



House of Lords
House of Commons
Joint Committee on Human
Rights

Legislative Scrutiny: Anti-social Behaviour, Crime and Policing Bill (second Report)

Ninth Report of Session 2013–14

Report, together with formal minutes

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Joint Committee on Human Rights

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Summary

This Report follows up some of the recommendations we made in our first Report on the Anti-social Behaviour, Crime and Policing Bill, in light of the Government's response to our Report, parliamentary debates on some of our recommended amendments and other relevant developments.

Anti-social Behaviour (Parts 1–6)

Legal certainty

In our first Report we considered that the definition of “anti-social behaviour” in the Bill's provisions relating to the new civil injunction to prevent nuisance and annoyance (“IPNAs”) was too broad and unclear. We recommended that the test be amended to make it more precise, by inserting an objective requirement that the conduct “might reasonably be regarded as” causing nuisance or annoyance.

We welcome the Government's indication that IPNAs should not be used to stop reasonable, trivial or benign behaviours, but this intention is not so far reflected in the wording of the Bill. We therefore maintain our recommendation that the Bill be amended to introduce an objective element into the definition of anti-social behaviour in Part 1 of the Bill, by inserting a requirement that the conduct in question “might reasonably be regarded as” causing nuisance or annoyance.

Risk of conflict with religious beliefs

In our first Report we questioned why it is necessary to expressly provide that prohibitions and requirements in an IPNA and a Criminal Behaviour Order (“CBO”) must, “so far as practicable”, avoid any conflict with religious belief. We welcome the Government's clear assurance that it is not its intention to interfere with the absolute right to hold religious beliefs and its willingness to consider amendments to the relevant provisions, but it has not so far explained why singling out religious belief for special protection in these provisions is necessary.

In the absence of such an explanation, we consider that the existing protections for religious beliefs in sections 6(1) and 13 of the Human Rights Act should be sufficient, and we therefore invite the Government to consider whether any legal protection for religious freedom would be lost by accepting our original recommendation that the two provisions in question be deleted from the Bill. However, if the Government remains of the view that these provisions are required, notwithstanding the protection provided by the Human Rights Act, we recommend that the current wording is revised to ensure that the absolute right to religious belief must not be interfered with under any circumstances (rather than “so far as practicable”).

Eviction for riot-related anti-social behaviour

In our first Report, we expressed our concern about the inclusion in the Bill of a new discretionary ground of possession for riot-related anti-social behaviour which would enable landlords to evict tenants who had been convicted of a riot-related offence committed

anywhere in the UK. The Government said that, in light of the concerns we had raised, it would reflect carefully on the views expressed during the Committee stage in the House of Lords. However, in its response to the debate in Committee, the Government showed no sign of such further reflection.

In our view it is the job of the criminal law, not the civil law, to deter riot-related offences and to administer sanctions when such offences are committed. Nor do we consider the existence of judicial discretion to be a satisfactory answer to our concern about the disproportionate impact of eviction on other members of the household who have not engaged in such behaviour. We maintain our recommendation that clause 91 be deleted from the Bill.

Powers to stop, question, search and detain at ports (Part 11)

In our first Report we accepted that the Government had clearly made out the case for a without suspicion power to stop, question and search travellers at ports and airports, but recommended that the more intrusive powers, such as the power to detain and to copy and retain personal electronic data, should only be exercisable on reasonable suspicion.

Since the publication of our first Report, the Independent Reviewer of Terrorism Legislation, David Anderson QC, in his oral and written evidence to the Home Affairs Committee, has made a number of recommendations about changes which should be made to Schedule 7 to the Terrorism Act 2000 in addition to the amendments already contained in Part 11 of the Bill.

We welcome the fact that the Independent Reviewer has made his views available to Parliament in time to inform debate on the remaining stages of the Bill. We endorse all of his recommendations except in one respect, concerning the nature of the threshold which should be satisfied before powers of detention and powers to copy and retain electronic data can be exercised.

We have considered the Independent Reviewer's recommendation that a subjective suspicion threshold be required to be met before the powers to detain and to copy and retain personal electronic data can be exercised, but we remain of the view that the threshold for the more intrusive powers in Schedule 7 should be reasonable suspicion.

