



Revised transcript of evidence taken before

The Select Committee on the European Union

Justice Sub-Committee

Inquiry on

POTENTIAL IMPACT ON EU LAW OF REPEALING HUMAN RIGHTS ACT

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Questions 34 – 43

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11 am

Witness: Marco Biagi MSP

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Members present

Baroness Kennedy of The Shaws (Chairman)
 Lord Blair of Boughton
 Lord Cromwell
 Baroness Eccles of Moulton
 Baroness Hughes of Stretford
 Lord Judd
 Baroness Ludford
 Baroness Neuberger
 Baroness Newlove
 Lord Richard
 Baroness Shackleton of Belgravia

Examination of Witness

Marco Biagi MSP, Minister for Local Government and Community Empowerment, Scottish Government

Q34 The Chairman: Mr Biagi, I welcome you to this evidence session of the Justice Sub-Committee of the European Union Select Committee of the House of Lords. It is very nice to see you, and thank you for joining us. I will start by asking you to what extent the protection of human rights in Scotland under the European Convention on Human Rights and the European Union charter is any different from that in England and Wales.

Marco Biagi MSP: There are some broad similarities. The Human Rights Act clearly applies north and south of the border, and you would expect to see many of the same features of that wherever you live. The issue that really is different is the constraints on the Scottish Parliament and on the Scottish Government elected through that Parliament. It reflects some of the differences in constitutional approach that you can see around the world, in that we have a very hard barrier against taking any action or passing legislation that is in violation either of convention rights or of EU law. Strictly speaking, if we pass primary or subordinate legislation, or undertake an administrative action, that is found to violate these precepts, it can be struck down by courts.

The Chairman: That was one of the things that I realised was rather different. So your courts in Scotland can strike down legislation from the Scottish Parliament that contravenes the European convention.

Marco Biagi MSP: Yes. The specific term is that it is “not law”. That is set out in the Scotland Act. We essentially have a constitutional arrangement through the Scotland Act 1998 that is analogous to the constitutions that bind most of the states in Europe, as opposed to the sovereign-parliament approach that is taken in Westminster. Similarly to such a constitution, there are provisions for referring Acts to judicial scrutiny if necessary to determine whether they are indeed compliant with both the Scotland Act and the Human Rights Act, which is given power through the Scotland Act. Anybody introducing legislation has to give a statement of compliance: if that is a member of the Government, they will have taken the

views of the Lord Advocate. In doing that, the Presiding Officer and the Parliament itself have to rule. After passage of the Bill, should it pass, there is then a four-week opportunity for either the Lord Advocate in Scotland or the UK's Law Officers to refer any Bill that they consider to overstep the Scotland Act or the Human Rights Act, which is embedded in it, to the Supreme Court for consideration. Those are quite substantial provisions and can prevent something that violates the Scotland Act or the Human Rights Act from making it through.

I appreciate that the Human Rights Act can affect subordinate legislation and actions at the UK level, but this difference—the inability to undertake primary legislation that violates it—is distinct to us and a much greater restriction.

There is one other point. Although I am aware that the European Communities Act places EU law superior even to primary Westminster legislation, it would be an interesting and debateable constitutional point were a right-wing UK Government to seek to use parliamentary sovereignty to rescind that. That would certainly engage scholars and politicians in debate, but there would be no prospect of a Scottish Parliament being able to undertake anything equivalent to that. Both bodies that are being referred to are very clearly bounded in their powers by European laws.

The Chairman: Is there controversy in Scotland about your judiciary having that power and their not being elected—that they can actually decide that some piece of legislation from the elected Parliament could be declared non-law? Is there controversy about that? Do people feel that judges therefore have too much power?

Marco Biagi MSP: That has not been expressed. Whenever rulings have gone against previous Scottish Governments, those have been implemented. That can be difficult, but both the current Scottish Government and the parties that formed the previous Scottish Government have maintained the observance of this principle and have continued to value it. The greater controversy in the Scottish Parliament at the moment is about the UK Government's stated intention to repeal the Human Rights Act. This was debated in the Scottish Parliament around this time last year, and the Act was backed by 100 votes to 10. If there is any controversy, that is where it is, because we take that view very much on a cross-party basis. There was an overwhelming view in the Scottish Parliament that these proposals, which we are still to see the detail of, do not represent the views of the Scottish legislature.

