House of Commons

European Scrutiny Committee

European enforcement order and the transfer of sentenced persons

Nineteenth Report of Session 2006-07

Report, together with formal minutes and oral evidence

Ordered by The House of Commons
to be printed 25 April 2007

HC 41-xix
Incorporating HC 442-i
Published on 9 May 2007
by authority of the House of Commons
London: The Stationery Office Limited
£10.00

The European Scrutiny Committee

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

a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;
b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Standing Committees); and
c) to consider any issue arising upon any such document or group of documents, or related matters.

The expression "European Union document" covers —

i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament;
ii) any document which is published for submission to the European Council, the Council or the European Central Bank;
iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council;
iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;
v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation;
vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

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

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

Current membership

Michael Connarty MP (*Labour, Linlithgow and East Falkirk*) (Chairman)
David S. Borrow MP (*Labour, South Ribble*)
William Cash MP (*Conservative, Stone*)
James Clappison MP (*Conservative, Hertsmere*)
Katy Clark MP (*Labour, North Ayrshire and Arran*)
Wayne David MP (*Labour, Caerphilly*)
Jim Dobbin MP (*Labour, Heywood and Middleton*)
Nia Griffith MP (*Labour, Llanelli*)
Greg Hands MP (*Conservative, Hammersmith and Fulham*)
David Heathcoat-Amory MP (*Conservative, Wells*)
Kelvin Hopkins MP (*Labour, Luton* North)
Lindsay Hoyle MP (*Labour, Chorley*)
Bob Laxton MP (*Labour, Derby North*)
Angus Robertson MP (*SNP, Moray*)
Anthony Steen MP (*Conservative, Totnes*)
Richard Younger-Ross MP (*Liberal Democrat, Teignbridge*)

Contents

Report

European enforcement order and the transfer of sentenced persons

(27840) 13080/06	Draft Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union

Legal base	Articles 31(1)(a) and 34(2)(b)EU; consultation; unanimity
Department	Home Office
Basis of consideration	Minister's letters of 24 January, 7 February and 28 March 2007, oral evidence given on 28 March 2007
Previous Committee Report	HC41-ii (2006-07), para 4 (29 November 2007); HC 34-xxxix (2005-06), para 6 (25 October 2006) and see (26317) 5597/05 HC 38–xv (2004-05), para 6 (6 April 2005)
Discussed in Council	Justice and Home Affairs Council 15 February 2007
Committee's assessment	Legally and politically important
Committee's decision	For debate in European Standing Committee (decision reported 29 November 2006)

Background

1. The proposal is concerned with the transfer of prisoners from one EU State to another. It replaces a long-standing Council of Europe Convention which provided for the transfer of prisoners where the prisoner so agreed. The EU proposal dispensed with the requirement of the prisoner's consent where he is transferred to his State of nationality when this is also his normal place of residence. In relation to a number of types of conduct, it also required Member States to enforce the sentence of imprisonment imposed on a person convicted abroad, irrespective of whether the conduct was also criminal in the State to which he is transferred. In other words, the safeguard of dual criminality would not be applied in respect of those crimes.

2. We were concerned about three main issues — whether there was a need for the proposal given the existence of the Council of Europe Convention, whether it was right to provide for the compulsory transfer of prisoners, and whether the UK should maintain the safeguard of dual criminality. We drew attention to the bizarre consequences which might arise from the compulsory transfer of prisoners without regard for the safeguard of dual criminality, noting that the Minister had herself confirmed that this could result in a British national, convicted abroad, being transferred back to the UK against his will and imprisoned here for conduct which was not criminal in this country. The Minister had not confirmed that the Government would avail itself of an exception under the Framework Decision which would prevent this. We considered these points to be of sufficient

importance to be debated by the House before the Government signified any agreement to the proposal and on 29 November 2006 we recommended it for debate in European Standing Committee.

Warnings given by the Committee not to override scrutiny

3. Having made the recommendation for a debate in European Standing Committee, we were surprised to see from the Minister's statement on the Justice and Home Affairs Council on 4-5 December 2006[1] that the UK had "pushed hard" in the Council for agreement on the latest text, when it was still awaiting debate. By letter of 11 January 2007, the Chairman of the Committee asked the Minister to explain if it had been the Government's intention to agree the proposal, notwithstanding the recommendation for debate, and what consideration had been given to the scrutiny position before the UK decided to support the Presidency in pushing for agreement.

4. By letter of 24 January 2007 the Parliamentary Under-Secretary of State at the Home Office (Joan Ryan) replied that it had not been the intention of the UK to signal agreement to the Framework Decision and thereby to override the scrutiny reserve resolution. The Minister stated that the Government was content with the approach taken in the draft Framework Decision and that "it was in that context that we encouraged the Finnish Presidency to seek a deal between all delegations on its compromise package". The Minister added that "the most the Council could have concluded, should unanimity have been achieved, was a general approach on that deal". The Minister went on to state that, "as [the Committee] is aware", a general approach "allows delegations the right to re-open points on the text should they have the need to do so", and that 'the UK's Parliamentary scrutiny reserve had also been clearly recorded'.

5. The Minister further explained that the German Presidency would undertake "high level discussions" with the "one remaining Member State" (which we later learned was Poland) which had "substantive concerns" with the current draft which included concerns over the removal of the requirement for the prisoner's consent. The Minister thought it likely that the Framework Decision would be considered at the Justice and Home Affairs Council on 15-16 February 2007. The Minister added that, in the light of our concerns, her officials had investigated the possibility of bringing forward the debate which was due to take place on 20 February, but that "because of the Parliamentary recess and the commitments of both Ministers and the Committee"[2] this had not proved possible. The Minister assured us that the Government would "at most" participate in a general approach on this matter and would re-iterate the Parliamentary scrutiny reserve at the Council.

6. By letter of 30 January 2007 the Chairman of the Committee stated that we wished to make it clear that if the Government were to take part in a "general approach" before the debate took place in European Standing Committee, we would regard such participation as a breach of the spirit of the scrutiny reserve resolution. The Chairman pointed out that the recommendation for debate had been made on 29 November, that there was opportunity

1 Official Report 18 December 2006 cols. 123-4 WS.

2 As was later confirmed during the Minister's oral evidence, the 'Committee' in question was not ourselves but the European Standing Committee

for a debate before the February Justice and Home Affairs Council and that we were not persuaded there was any urgency to this proposal, which had been introduced as long ago as January 2005.

7. The letter also pointed out that if the Presidency and the other Member States persuaded Poland to concede on the issue of prisoner consent, there would be no further discussion in the Council on one of the very issues we had identified as requiring debate. If a "general approach" were agreed the issue would be foreclosed, without the House having had the opportunity to consider it, and the Government would have agreed the measure without having first explained to the House whether it would apply the safeguard of dual criminality in the case of a UK national brought back to this country against his will to serve a prison sentence for conduct which was not a crime here. The Committee invited the Minister to reconsider any intention to take part in a general approach on the proposal before it had cleared scrutiny.

8. By letter of 7 February the Minister (Joan Ryan) stated that it was the UK's intention to participate in a general approach at the February Justice and Home Affairs Council. The Minister expressed her "regret" that a debate after the JHA Council would not allow the House to raise the Committee's outstanding concerns prior to the general approach being reached. The Minister acknowledged that "where possible, scrutiny should be completed before participation in a general approach". The Minister went on to say that "her officials attempted to bring the debate forward" but that "unfortunately, due to Parliamentary Recess and conflicting Ministerial and [European Standing] Committee commitments, this was not possible".

9. The Committee considered the letter the same day, and the Chairman wrote on 7 February to the Home Secretary. The Chairman said it was "hard to believe" that the Government had been unable to arrange a debate in time for the JHA Council when (as the Minister had said in her letter of 7 February) the issue of foreign prisoners was "one of the Government's top priorities". The letter repeated our view that participation in a general approach would be in breach of the spirit of the scrutiny reserve resolution, and that if this were to happen, the Committee would invite the Home Secretary to give evidence.

10. Notwithstanding our warnings, the Government did participate in a general approach at the Justice and Home Affairs Council on 15 February. As much was apparent from press coverage and the Council's provisional press release.

11. The proposal was subsequently debated in European Standing Committee on 20 February.

12. The Minister made a statement on the JHA Council which stated that "the Council also secured a general approach on a Framework Decision which will provide for the exchange of prisoners between Member States". The Minister also stated that "whilst participating in this general approach the UK maintained its parliamentary scrutiny reserve".[3]The Chairman wrote to the Home Secretary on 21 February, inviting him to attend before the Committee. The Home Secretary replied on 16 March indicating that the Parliamentary

3 The formal Council minutes (6472/07) of 26 February 2007 state that "following the presentation of [a] compromise text an agreement on a general approach on the Framework Decision was reached. The text of the proposal, subject to parliamentary reservations entered by PL/NL/UK/SE/DK/IR, is set out in the Annex.."

Under-Secretary of State at the Home Office (Joan Ryan – who had represented the UK at the JHA Council) would appear to give evidence.

"General approach" and the scrutiny reserve resolution

13. In correspondence with us before the JHA Council, and when appearing before us to give evidence on 28 March, the Minister argued that she did not act in breach of the scrutiny reserve resolution by participating in a "general approach".

14. This assertion requires examination, both as a general proposition and in the light of the particular circumstances of this case.

15. The Resolution of 17 November 1998 on the Scrutiny of European Business (the scrutiny reserve resolution) provides, so far as relevant for present purposes, that no Minister of the Crown should give agreement in the Council to any proposal for a Framework Decision which is awaiting consideration by the House. The scrutiny reserve resolution further provides that any reference to "agreement to a proposal" includes agreement to a programme, plan or recommendation for European Community legislation, "political agreement" and agreement to a "common position". The concept of "agreement" is therefore defined inclusively in the scrutiny reserve resolution and no provision is made to exclude a "general approach" from the scope of the term "agreement".[4]

16. In the working practices of the Council, a number of terms have been used (such as "provisional agreement") to describe an agreement within the Council before a proposal may formally be adopted. In a letter of 20 March 2002 from the then Leader of the House of Lords (Lord Williams of Mostyn QC) to the then Chairman of the House of Lords Select Committee on the European Union (Lord Brabazon of Tara) the Minister explained that in guidance issued to the Council by its own Legal Service, the term "general approach" was used as a term "referring to a decision stating a position on a text before fulfilment of the legislative-procedure preconditions for voting, in particular delivery of the European Parliament's opinion".[5]

17. In its Report on Democracy and Accountability in the EU and the Role of National Parliaments[6] the previous Committee was concerned to find the Council beginning to reach "provisional agreements" on proposals which it had not cleared, apparently bypassing the scrutiny reserves. The Committee noted the explanation from the then Minister for Europe, Community and Race Equality at the Home Office that:

> "provisional agreement does not stop you from reopening the issues that you have agreed if something important comes up. It is an attempt to work through the texts

4 We note here that in its Report on Provisional Agreement in the Council of Ministers (23rd Report Session 2001-02, HL Paper 135) the House of Lords Select Committee on the European Union also took the view that it was clear that the definition of 'agreement' in the scrutiny reserve resolution was not exhaustive.

5 HL Paper 135 (Session 2001-02), Appendix 3.

6 HC 152 –xxiii (2001-02) (12 June 2002).

and see the lie of the land and get as much consensus around 15 States as possible so that you know where you are instead of leaving all of that work.. ..to the end".[7]

18. The Committee also noted the statement in the letter of 20 March 2002 from the then Leader of the House of Lords to the Chairman of the House of Lords Select Committee on the European Union that, in cases where the European Parliament's opinion had not been considered, Ministers could take a general position in support of a text, while retaining the possibility of pursuing issues raised by Parliament at the point when the Council returned to the European Parliament's opinion. Our predecessors said they would keep a close watch on examples of "general approaches", and would not be fully reassured until they had seen examples of issues subsequently identified by it or the House of Lords Committee raised successfully in the Council.

19. In its Report on the Scrutiny of European Business - Provisional Agreement in the Council of Ministers the House of Lords Committee concluded that "'provisional agreement' or 'general approach' involves some form of agreement in the Council" and that there could be no doubt that "reaching 'provisional agreement' or 'general approach' on a proposal in the Council marks a significant step in the political and legislative process in the Council and in our Parliamentary scrutiny process". Both Committees expressed an intention to monitor future practice.

20. The current version of the Cabinet Office guidance (Parliamentary Scrutiny of European Union Documents – Guidance for Departments)[8] states that in relation to the scrutiny reserve resolution, "the objective should always be to complete scrutiny well in advance" of final adoption, common position and political agreement. The Guidance also states that "the same objective should apply to the stage known as general approach".[9] This is described as "a decision stating a position on a text before the fulfilment of the legislative procedure preconditions for voting".

