

HOUSE OF LORDS
MINUTES OF EVIDENCE
TAKEN BEFORE
THE SELECT COMMITTEE ON THE CONSTITUTION
MEETING WITH THE LORD CHIEF JUSTICE

WEDNESDAY 9 JULY 2008

LORD PHILLIPS OF WORTH MATRAVERS and SIR IGOR JUDGE QC

Evidence heard in Public

Questions 1 - 58

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WEDNESDAY 9 JULY 2008

Present

Bledisloe, V.
Goodlad, L. (Chairman)
Morris of Aberavon, L.
Norton of Louth, L.
O'Cathain, B.
Peston, L.
Rodgers of Quarry Bank, L.
Rowlands, L.
Smith of Clifton, L.

Witnesses: **Lord Phillips of Worth Matravers**, a Member of the House of Lords, Lord Chief Justice, and **Sir Igor Judge QC**, President of Queen's Bench Division, Lord Chief Justice Designate, examined.

Q1 Chairman: My Lords, may I welcome the Lord Chief Justice and Sir Igor to the Committee. Thank you very much for coming. May I congratulate them both on your behalf on their future posts. We are not being televised, but we are being recorded, so I would like, if I may, to ask you to identify yourselves for the record, as if it were necessary.

Lord Phillips of Worth Matravers: Thank you. I am Nicholas Phillips, I am Lord Chief Justice.

Sir Igor Judge: I am Igor Judge, I am President of the Queen's Bench Division.

Q2 Chairman: Thank you very much indeed. Perhaps I could start, Lord Chief Justice, by asking about the review of the administration of justice in the courts. In July 2007 you announced that the Judicial Executive Board had agreed that you would lay an annual review before Parliament in order to meet the needs of accountability to Parliament and the public in the light of the 2005 reforms. The first such review was published in March 2008. I think it would be of interest to know who received copies of the review and how much it has been

downloaded from the website? Has any assessment been made of its impact in increasing the “public understanding of the role of judges”?

Lord Phillips of Worth Matravers: Thank you. We printed 500 hard copies. They were, of course, placed in both the libraries of the House of Commons and the House of Lords, a copy went to Her Majesty, and copies went to the media. They have almost all gone. I think 80 of them were in Welsh.

Lord Rowlands: Hear, hear!

Q3 Lord Morris of Aberavon: For me!

Lord Phillips of Worth Matravers: Quite apart from that, we published the review on our website. We have had about 3,000 hits.

Q4 Chairman: Very, very good.

Lord Phillips of Worth Matravers: As to whether it has enlightened the general public as to the role of the judiciary, I find it rather difficult to comment on that. One suspects, having regard to the limited number of hits, that it has not had a direct impact on the general public but it is there, it will come to the attention of the general public in as much as the media make use of it over the year.

Q5 Chairman: Have you a view as to whether it would be helpful for there to be some formal follow-up to the review in Parliament from either the Government or Parliament, or both and, if so, what sort of form it might take?

Lord Phillips of Worth Matravers: I think it would perhaps depend upon whether any serious issues were raised by it. My own feeling is that appearing before the appropriate parliamentary committees to answer questions on the review may well suffice.

Chairman: Yes. Thank you.

Q6 Baroness O'Cathain: Can I ask a subsidiary on that point. You said about the 3,000 hits. When you launched the review, Lord Chief, did you actually have a press conference where you had a teach-in for the media, if you like, because you said it depends on the media? You have to bring them along with you, as you well know, I am sure. I am sure you could get them on-side to try and, if you like, disseminate further the contents of your review, thereby making the judiciary even more a real thing in people's minds.

Lord Phillips of Worth Matravers: Yes, I did have a press conference. I do not think I could describe it as a "teach-in". The press when they come to such a conference are rather more interested in making copy out of the matter you are discussing than being given a teach-in. Interestingly, after my appearance before the Commons committee one member of the press asked, "Would it be possible for us to have some instruction in some of the matters that we write about?" I think he was particularly interested in the conditions under which bail have to be granted. I said that we would be delighted to give the press instructions on anything they wanted us to talk about, provided it was appropriate.

Q7 Baroness O'Cathain: Do you not think you ought to set the initiative rather than getting the initiative from the press?

Lord Phillips of Worth Matravers: I think there may be a good point there. How many would turn up if we simply said we are going to give a bit of instruction is another matter.

Q8 Lord Rowlands: When we held our previous inquiry we got very preoccupied by the budgetary issues, particularly the cost of the court administration, budgets and so forth. I was, therefore, rather disappointed that in the annual review there was very little on the whole issue of budgets, except that there was a backlog of repairs, et cetera. Why did it not spell out more for laymen to understand what exactly the court administration costs are and net costs to the public, as it were? Where would we find that information?