Q35 The Chairman: In your view, what are the strengths of the human rights protections provided by the European Convention on Human Rights compared to the European Union charter in Scotland?

Marco Biagi MSP: The biggest difference here is the scope. The EU charter will only apply to areas within the scope of EU law, whereas in Scotland the ECHR, by being embedded via the Human Rights Act and the Scotland Act, will apply more widely. That said, the remedies that are available for violations of EU law by the UK Government that happen to take place in Scotland are much greater because of the greater powers that the Court of Justice has, whereas the ECHR is advisory. There are two systems, and we see them both as valuable. and it is an open question whether that is an efficient way of doing it, but we would not want to lose any of the efficacy of either system here, especially with the powers for remedy that there are under the charter. But as I said, and I re-emphasise this, anything the Scottish

Government or Scottish Parliament do has to be in compliance with both. So the remedy already exists for actions in devolved areas.

Q36 Lord Richard: Can I follow on from that to look at prisoners' rights to vote? We had the Chester case, which I am sure you are familiar with, in which the Supreme Court here denied a right to vote in European parliamentary elections. What effect do you think the ECJ's decision in *Delvigne* would have on the Scottish court if faced with a similar application?

Marco Biagi MSP: The Scottish Parliament does not have competence over the European Parliament elections, and there are no prospects of that happening in the near term—the Scotland Bill will not extend our control of the franchise or of the organisation of elections to the European Parliament elections. Since this is a matter of EU law, and has been applied to the European Parliament, as that is felt to be within the scope of European law, it would not be triggered in the Scottish Parliament. Where we are on other elections will have to be considered as the Scotland Bill goes through, but the *Delvigne* ruling certainly suggests that the UK Government are going to have to provide a remedy and reconsider the blanket voting ban on European Parliament elections. That will apply in Scotland as well as in the rest of the UK.

Lord Richard: Would you be bound by that?

Marco Biagi MSP: If Westminster legislates for the European franchise or the Westminster franchise, that will apply in Scotland. Under the Scotland Bill, we will be gaining powers over the Scottish Parliament and further powers over local government, where we are in charge of the elections but not the franchise at the moment. That is in one of those wonderful caveated sections of the Scotland Bill that many of us in the Scottish Government have come to be very familiar with. If the UK remedies that, that will apply in Scotland as well.

The Chairman: I just want to be clear. If the Scotland Bill goes through, giving more devolved powers to Scotland, including powers on elections, do you think the Scottish courts will decide differently about prisoners' voting rights?

Marco Biagi MSP: We will have to review what takes place in light of these powers. We have to accept that there are going to be developments and things to consider. We will look at that once we have a clear view of what our powers are actually going to be under the new Scotland Act and once there is a greater clarity of where the jurisprudence lies on this. After all, the issue was considered in the light of the referendum, when we sought to exclude prisoners from voting in the referendum. That was taken to judicial consideration, and we were found to be compliant with our obligations by continuing to exclude prisoners from voting in that context. This is always an area of complexity, and I would expect there to be some kind of legal debate and some kind of likely legal challenge. The history of this issue has been that people regularly raise legal challenges under it.

Q37 Lord Blair of Broughton: Mr Biagi, first, I apologise that I will have to leave before the end of the session. This question is a particularly interesting one. Would the Scottish Parliament need to consent to repeal the Human Rights Act under the Sewel convention?

Marco Biagi MSP: The short answer is yes, but there is a longer answer.

The Chairman: You are allowed one.

Lord Richard: Can we have the slightly longer one?

