

HOUSE OF LORDS

European Union Committee

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2nd Report of Session 2006–07

**Breaking the  
deadlock: what  
future for EU  
procedural rights?**

Report with Evidence

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Ordered to be printed 19 December 2006 and published 16 January 2007

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Published by the Authority of the House of Lords  
*London: The Stationery Office Limited*  
£price

HL Paper 20

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## ORAL EVIDENCE

<i>The Rt Hon The Lord Goldsmith QC, Attorney General, Mr Mark de Pulford, Better Trials Unit, Office for Criminal Justice Reform; Ms Melissa Bullen, Legal Adviser’s Branch, and Ms Claire Fielder, International Directorate, Home Office</i>	
Oral evidence, 25 October 2006	1
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NOTE: References in the text of the Report are as follows:

(Q) refers to a question in oral evidence

(p) refers to a page of the Report or Appendices, or to a page of evidence

## **FOREWORD—what this Report is about**

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In Spring 2004 the Commission proposed that minimum safeguards for criminal proceedings be agreed by Member States. The rights comprised in the original Framework Decision included the right to legal assistance, the right to interpretation and translation and the right to communicate with consular authorities.

We reported on the proposal in February 2005 and supported this initiative. We considered that it could bring benefits to citizens facing justice abroad and would enhance perceptions of criminal justice systems across the EU.

Over the past 18 months negotiations have continued with increasing opposition to the proposal emerging. As a result, a small number of Member States, including the United Kingdom, have put forward a draft Political Resolution for agreement instead of the Framework Decision. The Political Resolution calls for practical measures to improve defendants' rights in the EU. Both options are now being considered in the Council.

This Report examines the current draft Framework Decision and the rival Political Resolution. It considers the changes introduced to the proposal and the reasons for Member States' objections to the legislative instrument. In particular, it explores the potential problems which may arise due to the existence of procedural rights guarantees under the European Convention on Human Rights.

We conclude that there is a need for EU action in the field of procedural rights; the existence of the Convention does not remove this need. The current draft Framework Decision would, however, add little value to existing protections. Member States should work together in a spirit of compromise to set higher standards. While practical measures pursuant to a Political Resolution would prove useful in the short-term and should be put in place immediately, they do not provide an adequate long-term alternative to legislation.

# Breaking the deadlock: what future for EU procedural rights?

## CHAPTER 1: INTRODUCTION

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1. The Commission proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union was published in April 2004.<sup>1</sup> It was welcomed as “a positive step to develop standards and consistency to protect the rights of individuals in the European judicial area”<sup>2</sup> and a “vital first step towards redressing the current imbalance in favour of prosecution-led measures”.<sup>3</sup>
2. Sub-Committee E (Law and Institutions) undertook an inquiry on the proposed Framework Decision and the Select Committee published a Report on the proposal in February 2005.<sup>4</sup> In that Report we welcomed this initiative, recognising that minimum standards have an important role to play in enhancing mutual trust and confidence and improving public perception of criminal procedures in the Member States.<sup>5</sup> We called on the Government to ensure that negotiations on the Framework Decision resulted in truly “something worthwhile”; we opposed any further watering down of the proposal.<sup>6</sup>
3. Following publication of our Report, Sub-Committee E continued to examine the progress of negotiations on this proposal as part of our general scrutiny function. Over the past year substantial opposition to the Framework Decision has emerged, culminating in the proposal in April 2006 by a small group of Member States, including the United Kingdom, for a non-binding Resolution coupled with practical measures instead of a legislative instrument.
4. We decided to explore in more detail the reasons behind the increasing opposition to the Framework Decision, and to look in particular at why the Government have withdrawn their support for the proposal. We heard evidence from the Attorney General, Lord Goldsmith, on 25 October 2006. The Attorney General’s oral evidence and supplementary written evidence is published with this Report.
5. This Report is made to the House for information.

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<sup>1</sup> COM (2004) 328, adopted 28 April 2004, Brussels.

<sup>2</sup> Evidence of EUROJUST published with *Procedural Rights in Criminal Proceedings*, 1st Report of Session 2004–2005, HL Paper 28, at page 109.

<sup>3</sup> Evidence of JUSTICE published with *Procedural Rights in Criminal Proceedings* at page 30.

<sup>4</sup> *Procedural Rights in Criminal Proceedings*, 1st Report of Session 2004–2005, HL Paper 28, published 7 February 2005.

<sup>5</sup> Report, paragraph 200.

<sup>6</sup> Report, paragraph 202.

## CHAPTER 2: THE CURRENT POSITION—ALTERNATIVE PROPOSALS IN THE COUNCIL

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6. The shape and content of the Framework Decision have changed significantly as concerns have emerged in the Council. Exceptions to rights in cases of terrorism and serious crime, the removal of certain rights, and difficulties in ensuring compatibility with the European Convention on Human Rights have resulted in modifications which have increased disagreement among Member States. In April 2006 the Austrian Presidency prepared a compromise text focusing on fewer rights than the original Commission draft and expressing them in more general terms. At its meeting in June 2006 the Justice and Home Affairs Council decided that the Council Working Group should continue to discuss this text as the basis for the Framework Decision alongside the proposal for a Resolution.<sup>7</sup>
7. At the Justice and Home Affairs Council on 4–5 December 2006, the Council agreed that work should continue on the proposal with a view to its adoption as soon as possible. Member States remain divided, however, as to which of the two options should be pursued.<sup>8</sup>

### The Austrian Presidency draft Framework Decision

8. The scope of the new draft Framework Decision is outlined in Article 1: to facilitate judicial cooperation in criminal matters, and in particular mutual recognition, and to safeguard the fairness of proceedings. The proposal aims to establish “minimum standards to be respected by Member States throughout the European Union concerning certain rights of persons subject to criminal proceedings”. The rights are to be interpreted with respect to the different legal systems and traditions of the Member States and in full compliance with the European Convention on Human Rights (ECHR).
9. The draft Framework Decision focuses on five specific rights:
  - the right to information;
  - the right to legal assistance;
  - the right to legal assistance free of charge;
  - the right to interpretation; and
  - the right to translation of documents of the procedure.

The content of each of these rights is considered below.

10. The monitoring and evaluation provisions proposed in the original Commission draft have been reproduced, with important amendments, in Article 7. Formerly, monitoring and evaluation was to be the Commission’s responsibility, and it was given an express power to “coordinate” and publish reports. The new article provides for the evaluation of the Framework Decision’s effectiveness in accordance with relevant mechanisms of the Treaty on European Union (TEU) and requires Member States to ensure “due cooperation and the provision of information”. It is not clear what is

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<sup>7</sup> Unless otherwise indicated, all references to the Framework Decision will be references to the Austrian Presidency draft.

<sup>8</sup> *Europolitics*, No. 3204 of 6 December 2006 at page 9.

meant by mechanisms established under the TEU: the Treaty gives no express power to the Commission to monitor the effectiveness of Framework Decisions. Nor is it obvious from Article 7 of the Framework Decision with whom and to whom Member States are to cooperate and provide information.<sup>9</sup>

### *The right to information*

11. The Commission's proposal contained detailed provisions on notification of rights, including the requirement for a Letter of Rights which was to be issued to all suspects in the EU. This has been replaced in the Austrian Presidency text by a general right to "effective information". Article 2 provides for information on the reasons for the arrest and any charge, the nature and cause of the accusation and details of relevant procedural rights to be delivered promptly to a person subject to criminal proceedings or to a European Arrest Warrant (EAW) or other surrender procedure. The information should include notification of the person's right to legal assistance, his right to free legal assistance and his right to free interpretation and translation.
12. Under Article 6(3)(a) of the ECHR, information on the nature and cause of the accusation must be given promptly to an accused. It seems, therefore, that some efforts have been made to align the language of the Framework Decision with that of the ECHR. However, a contentious point, and one which arises in relation to most of the five rights provided by the Framework Decision, is the stage at which the right can be invoked. Unlike the position under the EU proposal, the specific ECHR rights in Article 6(3) only apply to those "charged with a criminal offence".<sup>10</sup> While EU Member States may agree that information relating to the cause of the accusation should be provided to suspects who have been charged, there is not universal agreement that the right should apply at the earlier stage proposed.<sup>11</sup>

### *The right to legal assistance*

13. Unlike the Commission's proposal, the Austrian Presidency text provides that the right to legal assistance applies to persons charged with a criminal offence,<sup>12</sup> and not those who are merely "suspected" persons, thereby narrowing the scope of this right. Article 3 provides that the right to legal assistance should include at least "adequate opportunities, time and facilities to communicate and consult with a legal adviser".
14. The amendments to Article 3 appear to bring it closer to the wording of the ECHR. The article would usually apply only to those "charged with a criminal offence", thus limiting the scope of the right to those already

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<sup>9</sup> Recital 18 provides, however, that the information gathered is to be used by the Commission to produce progress reports.

<sup>10</sup> Article 6(3) of the ECHR. The general Article 6(1) ECHR right to a fair trial applies to the "determination ... of any criminal charge". Further difficulties are created by the fact that the concept of "criminal charge" within the meaning of Article 6 is an autonomous one. This will be considered in more detail in Chapter 3.

<sup>11</sup> There are concerns that this article would require evidence to be disclosed to a suspect at an early stage of police investigation—scrutiny reservation lodged in relation to Article 2(1) of the proposal (Document 13116/06 DROIPEN 60 of 27 September 2006).

