



House of Lords
House of Commons
Joint Committee on Human
Rights

Proposal for the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010

Fifth Report of Session 2010–11

*Report, together with formal minutes and
written evidence*

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Summary

Remedial Orders are secondary legislation made under the Human Rights Act 1998. They are used to remove incompatibilities with the European Convention of Human Rights (ECHR) in primary legislation identified by either domestic courts or the European Court of Human Rights (ECtHR). For every draft Remedial Order proposed by the Government, we are required to report to each House our recommendation as to whether a draft Order in the terms proposed should be laid before Parliament, and any other matter arising from our consideration of the proposal.

A proposal for a draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010 was laid before Parliament on 26 July. The purpose of the draft Remedial Order is to remove the incompatibility in Section 19 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 declared by the domestic courts in *Baiai v Secretary of State for the Home Department*. Section 19 creates a Certificate of Approval scheme involving people subject to immigration control. This scheme prohibits people subject to immigration control from marrying other than in a Church of England religious ceremony without authorisation. In 2006, the domestic courts ruled that the exemption of Church of England marriages is incompatible with the right to marry without discrimination on the grounds of religion (Articles 14 considered with 12, ECHR). The draft Order repeals all the provisions of primary and secondary legislation required to operate the scheme.

Subject to a minor drafting issue, we recommend that a draft order in the same terms as the proposal be laid before both Houses. In our view, the proposal would remove the incompatibility identified by the domestic courts.

Use of the Remedial Order process

We agree that the two conditions for the Minister using the Remedial Order process, that the provision has been declared incompatible with a Convention right and that no further appeal is possible, have been met.

The Government argued that the incompatibility should be addressed through the Remedial Order process for three reasons: the lack of available time in the Government's legislative programme for primary legislation to be introduced to tackle this issue; the need to deal with issues relating to discrimination swiftly and the four year delay in remedying the compatibility. We agree these are sufficiently compelling reasons to justify proceeding by way of Remedial Order.

Scope of the proposal

We have considered whether it is necessary to abolish the Certificate of Approval scheme in order to remove the identified incompatibility with Convention rights. The option to abolish the scheme is broader than the alternative of extending the scheme to include Church of England marriages, which would also address the incompatibility. The previous Government, however, failed to find a politically and legally acceptable method of extending the scheme, after spending a significant time discussing the issue with the Church of England. The Government has also explained that modifications to the scheme to introduce

human rights safeguards have meant it is no longer as effective in meeting its objectives as was originally hoped. In these circumstances, we agree that it is necessary to abolish the scheme in order to remove the incompatibility identified by the domestic courts. The Government should provide further information on its policy and legislative intentions to deal with sham marriages.

We also recommend that—in light of the abolition of the scheme in relation to civil marriages—the inclusion of provisions to abolish the application of the scheme to civil partnerships is appropriate in order to avoid further violations of Convention rights.

Use of the non-urgent procedure

Using the non-urgent instead of the urgent procedure for a Remedial Order provides for parliamentary scrutiny of the Order, before it comes into force, but slows the redress of the incompatibility. Although we note that there has been a four-year delay in remedying the incompatibility, we welcome the Government's decision in this case to use the non-urgent procedure. This strikes a reasonable balance between the need to remedy the violation without further delay and for effective parliamentary scrutiny.

Drafting issues

We have drawn a single technical drafting issue to the attention of officials. In order to have its desired effect, we consider that the draft Order could be amended to repeal Article 6 of the Immigration and Asylum and Nationality Act (Commencement No 6) Order 2007.

Other matters arising

Four years have elapsed since the original declaration of incompatibility by the domestic courts in 2006. We regret the delay in remedying the incompatibility in this case, given that the legal steps proposed in the draft Order are not complex.

In future cases, we recommend that any departments considering the use of the Remedial Order process consult the predecessor Committee's guidance on the making of Remedial Orders. We also recommend that full information on the ongoing impact of a violation subject to a proposal for a Remedial Order should be included with the required information.

A challenge to the Certificate of Approval scheme is currently pending consideration by the European Court of Human Rights in the case of *O'Donoghue v UK*. We recommend that the Government should accept any ECtHR suggestion to treat this case as a pilot judgment and that they proactively consider mechanisms to respond to pending applications in clone cases should the applicant in *O'Donoghue* be successful. The Government should also consider how to proactively manage any applications for further compensation should the applicants in *O'Donoghue* be awarded just satisfaction.

1 Recommendation

1. Remedial Orders are secondary legislation made under the Human Rights Act 1998 (HRA) to remove an incompatibility with Convention rights in primary legislation identified by either our domestic courts or the European Court of Human Rights.¹ After the domestic courts have made a declaration of incompatibility which is no longer subject to appeal, or a European Court of Human Rights judgment finding a violation becomes final, it is open to the Government to remove the relevant breach of the ECHR through the fast-track Remedial Order process. The Minister must consider that there are “compelling reasons” to use the Remedial Order process and “may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.”² The Minister can choose to use either an “urgent” or a “non-urgent” Remedial Order. A draft remedial order may not be laid before Parliament unless the person proposing to make the order has previously laid before Parliament a document which contains a draft of the proposed order and “the required information”.³

2. A proposal for a draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010 and the required information was laid before both Houses on 26 July 2010. Our terms of reference require us to report to each House our recommendation as to whether a draft order in the same terms as the proposal should be laid before Parliament, and we may also report on any matter arising from our consideration of the proposal.⁴ We issued a call for evidence on the Government’s proposal on 9 September 2010, the day following our first meeting in this Parliament. We have received two submissions: from the Equality and Human Rights Commission (EHRC) and the Immigration Law Practitioners Association (ILPA). Both submissions are supportive of the Government’s proposal.⁵

3. Subject to a minor drafting issue, which we explain below, we recommend that a draft Order in the same terms as the proposal for a draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010 should be laid before both Houses.

1 Section 10 and Schedule 2, HRA 1998.

2 Section 10(2) HRA 1998.

3 Para 3(1)(a) of Schedule 2, HRA 1998. The required information means (a) an explanation of the incompatibility which the order (or proposed order) seeks to remove, including particulars of the relevant declaration, finding or order; and (b) a statement of the reasons for proceeding under section 10 and for making an order in those terms (para 5, Schedule 2).

4 House of Commons Standing Order 152(B) and House of Lords Standing Orders, 2010, 72(c).

5 Ev 2 (Vol. II) and Ev 1 (Vol. II).

2 Background to our recommendation

The purpose and effect of the proposal for a draft order

4. The purpose of the proposal for a draft Remedial Order is to remove the incompatibility in Section 19 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 declared by the domestic courts in *Baiai v Secretary for State for the Home Department*.⁶

5. Section 19 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 creates a Certificate of Approval scheme involving people subject to immigration control. The effect of the scheme is to prohibit persons subject to immigration control from marrying (other than in a Church of England religious ceremony) without specific authorisation. In 2006, the domestic courts held that the exemption of Church of England marriages from the scheme is in breach of the right to marry without discrimination on the grounds of religion (Article 14 ECHR considered together with Article 12 ECHR) and have declared the provision to be incompatible with the ECHR to that extent.⁷

6. In addition to the declaration of incompatibility made in respect of this issue, the House of Lords has held that, in order for Section 19 to operate in a manner compatible with the right to marry guaranteed by Article 12 ECHR, it must be read, pursuant to section 3 HRA 1998, to ensure that permission in a Certificate of Approval should not be withheld:

[I]n the case of a qualified applicant seeking to enter into a marriage which is not one of convenience and the application for, and grant of, such permission not to be subject to conditions which unreasonably inhibit exercise of the applicant's right under Article 12 of the European Convention.⁸

7. The House of Lords concluded that the scheme had previously been applied in an arbitrary and disproportionate way which amounted to an interference with Article 12 ECHR. The House concluded that although the Certificate of Approval scheme could have operated in a way which was ECHR compatible, there were a number of factors which rendered its operation disproportionate:

- The fixed fee of £295 (or £590 where both parties require approval) was set at a level which could impair the essence of the right to marry for a “needy applicant”;⁹
- The practice of refusing applications for approval from anyone in the UK without leave to remain, or whose leave to remain did not total more than 6 months or whose leave had less than 3 months to run, amounted to an arbitrary and disproportionate interference with the right to marry guaranteed by Article 12 ECHR. This practice provided for no investigation of the genuineness of any proposal for marriage and treated every case in the same way, despite the motivation for the application. The justification for this approach was that

6 [2006] EWHC 1454, [2008] UKHL 53.