Marco Biagi MSP: The longer answer starts with consideration of the Sewel convention itself. As legal experts, you will be aware of its debatable nature and, indeed, the debatable nature of anything in the United Kingdom constitution. As Members of the Lords, you will also be aware, following recent events, of how even conventions of very long standing can be debated and viewed differently by different sides of those conventions. The Sewel convention made clear, through devolution guidance note 10 back in 1999, the UK Government's understanding at that point, which was that any legislation in a devolved area would involve the consent of the Scottish Parliament, but—and this went beyond Lord Sewel's first statement—any alteration of either the legislative or the executive competence of the Parliament would also require consent. Both these broad fields are engaged if the Human Rights Act is repealed. The Human Rights Act is part of the architecture of devolution; it is explicitly referenced in the Scotland Act and constrains the powers of Scottish Ministers. As a Scottish National Party MSP it is perhaps odd to come here and say that I would rather we did not gain extra powers to violate human rights, but since that power to violate human rights would be conferred by the removal of the HRA prescription, it is one I am happy to decline. It would, nonetheless, quite clearly alter what the Scottish Government and Scottish Parliament would be capable of doing if that restriction was removed. That engages that side of the Sewel convention.

The other—and this is a point of some debate between the Scottish Government and the UK Government—is whether human rights themselves are a reserved or a devolved issue. We are very clear that Schedule 5 to the Scotland Act, which sets out what reserved issues are, does not mention human rights, it does not reserve human rights, and the principle of the Scotland Act is that if it is not mentioned there, it is devolved. The only mention of the term “human rights” in Schedule 5 comes under international obligations and is actually an exemption from the reservation of foreign policy, so we in the Scottish Parliament are required to give effect to international obligations, including the human rights convention.

It has been pointed out that it is a protected Bill, that the Scottish Parliament cannot change it, but that is different from reservation. It is set out in Schedule 4 as something the Scottish Parliament cannot change, alongside the Scotland Bill itself. That does not reserve human rights. If human rights were being reserved, they would follow the example of, for example, equality law in Schedule 5 by stating that the subject matter of the Human Rights Act 1998 was reserved. That is not present. We therefore have the power to legislate for human rights in Scotland as long as we do not alter that bedrock of the Human Rights Act 1998. We have exercised this power in the past as well. In 2006, we passed through primary legislation the creation of the Scottish Human Rights Commission, which is our national human rights institution in Scotland. That process of legislation will have passed through the Government, the Lord Advocate at the time, the Presiding Officer and the UK Law Officers without any devolution issues being raised. There is therefore very clear precedent of their accepting that the Scottish Parliament can legislate on human rights issues. Therefore, the UK Government legislating for human rights issues in Scotland would engage both parts of the Sewel convention, and the Scottish Government have been very clear, and the Scottish Parliament is behind us, that we do not support that, and that we would invite the Scottish Parliament to decline consent.

Lord Blair of Boughton: This is pertinent to this inquiry, which of course is about the effect on EU law. You are saying that a Bill to alter the Human Rights Act would not pass through the Scottish Parliament.

Marco Biagi MSP: The Scottish Parliament would be invited by the Scottish Government to refuse legislative consent. Based on the vote that we had last year, I think that would be passed, and given that the main opposition party supports the Scottish Government in this interpretation, it is likely that any Scottish Parliament after next May's election would do the same. It is reserved as the right of the UK Government in the Scotland Act to be able to legislate regardless. Sovereignty continues to rest at Westminster, so that could happen, but there would be substantial political constitutional implications of that. It is also important to add that the Scotland Bill currently going through on the back of the Smith commission recognises the lack of strength of the Sewel convention at the moment and seeks to place it in statute. This was the subject of some debate over amendments in the other place quite recently, but even at the moment the Scotland Bill that is going through states that the UK Government "will not normally legislate" in devolved areas "without the consent of the Scottish Parliament". The effect that would have and how it would be judged if it were to go to the Supreme Court, for example, are uncharted constitutional territories, but generally speaking uncharted constitutional territories are something that you should think a lot about before you enter.

The Chairman: That was one of the things that I was going to ask you about. You mentioned that some repeal of the European convention or the Human Rights Act could cause discussion amongst constitutional experts in Scotland. Sorry, you were referring to the European Communities Act, and you said, "Were we to amend the European Communities Act", which is one of the things that might be required of us if we change our relationship on the convention. Can you tease out a little for us what you meant by that?

Marco Biagi MSP: The point I was trying to make was to illustrate sovereignty. UK primary legislation can be changed within the scope of EU law if it violates the Court of Justice, and that can happen automatically. Nonetheless, it would be open to the Westminster Parliament, should it wish and should it be willing to take all the other consequences, political and international, that would come with it to rescind the European Communities Act 1972. It is not open to the Scottish Parliament to rescind the Act of Union 1707, otherwise we might well have tried by now rather directly.