In our view, reasonable suspicion is the absolute minimum that is required to qualify as a safeguard because it opens up the possibility of independent scrutiny and review. That scrutiny and review can still be appropriately deferential and sensitive to operational realities, especially if there is good practical guidance for police on the sorts of things that count as reasonable grounds for suspicion.

Compensation for miscarriages of justice (Part 13)

In our first Report on the Bill we explained why in our view requiring proof of innocence beyond reasonable doubt as a condition of obtaining compensation for wrongful conviction is incompatible with the presumption of innocence which is protected by both the common law and Article 6(2) ECHR. We recommended that the relevant clause (now clause 161) be deleted from the Bill because it is incompatible with the Convention.

In light of the parliamentary debates which have taken place on this clause, and some

subsequent significant decisions of the European Court of Human Rights, we are now of the view that the clause requires an amendment rather than deletion, and we recommend an amendment which in our view would both provide greater legal certainty and be compatible with the presumption of innocence protected by both the common law and Article 6(2) ECHR.

The Government's reliance in its response on the language used when declining an application for compensation under the new test does not meet our concern about the presumption of innocence. Nor are we persuaded that the decision of the European Court of Human Rights in *KF v UK* supports the Government's view that there is no incompatibility between clause 161 and Article 6(2) ECHR.

Since our first Report, the compatibility of the UK's current approach to awarding compensation for miscarriages of justice with the presumption of innocence in Article 6(2) ECHR has been considered again by the European Court of Human Rights in two decisions, *Adams v UK* and *A.L.F. v UK*. In both cases the challenge to the ECHR compatibility of the current law failed and the complaints were rejected as inadmissible. The reasoning of the Court in reaching that conclusion is significant for Parliament's debate about the ECHR compatibility of clause 161 of the Bill and about the text of any amendment to that clause in order to render it compatible.

The Court's reasoning demonstrates that, as currently drafted, clause 161 is incompatible with the presumption of innocence in Article 6(2) ECHR because it uses the language of "innocence". It confirms the Government's view that under the current law there is scope for misconceptions about eligibility for compensation. And it confirms that the test for miscarriage of justice formulated by Lord Phillips in the Supreme Court in *Adams*, that there has been a miscarriage of justice where a new fact so undermined the evidence against the defendant that no conviction could possibly be based on it, is a clear test which is compatible with the presumption of innocence.

We recommend that the Bill be amended to remove the reference to "innocence" in the proposed statutory test for a miscarriage of justice and to enshrine into law the test formulated by Lord Phillips in the House of Lords in the case of *Adams*. In our view, this meets both the concern that the current clause is incompatible with the presumption of innocence, and the concern that the law has become so uncertain that statutory clarification is needed in order to avoid unnecessary and costly litigation.

1 Introduction

Background

1. This is our second Report on the Anti-social Behaviour, Crime and Policing Bill, which completed its Committee Stage in the House of Lords on 11 December 2013 and is due to begin its Report stage on 8 January 2014. In our first Report, published on 11 October, we made a number of recommendations including that the Bill be amended in order to address concerns we had about its compatibility with the requirements of human rights law.¹

2. The Government responded to our Report in a letter dated 11 November.² We are grateful for the Government's detailed response to our conclusions and recommendations.

3. In this Report we follow up on some of the recommendations we made in our first Report, in the light of the Government's response to our Report, parliamentary debates on some of our recommended amendments to the Bill and other relevant developments since our first Report was published. The purpose of this further Report is to inform debate at the Bill's Report stage in the House of Lords, and its scope is therefore confined to issues likely to be debated at that stage on which the Lords may be interested in the views of the Committee.

1 Fourth Report of Session 2013–14, *Legislative Scrutiny: Anti-social Behaviour, Crime and Policing Bill*, HL Paper 56/HC 713 (hereafter "JCHR first Report on the Bill").