21. The Cabinet Office Guidance goes on to state (in apparent contradiction) that "it is the Government's view that a general approach is not subject to the Scrutiny Reserve Resolution because it does not constitute a definitive point of agreement in the legislative process". The Guidance explains that, although the UK has stated in the Council that it reserves the right to re-open a text after a general approach on the basis of concerns raised in Parliament, the Government "would do this only where such points correspond to the Government's policy stance on the proposal and where the point(s) had not previously been pursued". The guidance also states that "working with the Committee(s) to complete scrutiny before a general approach is therefore the best way to ensure that the spirit of the Scrutiny Reserve Resolution is not breached. But if it is clear the general approach will be reopened for full discussion by Ministers at a later date, there is no need to complete scrutiny beforehand".[10]

7 HC 325 (2001-02), q.20.

8 Version of February 2006, reissued on 30 January 2007.

9 Guidance paragraph 6.2.1.

10 Guidance ibid. Emphasis as in the original.

22. In the present case, it seemed clear to us that the "general approach" marked the end-point of discussions on all substantive issues, including the key issue of prisoner consent, which we had recommended for debate It did not seem credible that, so much pressure having been exerted on Poland over the issue, 26 Member States would subsequently agree to the re-opening of the matter at the request of the UK. We noted the Minister's explanation in her letter of 24 January 2007 that a general approach "allows delegations the right to re-open points on the text should they have need to do so", but we considered this to be at least disingenuous in circumstances where the Government, according to its own Guidance, would not re-open points on the text. The Government had already disagreed with the Committee on the issue of prisoner consent, which issue was, moreover, one which had already been pursued in the negotiations. It was also an issue on which (according to press reports) Germany and the other Member States (including the UK) were pressing Poland to agree. In these circumstances, it seemed to us that there was no real prospect of a re-opening of the "general approach" for "full discussion" by Ministers of the kind referred to in the Government's own Guidance. It also appeared to us that the Minister was seeking to make a virtue of the fact that at the December JHA the UK had "pushed hard" for agreement on the latest text, and that this was inconsistent with any genuine disposition to re-open the general approach.

23. We therefore reached the provisional view that for the Government to participate in a "general approach" on this proposal before it had been debated in European Standing Committee would constitute a breach of the spirit of the scrutiny reserve resolution, and so informed the Minister by letter of 30 January 2007, and the Home Secretary by letter of 7 February 2007.

24. The Government had not explained why the matter was so urgent that it could not have waited until the April Justice and Home Affairs Council. The proposal for a Framework Decision had been introduced in January 2005 and had the usual provision requiring Member States to implement its provisions within 2 years. Therefore, the earliest time for the proposal to be fully effective would have been 2009. According to the Government's Explanatory Memorandum, the Repatriation of Offenders Act 1984 would have required amendment to permit the transfer of prisoners without their consent. Against this, it was not obvious to us why the Council could not have waited a few weeks to allow Parliamentary consideration of the Framework Decision.

25. The Minister's argument in her letter to us of 7 February 2007 that it was necessary to "finalise negotiations as soon as possible" and the statement by the Minister (Gerry Sutcliffe) in the debate in European Standing Committee that "the Government's position was to get a good agreement quickly" seemed to us to be inconsistent with what we had been told by the Minister (Joan Ryan) in her letter of 24 January 2007 that a "general approach" allowed delegations to re-open points on the text. It seemed to us that the agreement reached at the February Justice and Home Affairs Council was indeed the "definitive point" in the legislative process.

26. We therefore asked for oral evidence from the Home Secretary to explain the position taken by his Department on the issue of scrutiny of this proposal. By letter of 16 March the Secretary of State for the Home Department (John Reid) expressed his regret that he was unable to attend, and nominated the Minister (Joan Ryan) to attend on his behalf as the "lead Minister for international issues".

The Minister's oral evidence

27. The Parliamentary Under-Secretary of State at the Home Office (Joan Ryan) appeared before us on 28 March 2007.

28. The Minister did not acknowledge that by taking part in a "general approach" on the proposal before it had been debated in European Standing Committee, she had acted in breach, at least of the spirit, of the scrutiny reserve resolution. The Minister stated that she was not of the view that the scrutiny reserve resolution had been breached, but that "it is better and preferable, wherever possible, to be in a position where the Scrutiny Reserve has been lifted before even a general approach is reached, and it is regrettable that this was not possible in this case".[11]

29. In reply to questions about the warnings from us over the scrutiny issues, the Minister said that our report of 29 November 2006 (in which we had concluded that the Framework Decision raised a number of issues of principle which ought to be debated) did not suggest that she should not participate, or that the UK should not participate, in reaching a general approach.[12] Continuing, the Minister said that at the JHA Council on 4-5 December "no approach was then forthcoming" and that matters "did not seem to have reached the point that was expected".[13] Reporting to the House on that Council, the Minister's statement of 18 December said that "the Presidency, with the support of the UK and a number of delegations, pushed hard for agreement on the latest text". The Minister acknowledged receiving our letter of 11 January 2007 (which said that the Minister's statement left the impression that the UK would have agreed the proposal, notwithstanding the fact that it was awaiting debate in European Standing Committee and asked for an explanation as to what consideration had been given to the scrutiny position), but said that at the December JHA Council "at no stage were we pushing for agreement as "political agreement"", that there was "no question at any time that we would have participated in a political agreement which would have ignored the Scrutiny Reserve" and that "the strongest likelihood was we would proceed to participate in the general approach but no question of an agreement, and I made that absolutely clear".[14]

30. It was put to the Minister that our letter of 11 January 2007 did express concerns about reaching a general approach before the matter had been debated, and that much earlier than this the Government was already taking steps to press for an agreement at the December JHA Council. In reply, the Minister said that:

> "When we talk about "agreement on the text", that is in the common usage of the word "agreement". It is not in relation to political agreement as a definition of a final decision subject to the linguist lawyers at the European Union. Perhaps I can say that maybe usage of the word "agreement" has caused some confusion, and certainly, if that is the case, I would apologise for that and it is regrettable and that is one of things I will take back. When I mentioned issues such as working with the officials

11 Q2, Q11.

12 Q3.

13 Q3.

14 Q3. The Ministerial statement uses the term 'agreement' without qualification.

> and staff training and trying to better monitor the match between our process here and our process in the EU, that is precisely one of the issues I will feed in."[15]

31. It was put to the Minister that the end-point of the discussions of this proposal came with the general approach, because it was at this point that all the substantive issues were settled, including the issue of prisoner consent. It was also put to the Minister that she could not "have her cake and eat it" by agreeing to a general approach and yet saying that the scrutiny reserve resolution was being observed. In reply, the Minister said:

> "It is the case when you reach a general approach that one would expect substantive issues to be agreed upon around the Council table, or I think it would be very difficult to be able to reach a general approach. So if as a government we were not satisfied in relation to the issues within the proposal, if others round the table were very dissatisfied, then I think it would be difficult to reach a general approach, and I think that was the case in December. But is still remains the fact that when you reach a general approach, although there probably is agreement around the table on substantive issues, it is still subject to scrutiny reserve, the issue can still be reopened, and there are examples where in fact this has happened. There are not many, I agree. The reason there are not many is that the likelihood is substantive issues are agreed upon, or there is general agreement in the common usage of the word "agreement", before a general approach would be reached at a Council."[16]

32. In reply to further questions, the Minister agreed that her case was that a general approach was not "really an agreement".[17] Asked to explain what had been meant by the her Ministerial colleague's statement at the European Standing Committee debate that "the Government's position was to get a good agreement quickly, if possible", the Minister said she assumed that what the Minister (Gerry Sutcliffe)was suggesting on that occasion was that the Government wished "to get to a good general approach as quickly as possible".[18]

33. During her evidence to us, the Minister agreed that, although the Government reserved the right to re-open a text after a general approach had been agreed, in practice, the Government would be prepared to do so only where the concerns raised corresponded to the Government's own policy and where the point had not previously been pursued.[19]

34. In reply to questions over the timing of the general approach on the proposal, the Minister noted that the proposal had been under discussion since January 2005, that there was no "rush in the overall sense", but that matters did speed up with the incoming German Presidency "in a way we did not expect them to at that particular point in time" and that, when agreement was not reached in December 2006, this would not occur until Easter 2007, but that "it did then move forward".[20] The Minister added:

---

15 Q13.

16 Q14.

17 Q15

18 Q17.

19 Q19.

20 Q31.

> "Once those who had difficulties with [the Framework Decision] found a way forward, everybody was very keen to reach a general approach because, as Members will know, if a general approach had not been reached then, after that period of time, the possibility that this would all fall apart and different Member States might find different problems, the moment might well pass and that would have been very regrettable of itself given the importance of this policy."[21]

35. In reply to the question of whether a period of 11 weeks was sufficient time for the Government to have arranged a debate, the Minister said that this was "an important point" and agreed that this period "looks like a reasonable number of weeks within which to get the debate timetabled and undertaken", but added that the moving forward of the issue by the German Presidency "became part of our timetabling difficulty". Questioned further on the arrangements for the debate, the Minister said that three dates had been offered, but that two were "impossible for Home Office Ministers to make it to the debate" and that the third date was one which was impossible for the European Standing Committee to accommodate.[22]

The Minister's letter of 17 April

36. The Minister wrote to us on 17 April in relation to another proposal (for a Framework Decision on combating racism and xenophobia)[23] where it was also expected that the German Presidency would seek a "general approach" at a forthcoming Justice and Home Affairs Council. We have reported separately on the substance of that proposal.[24]

37. The purpose of the Minister's letter was to "clarify" the position the Government intended to take at the Justice and Home Affairs Council on 19-20 April in relation to that proposal. The Minister explained that the German Presidency had been "working hard" to address the UK's concerns, and that:

> "The Presidency has also made it clear that, in the light of the consensus now emerging among Member States, it will not delay seeking a general approach on the text until the next JHA Council in June and intends, instead, to capitalise on that momentum. We therefore fully expect them to push for a general approach this week as was emphasised to me by the German Justice Minister in my own recent conversations with her.
>
> "Against that background, as I have said previously,[25] blocking a general approach at this stage would seriously damage our relations with the current Presidency, who have been very helpful on this matter already, and may impact on future negotiations, to the UK's overall detriment."

---

21 Q31.

22 Q36.

23 See (28294) HC 41 –xvi (2006-07), para 6 (28 March 2007).

24 HC 41-xvii (2006-07), para 16 (18 April 2007)

25 We are not aware of this point being previously made to us by the Minister in her oral evidence to us or in her correspondence.

38. The tone of these passages indicate to us that the Minister is aware that the "general approach" sought by the German Presidency would indeed, constitute an agreement on the proposal which would not subsequently be re-opened. The Minister refers to the German Presidency as intending to "capitalise on the momentum" by reaching a "general approach", to "blocking" such an approach, and to the "serious damage" which would be done to the UK's relations with the current Presidency which "might impact" on future negotiations if the UK did not take part in the "general approach".

Conclusion

39. **We have recounted the history of this matter in some detail, as we believe it important to show the fundamental difference we have with the Minister over the scrutiny issue.**

40. **In our view, the question of whether an agreement has been reached in the Council should not be approached in a spirit which gives higher regard to form than substance and purpose, but in a way which corresponds to common sense and the natural and ordinary meaning of words. The Minister's frequent attempts in her oral evidence to distinguish a "general approach" from the term "political agreement" or "agreement" in "common usage" shows that a "general approach" cannot be explained otherwise than as amounting to an agreement, and we think it significant, in this regard, that the formal minutes of the Council should refer, in terms, to "an agreement on a general approach". The evidence suggests to us that the Government's concern was more with arguing a case than with demonstrating any genuine acceptance of the purpose and principles of Parliamentary scrutiny. In our view, the concept of the "general approach" should not be used as a device for achieving substantial agreement in the Council, whilst maintaining a fiction before Parliament that no such agreement has been reached, because this would effectively bypass Parliamentary scrutiny.**

41. **We are concerned that this case has shown that the use of the concept of "general approach" can undermine Parliamentary scrutiny in exactly the way identified in relation to "provisional agreements" by our predecessors and by our sister Committee in the Lords.**

42. **We consider that, in this case, the Minister wilfully acted in breach at least of the spirit of the scrutiny reserve resolution. We do not find it credible that there was any realistic possibility of discussion being reopened on this proposal once the Council reached a "general approach" on 15 February, before the matter was to be debated in European Standing Committee. It clearly was an agreement, however described, reached after the reluctance of Poland had been overcome on the very issue we had identified for debate. Revealingly, the Minister concedes in her oral evidence that if a "general approach" had not been reached at the time it was there was "the possibility that this would all fall apart" and "the moment might well pass". There is clearly a contradiction between seizing the moment in order to secure agreement, whilst maintaining that such agreement can subsequently be re-opened.**

43. **If a "general approach" were not in reality an agreement on the substance drawing the discussions to a close, the references by the Minister in her subsequent letter us of 17 April to the supposed harmful consequences for the UK if it were to "block" a**

general approach in relation to the racism and xenophobia proposal would make no sense. The letter indicates to us that the "general approach" on that proposal would indeed amount to an agreement on the substantive issues which could not be re-opened .