The Chairman: You might well.

Marco Biagi MSP: The actual level of sovereignty that the Scottish Parliament has is very clearly bound by those agreements that are entered into and that surround it, whereas Westminster's ceding of sovereignty over the European Communities Act, even within the scope of EU law, is conditional on primary legislation that Westminster itself could theoretically rescind or amend, although, as I say, that would end up with substantial consequences with the rest of Europe.

There is the possibility here of selective repeal of the Human Rights Act, which I know some members of the UK Government and some commentators have aired: the question of whether the Human Rights Act could be repealed for its effect in England and Wales but be left in Scotland. This is an interesting area that theoretically could happen, in the sense that the UK Government can do what they like—that is the nature of parliamentary sovereignty—as long as it gets through Parliament. It will depend on what comes forward. At this point, I work from a Conservative Party document of October 2014 as my understanding of the direction of travel of the United Kingdom Government, but if the UK Government seek to keep the Human Rights Act in place in Scotland and just in Scotland, making Scottish

citizens able to go to domestic jurisdictions and then to Strasbourg through the existing process while implementing a British Bill of Rights that affects only England and Wales, that would throw into question whether it was a British Bill of Rights to begin with. If the Human Rights Act was repealed entirely and the Scottish Parliament sought to maintain the convention rights in Scotland, we could theoretically legislate for that because it is a devolved area. The challenge would be where it is was affecting reserved bodies, for example the Department for Work and Pensions, the MoD, and perhaps, most acutely for debate, the border agency and the Home Office for immigration purposes. The Scottish Parliament's ability to reintroduce those human rights obligations on reserved public bodies is potentially a matter of some interest to debate. I do not think there is a clear picture. You could end up with a situation where a British Bill of Rights applied in Scotland to public bodies that responded to Westminster, while a separate human rights framework was in place for devolved functions. However you go here, it is not easy to come up with a system that is coherent if the Human Rights Act is withdrawn from Scotland, because of the different responsibilities of the different parliaments and the fact that there are public bodies that will exercise functions across both domains.

Lord Blair of Boughton: One thing I should say is that we must not neglect Northern Ireland in that part of the discussion.

The Chairman: It is not within your remit, but is there anything you would like to add to that?

Marco Biagi MSP: That is a question for our equivalents in the Northern Ireland Executive.

The Chairman: Of course, and we have invited others to come too. Lord Judd, you have a question.

Q38 Lord Judd: As a non-lawyer—an ordinary layman—could I clarify the implications of what you have said? As things stand, would the Scottish Parliament have the competence or not to legislate for any gaps in human rights protection caused by repealing the Human Rights Act that were not covered by a Bill of Rights or the EU charter?

Marco Biagi MSP: In the absence of the concrete proposals, it is hard to be definitive. In the absence of anything that was implemented being tested in courts, it is also hard to be definitive, but we believe that human rights are a devolved area and that we can legislate for them. However, where that comes into conflict with the actions of bodies that are exercising reserved functions, there is a question that is hard to answer at this point. Those are the areas where there is the greatest likelihood of political flashpoints. I envisage there being considerable controversy around such cases were that to happen. Beyond that, it is hard to say. I know from the passage of a Bill in my portfolio that concerns have been expressed in certain quarters about the potential impact of exercising devolved powers on reserved bodies. It is fair to say that this has been the object of some discussion for many years between the Scottish Parliament and the UK. If such an attempt was made, and it resulted in a difference of opinion and an organisation having to answer to a parliament that it is not used to dealing with and whose powers are explicitly reserved from tampering with it, it would be highly likely that that organisation would want to seek some kind of remedy. The answer is very unclear because of the continuing activity of public bodies in Scotland in particular that are beyond the powers of the Scottish Parliament or are taking actions in areas that are beyond the powers of the Scottish Parliament. I can give you an example.