2 Available on our website.

2 Anti-social Behaviour (Parts 1–6)

Injunctions to prevent nuisance and annoyance

Legal certainty

4. In our first Report, we considered that the definition of “anti-social behaviour” in the Bill’s provisions relating to the new civil injunction to prevent nuisance and annoyance (“IPNAs”) was too broad and unclear.³ In our view, “conduct capable of causing nuisance or annoyance to any person” is not a sufficiently precise definition to satisfy the requirement of legal certainty demanded by both the common law and human rights law, because it does not provide enough guidance to people, including children, as to what behaviour is expected of them to avoid the risk of an injunction. We recommended that the test be amended to make it more precise, by inserting an objective requirement that the conduct “might reasonably be regarded as” causing nuisance or annoyance.⁴

5. The Government, in its response to our first Report, did not accept our recommendation.⁵ It argues that the test for anti-social behaviour is already well understood in the context of the housing legislation where it has been in use since 2004. It also argues that the drafting of the clause already “sets an objective threshold for ‘nuisance and annoyance’, by the inclusion of the words “capable of”. This wording, the Government says, means that “it is not necessary to prove whether or not the conduct actually did cause nuisance or annoyance, instead a judge can objectively consider whether the threshold has been satisfied, rather than relying on a variable standard based, subjectively, on how much a victim can take before they are annoyed or feel they have been subjected to nuisance.”

6. The House of Lords Constitution Committee has also sought clarification from the Government in relation to this issue.⁶ It wrote to the Government on 6 November expressing its concern that the wording of clause 1 of the Bill may not meet the constitutional requirement of legal certainty, because it is unclear what conduct may be capable of causing annoyance to any person. It thought that the wide scope of clause 1 “may make it difficult for individuals (including parents and guardians of minors) to predict whether certain conduct might attract an IPNA. It therefore asked the Government for an explanation of the rationale for introducing the broad test in clause 1, and of why it was not considered appropriate for there to be an objective element to the test.

7. The Government responded to the Constitution Committee’s concerns in a letter dated 21 November. It said that it is satisfied that this part of the test for an IPNA “is not arbitrary, but, rather, it satisfies the common law principle of legal certainty and human rights law.” In support of that position it says that the test is well known in the civil courts

3 JCHR first Report on the Bill, paras 21–33.

4 *Ibid.*, para. 26.

5 Letter dated 11 November 2013 from Norman Baker MP, Minister for Crime Prevention.

6 Letter dated 6 November 2013 from the Chair of the House of Lords Constitution Committee to Lord Taylor of Holbeach (available on the Constitution Committee’s website).

in the housing context; the court will have regard to the principles of proportionality, reasonableness and fairness in deciding whether to grant an injunction; and the draft guidance for frontline professionals makes clear that IPNAs “**should not** be used to stop reasonable, trivial or benign behaviours that have not caused, and are not likely to cause harm to victims or communities. For example, children simply playing in a park or outside, or young people lawfully gathering or socialising in a particular place may be ‘annoying’ to some, but are not in themselves anti-social.”

8. On 11 December the House of Lords Constitution Committee wrote a gain to the Government about clause 1 of the Bill, to say that the Government’s reliance on the draft guidance does not meet its concern about the lack of legal certainty on the face of the Bill.⁷

“It is insufficient for necessary safeguards to be contained in guidance rather than in statute. This is because it is possible for professionals to depart from the guidance and, of course, it may be repealed or replaced subsequently.”

9. Our recommended amendment was debated in Committee in the Lords,⁸ and the Government indicated in response that it is willing to consider introducing a reasonableness element into the test for obtaining an IPNA.⁹ So far, however, no Government amendment has been forthcoming.

10. We have considered the Government’s reasons for rejecting our recommendation that the Bill be amended to introduce an objective element into the definition of anti-social behaviour. We are not persuaded that the inclusion of the words “capable of” causing nuisance or annoyance meets our concerns about the lack of legal certainty. It is true that these words mean that an injunction could still be obtained where there is no “victim” of the anti-social behaviour because the only people exposed to the behaviour had an unusually high tolerance threshold, and to this extent there is an objective element in the definition. However, the words do not prevent an injunction being applied for or granted in the opposite situation, when unusually sensitive people claim to have been exposed to nuisance or annoyance by particular behaviour, and this is the essence of our concern about the lack of objectivity in the clause as currently drafted.

