



House of Commons

European Scrutiny Committee

EU Accession to the European Convention on Human Rights and the EU Charter of Fundamental Rights

Oral and written evidence

Wednesday 7 September 2011

*Ordered by The House of Commons
to be printed 7 September 2011*

The European Scrutiny Committee

The European Scrutiny Committee is appointed under Standing Order No.143 to examine European Union documents and—

a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;

b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Committees); and

c) to consider any issue arising upon any such document or group of documents, or related matters.

The expression “European Union document” covers —

i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament;

ii) any document which is published for submission to the European Council, the Council or the European Central Bank;

iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council;

iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;

v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation;

vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

The Committee’s powers are set out in Standing Order No. 143.

The scrutiny reserve resolution, passed by the House, provides that Ministers should not give agreement to EU proposals which have not been cleared by the European Scrutiny Committee, or on which, when they have been recommended by the Committee for debate, the House has not yet agreed a resolution. The scrutiny reserve resolution is printed with the House’s Standing Orders, which are available at www.parliament.uk.

Current membership

Mr William Cash MP (*Conservative, Stone*) (Chair)

Mr James Clappison MP (*Conservative, Hertsmere*)

Michael Connarty MP (*Labour, Linlithgow and East Falkirk*)

Jim Dobbin MP (*Labour/Co-op, Heywood and Middleton*)

Julie Elliott MP (*Labour, Sunderland Central*)

Tim Farron MP (*Liberal Democrat, Westmorland and Lonsdale*)

Nia Griffith MP (*Labour, Llanelli*)

Chris Heaton-Harris MP (*Conservative, Daventry*)

Kelvin Hopkins MP (*Labour, Luton North*)

Chris Kelly MP (*Conservative, Dudley South*)

Tony Lloyd MP (*Labour, Manchester Central*)

Penny Mordaunt MP (*Conservative, Portsmouth North*)

Stephen Phillips MP (*Conservative, Sleaford and North Hykeham*)

Jacob Rees-Mogg MP (*Conservative, North East Somerset*)

Henry Smith MP (*Conservative, Crawley*)

Ian Swales MP (*Liberal Democrat, Redcar*)

List of witnesses

Wednesday 7 September 2011

Page

The Rt Hon Kenneth Clarke QC, MP, Lord Chancellor and Secretary of State for Justice, **Daniel Denman**, Assistant Director, Information and Human Rights Team, Legal Directorate and **Katie Pettifer**, Deputy Director, Information and Human Rights, Justice Policy Group.

Ev 1

List of written evidence

- | | | |
|---|---|-------|
| 1 | Letter from the Rt Hon Kenneth Clarke QC, MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice to the Chair | Ev 13 |
| 2 | Letter from the Chair to the Rt Hon Kenneth Clarke QC, MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice | Ev 13 |
| 3 | Letter from the Rt Hon Kenneth Clarke, QC, MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice to the Chair | Ev 14 |

Oral evidence

Taken before the European Scrutiny Committee on Wednesday 7 September 2011

Members present:

Mr William Cash (Chair)

Mr James Clappison
Michael Connarty
Nia Griffith
Chris Heaton-Harris

Kelvin Hopkins
Chris Kelly
Jacob Rees-Mogg
Henry Smith

Examination of Witnesses

Witnesses: **Rt Hon Kenneth Clarke QC, MP**, Lord Chancellor and Secretary of State for Justice, **Daniel Denman**, Assistant Director, Information and Human Rights Team, Legal Directorate and **Katie Pettifer**, Deputy Director, Information and Human Rights, Justice Policy Group, gave evidence.

Q1 Chair: Thank you very much, Lord Chancellor. I am going to start with a question relating to the scrutiny of this agreement because, frankly, we are deeply concerned about a question that relates to the confidentiality of the negotiations in respect of this agreement. We know that the final draft was published on 19 July and I would be grateful if in a moment you could tell us what procedure the UK and the European Union are now following and when the accession agreement is likely to be deposited for parliamentary scrutiny.

What I would like to know from you is why these negotiations have been confidential, and would you prefer that this was not the case? Don't you really think that the fact that the final version is marked on the front page of the agreement as a final version means that it is not open for further renegotiation? Frankly, you are coming here to speak to us and the idea that a matter of this importance should be shut off, marked confidential, final version, end of story is not the kind of thing that we would appreciate. Could you try to explain the circumstances and then tell us what you think about it?

Mr Clarke: Chairman, I really think I can reassure you on that and explain. There actually is going to be a very great deal of scrutiny of this process, which is going to be a very long one, before it gets any kind of finality. The few documents we have at the moment do not have the status that I quite understand you fear they have; when you look at them it might give that impression. In principle it has all started; the principle of it we are already committed to from the last Parliament—it's the Lisbon Treaty, the EU accession to the European Convention on Human Rights—but everything else is up for negotiation and approval by individual Member States. In my personal opinion, we are in quite an early stage of this being finalised.

The reason we have not had any formal scrutiny before is we have not yet got any formal documents produced from the Commission upon which the process is going to go forward. So far we have two things: one is the negotiating mandate for the European Union with the Council of Europe, responsible for the European Court of Human Rights, and that is confidential. All the negotiating mandates

always are, but that is for an extremely good reason. If you are negotiating with anybody, as you have and I have, you cannot negotiate with anybody if your mandate is a public document that has been handed to the other side. On the other hand, the negotiating mandate does not actually bind individual Member States to anything on any side. It is a process upon which it has been agreed the Commission should go away and start these negotiations with the Council of Europe.

They have not really started yet because what has then happened is a committee of experts has been appointed to produce the draft accession document, which is the document you do have to which you have just referred.¹ I am sorry we did not send it to the Committee, but it is actually publicly available. It is not a secret document; I think it is on the Council of Europe's website and that is the only document that has been produced. This is by a nominated committee of experts—officials—including a British official. They have no power to take any decisions; they just go away and produce their expert, first stab at what it might look like when we get to an accession agreement, to really get the negotiation started. This is again my personal interpretation of it, but I think it is in line. I gladly invite Katie or Daniel to correct me if I overdo it, but this is the piece of paper on which you start. That is the final version of what the experts are going to do; that is what they produce. None of this has been signed up to yet by a single Member State and the next stage is the Member States will look at that, including ourselves, and we will decide how we go from here and what the accession agreement may look like.

When we eventually get a draft accession agreement being put forward, that will be subject to the ordinary process of formal scrutiny here, so if you want us again we will be back. By that time, of course, it will be coming in an official draft that is being debated by Member States and being looked at, or at least is to be debated by the Member States. It will be the

¹ *Note by witness:* Negotiations have started between the Commission and Council of Europe, through the expert group, but Member States have not been involved—until now.

Commission who will put it to us for agreement. The final accession agreement, if the Member States finally agree on an accession agreement, has to be approved by each Member State of the European Union and each Member State of the Council of Europe. Therefore, 27 EU Member States will all have to agree—it is unanimity, so the whole lot will have to agree—and 47 members of the Council of Europe, which is an overlap of course because there are 20 more, will have to agree it unanimously. The British, before we can agree to the accession agreement in its final form—I hope you are already getting the impression, which I think is the case, that this is some way down the track—are going to be bound by the EU Act, which now has Royal Assent. Even if the Government as one of the Member States wants to accede to the accession agreement we will not be able to until we have a positive resolution of each member Parliament.

I understand your alarm, because if you thought we have here the final document and we are getting near to signing it—

Chair: It did say final version.

Mr Clarke: I hope I have explained as clearly as I can—I hope not too laboriously—that we are actually at a terribly early stage of drawing this up. I can assure you the British Government has not committed itself to a word of the draft accession document that you have in front of you.

Q2 Chair: So for practical purposes we are now assured that “final” does not mean final in this context.

Mr Clarke: Yes and with any luck, you and I might still be Members of this House when it finally gets to the end of the process I have just described. It is a long way away.

Chair: As we are almost exactly the same age, we’ll have to ponder that one.

Mr Clarke: Yes, we are both facing the same odds.

Q3 Chair: So can we expect to be able to give our opinion on this agreement when it does come through?

Mr Clarke: You will certainly be able to scrutinise it, and the entire House of Commons will have to give its agreement before we can agree to anything. We will have to have a resolution on the Floor, but I would have thought that will almost certainly follow the normal process of scrutiny by this Committee.

Q4 Michael Connarty: Can I first welcome you? It is important that you should be here at this early stage. One of the first questions is: what is the procedure for EU and UK ratification? Could you spell that out so that those who read these minutes know exactly what the UK Government and Parliament will do in the ratification process and what you expect the EU to do in the ratification process?