Going back some years to 2004, a case that resulted in a human rights claim allowed the tenancy of a same-sex partner to be passed to the other partner after the original signatory to the tenancy had died. If that had happened in a Scotland where a Human Rights Act had been passed by the Scottish Parliament, that Act would apply, because housing law is devolved to the Scottish Parliament—there would be no hesitation in saying that the Scottish Parliament’s legislation for human rights applied there. However, there would be much more of an open question with tax or the inheritance consequences of that death, because those issues are reserved. In that situation, you would be trying to apply human rights legislation that had passed through the Scottish Parliament to the implications of a change in domestic arrangements or to rights *vis-à-vis* a reserved area. The position is essentially unclear, and our very clear policy preference would be to retain the current arrangements, which maintain one system of human rights protection in Scotland under the European Convention on Human Rights.

Lord Judd: You are being very straightforward and very helpful. I stress again that I am just an ordinary layman. If, God forbid, we were to repeal the Human Rights Act, are you saying that there would inevitably be a period of uncertainty while things were being sorted out?

Marco Biagi MSP: The first uncertainty would arise from the fact that the Scottish Parliament would, in all likelihood, decline consent, which would create your first constitutional and judicial battle. That would happen during the passage of the Bill. Its enactment, if that were to happen, would happen against the will of the Scottish Parliament, and that would have had quite considerable consequences, I would expect, for public opinion north of the border and for the current debates about the relationship between Edinburgh and London. Then, as with many of the other decisions that have passed through the UK Parliament that we have disagreed with, it would fall to the Scottish Parliament to attempt to do something to try to make restitution. We have been able, in some cases, to take action on some of the welfare reforms: we spend about £300 million at the moment mitigating UK welfare decisions that we disagree with. Those are also controversial—certainly more controversial than issues of human rights in Scotland. There would be an attempt in Scotland to examine our powers and the Scotland Act to attempt to put in place the strongest possible alternative that we could. But as with everything else that we have done where the UK has taken action that we disagree with, our powers will inevitably be limited by the Scotland Act. The crucial difference, however, is that on welfare we accept the reservation: it is very hard to read the Scotland Act and not see welfare jump out in Schedule 5. While we recognise the right of the UK Government to do this, we disagree with it and attempt to ameliorate, or at least slightly mitigate, the effects.

This is an area where the UK Government do not have, we believe, the clear responsibility through reservation of human rights in the Scotland Act to be able to do this. This would be the United Kingdom Government legislating in a devolved area against the wishes of the Scottish Parliament. That is a very substantial step to take.

Q39 Baroness Eccles of Moulton: This question is more general, but it has a rather extreme point in it. If a Bill of Rights was to limit the scope of the European Convention on Human Rights, as interpreted by the court, would the UK be right to remain a party to the convention?

Marco Biagi MSP: I think that would depend on the specific mechanisms that were being enacted and, crucially, on the views of the other states in Europe. Our view is quite clear

that, regardless of what happens, we should remain within that regime and stay party to the ECHR. From our perspective, there is an interesting interaction between the ECHR and the EU. There is the expectation through the Copenhagen criteria that countries that accede will have incorporated the ECHR, but that is at the point of passing through the door. It is a much more open question as to whether the EU would kick somebody out of the door for stepping outside the ECHR. It is a difficult position to be put in and it is certainly not going to do the UK's international reputation any good. That is of concern to us in the Scottish Government, because obviously, as part of the United Kingdom, we are affected by the UK's international reputation and standing. Our view would be that, whatever happens, the best approach is to stay within the ECHR to avoid sending such a message, which would be heard in capitals around the world that have scant regard for human rights.

Q40 Baroness Neuberger: Let us assume that whatever else happens, there has been some kind of change in the rules governing the UK's protection of human rights and we already have the principle of mutual recognition in the field of EU justice and home affairs policy. With everything that you have already said, supposing that went through, how do you think it would affect the UK's continuing participation in this area of EU co-operation?

Marco Biagi MSP: I would reiterate what I said: that any reduction will have international consequences for reputation and esteem. That said, the countries of Europe do not have judicial relationships and traditions solely with each other; they also have them with countries outwith Europe. The Scottish Government would be reluctant to speculate on the exact implications of any proposals without having seen them, but certainly the reputational issue is there, and if you step away from the principles, other Governments, other countries, are going to consider the relationships between the jurisdictions, and in the end the question will probably be resolved by the other jurisdictions rather than by the UK itself. As I say, I do not want to speculate; I would simply emphasise the importance of maintaining our international relations on this.