44. It **is also evident from the Government's own guidance to departments that the "general approach" would not be reopened on this issue, because the Government did not share our views on the issue of prisoner consent and because the point was not new. In our view, it would have been preferable if the Minister had made this clear from the start, rather than referring to an abstract possibility which would never become real.**

45. **It is also the case that the Government was warned on three occasions of our views on the scrutiny issue, but nevertheless chose to take part in a general approach on a matter which was awaiting debate.**

46. **We are not convinced that there was any insuperable difficulty in arranging for a debate in the 11 weeks between our recommendation and the Justice and Home Affairs Council in February. We express concern that the Government's business managers were unable to set a date for the European Standing Committee within the 11 week period and when it was apparent that there were at least two Home Office Ministers who were sufficiently versed in the matter to have moved the Government's motion in the debate.**

47. **We are also not convinced that there was any pressing need to agree this proposal in February, as opposed to April. We note from the Minister's evidence that the Government's expectation was that the matter would be submitted to the April Council, but that the German Presidency brought the matter forward. In our view, the aspirations of a Presidency to accelerate progress should not be allowed to take precedence over the right of the House to hold Ministers to account and to debate proposals before they are agreed.**

48. **In the light of the experience of this case, we now make it clear that we reject any general proposition that agreement to a "general approach" does not amount to agreement for the purpose of the Resolution of the House on the Scrutiny of European Business, or that the reaching of a "general approach" is not subject to that Resolution. In a European Union of 27, it seems to us to be quite unreal to suggest that the reaching of a "general approach", after all the bargaining of national positions there will have been, does not, in fact, amount to substantive agreement.**

Formal minutes

Wednesday 25 April 2007

Members present:

Michael Connarty, in the Chair

Mr David S Borrow
Mr William Cash
Mr James Clappison
Ms Katy Clark
Mr David Heathcoat-Amory
Kelvin Hopkins
Bob Laxton

The Committee deliberated.

Draft Report [European enforcement order and the transfer of sentenced persons], proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 25 read and agreed to.

Paragraph 26 read, amended and agreed to.

Paragraphs 27 to 41 read and agreed to.

Paragraph 42 read, amended and agreed to.

Paragraph 43 to 48 read and agreed to.

Resolved, That the Report be the Nineteenth Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

The Committee further deliberated.

[Adjourned till Wednesday 2 May at 2.30 p.m.

List of witnesses

Wednesday 28 March 2007

Page

Written evidence

Oral evidence

Taken before the European Scrutiny Committee

on Wednesday 28 March 2007

Members present:

Michael Connarty, in the Chair

Mr William Cash	Nia Griffith
Mr James Clappison	Mr David Hamilton
Ms Katy Clark	Mr Greg Hands
Mr Wayne David	Mr Lindsay Hoyle
Jim Dobbin	Mr Anthony Steen

Witnesses: **Joan Ryan MP,** Parliamentary Under-Secretary of State, **Mr Peter Storr,** International Director, and **Ms Emma Gibbons,** Head of EU Section, International Directorate, and **Mr Graham Wilkinson,** Head of Cross-Border Transfers, Offender Policy and Rights Unit, National Offender Management Service, gave evidence.

Q1 Chairman: Welcome Minister. Can I first ask you to introduce your officials?
Joan Ryan: Can I introduce Emma Gibbons, Peter Storr, Head of the International Directorate and Graham Wilkinson, who is leading on the matter of prisoner transfer.

Q2 Chairman: Can I say that we have considered the fact that you wish to make a statement, but we do not consider it would be appropriate and we will proceed with the business of the Committee. I want to make a short statement. You have been invited here today to explain why you agreed to a measure in the Council just days before it was due to be debated in a European Standing Committee and despite three separate letters from me, as Chairman, drawing to your attention the Committee's view that doing this would amount to a breach of the spirit of the resolution of the House on the scrutiny of European business. As you know, such breaches are always taken most seriously by the Committee and we hope you will be able to explain why and how this came about on this occasion. I will start by asking the first question and then the Committee will take up the other questions. Minister, you took part in a "general approach" on this proposal just days before it was due to be debated in a committee of this House. Do you acknowledge that that was a breach at least in the spirit of the Scrutiny Reserve Resolution of the House?
Joan Ryan: Chairman, thank you for inviting me to the Committee. I am appearing today on behalf of the Home Secretary. I would like to begin my answer to your question by expressing my regret about the lack of opportunity to debate the important subject that came before the February Justice and Home Affairs Council and, indeed, to acknowledge we had had some considerable correspondence on the issue. We do have in the Home Office the highest regard for the scrutiny process and the Committee's views were taken into account during negotiations. However, I do realise that there was possibly room for improvement in the handling and timing of scrutiny in this case. I am not of the view that we breached the Scrutiny Reserve; I am of the view that it is better and preferable, wherever possible, to be in a position where the Scrutiny Reserve has been lifted before even a general approach is reached, and it is regrettable that that was not possible in this case. For my part, I make a commitment to this Committee to go back to the Home Office and to my officials and to ensure—both in terms of issues like staff training, monitoring of deadlines and the correspondence and issues in front of the Committee in relation to European deadlines and, therefore, the match between our scrutiny process here and what is happening in the cycle in the Justice and Home Affairs Council and the European Union—that we are monitoring that and endeavouring to have a situation where we do not have to be in a position again where a general approach has to be reached before a debate that has been requested by the Committee is had. I cannot give a cast-iron guarantee that that would always be the case, but I can point to the fact that we have a very good record in the Home Office in terms of any kind of formal scrutiny override. In recent years we have had one in 2004, two in 2005 and none in 2006, and what I am saying to the Committee is it is regrettable. I would always prefer to be in the position where the Scrutiny Reserve is satisfied and lifted and I will seek to put in place measures to further ensure that, as far as possible, that is the case.
Chairman: Let us refocus on this particular issue. Mr Dobbin.

Q3 Jim Dobbin: Chairman, I have been on this Committee for a number of years now, and the Committee is very jealous of its Scrutiny Reserve and I think we need to make this point really strongly. Minister, you were warned, not once but three times, that the Committee would regard what

you did as a breach of the resolution. I am just asking a straight question. Did you ignore those warnings?

Joan Ryan: No. "Dispute" is a strong word, but if we could go back through some of the correspondence and look at the content of that correspondence, I would seek to go back to 23 November, when I wrote to the Committee stating that the Presidency was seeking a general approach at the December Council. On 29 November the Committee report to me does not suggest that the UK should not participate in this before a debate could be held. So a debate was being requested but the Committee was not suggesting that I should not participate, the UK should not participate, in reaching a general approach. At the 4 and 5 December Council no approach was then forthcoming. Things did not seem to have reached the point that was expected and other Member States had some difficulties. On 18 December I made a written ministerial statement on the outcome of the discussions of the Justice and Home Affairs Committee. On 11 January I received a letter from the Committee questioning whether the UK had pushed for an agreement on the proposal at the December Council. At no stage were we pushing for agreement as in "political agreement". We were (and I made it clear), having had no objection from the Committee, willing to participate in a general approach, and members will know a general approach leaves the door open for us to come back after the debate if there are issues that we feel are of a serious enough nature that the question should be reopened. So a general approach does not close the door and does not give final agreement or any kind of sign-off. There was no question at any time that we would have participated in a political agreement which would have ignored the Scrutiny Reserve and would have been a breach of that Scrutiny Reserve. At no point were we suggesting we would breach that Scrutiny Reserve in that way. I am not sure whether there was some confusion about the Home Office position, and I am certainly willing to go back and look at correspondence again, but I have reviewed it and I certainly was very strongly of the opinion that we would definitely not reach an agreement. Indeed, I had a conversation with the Chairman—thank you Chairman for nodding—outside of committee where I said I was very disappointed that we were not managing to agree a date, despite having three circulating dates, to get this debate that the Committee (as is its absolute right) requested, but I had no intention of making any kind of political agreement and that, because of the importance of this policy, because of the position we had long held—I am sure this has been happening since 2005—the strongest likelihood was we would proceed to participate in the general approach but no question of an agreement, and I made that absolutely clear. As things moved on, I do not know if everybody is aware of the kind of—

Chairman: I think in the length of the answers we are losing some of the points we are trying to make. Can we move on?

Q4 Jim Dobbin: I was going to follow up from that very long answer by saying: can the Committee take it that the Minister does not consider that there has been any breach of the Scrutiny Reserve? It is a yes or no answer.

Joan Ryan: I do not consider we have breached the Scrutiny Reserve.

Chairman: Minister, I think Mr Clappison wants to pursue that very point. He was in the Standing Committee and raised these issues.

Q5 Mr Clappison: With your leave, Chairman, can I go back a moment so that we are clear about what the Minister has said. Can I say, I welcome the regret that she has expressed in so far as that goes, but the Committee did write to you, the Chairman did write to you and warn you, and I think it was fairly clear. Can I quote what the letter of 30 January said: "The members of the Committee wish to make it clear that if the Government were to take part in such a general approach before the debate takes place in the European Standing Committee, they will regard such participation as being in breach of the spirit of the Scrutiny Reserve Resolution." Then the Chairman wrote to you again on 7 February and said, "If a general approach is reached at the February Justice and Home Affairs Council in which the UK takes part, the Committee will look to you to explain the position taken by your department on the issue of scrutiny of this proposal. In that event, it will therefore invite you to appear before the Committee to give evidence." Those letters are clear enough, are they not?

Joan Ryan: The point I was trying to make was that I do not believe we have breached the Scrutiny Reserve and, although I regret the situation, I do not actually believe we breached the spirit of the Scrutiny Reserve.

Q6 Mr Clappison: That is a different matter. I was asking you about warnings. You disputed whether a warning had been given.

Joan Ryan: No, I did not.

Q7 Mr Clappison: Is that a warning?

Joan Ryan: No, I did not. I said it is not until 30 January that any question around whether we reach a general approach or not was raised. There is a whole series of previous letters from the Committee, and I go back to December where I flagged up quite clearly in the November letters for the December Council that we would seek to reach a general approach, and no objection was made at that stage.

Q8 Mr Clappison: It is clear that an objection was being made on 30 January to you reaching a general approach. It was made again on 7 February in clear terms. On 14 February you went ahead and reached a general approach. You cannot say you were not warned.

Joan Ryan: I think timing is of the essence here and is absolutely crucial to the chain of events. We have made very, very clear the importance of this policy.

The position we had taken in the European Union—and subsequent debates have happened and both the Lords and the Commons are, in fact, satisfied and have lifted the Scrutiny Reserve and we have no need to go back and reopen—was made very clear. Our position would be untenable if we had not been able to participate in a general approach, but it was made absolutely clear at the Justice and Home Affairs Council that this was subject to the Scrutiny Reserve. Although I say it is regrettable, I do not accept we breached the spirit of the Reserve.

Q9 Mr Clappison: You were warned and you chose to ignore the warning, but do you think you can take part in a general approach whilst observing the Scrutiny Resolution?
Joan Ryan: I think, in this case, I would say that we had not broken the Scrutiny Reserve, nor had we broken the spirit of it, but also I think the chain of events is very important in understanding why I take that view. I accept what is written in the letters of 30 January and the subsequent letter in February. I accept it is a matter of public—

Q10 Chairman: And the letter of 11 January.
Joan Ryan: It is a matter of public record that it was not until much later in January, as I have said 30 January, that the Committee raised any question that they wished us not to participate in a general approach. If we think about the timing, the Committee was fast on our heels at that point; there was a recess in the middle of those two dates; that left us one week to accommodate the Committee's request. We came up with three dates, two of which were not possible and one of which the Committee could not accommodate either. So, what I am saying is that although it is regrettable, and I undertake to do everything within my power to avoid these situations whenever and wherever I can, I cannot say that in this case, in all honesty, I think we broke the spirit of the reserve, because we did not, and I think the individual circumstances are crucial to an understanding of that and the timing of it.

Q11 Mr Clappison: Having participated in the Standing Committee, which took place on 20 February, a few days after you had reached agreement, I find what you have said strange because the Minister on that occasion came along and apologised and expressed his regret. You are saying now that he was expressing his regret for nothing because you did nothing wrong?
Joan Ryan: I am not saying that at all, I am saying that I think, wherever it is possible, the Scrutiny Reserve should be fully satisfied and able to be lifted before we even reach a general approach. However, in this case, for a number of reasons, that was not possible. The general approach is used right across government, across Whitehall; it is not just a matter for the Home Office. General approaches are very often reached, with no problem whatsoever, before Scrutiny Reserve is lifted. In this case the Committee had decided by letter of 30 January that it had an issue. Subsequently the debates have taken place, and I am pleased that no issue has actually transpired. He did not apologise needlessly. It is regrettable, and we would seek to avoid the situation in the future.