Lord Phillips of Worth Matravers: That is probably a good point. I think one of the problems with this report was it was being drafted at the same time that there were continuing negotiations going on in relation to the budget of the Court Service and the role we judges would be playing in relation to that. Maybe we took our eye off the ball so far as informing the public was concerned.

Sir Igor Judge: If I may, I suspect that you would get the information that you need directly from the Ministry of Justice in the HMCS budget.

Q9 Lord Rowlands: I tried that and did not get very far, to be honest.

Sir Igor Judge: Shall I try and make inquiries, Lord Rowlands, and find out for you. Obviously the information is there, it is a question of whether it was put into the Lord Chief's annual report.

Lord Phillips of Worth Matravers: In future there will be the negotiations that are made provision for under the Framework Document and I would anticipate the result of those negotiations will be an important feature in any future review.

Q10 Lord Rowlands: I do not want to anticipate question four, but as we have mentioned the Framework Document. Again, in the context of the budget, are you satisfied that the Framework Document on the budgetary issues has resolved the tensions between yourselves and the ministers?

Lord Phillips of Worth Matravers: I am satisfied that it has done that. There is now, as you will have seen, a very detailed process under which the Lord Chief Justice is going to take part in discussions at all the vital stages. First of all, before a bid is made in each expenditure round to tell the Lord Chancellor how much the Court Service needs, when the Ministry then receives its allowance there will be further discussion as to how much of this is going to go to the Court Service, and once that is decided there will be further discussion as to what it is

going to be spent on. Once the Court Service has been allocated its budget it cannot have any taken away without going through the whole process again, which I think is very important.

Q11 Lord Rowlands: So you have achieved a kind of ring-fencing?

Lord Phillips of Worth Matravers: I think this is in reality a kind of ring-fencing.

Q12 Chairman: Lord Chief Justice, there was a perceived commitment to publish an annual review, but there is now a perception that such a commitment is diluted. Would you like to comment on whether or not there will be an annual review and whether or not it would be desirable for there to be a statutory requirement for an annual review?

Lord Phillips of Worth Matravers: I will start with the latter. We are very firmly of the opinion that it would not be desirable to have a statutory requirement for an annual review. We do not consider that would really be compatible with the independence of the judiciary as a separate arm of state. We do think it is appropriate that we should volunteer a view so that we are publicly accountable in that way, but it is important that we should be doing so of our own volition. As to how often it should be, I did not want to bind my successor is really the answer. I was not intending to suggest that we would not be producing it every year. Producing this particular review proved to be a very arduous task and in future we would not expect to produce anything nearly as detailed, this was really laying the foundations for future review. Personally, I think it probably would be a good idea that there should be a regular review each year but, as I have said, it is going to be a matter for Sir Igor and not for me.

Q13 Chairman: I believe the Supreme Court will be producing an annual review. Would your successor like to make a comment?

Sir Igor Judge: I am just troubled about the automatic assumption that if there is a review it should be annual. If we have something to report we should report annually. If we do not

have very much to report, I cannot myself see any sense in reporting when we have nothing to report. We will have some things to report every year, there will be all the formalities and all that information can be produced, but if we are producing what I would hope we will produce, a carefully structured, useful report with observation about what is going right and what is going wrong, it may not be sensible to produce it every year. Equally, if there is any area for concern, and there may be, then we should have to address that quickly without having to produce a complete review of everything. I am not committing myself, but I can see the force of the point that we are dealing with a public area and you must be able to take us to account whenever you want to.

Q14 Chairman: But if there is not too much to report then it will not be too arduous, will it?

Sir Igor Judge: No, but then there is the paper.

Chairman: The accountability point remains.

Q15 Lord Peston: I agree with you entirely, of course, there is nothing magical about the period of time called “a year”. Certainly in our House I am just astonished by how many annual reports I get which go straight into the wastepaper basket because they are reporting nothing other than using, as you say, a lot of paper and a lot of coloured ink and so on. Is there not a slight problem that if you only report when there is something serious then in a way you are alerting the public when you should not really be over-alerting them? In other words, a report that says, “It is serious but it is under control” might still get misinterpreted.

Sir Igor Judge: I am sorry. Your point is well made. I do not for a moment suggest that we should not have regular reports. If we do not have an automatic annual cycle there must be a facility to enable us to report if something dramatic arises. I am not anticipating the idea that a report should only be prepared when there is something dramatic that arises.

Q16 Baroness O'Cathain: Still on the review of the administration of justice in the courts. You noted that the media team of the Judicial Communications Office “is in the process of organising a small panel of serving judges who will be trained to undertake media interviews where it is necessary to provide an informed judicial perspective on issues of sentencing and process”. I think this probably arose with all the controversy around the *Sweeney* case.