Mr Clarke: Each Member State will have to agree to ratify and then, presumably, the Government would notify its colleagues in the Council that we intended to ratify. We would then come back to Parliament and we would require positive votes from both Commons and Lords before ratification could be formally made. Each and every one of the other Member States would

have to go through the same process. So all the EU States, each one with the power of veto, and all the other 20 Council of Europe States, each one with the power of veto, will have to go through whatever their procedures are. Ours would be agreement in Council subject to parliamentary reserve, scrutiny here and resolution of both Houses. Katie is much more expert, and Daniel is the legal expert, so is that right? Do either of you wish to clarify it?

Daniel Denman: Just to clarify that there are two parts to the accession process. The EU itself will be acceding and the UK will be separately acceding. As the Secretary of State says, the EU’s accession will require unanimity within the Council. Before the UK can agree to the Council’s decision to accede there will have to be the parliamentary process that the Secretary of State has described. In addition to that, because the UK also needs to be a party to the agreement before it can come into force, it will be necessary for the Treaty to go through the normal Ponsonby process and to be laid before both Houses in the normal way. There will be those two layers to it because both the EU and the UK will need to be a party to it.

Q5 Chair: I don’t know whether I need to address this to you or to your legal advisors, Lord Chancellor, but in the case of international agreements there is a problem about when we see the documents and also the extent to which we can influence them. Quite clearly, in the light of your commitment as expressed to us just now that this whole process is not a final version, but in fact there is a process of continuing negotiation and, for that matter, in a sense, renegotiation, it follows that we would ourselves—and I think you implied this just now—want to be able to influence that outcome at the appropriate time before the final decisions are taken. Can you give us an assurance?

Mr Clarke: We have not really started negotiating; it is an opening of negotiating. What you have is a best stab, as it were, by a collection of international experts: “How about this?” They are experts, so they have scoped out, obviously, the points we must cover and the agreement they have reached on what they suggest will be the best way of approaching it. That now will be considered by each of the Member States. We have only just got it. Your views are very welcome at this stage, but we do have views on this document. We have not finalised them yet. I’m going to be reserved because I have not cleared half of this with my colleagues, but the Government is now going to have to form a view on this, and on some of the things we will go back and say, “We don’t agree with the experts and we want to change this”, and I think most of the other States will. Then, there will be the usual Council thing. We will keep consulting with this Committee; you have so far had two letters off us, which we were not obliged to give, to show you where we were.²

² The letters, dated 30 July 2010 and 21 September 2010 can be found here: <http://www.parliament.uk/documents/commons-committees/european-scrutiny/Ministerial-Correspondence-2010-12.pdf>

7 September 2011 Rt Hon Kenneth Clarke QC, MP, Daniel Denman and Katie Pettifer

Chair: That was extremely good of you, Lord Chancellor. We are deeply indebted.

Mr Clarke: Eventually, there will be a draft accession agreement put to us by the Commission. That will have to go through the scrutiny process. Then we will not be able to agree to that, even when it is settled without having a vote. If I may, just to get it all in one and to reassure you further—and to complicate it further, although I'm not trying to do that—we think the accession agreement is only half the process anyway. The internal rules that the EU intends to follow, by which the EU is going to be a member and accede to a Convention of which all the Member States are also parties because of this strange duality, are as important as the accession agreement.

I do not think any of us are contemplating changing the British Government's present position; we are not going to reach a stage of saying, "We're prepared to accept the accession agreement in its final form" until we can also see the internal rules have gone through the same process by which the Member States have agreed on these internal rules. Exactly what the relationship is between the EU and its Member States and what role the EU thinks it is going to play in the Council of Europe is quite important. I do not think for one moment we are going to resile from the position we are taking; I know from what discussions we have had within the Council that we are not the only Member State taking the view we are. These internal rules have to be settled as well before we have the accession agreement, so only when all the internal rules have been settled are we contemplating going on to accession.

Of course, once they start publishing draft internal rules—I think I'm right: I look to my two colleagues—they will start going through your Committee's scrutiny process again to look at them. There will be quite a lot of difficult negotiations on the internal rules and we do not have any draft internal rules yet. I assure the Committee on behalf of the Government, I have been taking the position: "We are not going to move very far down here; we're not going to go ahead and look at the accession agreement and then look at the internal rules." As far as the British Government is concerned, we want both. They have to come to us with both and we have to negotiate both together. That is the process the Commission are going to have to accept they're going to have to follow.

Q6 Michael Connarty: Can I echo the Chairman's thanks to you for the correspondence? It is not mandatory, but it has been very helpful. I am a recent addition to the Parliamentary Assembly delegation from the UK Parliament. Just to finalise the question of the ratification process, you have said that the other countries in the Parliamentary Assembly would also have to vote unanimously. Is this an impression you have or something that you expect? Is it something you would anticipate has to happen?

Mr Clarke: It's the impression, but I am capable of making mistakes because this is a tricky area. My belief is—and, either of my colleagues, correct me if I am wrong—the Council of Europe proceeds by unanimity. It can only take decisions by unanimity

because there are going to have to be some amendments to the Convention in respect of the Council of Europe to accommodate having a non-nation state signatory.

Let's not get on to this, but just to remind you of the other issue we have about the European Convention on Human Rights, which is a Council of Europe responsibility, we are trying to get some amendments to the Convention on Human Rights and some reform of the Court. If you are going to amend the Convention, each and every one of the Member States of the Council of Europe has to approve it. You can only take a decision of that kind by unanimity and I think, therefore, the accession agreement of the EU to the ECHR will require unanimity. Russia and Ukraine will have to cast their vote and approve it by their processes, just as will all the EU states elsewhere.

Michael Connarty: That's very clear, thank you.

Mr Clarke: So that is why I think we are a long way down the track. As you are on the Council of Europe, you know that the other Member States do have strong views on this. At the moment there are 27 EU and 47 in the Council of Europe, but to have another EU vote brought in—and I forget what the figures are; I may have the figures wrong—could give an overall majority to the European Union if the European Union and all its Member States started voting in a bloc.

Michael Connarty: I think we will come back to the internal questions later on the ratification.

Mr Clarke: The others are all very worried about bloc voting in the Council of Europe.

Michael Connarty: We will come back to that.

Mr Clarke: We share their views about bloc voting; we don't want to operate as a bloc in the Council of Europe. I won't go on—as I probably am doing—but I think we have years of this before you have everybody from Bulgaria to Luxembourg to sign up to this. Our processes are quite thorough.

Chair: I think you have given us a full description and I can only say I hope you have a chance to read the history of Justinian's attempts to achieve a similar situation with regard to the *Codex Iustiniani*, if you remember from your days at Caius College Cambridge under the great legal masters there. I would now like turn to Henry Smith and we now want to turn to the substance of the agreement.

Q7 Henry Smith: Thank you, Chairman. Lord Chancellor, turning to that substance, can you give any practical examples of how the EU's accession to the ECHR would benefit constituents?

Mr Clarke: We have a list of some individual cases here where we think it might have changed the way it had gone ahead. The point of all this is to make the EU and its institutions subject directly to the European Convention on Human Rights, and have complaints against the EU and its institutions subject to that jurisdiction in the same way as Member States that at the moment you can challenge. If someone thinks their human rights have been infringed by one of the institutions of the European Union, they can go to the court in Luxembourg, but they can indeed go to the court in Strasbourg if they want. However, they can only go to the court in Strasbourg by bringing an action against one of the Member States.

If you as a British subject think the Convention has been breached and your human rights have been impaired by one of the institutions of the European Union, you may, in some circumstance, be able to bring an action against the British Government.³ This is not satisfactory, and so what this would allow you to do is to bring an action against the EU and its institutions; it makes the EU and its institutions directly subject to the Convention and answerable for it. Then there are elaborate procedures I have no doubt we will go into where the exact division of responsibility between the Member State and the EU comes in; you can have co-respondent procedures. The point, though, that set all this off was: why should a Member State have one of its citizens take it to the Court when actually the argument is about what has been done by some European Union institution—the Commission or one of the other agencies of the European Union—and that is where we started this whole process? A constituent who felt they wanted to bring an action for breach of their human rights, contrary to the Convention, against a European Union institution would be able to take them directly to Strasbourg.

Q8 Chris Heaton-Harris: I understand the impeccable logic behind that particular argument, but if the European Court of Human Rights found against the European Union, then would the European Union then not have to repeal, amend or enact laws accordingly? This obviously then would directly affect us and bypass scrutiny and the other procedures that we have.