7 [2006] EWHC 1454, [2008] UKHL 53. In 2008, the House of Lords clarified that the declaration of incompatibility was limited to Section 19(1) and the discriminatory exemption of Church of England marriages from the scheme.

8 *Ibid*, para 32.

9 *Ibid*, para 30.

investigation of “sham” marriages was considered too expensive and administratively burdensome. The court considered that this blanket prohibition on the right to marry for some individuals—including those seeking asylum who may be in the country for some significant time before leave to remain is granted—was unjustifiable.¹⁰

8. The decision of the House of Lords to narrow the scope of Section 19 has a significant impact on the operation of the Act. In effect, it means that a Certificate of Approval cannot be refused unless the Secretary of State has evidence to illustrate that the marriage is a marriage of convenience. This introduces an element of investigation previously considered too expensive and administratively burdensome by the UK Borders Agency and the Home Office.

9. In its Explanatory Memorandum and required information paper, the Government explains that previous consideration of the extension of the scheme to Church of England marriages has been unsuccessful and the decision has been taken to use the Remedial Order process to abolish the Certificate of Approval scheme:

Given the difficulties in finding a satisfactory way of removing the incompatibility and concerns about the effectiveness of the scheme, the Government has decided that the only appropriate course of action in these circumstances is the removal of the Certificate of Approval scheme.

10. The effect of the draft Order is to repeal all of the provisions of primary and secondary legislation which are required to operate the scheme in the UK, in relation to both marriages and civil partnerships (the scheme was extended to civil partnerships by the Civil Partnerships Act 2004). (A Remedial Order may contain any such incidental, supplemental, consequential or transitional provision as the person making it considers appropriate and necessary to remove the incompatibility in question).¹¹

The Committee’s role

11. This proposal is the fourth occasion when the Remedial Order process has been used.¹² The first JCHR set a number of criteria and factors for its consideration of Remedial Orders and our predecessor Committee published guidance for departments on the making and use of the remedial order process.¹³ We welcome the helpful framework set by our predecessors and adopt it in this Report. Our role is to balance two objectives: the need to ensure that parliamentary scrutiny of Remedial Orders is commensurate with the fact that they amend primary legislation, and the need to ensure that breaches of Convention rights are remedied without delay.

¹⁰ Ibid, para 31.

¹¹ HRA 1998, Schedule 2, para 1(1)(a).

¹² Sixteenth Report of Session 2005-06, *Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006*, HL Paper 154, HC 1022; Twenty-ninth Report of Session 2005-06, *Draft Marriage Act 1949 (Remedial) Order 2006*, HL Paper 248, HC 1627; Ninth Report of Session 2003-04, *Naval Discipline Act 1957 (Remedial) Order 2004*, HL Paper 59, HC 477.

¹³ Fifteenth Report of Session 2009-10, *Enhancing Parliament’s role in relation to human rights judgments*, HL Paper 85, HC 455, Annex 1, paras 22-23; Seventh Report of Session 2001-02, *Making of Remedial Orders*, HL Paper 58, HC 473.

12. In respect of each Remedial Order proposed, the main judgement we make is whether the Minister has the power to make the Order under the HRA 1998. This involves answering a number of questions, including:

- Have the conditions for using the Remedial Order process (Section 10, HRA 1998) been met? (Has a violation of the Convention been identified by a declaration of incompatibility or an adverse judgment of the European Court of Human Rights?)
- Are the reasons for proceeding by Remedial Order rather than through primary legislation “compelling”?
- Have the Government produced the information required by Section 10 HRA 1998?
- Have the Government responded effectively to any further requests for information by the Committee?
- Does the proposal remove the incompatibility with Convention rights which it is designed to meet, and is it appropriate?
- Is the non-urgent procedure appropriate?¹⁴

13. We are also required to consider the technical questions usually asked by the Joint Committee of Statutory Instruments, which reviews all other delegated legislation. This must include whether:

- The Order imposes a charge on public revenues or requires a payment to be made to a public authority;
- There is doubt about whether the Government has the power to make the Order;
- An unusual or unexpected use is being made of the power;
- There are special reasons to call for elucidation of its form or purport; and
- The drafting is defective.¹⁵

14. It is evident that there is a significant overlap between some of the JCSI tests applied and the judgement we take in considering whether the proposal is within the scope of Section 10, HRA 1998. With this in mind we consider each of these questions below. There is one technical drafting issue which we draw to the attention of both Houses.

Use of the power to take remedial action

15. Section 10(1)(a) of the HRA provides that a Minister may take remedial action if “a provision of legislation has been declared under section 4 to be incompatible with a Convention right” and no further appeal is possible. In 2006, the High Court in *Baiai v Secretary of State for the Home Department* made declarations of incompatibility in relation

14 See for example, Sixth Report of 2001-02, *Mental Health Act 1983 (Remedial) Order 2001*, HL Paper 57, HC 472, para 18.

15 Standing Order 152B, House of Commons Standing Orders, April 2010 and Standing Order 73, House of Lords Standing Orders 2010.

to Section 19(3) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 indicating that the Certificate of Approval scheme was incompatible with the right to marry in Article 12 ECHR and discriminatory in so far as it exempted Church of England marriages (and so, in violation of Article 14 ECHR). The Government did not appeal the declaration of incompatibility made on the grounds of discrimination. Subsequently overturning the declaration of incompatibility made solely on the grounds that the scheme was incompatible with the right to marry (Article 12 ECHR), the House of Lords made a new declaration of incompatibility in 2008 intended to make clear that the incompatibility related only to Section 19(1) of the Act and the exemption for Church of England marriages. **We agree that it is open to the Minister to proceed by way of a Remedial Order in this case, since a declaration of incompatibility has been made and no further appeal is possible.**

Compelling reasons

16. The Minister may only proceed to use the Remedial Order process if he considers that there are “compelling reasons” to do so. As a matter of general constitutional principle, it is desirable for amendments to primary legislation to be made by way of a bill, to maximise opportunities for detailed parliamentary scrutiny. A number of factors might be considered “compelling” in favour of the Remedial Order process, including the need to avoid undue delay in removing breaches of the Convention, the impact of the violation on affected individuals and the legislative timetable.¹⁶

17. The Government considers the following reasons sufficiently compelling to justify the use of the Remedial Order process:

- there is no available space in the current legislative programme for legislation to deal with this issue;
- any issue relating to discrimination should be dealt with “swiftly”; and
- there has already been some delay in the implementation of the Government’s response to this declaration of incompatibility.

18. This issue has been outstanding without remedy for 4 years. We agree with the Government’s view that it is undesirable for the delay in this case to continue. Although the Government would have preferred to proceed by primary legislation, they state that there is no obvious space in the current or imminent legislative programme for this issue to be considered. In our view, the discriminatory basis of the violation, the delay in this case and the significant number of people who continue to be affected by this scheme annually (around 24,000 applications for Certificates of Approval were made in 2009)¹⁷, justify the use of the Remedial Order process. **We consider that the reasons given by the Government for using the Remedial Order process in this case are clearly capable of being “compelling reasons” for the purposes of Section 10(2) HRA 1998. In our view they are sufficiently compelling to justify proceeding by way of Remedial Order in this case.**

¹⁶ Seventh Report of Session 2001-02, *The Making of Remedial Orders*, HL Paper 58, HC 473, paras 32-33.

¹⁷ Ev 2.

Scope of the proposal

19. The Minister’s power to make a Remedial Order extends to any changes to the Asylum and Immigration (Treatment of Claimants etc) Act 2004 “he considers necessary to remove the incompatibility”.¹⁸ He may also make such incidental, consequential or transitional provisions he considers appropriate. This includes amendments to other primary or secondary legislation.¹⁹ We address two issues about the scope of the draft Order below.

Abolition or extension?

20. The simplest means of remedying the incompatibility in this case would be to remove the discrimination in violation of Article 14 ECHR by extending the Certificate of Approval scheme to Church of England marriages. As outlined above, the previous Government spent a significant time considering how this approach might be achieved before determining that this would not be possible and that abolition of the entire scheme should be proposed by Remedial Order. We must ask whether abolition of the Certificate of Approval scheme—as opposed to its extension—is “necessary to remove the incompatibility” declared in *Baiyai v Secretary of State for Home Affairs*.

