reached in terms of the accession—we in the UK would be pretty vigilant about this—is it would not be acceptable to us for the accession of the EU to the ECHR to be, effectively, a Trojan horse for the European Union and the European Union institutions to take the role of the member states on the Council of Europe, or seek to take a part of the role of the member states on the Council of Europe.

We have been very clear in saying to the Commission, “We are not going to sign up for anything unless we see, very clearly, the rules of engagement for the EU in the Council of Europe and in the Convention mechanism.” If it appears that the roles of the member states are going to be subsumed by the accession, we are going to take a pretty long, hard look at whether we want to support that. If you are a signatory to the Convention, you subscribe to the Court and you believe that your citizens should be able to individually petition the Court, my view is that it is not unreasonable they should be able to do that around a decision that is taken by the Commission, if they feel it is an infringement of their rights under the Convention.

How we see, as a nation, our relationship, with the Convention and the Court is a different matter. Many member states are very happy with the way the Convention is working and the way the Court is working, and if they want their citizens to be able to petition it there is no obvious reason why they should not be able to challenge the European institutions under those provisions as well.

Q110 Chair: There is a further point, too, is there not? That is the question of whether there is a difference between the Strasbourg Court on the one hand and the Luxembourg Court has profound implications in relation, for example, to the role of the Supreme Court. Under Section 3 of the European Communities Act 1972, our Supreme Court is bound to follow and accept decisions made by the Court in Luxembourg. Therefore, there is a really huge difference between decisions that are taken under the rubric of the European Convention on Human Rights, as compared to the decisions that are taken by the European Court of Justice, in the implications for Parliament and the whole question of whether or not we could or should ever override decisions that are taken in the European Court of Justice.

Chris Grayling: Chair, as everyone knows, I come to my role as the non-lawyer. When I look around the legal landscape, it seems to me to be rather a mess. We have the

Strasbourg Court sitting there with the Convention; we have the ECJ with European law and Charter; we have a Supreme Court in this country; we have the German constitutional court and constitutional courts in other countries. It is not entirely clear to me who has the final say.

Q111 Stephen Phillips: It is not the German constitutional court, as far as the United Kingdom is concerned.

Chris Grayling: Indeed it is not, but if you are a German citizen, ultimately, which court is the one that has the final say? Most Germans would say it is the constitutional court, but is it the constitutional court in Germany? Is it Strasbourg? Is it Luxembourg? It is the same for us: is it the Supreme Court? Is it the international courts? As I say, looking at it as a non-lawyer, it seems to be something of a mess.

Q112 Chair: There is one other point here—we do not want to go right down this route this afternoon—which is that we do not have a written constitution. However, Article 25 of Germany’s basic law, for example, commits Germany to the whole concept of the European Union. There is then a completely different type of constitutional response. The implications for us are, as put to me only a few days ago at a conference I was at in Brussels by a very senior French senator, that there are enormous advantages in the flexibility of our constitutional arrangements, because it was impossible for them just to change their constitution, whereas we can allow ours to evolve and we can react accordingly, because of the flexibility we have in our constitutional arrangements.

Now, however, I want to turn to the domestic application of the Charter and the Government’s concern to clarify its legal effect. We noted from an article in last weekend’s *The Sunday Times*, which you will recall, that you “may use an appearance before the Commons EU Scrutiny Committee on Wednesday”—that is, today—“to reveal your intention to seek a ruling” on the case of *Benkharbouche v Embassy of the Republic of Sudan* in the Court of Appeal. Let me ask a general question at the outset: what impact is the Charter having or what impact will it have on human rights litigation in the UK? In the Government’s view, is this a good or a bad thing?

Chris Grayling: My view is that we have quite enough human rights legislation in the UK. I would not wish to see the Charter become a reference point as well for debates about human rights legislation.

If you look at what prompted the article you read last week and the questions that were put to us ahead of this meeting—because, as you know, we have said publicly that we are looking for opportunities to go back and clarify the legal position—we think the judge who expressed surprise that we did not have an opt-out got the legal situation wrong. We could not appeal that particular case because we had won it—and you tend not to appeal cases you have won. We decided that the best strategy was to get proper clarification of the legal position, lest any other court should treat that initial ruling as creating precedent, so we have been looking for an appropriate case to do that. Abigail, do you want to say a little bit about the criteria we have been looking at to find the right case and how we happened upon this particular option?