Mr Clarke: If the action was against the European Union alone and the European Union lost, so something has been done which is in breach of the European Convention on Human Rights, the EU can only respond to that if the Member States and the European Parliament take a decision about how they are going to respond. What then happens is that the Council of Ministers and the European Parliament, no doubt acting on a proposal from the Commission, start considering what to do now you have lost this judgment because you are under a legal obligation to comply with the judgments of Strasbourg. Then the British Government comes into play because we start expressing a view about how it is proposed to comply with this judgment and, it seems to me inevitably, we go through scrutiny.

Chris Heaton-Harris: So it is the start of the normal process.

Mr Clarke: Yes, and that is what I think would happen. We have never had this before, but I think it is quite clear that is what is contemplated.

Q9 Henry Smith: Following on, if I may, in the past in correspondence to us you have spoken of a gap in human rights protection. Can you give any examples of where you believe that has led to an injustice already?

Mr Clarke: Well, I am trying to think. Does anybody have an example of an injustice? The reference to the gap in the correspondence I have sent—or the gap that

everybody had in mind—was that you cannot bring an action against the European Union, despite the fact that ever since it started the European Union's actions have been subject to the Convention on Human Rights. The Treaties make it clear everything has to be done in the courts. That's the gap. Individual cases of injustice? No, I can't say that one leaps to my mind, but if anyone can think of one—

Katie Pettifer: Daniel can.

Daniel Denman: There is a question at the moment under the Convention about how far the Member States can be held responsible for the actions of the institutions that they take entirely on their own, when the Member States cannot be held responsible except for the fact that they agreed to the Treaties that created the institutions. The classic example is the Commission in an overzealous competition investigation that kicks down the door rather too zealously. There is a question at the moment whether it would be possible for an individual to take the Member States to the Strasbourg court in respect of that sort of action. That question is unresolved. It is quite possible that would not be the case. After accession, though, it would be clear that it would be possible to take the EU to the Strasbourg court in respect of that act of the Commission in the individual case.

Q10 Chair: So that is really what you meant in your letter of 8 September when you set it out by saying, "First, at present individuals who consider that the actions of the EU have breached their fundamental rights cannot bring a proceeding against the EU at the European Court of Human Rights. Following the EU's accession to the ECHR they would be able to do so". That's what you are saying now and this, as you say, would be a significant step.

Mr Clarke: It's a good example; I hadn't thought of that. The Commission has and exercises its own jurisdiction in competition issues. It starts acting as a competition authority and, at the moment, if a British company were indignant and wanted to do something about it, it would have to take an action against the British Government saying that as a member we weren't restraining it, and then it is unclear whether you could.⁴

Q11 Chair: What evidence is there that there have been any difficulties in respect of individuals in these circumstances?

Mr Clarke: Arguments about competition cases? I think there is quite a lot. I have known controversy about the attitude that was taken towards the competition law in a particular case. Most people who want to go for merger or acquisition activity tend sometimes to get into conflict with the competition authorities.

Q12 Chair: What does that have to do with human rights? I am slightly puzzled by this, Lord Chancellor, because we are really talking about issues of wrongdoing—people who are put in some jeopardy. It is not exactly comparable to a situation regarding

³ *Note by witness:* You can, depending on the circumstances. There are also cases where you cannot.

⁴ *Note by witness:* for clarification we weren't restraining the Commission, rather we were restraining the company.

7 September 2011 Rt Hon Kenneth Clarke QC, MP, Daniel Denman and Katie Pettifer

competition law between commercial entities. What we are interested in here in our advocacy of human rights legislation and the possible UK Bill of Rights or whatever else is to protect people as individuals from their being adversely affected by the mechanisms of the legal process.

Mr Clarke: I wouldn't trivialise it; it can arise in commercial decisions, but I will see if Daniel can find an individual instance.

Chair: Could you fish out an individual relationship between an agency of the European Union and an individual British citizen.

Daniel Denman: Yes. One of the examples that was given in the letter to the Committee of 21 September 2010 was the Senator Lines case where precisely this circumstance arose. Senator Lines was the company that brought proceedings against all the then 15 Member States of the European Union. As it happens, the case was inadmissible on other technical grounds so the matter was never resolved, but the point certainly did arise in the case. There are regularly cases in the Luxembourg court and competition cases where there are arguments that the procedures the Commission has followed in individual cases do not entirely comply with the procedural rights in the Convention, as reflected in European law, so this is not hypothetical. These cases arise and have arisen.

Q13 Chair: The one point I must ask is why it is that you are making so much of the question of states rather than individuals, because really the essence of human rights is to protect individuals, not states.

Mr Clarke: You usually have an individual on one side as the plaintiff and a state on the other side as the defendant. In the future, in some cases if an instance arises, you are going to have an individual with a grievance who will be the plaintiff on one side and the European Union or one of its institutions who will be the defendant on the other side.

Chair: I think we've got the message that it is more about states than individuals.

Mr Clarke: No, it is about both. It is individuals bringing complaints against states or big international institutions. It is David against Goliath; that is what the whole thing is about. You have David on one side but Goliath cannot be left out of the picture, because the whole point is you are trying to get a remedy against him.

Q14 Chris Heaton-Harris: Just quickly—Lord Chancellor, if I might actually ask Mr Denman this—does that mean OLAF⁵, the anti-fraud body, would be one of those types of institutions because that does take action against individuals having been, essentially, instructed by the European Commission. Is that correct?

Daniel Denman: Yes, that's correct.

Chris Heaton-Harris: That would actually be a huge step forward because in the past, under the whistleblowing cases that many on this Committee would know, there was a German journalist, Hans-Martin Tillack, who was apprehended, had a briefing taken from him and had no recourse whatsoever through the courts.

Mr Clarke: And under the Convention on Human Rights as established he would be advised to see if he could go against the British Government, because of our membership of the Union, and probably his lawyers thought this was a bit of a long shot.

Q15 Michael Connarty: A very simple question just to clarify: can you give the Committee reassurance that this accession will not in any way allow states to take cases, and that it is individuals who would be allowed to take cases against the European Union should it accede? Would states be able to claim a breach of human rights against the Union?

Mr Clarke: In a dispute between the state and the European Union over competence or something of that kind, or some argument about the legal basis for some activity, my off-the-cuff opinion is that in 999 cases out of 1,000 you would go to the Luxembourg court—the European Union Court of Justice. I think anybody can bring a claim under the European Convention on Human Rights, but I have no personal recollection of any state at any time ever having done that. I can't dream of one, but Daniel might be able to find a case where some state or the Government of a state has taken an action against somebody else.

Q16 Michael Connarty: It was just to clarify for people who read this evidence, having had discussion with the Chairman, that this is about individuals; it is not about giving power to the states.

Mr Clarke: Daniel seems to think that states have brought actions under the Convention.

Daniel Denman: It is possible for states under the Convention to bring actions against other states. There are famous examples, such as Cyprus against Turkey or, for that matter, Ireland against the UK. Under the draft as it presently stands it would hypothetically be possible for a non-member state of the EU to bring proceedings against the EU. I do not think anyone can particularly see a circumstance where that might happen; I think that would be a hypothetical possibility.

Katie Pettifer: I would add that the explanatory report to the draft says that it is not governing whether the Member States of the EU can bring actions against the EU, but it does note that the EU's own Treaties say that Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties, or any other method of settlement other than those provided for therein. So the assumption is it would be done internally within the EU.

Q17 Chris Heaton-Harris: But the EU would, under this, be empowered to take the UK to the European Court of Human Rights if it believes that we are not actually fulfilling our obligations under the ECHR. Is that correct?

Mr Clarke: At the moment, obviously, we do get taken to Strasbourg by various people claiming that we are in breach of the Convention. I do not think the British have any history of being taken there by another Member State. As anybody can take us there who wants to argue the point, I suppose theoretically it is possible that the European Union would. If it is a dispute about competence or interpretation of

⁵ Office Européen de Lutte Anti-Fraude

European Treaties or anything of that kind, that is what the European Court of Justice in Luxembourg is for. The European Court of Justice in Luxembourg themselves are putting their oar into this whole process because they wish to be consulted on certain cases. What we do not want is two sets of jurisprudence coming out of Strasbourg and Luxembourg. The Member States' Governments and the EU would normally just go to the logical court, both of which are bound by the Convention.

Q18 Chris Heaton-Harris: Yes, in theory, I think the way the information we have received reads, it does seem as though the EU would be able to do that. It is just an interesting possibility for the future because this obviously extends to matters outside the current scope of EU competence.