<sup>12</sup> It also applies to those subject to pre-trial detention and EAW or other surrender proceedings—Article 3(3) and 3(4).



protected under the ECHR.<sup>13</sup> The general language of the provision also appears to reflect the terms of Article 6(3)(b) of the ECHR.<sup>14</sup> However, the extension in Articles 3(3) and 3(4) of the right to legal assistance to EAW and other surrender proceedings and to pre-trial detention is controversial: under the ECHR and its caselaw, Article 6 does not apply to extradition proceedings or to certain aspects of pre-trial detention, which are instead covered by Article 5 of the ECHR.<sup>15</sup>

*The right to legal assistance free of charge*

15. Under Article 4, the right to free legal assistance would arise in the case of a person subject to criminal proceedings or to an EAW or other surrender procedure who cannot afford legal assistance as a result of his economic situation. In such cases, the State must bear the costs of legal assistance where the “interests of justice” so require.
16. Member States have questioned the reference to the suspect’s “economic situation” and consider that the right to free legal assistance should not necessarily be assistance of the suspect’s own choosing (as provided in Article 3). The “interests of justice” test is taken directly from Article 6(3)(c) of the ECHR.

*The right to interpretation*

17. Article 5 provides for free interpretation in relation to “procedural acts” that require the participation of the person subject to criminal proceedings or to an EAW or other surrender procedure. Free interpretation would be available where the suspect does not understand or speak the language in which the procedural act takes place.
18. The relevant ECHR article<sup>16</sup> provides for free assistance from an interpreter if an accused “cannot understand or speak the language used in court”. Although the wording appears similar to that of the proposed Framework Decision, it seems that some Member States see an important difference (though it is unclear to us) in the scope of the obligation to provide interpretation.<sup>17</sup> Further clarification of “procedural acts” would be helpful to allow the extent of the right to be more clearly ascertained.

*The right to translation of documents of the procedure*

19. Free translation or “interpretation relevant for the proceedings” is to be provided to those subject to criminal proceedings or to an EAW or other surrender procedure. The right is not an absolute one: it only applies to documents relevant for the participation of the person concerned in any procedural act which are in a language he does not understand, and only to the extent necessary to ensure the effectiveness of the rights of the defence.

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<sup>13</sup> Although see Chapter 3 for a discussion of the autonomous meaning of “criminal charge” in the ECHR context and the implications for the application of the Framework Decision.

<sup>14</sup> This article provides that those charged with a criminal offence should have adequate time and facilities for the preparation of their defence.

<sup>15</sup> See Case 24668/03 *Olaechea Cahuas v Spain*, judgment of 10 August 2006, paragraph 59.

<sup>16</sup> Article 6(3)(e).

<sup>17</sup> Scrutiny reservation lodged in relation to Article 5(1) of the proposal (Document 13116/06 DROIPEN 60 of 27 September 2006).



20. Although Article 6(3)(e) of the ECHR speaks of interpretation and not translation, the caselaw of the European Court of Human Rights confirms that there is a right to interpretation or translation of all the documents or statements in the proceedings which it is necessary for the accused to understand in order to have the benefit of a fair trial. The Strasbourg Court has, however, made it clear that this right does not go so far as to require a written translation of all items of written evidence or official documents in the procedure.<sup>18</sup>

### **The Political Resolution**

21. In light of increasing objections to the proposed Framework Decision, the United Kingdom, the Czech Republic, Ireland, Malta, Cyprus and Slovakia proposed in April that Member States agree a non-binding Resolution instead. The purpose of the Resolution is to set out practical action to promote fairness in criminal proceedings, with particular reference to access to free legal aid and to an interpreter.<sup>19</sup>
22. The Resolution refers to the need for cooperation among Member States to combat criminal organisations effectively throughout the Union. It stresses the need for compliance with the ECHR and considers that “at this stage of the Union’s development it is expedient to take practical steps for maintaining and enhancing observance of certain minimum standards”.<sup>20</sup>
23. The Resolution calls on Member States to:
- promote full compliance with Articles 5 and 6 of the ECHR as developed in ECHR caselaw.
  - ensure dissemination of relevant caselaw.
  - consider a menu of concrete Action Points for provision of information, legal aid and assistance of interpreters/translators.
  - consider extending and participating in available peer evaluation mechanisms.
24. A proposed Action Points paper accompanies the Resolution and presents practical measures to promote fairness in criminal proceedings. Member States are invited to consider the paper and prepare national action plans as required. The Action Points raised fall under three headings:
- access to information;
  - access to legal assistance; and
  - access to interpreters.

In relation to each heading, a number of questions are posed which probe the level of protection currently available in Member States and the scope for improving existing protections. The Commission is invited to provide financial assistance to Member States wishing to implement the Action Points.

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<sup>18</sup> See for example Case 18114/02 *Hermi v Italy*, Grand Chamber judgment of 18 October 2006, paragraphs 69–70.

<sup>19</sup> Document 13116/06 DROIPEN 60 of 27 September 2006, Annex II.

<sup>20</sup> Recital 9 of the draft Resolution.

### The current position of negotiations

25. Both the draft Framework Decision and the draft Resolution remain under discussion in the Council Working Group; unanimity would be required for the agreement of either one. Around nine or ten Member States are in favour of a Framework Decision and about six are opposed. The remaining Member States are either undecided or have not yet disclosed their positions (QQ 4 & 9–11).
26. When asked what benefits those Member States which support the Framework Decision see in the proposal, the Attorney General replied that a point made strongly in the context of the negotiations is that the EU has adopted a number of coercive measures and it is important to balance those measures with “some statement that the EU still regards as important defendants’ rights” (Q 12).
27. The decision whether to abandon the draft Framework Decision in favour of concluding a political resolution has been left for a future, unspecified meeting of the Working Group. It is difficult to envisage how the deadlock can be broken: the Framework Decision requires unanimity and with “substantial reservations”<sup>21</sup> from a number of Member States this looks unlikely to be achieved; on the other hand, those Member States hoping for a binding decision may not be prepared to sign off on anything else (Q 48).
28. The next chapter of this Report considers the Government’s reasons for their change of policy as regards the proposed Framework Decision and assesses whether those reasons justify the present UK position.

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<sup>21</sup> Q 10.

## CHAPTER 3: THE EVOLVING UK POSITION

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### **The Government's original view**

29. When the proposal for a Framework Decision on procedural rights was first published by the Commission in Spring 2004, the Government's response was positive. In her Explanatory Memorandum, then Home Office Minister Caroline Flint said, "The Government broadly support the proposal ... We feel that common minimum standards would also provide increased clarity to EU (including UK) nationals as to their rights in criminal proceedings throughout the EU."<sup>22</sup> Home Office officials, giving evidence to this Committee in November 2004, expanded on the Government's position: "It is necessary that there is sufficient trust and confidence between Member States to achieve effective judicial cooperation ... it is clear that the Framework Decision addresses some core issues which would help to ensure greater visibility of existing rights under the ECHR and to make sure that those rights are applied in a more consistent way across the European Union."<sup>23</sup>
30. The Government did express some concerns regarding "specific details within the text"<sup>24</sup> but their overall conclusion was that "the basic content of the Framework Decision is right".<sup>25</sup>

### **Current Government position on the Framework Decision**

31. The Attorney General confirmed that there has been a change of policy within the Government and explained that this has "gone alongside the development in the [proposed Framework Decision] itself". The Government's original support for the proposal was based on the understanding that it created possibilities for raising standards and that care would be taken to avoid creating confusion between the Framework Decision and the ECHR. However, the Attorney General explained that the text of the draft Framework Decision has become more general and vague and that the risk of a clash with the ECHR is now "quite significant". He explained that the benefits of the proposal had been lost but the problems had not been solved and concluded, "We cannot see, at the moment, that the current draft really offers any clear benefits to the citizen" (QQ 7 & 32).

### *General and vague rights*

32. The Commission's proposal provided for a number of rights in some detail. Member States' opposition to certain rights has led to the rights in the current draft Framework Decision being whittled down to the five more general rights outlined in the previous chapter. However, far from solving the problems, the Government consider that it creates "further difficulties of uncertainty". The Attorney General explained that, "if there were real, substantial enhancements to protection which we supported through a binding text, one would look at what the benefit of that, from the point of

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<sup>22</sup> Government Explanatory Memorandum of 20 May 2004 regarding document 9318/04, paragraph 13.

<sup>23</sup> Evidence of Home Office officials published with *Procedural Rights in Criminal Proceedings* at page 61.

<sup>24</sup> Government Explanatory Memorandum, paragraph 13.

<sup>25</sup> Evidence of Home Office officials, page 61.

view of the citizens, was compared with the disadvantage of the risk of legal uncertainty” (QQ 4 & 31).

33. We agree with the Government that the current basic level of rights outlined in the proposed Framework Decision is disappointing. The removal of the recording of police interviews provisions and the provisions relating to a Letter of Rights, the watering down of other rights and the desire for exceptions to the rights guaranteed has thrown into doubt the utility of concluding the Framework Decision at all. **In our previous Report on procedural rights we called for an instrument which was truly something worthwhile. The procedural rights Framework Decision can no longer be described as such and we see little value in agreeing the instrument as currently drafted.**
34. In reaching this conclusion we do not ignore the role which the Member States have played in reducing the proposal to its current level. As with all international negotiations, there is a delicate balance of interests for negotiating parties. In the present case, national interests may have taken precedence over the desire to conclude an instrument which would add value. Reservations placed on the numerous revised texts would seem to illustrate the extent to which Member States have been unwilling to compromise.<sup>26</sup>
35. **We urge the Government to encourage Member States to look beyond their own criminal justice systems and recognise the benefits which a binding Framework Decision could bring for all EU citizens moving within the Union.** The Government are rightly proud of the high standards of procedural rights which are generally observed across the United Kingdom and suggest that practical measures could help all Member States meet the requirements of the ECHR (QQ 16 & 24). It is precisely because of the high standards in this country that we consider that British citizens have the most to gain from this proposal. British citizens may travel to countries where police interviews are not recorded and where access to interpretation is not freely available. Furthermore, they are unlikely to be familiar with the rights available to them in other Member States. The practical measures envisaged by the Government, although potentially helpful, would be optional and introduced by Member States as they see fit. **Citizens should be able to exercise their free movement rights in the knowledge that, if they find themselves having to deal with other EU criminal justice systems, they will be entitled to similar procedural safeguards to those that they would receive in their home States.**
36. Minimum standards already exist across the Union, namely the rights set out in the ECHR. The key decision which must be made before any EU action—binding or otherwise—in the field of procedural rights can be taken is whether measures should go beyond the guarantees of the ECHR. Once this general point of principle has been agreed, then it is likely to be easier to draft the appropriate measures. The extent to which EU rights should exceed those provided for in the ECHR is discussed in the next section.