Abigail Culank: We are looking for a case that gives us the opportunity to argue a number of points that this Committee has identified as being blurred. To go back one step, it has been acknowledged that the UK courts are generally very good at conducting a rigorous assessment of whether the Charter is engaged. The concern that came out of the case of *AB* was that that had not been done with the benefit of the Government's argument. *Benkharbouche* may or may not be the right case. We are yet to find out whether the issues we will want to put before the court will actually be live before the Court of Appeal. However, it is a case where Human Rights Act arguments—i.e. both ECHR and Charter arguments—came into play. It raises interesting questions there.

Chris Grayling: We have identified two or three other possible candidates. If the arguments that come forward in this case mean it is not actually one where we can make the appropriate points we need to and get the appropriate clarifications, we have a couple of other candidates in the wings that we will seek to do this on. I do want to get this laid to rest, because I do not want any suggestion of precedent kicking around in the UK courts that implies that the Charter has more of a role in this country than it actually does.

Q113 Stephen Phillips: Has a notice of appeal been lodged in *Benkharbouche*?

Tim Jewell: The case is live. It is in its early days. The Foreign Secretary has given notice to the court that he intends to intervene. That notice is under the Human Rights Act. As I say, it is in early stages and one has to be careful in discussing live cases.

Stephen Phillips: In accordance with the resolution of the House on 15 November 2001, no-one should be referring to it.

Chris Grayling: Whilst we would not discuss the individual circumstances of the case, it is common practice for Government Departments to indicate when and where they seek to intervene in any case.

Q114 Chair: Moving on, Lord Chancellor, you may not wish—I emphasise “wish”—for the Charter to become a reference point, but the question arises: do you think it will?

Chris Grayling: There are those who would like it to become so, and there is a risk that it will increasingly become a reference point in the way that I described has happened over social security, for example. I would suggest that the particular risk is around the free movement elements of the Charter: that they become a reference point to allow, effectively, a degree of mission creep in jurisprudence that would effectively take the Charter into new areas of legal consideration.

Q115 Chair: It may not only be matters of legal consideration, because one of the questions that has been concerning some of us is the question of what areas of national policy could be particularly affected by the Charter because it is so broad, so wide and so deep that it is subject to interpretation. You have quite well described your concerns on that front, but do you have any concept of the areas that this could extend to in terms of national policy-

making, rather than, as you have put it, only to questions of legal interpretation and jurisdiction?

Chris Grayling: In the current EU, listening to what other member states are saying to me about their views on these matters, I do not see a great change that will take the Charter into wholly new areas of law by intent in terms of new legislation and new legal practice driven by the institutions.

The much greater risk is that we see the Charter becoming cited in the European Court of Justice to justify individual references about individual cases—as I described earlier with the comments made by the Commission today around the right to vote. That is the kind of case one could imagine coming to the ECJ, and the Charter and free movement rules being prayed in aid to say, “Actually, member states have a duty to provide access to the right to vote to all citizens at all times, wherever they live in the European Union.” That is an example of where it could happen. We have seen similar things happen in the social security area.

If you look at where the Charter is being brought to life in legislative terms, what is noticeable is that it is in the programme of legislation that is being put forward by DG Justice in areas like the presumption of innocence, for example, and in areas like legal aid, where relatively loosely worded elements of the Charter are now being turned into legislative proposals. Of course, we have an opt-out right to those, but it is an example of where the Charter is being turned into legislation.

Q116 Andrew Bingham: You talked earlier about having a long, hard look around the EU’s accession to the ECHR. We received a memorandum of evidence that suggested the UK should actually use its right of veto over this. Is that something the Government would consider?