21. In the required information, the Government explains the reason they consider that this approach is necessary as follows:

Given the difficulties in finding a satisfactory way of removing the incompatibility and concerns about the effectiveness of the scheme, the Government has decided that the only appropriate course of action in these circumstances is the removal of the Certificate of Approval scheme.

22. Neither the EHRC nor ILPA express any view on whether it is necessary to repeal the scheme to secure the incompatibility, but both are supportive of this approach. The EHRC explains:

The declaration of incompatibility in *Baiyai* was made because the marriage certificates of approval scheme operated in a discriminatory fashion against all those who were not members of the Church of England. In abolishing the Section 19 scheme, the Remedial Order does remove the incompatibility identified by the courts...In the Commission’s view, the terms of the draft order are adequate to meet the task it seeks to do. However, we await information from the Government on any proposals it intends to introduce to replace the discontinued scheme.²⁰

23. The required information does not explain what measures the Government intend to take to meet the original policy objective of the scheme. This was identified during the passage of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 as the need to prevent individuals using “sham” marriages to evade immigration control in the United Kingdom.²¹ The Government explain that they have reviewed the effectiveness of

18 HRA 1998, Section 10(2).

19 HRA 1998, Schedule 2, para 1(1) – (2).

20 Ev 2 (Vol. II).

21 HL Deb, 15 June 2004, Cols 682-685.

the scheme in the light of modifications made as a result of the judgment of the House of Lords. They take the view, in the light of this review, and the failure to secure a means to extend the scheme, that abolition is necessary to remove the violation of Convention rights in this case

24. We consider, in the light of the delegated nature of the Remedial Order process, that we must scrutinise closely whether the approach proposed by Government is necessary. There are only two alternatives in this case which will remedy the incompatibility. The first is extension and the latter is abolition. Given that the latter option is broader than the first, we consider that the Government has an obligation to justify its approach. In this case, the previous Government spent four years attempting to find a politically and legally acceptable means of extending this scheme to Church of England marriages and failed. Applicants under the Certificate of Approval scheme continue to be treated less favourably than Church of England members without justification. This discriminatory impact continues to affect a significant number of people and the Government has explained that modifications to the scheme – made to introduce human rights safeguards – mean that it is no longer as effective in meeting its objectives as the previous Government had hoped. Against this background, **we consider that it is necessary to abolish the Certificate of Approval scheme in order to remove the incompatibility identified by the domestic courts in *Baiai v Secretary of State for Home Affairs*.**

25. This judgment has been a finely balanced one, made on the basis of the information provided by the Government about the efforts of the previous Government to secure compliance by extending the scheme and on the continuing impact of the scheme on people affected. It remains our view that the Government should take a proactive approach to their responses to adverse human rights judgments, which should generally be designed to secure the rights of individuals affected by removing the incompatibility entirely and ensuring that future violations are avoided. However, when Ministers propose to use the Remedial Order process, they are required to show that their approach is “necessary” in the terms defined in the HRA 1998 and must justify their proposals. **Where there are alternative means to remove an incompatibility with Convention rights, the Minister must show why the Government’s approach is necessary and should give evidence why obvious alternatives are not. In a case such as this, where there appears to be a narrower approach possible, relevant factors will include: (a) steps taken to secure the alternative, narrower, approach; (b) the breadth of the Government’s proposal and justification for it; and (c) whether the Government’s approach will adversely affect a human rights enhancing measure or a measure which has human rights enhancing effects, despite the incompatibility concerned.**

26. The Secretary of State for the Home Department has made clear that the Government intend to revisit policies on immigration, and, specifically, on sham marriage.²² As a first step, the Government have introduced changes to existing immigration rules which introduce new language requirements for individuals travelling to the UK for the purposes of marriage.²³ In its evidence, ILPA told us that this proposal also raises human rights concerns, in so far as an English language test will have a disparate impact on people from

22 See for example, BBC News Online, *Theresa May pledges immigration abuse crackdown*, 5 November 2010.

23 *Migrants marrying UK citizens must now learn English*, Home Office, Press Notice, 9 Jun 2010; Statement of changes in immigration rules, Cm7944, 1 October 2010.

non-English speaking countries and may discriminate on the grounds of nationality or race.²⁴ We have no further information on how the current Government intends to meet the original policy intentions of the Certificate of Approval scheme, which was designed to prevent individuals using marriage to evade immigration controls. **We are satisfied that the proposal for a Remedial Order meets the statutory requirements stipulated by HRA 1998. However, in the light of the broader approach taken by the Government, we are concerned that Parliament should have certain additional information in order to help inform the decision of both Houses whether to approve the Order, and our decision as a Committee on whether approval should be recommended. In this case, we recommend that any draft Order repealing the Certificate of Approval scheme is accompanied by an explanation by the Government of any steps it intends to make to meet the original policy intention of the scheme. This information should include existing and planned measures or policy intentions and an explanation of the Government's view that those measures will be effective, proportionate and compatible with the human rights obligations of the United Kingdom.**

Extension to civil partnerships

27. Although the original declaration of incompatibility in this case extends only to the Certificate of Approval scheme as it applied to civil marriages, the scheme was extended to civil partnerships after their introduction in the Civil Partnerships Act 2004. The Explanatory Notes explain that the draft Order contains consequential amendments to abolish the scheme in so far as it applies to civil partnerships:

The Order will end the Certificate of Approval scheme in relation to civil partnerships in order to ensure that the obligation to obtain permission from the Secretary of State under the scheme does not remain in place for civil partnerships when it will not apply to marriages.

28. Since civil partnerships do not take place outside the civil process, there is no parallel exemption for Church of England proceedings in the Civil Partnerships Act 2004. In this way, the declaration of incompatibility could arguably be remedied without amendment to the Civil Partnerships Act 2004.

29. Our predecessor Committee was required to consider a similar issue in its Report on the draft Marriage Act 1949 (Remedial) Order 2006. In that case, the Government did not include consequential provision in the draft Order to deal with civil partnership since the underlying incompatibility related to the right to marry (Article 12 ECHR), which the Government did not accept extended to civil partnership. Our predecessors concluded that this approach proposed an overly narrow interpretation of the HRA 1998:

Omitting [the repeal of the provisions in the Civil Partnership Act 2004] would in our view have given rise to a new risk of incompatibility with Convention rights because it would have introduced a difference of treatment between marriage and civil partnership which would require justification...we consider [the Government's view that it cannot repeal these provisions by remedial order] to be based on too

narrow an interpretation of the power to make incidental, supplemental or consequential provision.²⁵

30. If the scheme were to remain in place, it is our view that the relevant provisions of the Civil Partnerships Act 2004 would most likely be open to a further declaration of incompatibility on the grounds that the application of the scheme to civil partnerships, but not civil marriages, was incompatible with the right to enjoy respect for private and family life (Article 8 ECHR) without discrimination (Article 14 ECHR). Against this background, **we recommend that the inclusion of provision to abolish the Certificate of Approval scheme in so far as it extends to civil partnerships is an appropriate consequential amendment. This wider approach is necessary in our view to avoid further violations of Convention rights and is an appropriate use of the power to make incidental, supplemental or consequential provision in paragraph 1(1)(a) of Schedule 2 of the HRA 1998, which is expressed in very broad terms.**

Remedying the incompatibility

31. **In our view the repeal of the Certificate of Approval scheme proposed in the draft Asylum and Immigration (Treatment of Claimants etc) Act 2004 (Remedial) Order 2010 would remedy the incompatibility identified in *Baiai v Secretary of State for the Home Department*.**

Required information and information provided to the Committee

32. Our staff received draft copies of the proposal and the required information shortly before the proposal was laid before Parliament on 26 July 2010, shortly before the summer recess. The Government is required to provide information relating to the incompatibility to which its proposed draft Order relates and a statement of its reasons for proceeding under the Remedial Order process.²⁶ **We are satisfied that the Government has provided the information required by the HRA 1998. Subject to a few concerns raised below, we welcome the full and timely information provided by the Government.**

Use of the non-urgent procedure

33. The Government propose to use the non-urgent procedure for this Remedial Order. The Explanatory Memorandum explains that while the Government acknowledges that “a significant number of people are still affected by the incompatibility”:

[T]he limited nature of the burden now imposed by the Certificate of Approval scheme, following steps taken to diminish its impact, mitigates against its use of the urgent Remedial Order process.