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<sup>26</sup> For example Document 10880/05 DROIPEN 34 of 11 July 2005, Document 14248/05 DROIPEN 54 CATS 73 of 11 October 2005 and Document 15432/05 DROIPEN 61 of 6 December 2005.

*Overlap with the European Convention on Human Rights*

37. As with many initiatives by the EU in the field of fundamental rights, there is a concern that action by the Member States may conflict with and undermine the work of the Council of Europe, which could damage human rights in Europe. There appear to be two principal ECHR-related concerns in respect of the present proposed Framework Decision (Q 13):
- The extent of the rights guaranteed under the Framework Decision and whether they are intended merely to set out a means of complying with ECHR standards or whether they are intended to go further than the ECHR.
  - The “another layer, another player” issue—the existence of two parallel rights regimes could cause confusion in this field and may lead to increased and divergent litigation before the relevant courts.

A further area of concern, which has not been publicly expressed, may be the potential loss of the margin of appreciation generally afforded to States by the European Court of Human Rights in implementing ECHR rights. This would be particularly relevant in the fight against terrorism and organised crime, where changes to finely-balanced existing national legislation required by any Framework Decision might risk falling foul of the ECHR provisions. In this regard, it should be recalled that Third Pillar measures always leave some discretion for Member States as to how to implement legislation: Framework Decisions are “binding on the Member States as to the result to be achieved but ... leave to the national authorities the choice of form and methods”.<sup>27</sup> It may also be that frequent references to national law throughout the proposal are intended to reassure Member States on this point; if the political will to provide some flexibility exists, then we do not doubt that a solution can be found.<sup>28</sup>

*Extent of rights under the Framework Decision*

38. The Commission’s Explanatory Memorandum explained that the proposal was intended to “enhance the rights of all suspects and defendants generally” by promoting compliance with Articles 5 and 6 of the ECHR at a consistent standard.<sup>29</sup> A number of the Recitals of the original Framework Decision expressly stipulated that the provisions of the proposal do not impose obligations on Member States that go further than the ECHR but merely set out common ways of complying with it.<sup>30</sup> The Austrian Presidency draft repeats this language in respect of the right to legal assistance<sup>31</sup> but is silent on the impact of other provisions of the Framework Decision.
39. The Attorney General noted that there is some uncertainty as to whether the proposed Framework Decision intends to go further than the ECHR (Q 13). As regards the right to legal assistance for example, despite a Recital to the effect that the provisions are not intended to go further than the ECHR, the

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<sup>27</sup> Article 34(2) TEU.

<sup>28</sup> The references to national law are criticised by some Member States as introducing further confusion as to how rights should be interpreted and increasing the likelihood of inconsistency.

<sup>29</sup> Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328 of 28.04.2004, pages 2 and 3.

<sup>30</sup> Recital 12 on the right to legal assistance and Recital 13 on the right to linguistic assistance.

<sup>31</sup> Recital 12.

Government consider that the provisions do go beyond the guarantees in the ECHR.<sup>32</sup> Explaining the UK's concerns, the Attorney General said, "it is not, in drafting terms, terribly satisfactory when something in its substantive form looks as if it might go beyond [the ECHR] but the intention is that it should not". He did, however, accept that this sort of problem could potentially be resolved by further drafting (Q 34).

40. As for specific cases of concern, the Attorney General pointed to the lack of clarity in Articles 3(3) and 3(4) as to when the right to legal assistance arises and suggested that this might have the effect of extending the right to legal assistance to those subject to deprivation of liberty prior to trial, or to EAW or surrender proceedings, from the moment of the deprivation of liberty, and not from the moment that the individual is charged with a criminal offence.<sup>33</sup> He also referred to Article 2 of the proposed Framework Decision, which appears to extend the right to information guaranteed under Article 6(3)(a) of the ECHR to EAW proceedings.<sup>34</sup> The Attorney General pointed out that such proceedings do not currently benefit from any Article 6 rights: specific detention rights are set out in Article 5 of the ECHR. If the intention of the proposed Framework Decision is not to go beyond the provisions of the ECHR, then the right to information in EAW and other surrender cases should be aligned with the right in Article 5(2) of the ECHR which provides only for prompt information, in a language understood by the detainee, of the reasons for his arrest and any charge against him.<sup>35</sup>
41. **There is a need for agreement in the Council as to how far the proposed Framework Decision should go.** Without a clear statement of intention, the scope for uncertainty, incoherence and inconsistency with the jurisprudence of the European Court of Human Rights is great.
42. **We consider that there is a strong case for setting out rights which go beyond the guarantees of the ECHR.** This would bring real benefits for citizens of the EU. It would also address concerns that the rights in the Framework Decision are too general and vague.
43. In light of the Government's justified concerns regarding the increasingly vague and general nature of the rights contained in the Framework Decision, and their initial support for an instrument that might actually improve the human rights position of individuals in the EU, it might reasonably be expected that they would view any measures which go beyond the rights guaranteed in the ECHR very favourably (QQ 4, 7, 32 & 49). **We assume that the Government remain in principle committed to setting higher standards provided that consistency with the ECHR is assured. We encourage them to press for a similar commitment from other Member States.**
44. As we have said in the past, we recognise the importance of promoting consistency and coherence between the work of the EU and that of the

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<sup>32</sup> For this reason they have lodged a scrutiny reservation to Article 3 of the draft Framework Decision—Q 34.

<sup>33</sup> Letter of 15 November 2006 from Lord Goldsmith to Lord Grenfell, printed with this Report, and Q 17.

<sup>34</sup> Letter of 15 November 2006 from Lord Goldsmith to Lord Grenfell, printed with this Report.

<sup>35</sup> Contrast with Article 6(3)(a) of the ECHR which also provides for information on the nature and cause of the accusation.

Council of Europe.<sup>36</sup> We consider below how to minimise conflicts as regards the procedural rights Framework Decision.

*Another layer, another player*

45. The problems raised by the existence of two separate systems for the protection of fundamental rights in Europe are not new. They were considered in the context of the EU Charter of Fundamental Rights and more recently during the negotiations on the proposal for establishing a Fundamental Rights Agency in the EU.<sup>37</sup> From the outset of negotiations on the Framework Decision, the Government have sought assurances that conflicts with the ECHR would be minimised. The Attorney General explained that their “high level concern is to avoid unnecessary duplication with the European Convention on Human Rights and the risk of legal uncertainty for citizens and for Member States” (QQ 7 & 32).
46. The concerns are twofold: firstly, adding a further layer of remedies for those who consider their fundamental rights to have been breached may lead to increased and protracted litigation;<sup>38</sup> second, the existence of two different courts reviewing the application by Member States of fundamental rights could lead to conflicting judgments and uncertainty (Q 4).<sup>39</sup>
47. The possibility of an increase in the volume of litigation before the courts is unavoidable. If further remedies are available then they are likely to be pursued by those who have the resources to do so. However, this potential increase should be balanced against the possibility that more robust national standards required by the Framework Decision may lead to a reduction in the number of cases taken to both the domestic courts and on to Strasbourg. It should also be recognised that appeals to Strasbourg following the conclusion of domestic cases involving an ECJ preliminary reference, however undesirable from a delay point of view, may help to reduce inconsistencies in interpretation between the two courts.
48. The Attorney General pointed to an example of how differences may well emerge between the two jurisdictions on the scope of the proposed Framework Decision (Q 34). Article 1 provides that it applies to persons “subject to criminal proceedings”, a phrase which is to be interpreted in accordance with national law while respecting the ECHR and its caselaw.

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<sup>36</sup> *Human Rights Protection in Europe: the Fundamental Rights Agency*, 29th Report of Session 2005–06, HL Paper 155 at paragraph 92.

<sup>37</sup> See our Reports on the Charter and the Fundamental Rights Agency: *EU Charter of Fundamental Rights*, 8th Report of Session 1999–2000, HL Paper 67; *The Future Status of the EU Charter of Fundamental Rights*, 6th Report of Session 2002–03, HL Paper 48; and *Human Rights Protection in Europe: the Fundamental Rights Agency*, 29th Report of Session 2005–06, HL Paper 155.

<sup>38</sup> For example, in the *Bosphorus* case, a preliminary reference to the ECJ added 17 months to the national proceedings and a subsequent case before the European Court of Human Rights took a further 8 years—Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*, judgment of 30 July 1996, [1996] ECR I-3953 and Case 45036/98 *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, judgment of 30 June 2005, (2006) 42 EHRR 1.

<sup>39</sup> There has been, for example, an ongoing debate regarding the extent of the right against self-incrimination and the compatibility of EU and ECHR interpretations of this right following judgments from the ECJ and the Strasbourg Court in the cases of Case 374/87 *Orkem v Commission*, judgment of 18 October 1989, [1989] ECR 3283; Case 10828/84 *Funke v France*, judgment of 25 February 1993, (1993) 16 EHRR 297; and Case 19187/91 *Saunders v United Kingdom*, judgment of 17 December 1996, (1997) 23 EHRR 313. For a recent statement of the ECJ’s position, see Case C-301/04 *Commission v SGL Carbon AG*, judgment of 29 June 2006.