Q12 Chairman: There have, unfortunately, been placed on the record some matters that are not quite correct. Following the Justice and Home Affairs Report which came to us after the Council, it says on the bottom paragraph of the first page: "The Presidency, with the support of the UK and a number of delegations, pressed hard for agreement on the latest text." This is your own report to us. I wrote to you on 11 January and said, "The Committee was, therefore, surprised to see the statement that the UK supported the Presidency when it pushed hard for agreement on the latest text", your own words. "Such agreement had been eventually blocked by one Member State", which was in fact the Polish Government, "which did not think the text went far enough to meet its concerns about the need for prisoner consent." A similar concern was expressed by this Committee. Your statement left the impression that the UK had agreed the proposal, notwithstanding the fact that it was awaiting debate in the European Standing Committee. That was what we decided needed to happen to complete scrutiny when we considered the EM during December. So it does seem to me that we have to clarify this. It was much earlier that the Government was taking steps to press for agreement knowing in that Council meeting that we had a Scrutiny Reserve. That is where the concerns began. It is not correct to say that we had not expressed concerns about a general agreement. If that was not a general agreement you were pressing for at that Council meeting, what were you pressing for—political agreement, total agreement? Was it not general agreement?
Joan Ryan: Perhaps I could clarify, Chairman.

Q13 Chairman: What were you pressing for?
Joan Ryan: When we talk about "agreement on the text", that is in the common usage of the word "agreement". It is not in relation to political agreement as a definition of a final decision subject to the linguist lawyers at the European Union. Perhaps I can say that maybe that usage of the word "agreement" has caused some confusion, and certainly, if that is the case, I would apologise for that and it is regrettable and that is one of the things I will take back. When I mentioned issues such as working with the officials and staff training and trying to better monitor the match between our process here and our process in the EU, that is precisely one of the issues I will feed in.
Chairman: Can I bring Mr Wayne David in.

Q14 Mr David: My point follows on from yours. It seems to me that in this particular case, and we are talking about the minutiae of these circumstances, not of any other circumstances, the end-point of the discussions came with the general approach because that is when all of the

substantive issues were settled, including the issue of prisoner consent. With all due respect, you cannot have your cake and eat it. You cannot say, nevertheless, you went along with the general agreement but, on the other hand, you maintained the Scrutiny Reserve. The very fact that you had a general agreement through the general approach meant that you ignored the Scrutiny Reserve.
Joan Ryan: I rarely get my cake and get to eat it as well, I might say, but I do not think that is what we were trying to do in this case at all, and I do not think that is the way in which general approach is used. It is the case when you reach a general approach that one would expect substantive issues to be agreed upon around the Council table, or I think it would be very difficult to be able to be in a position to reach a general approach. So if as a government we were not satisfied in relation to the issues within the proposal, if others round the table were very dissatisfied, then I think it would be difficult to reach a general approach, and I think that was the case in December. But it still remains a fact that when you reach a general approach, although there probably is agreement around the table on substantive issues, it is still subject to scrutiny reserve, the issue can still be reopened, and there are examples where in fact that has happened. There are not many, I agree. The reason there are not many is that the likelihood is substantive issues are agreed upon, or there is general agreement in the common usage of the word "agreement", before a general approach would be reached at a council.

Q15 Mr Clappison: Is your case that a general approach is not really an agreement?
Joan Ryan: Yes.

Q16 Mr Clappison: What do you think your colleague was talking about when he came to the European Standing Committee (the Minister, Mr Sutcliffe) and said, "I said in my opening remarks that we reserved our right to reopen the debate if necessary, but the Government's position was to get a good agreement quickly, if possible." What did that mean?
Joan Ryan: I cannot speak for Mr Sutcliffe.

Q17 Mr Hoyle: What is your interpretation then?
Joan Ryan: I would assume that what he is suggesting is that we wish to get to a good general approach as quickly as possible.

Q18 Mr Clappison: But he used the word "agreement". It is not perhaps staff who need to consider the legal words, that is for ministers?
Joan Ryan: I accept he used that word, it is a matter of public record, but you would have to take that matter up with him. I suggest that he used the word "agreement" in its common usage as opposed to the notion of "political agreement", and I think there is a difficulty here in the language between "approach", "agreement" in the common usage of the word, and "political agreement", and I think this certainly will be an object lesson to probably all of us involved this matter to be very careful about using the word "agreement". If we mean "political agreement", we need to say "political agreement" and not "agreement". If we are using the word "agreement", we need to be clear that we are using it in the right way, ie common usage, and we need to be very clear when we are talking about a general approach and the difference between reaching a general approach and reaching a political agreement; but I can only say, given the nature of the debate that happened, given the views of the Committee (and we obviously take those views very seriously and have taken them into account throughout this process), it would have been of no difficulty to us, and much more preferable, if we could have got that debate timetabled earlier. The other thing I would say, Chairman, in relation to this, when general approach did not prove possible in December, you realise there was a change of presidency happening then for the beginning of January from Finland to Germany, and it seemed very much that nothing more would happen before Easter, before the Justice and Home Affairs Council that is coming up for the 19 and 20 April. Things moved very quickly with the incoming German Presidency, and they pushed this very hard, and we are pleased that they did because it is a policy that we think is a very good policy, is a very important policy and is a beneficial policy to the United Kingdom. However, that created the difficulty in the timescale, but as soon as we realised how fast this was moving, I was in correspondence with the Committee immediately to alert them to this fact. I am trying to demonstrate, I was trying very hard to ensure that the Committee could exercise all of its rights fully.

Q19 Mr Clappison: It may or may not have been a good agreement, but the fact of the matter is that Parliament did not have the opportunity to properly debate and scrutinise it. You have mentioned on the general approach that the Government reserves the right to reopen a text after a general approach has been agreed, but it is the case, is it not, that on the Government's own guidelines, the Government is only prepared to do that in very limited circumstances. Your Cabinet Office guidelines say, "We would do this only where such concerns correspond to the Government's policy stance to the proposal and where the point had not previously been pursued."
Joan Ryan: Yes.

Q20 Mr Clappison: The fact of the matter is, by the time this matter came before a European Standing Committee, the issues had been done and dusted, agreement had been reached and that committee found itself scrutinising something which had already come into effect or on which agreement had been reached?
Joan Ryan: No. No, that is not the case. A general approach had been reached. Agreement, as in "political agreement", had not been reached. We could, we can, reopen the matter if there was a very good reason why. It is clear from both debates, Lords and Commons, that that is not the case, but

that does not mean that we do not find it regrettable that we could not find a timescale that allowed the committee to exercise its scrutiny and have its debate and lift its Scrutiny Reserve. So, I do not accept, Mr Clappison, the way in which you portray this. That is not the approach that we were taking. I was not in any way trying to deliberately override or breach the spirit of a Scrutiny Reserve, I have the greatest of respect for the Committee and for the support, help and advice that it affords us in our policy-making.

Q21 Mr Clappison: This was the outcome of it. A committee of Parliament was debating something after agreement had already been reached on it. The questions about prisoner consent and the other issues were raised but they could not be reopened by the Government, so it was all academic. In effect, you had destroyed the whole point.

Q22 Chairman: Mr Storr, do you have a comment to make?
Mr Storr: No, I was whispering to my Minister.

Q23 Chairman: Perhaps you could try and make your whispers to us.
Joan Ryan: Pardon?

Q24 Chairman: I anticipated Mr Storr had started to speak.
Mr Storr: I was whispering to my Minister.
Joan Ryan: Can I say, agreement had not been reached. I accept that perhaps Mr Clappison and myself take a different view of some of the explanation of why this has occurred in the way it has, but I think, as I said, language is clearly crucial here, and we reached a general approach, not an agreement, and if substantive issues of real concern had arisen in the debate, then we were in a position to go back to the Council. We had not reached a political agreement.
Mr Clappison: But your own guidelines preclude that.
Chairman: Can I bring in Mr Cash.

Q25 Mr Cash: You have so far said that the issue was beneficial to the British people, but you have just mentioned the substantive question. Apart from the process, and I share the view of the Committee with regard to the question of breach of Scrutiny Reserve, but just to remind you, you have yourself confirmed that the framework decision, which is what we are talking about, could result in a British National convicted abroad being transferred back to the United Kingdom, against his will, and imprisoned here for conduct which is not criminal in this country. You will agree, I am sure, that that is a crucially important question of justice and fairness and that, therefore, what you are dealing with is not just an arcane issue, it is actually about a substantive issue which, on the face of it, certainly is not beneficial to the people of this country on that basis. Could I ask you, very simply, whether you have discussed this issue at any point over the last few months with the Home Secretary in the light of these three warnings that you have received, because we asked him if he would come here. Have you discussed it with him?
Joan Ryan: I have talked with the Home Secretary about this framework decision.

Q26 Mr Cash: What does he say?
Joan Ryan: As you will know, I am not the lead minister on the content of this framework decision issue and also you will know the issue you refer to, which I think is the dual criminality issue, we have not made a decision yet on our view on that matter within this framework decision and we are happy to take the Committee's views into account on that matter.

Q27 Mr Cash: There is a thing called "three strikes and out", you have heard that before. Three warnings and out would be actually quite a good way of describing this particular situation. Do you not agree that it would have been appropriate for the Home Secretary to come here to actually explain to the Committee, particularly as we asked to him to do so, and it is quite clear that you are doggedly determined to stick by the position which has quite clearly been worked out between yourself and your civil servants?
Joan Ryan: The Home Secretary also has the greatest respect for this Committee.

Q28 Mr Cash: It does not look like it.
Joan Ryan: But he had overriding prior commitments.

Q29 Mr Cash: Overriding prior commitments like what?
Joan Ryan: That is my understanding. I can answer no further for the Home Secretary.

Q30 Mr Cash: Have you heard the word "not fit for purpose"?
Joan Ryan: I can assure you, Chairman, that the Home Secretary does have respect for this Committee and for the scrutiny process. I am not saying that in some kind of tongue-in-cheek way. I sensed a reaction from some members that they might think I was. I am most definitely not. I say that in all seriousness and with the integrity of this Committee, I think it is important, absolutely important, when ministers say that we respect the scrutiny role of a scrutiny committee that we say it in all honesty. I am not saying that to placate anybody, I am saying that as a statement of fact on behalf of myself and the Home Secretary and every other Home Office minister.

Q31 Mr David: I wanted to ask a simple question. Obviously you explained why the Government considers this to be an important policy, and people might have reservations about that, but what I cannot really understand is this. You were clearly aware of the importance of this issue to the Committee. You clearly knew how strongly we felt about it. You had received letters from us in strongly worded terms. Nevertheless, the

Government pressed ahead and made agreement. Why the rush? Why could you not have held things for a couple of months until the next JHA meeting, kept this Committee happy and served the Government position as well? Why the rush?

Joan Ryan: We reached a general approach and this has been before the Committee, this has been on the table and up for discussion, I think, since January 2005, so a considerable period of time, and much discussion has been had. I do not think there is a rush in the overall sense or that anybody has been prevented having full-time to consider all the aspects of this policy. Things did speed up with the incoming German Presidency in a way we did not expect them to at that particular point in time. However, as I say, it did not speed up beyond anything we had anticipated previously, because I had indicated to the Committee in writing that we would, if it was possible, reach a general approach in the Council of the 4 and 5 December. So there was no change in our position and I do not think there was undue haste, given that this has been around since January 2005. However, we had then expected, when agreement was not reached in December, that this would not now occur until Easter. That was the indication. It did then move forward. We had always been clear, for quite some time we had been very clear, that we were very supportive of this framework decision. Once those who had difficulties with it found a way forward, everybody was very keen to reach a general approach because, as members will know, if a general approach had not been reached then, after that period of time, the possibility that this would all fall apart and different Member States might find different problems, the moment might well pass and that would have been very regrettable of itself given the importance of this policy.

Q32 Nia Griffith: I think you have answered some of the issues I wanted to raise, particularly this issue of the speed and the fact that you are saying the German Presidency pushed this. When you say you did not want to miss this opportunity, we have got until 2009 until it is implemented. It still does not seem to me that that is a valid way of proceeding with any legislation, that suddenly something is speeded up and that is okay. I would like a little bit more explanation of that really.

Joan Ryan: I am not saying it would always be okay. What I am saying is that it took us to the same position that we were in at the end of November for leading into the December Council, where, as I said, I flagged up at that point that we would be anticipating a general approach, should that be possible to be reached, in December. The German Presidency did grip the issue and move it forward, and I alerted the Committee as soon as we were aware that that was the case and that it would come to the February Justice and Home Affairs Council for general approach, but it was made absolutely clear that it was subject to our Scrutiny Reserve. Having said that, again, Chairman, I can only reiterate, I accept the importance of the scrutiny function and I think it is regrettable that the Committee was not able to, and we were not able to, facilitate that debate prior to that general approach being reached.