34. It goes on to explain that:

25 Sixteenth Report of 2005-06, *Proposal for a Draft Marriage Act 1949 (Remedial Order) 2006*, HL 154/HC 1022, para 31.

26 Paragraph 3(1)(a) of Schedule 2, HRA 1998. Schedule 2(5) provides that required information means “(a) an explanation of the incompatibility with the order (or proposed order) seeks to remove, including particulars of the relevant declaration, finding or order, (b) a statement of the reasons for proceeding under section 10 and for making an order in those terms.” The required information provided by the Government was laid before Parliament together with its draft proposal.

We have alleviated the effect of the incompatibility by suspending the application fee payable under the Certificate of Approval scheme in April 2009. Those who applied for a Certificate of Approval between 2005 and 2009 may be eligible for the repayment of the fee paid, if they can show that paying the fee caused real financial hardship at the time of payment....This formal ex-gratia repayment scheme comes to an end on 31st July 2010.

35. The previous JCHR set a number of criteria for its consideration of whether an urgent or non-urgent Remedial Order would be appropriate. These were:

- The significance of the rights which are, or might be affected by the incompatibility;
- The seriousness of the consequences for identifiable individuals or groups allowing the continuance of an incompatibility with any right;
- The adequacy of compensation arrangements as a way of mitigating the effects of the incompatibility;
- The number of people affected;
- Alternative ways of mitigating the effect of the incompatibility pending amendment to primary legislation.²⁷

36. In the light of the reading down of Section 19 by the House of Lords and the suspension of the fees applicable for a Certificate of Approval, the Government correctly identify that the impact of the scheme has been mitigated to a significant degree. The continuing impact of the scheme on those who are not exempt because they do not qualify for the discriminatory exemption offered to those able to undertake Church of England marriages is key to whether the non-urgent or urgent procedure should be used.

37. As our predecessor noted in its Report on the last Remedial Order, interferences with the right to marry (in this case, discrimination in access to the right to marry) is an example of the type of incompatibility which could have serious consequences for an individual's private life and personal and moral integrity. The impact on those individuals required to apply for a Certificate of Approval will vary greatly. All applicants will experience a personal impact in relation to the requirement to have one's decision to marry officially approved as genuine. If approval is granted, those applicants may have to delay their marriage as a result of time taken to process an application. If approval is refused, the impact will clearly be more serious, in that the individual and his or her partner will not be permitted to marry in the UK. In the light of the announcement that the scheme will be repealed individual plans for marriage may be on hold, awaiting the end of the scheme.

38. Unfortunately, the Explanatory Memorandum does not give any information on the application of the scheme after the decision of the House of Lords (for example, what guidance has been issued on the scheme; how many Certificates of Approval have been refused and how long it takes to process applications for Certificates of Approval). The

27 Seventh Report of 2001-02, *The Making of Remedial Orders*, HL 58/HC 473, paras 36 – 37.

Committee requested this information in a letter to the Minister and received a prompt response. This correspondence is published with this Report.²⁸

39. The Government correctly explains that “a significant number of people” continue to be affected by the incompatibility. In his letter the Minister identifies that 24,042 applications for a Certificate of Approval were received in 2009 and a further 23, 052 were made between January and September 2010. Although the time taken to process an application subsequent to the guidance of the House of Lords appears to have increased (from an average of 32 days in 2007 and 36 days in 2008 to 50 days in 2009 and 65 days in 2010), the average time taken to process applications remains relatively low. We were concerned to read however that the longest time taken to process an application following the House of Lords’ judgment was 366 days. Approval was granted in this case. Of the significant number of applications, a relatively low number of cases are refused. In 2009, of 24,042 applications, 1,517 were refused (around 6.3%). In 2008, around 3.9% of applications were refused.

40. We also asked whether individuals were removed from the UK while their applications were pending. The Minister explained that enforcement action was considered separately from applications for Certificates of Approval to marry. Since April 2008, 28 applicants (from 47, 926 applications since July 2008) have been removed before their application has been determined. While each of those removals will have an obvious personal impact on the applicant and his or her partner, there appears to be a relatively low risk that individuals will be removed while awaiting approval to marry.

41. Subject to concerns expressed below about earlier delay in this case, it is our view that the use of the non-urgent process in this case strikes a reasonable balance between the need to remedy the violation without any further delay and the need for effective parliamentary scrutiny. We welcome the Government’s decision to use the non-urgent procedure.

Technical issues: drafting

42. We have raised a single, minor drafting issue with officials. Article 2(3) of the draft Order proposes to repeal Section 25 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 for “all remaining purposes”. The draft Order explains that Section 25 was previously repealed by Section 50(3)(2) of the Immigration Asylum and Nationality Act 2006. That provision was brought into force by a commencement order²⁹ which included a savings clause for the purposes of maintaining the power of the Secretary of State to make regulation in relation to the Certificate of Approval scheme. The savings clause provides:

The repeal by this Order of section 25 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 shall not affect the power of the Secretary of State to make regulations [which relate to the Certificate of Approval scheme][Emphasis added]

²⁸ Ev 1 and 2.

²⁹ The Immigration, Asylum and Nationality Act 2006 (Commencement No 6) Order 2007, SI 1109/2007.

43. On our reading of this provision, in order to have the intended effect, the draft Order could repeal the relevant savings clause. Similar savings are made for the Isle of Man by Order in Council, which for the sake of completeness, should also be repealed.³⁰ **In the interests of completeness, we consider that the draft could be amended to provide for the repeal of Article 6 of the Immigration and Asylum and Nationality Act 2006 (Commencement No 6) Order 2007 and the equivalent savings clauses for the Isle of Man in Immigration (Isle of Man) Order 2008. We have drawn this drafting issue to the attention of officials and Parliamentary Counsel. Subject to this minor technical concern, we recommend that the draft Order should be laid before both Houses for their consideration as proposed.**

³⁰ Article 18, Schedule 8(9), S.I. 2008/680.

3 Other matters arising

The making of remedial orders

Delay in responding to adverse human rights judgments

44. When the JCHR scrutinised Section 19 during the passage of the 2004 Act, it concluded that:

- there was a significant risk that the requirement to obtain permission to marry, as presently drawn, will be incompatible with the right to marry because it introduces restrictions on that right for a wide class of people which are disproportionate to the legitimate aim of preventing sham marriages and which may impair the very essence of the right;”
- that the exemption of Church of England marriages from the proposed restrictions “leads to a significant risk that the provisions will discriminate on grounds of religion and belief without objective and reasonable justification”; and
- that there was a “significant risk that the provisions relating to marriage would discriminate, on grounds of nationality, without objective and reasonable justification, between people of marriageable age who wish to marry”.³¹

45. The then Government rejected the JCHR’s conclusions. The JCHR continued to report on this issue on a number of occasions.³² Most recently, our predecessor JCHR noted the commitment of the previous Government to deal with this incompatibility by introducing a Remedial Order to repeal Section 19 and end the Certificate of Approval scheme. The Committee called on the Government to publish its preparatory work towards the draft Remedial Order, regretting that delay on its part had ruled out a remedy before the general election.³³

46. Although we welcome the use of the non-urgent remedial order in this case, we are disappointed with the degree of delay in reaching this point. Between 2006 and 2008, the previous Government negotiated with the Church of England over a separate plan to extend the scheme to Church of England marriages, in order to remove the incompatibility. The Church of England successfully persuaded the Government to wait for the outcome of the House of Lords decision on the wider operation of the scheme before extending it to remove the discriminatory exemption. It argued that the administrative costs of extending the scheme would be wasted if the House of Lords determined that the scheme itself was incompatible with the Convention and the Government consequently decided to scrap the scheme. Our predecessor Committee noted that the Government appeared to have taken the decision to await the appeal in the

31 Fourteenth Report of 2003-04, *The Asylum and Immigration (Treatment of claimants etc) Bill*, HC 828/ HL 130, paras 36-76.

32 Sixteenth Report of 2006-07, *Monitoring the Government’s response to court judgments finding breaches of human rights*, HL Paper 128/HC 728, paras 135 – 136; Thirty-first Report of 2007-08, *Monitoring the Government’s response to human rights judgments: Annual Report 2008*, HL Paper 173/HC 1078, paras 96 – 106.