Sir Igor Judge: Yes.

Q17 Baroness O'Cathain: How far has the JCO got with this initiative? Has the panel been set up? Have the judges been trained? How many interviews have been given so far?

Lord Phillips of Worth Matravers: We have a team of five now, I think, who have been trained. So far there have been four interviews, I think they were radio interviews, dealing with sentencing, dealing with bail and dealing with housing repossession.

Q18 Baroness O'Cathain: How do you think they went? Do you think they went better than they would have done by not giving the interviews?

Lord Phillips of Worth Matravers: I think they undoubtedly would have been probably better as a result of the tuition. That is not an easy question to answer. I certainly have not received any expressions of dissatisfaction about those interviews.

Q19 Baroness O'Cathain: Who decides when the panel actually speaks to the media, or one of the judges who have been trained?

Lord Phillips of Worth Matravers: Sometimes I would decide because I would consider that this is a situation that calls for a spokesman to say something, but in these instances in none of them was I directly consulted. What would normally happen is that there would be either a request of our Communications Office or our Communications Office would become aware of a situation where they felt that it was desirable that there should be a judicial spokesman

dealing with a topic. They would then brief the appropriate member of the team as to the topic, as to any other questions that might be thrown at them once they expose themselves to the media, and they would then give the appropriate interview.

Q20 Lord Rodgers of Quarry Bank: If I may, I would like to squeeze in a question which is related both in relation to media interviews and also your report about relationships between the executive and the judiciary. I am referring to a report in all the papers yesterday about knives. There was a very full report which emerged, although it refers to what Sir Igor is going to say if he has not said it yet, presumably it was explained now rather than later. Also, in at least one report there are references to a further fresh review by the Justice Secretary, by the Lord Chancellor, together with the Home Office Secretary and also the Attorney. That raises the question of are they proceeding in parallel over the whole question of the future of knives. Will it be the case, and is it natural for this to happen, for the new Lord Chief Justice to discuss this matter at all? If not, how do we get such a harmony of view, if there is such, and who is going to deal with the media issues? Presumably either the Lord Chief Justice or your successor said the piece which led to yesterday's papers.

Lord Phillips of Worth Matravers: Can I start and then I will hand over to Sir Igor to deal with what he is reported, and I suspect to some extent misreported, to have said.

Sir Igor Judge: Yes.

Lord Phillips of Worth Matravers: So far as knives are concerned, guidance on sentencing from judges only comes appropriately in the course of a judgment hearing and appeal in a case involving the use of a knife, in which case that is a perfectly appropriate context for whoever is presiding over the Court of Appeal to give a guideline judgment, or, and this will take longer, the Sentencing Guidelines Council might be considering that issue. It would not be in any way appropriate for any judge to go on the radio or on television and say, "We have got a terrible problem with knife crime, we ought to be sending people to prison for longer",

for instance. That would be quite inappropriate. So far as government is concerned, government may be considering legislation to address knife crime. That would involve policy on which it would almost certainly be inappropriate for judges to comment. Judges might quite properly comment on the implications that a change in policy might have, for instance on judicial process, or even the effect this might have on the prison population.

Sir Igor Judge: I read the article in the newspaper yesterday - I think I might even be able to see which paper it was - and I did not recognise it as anything I have said recently, but about three or four weeks ago sitting in the Court of Appeal Criminal Division I gave a judgment in relation to four cases involving knife crime of different seriousness and expressed myself in what some called fairly robust terms. One, on the whole it is not a good idea for people who are carrying knives to be dealt with by way of a caution, the issue should be brought to a court for decision. Two, that sentences in relation to knife crime should be deterrent sentences. I did not use that actual word, I do not think, but sentences which were at the top end of the appropriate range. The appropriate range, of course, depends on the particular crime. There is just the bare carrying, the use and so on and so forth. That article is dealing with something that I said sitting in court, as I said, about three or four weeks ago. It made lots of headlines at the time and then went to sleep again and was resuscitated yesterday.

Q21 Lord Rodgers of Quarry Bank: When the article says: “Every magistrate in England and Wales is to be sent a warning from the next Lord Chief Justice that knife crime is reaching epidemic proportions”, you do not intend to send out any such letter to the magistrates?

Sir Igor Judge: No, I do not.

Q22 Lord Rodgers of Quarry Bank: Thank you.

Sir Igor Judge: If, however, somebody sends them a copy of my judgment then the copy of my judgment will be sent, but I know nothing about any plan.