The term “criminal proceedings” is taken up in most other articles of the proposal, the only exception being Article 3, which talks of persons “charged with a criminal offence”. The Attorney General highlighted the problems this is likely to cause in EU States, which under their national laws define different kinds of proceedings in different ways. The European Court of Human Rights has overcome this difficulty by stressing on a number of occasions that the concept of “criminal charge” is an autonomous one. It does not concern itself with national definitions and instead applies its own test to decide whether the proceedings are criminal in nature. The Attorney General argued that the Framework Decision definition is a “fudge, intended to overcome past difficulties over agreeing a single definition of criminal proceedings”.<sup>40</sup>

49. The danger of diverging, or potentially conflicting, jurisprudence is a real one, as the existing caselaw highlights, but there may be ways to reduce this risk. As the Attorney General emphasised, “if they have different wording, then the risk of them reaching different conclusions is great” (Q 13). So by aligning the language of the Framework Decision more closely with that of the ECHR and the jurisprudence of the European Court of Human Rights, for example, the risk of divergence and confusion is likely to be more limited. The Council of Europe itself agrees that the proposal could be made clearer and much more compatible with the Convention (Q 4). In a paper prepared at the request of the Finnish Presidency, the Council of Europe makes a number of suggestions in order to try and achieve a greater level of consistency and these ought to be fully explored by Member States.<sup>41</sup>
50. **We do not consider that it is reasonable to oppose action on fundamental rights within the EU simply on the basis that the Council of Europe is a European organisation for the protection of human rights.** This is a view implicitly shared by the Government (Q 44). States have an obligation to ensure respect for fundamental rights and this obligation can be met through national legislation or international agreements, provided always that the guarantees of the ECHR are respected.<sup>42</sup>
51. **While we commend the excellent work of the Council of Europe, and in particular of the European Court of Human Rights, in ensuring human rights protection in Europe, the shortcomings of this system should not be ignored.** In an organisation which covers countries as diverse as the United Kingdom, Turkey and Russia, the standards set are inevitably aimed at securing minimum safeguards at a level acceptable to all its members; there is a significant backlog of cases pending before the Strasbourg Court, which is only expected to increase; and there is no means of enforcing a judgment of the Court of Human Rights. EU cooperation is at a far more advanced stage. The agreement of a number of measures in the criminal justice sphere on surrender proceedings, organised crime and terrorism provides an example of how action can be coordinated across the EU at a level which could not currently be achieved in the Council of Europe and puts the EU in a position to set higher standards. While Third Pillar

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<sup>40</sup> Letter of 15 November 2006 from Lord Goldsmith to Lord Grenfell, printed with this Report.

<sup>41</sup> Document 13759/06 DROIPEN 62 *Observations by the Council of Europe Secretariat on the Proposal for an EU Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union*, 10 October 2006.

<sup>42</sup> Article 53 of the ECHR.

measures do not benefit from the same stringent enforcement measures available under the First Pillar, there is nonetheless greater scope for securing enforcement in the EU than in the Council of Europe, and future constitutional developments may bring further improvements here.

52. **We still support EC/EU accession to the ECHR.<sup>43</sup> This may also be one way of resolving some of the complex issues which the current dual structure creates.**

### Government support for practical measures

53. The Government have consistently expressed a strong commitment to measures which would enhance better compliance with the ECHR. As the rights in the Framework Decision have diminished, the attraction of a set of practical measures has increased. The Attorney General set out the Government's position quite clearly: "we are not satisfied that the present proposal is worthwhile. On the other hand, practical measures which can bring tangible benefits we think is something which ought to be pursued" (QQ 7, 32 & 49). In the Attorney General's view, practical measures would help to make ECHR guarantees a "reality", an approach which is supported by the Council of Europe (QQ 16 & 23).
54. The Attorney General was also keen to emphasise that there could be a substantial amount of funding available for practical measures under the Commission's Justice and Home Affairs budget. He explained that the Criminal Justice Programme had something like €190 million available over the next seven years (QQ 24, 30 & 46).
55. **We find it surprising that the list of practical measures proposed does not include encouraging the recording of police interviews, which we understand to be of key importance for the Government.** The Attorney General told us that the draft Resolution, "is intended as an illustrative list of the sorts of things which could be dealt with" and the Government have encouraged Member States to suggest other measures that they think would help. He accepted that the recording of police interviews may not be practicable given that it appears not to appeal to a number of Member States but concluded that he would be "very happy" to put it forward (QQ 52–54). **Despite the potential opposition, we support the Government in their undertaking to press for the inclusion of this measure. If practical measures are to be agreed by the Member States, we would expect them to meet the test which has been applied to the Framework Decision: they must add something to the existing protection already available in the EU.**

### The scope for a future Framework Decision

56. The Attorney General told us that, "having an alternative route does not rule out having a binding Framework Decision, or certainly does not rule it out for all time". The introduction of practical measures might therefore be viewed as a relatively straightforward immediate step to improve defendants' rights in the EU while negotiations on the content of binding legislation

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<sup>43</sup> For the Committee's previous recommendations to this effect, see *The Future Status of the EU Charter of Fundamental Rights*, 6th Report of Session 2002–03, HL Paper 48 at paragraphs 115, 119 and 135 and *The Future of Europe: Constitutional Treaty—Draft Articles 1–16*, 9th Report of Session 2002–03, HL Paper 61 at paragraph 30.

continue. However, Lord Goldsmith stressed that this will be a matter for Member States' agreement; given the time and resources involved in negotiating legislative proposals and the current opposition to a binding Framework Decision, Member States and the Commission may not consider this a productive course of action (QQ 28 & 47).

57. **We strongly support the use of Union funds, where appropriate, to introduce immediate measures to improve defendants' rights across the EU. However, we do not consider that this should be viewed as an adequate long-term alternative to binding legislation which commits Member States to higher standards in procedural rights in criminal proceedings.** While we are opposed to more resources being wasted on a proposal to which a number of Member States are strongly opposed, we urge the Government, together with the Commission and Member States, to evaluate the position subsequent to practical measures being adopted with a view to proposing acceptable binding legislation in due course.

### Government support for the Hague Programme

58. The proposed Framework Decision on procedural rights is an important criminal justice measure provided for by the Hague Programme.<sup>44</sup> It was to be agreed under the Hague timetable by the end of 2005. A year has passed since this deadline and the Framework Decision is no closer to being agreed. This is not the only dossier in the Hague Programme to have met with significant opposition from Member States.
59. The Attorney General emphasised the Government's continuing support for the Hague Programme. However, he pointed to the difficulties which have arisen for Third Pillar legislation as a result of the failure to ratify the Constitutional Treaty. This Treaty would have brought important changes to the way criminal justice measures are agreed in the Council—most notably by removing the need for unanimity. The absence of the Treaty means that any Member State may block the adoption of a proposal which it does not like. As a result, there has recently been a call by a number of Member States for the EU to “focus on a limited number of areas where real progress could be made rather than a larger number of measures which were getting bogged down in differences”. The Attorney General concluded that, “some re-prioritisation of JHA priorities may well be appropriate” (QQ 35–40).
60. At their December 2006 meeting, EU Justice and Home Affairs Ministers reaffirmed the Council's determination to take forward the remaining priority measures set out in the Hague Programme in keeping with the agreed deadlines. The Council considered that, along with certain other aspects of the Programme, mutual recognition in criminal matters deserved particular attention.
61. It is disappointing that only two years after agreeing the Hague Programme of measures in the field of Justice and Home Affairs, measures envisaged are lacking support from Member States. While the Government stress their commitment to the Hague Programme, they nonetheless see a need for what they call “re-prioritisation”. The Conclusions of the December Justice and Home Affairs Council are encouraging, but it remains to be seen whether

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<sup>44</sup> Document 16054/04 JAI 559 The Hague Programme: strengthening freedom, security and justice in the European Union, 13 December 2004.

Member States are willing to follow this through with genuine efforts to agree outstanding measures. The Commission has recently launched a broad review of the Hague Programme and it is not clear whether a revised Programme will be produced at some point in the future.<sup>45</sup>

62. In our Report on the Hague Programme<sup>46</sup> we expressed concern at the emphasis placed on security considerations at the expense of respect for fundamental rights. We called on the Commission and Member States to give full weight to the need to protect fundamental rights when developing and implementing the Programme.<sup>47</sup> The failure to date to reach agreement on the procedural rights Framework Decision should not be viewed as justification for rewriting the Hague Programme to remove the more controversial justice and freedom-based measures. **We encourage the Government to participate fully in the Hague Programme review and urge them to ensure that the final Programme and Action Plan balance the need for security with protection of citizens' rights, which is a founding principle of the European Union.**<sup>48</sup>

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<sup>45</sup> The Commission published four Communications on 28 June 2006 which evaluate progress made in achieving the objectives set out in the Hague Programme and propose some ways of improving decision-making in Justice and Home Affairs: Report on the implementation of the Hague Programme for 2005 (COM (2006) 333); Evaluation of EU policies on Freedom, Security and Justice (COM (2006) 332); Implementing The Hague Programme: the way forward (COM (2006) 331); and Adaptation of the provisions of Title IV establishing the European Community relating to the powers of the Court of Justice with a view to ensuring effective judicial protection (COM (2006) 346).

<sup>46</sup> *The Hague Programme: a five year agenda for EU justice and home affairs*, 10th Report of Session 2004–2005, HL Paper 84.

<sup>47</sup> Paragraphs 10–11 of our Report.

<sup>48</sup> Article 6, TEU.