Q33 Ms Clark: You have expressed regret on quite a number of occasions. You will be aware that this Committee recommended this matter for debate on 29 November and the Council took place in mid-February. That is a period of 11 weeks. Would you accept that a debate should have taken place within that 11 weeks, that really that was sufficient time for the Government to allocate time for the debate to take place?

Joan Ryan: You make an important point there, and I think that is a point for the two commitments I gave in answer to the Chairman's first question about the issue of both staff training on these matters and this aligning of our processes here and our processes in the European Union. When put in that way, yes, that looks like a reasonable number of weeks within which to get the debate timetabled and undertaken. As I said, what happened in January, with the way in which the German Presidency gripped the issue and moved it forward very quickly, is that became part of our timetabling difficulty; so we ended up with what, in effect, was a week in which to try and get this debate timetabled, and I do not have to tell members here the difficulty of managing to do that within the parliamentary timetable for both the Committee and Home Office ministers, and that proved impossible to do, despite willingness on the part of ministers and the Committee to try and find that way forward and conversations I did have with the Chairman, I made clear my desire to do that, and he made absolutely clear the Committee's position, and I respect that. It just did not prove possible, and I regret that. But you make a valid point and I will take that back with the two undertakings that I have given.

Q34 Chairman: Can I make a comment that will certainly be understood by Katy Clark from Ayrshire. That reminds me of Holly Willie's prayer, if you would like to go and look up Holly Willie's prayer.

Joan Ryan: I think I know what that is, Chairman.

Q35 Chairman: I think it is quite appropriate that people should actually, by their actions, show that they are sincere about the process. It is not this Committee, it is this Parliament as opposed to the Executive, that was denied its rights when you did not find time to carry out our first request, and the first request of this Committee was for a proper debate on these issues. We clearly had substantive doubts about the lack of prisoner consent, we had substantive doubts about the dual criminality question, which was not resolved and will not be resolved because now the position will go through with prisoner consent being ignored and dual criminality possibly coming back in the future to haunt us. But I understand from our Chief Whip's Office, whom we have checked with, that you were offered a date that there appeared to be no barrier

to on 5 February and this was declined by the Home Office. The Home Office declined to make that date. Is that fair? As Katy Clark has said, it is a top priority, but what is not a top priority is the position of this Parliament. In fact whether you regard it as being something that you would like to do better, the Home Office in this event is a serial offender and it has not shown proper respect to Parliament and parliamentary scrutiny. That is the reality. We had a date that we understand the Committee and the Home Office could have met on 5 February and the Home Office turned it down. For what reason: convenience of the minister, convenience of the civil servants?
Joan Ryan: Could I just respond to that?

Q36 Chairman: Why did you turn down 5 February?
Joan Ryan: I have not seen whatever document you have from the whips, but I can assure you that, after we spoke, I went and spoke with the whips and they were as concerned as we were to try and make this happen. There were three dates available, and, as I said, two of them it was impossible for Home Office ministers to make it to the debate, and this is all in the same week, and one of them, in the same week, it was impossible for the Committee to accommodate. That is the situation. I presume the date you are referring to is one of those three dates, and I have been absolutely open with the Committee about that situation.

Q37 Chairman: The date given to us by the Chief Whip is one where there were no barriers, but suddenly the Home Office were unwilling to take the date for some reason. There were three options. On one side, one was difficult for our clerks to organise, one was difficult for the Home Office and the third one seemed to be acceptable but was then turned down by the Home Office. I cannot understand why, after all this breast-beating about respect for the Committee.
Joan Ryan: Chairman, you will have to let me take that back. It is not my understanding. I say emphatically that my understanding is that there were three dates proffered. It is the case that for two of them Home Office Ministers could not be available and one of them the Committee could not accommodate, and I said that at the beginning. That is my understanding. We are not serial offenders in the Home Office. I pointed out earlier early on that we are very much not serial offenders, though there have been very few instances of the Home Office overriding the Scrutiny Reserve.

Q38 Mr Hoyle: I think we are all concerned, are we not, first of all, that we need better training for your officials because they cannot get it right. Now the Chief Whip cannot get it right, the Chief Whip must be wrong. It is everybody but yourselves, Minister? What is it? Is there something really wrong with admitting that you have made a mistake and that you are actually in breach? Why do you not just accept it? All the proof tells us it is the case. Why do you not own up, do the decent thing and then we can all go away?
Joan Ryan: Mr Hoyle, if I felt that we had made a mistake, I would have no difficulty saying that that was the case. I cannot say we have made a mistake if I do not think that the case, and that is why I have taken—

Q39 Mr Hoyle: You have admitted on three occasions that you have?
Joan Ryan: —considerable time to try and answer the points that members are making. I think it is regrettable, I think we can improve on this and there are lessons to be learned.

Q40 Mr Hoyle: If there are no mistakes, what lessons can you learn? You cannot have it both ways. This is ridiculous.
Joan Ryan: You can learn to do things better in terms of aligning these processes and ensuring that officials are monitoring the degree to which we are meeting the Committee's needs and requirements, and I have undertaken to do that. To say that the process has not worked as well as we would hope or as we think it could, I do not think is quite the same thing as saying we made a mistake at some point. There are lessons to be learned. The process could work better. To say I regret that the problems that have occurred is not in some way to not accept responsibility for the fact that a problem has occurred: an issue has occurred here.

Q41 Mr Hoyle: You have total disregard for this Committee. That is what you are saying.
Joan Ryan: I do not think so.

Q42 Chairman: This is not about process. The Lords' Committee, which I think is held in very high esteem, not just in this House but throughout Europe, in the way it does its business, and this Committee, which I believe has a reputation for being fair and trying to accommodate departments and work with departments, overall to give Parliament its due place. Not frankly to worry about the Executive to the extent that we put Parliament second but always to put Parliament and the members of this House first. Both Committees disagree with the fundamental interpretation taken by the Home Office which allowed them to do something that we regard, and regarded and said on three occasions, was a breach of scrutiny, as also did the Lords' committee. It is not about process. Someone in your department, or in the political group that you represent, from the Home Secretary down, has taken a decision that their view is right and Parliament's view, represented by this Committee and the Lords' Committee is wrong. That is not about process, that is what it is really about and that is why I think the Committee admire your stoicism in defending the parliamentary position but totally, I believe, looking round the table, disagree with your department's interpretation. That cannot be corrected by teach-ins or training days, it needs a

change in the attitude of the Home Office to this Committee's role. If we think it is a breach of scrutiny, it is a breach of scrutiny.
Joan Ryan: I am sorry, Chairman.

Q43 Chairman: Do you not accept that?
Joan Ryan: No.

Q44 Chairman: If we think it is a breach of scrutiny, it is not a breach of scrutiny?
Joan Ryan: No, I do not think so. I do not accept that. As I understand it, the Cabinet Office, who are responsible for these issues in terms of whether scrutiny is breached or not, have said that we have not breached scrutiny in this case.

Q45 Chairman: That is the problem. You want the Executive to rule on an Executive decision. We represent Parliament. We believe Parliament should have the say about what is right in Executive decisions. Who has primacy here, Parliament or another part of the Executive?
Joan Ryan: I think the role of Parliament is extremely important, which is why I said what I said about the importance of scrutiny. I understand the Committee represents Parliament.

Q46 Mr Hoyle: Accept the decision then, if you believe we are right.
Joan Ryan: I cannot accept the decision because I do not think we are wrong. The Cabinet Office agreed. In answering your point, Mr Connarty, I respect that we take a different view on this particular incidence in terms of whether we breached scrutiny or the spirit of scrutiny here. I accept that that is the case. I also accept, as I said, that we can seek to do things better in the future, but I think it is not accurate to say that the Home Office has a particular problem or rides roughshod over scrutiny, because the record on respecting the Scrutiny Reserve and not overriding it for the Home Office is a very good record and speaks for itself. If the Home Office did not respect the scrutiny process, I do not suppose I would be here saying we regret the fact that the Scrutiny Reserve was not able to be lifted and the debate was not able to be had before this happened, and I accept the Committee's very serious view of the matter.

The Committee suspended from 3.23 pm to 3.37 pm for a division in the House

Chairman: Can I recommence by clarifying something for the record so that people reading this do not get a misconception. There have been a number of references to the inconvenience of the dates, once to the committee and twice to the department. It is worth putting on the record that that is not a reference to this Committee it is a reference to a committee which is formed and called, basically, by the whips, because the members put on the committee are designated by the whips. It is a committee that is committed by the Committee of Selection, by the whips basically, so it is not a committee we have any control over. In fact its membership does not exist until it is called to the meeting. What we are talking about is three dates which were suggested on which agreement could not be reached by the whips and the department, not anything to do with this Committee. As long as that is now on the record people will be able clarify, in case they think that this Committee was unwilling at any time to meet with the Minister. I want to finalise this session. We have many other questions, but I think we have in evidence the dichotomy that exists between us. I know many things are outstanding from the Standing Committee debate and Mr Hands was a member of the Standing Committee, so I am going to give him the chance to ask a question before we close.

Q47 Mr Hands: Thank you, Chairman. I was also a member of the Standing Committee debate. In my view it is a great pity that the measure was implemented before we had that debate because there were a number of issues in that debate that were raised by members that were not properly answered, in my view. I am going to raise one of them again, because I think it shows the benefit that could have been had had the measure been scrutinised properly, and that is the rights of UK-based victims of crime. When a prisoner is released in this country it is routinely, as I understand it, the case that the victim of the crime for which the person being released is imprisoned is notified that the person is going to be released. I believe it is also a procedure for members of Parliament to be able to ensure that that notification date reaches the victim. One of the things that I raised on that committee, which was not properly argued, in fact I think your colleague, Mr Sutcliffe, said: "I certainly intend that the issues relating to victims will be considered in the detail that will necessarily flow from the agreement." This is precisely the sort of detail that I think would have been helpful to have been aired before signing the agreement. Could the Minister tell us a little more about the rights of UK-based victims under this proposal where the assailant or convicted person has been incarcerated abroad and then released abroad?
Joan Ryan: Let me say, Mr Hands, I think my honourable friend the Under-Secretary of State made very clear our view of the benefits of implementing this framework decision and the benefits for prisoners themselves in terms of many issues (alleviating language, cultural, visiting difficulties) that are experienced by prisoners who are imprisoned abroad, the benefits of rehabilitation issues and being released back into the community in which you are going to live. They are our primary reasons for being very supportive of being able to move forward on this policy. However, in terms of your very specific question, I will ask Mr Wilkinson to come in on that as the official dealing with the detail of that kind of matter.
Mr Wilkinson: There are no specific provisions in the framework decision itself for dealing with victims' issues, but one of the things that we do at

present in dealing with prisoner transfers is that where life sentence prisoners are being transferred under the existing arrangements, for example, we notify the Probation Service, or the probation officer seconded to a particular prison establishment where the prisoner is, so that the victims are notified that the individual concerned is being repatriated to another jurisdiction. What victims do not have is an ability to make representations against the transfer of a prisoner, nor at the moment an ability to request information or what happens in terms of when the prisoner is actually released following transfer.

Q48 Mr Hands: Let me get this right. The victim is notified when the prisoner is transferred to a foreign jurisdiction but is not notified when the person is released?
Mr Wilkinson: Yes.

Q49 Chairman: I think that is clarified. I would hope, Minister, it is not our remit but that in the new spirit that we have with the Liaison Committee about departmental select committees following European decisions and scrutinising them and their substance, that any of these arrangements that are talked about will be transmitted to the Home Affairs Select Committee. Can I ask a final question? A number of times it has been said that this framework decision is for the purpose of facilitating social rehabilitation, but it would seem to me that it is much more honest for the UK Home Office to say it is really a mechanism that they support very strongly because they want to get rid of foreign prisoners out of our jails, because of the massive public outcry about the foreign prisoner situation, whether they want to go or not. I hope she does accept that in our discussions serious reservations have been expressed about whether this is about rehabilitation or not.
Joan Ryan: What I would say, Chairman, is the answer I just gave to Mr Hands about our primary motivation was an honest answer, but, equally, I would not deny that we think it is beneficial to the United Kingdom. It is the case that there are three times more foreign national prisoners from the European Union in our jails than British citizens in jails in the European Union; but I think the overriding factor is that if UK nationals are released from prisons abroad, they usually come back and live in the UK. It is far preferable and safer if they are in prisons here and we have the chance to assist them in terms of rehabilitation and release measures that protect UK citizens. So, although I do not deny that there is a beneficial effect potentially further down the road on implementation in terms of placing UK prisons, that is not the overriding objective for doing this. The overriding objective is the safety and security of British citizens here in the UK and having our own nationals serve their sentence here, released into the community here and being able to apply all the measures that we are able to in those circumstances will help ensure that safety and that security.
Chairman: Thank you for that answer. We look forward to the Home Affairs Select Committee monitoring the outcome of this process. Thank you for attending this committee.
Mr Hoyle: The Minister did say that training will take place. Will she give us the details of what training did take place when it happens?