Chris Grayling: We are not expecting the right of veto to be matter that needs to be considered for, probably, a couple of years. At the moment, the draft accession agreement is being considered in the ECJ. We are not expecting that to conclude for another 12 to 18 months, so this is a matter that will fall to the next Government and the next Parliament. Therefore, the decision will depend on the political complexion of the next Parliament. I would not personally recommend to my Government colleagues that we should accept the accession to the ECHR if I believed it was not in the UK’s national interest, and if I believed the rules that were being put forward effectively allowed the European Union to subsume some of the rights that the United Kingdom currently enjoys in those international forums.

Q117 Chair: Would you consider using the right of veto over the EU accession to the ECHR to secure an effective opt-out from the Charter?

Chris Grayling: There is an interesting question. I probably would not get drawn that far, Chair. It is the case that we actually have two vetoes over accession by the EU. We have a veto within the EU mechanism itself, which has to be done by unanimity—although undoubtedly we would come under some pressure because of the duty of sincere

co-operation. We also have a potential veto in the Council of Europe, where the acceptance of EU membership has to be unanimously agreed by the members of the Council of Europe. We have the ability to ensure that the final deal on the table is one that is in the UK's national interest.

Q118 Nia Griffith: Supposing the treaties were opened up for renegotiation, would there be pressure from some parts of the EU to extend the impact of the Charter much further into domestic policy?

Chris Grayling: It is quite clearly the case that within the Commission there are those who believe that the Charter should be applied to national law. Commissioner Reding said this very clearly a few of months ago. She made a number of bold statements; she is a lady who has a very clear vision about what she wants. She wants to see a single European government, elected directly by the citizens of Europe, with a lesser role for member states, and she wants the Charter to be a legal reference point for all legal systems right across the European Union. It is an opinion, and I suspect she is not the only person with that view in Brussels. In my experience, that is not the view of the Justice Ministers that I have talked to, so there are clearly divided opinions. I struggle to see a change to the treaties any time soon that would simply accept the application of the Charter to national member state legal systems. Nobody is seriously proposing that as something that is likely. Mission creep is much the more realistic risk to national legal systems.

Q119 Stephen Phillips: I was going to ask about *Benkharbouche*, but what about the Court of Appeal decision, which you will know about, in *ZZ*? That involved a reference to the ECJ. The national security concerns of the UK—they are safeguarded in the EU treaties—were, it seems, overridden by the primary importance the ECJ gave to respecting the right to an effective remedy in Article 47 of the Charter. Do you think that case was correctly decided?

Chris Grayling: Mr Phillips, you have of course rightly been highlighting the need for us all to be circumspect in these proceedings about individual cases; since we are currently considering an appeal in that case, I am afraid I cannot really say very much about it.

Q120 Stephen Phillips: The standing order only applies to the extent that the notice of appeal has been lodged. It has not been lodged, has it, Secretary of State?

Chris Grayling: No. Even so, however, where we are considering an appeal—and considering the nature of that case—you would forgive me if I am circumspect today about what we will do. I will happily inform the Committee about our plans at an appropriate future point.

Stephen Phillips: Maybe we could leave it this way: when the Government has taken a decision, perhaps you could look again at that question, irrespective of whether we have published our report, and write to the Committee to tell us what your answer is.

Chris Grayling: I will happily do that.

Q121 Chair: Moving on, I would remind you of two amongst several examples of what you said, in the course of the debate in the House on 19 November, on the Charter, which has caused us some confusion: “Of course [the Charter] now does have legal force in European law. The issue is about whether that legal force extends to UK law. We regard that matter as being exceptionally important. If there were any question of that linkage being made, we would have to take steps on it.” You then said, “It is inconceivable that this country could accept a situation in which the charter of fundamental rights was applicable in domestic UK law.” Contrary to what you say, however, rather than inconceivable, it is beyond any doubt that the Charter does apply to UK law, as the cases we have just been discussing clearly show. Can you explain what you mean by “having to take steps” if the legal force of the Charter extends to UK law?