11. Nor are we persuaded that the lack of legal certainty is made up for in the draft guidance for frontline professionals which has been published alongside the Bill. Like the House of Lords Constitution Committee, we consider that statutes should not be drafted in such broad terms that they give rise to legal uncertainty which has to be resolved by reading the statutory language alongside administrative guidance. To satisfy the legal requirements of accessibility and foreseeability, the wording of the legislation itself should reflect the Government’s intention.

12. We welcome the Government’s indication that IPNAs should not be used to stop reasonable, trivial or benign behaviours, but this intention is not so far reflected in the wording of the Bill. We therefore maintain our recommendation that the Bill be amended to introduce an objective element into the definition of anti-social behaviour

7 Letter dated 11 December from Chair of the House of Lords Constitution Committee to Lord Taylor of Holbeach (available on Constitution Committee’s website).

8 HL Deb 18 Nov 2013 cols 784–792.

9 Ibid. at col 790.

in Part 1 of the Bill, by inserting a requirement that the conduct in question “might reasonably be regarded as” causing nuisance or annoyance.

Risk of conflict with religious beliefs

13. In our first Report on the Bill,¹⁰ we questioned why it is necessary to expressly provide that prohibitions and requirements in an IPNA and a Criminal Behaviour Order (“CBO”) must, “so far as practicable”, avoid any conflict with religious belief.¹¹ We pointed out that under Article 9 ECHR, justifiable interferences with the freedom to manifest one’s religion or belief are permissible, but the right to hold religious beliefs is an absolute right under Article 9(1) and interferences with it are therefore not permitted. We were not persuaded as to why it is necessary to single out religious belief for protection, particularly as the freedom to hold religious beliefs is an absolute right, and we recommended that these provisions be deleted from the Bill.

14. The Government wrote to us on 18 November assuring us that it is not the Government’s intention to allow a court to interfere with a person’s religious beliefs, acknowledging that the right to hold such beliefs is absolute. It explained that the form of these provisions follow a number of precedents in existing legislation, including in the Crime and Disorder Act 1998 and the Policing and Crime Act 2009. The Government indicated that it was happy to consider further the suggestion that these clauses be amended to refer explicitly to the respondent’s right to manifest his or her religion or belief.

15. We welcome the Government’s clear assurance that it is not the intention of Clause 1(5) and Clause 21(9) of the Bill to interfere with the absolute right to hold religious beliefs. **We welcome the Government’s willingness to consider amendments to these provisions, but it has not so far explained why singling out religious belief for special protection in this provision is necessary. In the absence of such an explanation, we consider that the existing protections for religious beliefs in sections 6(1) and 13 of the Human Rights Act should be sufficient, and we therefore invite the Government to consider whether any legal protection for religious freedom would be lost by accepting our original recommendation that the two provisions in question be deleted from the Bill.**

16. However, if the Government remains of the view that this provision is required, notwithstanding the protection provided by the Human Rights Act, we recommend that the current wording is revised to ensure that the absolute right to religious belief must not be interfered with under any circumstances (rather than “so far as practicable”). In our view, legislative provisions should be drafted in a way that accurately reflects legal requirements, rather than leaves them to be interpreted compatibly by judges. The following amendments to the Bill would give effect to this recommendation:

Clause 1, page 2, delete line 6, and after line 11 insert:

“;

¹⁰ JCHR first Report on the Bill, paras 38–40 and 57.

¹¹ Clauses 1(5) and 21(9) of the Bill.

and must avoid any conflict with the respondent’s religious beliefs.”

Clause 21, page 12, delete line 16, and after line 20 insert:

“;

and must avoid any conflict with the offender’s religious beliefs.”

Eviction for riot-related anti-social behaviour (Part 5)

17. In our first Report, we expressed our concern about the inclusion in the Bill of a new discretionary ground of possession for riot-related anti-social behaviour which would enable landlords to evict tenants who had been convicted of a riot-related offence committed anywhere in the UK.¹² We were concerned about its potentially serious and disproportionate impact on family members, including women and children, and, given the Government’s emphasis on deterrence as the rationale for the measure, it seemed clear to us that it amounts to a punishment rather than a means of preventing harm to others. We recognised the seriousness of riot-related offences, but we considered the custodial sentences imposed by courts to be a sufficient deterrent. We therefore recommended that the provision be deleted from the Bill.