Q50 Chairman: I am sure that will be transmitted to our clerks.
Joan Ryan: I will keep in communication with the Committee on those matters.

Written evidence

Written Ministerial Statement, 18 December 2006, Official Report, c 124–126 WMS, Joan Ryan MP, Parliamentary Under-Secretary of State, Home Office

JUSTICE AND HOME AFFAIRS COUNCIL (4–5 DECEMBER 2006)

The Justice and Home Affairs Council was held on 4–5 December 2006 in Brussels. The Home Secretary, Baroness Ashton and I attended on behalf of the UK.

The Finnish presidency opened the Council with the "A" points list which was approved. These included general approaches on taking account of convictions in new criminal proceedings (an important measure that requires member states to ensure that judges can take into account previous convictions in other member states, when, for example, sentencing, in the same way that they would take into account previous domestic convictions) and the draft Council Regulation (a measure that applies only to Schengen member states) listing the third countries whose nationals must be in possession of visas when crossing the external borders of member states.

The presidency presented its draft conclusions on the Hague programme review. Discussion focused on two elements of the conclusions: the passerelle and the wording with regard to the assessment of progress made in the areas of criminal and judicial cooperation. On the passerelle, there was robust discussion with some member states seeking to have reflected in the text the need for further work to explore the possibilities in the passerelle and a reference to the constitutional treaty. The UK opposed these suggestions strongly, noting that the majority of member states were against further work on the passerelle. The Home Secretary made clear additionally that there should not be any link to the constitutional treaty and that, given the limited support for the proposed use of the passerelle, the current debate should be regarded as over. A number of other member states joined in opposing reference to possible European Council discussion of the passerelle. The final text states that "the subject of decision making would remain under consideration by the Council [for example, the JHA Council]. This would be brought to the attention of the European Council in December".

On the Hague programme review more generally, the agreed conclusions reflect the UK view that proposals or initiatives for new instruments at EU level should be based on a rigorous assessment of their potential impact and welcome the progress made in implementing the programme to date.

The Council reached political agreement on the regulation establishing the fundamental rights agency on a basis that avoids any formal extension of the agency's remit to the areas covered by title VI and any reference to the charter of fundamental rights in the operative part of the regulation. Both of these elements were essential to enable the UK to agree the regulation. The text of the regulation will be formally adopted at a Council in January 2007. The commission is expected to implement the transitional arrangements from the existing European monitoring centre on racism and xenophobia.

No agreement was reached on the prisoner transfer framework decision. The presidency, with the support of the UK and a number of delegations, pushed hard for agreement on the latest text on the basis that it represented a compromise package for all. However, one member state maintained that the text did not go far enough to meet its concerns about the need for prisoner consent and the right of the executing state to determine whether transfer to its territory would facilitate social rehabilitation. Work will continue in the Council on the outstanding issues.

The presidency asked whether the Council wished to pursue work on a binding framework decision on procedural rights in criminal proceedings, pointing out that it and a non-binding resolution on practical measures (which had been put forward by six member states) were not mutually exclusive. Several member states, including the UK, preferred the non-binding text, arguing that the framework decision added no value for the citizen and created legal uncertainty. A large majority of member states were in favour of a binding instrument or prepared to be flexible. However, within the majority there was disagreement on whether a binding text should contain explicit derogations so as to protect national law. The issue would be taken up by the German presidency who are making it a priority of their presidency to reach agreement on a binding text.

Commissioner Frattini presented the Commission's Communications on the global approach to migration and reinforcement of the southern maritime border. These were welcomed by the Council, though it was noted that there was more that needed to be done. The UK introduced a paper on behalf of the G6 and underlined our wish for succinct, practically focused conclusions from the European Council. Work needed to be done to build partnerships with third countries and effectively planning the management of the southern maritime border.

The second generation Schengen evaluation system (SIS II) and interim solution to connect the new member states to SIS I (SISOne4all) were discussed at length. A majority of member states wished to proceed with SISOne4all given their view that the political implications of delaying the lifting of internal borders were serious. The UK stressed its support for measures to allow the new member states to join the Schengen area as soon as possible, but also reiterated its concerns about costs, timetable and technical feasibility. The

presidency proposed a compromise text on the basis that only those member states connected to SIS I would be liable for the extra costs resulting from the extension of the network, thereby excluding the UK and some other states from liability. The Council conclusions were agreed on this basis.

The presidency called for agreement on the rapid response and preparedness instrument on the basis of a compromise text which would have seen the previous proposal for Community finance to be available for the hire of civil protection equipment removed from the instrument entirely. This represented a major move towards the UK position. Community finance would have remained within the scope of the Instrument for the transport of civil protection assistance to disasters inside and outside of the EU provided the member state sending the assistance met 50%. of the costs. The amount of community expenditure available for transport would also have been capped at 60%. of the total spend available through the instrument. There was support for this proposal from most other delegations. However the UK was not prepared to agree the instrument at the Council on this basis. The presidency agreed to send the item back to Coreper for further discussion. Following a further concession to the UK whereby the maximum amount of community expenditure available for transport was lowered to 50%. agreement was reached at the General Affairs and External Relations Council on 11 December.

The Council conclusions on the future of Europol were agreed in principle with just one issue to be discussed at Ambassadorial level on the replacement of the Europol convention with a Council decision.

The EU counter-terrorism coordinator presented a stocktake report which noted good progress on developing EU counter-terrorism legislation, secure intelligence analyses from the EU's situation centre and international co-operation. The report also identified shortcomings identified in implementing the legislation and in national capabilities to respond to attacks. As such, it may be useful to note that the EU has recently begun to develop initiatives in the field of combating radiological and biological terrorism. The UK has been closely involved with this work since its inception, lending our considerable expertise in this field, and ensuring that this work progresses in a manner that adds value at the European level and is not detrimental to UK interests.

The presidency presented a progress report on the strategy for the external dimension of JHA, which had been agreed under the UK's presidency. It was noted that implementation of the strategy was progressing, but that more time would be needed before a full evaluation of results would be possible.

There were a number of AOB items: the European evidence warrant should be adopted early in the German presidency; European contract law, during which the commission stressed that the project concerned better law-making, not a European code of contract law; progress on the Prñ/4m treaty was noted and the German presidency indicated that it intended to attach priority to bringing the treaty into the EU acquis during its presidency. This would be discussed further at the JHA informal Council in January.

At lunch on day one the Home Secretary took the opportunity to brief colleagues on the ongoing investigation into the death of Alexander Litvinenko. There was a brief exchange of views on violent video games where the Home Secretary emphasised the need to protect children, and others, from violent material and set out the UK's specific concerns about extreme pornographic material. Domestically the UK is proposing to make illegal the possession of a limited range of violent and extreme pornographic material and would like other member states to consider how they control the publication and distribution of such material. The Home Secretary urged that this work be taken forward under the German presidency. Judge Vassilios Skouris, President of the European Court of Justice (ECJ), gave a presentation on the ECJ's proposals for accelerated procedures for handling cases in the area of freedom, security and justice. Lunch items on day two included a presentation by Michel Barnier, diplomatic adviser to Nicolas Sarkozy, on disaster response and a presentation by Kristiina Kangaspunta, chief of the anti-human trafficking unit in the United Nations Office on Drugs and Crime, followed by discussion of the EU action plan to combat human trafficking.

Letter dated 11 January 2007 from Michael Connarty MP, Chairman of the European Scrutiny Committee, to Joan Ryan MP, Parliamentary Under-Secretary of State, Home Office

JUSTICE AND HOME AFFAIRS COUNCIL 4–5 DECEMBER 2006

The Committee was grateful for your comprehensive and thorough statement on the Justice and Home Affairs Council on 4–5 December. Indeed the Committee regarded it as a model of its kind.

There was, however, one matter which caused some concern. This relates to the draft Framework Decision on the transfer of prisoners, which the Committee has recommended for debate (see HC 41-ii (2006–07) paragraph 4 (29 November 2006)). The Committee was therefore surprised to see the statement that the UK supported the Presidency when it "pushed hard" for agreement on the latest text, such agreement being eventually blocked by one Member State which (like the Committee) did not think the text went far enough to meet its concerns over the need for prisoner consent. Your statement left the impression that the UK would have agreed the proposal, notwithstanding the fact that it was awaiting debate in European Standing Committee.

I believe it would be helpful, for the purposes of that debate, if you would explain if this was the intention, and would describe what consideration was given to the scrutiny position before the UK delegation decided to support the Presidency in pushing for agreement.

Letter dated 24 January 2007 from Joan Ryan MP, Parliamentary Under-Secretary of State, Home Office

DOCS: 5597/05 AND 13080/06. DRAFT COUNCIL FRAMEWORK DECISION ON THE APPLICATION OF THE PRINCIPLE OF MUTUAL RECOGNITION TO JUDGEMENTS IN CRIMINAL MATTERS IMPOSING CUSTODIAL SENTENCES OR MEASURES INVOLVING DEPRIVATION OF LIBERTY FOR THE PURPOSE OF THEIR ENFORCEMENT IN THE EUROPEAN UNION

Thank you for your letter of 11 January about the draft EU prisoner transfer agreement and the Governments' stance on this proposal at the JHA Council meeting in December. You asked whether it was the UK's intention to signal agreement to the Framework Decision at the December JHA Council, thereby overriding the scrutiny reserve resolution. I can assure you that was not the case.

Whilst recognising that the text remains subject to parliamentary scrutiny, the Government is content with the approach taken in the draft Framework Decision and it was in that context that we encouraged the then Finnish Presidency to seek a deal between all delegations on its compromise package. However, it was clear from the documents that went to he JHA Council and the current state of negotiations, that the most Council could have concluded, should unanimity have been achieved, was a general approach on that deal. As you are aware a general approach allow delegations the right to re-open points on the text should they have the need to do so. Indeed, should a general approach have been reached, the text would have been subject to further work at expert level, and specifically the Annex to the Framework Decision. The UK's parliamentary scrutiny reserve had also been clearly recorded.

The Working Group will resume work on the detail of the accompanying Annex to the Framework Decision on 24 January, whilst in parallel the current German Presidency is undertaking high level discussions with the one remaining Member State which had substantive concerns with the current draft of the Framework Decision.

It is likely that the Framework Decision will be considered again t the JHA Council on 15–16 February. In light of your concerns my officials have investigated the possibility of bringing forward the Committees debate on the Framework Decision which is due to take place on 20 February. However, because of the Parliamentary recess and the commitments of both Ministers and the Committee, this has not proved possible. I would like to reassure you, however, that the Government will at most participate in a general approach on this matter and re-iterate our parliamentary scrutiny reserve at the Council.

Letter dated 30 January 2007 from Michael Connarty MP, Chairman of the European Scrutiny Committee, to Joan Ryan MP, Parliamentary Under-Secretary of State, Home Office

JUSTICE AND HOME AFFAIRS COUNCIL 4–5 DECEMBER 2006: DRAFT COUNCIL FRAMEWORK DECISION ON THE TRANSFER OF PRISONERS 13080/06 (27480)

The Committee was grateful for your letter of 24 January.

You assure the Committee that it was not the Government's intention to signal agreement to the proposal at the JHA Council meeting in December, but you also state that the Government "encouraged the Finnish Presidency to seek a deal between all delegations on its compromise package" and that, had there been unanimity, the Council could have concluded a general approach.

In the event, such unanimity was not achieved, and you inform us that the German Presidency is undertaking "high level discussions" with the one Member State which has substantive concerns with the current draft. (We understand this Member State to be Poland).You also inform us that the proposal will be considered again at the JHA Council on 15–16 February, but you reassure us that the Government will "at most" participate in a general approach on that occasion.

The Members of the Committee wish to make it clear that, if the Government were to take part in such a general approach before the debate takes place in European Standing Committee, they will regard such participation as being in breach of the spirit of the scrutiny reserve resolution. The Committee's reasons are as follows. The debate was recommended by the Committee as long ago as 29 November 2006. There has, therefore, been opportunity for a debate to be held before the February JHA Council. In any event, the Committee is not persuaded that there is any pressing urgency to agree this proposal, which was first introduced as long ago as January 2005.

In the circumstances which you describe, it seems plain that if Poland is persuaded by the Presidency and other Member States to concede on the question of prisoner consent there will be no further substantive discussion on this point once a general approach is reached. You will recall that it was this very issue which was one of those identified by the Committee for debate in European Standing Committee. If a general approach is agreed at the February JHA Council before a European Standing Committee debate, the issue will be foreclosed, without the House having had the opportunity to consider it. It also means that the Government will have agreed the proposal in Council without first having explained to the House whether it will apply the safeguard of dual criminality in the case of a UK national brought back to this country against his wishes to serve a prison sentence for conduct which is not a crime here.