Mr Clarke: Yes, they take us now to Luxembourg, if they can, in theory—and have done—under infraction proceedings, for not complying with our Treaty obligations under the Treaties of the European Union. That is what the Luxembourg court is for. It is conceivably, theoretically possible that they take the view we are complying with our Treaty obligations, but we are still in breach of the European Convention on Human Rights. I cannot myself envisage circumstances in which they decide to take the British Government to Strasbourg, but that is theoretically possible. I look for advice.

Daniel Denman: First of all, just to add to what the Secretary of State says, it is of course already possible for the Commission to bring proceedings against the UK in the Luxembourg court in respect of breaches of fundamental rights. That is already within the purview of the Luxembourg court. As to whether it might hypothetically be possible for the EU to bring proceedings against the UK in the Strasbourg court, I would just draw your attention again to the internal rules that the Secretary of State mentioned. Before the EU could take any steps in Strasbourg, it would be necessary to go through the processes envisaged in the internal rules, which we would say we want the UK itself to be involved in as far as possible. That is another reason why it is particularly important to make sure that the internal rules provide the necessary safeguards and procedures.

Chair: We accept that that is very important—critical in fact.

Q19 Jacob Rees-Mogg: Lord Chancellor, if the EU is signed up to the Convention and it is signed up to more protocols than the UK is signed up to, what would the situation be as far as the UK is concerned?

Mr Clarke: Undesirable. The present draft from the experts has the EU only signing up to those protocols that every single Member State has also signed up to—I think there are only two of them—and we think that is fine. That is not a part of the draft accession agreement that we disagree with; I think that is rather good advice from our experts and that, at the moment, is our position. I suspect that would be the position of most other Member States.

Q20 Jacob Rees-Mogg: What would the position be in terms of signing up to further protocols? Would it be unanimity or would it be qualified majority voting?

Mr Clarke: The EU can only act on behalf—when the EU takes an action in the first place, when it comes to something like signing up to a protocol, it needs the approval of the Council of Ministers to do it. The EU cannot do this kind of thing of its own volition, so you are bound with each of the Member States to considering a proposal that the Council of Ministers has received from the Commission whether they should sign up to another protocol. If that were to occur then the British Government at the end of the day would be one of the Member States taking a view on that. I imagine any British Government, if it has decided not to sign up to a protocol itself, would start objecting to the European Union as a whole going off and signing up to the protocol in principle. I do not know yet what the reaction will be to the draft as it stands at Council of Ministers meetings and so on, but this committee of experts has taken the point.

Q21 Jacob Rees-Mogg: But it will, as you understand it, remain unanimity; there is no question of it becoming qualified majority voting?

Mr Clarke: As far as I'm aware, I believe that both in the Council of Europe and in the European Union this will all be unanimity, which is why I think it is going to take a long time because, as we have already discovered, it is going to be extremely detailed negotiations. Even if we were all desperately anxious to get this through tomorrow, my experience of 47 Governments negotiating documents of this kind is you can be into years and years. I am more anxious to see progress on the procedures of the court in Strasbourg, but my big problem there is: a majority is easy; 47 unanimous may take a little time.

Q22 Mr Clappison: Lord Chancellor, thank you very much for coming today. You mentioned in your earlier remarks the problem of bloc voting as something that exercised you. Could I give you an example of that that seems to arise from the very detailed draft legal instrument we have, which arose from a working meeting in June in the Committee of Ministers in the Council of Europe?

Mr Clarke: In the Council of Europe in Strasbourg, yes.

Mr Clappison: In Strasbourg, in the Council of Europe it is the Committee of Ministers who are charged with a lot of the day-to-day work of the Council of Europe, including supervision of execution of judgments made by the European Court of Human Rights, monitoring of States' obligations and many other things as well. In the draft legal instrument for the accession of the EU to the Convention, could I refer you to Article 7, which deals with the participation of the European Union in the Committee of Ministers, to which I have just referred? The Committee of Ministers consists of Ministers from each individual nation state of the 47 Member States. As I understand it from this working document, the EU is going to be represented on the Committee of Ministers as the EU, but it is also going to have a form of what it calls co-ordinated voting, or acting in

7 September 2011 Rt Hon Kenneth Clarke QC, MP, Daniel Denman and Katie Pettifer

a co-ordinated manner, when questions arise as to the supervision of the fulfilment of obligations by the EU—which, as you said, is the whole point of this—so that the EU can be made subject to the European Convention and people can take actions. When those actions have gone through the European Court the fulfilment of the obligations will then be dealt with by the Committee of Ministers.

When it comes to the Committee of Ministers, if I can quote to you what is said in paragraph 75 of Article 7, on the fulfilment of obligations by the EU alone or where the EU is there with one of its Member States, it says: “It derives from the EU treaties that the EU and its member states are obliged to express positions and to vote in a coordinated manner”. There is then provision made for a voting system for the EU to step aside under subsequent articles. I am sorry to go through some detail, but I want to know if that is an example of the sort of bloc voting that would concern you. I think on the Council of Europe there is concern that this will create two classes of members of the Council of Europe—those who are members of the EU and those who are not—and all sorts of undesirable consequences could follow from that; whereas at the moment the Council of Europe’s Committee of Ministers consists of 47 member states, all of whom are on equal footing with no division into different blocs.

Mr Clarke: I have heard that argument. I went to the last meeting of the Council of Ministers and the non-EU members all raised this and so it is obviously a very legitimate concern. I will pass off to one of my colleagues, particularly Article 7 as drafted by these experts. I think it actually turns on this point I was making a moment ago. When the EU is being required to comply with a judgment, the European Union actually has no power to act of its own volition on a thing of that kind. What happens is the Commission proposes to the Council of Ministers, and nowadays to the European Parliament, that it is going to act in response to the judgment in order to comply with the judgment. Then each and every one of the Member States start arguing about it at the Council of Ministers and agreement is reached.

Anyway, it looks to me as though they are being required by Strasbourg, by the Council of Europe, to all turn up saying the same thing when they have sorted out how they wish to comply. That is probably my slightly too general description, so would somebody else like to have a go? Co-ordinated voting is an issue because the other non-EU members, I quite agree, of the Council of Europe are very iffy—very concerned about co-ordinated voting between the European Union and all its Member States. So I will see if either of my colleagues is prepared to have a go at putting it in clearer and more formal legal terms.

Katie Pettifer: I am happy to have a go. The paragraph 75 that you are referring to is actually paragraph 75 of the explanatory report to the draft agreement, and this is covered in paragraph 2 of Article 7 of the agreement. It does recognise that when the EU is a party to the case, then the Member States are obliged, to some extent, to vote in a co-ordinated manner. For that reason the current text proposes a change to the voting rules in the

Committee of Ministers, and they have suggested a new rule in there that will prevent the EU and its Member States together effectively being able to block proper supervision of the execution of judgments.

Q23 Mr Clappison: I understand that and there is this complicated voting procedure that follows that. My concern is the fact that it is operating as a bloc in the first place, which is something new in the Council of Europe and would be new for a British representative on the Council of Ministers representing the British Minister. He would not be there as a British Minister; he would be there as somebody who was an EU co-ordinator: a Minister acting in accordance with EU instructions, not with the British Minister.

Katie Pettifer: This is only about cases that actually concern the EU’s actions or the EU’s legislation. As you say, the Member States of the EU do not act as a bloc at the moment when there is a judgment about—

Mr Clappison: No, but isn’t this the whole point of the accession: to deal with those cases? There would not be any point to it otherwise.

Katie Pettifer: That derives from EU law. It may be Daniel would want to say something about that.

Mr Clarke: When it comes to compliance with judgments—and the EU is being required to comply with its obligations under the Treaty—it is obvious that the EU and its members all have to agree upon how they are going to comply. In so far as a rule then requires them all to turn up at Strasbourg saying the same thing, but with voting powers that make sure they cannot just overwhelm all the others, that seems sensible because you cannot have them all agreeing how they are going to comply, and then turning up in Strasbourg disagreeing about whether it is quite the best way of doing it.

The position of the British Minister, accountable to the British Parliament, is that he or she has to keep being scrutinised on the positions being taken about how you comply with this judgment. When it goes outside the judgment, there is going to have to be some clarity about how far the EU’s own practices and rules somehow require everybody to vote as a bloc. When we get to the internal rules there will be strong views on that, and the British Government would have strong views, if we start going much beyond working out how you comply with judgments.

Q24 Chair: Lord Chancellor, do you think that the changes in the internal rules will amount to Treaty changes?

Mr Clarke: No. The Treaty obligation for the EU to accede to the European Convention on Human Rights expressly provides that it will not require Treaty change. The British Government’s strong view does not require a Treaty change and, indeed, one of our negotiating positions is that there should not be any Treaty change.