Q23 Lord Morris of Aberavon: I did not see the article, Sir Igor, but I did read the reports of your judgment. There is a rather confused picture regarding the guidance certainly from the Sentencing Guidelines Council regarding knives. Do I presume the media team would cover the activities of the Sentencing Guidelines Council? Perhaps you might agree that the picture is not entirely clear to the public in view of the contradictory newspaper reports that we have as regards the intentions of the judiciary so far as knives are concerned.

Lord Phillips of Worth Matravers: The first question, would the media team cover this, I think the answer would be no. If comment is called for, it ought to come from the Sentencing Guidelines Council itself and on the Council we have our own adviser on relations with the media. Secondly, the Sentencing Guidelines Council lays down long-term guidelines seeking to achieve proportionality and uniformity of approach, not to dictate individual sentences but looking at the longer term. You can get what may be a shorter term situation where a particular type of offence suddenly becomes prevalent, or is shown to be prevalent, which may call for a faster reaction than the Sentencing Guidelines Council is capable of. In that kind of situation it is perfectly appropriate for the President of the Queen's Bench Division or an appropriate member of the Court of Appeal presiding in the Criminal Division of the Court of Appeal to give the kind of judgment that Sir Igor gave.

Sir Igor Judge: May I just add, it so happens that I am seeing the Sentencing Guidelines people this week simply so that we can iron out where there seems to be public misunderstanding and I would expect that by the end of the week the position will be clarified. There is no problem. There is, in fact, no confusion. I do not think there is any uncertainty. I suspect the confusion has been added to by the issue yesterday by the Sentencing Advisory Panel of a very broad paper on the whole issue of sentencing which is

not a Guidelines Council paper but a Panel paper and that has got into the mixture, so the cake that is being produced has rather a lot of inappropriate excrescences.

Q24 Viscount Bledisloe: Going back to the Framework Document, when you made your speech in Melbourne, Lord Chief Justice, you said: "...it is reasonable for us [the judiciary] to be prepared to account for the manner in which we perform our share of the partnership". How do you envisage that happening? In particular, how do you envisage Parliament holding the Lord Chief Justice to account for his role in that service?

Lord Phillips of Worth Matravers: The accountability of which I was speaking was explanatory accountability and by producing the review and by coming before committees to answer questions about it, it seems to me that I am going a long way to providing that explanatory accountability. Of course, I also had the press conference, so that is more dealing with explanatory accountability to the general public.

Q25 Lord Rowlands: The draft Constitutional Renewal Bill would make a number of changes to the judicial appointments system in England and Wales. Given that the new system has not been operating for very long, do you think any of the provisions in the draft Bill are premature?

Lord Phillips of Worth Matravers: No, I do not. The system has been running long enough to demonstrate a number of teething problems. Those teething problems, to some extent, have been problems that have resulted in delay. Those matters, I think, can be put right. For instance, junior appointments at the moment have to be approved by the Lord Chancellor and that has proved to be really something of a formality, but a formality that takes time. The Lord Chancellor cannot have personal knowledge of individual candidates for junior appointments at the judiciary unless he maintains a huge department to second-guess the Judicial Appointments Commission. In that respect it seemed to us it would be better if the

reality was not recognised and he did not have a role to play there. Equally, the Prime Minister only has a formal role in judicial appointments but it is a role that can delay the appointments, so what is the point of that particular role rather than leaving it to the Lord Chancellor to make recommendations.

Q26 Lord Rowlands: So you are content with the Bill as drafted in respect of judicial appointments?

Lord Phillips of Worth Matravers: There are some proposals with which we do not agree. Those, I think, are proposals which would give the Lord Chancellor more control over the Judicial Appointments Commission. He is already in a position to give guidance. He has not availed himself of that power yet, and we do not consider it would be appropriate that he should, for instance, and this is a suggestion, be setting some kinds of targets for the Judicial Appointments Commission. The statute lays down the criteria for judicial appointments and to impose targets on top of those criteria would tend to make it very difficult for the commission to fulfil its statutory mandate.

Q27 Lord Morris of Aberavon: Initially, Lord Chief, there was some criticism, anecdotal evidence, of delays in judicial appointments and obviously the new body was running in. Have they now caught up? Are there significant delays now? We have heard of certain posts which have been empty for some time. What is the position to date? Are things going smoothly now?

Lord Phillips of Worth Matravers: Things are going much more smoothly now. The most notable problems arose in two areas. There was a competition for the Circuit Bench which ran into a bit of technical difficulty which had to be sorted out and that resulted in delay. There are also problems where a particular post crops up unexpectedly, and Senior Circuit Judge positions are a good example of that. We have had some real problems and very long

delays in filling those individual posts because the Commission simply did not have the capacity at short notice to run a competition. They have now addressed that and we are hopeful that we are not going to have that problem any more. I am optimistic that the delays that have taken place in the past are going to be a thing of the past.