Chris Grayling: It is worth saying that I sometimes highlight the fact that in areas of human rights matters there is a difference between the coalition partners. Over the role of the Charter, there is no difference. My new Minister of State, the Member for Bermondsey and Old Southwark, stood up in the House in that very same debate we had and said there is no difference between us over our view of the role of the Charter and the issue of UK national law. I cannot conceive of a situation where a hypothetical treaty change brought forward by somebody with the same view as Commissioner Reding—that the Charter should apply in all aspects of national member state law as well—would be accepted by this country and that a British Prime Minister would sign up to such a treaty change.

In terms of my latter point, that is the case: were it proposed, I would oppose any such action vigorously. Where the Charter clearly does have a role—not in UK law, but in law in the UK, and there is an important difference—is where EU law is applied in the British courts; the Charter then clearly does apply. That is what the provisions of the establishment of the Charter provide for.

Q122 Chair: I quite understand that these statements were made on 19 November 2013 and arose from an urgent question, which I put down and which was granted by the Speaker, and I also understand that there are circumstances where something as important as all this is suddenly presented to you at short notice and you get up and you say what you said and that, therefore, that has to be taken into account. However, you also said in the *Sunday Telegraph* this weekend, “This country has never wanted the possibility of crucial decisions about our society and our system of justice and government being taken by unaccountable national [*sic*] courts.”

Chris Grayling: Whether that has been written down correctly, I do not know. It would be international courts, rather than national courts. Our national courts are perfectly accountable, because we can change the law if we do not like the rulings our courts come up with.

Q123 Chair: We agree; it is “unaccountable international courts”. Given that you also intend to challenge the application of the Charter to the UK in the courts, which inevitably will take a very long time, and that this will inevitably include the European Court of Justice, and given what I referred to earlier as the implications of Section 3 of the

European Communities Act, requiring our Supreme Court to accept judgments of the European Court of Justice, which is where the issue resides, and who have already ruled on *Saeedi* and *Franzén*, will you also introduce primary legislation to make it clear that the Charter cannot and will not apply in UK law by disapplying the Charter and the pre-existing fundamental rights altogether, or will you merely accept the European Court of Justice's ruling when they give it?

Chris Grayling: The position of this Government, Chair, is very clear: we have no plans to change the nature of our relationship with the European Union. That has been the Coalition position all the way through. We have sought to make changes to our laws to ensure, for example, that further treaty change will require a referendum. However, as you know, the position of my party—indeed, our party—is slightly different from that. We have said we need to renegotiate our membership of the European Union. I have no doubt that part of that renegotiation will have to address the issue of governance structures and the way in which they impact on the British national interest. I have no doubt that those leading the renegotiation will wish to ensure that we provide proper protection for the UK national interest in the future, as has happened to a degree within the current structures with the work the Chancellor of the Exchequer has done in providing extra protections for our financial services industry in some of the negotiations. I know you have set out some interesting thoughts about how that might be achieved, but one has to deal with the world as it is rather than how one would like it to be. The reality at the moment, as a coalition government, is the questions you have raised are not matters the Government is able or willing to address.

Chair: In our report, we have referred to circumstances where, in our national interest—leaving aside any party-political considerations—it becomes clear. For example, in a case of this kind, you have an accumulation of words that are used in an Act of Parliament, the Lisbon Treaty Act, on the one hand, which make certain assertions, but, on the other hand, you have a European Court of Justice decision, as in *Saeedi* and *Franzén*, which produces a completely contrary result. Clearly, this is not a matter of pure negotiation. This is a matter of primary national interest and it cannot just be left there—for all the reasons you expressed extremely well this afternoon. There is confusion; there is uncertainty; and the consequences are very uncertain. Surely it is not just a question of whether or not you might or might not like to do this. Actually, you have to clear it up, do you not? It seems that primary legislation would be the only way of making sure that we got the position clear.

Chris Grayling: It goes beyond that, Chair. Simply introducing primary legislation disapplying the Charter, for example, would not deal with all of the issues and challenges we face around our relationship with the European Union. The legal issues that you make reference to are quite clear to me. The fundamental problem is the Lisbon Treaty is very vague. Even areas that we thought—and, indeed, were set out as such—were matters for national competence, like social security, are being eroded step by step by European Court of Justice judgments. We are going to have to address this. The social security issue is one the Prime Minister has said very clearly we have to address.