Baroness Neuberger: So you do not think there are specific areas where there would be a real problem.

Marco Biagi MSP: It is impossible to speculate without having seen it enacted, if it were to be enacted, and without seeing which cases came forward to test the provisions. Again, as with many of these things it would be dependent on the first high-profile example and how that was reacted to. It is always bad to set law by high-profile examples, but law is not set by lawyers but by politicians, and we often have to respond to the prevailing mood. After all, the very first question was about controversy, so until you have seen any of this happen, if indeed it does, it is hard to be definitive.

Baroness Neuberger: You cannot play it out.

Q41 Baroness Newlove: I think you have answered, articulated and flagged up other areas where this could cause problems, so my question is: could the repeal of the Human Rights Act put the UK in direct conflict with other areas of EU law and, if so, in which areas?

Marco Biagi MSP: Again, we do not know exactly what is being proposed here, so it is difficult to say. The rights under the convention are recognised in EU law as well and broadly form part of the *acquis communautaire*. There is clearly overlap. It is a very complicated issue, and as a representative of a Government rather than a legal expert I would not necessarily want to give a legal opinion. It is, however, important to observe that if there is

no scope for actions under the European Convention on Human Rights, people seeking remedy through the Human Rights Act will have an incentive and a desire to look a lot more closely at EU law than they do at the moment and to try to test the bounds of EU law, which applies within the scope of European operations. But that understanding of what that comprises has also evolved. The *Delvigne* case, for example, was an application of EU law to the European Parliament that had not been expressed before, and that therefore broadened out the impact of EU law. I expect there will be people who attempt to seek remedy through EU law if they cannot do so through the Human Rights Act, but, again, we do not know exactly what mechanisms are going to be set up.

The Chairman: Baroness Ludford would like to pick up on that, because that is precisely what she was going to ask about: the extent to which we might see that.

Q42 Baroness Ludford: Indeed. I think you have sort of answered the question, because I was going to ask whether it is your view that there would be increased reliance on the EU charter in Scottish courts if the Human Rights Act were to be repealed. Perhaps I can wrap that up with the final question, which is: would this lead to increased references to the European Court of Justice? Perhaps I can add another question. Would that, in your view, be desirable or undesirable? Would it stretch the charter to its limits and beyond?

Marco Biagi MSP: There is an irony here. The Human Rights Act was introduced to try to bring the decision-making home—I think that the exact phrase was “bringing human rights home”—the idea being that it could be actioned in United Kingdom courts so that petitioners did not have to go all the way to Strasbourg. That is still a useful principle, of which the Scottish Parliament and Scottish Government would be very supportive. I do not want to be the person coming to the defence of the UK Government, but it is important to point out that, from my understanding of the proposal, there is an intention to have a domestic mechanism of some kind—it is not about throwing out human rights entirely—with the talk about a British Bill of Rights. However, that throws up all kinds of difficulties. If the British Bill of Rights is to be enforced in the Supreme Court, will that not lead to the same concerns when that court disagrees with the views of the Government of the time? I personally believe—indeed, the Scottish Government believe—that our powers as a Government should be bound judicially and that that should apply generally as a principle. There would have to be some kind of domestic mechanism, but there will still be recourse because, under the ECHR, individuals have to have the ability to go to Strasbourg, even if that is only in an advisory capacity. For that to happen and then for it to be explicit that the advice was ignored domestically, although that may not have an effect domestically I would imagine that in these high-profile cases, especially the ones that fuel controversy, people will still seek to go to Strasbourg and then come back to the United Kingdom waving an advisory opinion and saying, “Look, you’re out of step.”