Q28 Lord Morris of Aberavon: Compared to the situation before the JAC was set up, are appointments now as speedy as they were before or slightly more delayed?

Lord Phillips of Worth Matravers: They are more delayed in one particular respect, and I am not sure that one can avoid it but it is a very pertinent one at the moment. I was appointed, or am to be appointed, to replace Lord Bingham as the senior Law Lord. That involved quite a lengthy appointment process because it is a United Kingdom appointment, so the Judicial Appointments Commission and equivalents in Northern Ireland and Scotland have to be consulted and so on. One could see that the appointment was going to be necessary because Lord Bingham is retiring when he reaches his retirement age. It took a long time for that process to go through. That process having been concluded and my appointment announced, it then becomes apparent we need a new Lord Chief Justice, and so the process of appointing a Lord Chief Justice then begins, and that takes a long time too. The new Lord Chief Justice is announced and then it becomes apparent we need a new President of the Queen's Bench Division. In the old days, the Lord Chancellor, after consulting, would have sat down with senior members of the judiciary and discussed who was going to fill each slot, so it could be done once-and-for-all on a single occasion. The current process really has given rise to some difficulties. We hope that everything will be in place by 1 October but it can be a rather slow process.

Chairman: Critical path analysis.

Q29 Baroness O'Cathain: On that basis, I know one should not because the judiciary is way up there, you are not supposed to ever suggest anything to them that might come from something so low down below as business, but personnel planning and executive appointments planning was always the mark of a very good organisation and, in fact, people used to be groomed for that, using the term properly, for promotion and seeing where people were likely through age to move on or move sideways. In fact, sometimes you see six or seven names for a box and way out for somebody who will not be retiring for another three or four years, but those six or seven names might also be for other boxes in the pecking order. Something like that, that has always worked in industry and business, in large corporations, is there any merit in looking at something like that so that people who are in charge of the judicial appointments, and I know we should not really be addressing this to you, the Judicial Appointments Commission, should be aware that things will happen, like somebody will die suddenly or something else might happen or a new position is created, and instead of having a huge, long drawn-out process looking at every name in the sphere, so to speak, there would be an easier way through it?

Lord Phillips of Worth Matravers: Two points. As far as the process I was talking about, first of all replacing the senior Law Lord then Lord Chief Justice then the President of the Queen's Bench Division, I cannot see any easy way of amalgamating that process. Certainly it would need legislation because there are different panels responsible for the different appointments, to start with. The point you make about longer term planning is a very valid point and one that has been concerning us. Judges who are appointed now have to retire at the age of 70 and it does not leave very long for a judge to work his or her way up from High Court to Court of Appeal, maybe the Supreme Court or Heads of Division. It seems to us when we have been discussing this that this does call for a bit of forward planning so that one is looking at the first stage at those who are potentially highfliers who are going to get to the

top and making sure that when promotions are considered, those get promoted in sufficient time to get the experience they need to reach maybe the Supreme Court.

Q30 Viscount Bledisloe: Two questions on that. Firstly, is not one of the difficulties of Lady O’Cathain’s very sensible idea that in industry you assume that everybody wants to be promoted whereas the Judicial Appointments Commission is not allowed to look at anybody unless they have actually applied, so the exercise might be rather vain because some of the people you were considering might say they did not want it? Secondly, does not the fact you have given us about your replacement to Lord Bingham demonstrate that there would have been a very serious problem had Lord Bingham unfortunately dropped dead overnight?

Lord Phillips of Worth Matravers: There would obviously be an emergency if somebody who holds an important position in the judiciary dies overnight. What then has to happen is you have to move as fast as you can applying the statutory process and in those circumstances one can move with a degree of speed, particularly if it is a very senior appointment because the panel that makes the replacement appointment is a small one and the catchment area in which it would be looking is a relatively small one. I think the suggestion was really focusing on promotion so that your starting point would be those who already have judicial appointments. I said to all the High Court judges that I would proceed on the basis that they wished to be considered for an appointment in the Court of Appeal unless they informed me to the contrary and, by and large, I think judges do wish to be considered for promotion; not always.

Q31 Viscount Bledisloe: A different question. You were referring to the removal of the power of the Lord Chancellor over appointments below the level of High Court.

Lord Phillips of Worth Matravers: Yes.

Q32 Viscount Bledisloe: You and the Judicial Appointments Commission take the opposite positions on that, do you not?