33 Fifteenth Report of 2009-10, *Enhancing Parliament’s role in relation to human rights judgments*, HL 85/HC 455, paras 151 – 152.

House of Lords without any clear consideration of the ongoing impact of the violation on those affected by it.³⁴ In January 2009, some time after the decision of the House of Lords, the then Government informed our predecessors that they were considering the way forward in light of the House of Lords' comments on the wider operation of the scheme.³⁵ The Committee asked for further information in May 2009. The Government failed to respond to this request until November 2009, when it decided that a Remedial Order would propose abolition of the entire scheme. In March 2010, our predecessors regretted that delay had meant that no Remedial Order would be introduced in the last Parliament.³⁶

47. As we have noted above, the legal steps proposed in the draft Order are not complex. As we explain above, we consider that it was acceptable for the Government to spend some time consulting on how to extend the scheme to remove the discrimination. We are doubtful whether it was appropriate not to seek to remedy the incompatibility during the two years between the making of the original declaration of incompatibility and the decision of the House of Lords. Equally, a further two years have passed since the decision of the House of Lords in 2008. Since that time, the Government has received 47,926 individual applications under the discriminatory Certificate of Approval scheme. While we welcome the Government's decision to introduce a Remedial Order in this case, and its decision to use the non-urgent procedure, we regret the earlier delay in remedying the incompatibility.

Explanatory notes and required information

48. As we have noted above the information provided by the Government complies fully with the technical requirements of the HRA. However, we raise two concerns below about the process of making remedial orders and the involvement of our Committee.

Clear information and guidance for officials

49. Unfortunately, we were first alerted to the Order and its timing when the legal staff of the Joint Committee on Statutory Instruments (JCSI) was sent advance drafts of the proposal by Home Office officials. While the JCSI would ordinarily report on the propriety of other delegated legislation, it has no role in relation to Remedial Orders and contacted our legal team. We are disappointed that 10 years after the HRA came into force, Government officials working on Remedial Orders are not aware of the role of the JCHR in relation to such orders, or our predecessor Committees' guidance on their parliamentary scrutiny. **We recommend that any Departments considering use of the Remedial Order process consult this Committee's guidance on the making of Remedial Orders. We recommend that any formal guidance produced by the Government on the issue of responding to adverse human rights judgments incorporates this guidance and encourages officials working on any proposals for Remedial Orders to contact the staff of the JCHR at an early stage.**

34 Thirty-first Report of 2007-08, *Monitoring the Government's response to human rights judgments: Annual Report 2008*, HL Paper 173/HC 1078, para 106.

35 Fifteenth Report of 2009-10, *Enhancing Parliament's role in relation to human rights judgments*, HL 85/HC 455, paras 146.

36 *Ibid*, para 151-152.

Information on the continuing impact of incompatibility

50. We asked for further information on the continuing impact of the scheme, including the number of applications made, approved and refused; the time taken to process applications and the number of individuals removed from the UK while their applications were pending. Although this information was provided speedily by the Minister, this information was essential to allow us to take a considered view on the need for the use of the Remedial Order process and whether the non-urgent procedure was adequate in this case. Subject to this shortcoming, we welcome the engagement of the Minister and the officials working on this proposal with our work. **However, full information on the ongoing impact of a violation subject to a proposal for a Remedial Order, including any relevant statistical information, should always be included with the required information prepared. This may reduce the need for further unnecessary correspondence between the Committee and Ministers and may allow our Report on a proposal to be published at an earlier stage.**

Outstanding litigation arising from the Certificate of Approval scheme

51. A challenge to the Certificate of Approval scheme is currently pending consideration by the European Court of Human Rights in the case of *O'Donoghue v UK*. The previous Committee asked the Minister for further information about the Government's approach to this case, in light of the expected Remedial Order. The Government refused to comment on individual cases. A number of arguments raised in this case are broader than the incompatibility identified by domestic courts in the *Baiyai v Secretary of State for the Home Department*. The applicants in *O'Donoghue* are a couple and their children who are affected by the Certificate of Approval scheme. The first applicant is an Irish citizen and the second applicant is her fiancé, a Nigerian national. The third and fourth applicants are their children. Each of the applicants are of the Roman Catholic faith. They argue that the operation of the Certificate of Approval scheme violates their right to marry (in breach of Article 12 ECHR); that it interferes with their right to respect for private and family life (Article 8 ECHR) and their right to respect for their religion (Article 9 ECHR). They argue that the scheme discriminates against them in their enjoyment of those Convention rights (Article 14 ECHR) and that they have been denied their right to an effective remedy for the violation of their rights as the declaration of incompatibility in this case is not an effective remedy for Convention purposes (Article 13 ECHR). A significant number of applications against the UK are awaiting the result in this case, which the Court may treat as a pilot judgment.³⁷ We note the ongoing litigation in this case. **We recommend that the Government should accept any ECtHR suggestion to treat this case as a pilot judgment. We call on the Government to proactively consider mechanisms to respond to pending applications in clone cases should the applicant in *O'Donoghue* be successful.**

52. The Government explain that an ex-gratia scheme for compensation for those who suffered real financial hardship as a result of fees levied as part of this scheme operated

³⁷ A pilot judgment is a case where the ECtHR identifies that a new issue of law is being decided, where a significant number of cases might arise, following a decision in the lead case. The Court designates the lead case a pilot judgment, then suspends progress in the repeat applications, with more detailed recommendations to the State on the steps which it must take to remove the violation domestically. For more information, see Thirty-first Report of 2008-09, *Monitoring the Government's Response to Human Rights Judgements: Annual Report 2008*, HL 173/HC 1078, paras 122 – 124.

between July 2009–July 2010. This scheme was limited to those who could provide evidence of hardship. In its evidence the Immigration Law Practitioners Association comments that this test was difficult to satisfy. The scheme only related to actual financial hardship caused by the imposition of fees connected with the scheme and did not relate to compensation for any harm caused by the violation of the rights of applicants by the scheme. The domestic courts did not award any compensation under the HRA 1998. It remains open to the ECtHR to award just satisfaction – compensation - to the applicants in *O'Donoghue* on a wider basis than the ex-gratia scheme. **We note that the proposal for the draft Remedial Order makes no provision for compensation for those affected by the violation identified in this case. In the past, predecessor Committees have recommended that amendments be made to ensure that Remedial Orders adequately compensate individuals adversely affected by violations of the Convention.³⁸ In the light of the judgment of the domestic courts, and the operation of the limited ex-gratia scheme in this case, we recommend that the proposed draft Order is tabled despite the lack of provision for further compensation. However, we note the ex-gratia scheme did not compensate for the impact of the discriminatory application of the scheme, as opposed to hardship caused by the fees imposed. The Government should consider how to proactively manage any applications for further compensation should the applicants in *O'Donoghue* be awarded just satisfaction. Innovative thinking should be encouraged to avoid adding to the backlog of cases at the ECtHR, particularly in clone cases where applicants simply seek a repetitive decision and an award of just satisfaction.**

38 Sixth Report of Session 2001-02, *Mental Health Act 1983 (Remedial) Order 2001*, HL Paper 57, HC 472, para 19 – 29.

Conclusions and recommendations

1. Recommendation

1. Subject to a minor drafting issue, which we explain below, we recommend that a draft Order in the same terms as the proposal for a draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010 should be laid before both Houses. (Paragraph 3)

2. Background to our Recommendation

2. We agree that it is open to the Minister to proceed by way of a Remedial Order in this case, since a declaration of incompatibility has been made and no further appeal is possible. (Paragraph 15)
3. We consider that the reasons given by the Government for using the Remedial Order process in this case are clearly capable of being “compelling reasons” for the purposes of Section 10(2) HRA 1998. In our view they are sufficiently compelling to justify proceeding by way of Remedial Order in this case. (Paragraph 18)
4. we consider that it is necessary to abolish the Certificate of Approval scheme in order to remove the incompatibility identified by the domestic courts in *Baiai v Secretary of State for Home Affairs*. (Paragraph 24)
5. Where there are alternative means to remove an incompatibility with Convention rights, the Minister must show why the Government’s approach is necessary and should give evidence why obvious alternatives are not. In a case such as this, where there appears to be a narrower approach possible, relevant factors will include: (a) steps taken to secure the alternative, narrower, approach; (b) the breadth of the Government’s proposal and justification for it; and (c) whether the Government’s approach will adversely affect a human rights enhancing measure or a measure which has human rights enhancing effects, despite the incompatibility concerned. (Paragraph 25)
6. We are satisfied that the proposal for a Remedial Order meets the statutory requirements stipulated by HRA 1998. However, in the light of the broader approach taken by the Government, we are concerned that Parliament should have certain additional information in order to help inform the decision of both Houses whether to approve the Order, and our decision as a Committee on whether approval should be recommended. In this case, we recommend that any draft Order repealing the Certificate of Approval scheme is accompanied by an explanation by the Government of any steps it intends to make to meet the original policy intention of the scheme. This information should include existing and planned measures or policy intentions and an explanation of the Government’s view that those measures will be effective, proportionate and compatible with the human rights obligations of the United Kingdom. (Paragraph 26)