Simply passing primary legislation disapplying a part of our relationship with the European Union misses the point: we have to address things on a wider basis. I am

personally very committed to a broader renegotiation that establishes a proper relationship for the future. It is best to do that comprehensively. Realistically, even if we wished—or I wished—to bring forward legislation in the current Parliament to do what you describe, I would not have agreement within the Coalition Government, and we are, after all, a coalition government. We have to reach consensus in bringing forward legislation to the House. Even were you to bring a private member's bill to the floor and command the support of your colleagues, the resistance of the other two parties to change in this area would, I fear, guarantee defeat in the Commons—and if it was not in the Commons, it would certainly reach defeat in the Lords. My view is we should prepare the ground for renegotiation and look at these issues in the round—rather than trying to pick an individual, albeit significant, step to take to address one of the issues we face.

Chair: This is one issue. Actually, your answer suggests an argument based more on expediency in relation to the Coalition than to deal with a matter that directly affects the United Kingdom as a whole in relation to the European Court of Justice. I have heard what you have said and we will simply leave it at that, for the time being.

Q124 Henry Smith: At the European Justice and Home Affairs Council on 6 June last year, you supported a general approach on the draft directive on the fight against fraud to the Union's financial interests by means of criminal law. The general approach included, for the first time, a Title V legal base. The Council legal services advised that the inclusion of a Title V legal base triggered the three-month period during which the UK and Ireland must exercise an opt-in decision. We understand the UK reserved its position as to whether the general approach did in fact trigger the opt-in process. Are you now in a position to confirm whether you concur with the Council's legal advice and, if not, why not?

Chris Grayling: This has been something of a legal mess at the European end. The story was basically this. This particular directive, the PIF directive, I regard as being absolutely at the heart of what I have described to this Committee before—creating minimum standards and measures and Europeanising criminal penalties in a way I do not believe is right and I do not believe we should accept.

The Justice directorate brought forward a proposal that, in my view—which is a view that was actually confirmed by Commissioner Reding in what she said to the Council—was an attempt to ensure that all member states were covered by this directive, rather than some. By adopting a different legal base from the one that we believed was right and most other member state believed was right, it would prevent those countries that had an opt-out from exercising it. She made it very clear in a Council session that there was a geographical factor behind the decision that was taken. What then followed was an interesting exchange between the Commission and the Council. The Council legal services basically told the Council, “This is simply not acceptable. It is on the wrong title base; it is not legal.” The Council effectively enforced its will and insisted that the measure was returned to a Title V legal base.

We are in an interesting legal position there—and I will ask my colleagues to say a little bit about the legal position we are in now—because, whilst we have reserved our position, there is not a precedent for the Council simply changing a legal base and, therefore, other wheels have to roll within the European institutions, particularly the Commission, before this can happen. It is not that we are trying to be disingenuous; it is that we are in

uncharted legal territory. Therefore, we are doing the best we can to preserve the interests of the United Kingdom in that difficult legal territory. There has not been a case before that I am aware of where the Commission has deliberately moved away from the appropriate legal base to try to prevent us from exercising our opt-out. That is what has happened in this case; I was pretty unhappy about it. I am very pleased to receive widespread support from other member states that in principle it should be Title V.

Our message would be, “Bear with us.” We are trying to tread a careful line so that we preserve our rights in this matter, but it is not clear to us at this stage at what point the actual trigger point is that the Title V base is confirmed, even though the Council has quite clearly asserted its authority. Is there anything you two would like to add?

Abigail Culank: We are actively considering this at the moment and we are aware of the need to update the Committee as soon as possible.

Tim Jewell: So far as the legal position is concerned, the Lord Chancellor is precisely right, of course: this is a novel situation, for which Protocol 36 makes no express provision. As this Committee, of all Committees, will be aware, there are some intricacies in terms of the procedure of the operation of the relevant protocols, both 21 and 36, and the Schengen protocol as well, which we are learning from by experience. Abigail has described, and the Lord Chancellor has put his finger on, the legal issue.