Lord Phillips of Worth Matravers: We do. I think they are taking a constitutional position and I am taking a pragmatic position, and I have always been a pragmatist. We are not taking the Lord Chancellor's control away altogether. If he formed the view that there had been something wrong with the process he could then challenge the entire process and that would remain open to him. All we are suggesting is that there is no point in his having to approve individual appointments. Constitutionally one may say what is the difference between that and a High Court appointment, but in practice he simply has not got any value to add to the process.

Q33 Viscount Bledisloe: So you are content with a situation where no-one in government is answerable, even theoretically, for non-High Court Appointments?

Lord Phillips of Worth Matravers: I would be, yes.

Q34 Lord Smith of Clifton: The draft Bill would also give the Lord Chancellor the power to remove judicial offices from the list of posts in England and Wales that must, under the Constitutional Reform Act, be filled following a selection process by the JAC. Jonathan Sumption QC, a Judicial Appointments Commissioner, told the Joint Committee that the JAC accepted the objective of making it easier to redeploy existing judicial office holders to certain posts without making them go through a full JAC competition, but that they had "serious concerns" about the proposed mechanism because it would "entitle the Lord Chancellor to remove any schedule 14 office and basically resume the appointing power himself in any circumstances whatsoever. It appears to us that this is completely inconsistent with the whole rationale for creating an independent JAC in the first place. We think that the

redeployment problem can be tackled by a much less extreme form of legislation.” Do you share the JAC’s concerns about the breadth of this power?

Lord Phillips of Worth Matravers: Yes, we do, it goes too far. It in theory would give the Lord Chancellor power to remove the entire schedule 14 list from the Judicial Appointments Commission. It is inconceivable he would do so but it does not seem desirable to give him the theoretical power to do that. What we are concerned about is that there are on that list a number of appointments, and particularly appointments on various tribunals, which are filled by serving circuit judges. They do not get paid any more if they are allocated to a tribunal, they serve therefore a limited period and then they have to be replaced. It does not seem to us it makes much sense to say there has to be a competition for these. Sometimes they are not very keen to go anyway. So really it ought to be dealt with as a matter of deployment; it does not involve promotion. The Judicial Appointments Commission probably, if it is going to add value to this process, is going to make it quite arduous. It would be better if they could identify those in particular posts and say we do not need a competition for these posts, they can be dealt with, just as a lot of other posts to which I deploy judges are dealt with, without the involvement of the Commission.

Lord Smith of Clifton: Thank you. I am very glad to hear it.

Q35 Lord Rowlands: There has been some criticism of creating a two-tier system where by implication the appointments below High Court count for rather less than those above, which is not a message you would want to send out.

Lord Phillips of Worth Matravers: I am not sure. I think probably they do, do they not? High Court judges have a jurisdiction which is much more significant in some respects than judges on the circuit bench or district court judges. Their appointments are I think more important and it seems to me right that at that level the Lord Chancellor should have an

involvement so that if he should be advised there is some reason for questioning a particular appointment he should be able to do so.

Q36 Lord Rowlands: I was quoting Professor Dame Hazel Genn, a Judicial Appointments Commissioner. You do not share her view?

Lord Phillips of Worth Matravers: I must respectfully disagree about that aspect.

Q37 Viscount Bledisloe: Can I put the contrary point which I used to put to one of the Lords of Appeal? That actually the county court bench which has daily contact with ordinary members of the public is in fact rather more important than the Court of Appeal or the Supreme Court where contact with the public is really very small, and that people's faith in the judicial system depends much more on the adequacy of the more junior appointments?

Lord Phillips of Worth Matravers: I think it depends on your starting point and how you define what is important. Obviously they have an enormous importance so far as contact with the public is concerned because they are the judges who are coming into daily contact with the public in a way which certainly members of the Court of Appeal do not; we are dealing with appeals from their decisions. So to that extent one can say yes, so far as the direct impact on the public is concerned and the way we run our judicial system, those judges who are dealing directly with the public are more important. But if you are looking at the global picture and saying, "Who is in a position to have a more significant effect on the way the country runs" – "runs" is not quite the right word, judges are not concerned with running the country – a decision of the Court of Appeal or the House of Lords/Supreme Court can have immense implications for the country as a whole, viz the recent decision that said that anonymous witnesses were not compatible with a fair trial under the Human Rights Convention.

Chairman: Thank you very much. Supreme Court appointments. Lord Peston?

Q38 Lord Peston: You have answered quite a lot of the question I was supposed to ask you earlier but can you take me through it step by step. At the moment you are still the Lord Chief Justice?

Lord Phillips of Worth Matravers: Yes.

Q39 Lord Peston: Although I did see you attending the Law Lords at least once a few weeks ago to see what was going on.

Lord Phillips of Worth Matravers: I sit occasionally with the Law Lords.