7. we recommend that the inclusion of provision to abolish the Certificate of Approval scheme in so far as it extends to civil partnerships is an appropriate consequential amendment. This wider approach is necessary in our view to avoid further violations of Convention rights and is an appropriate use of the power to make incidental, supplemental or consequential provision in paragraph 1(1)(a) of Schedule 2 of the HRA 1998, which is expressed in very broad terms. (Paragraph 30)
8. In our view the repeal of the Certificate of Approval scheme proposed in the draft Asylum and Immigration (Treatment of Claimants etc) Act 2004 (Remedial) Order 2010 would remedy the incompatibility identified in *Baiai v Secretary of State for the Home Department*. (Paragraph 31)
9. We are satisfied that the Government has provided the information required by the HRA 1998. Subject to a few concerns raised below, we welcome the full and timely information provided by the Government. (Paragraph 32)
10. Subject to concerns expressed below about earlier delay in this case, it is our view that the use of the non-urgent process in this case strikes a reasonable balance between the need to remedy the violation without any further delay and the need for effective parliamentary scrutiny. We welcome the Government's decision to use the non-urgent procedure. (Paragraph 41)
11. In the interests of completeness, we consider that the draft could be amended to provide for the repeal of Article 6 of the Immigration and Asylum and Nationality Act 2006 (Commencement No 6) Order 2007 and the equivalent savings clauses for the Isle of Man in Immigration (Isle of Man) Order 2008. We have drawn this drafting issue to the attention of officials and Parliamentary Counsel. Subject to this minor technical concern, we recommend that the draft Order should be laid before both Houses for their consideration as proposed. (Paragraph 43)

3. Other matters arising

12. As we have noted above, the legal steps proposed in the draft Order are not complex. As we explain above, we consider that it was acceptable for the Government to spend some time consulting on how to extend the scheme to remove the discrimination. We are doubtful whether it was appropriate not to seek to remedy the incompatibility during the two years between the making of the original declaration of incompatibility and the decision of the House of Lords. Equally, a further two years have passed since the decision of the House of Lords in 2008. Since that time, the Government has received 47,926 individual applications under the discriminatory Certificate of Approval scheme. While we welcome the Government's decision to introduce a Remedial Order in this case, and its decision to use the non-urgent procedure, we regret the earlier delay in remedying the incompatibility. (Paragraph 47)
13. We recommend that any Departments considering use of the Remedial Order process consult this Committee's guidance on the making of Remedial Orders. We recommend that any formal guidance produced by the Government on the issue of responding to adverse human rights judgments incorporates this guidance and

encourages officials working on any proposals for Remedial Orders to contact the staff of the JCHR at an early stage. (Paragraph 49)

14. However, full information on the ongoing impact of a violation subject to a proposal for a Remedial Order, including any relevant statistical information, should always be included with the required information prepared. This may reduce the need for further unnecessary correspondence between the Committee and Ministers and may allow our Report on a proposal to be published at an earlier stage. (Paragraph 50)
15. We recommend that the Government should accept any ECtHR suggestion to treat this case as a pilot judgment. We call on the Government to proactively consider mechanisms to respond to pending applications in clone cases should the applicant in O'Donoghue be successful. (Paragraph 51)
16. We note that the proposal for the draft Remedial Order makes no provision for compensation for those affected by the violation identified in this case. In the past, predecessor Committees have recommended that amendments be made to ensure that Remedial Orders adequately compensate individuals adversely affected by violations of the Convention. (Paragraph 52)
17. In the light of the judgment of the domestic courts, and the operation of the limited ex-gratia scheme in this case, we recommend that the proposed draft Order is tabled despite the lack of provision for further compensation. However, we note the ex-gratia scheme did not compensate for the impact of the discriminatory application of the scheme, as opposed to hardship caused by the fees imposed. The Government should consider how to proactively manage any applications for further compensation should the applicants in O'Donoghue be awarded just satisfaction. Innovative thinking should be encouraged to avoid adding to the backlog of cases at the ECtHR, particularly in clone cases where applicants simply seek a repetitive decision and an award of just satisfaction. (Paragraph 52)

Formal Minutes

Tuesday 9 November 2010

Members present:

Dr Hywel Francis, in the Chair

Baroness Campbell	Dr Julian Huppert
Lord Dubs	Mrs Eleanor Laing
Lord Lester of Herne Hill	Mr Dominic Raab
Lord Morris of Handsworth	Mr Virendra Sharma
	Mr Richard Shepherd

Draft Report, *Proposal for the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010*, proposed by the Chairman, brought up and read

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

Paragraphs 1 to 17 read and agreed to.

Paragraph 18 read,

Question put, That the paragraph stand part of the report.

The Committee divided.

Content, 6	Not content, 2
Baroness Campbell	Mrs Eleanor Laing
Lord Dubs	Mr Dominic Raab
Dr Hywel Francis	
Dr Julian Huppert	
Lord Morris of Handsworth	
Mr Virendra Sharma	

Paragraph agreed to.

Paragraphs 19 to 22 read and agreed to.

Paragraph 23 read, amended and agreed to.

Paragraph 24 read.

Question put, That the paragraph stand part of the report.

The Committee divided.

Content, 6	Not content, 2
Baroness Campbell	Mrs Eleanor Laing
Lord Dubs	Mr Dominic Raab
Dr Hywel Francis	
Dr Julian Huppert	
Lord Morris of Handsworth	
Mr Virendra Sharma	

Paragraph agreed to.

Paragraph 25 read, amended and agreed to.

A paragraph – (*Dr Hywel Francis MP*) – brought up, read the first and second time, and added (now paragraph 26).

Paragraphs 27 to 42 read and agreed to.

Paragraph 43 read, amended and agreed to.

Paragraphs 44 to 52 read and agreed to.

Summary amended and agreed to.

Resolved, That the Report be the Fifth Report of the Committee to each House.

Ordered, That the Chairman make the Report to the House of Commons and that Lord Lester make the Report to the House of Lords.

Ordered, Written evidence ordered to be published on 12 October was ordered to be reported to the House for printing with the Report.

[Adjourned till Tuesday 16 November at 2.00 pm

Declaration of Lords Interests

Members declared the following interests relevant to scrutiny of this Remedial Order:

Lord Dubs

Chief Executive, Refugee Council (1988 – 1995)

A full list of Members' interests can be found in the Register of Lords' Interests:

<http://www.publications.parliament.uk/pa/ld/ldreg/reg01.htm>

No other Members present declared interests.

List of Written Evidence

- 1 Letter from the Committee Chair, to the Rt Hon Theresa May MP, Home Secretary, 9 September 2010 p 25
- 2 Letter from Mr Damian Green MP, Minister for Immigration, Home Office, to the Committee Chair, 30 September 2010 p 26
- 3 Letter from Helen Sayeed, Permanent Migration Team, UK Border Agency, to the Committee Clerk, 6 October 2010 p 31

List of Additional Written Evidence

- 1 Letter from Sophie Barrett-Brown, Chair, Immigration Law Practitioners' Association (ILPA), to the Committee Clerk, 6 October 2010 Vol II p 6
- 2 Memorandum from the Equality and Human Rights Commission, to the Committee, 8 October 2010 Vol II p 9

Additional written evidence is available on the Committee's webpage:
www.parliament.uk/jchr

Written Evidence

1. Letter from the Committee Chair, to the Rt Hon Theresa May MP, Home Secretary, 9 September 2010

The Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order

The JCHR is required to report to both Houses on every remedial order produced pursuant to Section 10 of the Human Rights Act 1998. I am grateful to your officials for providing our Committee Secretariat promptly with a copy of the draft proposal for a Remedial Order which was published on 26 July 2010, together with the Government's Explanatory Memorandum and the information which the Government is required to submit to Parliament under the HRA 1998. We intend to report on the draft proposal within 60 days of its publication and I enclose a copy of our call for evidence issued today.