## **APPENDIX 1: SUB-COMMITTEE E (LAW AND INSTITUTIONS)**

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The members of Sub-Committee E are:

Lord Borrie  
Lord Bowness (from November 2006)  
Lord Brown of Eaton-under-Heywood (Chairman)  
Lord Burnett (from November 2006)  
Lord Clinton-Davis  
Lord Grabiner (until November 2006)  
Lord Henley (until November 2006)  
Lord Jay of Ewelme (from November 2006)  
Baroness Kingsmill (from November 2006)  
Lord Leach of Fairford (from November 2006)  
Lord Lester of Herne Hill  
Lord Lucas  
Lord Neill of Bladen (until November 2006)  
Lord Norton of Louth  
Lord Tyler (until November 2006)

### **Declarations of Interest**

*A full list of Members' interests can be found in the Register of Lords Interests:  
<http://www.publications.parliament.uk/pa/ld/ldreg.htm>*

## APPENDIX 2: REPORTS

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### Recent Reports from the Select Committee

The Further Enlargement of the EU: threat or opportunity? (53rd Report, Session 2005–06, HL Paper 273)

Annual Report 2006 (46th Report, Session 2005–06, HL Paper 261)

The Brussels European Union Council and the Priorities of the Finnish Presidency (44th Report, Session 2005–06, HL Paper 229)

EU Legislation—Public Awareness of the Scrutiny Role of the House of Lords (32nd Report, Session 2005–06, HL Paper 179)

Ensuring Effective Regulation in the EU: Follow-up Report (31st Report, Session 2005–06, HL Paper 157)

Annual Report 2005 (25th Report, Session 2005–06, HL Paper 123)

The Work of the European Ombudsman (22nd Report, Session 2005–06, HL Paper 117)

Scrutiny of Subsidiarity: Follow up Report (15th Report, Session 2005–06, HL Paper 66)

### Recent Reports from Sub-Committee E

Rome III—choice of law in divorce (52nd Report, Session 2005–06, HL Paper 272)

The Criminal Law Competence of the European Community (42nd Report, Session 2005–06, HL Paper 227)

European Arrest Warrant—Recent Developments (30th Report, Session 2005–06, HL Paper 156)

Human rights protection in Europe: the Fundamental Rights Agency (29th Report, Session 2005–06, HL Paper 155)

European Small Claims Procedure (23rd Report, Session 2005–06, HL Paper 118)

Human Rights Proofing EU Legislation (16th Report, Session 2005–06, HL Paper 67)

Evidence from the EP Legal Affairs Committee on European Contract Law, Rome II and Better Regulation (8th Report, Session 2005–06, HL Paper 25)

The Constitutional Treaty: Role of the ECJ: Primacy of Union Law—Government Response and Correspondence (3rd Report, Session 2005–06, HL Paper 15)

European Contract Law—the way forward? (12th Report, Session 2004–05, HL Paper 95)

The Hague Programme: a five year agenda for EU Justice and Home Affairs (10th Report, Session 2004–05, HL Paper 84)—*Joint Report with Sub-Committee F (Home Affairs)*

# Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION  
(SUB-COMMITTEE E)

WEDNESDAY 25 OCTOBER 2006

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Present	Brown of Eaton-under-Heywood, L (Chairman)	Lucas, L
	Clinton-Davis, L	Mance, L
	Grabiner, L	Neill of Bladen, L
		Norton of Louth, L

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## Examination of Witnesses

Witnesses: LORD GOLDSMITH QC, a Member of the House of Lords, Attorney General, MR MARK DE PULFORD, Better Trials Unit, Office for Criminal Justice Reform; Ms MELISSA BULLEN, Legal Adviser's Branch, and Ms CLAIRE FIELDER, International Directorate, Home Office, examined.

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**Q1 Chairman:** Lord Goldsmith, we are extremely grateful to you and your officials for coming to help us. If occasionally I stray into calling you Mr Attorney you will forgive me, but I think Lord Goldsmith is your proper designation as you appear before the Committee. You have, I know, had an opportunity to look at the areas of questioning, the draft questions which we have prepared for you, and if I could just tell you that for the first time today we have decided we will circulate the questions amongst any interested members of the public so that they may more easily follow what is going on. I do not know whether any of you wanted to make any preliminary prepared statement or anything of that nature, or whether you are content that we should move straight into the area of questioning we have set out?

*Lord Goldsmith:* I am happy to deal with it in any way which suits the Committee, but it might be helpful if I just take a couple of moments just to say what the up to date state of play is, because of course it has changed from the communication from me in July. You have now got the latest Explanatory Memorandum of 19 October, which describes those developments, and I wonder whether it is helpful if I just summarise that.

**Q2 Chairman:** We have your July letter, of course. We understand there is a new Finnish Presidency text of 27 September, which we have not got, although we have got the Council of Europe's comments on it, rather oddly. This has all happened in the last very few days, because that was initially a 'limite' text.

*Lord Goldsmith:* We have got further copies, because we thought there might be a risk that you did not have this. Could I just distribute those and I will, if I may, just take a moment—

**Q3 Chairman:** Yes. We shall probably be taking, therefore, a necessarily broader brush approach to the problem as a whole, but certainly.

*Lord Goldsmith:* Yes. If we can distribute this. It was sent on the 19th. In any event, I hope it does not create a great deal of inconvenience, because my understanding of your questions is that they are at a slightly higher level than the detail of the text as it stands, but I am happy to deal with that. The history of this, of course, is that it did not prove possible for Member States to agree on the original Commission draft instrument by the Hague Programme deadline of the end of 2005 and there was a series of reasons for that—differences over legal base, over proportionality, concerns about the relationship between the proposed instrument and the ECHR, over exceptions relating to terrorism and serious crime, and so on. In April this year a number of Member States, including the United Kingdom, proposed an alternative route, the adoption of a non-binding Resolution, which would not of itself rule out the adoption of a binding document sometime in the future, but the aim of that was to encourage Member States to promote full compliance with Articles 5 and 6 of the ECHR as developed through Strasbourg jurisprudence by signing up to action points relevant to their national circumstances. We view that more as a way forward based on practical measures, but at the time that happened the Austrian Presidency proposed a further text for a proposed binding Framework Decision, which they regarded as a compromise.

**Q4 Chairman:** This is the text we got in July and it is a much attenuated text, six articles only.

*Lord Goldsmith:* Exactly, the thinking being that if they were more general and more vague, that would be easier to agree. It has the consequence, as far as we are concerned, of creating further difficulties of



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uncertainty. At the JHA council meeting of Ministers in June, which I attended, we agreed that discussion should proceed in parallel on both those informal texts to see whether either of them, or both of them, might command consensus. They have been considered at Working Group meetings in July, September and October. It was at the September meeting of the Working Group that the Council of Europe was invited to submit written comments and to meet members of the Working Group, and it did that on 19 and 20 October, so it is very up to date. What the Council of Europe said at the meeting—and I am pleased you have seen its paper—was to warn about the risks of introducing (I understand these were the words used at that meeting) “another layer, another player”. The Council advised that the draft binding text required further modification to ensure legal clarity and avoid problems. I understand that the Council of Europe representatives stated the text could be made clearer and much more compatible with the Convention, and they proposed two concrete amendments to start that process, but they also agreed that it would not be possible to eliminate the risks which were introduced by having “another layer, another player,” a risk of increased litigation, legal conflict, uncertainty and ultimately damage to human rights. Where we are now, as I understand, is that there is a number of Member States which are strongly in favour of having a binding Framework Decision along the lines of the current text. There are certainly several other States which believe that a non-binding measure with practical measures, as proposed in the draft Resolution, would be more realistic, more likely to be accepted and be of real benefit. We are in that latter camp. The only final observation I think I would make before answering such questions as I can is that when this Committee reported on this in February you called for something which was truly something worthwhile. I am afraid to say the document as it stands, as a draft Framework Decision, is not, in our view, that at all. That is a thumbnail sketch, as it were, of the history which gets us to today.

**Q5 Chairman:** Yes. As you say, the Committee (under my predecessor as the Chairman, Lord Scott) reported, but that was in February last year, 2005, not this year.

*Lord Goldsmith:* Yes, forgive me.

**Q6 Chairman:** Following a late 2004 inquiry, and of course before the end of 2005, by when, under the Hague Programme, this Framework Decision was to have been adopted.

*Lord Goldsmith:* Yes.

**Q7 Chairman:** As you know, and as the questions record, the Home Office evidence before the Sub-Committee two years ago now was broadly in favour of the Framework Decision. It was thought that there needed to be some tinkering with it, but essentially it was thought to be desirable and the Government was supportive. But one has, perhaps, the impression as time has passed, perhaps not least since the 7 July bombings of last year, that the Government has shifted and now—and I think your letter in July makes this plain—prefers a political declaration and possibly some funded schemes to improve human rights observation but without there being any sort of Framework Decision of this character. Is that fair?

*Lord Goldsmith:* I think it is fair to say that there has been a shift or an evolution development of our view, but it has rather gone alongside the development in the proposition itself. It is quite right that the Government was open and positive initially and the Government saw attractions in measures which could actually enhance the application of the ECHR, and indeed there seemed to be possibilities for raising standards. For example, the issue of taping of interviews at police stations, which was one of the things which the early draft was looking at. I understand also that the Commission at the time indicated that it would be very careful to avoid duplication with the ECHR, which is something the Government has been concerned about in a number of areas, for example the EU Charter, over a period of time. So we were positive and open to the idea of something which would enhance compliance with the ECHR and not simply just create “another layer, another player,” but the final stance has always been conditional upon the final text. The text, if anything, has got more general and it has got more vague. The risks of a clash with the ECHR seem to be quite significant. We cannot see, at the moment, that the current draft really offers any clear benefits to the citizen, and then it poses legal difficulties alongside it. So, as I say in my Explanatory Memorandum, our high level concern is to avoid unnecessary duplication with the European Convention on Human Rights and the risk of legal uncertainty for citizens and for Member States, and we are not satisfied that the present proposal is worthwhile. On the other hand, practical measures which can bring tangible benefits we think is something which ought to be pursued, which is why we have supported that particular alternative approach.

**Q8 Chairman:** The practical benefits—you have of course mentioned one, the taping of police interviews, ideally by video as well, and I think the funding of interpreters is possibly another scheme which is being considered?

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*Lord Goldsmith:* Yes.

**Q9 Chairman:** But there is, as I understand it, a group of Member States which still in principle would like a Framework Decision, something more directly applicable than a bare political declaration. Can you give us any idea as to what number of States take one view and what number another view? Please feel free to answer yourself or through your officials, entirely as your group would like.