Q25 Mr Clappison: Can I come back to this? You said at the beginning this was not all set in stone, it was not all decided and we would have the chance to debate, scrutinise and hopefully amend this, although

I do not know whether that will be possible on the resolution that will come before the House. Other members, I believe, of the British delegation are concerned about this and, certainly, as you rightly say, non-EU members of the Council of Europe are very concerned about this, of whom there are a very large number on the Conservative political group on the Council of Europe. Is this something that the Government can take away and look at again with a view to amending it, so as to remove this question of bloc voting? I take the point about the EU that you make, but at the end of the day when they are sitting in this Committee of Ministers on the Council of Europe, which is an international organisation, they will be voting according to what the EU has decided rather than what the British Government has decided.

Mr Clarke: This goes around in circles because the British Government has participated in the decision, which is now the EU's decision, as to what to do. It's the British Government changing its mind when everybody gets to Strasbourg, but I will let Katie have a go in a moment. When it comes to compliance with judgments I very much doubt that there is anything between you and me, Mr Clappison, because we both agree that the EU cannot comply with a judgment about its obligations until it has got it through the Council of Ministers. Once we start getting it through the Council of Ministers the British Government becomes accountable here for the decision it is taking on what the EU should now be doing. I hope you are persuaded, but I am interested in your views.

Everybody turns up as a bloc to explain how they are now complying with the judgment. Once it goes beyond that I would have reservations myself, but I must make one thing clear, as I said earlier on: the Government has not really looked at this very much yet; we only got it a few weeks ago. This particular hearing gives the opportunity either now or in follow-up for this Committee to give its views on what aspects of this most trouble you. When I meet non-EU members, I would reassure Council of Europe members that the British Government has no desire to see the European Union as a 27-member bloc turning up and imposing its view on the minority on the Council of Europe. I do not think that would last five minutes anyway; I think you would find they would all refuse to put up with this. The Russians I think would have strong views on that.

Q26 Michael Connarty: Again, just try and put things in a simple context, what you seem to be explaining is that when the compliance proposal comes from the Commission, the UK and any of the 27 member countries have a veto about things that are an inappropriate imposition on a country in terms of compliance, and, therefore, it is negotiated in the Council of Ministers. Whatever is agreed is something that all the 27 countries agree is a reasonable way of complying with the judgment.

Mr Clarke: I think so.

Michael Connarty: The veto we have remains in the Council of Ministers.

Katie Pettifer: Yes.

Mr Clarke: The EU has lost an action in Strasbourg so it now has to comply with a judgment. My

understanding is that the EU can only act by putting proposals to the Council of Ministers about what now has to be done to comply with the judgment, whereupon you have a discussion within the Council of Ministers, and every Government puts its oar in. Our Government would be accountable here for the oar we are putting in. I asked the question myself, actually, of my two colleagues. My assumption is, I cannot think of a circumstance in which that compliance with a judgment would not actually require unanimity; it could not be done. Does it depend on what legal head you are operating under—what the subject matter is? It might, so you would be back into what the subject matter was.

Katie Pettifer: Yes.

Daniel Denman: Yes.

Mr Clarke: It might be that, depending on the legal heading upon which the whole power of the EU is being exercised—is that right?—it would then be unanimity or it would be a qualified majority.

Daniel Denman: Yes.

Q27 Michael Connarty: That's a very interesting point to pursue because I have always assumed it was unanimity. Do you or your legal advisors think there will be circumstances in which, in the Council of Ministers, it will be qualified majority on a matter to do with compliance with human rights?

Daniel Denman: Again, I think there are different stages to this that need to be kept separate. There are two parts to it: one is the vote within the Committee of Ministers itself in Strasbourg, which is to do with whether the EU can be said to have done enough to comply with a judgment against it by the Strasbourg court. The other is the vote on the measure itself that it is necessary for the EU to take in order to comply with the judgement of the Strasbourg court. So, suppose the Strasbourg court gave a judgment that made it clear that the EU had to change its legislation in a particular respect; and that EU legislation might then need to be changed and the process for deciding how to change that legislation would be the normal one within the EU, which might be qualified majority, or it might be unanimity. There will be a question going back to Strasbourg for discussion within the Committee of Ministers whether the change that had been made within the EU was enough to satisfy the judgment by the court.

Q28 Michael Connarty: That is the second part; I was dealing with the Council of Ministers.

Mr Clarke: The Council of Ministers in the European Union.

Daniel Denman: Yes.

Michael Connarty: So you seem to have said there could be possibilities where a judgment against the UK in terms of compliance and the actions to be taken could be an action that would not be acceptable to the UK, but because of qualified majority voting might be overruled by the normal process of legislation as it is now called. Is that what you are saying?

Daniel Denman: Yes, but it will just be EU legislation as any other. The only difference would be that it had been prompted by an adverse decision by the

7 September 2011 Rt Hon Kenneth Clarke QC, MP, Daniel Denman and Katie Pettifer

Strasbourg court and then it would follow the normal process within Brussels.

Michael Connarty: On the Human Rights Convention?

Daniel Denman: Yes.

Q29 Michael Connarty: The final part: when it goes to Strasbourg, according to paragraph 76 of what we now know is the draft of the big document that we're negotiating, it basically says, "Provided that a decision appears (for instance, by an indicative vote) to be supported by a majority of the representatives entitled to sit on the Committee of Ministers on behalf of those High Contracting Parties that are not member states of the EU, the decision would be adopted without a formal vote". In other words, it is in fact saying if the EU has a position and the rest of the people indicate in some way that they accept that, then it just goes through. So it is as if they do not count, and I cannot see from the discussions I have heard in the Parliamentary Assembly that going down very well with the 20 non-EU members of the Council of Europe.

Katie Pettifer: May I respond, sir? First, a clarification: it is not the draft agreement itself that requires in any way EU Member States to take co-ordinated positions when there is a judgment against the EU. The agreement just recognises that EU law requires Member States to take coordinated positions, so it is not something you can redraft in the agreement. It is the position under the Treaties. Then when we come to this specific question about passing things without votes, first of all the Committee of Ministers often does stuff without a vote when it is clear there is no need for one. If it is clear that there is a need for a vote it takes a vote, but this is simply a proposal that has been put forward by the drafting group that you can have some new voting mechanism; it is all up for discussion and we need to look at whether that is actually going to work or not.

Q30 Mr Clappison: I think you are right as it comes from EU Treaties, but the effect of it is—and I am reading the words here—it derives from the EU Treaties that the EU and its Member States are obliged to express positions and to vote in a co-ordinated manner. It is the fact of that co-ordination, the creation of two classes of member—whatever the results are that flow from that—on the Committee of Ministers that makes the big change; in the past it has always been a Committee of Ministers of equal standing, with everybody on the same footing. Finally—because we have been over the ground of this—is this something the Government will take away and look at and be prepared to amend, or is it set in stone?

Mr Clarke: The first thing is, as I have explained, it is a discussion we are having. The Government has not yet formed a view on any of this, so this discussion is quite interesting and we are going to have to form a view. The view will be a collective view, I really believe, so I shall wind up discussing all this with the Foreign Office and everybody else, trying to reach a collective view. It isn't easy. I do not think many members of the public will be lying awake

at night waiting for me to resolve it, but it is actually quite important, I do agree.

The basic European Union rule we have now in the Council of Ministers—just to make sure which institutions come where—in the European Union in Brussels, is that depending on the legal basis in the Treaties, the decisions are taken either unanimously or by qualified majority vote. We do not vote all that often; twice I have been in the losing side in a vote in all the years I have been attending Councils, but we do vote. That is where we are now. Once the decision has been taken legally under the EU Treaties, the Treaties themselves stop any Member State going away and reopening the whole argument and in some other international institution continuing to go off on its own, trying to block an EU decision. I keep giving lay descriptions of this; I think that is what actually happens. It only happens very rarely.

Once the EU has decided how it is going to comply with a decision, I think the general view will be it ought to turn up to Strasbourg bound by that. Then, and I quite agree, the other members of the Council of Europe and the Committee of Ministers in the Council of Europe are probably going to take a view about whether there are any other circumstances at all in which they would contemplate that happening and, actually, what view they take about the whole lot turning up behind one EU decision as to how they are going to comply, and the British Government has to take a view on that.