The Members of the Committee also recall that the guidance to Departments issued by the Cabinet Office emphasises that "working with the Committees to complete scrutiny before a general approach is therefore the best way to ensure that the spirit of the Scrutiny Reserve Resolution is not breached". The guidance does go on to state that there is no need to complete scrutiny beforehand if "it is clear the general approach will be reopened for full discussion by Ministers at a later date", but you have offered no undertaking that the general approach would be reopened, and it is doubtful whether such an undertaking could in fact be given in the circumstances of this case.

The Committee therefore invites you to reconsider any intention to take part in a general approach on this proposal before it has cleared scrutiny.

Letter dated 7 February 2007 from Joan Ryan MP, Parliamentary Under-Secretary of State, Home Office

COUNCIL FRAMEWORK DECISION ON THE TRANSFER OF PRISONERS 13080/06

Thank you for your letter of 30 January.

The issue of foreign prisoners is one of the Government's top priorities and we attach considerable importance to this measure. We believe this proposal will add significant value to existing prisoner transfer arrangements. We therefore need to finalise negotiations as soon as possible so that implementation can commence and the benefits to Members States and prisoners can take effect.

In light of this and should a position be reached that meets our interests at the February JHA Council, it is the UK's intention to participate in a general approach. Since there is still work to be done on this proposal, especially with regard to the Annex, it cannot be formally agreed until this work is complete. We have and will maintain the UK's parliamentary scrutiny reserve and it will be formally recorded at the February Council.

I recognise that you have outstanding concerns on this proposal and I regret that a debate after the JHA Council will not allow the House to raise all of these prior to a general approach being reached. In your letter you mentioned in particular, the Committee's concerns about prisoner consent and dual criminality. You will be aware that Parliament has already approved changes to the Repatriation of Prisoners Act 1984 to enable prisoners to be transferred without their consent. At that time the Government made clear that it did not believe that a prisoner should be able to frustrate a transfer, properly agreed between States, simply by withholding consent. I hope that during the debate we will be able to discuss the Committee's concerns and explain further the Government's intentions in this area.

You also raised the issue of dual criminality. The text of the draft Framework Decision enables a Member State to choose whether to apply the principle of dual criminality. If a Member State wishes to do so it can issue a declaration to that effect at the time of adoption of the Framework Decision, which is likely to be later this year. A general approach will therefore not close off this particular issue now or for the future and the Committee's views expressed during the debate will be taken into account by the Government in reaching its final position.

Your report (27840) of 29 November indicates the Committee was aware of the possibility that a general approach could be reached at the December JHA Council. I acknowledge that, where possible, scrutiny should be completed before participation in a general approach. My officials attempted to bring the debate forward following the concerns you raised in your letter of 11 January. Unfortunately, due to Parliamentary Recess and conflicting Ministerial and Committee commitments, this was not possible. If a similar situation should arise in the future I have asked that officials discuss handling with your staff so that we can prevent this situation from occurring again.

DOCUMENTS FOR DEBATE ON 20 FEBRUARY

In order to help facilitate the debate on the Framework Decision I have attached a copy of the latest version of the text (Council Document 15875/1/06 dated 30 November 2006). A copy of this letter and text will be made available to members of the Committee in the document pack.

The revised text does not contain any significant changes over and above those contained in Council Document 13080/06 dated 21 September 2006 on which the Home Office deposited an Explanatory Memorandum dated 4 October 2006. However, Article 3a has been reordered to clarify the circumstances

under which a Member State is required to accept a prisoner. The executing State is now no longer obliged to accept non-nationals normally resident in its jurisdiction. A Member State may, however, issue a declaration stating that it will dispense with prior consent for the transfer of non-national residents when dealing with other Member States that have also entered such a declaration. The consent of the sentenced person will still be required when transfer is requested to the State in which he is a non-national resident.

Letter dated 7 February 2007 from Michael Connarty MP, Chairman of the European Scrutiny Committee, to Rt Hon John Reid MP, Home Secretary, Home Office

JUSTICE AND HOME AFFAIRS COUNCIL 4–5 DECEMBER 2006: DRAFT COUNCIL FRAMEWORK DECISION ON THE TRANSFER OF PRISONERS 13080/06 (27480)

The Committee today considered Joan Ryan's letter of 7 February, in which she explained that it is the Government's intention to take part in a general approach on this draft Framework Decision, notwithstanding the fact that it is awaiting debate in European Standing Committee.

This was in reply to my letter of 30 January in which I explained in some detail the reasons for the Committee's view that this course would amount to a breach of the scrutiny reserve resolution.

The Committee noted the statement by the Minister that the issue of foreign prisoners is "one of the Government's top priorities". If this is so, it is hard to believe that the Government was unable to arrange a debate on this proposal in time for the JHA Council, when the Committee made its recommendation as long ago as 29 November 2006.

The Members of the Committee note that its invitation to reconsider the intention to take part in a general approach on this matter before the House has had chance to debate the matter has been effectively declined. As was indicated in my letter of 30 January, the Members of the Committee do regard participation in a general approach in this case as being in breach of the spirit of the scrutiny reserve resolution.

If a general approach is reached at the February JHA Council, in which the UK takes part, the Committee will look to you to explain the position taken by your Department on the issue of scrutiny of this proposal. In that event, it will, therefore, invite you to appear before the Committee to give evidence.

Written Ministerial Statement, 15 March 2007, Official Report, c 20–22 WMS, Joan Ryan MP, Parliamentary Under-Secretary of State, Home Office

JUSTICE AND HOME AFFAIRS COUNCIL (15 FEBRUARY 2007)

The Parliamentary Under-Secretary of State for the Home Department (Joan Ryan): The Justice and Home Affairs Council was held on 15 February 2007 in Brussels. Baroness Scotland and I attended on behalf of the UK.

The German presidency opened the Council with adoption of the "A" points list which was approved apart from point 9, a mandate to open negotiations on the exchange of passenger name records. The items adopted included a regulation establishing an EU agency for fundamental rights, and a report on the extent of trafficking of human beings during the 2006 world cup in Germany and the measures taken by Germany to deal with this.

The presidency hosted an informal dinner for Ministers the evening before the Council, at which Ministers discussed how best to prepare the post-2009 JHA programme. The discussion built on the ideas put forward by the German presidency at the informal JHA Council in Dresden; notably, the idea of setting up an informal group of the next six presidencies and the Commission to coordinate this work. Member states generally welcomed the idea of preliminary work by such a group to assist in the thorough preparation of any future work programme, while recognising that this would be without prejudice to any formal discussions and decisions in the Council at the appropriate time. The UK secured agreement that the group should include a common law expert, that it should adopt transparent working methods to allow contributions from those outside the group, and should report regularly.

One of the principal items considered by JHA Ministers last week was the exchange of policing information between member states in the context of incorporating the Prüm treaty into the EU legal order. This will facilitate the identification and subsequent exchange of information on fingerprints, vehicle registration and DNA. The Council mandated experts to prepare a Council decision for adoption in the coming months which will transfer the third pillar (police cooperation and data sharing) elements of that treaty into the EU, subject to deletion of a provision on measures in the event of immediate danger. I welcomed this approach and the importance of effective exchange of information more generally. I noted

however that in taking forward this work further consideration needed to be given to the detail of the data protection regime and that sufficient time would be required for national Parliaments to scrutinise the proposal.

The Council also secured a general approach on a framework decision which will provide for the exchange of prisoners between member states so that custodial sentences can be served in the prisoner's home state, close to family and friends. Once finalised and implemented we believe that this will benefit both member states and our citizens in aiding the re-integration into societies of our prisoners. While participating in this general approach the UK maintained its parliamentary scrutiny reserve. Once adopted the Government expect this to reduce numbers of foreign prisoners in UK jails.

On migration there was discussion on a common approach to partnership agreements with countries of origin and transit. It was suggested that these agreements should include information on legal migration channels, national quotas, circular migration and capacity building, in exchange for readmission, safeguarding human rights and a commitment to mange migration. There was general agreement from member states on this approach although a majority were against the inclusion of quotas. The UK stressed the need for a flexible approach, highlighting a points based system as an alternative to quotas. The Council noted that the first of the Commissions proposals on legal migration would be expected in May.

There was a lunch time discussion on the framework decision on racism and xenophobia. It is clear that there is a commitment to reaching agreement on this measure and member states supported the text as a basis for further work. However, the UK, along with a number of other members states, could not accept article 8(2) on mutual legal assistance, which we argued had been superseded by the European evidence warrant. One member state argued for the retention of this article. The presidency indicated that it would seek agreement to the text at the April JHA Council.

In the Mixed Committee the Council took note that the SISOne4all project was running on time. The global rescheduling of the second generation Schengen Information System (SIS II) was also noted. The focus on SISOne4all has meant that there will be a six-month delay to the SIS II programme; the SIS II operational date for those member states already connected to the SIS 1 + will be mid-December 2008.

There was support for reaching an early agreement on the regulation establishing rapid border intervention teams, with the presidency hoping to agree it at the April JHA Council. Baroness Scotland stressed our support for Frontex, despite our exclusion from the regulation and offered to make available some equipment and expertise.

The increasing numbers of Moldovan applications for Romanian nationality was discussed under AOB, the Commission asking member states to participate in the common consular centre initiatives. This question will be discussed further at senior official level.

Finally, as another AOB item, the Commission presented their proposal for a directive setting criminal sanctions for environmental crimes. This would oblige member states to treat serious offences against the environment as criminal acts and set minimum sanctions for environmental crimes. Negotiations on this proposal will commence at a working group in March.

Minutes of the Justice and Home Affairs Council held in Brussels on 15 February 2007

COUNCIL FRAMEWORK DECISION ON THE APPLICATION OF THE PRINCIPLE OF MUTUAL RECOGNITION TO JUDGMENTS IN CRIMINAL MATTERS IMPOSING CUSTODIAL SENTENCES OR MEASURES INVOLVING DEPRIVATION OF LIBERTY FOR THE PURPOSE OF THEIR ENFORCEMENT IN THE EUROPEAN UNION

At its meeting on 15 February 2007 the Justice and Home Affairs Council discussed the remaining outstanding issue related to the above proposal. The discussions were based on document 6000/1/07 REV 1 COPEN 17, and the working document[1] in which the Presidency submitted a compromise text of Article 5(4) of the proposal and accompanying it with a text of the new Recital 6(c)(cis).

Following the presentation of this compromise text an agreement on a general approach on the Framework Decision was reached. The text of the proposal, subject to parliamentary reservations entered by PL/NL/UK/SE/DK/IE, is set out in the Annex to this note.

Before the adoption of the proposal the Council preparatory bodies will finalise the work on the certificate annexed to the proposal as well as on the form for the notification of the person. Moreover, some technical modifications to the text will be made including a provision which shall ensure that Member States can cooperate with a Member State which has availed itself of the possibility to make declaration under Article 20a(2).

---

[1] DS 115/07.

Letter dated 21 February 2007 from Michael Connarty MP, Chairman of the European Scrutiny Committee, to Rt Hon John Reid MP, Home Secretary, Home Office

JUSTICE AND HOME AFFAIRS COUNCIL 15–16 FEBRUARY 2006: DRAFT COUNCIL FRAMEWORK DECISION ON THE TRANSFER OF PRISONERS 13080/06 (27480)

I write further to my letter to you of 7 February.

The Committee noted that the UK did indeed take part in a general approach on this proposal at the recent JHA Council on 15–16 February, before the matter was debated in European Standing Committee on 20 February.

The Committee therefore invites you to appear before it to explain the position taken by your Department on the issue of scrutiny of this proposal.

Letter dated 16 March 2007 from Rt Hon John Reid MP, Home Secretary, Home Office

JUSTICE AND HOME AFFAIRS COUNCIL 15 FEBRUARY 2007: DRAFT COUNCIL FRAMEWORK DECISION ON THE TRANSFER OF PRISONERS 13080/06 (27840)

Thank you for your letter dated 21 February inviting me to appear before the European Scrutiny Committee to explain the position taken by the Government on the issue of scrutiny of this proposal.

I regret I am unable to attend on this occasion but have nominated Joan Ryan to attend on my behalf as she is the lead Minister for international issues. I understand that the evidence session will take place on 28 March.

The text of the Framework Decision represented an acceptable compromise to the UK and, once in force, will provide a valuable tool for dealing with the increasing number of foreign national prisoners in UK prisons. Joan Ryan will respond on 28 March to the specific issue of Parliamentary Scrutiny.

"Parliamentary Scrutiny of European Union Documents: Guidance for Departments", Cabinet Office, February 2006 (pp 49–50)

SECTION 6: UNCLEARED PROPOSALS: ACTION TO BE TAKEN

Introduction

6. This section:
   - explains the undertaking given by the Government not to vote (or in some cases to abstain from voting on) proposals in the Council of Ministers which have not cleared scrutiny; and
   - describes the action for Departments where uncleared proposals are likely to come before the Council for a vote.