*Lord Goldsmith:* I just wanted to check the number. Not all Member States have revealed their position, which is not entirely unusual. We think there may be a number who simply have not reached a final decision. Maybe nine or 10 are currently in favour of a binding measure, something of that order.

**Q10 Chairman:** So would it be roughly the same number opposed, the same number in favour?

*Lord Goldsmith:* I think, from those who have made it clear that they have got substantial reservations, rather fewer, perhaps half a dozen, have made it clear they have got substantial reservations.

**Q11 Chairman:** That includes the UK?

*Lord Goldsmith:* That includes the UK, but that obviously leaves a number who are either undecided or undeclared.

**Q12 Lord Lucas:** Could you tell us more about the advantages those in favour see in having this framework? How do they view things?

*Lord Goldsmith:* I may not be the best person to say how they see them. A point which was made strongly to me in the meetings I have had is that the EU has taken a number of measures, particularly following 9/11, which appear to be strongly in favour of security, policing, and so forth, arrest warrants, evidence warrants, et cetera, and that there is a political desire to balance what appears to be a bearing down on people with some statement that the EU still regards as important defendants' rights. That is a point which has been put to me. I hope I do the point justice in the way in which I have described it. If you ask the question, what is the actual tangible benefit, what does this add in terms of protection, I cannot say that I have had an answer which at the moment convinces me. As I have said, there are—and I can give examples if the Committee would find it helpful—some problems of legal confusion which I think the current text gives rise to.

**Q13 Lord Mance:** On the same subject, I can understand, reading the text, why you say it is general and vague. The risk of a clash with the ECHR is a point I would like to ask about. Clearly, it would not be inconsistent with the ECHR if it went further in

protecting suspects or accused, so do I understand that the concern is that some of the qualifications might be taken to suggest a less protective regime?

*Lord Goldsmith:* I think it is a double problem. One is the uncertainty as to whether it is supposed to go further or not. The second—and it is one which one cannot get away from, it seems to me—is that as soon as you put into a legally binding text obligations on Member States which cover the same ground as the ECHR you have then created a system where you have two courts which can then adjudicate upon what is the meaning of those. If they have different wording, then the risk of them reaching different conclusions is great. There are, of course, examples where the ECJ and ECHR have reached different conclusions on the meaning of the ECHR itself, so there is some legal uncertainty there, a legal risk there, which the Council of Europe refers to in its paper. If I could just give an example. There are several but, for example, Article 1 seeks to define the scope of the Decision.

**Q14 Chairman:** You have passed us up the Explanatory Memorandum, but you are talking in terms of the Finnish Presidency text, are you?

*Lord Goldsmith:* Yes, I am. If it would be helpful, I am very happy to send you a note after this hearing which makes these textual points and it may be easier to assimilate them with the documents.

**Q15 Chairman:** That would indeed be helpful and perhaps I should have said, as I ordinarily do at the beginning, that, as you know, this is recorded and you will get a copy of the transcript and have an opportunity to correct or expand where it would be helpful to do that. You are perfectly right that there are Member States, and indeed I think we were one, who originally thought that here we are talking about the area of freedom, security and justice, and security in recent years, for understandable reasons, has attracted all the emphasis and, as I think the Committee put it in its report 18 months ago, "Justice is destined to be of secondary importance to security for at least the next five years." There are States which think this sort of Framework Decision could counter that. That is the background to the other view, I think.

*Lord Goldsmith:* Yes.

**Q16 Chairman:** To what extent (if at all) did 7/7 last year affect the UK Government's approach to this?

*Lord Goldsmith:* Not at all, I do not believe. I would not want it to be thought for a moment that the UK does not also take the view that defendants' rights are important, it is just that we believe the way to enhance those is through a clearer recognition of the ECHR, which provides more than adequate

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guarantees in those areas, and by adding practical measures which may help to make some of those reality, such as the issues of interpreting in countries where some interpreting facilities may be difficult to get.

**Q17 Chairman:** Yes, of course. I think one can really understand the fears of overlap and uncertainty with ECHR, but Articles 5 and 6, which are very much behind this initiative, are in very general terms and I believe the thinking is that they can usefully be fleshed out, crystallised, and there can be more specific obligations, particularly minimum obligations, spelled out in a way which would help, particularly in some States, to give confidence that across the Union as a whole there will be true compliance with these important Articles.

*Lord Goldsmith:* Of course, now the detail of Articles 5 and 6 is considerably provided by the jurisprudence of Strasbourg over now many years and I do not think, when one looks at the text as it stands at the moment, one could actually claim for it that it actually provides greater clarity as to what those provisions provide. On the contrary, it creates uncertainty because it now puts them in different terms which makes one wonder, when it talks about the right to free legal assistance, is this the same as we now well understand the ECHR obligation is, or is it something greater, or indeed lesser? It is that sort of uncertainty.

**Q18 Lord Grabiner:** Could you spell out, certainly for me if not for anybody else, what are the practical consequences of a continuing failure amongst the states to reach a unanimous agreement?

*Lord Goldsmith:* As this is an area for unanimity, we will not have an agreed Framework Decision.

**Q19 Lord Grabiner:** What is the practical consequence of that?

*Lord Goldsmith:* We will not have succeeded in achieving something which we set out under the Hague Programme to do, but I think apart from that it is political rather than anything else. I do not think there is any other consequence.

**Q20 Lord Grabiner:** In terms of the position of individuals or members of the community, so to speak?

*Lord Goldsmith:* In that sense, I would say no, certainly not. The rights for those charged with offences will be provided in every single EU country by the rights which are guaranteed under the ECHR, or maybe higher in the case of individual nation States.

**Q21 Lord Grabiner:** Yes. So it is not the end of the world?

*Lord Goldsmith:* No, it is not.

**Q22 Lord Neill of Bladen:** On the practicalities, we have had a communication from the Council of Europe people and one of the things which struck me very much in their paper (in paragraph 15, for the record) is that they say that in their casework they found that 65 per cent of the violations of the basic provisions (I think we are talking about Articles 5 and 6) are what they call repetitive cases; in other words, there are already clear precedents covering the point and what is happening is it is either ignorance or unwillingness to comply with the laws as laid down. So we have already got a situation with the Convention, which Lord Grabiner's question brings to light, that everybody is bound by the Convention, but what is happening is that people are not complying with it. That is what is happening. Do you agree with that?

*Lord Goldsmith:* Yes. I think that is a very important point.

**Q23 Chairman:** I would not be surprised if quite a proportion of that 65 per cent is delayed hearings. There are one or two known recalcitrant Member States who take an unconscionable time to complete their litigation, particularly criminal cases.

*Lord Goldsmith:* That is true, and I am sure that is a part of the repeat violations. I would not think it accounts for all of it, by any means. I note, if I may, following on Lord Neill's reference to paragraph 15, what the Council of Europe go on to say in paragraph 16 is that what is required in this respect are practical measures to improve compliance with the existing ECHR standards. If I were to put what I see is the United Kingdom's position at the moment, it is that we want to see practical measures, we want a clear statement that we do care about defendants' rights and that is what the declaration of commitment to the ECHR is intended to do without duplicating standards which already exist.

**Q24 Lord Lucas:** What particular measures are you thinking of so far as this country is concerned? I am aware that interpretation is not yet as perfect as it might be (putting it gently) and perhaps there are other areas, too, where you think we could, following your preferred route, move in the direction of this proposed framework?

*Lord Goldsmith:* I do not think I can say that I have in mind, sitting here, particular measures for the United Kingdom. I do not want to sound arrogant in saying that, but rather what we have been looking at are for everybody practical measures which are set out in the draft resolution. So we want to propose that people

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should create an action plan looking at the good practice which exists, and the good practice which exists as a result of Strasbourg case law includes, for example, having at police stations lists of lawyers who are able to provide initial advice speedily to suspects, being able to assess the mental health of suspects, ensuring early legal input to the prosecution process, using modern technology to access or to facilitate access to a lawyer and issues in relation to interpreting. We have, for example, proposed that it could be helpful if the Commission was able to apply some of the money which is available (there is quite a bit available for JHA purposes) to assisting in developing training for interpreters so that the quality and availability of interpreters in different languages was more accessible throughout other Member States. These are the sorts of areas. We have said very much to our colleagues in the other Member States that we are very happy to discuss with them what other practical measures they may think may be helpful, but our emphasis has been on those, as the Committee well understands, rather than on simply trying to set out legal texts which cover the same ground as the ECHR.

**Q25 Chairman:** We are by no means following the prescribed route of questions, but none the worse for that. Really we are now in the heart of the group of questions under the head “Practical measures” on the second page, towards the foot, if you have that. The second paragraph of that notes that most Member States opposed the inclusion of provisions on the recording of police interviews in the original Framework Decision on the basis of cost. As I say, we do not have, alas, the latest text of the Finnish Presidency Decision, but does that include the recording of police interviews?

*Lord Goldsmith:* No.

**Q26 Chairman:** You have just answered to Lord Lucas what specific projects are being discussed, as I apprehend. Was that what you were telling us, the variety of initiatives which have been taken?

*Lord Goldsmith:* Yes.

**Q27 Chairman:** But has anything actually happened, or is it just discussion at this stage?

*Lord Goldsmith:* This is discussion in the context of, as it were, the alternative Resolution route, the one which we propose. The draft binding Framework Decision deals simply with these areas with the right to information, right to legal assistance, right to legal assistance free of charge, interpreting and translating. It does not cover the recording of interviews at police stations or anything of that sort.

**Q28 Chairman:** Does it seem as if we are not actually going to get beyond the discussion of these particular initiatives, particular funding arrangements, and so forth, unless and until the Framework Decision is buried?