Although no collective consideration has taken place of this yet—within the Department we have not taken a view yet as to whether we are going to start suggesting changes to this—my own instinct is the present British Government will take the view, "We have no desire whatever to start operating as a bloc inside the Council of Europe, except where it is obviously common sense that we should do so", because of the extremely adverse effect it would have on the workings of the Council of Europe if the European Union members were all seen to be operating as a bloc majority vote on every issue. I would understand why that would not be tolerated by a lot of the non-EU members, and I think Michael Connarty agrees with me that it would just cause endless trouble if the EU tried to do that. If anybody starts suggesting the Commission or elsewhere somehow should start behaving like that, I think the British Government would resist that.

Q31 Kelvin Hopkins: Lord Chancellor, at a recent conference on the EU's accession, Mr Justice Sales, formerly First Treasury Counsel, said that Government when seeking advice on human rights would now have to consider five separate overlapping regimes: the principles of domestic and public law, domestic human rights law—so, the Human Rights Act 1998—ECHR law, EU law and public international law of any international treaties. Do you think this is a welcome development, or rather does it add unnecessary complexity?

Mr Clarke: That is slightly repetitive, because the whole thing is based on the European Convention on Human Rights. Since pre-Maastricht, I think, the European Union has been expected and legally

obliged to act in compliance with the European Convention on Human Rights and there is case law back before the Maastricht Treaty; that is how the European Union behaves. As the commitment of its membership makes clear, nobody is contemplating changing the Treaties; nobody is contemplating extending this in any way. It is just a question of how we all comply with the European Convention on Human Rights. Also, everybody is bound by public international law; everybody has some domestic legislation of their own, but that does not give rise to international jurisdiction. So, with great respect to the distinguished gentleman you quote, I do not quite see what he thinks the new problem is. In fact, the reason it is so complicated is you have to try and make sure that you do not start getting inconsistencies, which you should not have because everybody is trying to make sure all these actions comply with the same European Convention on Human Rights.

Q32 Kelvin Hopkins: You won't find lawyers opportunistically trying to use one regime against another?

Mr Clarke: That is one of the things we are going to be debating. I mention *en passant*—I do not think we need to bother about it too much at this stage because it has not intervened yet—the European Court of Justice. I am sure they are going to say they should be involved in certain cases—certainly consulted—allowed to give a view on whatever they decide they want to ask for. They will be anxious—I think the Strasbourg judges will be equally anxious—to make sure the two courts do not start coming to inconsistent conclusions.

Chair: Sorry, Lord Chancellor—I think you may be just perhaps understating the importance of the Charter, but there is a question coming up on that so I do not need to ask it.

Q33 Kelvin Hopkins: A couple of more questions then. The EU Charter goes further than the rights provided for in ECHR, which covers second- and third-generation rights. Do you think two tiers of human rights protection in Europe was a necessary innovation—number one—and what is the risk of similar rights being put in conflict with each other?

Mr Clarke: You tempt me, Mr Hopkins, to go back to a debate we have had before as to how far the Charter goes on these. However I shall answer whatever questions you wish to produce and so will my colleagues. This problem we are discussing today, the question of whether and how—actually, “whether” has been settled by the Treaty—we are going to see the EU accede to the European Convention on Human Rights does not make the slightest difference to the status of the Charter under the Lisbon Treaty. Nothing in this makes the slightest change to the position I realise we have debated on the Floor of the House at length in the past.

The Charter position is debatable but what we are talking about is, this only affects obligations under the European Convention on Human Rights; it remains our position, protected by the Treaty. The Charter does not give new rights extending beyond that; it does not put us under any other obligations. Anyway, if you do

not think that is the present position we can continue to debate it, but it is not relevant today because this proposal does not make the slightest difference to the position that the House of Commons decided about three years ago.

Q34 Kelvin Hopkins: Just one more question. What do you say to commentators who argue that the more we have different standards of rights, the more they are seen as relative and therefore less fundamental?

Mr Clarke: I agree with that, but that is just a general expression of principle. If anybody came in now and asked if we could have yet another set of human rights drafted and add that to the various things we are bound by, I think all of us would throw our hands in the air and say, “This is becoming ridiculous”. I also agree with you: if anybody starts trying to extend the present Convention on Human Rights, my instinct is we have quite enough, but more seriously, you start debasing the importance of the really fundamental ones. That is why we are trying to reform the court and get it to narrow its jurisdiction.

An international court, like the court in Strasbourg, should be concerned with the big issues: with torture, with individual freedom, with national laws that are failing to comply with the fundamental rights that this country holds very dear. It is not a case where you should go wandering off claiming breaches of human rights because something has been done to your dog and you are claiming compensation. So I think we have quite enough conventions and charters, thank you very much, and what we are deciding here is how best to deal with alleged breaches of the Convention on Human Rights by the European Union or any of its institutions.

Q35 Chris Heaton-Harris: I was going to ask a very cheeky question which you have actually just answered in that final bit. We do seem to be heading in a direction that, to me, is a very complex way of simplifying something. Is that correct?

Mr Clarke: It is an attempt to simplify something and you find you wander into a maze of complications.

Chris Heaton-Harris: Okay, because I am sure it is something that we want to keep very close tabs on in this Committee, because of the perceived extension of issues that flow from what we might not describe as fundamental human rights, which are complicating Government policy in many areas at this time. So there is a lot of politics to this, as well as the simple unravelling or trying to make the situation less complex by this complex procedure that we are just about to embark on.

Mr Clarke: I think I agree with that entirely, Mr Heaton-Harris. I have to say, of the various controversies we have about human rights, it is some reassurance that very few of them actually come from judgments in Strasbourg. The problem more normally arises from judgments in the British courts, but they are all based on the same Convention, and Strasbourg, as we know, causes political troubles, like prisoner voting, to mention the most recent. So I quite agree with what you say.

If the aim of all this is simply to make sure that the European Union and its institutions are bound by the

7 September 2011 Rt Hon Kenneth Clarke QC, MP, Daniel Denman and Katie Pettifer

same conventional standards that its Member States are, it would be nice to keep it as simple as possible and not accidentally start going into other areas. I am reassured—I have been reminded; I have it in front of me here—that people who drafted the Treaty of Lisbon, which incorporated this business about the European Union acceding to the European Convention on Human Rights, were alert to some of the dangers and they expressly provided in the Treaty that accession will not enlarge EU competence; that is Article 6(2) of the Treaty on the European Union. It will not change the UK's obligations under the Treaties or the Convention; Article 2 of Protocol 8 to the Treaties .

I should add—I do not think this is statutory—no new claims can possibly be brought against the UK as a result of this accession. Apart from the fact it is changing the ability of people to sue the European Union, the British Government's desire otherwise would be: please avoid going into new areas and opening up new possibilities for our present relationship with the court. It is a matter for us and we do not want any Treaty changes. It is simply a question of putting the European Union's institutions directly under the same legal obligations as we are, and enabling somebody to take them to court under their jurisdiction directly, rather than having to do it through us.

Q36 Chair: The more I hear, the more sympathy I have with Justinian, whom I referred to at the beginning.

Mr Clarke: We need Justinian.

Chair: Because the attempt to reconcile all these different laws and to bring them all into one package does not fill me with great enthusiasm, as you probably know, not least because it is going to take a great deal of time and involve a great deal of complexity—that seems certain; we are agreed on that. There is also this other question: the UK Bill of Rights and the commission that you have set up, which is somewhat canted in a certain direction, judging from its composition, but that is only a personal opinion of mine. I think there is a strong tendency in that commission in a certain direction, but we shall see the outcome.

Mr Clarke: I shall be very relieved if there is; it will ensure unanimity of its opinion.

Q37 Chair: I am sure you will, but I am very glad to note that Martin Howe, who has just recently been in the newspapers, is a distinguished member of that. No doubt he will help to balance off some of the other opinions.

Mr Clarke: This is completely outside of today. The commission is looking at the Bill of Rights and the reform of the court. I am expecting very soon their advice on reform of the court, so I think the commission itself will start speaking for itself and we will all discover how near they have got to agreement and which way they are inclining, or if they are inclining at all.

Q38 Chair: We look forward to the outcome of this, but the work is under way and you are, of course,

the Minister responsible for the initiative in itself, so I understand.

Mr Clarke: Jointly with the Deputy Prime Minister.

Chair: That makes it even more interesting, then. I am very glad; another useful piece of information.

Mr Clarke: No, no, we are jointly responsible for the commission.

Chair: All right—jointly responsible.

Mr Clarke: It won't do anything that the Government as a whole doesn't actually agree with. *[Interruption.]* Well, it advises the Government as a whole, but the Government as a whole—

Q39 Chair: Jointly and separately. Anyway, let us simply just move on to the next question, which is: how do you see a UK Bill of Rights affecting the UK's human rights obligations under EU and ECHR law?