If I were to summarise these proposals, I would say that they have not been thought through. The Scottish Government are waiting with some interest to know how the UK Government are seeking to square all these circles, not just in light of the Sewel convention but in trying to construct something that they can defend as a human rights architecture for the United Kingdom in the absence of the Human Rights Act. If I can just extend slightly from the question to make one other point, one of the things that I have noticed most in the papers and debates, certainly when they have come to the Scottish Parliament, is a deliberate attempt to try to reduce the recourse to courts in the proposals—the so-called

trivial cases or “spurious human rights grounds”, to quote spokespeople. That is going to have an impact. It will be very hard, I suggest, to render into legislation. As a government Minister, I very often say to policy officials and lawyers, “Here’s what I want to do. Can you make it happen in law?”. I suspect that if I was going to try to do that, lawyers would have a hard time drafting something that would restrict people’s ability to go to courts on the grounds of what was trivial, because ultimately it tends to be the courts that decide the interpretation of statements like that and what is trivial or not. Whether it is recourse to the domestic courts, whatever they may end up being, or recourse to the UK courts, I think it is hard to predict exactly what will happen, except that the controversies will continue and in some cases will be exacerbated by these changes in structure.

Baroness Ludford: Can I just press you on the charter? There is a slight element of this being a leading question, but would you expect some displacement from the convention mechanism in Strasbourg to the charter mechanism and the Luxembourg court? Could that, ironically in a sense, reintroduce through another route European courts meddling in our affairs? Would it stretch the meaning of the charter, which, as you have repeatedly said, applies only to the implementation of EU law? You said that people would try to test it, but would that test it to difficult limits?

Marco Biagi MSP: I cannot prejudge the judges in Luxembourg as to what they would do, but if at the moment you have the option of the European Convention on Human Rights, as opposed to the charter, and that option ceases to be available, you would certainly, if you are looking for a remedy, be more likely to look at the charter as an alternative and to try to seek that. It is hard to prejudge whether the judges would wish to try to expand their understanding of what constitutes the scope of EU law, but what is within the scope of EU law has certainly expanded through treaty and other means for many decades. You would certainly expect plaintiffs to go there if they could not go elsewhere.

Q43 The Chairman: Mr Biagi, as we come to the end of the session, I want to put a different suggestion to you. In some of the discussions that are taking place—of course, we have not yet seen the consultation paper—it has been suggested that this will not be a great radical thing of pulling us out of the European convention or even the European court. The suggestion is that essentially the European Convention on Human Rights and all that is there will be included in the British Bill of Rights, but a gloss will be put on it—that is the language that I have heard used. A gloss will be put on each of the rights in order to inhibit judicial discretion, so that judges cannot roam with the rights, or lawyers—lawyers can always be inventive. The idea is to restrict that. That is the purpose. There will basically be the same rights and the same access to the European court, but a limit will be put on that by way of explanations entering into the legislation around it. How do you think Scotland is likely to respond to that?

Marco Biagi MSP: I think we would repeat what has been said every time human rights have been debated in the Scottish Parliament, which is that that is a dilution of those rights. Explanations are a positive spin for what others would call caveats or qualifications. Whether that is in the extent of the right itself or in how you can seek remedy under it, that is a departure from the mechanisms of the European convention. We would expect case law and jurisprudence to diverge over time and for the gap to start to open up, with people highlighting examples where perhaps the ECHR would have ruled one way when the domestic courts, because of these qualifications, went the other way. There would therefore

clearly be a departure from the European mainstream. There would be a separation and the Scottish Government would certainly view that as no longer being in keeping with the European Convention on Human Rights. It would certainly not be the European Convention on Human Rights if it was a British interpretation of it.

I would again caution the UK Government that if they think that they can prevent judges from ruling in ways that they disagree with by making sure that the judges in question are in London rather than in Strasbourg, they will have this issue come back to them 10 or 20 years down the line, because it is in the nature of human rights rulings to go against Governments of the time. That is what they are there for. The point of Governments having binding powers put on them is to occasionally have their actions checked and called in. I worry that perhaps that is what is being objected to, based on the history of Westminster's parliamentary sovereignty. My Government and the Scottish Parliament are very familiar and comfortable with the alternative view, which is that the decisions of Parliament and Government should be bound by a constitution. Yes, this is a European model, but it is also a north American model and a model that is used widely around the world. I suspect that, fundamentally, that is the problem that the UK Government are trying to solve and that anything that they are proposing is only going to continue to have the same fault lines running through it as at the moment.

The Chairman: As no one else has a question, let me say, Mr Biagi, that we are very grateful to you for coming. You answered with clarity and a great deal of knowledge and erudition on the subject, and I am grateful to you. It has been a very enlightening evidence session.