*Lord Goldsmith:* We hope not, because it seemed to us that it is possible for both tracts to continue alongside each other. That is why, at the June Council meeting, I particularly argued (and it was agreed by the Council) that the Working Group should be looking at both. We have always said that having an alternative route does not rule out having a binding Framework Decision, or certainly does not rule it out for all time. I do not think it needs to be that way. Why other colleagues may find it difficult to commit to an alternative approach whilst they hope that the Framework Decision is still alive is, I think, a matter for them.

**Q29 Chairman:** But here we are a year on from the non-implementation of the Hague Programme in terms of adopting this Framework Decision and we still have not actually got anything on the ground in terms even of these alternative measures, such as helping with interpretation, the recording of police interviews, and so forth.

*Lord Goldsmith:* That is right.

**Q30 Chairman:** Has anybody actually come up with concrete proposals for funding? You say there is money in the JHA budget?

*Lord Goldsmith:* Yes, there is a fair bit of money which the JHA budget has got which could be used for this. We have been pressing this route, and pressing hard, for it to be discussed within the Working Group and for those in the Working Group to come up with concrete proposals which could be implemented. The Commission is well aware of this. I have spoken to the Commissioner about it.

**Q31 Chairman:** Our questioning has rather been affected by the fact that we did not have, until just this very moment, the new text put before us and we have been working, therefore, on an out of date text, but I think we probably have now covered the first page of the proposed area of questioning. Question five, I think you have addressed, whether there is a case for setting out in more detail all the rights afforded. What you say, as I understand it, is not really, because now Article 6 has been the subject of a good deal of Strasbourg jurisprudence and people know where they stand and there is a problem, if you set it out in more detail, that it will not accurately reflect what Strasbourg has decided and there will be, so to speak, rival formulations of what the necessary standards are and then two different courts to resolve the differences. Is that essentially what you say?

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*Lord Goldsmith:* Yes. I think I would just qualify it in this way: always this must be a question of balancing up the advantages and the disadvantages and if there were real, substantial enhancements to protection which we supported through a binding text, one would look at what the benefit of that, from the point of view of the citizens, was compared with the disadvantage of the risk of legal uncertainty, and one would want to see how much of that risk one could reduce, but at the moment our concern is that we do not really have much practical benefit from the Framework Decision as it stands but we do have a lot of problems from it.

**Q32 Chairman:** What really has changed from the evidence you gave to the Committee two years ago? Are these problems which have somehow just come to light, or from further thinking, or what?

*Lord Goldsmith:* I think it has developed as a result of the text developing, so things like recordings in police stations, which we believe was a good thing to promote, those have disappeared from the agenda. So there are not those advantages and the concerns which we have about the text conflicting with the ECHR, the Commission has said that it will see that that does not happen, but we do not think we have got to that stage. So we have rather lost the benefit and have not solved the problems. So we move towards the idea of saying, let us see if we can achieve the objective of enhancing compliance through a different route.

**Q33 Chairman:** I think the Council of Europe's commentary on this latest proposal was not entirely hostile. True, it thought it was obviously necessary to make sure there were no inconsistencies, conflicts, and that that should be spelled out with some precision, but on the whole is it not right that they generally speaking support the notion of giving flesh to these important rights?

*Lord Goldsmith:* I confess, that is not how I read it. For example, paragraph 15, to which Lord Neill drew attention, seems to be making a different point, and paragraph 7, where they express concerns about having conflicting judgments. It is absolutely right—and one would expect them to approach this with great tact—that they talk about the need to avoid the conflict. My understanding of where they had got to in the Working Group meeting was, as I summarised it before, that they did see ways in which there could be a greater concordance between the two but were concerned that that would still leave some risk. I think there is an additional concern that the more room is left for hesitation as to compliance of a domestic measure with the Convention, the greater the likelihood of seeing the person concerned file an application to the Strasbourg court. That is

paragraph 27 of their paper. They already have, as that paragraph makes clear, a degree of litigation which comes from the way in which Member States within the Union are complying with ECHR law. So I do not read the paper as a whole as really being supportive of the approach. They are supportive, in paragraph 16, of practical measures.

**Q34 Chairman:** Yes. They would welcome, I think, anything which actually enhanced the basic standards set by Articles 5 and 6. I apprehend in the fresh text, which we have just now got, there is a possibility that some might. I am just looking at Article 3, the right to legal assistance, footnote 1 to which notes that the UK lodged a reservation on this Article as it might go beyond the ECHR. What is wrong with going beyond the ECHR?

*Lord Goldsmith:* First of all, one needs to be clear whether one is going beyond the ECHR, and the recital to this, under Recital 12, actually says in terms that this article is intended not to go beyond the ECHR. So it is not, in drafting terms, terribly satisfactory when something in its substantive form looks as if it might go beyond it but the intention is that it should not. These are things which it may be possible to sort out through further drafting, but this is one of the instances where one is not clear just what Article 3(1) is supposed to mean. "Member States shall take the necessary measures to ensure that every person charged with a criminal offence has the right to legal assistance of his or her own choosing." There is an issue as to what is meant by "criminal offence". Article 1 defines "criminal offence" by reference both to ECHR and to national provisions, and those who have dealt with this bit of the jurisprudence know very well that there is an autonomous meaning for criminal proceedings. Does this include courts martial, does it include administrative proceedings or not? It is not terribly satisfactory when that degree of uncertainty is left.

**Q35 Chairman:** Can we then move finally to the Hague Programme generally, because I think this is not the only initiative under Hague which is currently, so to speak, falling behind the planned Programme. Is that right? There is a number in this area of Justice and Home Affairs. If we just look at the last page of the draft questions with regard to conflicts of jurisdiction, the double jeopardy principle, the presumption of innocence, and possibly with regard to the supply of evidence.

*Lord Goldsmith:* Yes. I think it is right to say, if I may, about the Hague Programme that we do remain committed to the Hague Programme, but it is right to note that when it was agreed the assumption was that the Constitutional Treaty would be ratified within a year or two. That would have had some important

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provisions about how one goes about agreeing legislation in the JHA field. So the absence of the Treaty has rather changed the context of the agenda.

**Q36 Chairman:** It would have made decision-making easier. It would have meant there was no longer a requirement for unanimity?

*Lord Goldsmith:* Subject to the special provisions which were proposed in the Constitutional Treaty, yes, that is one issue. The Treaty is under reflection.

**Q37 Chairman:** So decision-making has undoubtedly become more difficult?

*Lord Goldsmith:* Yes.

**Q38 Chairman:** Has Government enthusiasm waned on that account for some of the proposals?

*Lord Goldsmith:* Certainly from our point of view it is much more a question of not so much the concept but getting the content right. Getting the content right is what is very important and agreeing with the Programme, which we have done, does not necessarily mean that we must agree with the detail of all the proposals which come forward from the Commission and during each Presidency. So I would not say that the enthusiasm has waned, but it is more difficult and the absence of the Treaty has changed the context in which the JHA agenda is to be run. I think there is one additional feature, which was strongly stated by a number of Member States at the last but one JHA Council meeting, which was really a request to the Commission for us and for the Commission and the Council to focus on a limited number of areas where real progress could be made rather than a larger number of measures which were getting bogged down in differences. I think that is quite an important point.

**Q39 Chairman:** So your answer to question 11 is that the Government remains committed?

*Lord Goldsmith:* Yes.

**Q40 Chairman:** But in answer to question 12, as I understand it, you are saying there is likely to be a revised programme to focus on fewer but perhaps more promising proposals, is that right?

*Lord Goldsmith:* Some re-prioritisation of JHA priorities may well be appropriate and we anticipate that the Presidency will present the December Council's Conclusions by reflecting an assessment of the progress made in implementing the Hague Programme to date and what the priorities may be for the future.

**Q41 Lord Neill of Bladen:** Could I go back to the Framework Decision, the paragraph to which you drew attention, paragraph seven. I mentioned

paragraph 15 and you drew attention to paragraph seven. This is the Council of Europe document.

*Lord Goldsmith:* Amongst others, yes.

**Q42 Lord Neill of Bladen:** I have gone away from The Hague, I have gone back. They flag up for us in paragraph seven the risk of jeopardising legal certainty and one of the things they take us into is this *Bosphorus* line of jurisprudence. If you were to assume that there was to be a Framework Decision covering the ground but the language was not identical to what we have in the ECHR you could have this situation, could you not? You could have an appeal arising out of a particular criminal case and that would be referred either by the court of first instance or an appellate court to Luxembourg for a ruling. Under the *Bosphorus* doctrine they give their ruling. It comes back to the national court, it is binding on the national court, which then reaches a conclusion on the particular criminal case, but it would then be open to the accused (or maybe the prosecution would want to, but thinking of it really from the point of view of the accused) for there to be now a new route. You would then go up to Strasbourg on what has been decided under the first route and the Strasbourg court is asked to rule that the upshot of all that is inconsistent with the ECHR rights of the accused. We are talking about a real person. We are talking about somebody in prison on possibly a very, very grave charge, and this has gone up to Luxembourg. I do not know how fast they are on crime. On civil, when I last enquired, it was about two and a quarter years. But assume it is expedited. You go back into court and you go to Strasbourg and your legal uncertainties, and it seems to me you multiply the uncertainties and the difficulties simply by the very fact of having two texts which are not identical. It is your point that I am just putting. This is one of the objections to going down the route of having a Framework Decision.

*Lord Goldsmith:* Yes. The answer to your question in principle is, yes. It would not, I do not think, apply to us because of the particular arrangements which we have within this Pillar, the Third Pillar, that we do not allow references to the court in Luxembourg on that, but through—

**Q43 Lord Neill of Bladen:** Other Member States do?

*Lord Goldsmith:* Yes.

**Q44 Chairman:** Now it has been pointed out—perhaps you had already perceived it—do you regard this as a decisive factor against such a Framework Decision coming into force? If so, it is rather a pity that so much time and effort has been devoted to it over the last couple of years.