Mr Clarke: I cannot go into that, Chair, really, because that is what we set the commission up for.

Chair: But it is directly relevant.

Mr Clarke: I do not have its terms of reference in front of me because I did not know we would go into this, but the whole point of setting the commission up was to get the commission to give its opinion on the proposal that there should be a UK Bill of Rights. It is at quite an early stage of working; I have not even met them yet. I hope to meet them soon because, obviously, it is time we got together and they gave me their first thoughts. They are visiting people; they are discussing amongst themselves. What I am hoping is very shortly to have their advice on the reform of the court, because we asked them to give us their agreed advice, as we have the chairmanship of the Council of Europe coming up.

A very important priority of the British Government there is to try to bring to a successful conclusion proposals we have for the reform of the court. I actually think there is a chance of doing it because they have been talking about it for years and have had some very good ideas canvassed, and I think other Member States are hoping that the British will give a constructive lead and produce some sort of conclusion in our chairmanship. Sir Leigh Lewis and his colleagues have been asked to give us their advice. I think they proposed to give us that advice publicly; I think they proposed to give it soon. I won't go beyond that. Then we will see where we go. They are going to take longer, though, over the Bill of Rights and it would not be right for me to go around and start expressing views on a Bill of Rights when we have asked them to advise us.

Chair: I understand that, but I am not so easily put off, Lord Chancellor.

Mr Clarke: You can give me your views on the Bill of Rights, Mr Cash, any time you like, but I cannot come back on behalf of the Government and give you mine.

Q40 Chair: You can give me a view on this. Of course, in relation to decisions that have been taken in the UK courts in the context of those decisions that were taken in Strasbourg that do apply in the context of European Convention law, which you have been talking about, we have Lord Judge, who says our first

7 September 2011 Rt Hon Kenneth Clarke QC, MP, Daniel Denman and Katie Pettifer

duty is to protect the common law; we have Lord Neuberger; we have Lord Hoffmann, who is a former distinguished Law Lord who has also contributed to this debate; and even Baroness Hale, a member of the Supreme Court. They are all saying that they are concerned about the manner in which our own courts are adopting Strasbourg decisions, instead of making their own decisions based on the law that is presented to them in that court.

All these questions do impinge on the question of the interpretation of the Convention and, indeed, on the Charter of Fundamental Rights, because these things are interactive. So I simply, in the context of this review that you have set up, ask you what you think, rather than about what they will think. Do you agree that there are significant and important standards that have to be set, in line with what Lord Judge and other distinguished judges have said, in order to ensure that we have our own decisions made and not have them imposed upon us, even through our own courts in relation to those decisions that have come out of Strasbourg?

Mr Clarke: Those are very important issues and that is what the commission is going to advise the Government on. There are serious issues and it does not matter whether you are a supporter of Strasbourg or an opponent of Strasbourg: practically everybody agrees that there are quite important decisions about how it is going to work if we remain bound, as we certainly are at the moment and as the Coalition Government is certain to remain, signatories to the Convention on Human Rights and committed to upholding our obligations under the Convention on Human Rights.

The big issue is subsidiarity. It is accepted on all sides that the main duty of complying with the European Convention on Human Rights lies on the Governments of the Member States. Then there is also the role of the court, which steps in if a Member State is not complying with its duty. I am not going beyond this because it is just wrong; I should not. We are all going to consider this again when we have the commission's report. But, very broadly, we have to decide to what extent the court in Strasbourg takes into account the judgments of national courts, the judgments of national Parliaments, when they have acted in accordance with what they believe to be their obligations under the Court of Human Rights,

particularly when a court has reached a decision in accordance with the Convention on Human Rights.

You also have to consider what kind of cases should go to Strasbourg and what the relationship is between Strasbourg and the national courts. Obviously, with them both applying the same Convention, they should be doing the same thing. I think there are plenty of international agreements and the court itself realises it is not there as a court of appeal from the Supreme Court in these cases, but it does have its own role to play in making sure the Member States comply with their obligations. That is exactly what the commission is coming back to us on: what changes if any might be desirable to clarify all that and deal with the present situation, which is where vast numbers of people go to Strasbourg; there are vast arrears of cases that cannot possibly be heard. My personal view, if I may be so reckless as to offer it, is that it long ago needed some clarification as to exactly what kind of case we think a major international court, like that in Strasbourg, should actually be considering. I think there are 100,000 plus cases now piling up of people trying to get the Strasbourg court to give them compensation for something or other.

The British are not in the middle of all this. We do not get many cases; we do not lose many cases. Most of the political rows, usually, that we have about having human rights obligations here come from some judgment of the British court. Then, as you say, the judges all argue amongst themselves about to what extent the British courts should follow Strasbourg precedents. Really though, on behalf of the Government and myself, I would not want to offer an opinion on that until we have done the decent thing by the commission, which consists of very distinguished people. If that particular collection of people can reach agreement on some of these things, it will take us many steps forward because it is not biased at all, I assure you; you probably know all the people on it, as I do. There is a very wide range of opinion represented on that commission.

Chair: I think on that note, Lord Chancellor, thank you very much for coming this afternoon. You have given us a thoroughly good explanation, as you see it, of the position and we shall be looking forward, no doubt, to yet another session along similar lines when we have a bit more information and the negotiations have moved further forward. Thank you.

Written evidence

**Letter from the Rt Hon Kenneth Clarke QC, MP, Lord Chancellor and Secretary of State for Justice,
Ministry of Justice, to the Chairman**

EU ACCESSION TO THE EUROPEAN CONVENTION FOR HUMAN RIGHTS

I am writing to you to advise you that the European Union has adopted a mandate for its negotiations with the Council of Europe regarding the European Union's accession to the European Convention on Human Rights ("the Convention"). The UK, along with other Member States agreed the negotiating mandate at the Justice and Home Affairs Council on 4 June 2010.

The Government supports EU accession to the Convention, and it is a treaty obligation under the Lisbon Treaty. The key benefits are that it will:

- close the gap in human rights protection as applicants will, for the first time, be able to bring a complaint before the European Court of Human Rights ("the Strasbourg Court") directly against the EU and its institutions for alleged violations of Convention rights;
- enable the EU to defend itself directly before the Strasbourg Court in matters where EU law or actions of the EU have been impugned; and
- reduce the risk of divergence and ensure consistency between human rights case law between the Strasbourg and Luxembourg Courts.

The EU will be alone amongst parties to the ECHR in that it is not a state. Clearly, the modalities of accession must reflect this fact. However, there is little precedent from which to work, and it will therefore be legally and technically challenging to come up with an approach that respects the particular characteristics of both the EU and the ECHR.

In particular, it will be necessary to translate concepts that are familiar when applied to states—for example, the exhaustion of domestic remedies—to this different context. There may also be challenges relating to cases that are brought against both the EU and one of its member states. We will especially want to ensure that the EU's accession does not have an unanticipated impact on the functioning of the Strasbourg and Luxembourg Courts, and that it is practically possible for applicants to bring proceedings to hold the EU to its obligations under the Convention in the same way as they can the existing member states. We will also be alert to ensure that the UK's interests as a member of the EU or as a party to the Convention are not disadvantaged by the EU's accession.

We expect negotiations with the Council of Europe to start later this year.

The final agreement between the EU and the Council of Europe will be subject to unanimous agreement between the EU Member States, and will be subject to European Parliamentary consent. It will also need to be agreed by the 47 Member States of the Council of Europe, which are also contracting parties to the Convention. EU accession will not extend the competence of the EU or affect the position of the Member States positions in relation to the Convention.

I will write again as negotiations progress, and prior to a final accession agreement being concluded.

30 June 2010

**Letter from the Chairman to the Rt Hon Kenneth Clarke QC, MP, Lord Chancellor and Secretary of
State for Justice, Ministry of Justice**

EU'S ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Thank you for your letter of 30 June on the adoption of the negotiating mandate for the EU's accession to the European Convention on Human Rights (ECHR).

The EU's accession strikes us as potentially a very significant development both in its internal legal order (despite Treaty provisions to the contrary): it would amount to submitting the acts of EU institutions to independent external control by the European Court of Human Rights (ECtHR); and in the way in which EU citizens' human rights are protected. We say "potentially" because it is difficult on the information before us to know how much the EU's accession to the ECHR is a symbolic gesture, and how much it will lead to practical changes for UK citizens.