The draft proposes to repeal Section 19 Asylum and Immigration (Treatment of Claimants, etc) Act 2004, in so far as it prohibits people subject to immigration control marrying without prior authorisation, other than in a Church of England ceremony. This aims to provide remedy for a violation of Convention rights first identified by the domestic courts in 2006, over four years ago. The required information provided with the Explanatory Memorandum explains the Government's view that non-urgent process is appropriate in this case:

[T]he limited nature of the burden now imposed by the Certificate of Approval scheme, following steps taken to diminish its impact, mitigates against its use of the urgent Remedial Order process.

We would be grateful for further information about the ongoing operation and impact of the Certificate of Approval scheme in order to allow us to assess whether the non-urgent procedure is appropriate in this case. In particular:

What guidance has been issued on the operation of the scheme, after the decision of the House of Lords in *Baiai* [2006] UKHL 53, to ensure that authorisation is not refused in cases which "unreasonably inhibit exercise of the applicant's rights under Article 12 of the European Convention"?

Please could you provide information about the time taken to process applications for approval (a) on average; and (b) the longest time taken, for both (a) approvals prior to the decision of the House of Lords and (b) decisions taken after the House of Lords judgment.

How many applications for authorisation have been received since the decision of the House of Lords? How many such applications have been (a) granted and (b) refused?

Please provide us with details on UK Borders Agency policy on removals after an application for authorisation pursuant to Section 19 has been received, if any such policy exists.

How many people, if any, have been subject to removal between submitting an application for approval and a decision on the application?

It would be helpful if we could receive your reply by **8 October 2010**. I would also be grateful if your officials could provide the Committee secretariat with a copy of your response in Word format, to assist publication.

9 September 2010

2. Letter from Mr Damian Green MP, Minister for Immigration, Home Office, to the Committee Chair, 30 September 2010

Re: Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order

Thank you for your letter of 9 September seeking information about the ongoing operation and impact of the Certificate of Approval (COA) scheme.

First, I should like to extend my congratulations and good wishes on your appointment as Chair of the Joint Committee on Human Rights. As our Coalition Agreement sets out, the Government is committed to the European Convention on Human Rights (ECHR) and to ensuring that the rights flowing from it continue to be enshrined in British law. I look forward to developing a constructive working relationship with the Committee and am pleased to hear that my officials have supplied you with prompt information about the above remedial order. We look forward to receiving the Committee's report on the draft proposal so that we can remedy the scheme's incompatibility with the ECHR at the earliest opportunity.

I note you are seeking further information about the ongoing operation and impact of the COA scheme so that the Committee can assess whether the non-urgent remedial order procedure is appropriate in this case.

As you know, we acknowledge that a significant number of people are affected by the incompatibility. However, the significance of rights which are or might be affected by the incompatibility, and the impact of the scheme on individuals, have been carefully considered against the need to legislate in an open and transparent manner that allows appropriate opportunity for debate and discussion. While there are compelling reasons to proceed by way of Remedial Order, we believe the limited nature of the burden now imposed by the COA scheme, following steps taken to respond to the judgments in the domestic courts, mitigates against the use of the urgent Remedial Order process.

The continuing incompatibility does not prevent a person from marrying or founding a family. Those who are subject to the COA scheme can still marry; they simply need to apply for a COA from the Secretary of State. We responded to the House of Lords' comment that a fixed fee could interfere with the right to marry in respect of needy applicants by suspending the fee payable under the scheme in April 2009. We subsequently removed the fee for an application for a COA to marry or enter into a civil partnership from the Immigration and Nationality (Cost Recovery Fees) Regulations 2010 (SI 2010/228). In addition, we implemented a fee repayment scheme which meant that those

who applied for a COA between 2005 and 2009 could apply for and receive repayment of the fee, if they could show that paying it caused them real financial hardship. The repayments were made as part of an ex-gratia repayment scheme which began on 31 July 2009. The fee repayment scheme was publicised via the UK Border Agency website and ran for one year, coming to an end on 31st July 2010.

1. Guidance

I enclose at Annexes (i)¹ and (ii)² copies of guidance issued on the operation of the COA scheme after the decisions in the domestic courts in Baiai which are relevant to the consideration of the potential impact on Article 12 (the right to marry) in making decisions about COAs. Annex (i) is an instruction from 2006 issued following the High Court judgment in that year. Annex (ii) is an instruction from 2007 issued following the Court of Appeal judgment in that year. The Committee may also find it helpful to have sight of guidance issued in 2009 at Annex (iii)³ about the suspension of the COA fee and at Annex (iv)⁴ in relation to operation of the scheme for return of COA fees.

The 2007 process instruction was amended in March 2010 to reflect a change in procedure and again in August 2010 in the light of issues raised by a convicted rapist who was seeking to marry an EEA national to prevent deportation. The guidance relating to those 2010 changes identified various factors that might indicate that intended marriage is one of convenience and thus provided assistance in deciding which cases required further investigation. However this information is not currently in the public domain and disclosure in the public domain would in our view prejudice the operation of our immigration controls. This is because disclosure may enable potential immigration offenders to obtain detailed information on our risk assessment methodology.

It may also enable potential immigration offenders to circumvent the system. This is clearly not in the public interest; whereas there is a public interest in ensuring the integrity of the United Kingdom's immigration controls. We are prepared to disclose the relevant information to the Committee in confidence subject to agreement that the guidance will not be published by the Committee.

As the various iterations of the guidance demonstrate, the UK Border Agency has continued to take steps to ensure that while the scheme remains in operation the Agency's processes take account of the issues highlighted by the domestic courts in considering Baiai in particular ensuring that actions are targeted against those suspected of seeking to engage in a sham marriage.

2. Processing times

The average time taken to process applications for a COA (by year) is as follows:—

Calendar Year	Number of	Number of	Number of	Average
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1 Not printed. Copy of Annex placed in House of Commons Library

2 Not printed. Copy of Annex placed in House of Commons Library

3 Not printed. Copy of Annex placed in House of Commons Library

4 Not printed. Copy of Annex placed in House of Commons Library

	applications received	COAs issued	COAs refused	Processing Time
2005	13,865	9,725	2,092	Average of 21 days
2006	17,955	14,569	1,024	Average of 24 days
2007	17,316	14,518	409	Average of 32 days
2008	18,720	16,114	734	Average of 36 days
2009	24,042	19,835	1,517	Average of 50 days
1 January to 23 Sept 2010	23,052	13,749	876	Average of 65 days

The information has been derived from local management information and is not a National Statistic. As such it should be treated as provisional and therefore subject to change.

The individual applications for COAs which have taken the longest to process involve criminality and a failed asylum seeker.

The longest time taken to process a COA application received prior to the decision in the House of Lords (pre 30 July 2008) was 1126 days. This case involved a convicted criminal. The application was refused as the applicant did not respond to enquiries. He did not challenge the refusal and is currently being considered for enforcement action.

The longest time taken to process an application for a COA received after the House of Lords judgment was 366 days.

This case involved a failed asylum seeker who had previously claimed asylum in another country. A COA was granted in this case.

3. Number of applications

The number of applications for a COA received since the decision of the House of Lords in 30 July 2008 are detailed below. The figures are correct as at 16 September 2010.

COA applications received since House of Lords decision on 30 July 2008

Number of COA applications received since 30 July 2008	47,926
Number of COA applications issued since 30 July 2008	37,282
Number of COA applications refused since 30 July 2008	2,209
Number of COA applications currently under consideration	8,500

The information has been derived from local management information and is not a National Statistic. As such it should be treated as provisional and therefore subject to change.

To understand the processing figures in context one must recognise the significant increase in applications for COAs (and the consequent increase in processing times) which resulted

from the modifications made to the scheme following the judgments handed down in relation to it by the domestic courts.