18. In the Government’s response to our first Report, the Government repeated its intention “that the proposal will send a strong signal and have a deterrent effect on potential rioters who are tenants or members of their household.”¹³ It envisaged that such evictions would only happen “exceptionally”, and since the new ground was discretionary not mandatory, the courts could be relied upon to ensure that the rights of other family members, including children, would be taken into account when considering whether it is “reasonable” to make a possession order. Nevertheless, the Government said that, in light of the concerns we had raised, it would “reflect carefully on the views expressed during the Committee stage in the House of Lords.

19. In its response to the debate in Committee on our recommendation that the clause be deleted, however, the Government showed no sign of such further reflection, repeating the reasons it gave to us in writing for rejecting our recommendation.¹⁴ “It sends out a strong and important message for the future that if you get involved in a riot, whether that is near your home or not, there may be consequences for your tenancy.”

20. We have considered the Government’s reasons for insisting that the Bill continues to provide for eviction for riot-related anti-social behaviour. We note the importance of what it describes as “messaging” in the Government’s rationale for the provision: sending a signal about what conduct is acceptable by providing for sanctions if conduct falls below that standard. **In our view it is the job of the criminal law, not the civil law, to deter riot-related offences and to administer sanctions when such offences are committed. Nor do we consider the existence of judicial discretion to be a satisfactory answer to our concern about the disproportionate impact of eviction on other members of the**

12 JCHR first Report on the Bill, paras 71–76.

13 Letter dated 11 November from Norman Baker MP, Minister for Crime Prevention.

14 HL Deb 2 Dec 2013 cols 63–64.

household who have not engaged in such behaviour. We maintain our recommendation that clause 91 be deleted from the Bill.

3 Powers to stop, question, search and detain at ports (Part 10)

Background

21. In our first Report we welcomed the improvements made by the Bill to the powers to stop and search at ports in Schedule 7 of the Terrorism Act 2000 which narrow the very wide scope for the powers and reduce the potential for them to be found incompatible with Convention rights.¹⁵ We also accepted that the Government had clearly made out the case for a without suspicion power to stop, question and search travellers at ports and airports.

22. However, we were not persuaded that the Government had demonstrated the necessity for the more intrusive powers under Schedule 7, such as the power to detain and the power to copy and retain personal electronic data, to be exercisable without reasonable suspicion. We recommended that those more intrusive powers should only be exercisable if the examining officer reasonably suspects that the person is or has been involved in terrorism. We recommended amendments to the Bill which introduce into the legal framework this distinction between no suspicion powers to stop, question and search and the more intrusive powers requiring reasonable suspicion.

The Government's response

23. The Government does not accept our recommendation that the more intrusive powers be subject to a reasonable suspicion requirement. It says in its response to our Report that “introducing a reasonable suspicion test to be met before an examining officer may detain a person, search for and retain property or take biometric samples would undermine the capability of the police to necessarily and proportionately determine whether or not individuals passing through ports and airports may be concerned in terrorism.”

24. The Minister elaborated a little on this assertion in his response to the debate on our recommended amendment in Committee:

Examinations are not simply about the police talking to people who they know or already suspect are involved in terrorism. They are also about talking to people travelling to and from places where terrorist activity is taking place or emerging to determine whether those individuals appear to be involved in terrorism, whether that is because they are or have been involved, are going to become involved or are at risk of becoming involved either knowingly or unknowingly.¹⁶

25. In short, the Government's response to our recommendation is that a reasonable suspicion requirement would undermine the operational effectiveness of the power. That view appears to be based in part on the view that the scope of the power extends to questioning people who have not and are not currently involved in terrorism, but are “at risk” of becoming so involved in the future “unknowingly.”

¹⁵ JCHR first Report on the Bill, chapter 4.

¹⁶ HL Deb 11 Dec 2013 col 813 (Lord Taylor of Holbeach, Parliamentary Under-Secretary of State, Home Office).