Government Undertaking (Scrutiny Reserve Resolutions)

6.1.1 The Government undertaking is embodied in Resolutions of the House of Commons last updated on 17 November 1998 and the House of Lords of 6 December 1999. These Resolutions are the cornerstone of the scrutiny procedures and provide the assurance to Parliament that Ministers will not agree to measures in the Council of Ministers unless scrutiny has been completed (except in certain exceptional circumstances).

The Resolutions cover:
   - business across all three Pillars of EU business;
   - the stages of agreement to legislation under the co-decision procedure;
   - the stage of political agreement reached in the Council of Ministers;
   - pre-legislative documents; and
   - certain decisions taken by Heads of State at meetings of the European Council (eg, agreement in principle on legislative proposals).

The full text of both Resolutions (known as the *Scrutiny Reserve Resolutions*) are set out in Annexes D and E.

6.1.2 Article 205 of the EC Treaty provides that abstentions do not prevent the adoption of Council acts which require unanimity. In such cases, therefore, paragraph (5) of the Resolution equates abstention to giving agreement; it would be anomalous for Ministers to have to explain their reasons in the latter case but not in the former. Conversely, where acts are adopted by majority vote, abstention is equivalent to voting

against. Accordingly, references in the remainder of this section to "giving agreement" or "voting in favour", include abstention in relation to an act whose adoption requires unanimity; references to "opposing" or "voting against" include abstention when the act in question is adopted by majority vote.

6.1.3 The terms of the Scrutiny Reserve undertaking have not been extended to the devolved administrations. In other words, the UK Government has made no undertaking to withhold agreement to proposals pending the completion of Scrutiny by the devolved administrations.

Action required on uncleared proposals

6.2.1 The objective should always be to complete scrutiny well in advance of:

— *final adoption of*, or under the codecision process, adoption of a *common position*: terms referring to a decision adopting a text finalised by the legal/Linguistic experts; and

— *political agreement* to: term referring to a decision adopting a definitive position on a text, subject to finalisation of that text by the Legal/Linguistic experts.

The same objective should apply to the stage known as:

— *general approach*; term referring to a decision stating a position on a text before the fulfilment of the legislative procedure preconditions for voting, in particular the delivery of the European Parliament's opinion.

It is the Government's view that general approach is not subject to the Scrutiny Reserve Resolution because it does not constitute a definitive point of agreement in the legislative process. We know from negotiating experience that it can be difficult to reopen negotiations after a general approach has been reached. The Government has confirmed to the Committees that the UK has stated in the Council of Ministers that we reserve the right to re-open a text after a general approach on the basis of concerns raised by our Parliament. But we would do this only where such concerns correspond to the Government's policy stance on the proposal and where the point(s) had not previously been pursued. The Government's view on General Approach is, however, contested by the House of Lords European Union Committee. Working with the Committee(s) to complete scrutiny before a general approach is therefore the best way to ensure that the spirit of the Scrutiny Reserve Resolution is not breached. But if it is clear the general approach will be reopened for full discussion by Ministers at a later date, there is no need to complete scrutiny beforehand. If a general approach is reopened (normally by the European parliament) even if the scrutiny process has previously been completed, the Committees must be informed. It may be necessary in such cases to reintroduce a parliamentary scrutiny reserve. In cases of doubt over handling you should contact the Cabinet Office for advice.

Letter dated 28 March 2007 from Gerry Sutcliffe MP, Parliamentary Under-Secretary of State, Home Office

Draft Council Framework Decision on the Application of the Principle of Mutual Recognition to Judgements in Criminal Matters Imposing Custodial Sentences or Measures Involving Deprivation of Liberty for the Purpose of their Enforcement in the European Union 13080/06

I was grateful for the opportunity to debate the draft EU prisoner transfer agreement at the meeting of Scrutiny Committee B on 20 February. During the debate I undertook to write to the Committee on some of the issues raised. I am sorry for the delay in doing so.

I would first like to repeat my regret that it was not possible to hold the debate before the Government participated in a general approach at JHA Council on 15 February.

As you know, the Scrutiny Committee made its request for a debate on 29 November 2006, shortly before JHA Council which was held on the 4–5 December. The JHA Council failed to resolve the difficulties of one Member State. As a result the issue was referred to the incoming German Presidency to resolve through bilateral discussions. At that point the Government did not expect the Framework Decision to return to Council before Easter.

Arrangements were made for the Committee to debate the Framework Decision on 20 February. This date was acceptable to both Ministers and to the Committee. On 11 January Michael Connarty wrote seeking clarification of the Government's intention to give agreement to the Framework Decision. On 24 January Joan Ryan explained that the Government had never intended to give its agreement to the Framework Decision at December Council but had instead sought to participate in a general approach. Participation in a general approach enables a Member State to re-open substantive discussions on the text of the agreement if necessary. In light of the Committee's concerns and the then likelihood that the Framework Decision would return to JHA Council in February, my officials sought to bring forward the date of the debate but no mutually acceptable time could be found when both the Committee and a Minister were available.

The draft EU prisoner transfer agreement provides a mechanism or the transfer of prisoners between Member States of the European Union. The Agreement will not apply to the transfer of prisoners to or from non-Member States. Member States will continue to apply existing international arrangements in their dealings with non-Member States. Transfers to and from Turkey, for example, will continue to be dealt with under the terms of the Council of Europe Convention on the Transfer of Sentenced Persons.

The draft Framework Decision is not expected to be adopted until later this year; as a consequence the Framework Decision will not enter into force until late 2009 at the earliest. Prisoners sentenced prior to the date of adoption will not qualify for transfer under this Agreement. However those sentenced between the date of adoption and date of implementation will form a pool of between 500 and 1,000 prisoners who could be transferred under these arrangements. An assessment of the annual cost of implementing this Agreement or of the annual savings to the Prison Service as a result of transferring prisoners has not been made. As I explained at the Committee this agreement is not primarily about cost savings, as important as that is, it is about the rehabilitation of the prisoner and through that improved public protection. However we expect that the UK will be a net "exporter" of prisoners and benefits will flow from freeing up valuable prison places.

Detailed work on the implementation of the Framework Decision including procedures for considering individual cases, will take place over the course of the coming months. However, in practice, the arrangements are likely to be broadly as follows:

The Framework Decision requires each Member State to designate a Central Authority for the purpose of processing transfer requests. In England and Wales applications for transfer under the Framework Decision wilt be dealt with administratively and the Offender Policy & Rights Unit of the National Offender Management Service will be the designated Central Authority. This Unit is currently responsible for the consideration and determination of applications for repatriation to and from England and Wales under existing prisoner transfer arrangements and so has considerable experience in dealing with such matters. Separate Central Authorities will be designated for Scotland and for Northern Ireland.

Arrangements will be put in place to identity EU nationals on reception into prison following sentence and for notification to be forwarded to the Central Authority. The Central Authority will look at each case in accordance with the criteria for forwarding a certificate set out in Article 3 of the Framework Decision. Those prisoners who appear to meet one or more of the criteria will be notified of their liability to be transferred and of the consequences for them of such a transfer. They will then be invited to give their opinion in writing. The opinion of the sentenced person will be taken into account when deciding whether to proceed with the transfer, and to which country a certificate should be forwarded, but the prisoner will not be required to give consent to transfer and will not therefore be able to veto transfer simply by withholding consent. In reaching a decision about whether or not to forward a certificate and judgment to the executing State, due weight will be given to the prisoners links, if any, with the United Kingdom, and his links with the executing State. As the issuing State the United Kingdom has a responsibility to satisfy itself that transfer serves the interest of the social rehabilitation of the prisoner concerned.

A prisoner will be notified of any decision taken with regard to his transfer. The draft Framework Decision does not provide a mechanism enabling a prisoner to appeal a decision to forward a certificate and to request transfer. The Government does not intend to build in a formal appeals process. However, prisoners will be free to notify the Central Authority of any information that could materially affect the decision to transfer. A prisoner will retain the right to seek judicial review of the Secretary of State's decision to forward the certificate and judgment. It is difficult to estimate the number of prisoners who may seek to challenge the decision to transfer by way of judicial review. We expect that initially a number of prisoners may seek to do so. However, we expect quickly to build up a body of case law which will feed into the decision making process. Any costs incurred should be seen in the light of ongoing annual savings associated with the freeing up of a prison place.

Letter dated 17 April 2007 from Joan Ryan MP, Parliamentary Under-Secretary of State, Home Office. Together with Annex

DOCUMENT 5118/07: PROPOSAL FOR A FRAMEWORK DECISION ON COMBATING RACISM AND XENOPHOBIA

Further to Vernon Coaker's letter of 12 April 2007 on the above dossier, I am writing to clarify the position the UK will take at the forthcoming Justice and Home Affairs (JHA) Council on 19–20 April in Luxembourg.

The German Presidency has, as you know, put considerable effort into this dossier, including working hard to address UK concerns, even where those concerns were shared by only a minority of other Member States. I am now satisfied that the current text addresses all of the Government's points of substance. It therefore represents a real improvement on the earlier version of the text cleared for scrutiny by debate in 2003. In particular, our concerns that we should not be obliged to amend our domestic law has now been fully satisfied.

Racist or xenophobic behaviour is intolerable in any circumstances but particularly when intended to incite hatred or violence. Our domestic law already reflects this. The current text of this proposal represents the best chance we are likely to see to establish a minimum level of effective, proportionate and dissuasive criminal penalties across the European Union. I would not wish to see this chance wasted, especially given that the Government is content with the substance of the proposal as now drafted. The aims of the Framework Decision send a powerful message to those who would seek to promote violence or hatred against any group of persons, when such behaviour is deplored throughout Europe.

The Presidency has also made it clear that, in the light of the consensus now emerging among Member States, it will not delay seeking a general approach on the text until the next JHA Council in June and intends, instead, to capitalise on that momentum. We therefore fully expect them to push for a general approach this week as was emphasised to me by the German Justice Minister in my own recent conversations with her.

Against that background, as I have said previously, blocking a general approach at this stage would seriously damage our relations with the current Presidency, who have been very helpful on this matter already, and may impact on future negotiations, to the UK's overall detriment.

As outlined In Vernon Cooker's letter of 12 April, the Government position is that a general approach is a vital negotiating tool, allowing the Government to reserve the UK's position without having to block the progress of negotiations in the Council. Therefore, should the Presidency request a general approach at this weeks JHA Council, the UK will participate, whilst making it clear that, if the dossier has not cleared scrutiny on 18 April, we have a parliamentary scrutiny reserve end that we reserve the right to re-open negotiations should that prove necessary. The Government considers that reaching a general approach does not constitute a breach of the scrutiny reserve resolution.

Cabinet Office could not see, on the basis of the Government guidance on scrutiny, an obvious reason for the Home Office to prevent the JHA Council on 19–20 April reaching a general approach on this dossier, as long as it is clear that the UK parliamentary scrutiny reserve remains. On this basis, reaching a general approach on this dossier would not represent a scrutiny override.

I attach a letter from the Director and Deputy Head of the Cabinet Office European Secretariat, Neil McMillan, which helpfully sets out the Government's position on the issue of general approach in relation to the scrutiny reserve.

Annex

LETTER DATED 16 APRIL FROM NEIL MCMILLAN, CMG, DIRECTOR AND DEPUTY HEAD OF EUROPEAN SECRETARIAT, CABINET OFFICE

I am writing in response to your request for information on whether reaching a general approach whilst scrutiny is on-going constitutes a breach of the scrutiny reserve resolution.

The issue of whether a general approach constituted a definitive point in the legislative process was last debated in the House Lords in 2002, following a report from the Lords' scrutiny committee. Following this a report was issued in 2003 by the House of Lords Committee recommending that the scrutiny reserve resolution should be amended to include reaching a general approach. This report included contributions from a range of participants, including Jimmy Hood, then chair of the Commons scrutiny committee. The Government's response to this point was:

> "The Government disagrees with the conclusion in paragraph 75 of the report that the term 'agreement' be defined to include a 'general approach'." As the Government has explained, most recently in the debate on Provisional Agreement in the House of Lords on 14 October 2002, a "general approach" does not equate to an agreement since it does not mark the end of a negotiation. The Government has made clear to its EU partners that in reaching a general approach it reserves the right to reopen the substance of the text at a future date. However, the ability to reach a general approach is a vital negotiating tool, allowing the Government to reserve the UK's position without having to block the progress of negotiations in the Council.

There was not further debate on other action taken by either House following this response.

In the light of these discussions the Government considers that reaching a general approach does not constitute an breach of the scrutiny reserve resolution. That said, Departments are encouraged, wherever possible, to complete scrutiny before a general approach is reached. We note that the Commons scrutiny committee has indicated that it may issue a report on reaching a general approach arguing that it constitutes political agreement. The Government will obviously wish to look at those arguments carefully and give its response at the appropriate time.

Printed in the United Kingdom by The Stationery Office Limited
5/2007 367429 19585