The following events led to increases in COA applications:—

- Following the High Court judgment in *Baiai* on 10 April 2006 which made a declaration of incompatibility in respect of both Article 12 and Article 14 of the ECHR we issued new guidance in August 2006. The revised COA scheme allowed applicants with some valid leave to enter or remain but insufficient leave to qualify for the original scheme to be granted a COA, provided the Secretary of State was satisfied the marriage was genuine. Applicants with no leave to enter or remain still could not apply for a COA. This led to an increase in applications.
- In August 2006 guidance was modified so in some cases we requested affidavits. This also slowed down the time taken to process cases since it takes time to write out for an affidavit and time for it to be returned.
- Following the Court of Appeal judgment in the cases of *Baiai* on 23 May 2007 that immigration status was irrelevant to the genuineness of the proposed marriage, we issued new guidance on 1 July 2007 which allowed applicants without valid leave to enter or remain. This meant overstayers, failed asylum seekers, illegal entrants, etc could apply for a COA. This led to an increase in applications. The number of applications from those with limited or no leave went up.
- In handing down the judgment on 30 July 2008 in the case of *Baiai* the House of Lords observed that the Certificate of Approval fixed fee of £295 was too high because a fee at fixed level which a needy applicant cannot afford might impair their right to marry (ECHR Article 12). Their Lordships did not proceed to rule on that point. However, with effect from 9 April 2009, the UK Border Agency suspended the fee for COA applications in order to reflect the House of Lords judgment. The suspension of the fee also led to a significant increase in applications (a 28% rise in 2009).

Despite this rise in applications, the UK Border Agency has been proactive in trying to speed up processing times. They have introduced a screening process to better identify those cases where a sham marriage is suspected and only request affidavits in those cases. This targeting of cases is in line with court judgments in *Baiai*.

Notwithstanding the delays in processing some cases, we do not consider that the time taken to process a case interferes with the right to marry under Article 12 of the ECHR. In our view, the current average processing time of 65 days (just over two months) does not represent an interference with the right to marry. Following the High Court's judgment in 2006, it is also important that the UK Border Agency give proper scrutiny to cases to ensure that they consider carefully the genuineness of the relationship. Each application is investigated and a COA is only refused where there are reasonable grounds for suspecting that the proposed union will be a sham. It is also not unusual for genuine wedding arrangements to involve lengthy preparations. Two months is not a significant time period in that context.

Whilst your letter refers to the operation of the scheme in relation to Article 12, as you will be aware the House of Lords amended the declaration of incompatibility made by the High Court to make it clear that the declaration of incompatibility with the ECHR was directed solely at the discrimination between civil and Anglican preliminaries to marriage i.e. the declaration related to section 19(1) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 rather than section 19(3). The Remedial Order seeks to remedy this incompatibility with Article 14 of ECHR by abolishing the Certificate of Approval scheme. Accordingly, we would submit that it is the incompatibility with Article 14 (discrimination against non-Anglicans who need to apply for a COA) which is relevant to assessing whether the non-urgent procedure is appropriate in this case.

4. Removals policy

UKBA only enforces removal where there are no barriers to removal (such as an outstanding application for leave) and before doing so would have due regard to any extenuating circumstances raised. Guidance for staff in this area is contained in Chapter 53 of the published Enforcement Instructions and Guidance. This guidance can be provided to the Committee in full if required. An application for a COA is not in itself considered a barrier to a removal.

Numbers subject to removal

You requested data on how many people, if any, have been subject to removal between submitting an application for a Certificate of Approval and a decision on the application. Please find below the numbers of removals where a COA has been applied for and how many people were removed before the outcome of their COA application.

Certificate of Approval for Marriage and Civil Partnership cases that have been removed since the date of COA application

Financial Year	Apr 08 to Mar 09	Apr 09 to Mar 10	Apr 10 to 24 September 10*
No of Removals	165	620	3
No removed before outcome of application	2	5	0

*The information has been derived from local management and is not a National Statistic. As such it should be treated as provisional and therefore subject to change. *The data is correct up to 24 September when the data was run.*

Statistics on the numbers of COA cases that have been removed during the period 2005-April 2008 are not readily available and due to the high volume of data are taking some time to compile. My officials will write to you separately, as soon as possible with this data.

O'Donoghue v United Kingdom

The Committee wanted to be informed of progress in the case of *O'Donoghue v United Kingdom*. The Committee may wish to be aware that this case remains ongoing and there is no judgment at present, although we understand from the Court that a judgment may be given before the end of the year.

30 September 2010

3. Letter from Helen Sayeed, Permanent Migration Team, UK Border Agency, to the Committee Clerk, 6 October 2010

Please find attached a word version of the Minister for Immigration's letter of 30 September to the Chair of the Joint Committee on Human Rights.

The Chair of the Committee had requested data on the number of people subject to removal between submitting an application for a Certificate of Approval and a decision on the application. The Minister for Immigration provided data for the period April 2010 to September 2010. Statistics for the period April 2006 to April 2008 are now provided below. Unfortunately removals data prior to 1 April 2006 is not available and we are therefore unable to provide numbers for the period from 2005 to April 2006.

Please also note that numbers for the period April 2010 to September 2010 have been revised to take into account those who applied for a Certificate of Approval prior to April 2008. A person who had made a Certificate of Approval application in 2007 and had been removed in 2009 would not have shown up in the earlier statistics because all the relevant data had not yet been analysed. Updated statistics are now set out below. I would be grateful if you could please forward this information to the Chair.

Certificate of Approval for Marriage and Civil Partnership cases that have been removed since the date of COA application

Financial Year	Apr 2006-Mar 2007	Apr 2007-Mar 2008	Apr 2008-Mar 2009	Apr 2009-Mar 2010	Apr 2010-30 Sep 2010*
No of Removals	218	388	510	862	87
No removed before outcome of COA application	11	9	7	15	6

*The information has been derived from local management information and is not a National Statistic. As such it should be treated as provisional and therefore subject to change. *The data is correct up to 30 September when the data was run.*

I would also be grateful for an indication of the date the Committee plan to publish their first report on the draft proposal for a Remedial Order and any further information you can share about the Committee's timescale for scrutiny of the Order, even if provisional.

If you require any further information please let me know.

6 October 2010

List of Reports from the Committee during the current Parliament

Session 2010-11

First Report	Work of the Committee in 2009-10	HL Paper 32/HC 459
Second Report	Legislative Scrutiny: Identity Documents Bill	HL Paper 36/HC 515
Third Report	Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report)	HL Paper 41/HC 535
Fourth Report	Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Second Report); and other Bills	HL Paper 53/HC 598
Fifth Report	The Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010	HL Paper 54/HC 599

List of Reports from the Committee during the last Session of Parliament

Session 2009-10

First Report	Any of our business? Human rights and the UK private sector	HL Paper 5/HC 64
Second Report	Work of the Committee in 2008-09	HL Paper 20/HC 185
Third Report	Legislative Scrutiny: Financial Services Bill and the Pre-Budget Report	HL Paper 184/HC 184
Fourth Report	Legislative Scrutiny: Constitutional Reform and Governance Bill; Video Recordings Bill	HL Paper 33/HC 249
Fifth Report	Legislative Scrutiny: Digital Economy Bill	HL Paper 44/HC 327
Sixth Report	Demonstrating Respect for Rights? Follow Up: Government Response to the Committee's Twenty-second Report of Session 2008-09	HL Paper 45/ HC 328
Seventh Report	Allegation of Contempt: Mr Trevor Phillips	HL Paper 56/HC 371
Eighth Report	Legislative Scrutiny: Children, Schools and Families Bill; Other Bills	HL Paper 57/HC 369
Ninth Report	Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010	HL Paper 64/HC 395
Tenth Report	Children's Rights: Government Response to the Committee's Twenty-fifth Report of Session 2008-09	HL Paper 65/HC 400
Eleventh Report	Any of our business? Government Response to the Committee's First Report of Session 2009-10	HL Paper 66/HC 401

Twelfth Report	Legislative Scrutiny: Crime and Security Bill; Personal Care at Home Bill; Children, Schools and Families Bill	HL Paper 67/HC 402
Thirteenth Report	Equality and Human Rights Commission	HL Paper 72/HC 183
Fourteenth Report	Legislative Scrutiny: Equality Bill (second report); Digital Economy Bill	HL Paper 73/HC 425
Fifteenth Report	Enhancing Parliament's Role in Relation to Human Rights Judgments	HL Paper 85/HC 455
Sixteenth Report	Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In	HL Paper 86/HC 111