Chris Grayling: We are not trying to be difficult; the reason we are being circumspect about all of this is we are trying to find our own way through what is a new situation.

Q125 Chris Kelly: Two recent cases—one concerning the EEA agreement, the other concerning the European Convention on the legal protection of services based on, or consisting of, conditional access—have called into question the Government’s assertion that the UK’s Title V opt-in can apply in the absence of a Title V legal base. Can you confirm the Government now intends to review its policy?

Chris Grayling: We are giving careful consideration to this. As I described a moment ago, we have had this whole area around exactly how and when the opt-ins apply in relation to a number of the international agreements and, in my previous role as Employment Minister, I took the Commission to the courts twice because it appeared to be trying to ride roughshod over our opt-in. There is no doubt there are those in the Commission who wish we did not have an opt-in. I have always been slightly struck by the fact that, on the one hand, they will say, “We are the guardians of the Treaty.” The Treaty says very clearly that the UK has an opt-in and an opt-out in these areas, and there are those in the Commission who sometimes do not like us exercising the opt-in. We will continue to do everything we can in the UK’s national interest, but this is a complex legal area.

Q126 Chair: It is a complex legal area, but, equally, it raises some very serious questions of uncertainty, and even confusion. That cannot be a good situation for the United Kingdom as a whole. Although you pray in aid of the Coalition and you pray in aid the difficulties of interpretation, we are still left with a situation—both on this question that has just been raised

and the previous question I raised—about whether or not there is a policy to deal with an issue that is, quite clearly, of national interest. I simply park the position there; you can reply if you wish. However, at this present juncture, I am afraid I get the impression that you are very aware of the uncertainties and the confusions, but you are equally determined not to make a decision about them.

Chris Grayling: What I would say, Chair, is that sometimes you have to deal with the world as it is, rather than how you would like it to be.

Q127 Stephen Phillips: On the first of those points, you are essentially waiting for the wheels of the institutions to turn; is that right?

Chris Grayling: Over the Title V base, we are doing what you would expect. We are discussing across Government and with law officers, exactly how best to address these issues.

Q128 Stephen Phillips: On the first one, which is the Council legal services' insistence that there is a Title V legal base, you are waiting for the wheels of the institutions within Europe to turn. Would it be fair to say there is nothing you can do until they have turned?

Chris Grayling: Quite clearly, they have to sort out what is an unusual legal position for them as well. We will seek to take appropriate action at the right moment.

Q129 Chair: There is some uncertainty in the position; that is where we can leave it for the time being. As far as block opt-out is concerned, you will be aware that the Chairs of this Committee and the Home Affairs and Justice Committees wrote to you on 22 January, asking for an early second debate and a vote to provide a parliamentary mandate for negotiations on the measures subject to the United Kingdom's 2014 block opt-out decision that the UK should seek to rejoin. We asked for a reply by the end of January. Can you confirm that a debate and vote in Government time on a substantive amendable motion will take place at the earliest opportunity?

Chris Grayling: We have said that we will have a vote; we will provide full information for the House. However, we do not believe that vote should take place prior to negotiations with the Commission. We have to have some commonsense flexibility to enter into those negotiations and deliver the best outcome we can for the United Kingdom, and then submit what we have provisionally agreed with the Commission to Parliament for its decision on whether to accept that or not. We think that is the best way around. I appreciate there may be a difference between us and you on this, but we do genuinely think this is the best way forward for the country.

Q130 Stephen Phillips: You mentioned "full information", but I hope the quality of the information the Committee and, indeed, the House is going to receive is somewhat better than last time. We were promised full information last time, and you will know that we received a

very slim description, which basically did not give the Government's reasons for thinking which parts of the JHA opt-out it should opt back into and which it should not.

Chris Grayling: We will provide as much information as we can for that vote, yes.

Q131 Stephen Phillips: Is that a personal undertaking from the Lord Chancellor that we will get full information about the Government's thinking, once it has conducted its negotiations with the Commission?

Chris Grayling: My expectation is that is precisely what we will do.

Chair: Thank you very much, Lord Chancellor. We will now move to the next stage, which is to prepare a report on the eviden