*Lord Goldsmith:* No, I do not, and that is why I said before, in qualifying a proposition which was being put to me, that at the end of the day it is a question of balance. One has to look at what the practical advantages to the Member States and the citizens will be of a particular proposal and judge that against the disadvantages and how much one can reduce them. I do not say, and I do not think we have taken the view, that the fact that one could have two decisions in this area means that this is simply not a viable proposition at all, but I come back to the point that our level of concern is that there are not practical benefits from the present proposed text which outweigh the legal uncertainty and legal risks to which it gives rise.

**Q45 Chairman:** One particular question raises the issue of Bulgaria and Romania, who of course are due to accede to the Union, I think, on 1 January. I do not know whether that is a relevant dimension from the point of view of assessing the desirability of this sort of Framework Decision, whether it is thought it might add value in the case of the accession of relatively unenlightened countries. I hope I do not speak out of turn.

*Lord Goldsmith:* I do not think so, no. I do not think that would be beneficial, particularly where you end up with something which really is not intended to go beyond what the ECHR already provides. On the other hand, practical measures and a renewed statement of commitment to the ECHR could help all countries. I would not want to single out those two countries, but it could help all countries.

**Q46 Lord Mance:** I just want to ask you about a rather general point. I have already expressed a certain amount of perhaps disappointment, consistent with what you said about the rather vague and general level of the present proposal. If one were thinking of real practical benefits, would it be right to say that this is likely to be a very long-term and slow exercise? I would have thought the sort of thing which people would think about in the European context, if they were hoping to achieve real protection for their citizens, is that tape recording is one good idea, PACE guarantees of every nature are certainly not present in every country, rights to bail and provisions regarding security, the extent to which you can be kept in custody, the length of time taken in proceedings, and then of course all sorts of evidential points, but all this must be probably very long-term, must it not?

*Lord Goldsmith:* And not really to be found in the draft Framework Decision. You can do quite a lot in terms of practical measures in relation to those areas. I mentioned the funds which the JHA has got available. I think for the Criminal Justice Programme

there are something like €190-odd million available over the next seven years. So there is a fair bit of money which could be applied in a practical way to deal with some of the logistical problems which maybe some countries have got in terms of interpreters, or translation, or whatever else it may be.

**Q47 Chairman:** Lord Goldsmith, could you just help on this: if a political Resolution and practical measures do come to be agreed in the Council, is it envisaged that negotiations on the Framework Decision will nevertheless continue with a view to eventual agreement?

*Lord Goldsmith:* I think that will be for the Member States to decide at that time. They will need, no doubt, to make an assessment and the Commission will need to make an assessment as to how productive it is likely to be at that stage. Each of these things takes time, the application of officials and Ministers to these proposals, and it may be that the decision will be that it is not worthwhile because the opposition is sufficiently strong at least to deal with it at that stage, but I cannot say. It will be for the Member States to decide then.

**Q48 Chairman:** The present division between these groups of Member States—those who still want a Framework Decision and those, including the United Kingdom, who at present think there is a better way forward by political Resolution and practical measures—does that conflict mean that actually neither might come to pass within the foreseeable future?

*Lord Goldsmith:* I hope not, but it is an area for unanimity and I cannot therefore rule out that whilst some Member States, for example, might hope for a binding decision they will not be prepared to sign off on anything else. But I do not know. That will be for them to decide.

**Q49 Chairman:** Just summing up, the difference in view really between the broad support the UK Government was giving to this proposal two years ago when giving evidence to the Committee under Lord Scott's chairmanship and today, you say, is in part because the failure of the Constitutional Treaty has meant that decision-making is more difficult now that unanimity continues to be required?

*Lord Goldsmith:* No, I was not putting the Constitutional Treaty as any reason for the present position we take in relation to the draft Framework Decision, I was saying that whilst we were hoping to see positive benefit from it, some of the things which could have provided that, such as a provision in relation to the recording of interviews, have disappeared from the agenda because it is not



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acceptable to a number of Member States. So we have seen less practical benefit. We have not seen that clear avoidance of conflict between the ECHR and the Framework Decision which we were hoping for and at the end of the day we see the present text as not really offering great practical benefit whilst bringing with it legal uncertainty and risk to Member States and to citizens. So we prefer an alternative route which would enhance defendants' rights, compliance with ECHR, and provide practical measures to achieve that.

**Q50 Chairman:** Are you aware of any plans by other Member States to proceed with the Framework Decision, obviously excluding those who remain opposed, under the Enhanced Cooperation provisions?

*Lord Goldsmith:* Is the question directed at whether future presidencies will want to take it up as strongly, or do I misunderstand the question?

**Q51 Chairman:** As I understand it, under the Enhanced Cooperation provisions, which is in the Treaty of the European Union, you can have a group proceeding with the Framework Decision but obviously excluding those Member States who remain opposed.

*Lord Goldsmith:* I do understand. Nobody has formally suggested that and it is not easy to see how it would work in the field of mutual cooperation.

**Q52 Chairman:** Just to clarify the matter, is the recording of interviews making use of EU money within the list of practical measures?

*Lord Goldsmith:* It is not as it stands at the moment, but it certainly is something which could be considered.

**Q53 Chairman:** In the document we have just got I am referred to paragraph 1.1.1, Proposed Action Points to Promote Fairness in Criminal Proceedings. It is not there. Why is that?

*Lord Goldsmith:* This is in the draft Resolution and this is intended as an illustrative list of the sorts of things which could be dealt with, but we have made it clear, both formally in Council meetings and informally in discussions which officials have held and which I have held, that we encouraged other

Member States to put forward areas for practical measures, practical assistance that they think would help and if somebody was to put that forward, saying, "We can see there is a way of assisting in relation to recording which would overcome the difficulties which they have," we would be very happy to consider that.

**Q54 Chairman:** But are we going to put it forward? If this was, as you say, one of the reasons why we were less enthusiastic as the negotiations developed because that was eliminated from the original decision, why have we not put this forward ourselves?

*Lord Goldsmith:* I think the reason we have not put it forward is because the things which are there we thought were practicable, would have an appeal to a number of Member States and would provide a practical benefit. I am not absolutely sure what this would be proposing in terms of recording. To say that it is good practice to do it, I think we would have no difficulty with that, although we know that a number of Member States do not and would have difficulty doing it because of the cost, but I am very happy that we should put that forward.

**Q55 Chairman:** Unless anybody else has any further questions for you, we have taken up already an hour of your time. We know what a busy schedule you have and we are most grateful to you for coming. Thank you very much for assisting us.

*Lord Goldsmith:* Thank you very much. Could I just make one point? Because of the fact that you did not have the right papers, and I am very sorry about that, I will write with some detailed points, but we have handed up to you a text which I deduce from the question you asked me, my Lord Chairman, has got footnotes on it. You would not normally get that and I am going to ask, if I may, whether you might be prepared to give back those copies and we will provide copies without the footnotes. Lord Grabiner will take that point, I know.

**Q56 Lord Grabiner:** I have scribbled on the document.

*Lord Goldsmith:* We will take them back, not read them, and we will destroy them.

**Chairman:** I think if we are to secure your future cooperation you had better have ours now! Thank you very much.

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25 October 2006

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**Letter from the Rt Hon The Lord Goldsmith QC to Lord Grenfell,  
Chairman of the European Union Committee**

I am as promised following up my appearance before your Committee on 25 October. As you know, for some reason the Committee had not received the latest text of the draft FD which had been sent and emailed on 20 October. This made it difficult for me to refer in detail to provisions which risked legal confusion and uncertainty, so I promised to send the Committee three examples.

I begin with Article 1, which fails satisfactorily to define the scope of the Framework Decision. It offers a double definition, national law and the ECHR. Neither we nor the Council of Europe are clear what either or both would mean at EU level. The fact of the matter is that the draft is a fudge, intended to overcome past difficulties over agreeing a single definition of criminal proceedings. This reflects the diversity of criminal justice systems across Europe. For example, the definition under German law appears to exclude administrative proceedings; the French definition includes some administrative proceedings; our law says that proceedings for failure to pay for a TV licence are criminal. Yet all three are compatible with the ECHR.

Secondly, the provisions on the right to legal assistance (Articles 3 and 4) are formulated in a way which implies a different approach to the ECHR. Recital 12 of the Preamble insists that the provisions on legal assistance do not impose obligations going further than the ECHR. In fact the scope of application does precisely that, while at the same time omitting an important safeguard. As the Council of Europe pointed out in a presentation to the EU Working Group negotiating the text, legal assistance free of charge is not a distinct free-standing right under the Convention. Article 6(3)(c) ECHR states that legal assistance must be provided free of charge if the accused lacks sufficient means to pay for it and when the interests of justice require. But the Framework Decision treats this as a self-standing right. In addition, the combined effect of paragraphs 3 and 4 of Article 3 seems to imply that a person who is subject either “to deprivation of liberty prior to trial” or “to a European Arrest Warrant or Extradition request or other surrender procedure”, shall be entitled to legal assistance as from the moment of his/her deprivation of liberty. Yet according to Strasbourg case-law, Article 6 of the ECHR applies only to proceedings which determine a criminal charge within the autonomous meaning of this provision.

Last but not least, Article 2 of the Framework Decision of the current proposal, as drafted, would seem to confer Article 6 ECHR rights in relation to European Arrest Warrant proceedings. Yet Article 6 is not applicable to such proceedings. Article 5 proceedings are instituted for the purpose of challenging the lawfulness of the detention as such (*habeas corpus*), including in an extradition context, but are different from those governed by Article 6 of the ECHR, which deal with the merits of an accusation. They pursue a different purpose and are therefore subject to different standards under the Convention. The European Arrest Warrant proceedings are designed to be speedy and simple—without bureaucratic requirements such as the full translation of evidential documents. We should not confuse the trial itself with the proceedings before the trial.

15 November 2006

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ISBN 978-0-10-401003-7



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Printed in the United Kingdom by The Stationery Office Limited  
1/2007 354748 19585