Q40 Lord Peston: So the first question is, when will you cease to be Lord Chief Justice?

Lord Phillips of Worth Matravers: On 1 October, or 30 September more accurately.

Q41 Lord Peston: This year?

Lord Phillips of Worth Matravers: Yes.

Q42 Lord Peston: And then you will become the Senior Lord of Appeal in Ordinary?

Lord Phillips of Worth Matravers: Yes.

Q43 Lord Peston: Do we know, I have forgotten, when the Supreme Court will come into operation?

Lord Phillips of Worth Matravers: We know that the Supreme Court is intended to come into operation on 1 October next year.

Q44 Lord Peston: So that gives us the progression?

Lord Phillips of Worth Matravers: Yes and the change is automatic under the statute. The senior Law Lord automatically becomes President of the Supreme Court.

Q45 Lord Peston: Nonetheless your appointment is historic in a sense, because we have never had a Supreme Court before, but you have been given both this job and told you will be the President?

Lord Phillips of Worth Matravers: It is the statute which says that providing I am still the senior Law Lord when the Supreme Court comes into existence I will turn into the President.

Q46 Lord Peston: The process of getting you appointed in the first place involved this committee you told us about and you also referred, I thought at first apropos of other appointments, to the relevant criteria being in statute for those appointments. Are the criteria for your appointment written in statute?

Lord Phillips of Worth Matravers: The statutory requirements as far as appointing judges is concerned are pretty simple. The appointment has to be on merit and that is what I was referring to when I was talking about the Judicial Appointments Commission having a statutory mandate or criteria in relation to their appointments. It is spelt out absolutely clearly, you appoint on merit, you cannot have a requirement that X per cent of those you appoint are criminal for instance.

Q47 Lord Peston: I understand that, but there is nothing more in the legislation other than “merit”? It does not say “by merit we mean”?

Lord Phillips of Worth Matravers: No, there is not.

Q48 Lord Peston: Does that apply to Sir Igor as well? Are you also there on merit, end of story?

Sir Igor Judge: I hope so!

Lord Phillips of Worth Matravers: Yes, it does. Could I just add a cedilla, my appointment as a senior Law Lord was by the process which the statute lays down for appointing the

President of the Supreme Court. Now as a matter of strict law, that does not come into effect until we have a Supreme Court, but there was agreement between Lord Bingham and the Lord Chancellor that it would be appropriate that that machinery should be used to appoint his successor.

Q49 Lord Peston: Just before I come to you, Sir Igor, just to clarify it to a total lay person, is there a legal literature on what the word “merit” means? As a layman I can think of at least two concepts. One is the person is a brilliant lawyer but the other is the person has very sound judgment, and the two do not seem to me to be the same. In other words, if I were the lay person on one of these committees, I might well say that X is the better candidate, if that is what we are doing, because he, she seems to show sound judgment even though Y seems to know more about the law.

Lord Phillips of Worth Matravers: There is no statutory definition of merit, it is really a matter for the relevant body, which would normally be the Appointments Commission, as to the elements which go into make a meritorious candidate. At the same time for a particular vacancy there may also be other specific requirements for a particular expertise in a particular area which have to be considered.

Chairman: The seminal work on the rise of the meritocracy says that merit is IQ plus effort.

Q50 Lord Peston: Sir Igor, was your experience pretty much the same?

Sir Igor Judge: There was what I would describe as a job description provided both for those who were consulted and of course for the Judicial Appointments Commission panel which undertook the process. There is a job description currently available for the President of the Queen’s Bench Division who will replace me. That job description has been at least partly drawn up in the light of the fact that I am now moving to be Lord Chief Justice and I will take some of my own current responsibilities with me as Lord Chief Justice so we will

need a different job description. But there is a job description available – I do not know whether it is common knowledge but anyway there is one and there was one – and there is one for the President of the Queen’s Bench Division.

Q51 Lord Peston: Are you interviewed as well?

Sir Igor Judge: I was.

Q52 Lord Peston: You were?

Sir Igor Judge: Yes.

Lord Phillips of Worth Matravers: I was not.

Q53 Lord Peston: What is lying at the back of my mind, which you can probably guess, is the extraordinary contrast between your experiences and what happens when a member of the US Supreme Court gets chosen. Much as I admire the American constitutional system the contrast, again speaking as a layman, just seems to me to be entirely right on our side as opposed to theirs.

Lord Phillips of Worth Matravers: I think we would both agree with that!

Chairman: Counter-Terrorism. Lord Morris?