The Independent Reviewer's recommendations

26. Since the publication of our first Report, the Independent Reviewer of Terrorism Legislation, David Anderson QC, in his oral and written evidence to the Home Affairs Committee, has made a number of recommendations about changes which should be made to Schedule 7 to the Terrorism Act 2000 in addition to the amendments already contained in Part 10 of the Bill.¹⁷

27. We welcome the fact that the Independent Reviewer has made his views available to Parliament in time to inform debate on the remaining stages of the Bill. We endorse all of his recommendations except in one respect, concerning the nature of the threshold which should be satisfied before powers of detention and powers to copy and retain electronic data can be exercised. We confine our comment to this one important respect in which we differ from the Independent Reviewer, for reasons which we seek to explain.

28. Like us, the Independent Reviewer recommends that no change be made to the “no suspicion” nature of the current power to stop, question and search at ports.¹⁸ The Independent Reviewer also agrees with us that an additional threshold should have to be crossed before a person is detained under Schedule 7, and before data stored on personal electronic devices are copied and retained.¹⁹ “It is hard to think of any other circumstances in which such a strong power may be exercised on a no-suspicion basis.” In deed, the Government has confirmed in its response to our questions that there are no other examples on the statute book of such an intrusive power being available on a no-suspicion basis. However, the Independent Reviewer recommends that the threshold should be subjective suspicion on the part of a senior officer, not reasonable suspicion on the part of the examining officer.

29. The Independent Reviewer has considered whether the threshold for detention should be changed to “reasonable grounds for suspicion”, but, on balance, is inclined to reject a reasonable suspicion threshold. He gives four reasons for doing so, based on his “exposure at a variety of ports to the operational constraints under which port officers operate.” His reasons are:

- Terrorists pose risks on a different scale to most other criminals: they have shown themselves capable of causing death and destruction on a massive scale.
- Active terrorists are not numerous, and not easily identified as such. Factors such as location, demeanour or evasive behaviour in the street may well give rise to a reasonable suspicion that a person is carrying stolen or prohibited articles. In the neutral port environment, an experienced officer’s suspicion of involvement in something as specific as the commission, preparation or instigation of acts of terrorism may however be harder to substantiate objectively in the absence of specific intelligence, if only because such involvement is relatively speaking so unusual.

¹⁷ David Anderson QC oral evidence to the Home Affairs Committee, 12 November 2013, Q80; and Supplementary written evidence to the Home Affairs Committee, *recommendations of the Independent Reviewer on Schedule 7 to the Terrorism Act 2000*, 20 November 2013 (both available on the Home Affairs Committee website).

¹⁸ Supplementary written evidence, para. 19.

¹⁹ *Ibid.* para. 25.

- The opportunity to test the validity of an officer's subjective suspicion in the hour allotted for examination may in practice be very limited, particularly when suspicion attaches to a large number of persons travelling together, and when time is lost by language difficulties or the use of false identities.
- Detention sometimes has to be imposed at the outset of the examination, because the person refuses to cooperate. Such behaviour from a person confronted with the exercise of counter-terrorism powers might awaken suspicion: but it could be hard to characterise it as reasonable suspicion of involvement in terrorism. Effectively to require in such cases that reasonable suspicion be shown immediately after the stop would also be contrary to my recommendation and that of the JCHR.²⁰

30. The Independent Reviewer therefore concludes that the operational needs of the police can best be reconciled with the necessary safeguards on detention by rejecting a reasonable suspicion threshold in favour of a purely subjective one. He therefore recommends that detention be permitted only when a senior officer is satisfied that there are grounds for suspecting that the person appears to be a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism, and that detention is necessary in order to assist in determining whether he is such a person. He recommends that the same subjective suspicion requirement should also apply to the extension of detention when it is periodically reviewed, and the power to make and retain copies of data stored on personal electronic devices should also be subject to a subjective suspicion threshold.

31. The Government has said that it is reflecting on the Independent Reviewer's recommendation ahead of Report stage.²¹

Subjective suspicion or reasonable suspicion?

32. We have considered carefully whether the subjective suspicion threshold recommended by the Independent Reviewer is sufficient to meet our concerns about the human rights compatibility of the more intrusive suite of "no suspicion" powers in Schedule 7. The essence of our concerns, as explained in our first Report, is the lack of adequate safeguards against such intrusive powers being exercised arbitrarily or in a discriminatory manner. As the Independent Reviewer himself rightly observes, "in any assessment of the Schedule 7 powers against the principles of the ECHR, the extent of the discretion given to examining officers will form an important part of the assessment of whether those powers are sufficiently circumscribed, necessary and proportionate."²²

33. We readily acknowledge that the Independent Reviewer is much better placed than us to appreciate the operational constraints under which ports officers operate. We also accept that the concerns which underpin his rejection of a reasonable suspicion standard are entirely justifiable concerns. In our view, however, they are concerns to which the court would pay proper regard in any legal challenges to the exercise of these powers if they were required to be exercised on reasonable suspicion. The concept of reasonable grounds

²⁰ Ibid., para. 28.