We note that the Cabinet Office Guidance recommends that Departments should provide the scrutiny Committees with "details of negotiating mandates as soon as they have been approved" and an "indication should be given as to the parties to the negotiation, the subject matter and any special factors" (paragraph 2.3.5). Whilst we are grateful for your explanation of how the Government views the benefits of accession, and of the difficulties that you foresee arising in the negotiations, we ask you to provide further details of the subject matters addressed by the mandate, as per the Cabinet Office Guidance. This will help us to scrutinise this policy.

In the context of the key benefits which the Government thinks will accrue from the EU's accession, we would also be grateful if you could explain further:

- what the current “gap” is in human rights protection that will be closed by accession;
- what you mean by “directly” when you say “applicants will, for the first time, be able to bring a complaint before the European Court of Human Rights (“the Strasbourg Court”) directly against the EU and its institutions for alleged violations of Convention rights”; and
- how accession will “reduce the risk of divergence and ensure consistency between human rights case law between the Strasbourg and Luxembourg Courts” when Article 52(3) of the Charter on Fundamental Rights specifically allows for EU human rights law to provide “more extensive protection” than the ECHR. In the light of this it is difficult to see why you have concluded that a key benefit of accession to the ECHR would be consistency between the two legal domains. On the contrary, there is concern in academic circles that the Charter will lead to legal uncertainty in how human rights are applied in Europe by introducing an additional standard of “fundamental” right.

Finally, the Court of Justice in Luxembourg will be bound by the ECtHR's interpretation of EU internal rules which engage human rights after the EU accedes to the ECHR; so we ask for your views on how the EU's autonomous legal order will be preserved, particularly in the light of the Court of Justice's Opinions 1/91 and 1/00.

8 September 2010

**Letter from the Rt Hon Kenneth Clarke, QC, MP, Lord Chancellor and Secretary of State for Justice,
Ministry of Justice, to the Chairman**

EU ACCESSION TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS

Thank you for your letter of 8 September about the accession of the European Union (EU) to the European Convention on Human Rights (the ECHR). I address each question separately and in full below.

You have asked for more information on the subject matters addressed by the mandate. Papers for the first negotiation meetings between the Council of Europe and the EU—which took place in June—have been released which set out five broad categories of issues for discussion:

- (a) issues around the scope of the EU's accession to the ECHR, including accession to additional Protocols and ancillary agreements; and the status of reservations, declarations and derogations;
- (b) technical adaptations to the provisions of the ECHR and other instruments, particularly the clarification of the application to the EU of terms in the Convention that were chosen in the context of its parties being sovereign states;
- (c) the procedure before the European Court of Human Rights (ECtHR), including the participation of the EU in proceedings before the Court; the introduction of a “co-respondent” mechanism for applications that engage the responsibilities of both the EU and its Member States; the prior involvement of the European Court of Justice in determining the compatibility of an EU act with the ECHR; and further related technical amendments;
- (d) the institutional and financial issues, including the election and participation of a judge elected in respect of the EU in the ECtHR; the participation of the European Parliament in the election of judges by the Parliamentary Assembly of the Council of Europe; the participation of the EU in the Committee of Ministers of the Council of Europe when exercising functions under the ECHR; and the participation of the EU in paying the costs of the Convention system; and
- (e) matters relating to the accession instrument itself, including how it will be ratified and come into force.

What is the current “gap” in human rights protection that will be closed by accession?

Broadly speaking, the reference to a “gap” denotes the fact that, currently, the EU is not directly accountable to the ECtHR. There are two respects in which the EU's accession to the ECHR will address this issue.

First, at present, individuals who consider that the actions of the EU have breached their fundamental rights cannot bring proceedings against the EU in the European Court of Human Rights. Following the EU's accession to the ECHR, they will be able to do so. This will in itself be a significant step, because the EU will be directly answerable to the Strasbourg Court for its own actions.

Second, the EU's accession to the ECHR will resolve an uncertainty about the extent to which Member States are answerable to the Strasbourg Court for the actions of the EU.

As the law stands, when individuals consider that the actions of the EU have breached their fundamental rights, they may in some circumstances bring a claim in the Strasbourg Court against one or more Member States. The ECtHR has held that when EU law results in a breach of the ECHR, the Member States can be held responsible for that breach, because they enabled the EU to act in the way that it did. For example, in

Matthews v UK (1999) 28 EHRR 361, the UK was held responsible for a violation arising from the EU's primary legislation on the grounds that the UK had freely entered into the relevant EU obligations.

However, it is open to question whether the Member States can be held responsible in the Strasbourg Court for violations resulting from the actions of individual EU institutions, such as the Commission. The point arose in *Senator Lines v 15 States* (2004) 39 EHRR SE3, but it was not resolved because the Court found that the claim was inadmissible on other grounds.

The EU's accession to the ECHR will resolve this uncertainty. Once the EU is a party to the ECHR, there will be no doubt that individuals will be able to bring proceedings against the EU in the Strasbourg Court on the grounds that the acts of the EU institutions have breached their Convention rights.

What do you mean by "directly" when you say that "applicants will, for the first time, be able to bring a complaint before the European Court of Human Rights ('the Strasbourg Court') directly against the EU and its institutions for alleged violations of Convention rights"?

At present, as described above, the only way for individuals to argue in the Strasbourg Court that the EU has breached their ECHR rights is for them to bring proceedings against one or more Member States. Once the EU has acceded to the ECHR, it will be possible for the EU itself to be the respondent in proceedings in the Strasbourg Court, and to defend claims in its own name.

How will accession "reduce the risk of divergence and ensure consistency between human rights case law between the Strasbourg and Luxembourg Court" when Article 52(3) of the Charter on Fundamental Rights specifically allows for EU human rights law to provide "more extensive protection" than the ECHR?

The EU will be bound by the Strasbourg Court's judgments in cases in which it is a respondent. Furthermore, like other contracting parties to the ECHR, the EU will need to have regard to the Strasbourg jurisprudence (reflecting the ECJ's own long-standing practice, in cases such as Case C-465/07 *Elgafaji* [2009] ECR I-921, paragraph 28).

Article 52(3) of the Charter confirms that the rights in the ECHR have precisely the same meaning in EU law. It provides that insofar as Charter rights correspond to rights in the ECHR, "the meaning and scope of those rights shall be the same as those laid down by the said Convention". The explanation of Article 52(3), to which Article 6(1) TEU requires courts to have regard, makes it clear that the purpose of this provision is "to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR." The explanation then lists those provisions in the Charter that correspond to provisions in the ECHR, as well as those where the right under EU law goes further than the right under the Convention. There is therefore no doubt about which rights in the Charter correspond to rights in the ECHR, and it is clear that to the extent that they correspond, they must be interpreted in the same way.

Furthermore, once the EU has acceded to the ECHR, individuals who argue unsuccessfully in the ECJ that the EU has breached their Convention rights will be able to make the same arguments before the Strasbourg Court, whose decision will be binding on the EU. Through this mechanism, the Strasbourg Court will have the final say about whether the EU has interpreted Convention rights correctly, which will ensure that the Convention is applied consistently.

How will the EU's autonomous legal order be preserved, particularly in the light of the Court of Justice's Opinions 1/91 and 1/00?

In Opinion 1/91 [1991] ECR I-6079 and Opinion 1/00 [2002] ECR I-3493, the ECJ held that the EU had no competence to enter into international agreements that would permit a court other than the European Union's Court of Justice (ECJ) to make binding determinations about the content or validity of EU law.

There is no reason to suppose that the agreement by which the EU accedes to the ECHR will fall foul of this principle. Article 6(2) TEU expressly provides that the EU "shall accede" to the ECHR. It follows that there can be no suggestion that the EU's accession is incompatible with the Treaties. Indeed, as mentioned above, the ECJ has always considered the case law of the Strasbourg Court when interpreting the scope of Convention rights as they apply in the EU's own legal order.

Furthermore, the Treaties expressly require that the accession agreement should be drafted in such a way that the autonomy of EU law is not undermined, and the EU is therefore under a legal obligation to ensure that the accession agreement respects these constraints. In particular, Article 6(2) TEU provides that accession "shall not affect the Union's competences as defined in the Treaties"; Article 1 of Protocol No 8 provides that the accession agreement must "make provision for preserving the specific characteristics of the Union and Union law"; Article 2 of the Protocol provides that accession "shall not affect the competences of the Union or the powers of its institutions"; and Article 3 of the Protocol provides that the accession agreement must not affect Article 344 TFEU, which requires that disputes concerning the interpretation or application of the EU Treaties must be settled only in accordance with the provisions of the Treaties.

I hope this letter answers your queries and is helpful to your committee in considering this issue.

21 September 2010

ISBN 978-0-215-03888-3