Q54 Lord Morris of Aberavon: Some of us have come hot foot from discussing the Second Reading of the Counter-Terrorism Bill last night. I am not going to ask you about the merits, as that is the word we are talking about, of the 42 day period which has been proposed, but what I want to know is the implications of having a parliamentary debate during the course of an investigation and the fears attached to that. I am not asking you about how a judge will decide in a particular case but in this unprecedented situation of a parliamentary debate, which would be very wide ranging according to the indications given by the Home

Secretary, could that cause as a general matter problems about a fair trial and an abuse of process argument?

Lord Phillips of Worth Matravers: Less frequently now than used to be but there is quite often an application made to a judge on behalf of a defendant that it is impossible to have a fair trial because it would be impossible to get a jury which has not been biased by what they will have read or seen in the media. It is very rare that a judge accedes to such an application. Judicial experience tells judges first of all that if there has been a significant period of time between something being in the newspapers and the trial the likelihood is that the jury will have forgotten all about it. Secondly, experience tells us that juries are very good at putting out of their minds, or out of consideration, matters they may have read in the papers some months before. The first thing which happens in any criminal trial is that counsel for the prosecution gets up with all the majesty of the law and tells the jury what the prosecution case is about the defendant, and nobody suggested that is unfair prejudice as far as the jury is concerned. The trial then proceeds. So it would only be in an extreme situation that facts which might have been stated in debate in the House subsequently reported by the press could lead to an application that it is no longer possible to have a fair trial. I imagine there would be precautions anyway taken by way of anonymising names and so on in debate but I am not conversant with the details of what is proposed.

Q55 Lord Morris of Aberavon: I appreciate, Lord Phillips, the issue of delay between a particular press reporting and an actual trial, and when I was Attorney one had issues of contempt to consider, sometimes happy and sometimes unhappy experiences in applications to the Court of Appeal. There it is. Is there any parallel you can think of where in the middle of an investigation there is a parliamentary debate, whatever the guidelines, which was triggered off by a specific case and sought to be justified by the Home Secretary and inevitably there would be not only publicity but the whole atmosphere that this is an

extraordinary situation calling for special measures and that in turn would make it difficult to have a fair trial?

Lord Phillips of Worth Matravers: I do not think that I am really competent to give an answer to that question; it would call for quite a lot of historical research. I did preside over a trial in which two of the defendants were alleged to have conspired with the late Robert Maxwell; it was after his death. I have not researched what may have been said in Parliament about Robert Maxwell but I suspect he was the subject of some parliamentary discussion which may well have been reported.

Q56 Viscount Bledisloe: I would like to ask you a question of which I am afraid you have received no warning, and that is about the funding of civil litigation. First of all, is it right that the funding of criminal legal aid and the funding of civil legal aid comes from the same source and that, as the criminal legal aid consumption goes up, so only the residue is left for civil legal aid? When the amount needed for criminal litigation is really a product of the activities of the Government and the police, is it right that civil legal aid should be eroded by that? Slightly related, what is your general view of the desirability and efficacy of contingency fees?

Lord Phillips of Worth Matravers: On the first one, I think all legal aid comes out of the Ministry's budget. I am not aware of any instance of the Ministry saying, "We have to cut back on civil legal aid because we have had an overspend on criminal legal aid." There has been an instance when the Ministry has said they have to make economies – they call them "efficiency measures" – because of the expenditure which has taken place on criminal legal aid. There has however been a cut-back on civil legal aid, particularly in the area of personal injuries, on the basis that this is replaced by the conditional fee system. The conditional fee system is not a perfect replacement for civil legal aid, you can get up to double what would be the appropriate fee as an enhancement for success if you agree to act on a basis you will

get paid nothing if you lose. You are not going to be prepared to accept instructions on that basis unless the prospects of winning look pretty rosy. That means that cases where there is a very strong case are likely to go for trial because there will be lawyers who are prepared to act, but sometimes you will have a case which ought to go to trial which is not all that strong but it does raise an important issue of principle. The conditional fee system does not cover that. I know the Master of the Rolls at the moment is very concerned about the whole area of fees and at the moment he is conducting an inquiry into it but we have not got a perfect system of public funding of civil litigation.

Q57 Viscount Bledisloe: It can only be anecdotal but are you saying that contingency fees in certain circumstances lead to abuses of process by the contingency fee lawyer?

Lord Phillips of Worth Matravers: There is a concern about this and this is why it would have been unlawful to have such a system in the past. I have not come across any case where it is suggested that because the lawyer was only going to get paid if he won, he has behaved in an improper or objectionable fashion.

Sir Igor Judge: My position is exactly the same. Very suspicious but no evidence.

Q58 Chairman: Lord Chief Justice and Sir Igor, can I thank you very much on behalf of the Committee for joining us this morning and for the evidence you have given us. Thank you very much indeed.

Lord Phillips of Worth Matravers: Thank you.