²¹ HL Deb 11 Dec 2013 col 813 (Lord Taylor of Holbeach).

²² Independent Reviewer's Supplementary Written Evidence to the Home Affairs Committee, para. 11.

for suspicion is a familiar one in the context of other police powers, including the power to arrest a suspected terrorist in s. 41 of the Terrorism Act 2000.

34. In our view, the courts have shown, in the words of Professor David Feldman, that they are “generally unwilling to question the opinion of experts in the field as to what is reasonable in the light of operational requirements”, a deference which is “particularly marked” in relation to policing matters.²³ It has long been established that the courts will apply ordinary administrative law principles to any review of the reasonableness of a police officer’s suspicion, which includes according a degree of latitude to the officer in question in view of the operational requirements.²⁴ Indeed, the approach which is likely to be taken to a reasonable suspicion requirement in this context can be seen in the case-law concerning the police power to arrest a person who he has reasonable grounds for suspecting to be a terrorist (such as the power in s. 41 of the 2000 Act). In *O’Hara v Chief Constable of the RUC*, for example, where a constable had been instructed by a senior police officer to arrest the plaintiff on the basis that he had been involved in a terrorist murder, the House of Lords held that the arresting officer had equipped himself with sufficient information to constitute a reasonable suspicion, and upheld the arrest as being lawful.²⁵ Lord Hope said:

It is now commonplace for Parliament to enable powers which may interfere with the liberty of the person to be exercised without warrant where the person who exercises these powers has reasonable grounds for suspecting that the person against whom they are to be exercised has committed or is committing an offence. The protection of the subject lies in the nature of the test which has to be applied in order to determine whether the requirement that there be reasonable grounds for the suspicion is satisfied.

My Lords, the test which section 12 (1) of the Act of 1984 has laid down is a simple but practical one. It relates entirely to what is in the mind of the arresting officer when the power is exercised. In part it is a subjective test, because he must have formed a genuine suspicion in his own mind that the person has been concerned in acts of terrorism. In part also it is an objective one, because there must also be reasonable grounds for the suspicion which he has formed. But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised.

This means that the point does not depend on whether the arresting officer himself thought at that time that they were reasonable. The question is whether a reasonable man would be of that opinion, having regard to the information which was in the mind of the arresting officer. It is the arresting officer’s own account of the information which he had which matters, not what was observed by or known to anyone else. The information acted on by the arresting officer need not be based on

23 D. Feldman, *Civil Liberties and Human Rights in England and Wales*, (2nd edition, 2002), p. 341.

24 See e.g. *Mohammed-Holgate v Duke* [1984] AC 437.

25 [1997] AC 286.

his own observations, as he is entitled to form a suspicion based on what he has been told. His reasonable suspicion may be based on information which has been given to him anonymously or it may be based on information, perhaps in the course of an emergency, which turns out later to be wrong. As it is the information which is in his mind alone which is relevant however, it is not necessary to go on to prove what was known to his informant or that any facts on which he based his suspicion were in fact true. The question whether it provided reasonable grounds for the suspicion depends on the source of his information and its context, seen in the light of the whole surrounding circumstances.

35. The Independent Reviewer says that “it would be unsatisfactory to rely on the courts adopting an over-permissive interpretation of the reasonable suspicion standard.”²⁶ The proper judicial approach to the reasonable suspicion standard, however is well-established. It requires the court to consider the whole context in which the individual officer reached his or her view about whether there were grounds to suspect that a person was a terrorist, and operational considerations of the sort spelled out by the Independent Reviewer would form an important part of that context.

36. The Independent Reviewer also suggests that the ECHR, given domestic effect by the HRA, may require a more intrusive scrutiny of the individual officer’s grounds for suspicion. Even where the minimum requirement of reasonable suspicion in Article 5(1)(c) of the Convention applies, however, the European Court of Human Rights recognises that the reasonableness of the suspicion must be judged “in all the circumstances”. As the Court said in *Fox v UK*, for example:

"The 'reasonableness' of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in article 5(1) c. The court agrees with the Commission and the Government that having a 'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as 'reasonable' will however depend upon all the circumstances."

37. As well as considering the objections to a reasonable suspicion threshold, we have also considered the adequacy of the safeguard provided by a subjective suspicion threshold. In our view, a subjective suspicion standard does not count as very much of a safeguard at all because it does not provide the basis for any independent scrutiny of the reasonableness of the officer’s suspicion on which the exercise of the power was premised. Indeed, it excludes the possibility of any meaningful judicial role scrutinising the lawfulness of the exercise of the power. A subjective suspicion threshold is satisfied by the officer concerned stating that he subjectively believed something to be so. In our view, the history of administrative law incontrovertibly shows that such subjectively framed powers are incompatible with effective legal control. Indeed, it was opposition to the notion that liberty could be encroached upon on the basis of subjective, and therefore unreviewable belief, that motivated Lord Atkin’s famous dissent in *Liversidge v Anderson*, in which he said:²⁷

26 Supplementary written evidence, footnote 41.

27 [1942] AC 206.

It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.

38. We note that the Independent Reviewer explains the subjective “grounds for suspicion” threshold that he favours in the following terms:

“It would require the officer to have formed a suspicion, whether on the basis of information supplied by others, behavioural assessment or even just intuition. It would however ensure that (in the words of Lord Bingham, in the context of a stop and search power) a ports officer is not deterred from detaining “a person whom he does suspect as a potential terrorist by the fear that he could not show reasonable grounds for his suspicion.”²⁸

However, it should not be forgotten that Lord Bingham’s subjective grounds for suspicion approach in *Gillan* did not survive scrutiny in the European Court of Human Rights, which found the stop and search power in question to be insufficiently circumscribed to satisfy the requirement that interferences with the right to respect for private life in Article 8 ECHR be “in accordance with the law.”

Recommendation

39. We have considered the Independent Reviewer’s recommendation that a subjective suspicion threshold be required to be met before the powers to detain and to copy and retain personal electronic data can be exercised, but for the reasons we have explained above we remain of the view that the threshold for the more intrusive powers in Schedule 7 should be reasonable suspicion.

40. In our view, reasonable suspicion is the absolute minimum that is required to qualify as a safeguard because it opens up the possibility of independent scrutiny and review. That scrutiny and review can still be appropriately deferential and sensitive to operational realities, especially if there is good practical guidance for police on the sorts of things that count as reasonable grounds for suspicion.

28 *Gillan and Quinton* [2006] UKHL 12 at para 35.

4 Compensation for miscarriages of justice (Part 12)

Background

41. In our first Report on the Bill we explained why in our view requiring proof of innocence beyond reasonable doubt as a condition of obtaining compensation for wrongful conviction is incompatible with the presumption of innocence which is protected by both the common law and Article 6(2) ECHR.²⁹ We recommended that the relevant clause (now clause 161) be deleted from the Bill because it is incompatible with the Convention.

42. In light of the parliamentary debates which have taken place on this clause, and some subsequent significant decisions of the European Court of Human Rights, we are now of the view that the clause requires amendment rather than deletion, and we recommend an amendment which in our view would both provide greater legal certainty and be compatible with the presumption of innocence protected by both the common law and Article 6(2) ECHR.

The Government's response to our Report

43. The Government's response to our first Report maintains that the current clause is not incompatible with the ECHR.³⁰ It says that the clause does not require a person applying for compensation for a miscarriage of justice to prove their innocence. It says that, provided the fact on the basis of which the conviction was overturned "shows that the applicant did not commit the offence", compensation will be payable. It also argues that a recent decision of the European Court of Human Rights, *K.F. v UK*,³¹ "provides support for our view that there is no incompatibility between the test proposed in clause 151 and Article 6(2)." We consider this argument below.

44. The Government also argues in its response that "it would be just as possible to refuse compensation compatibly with the presumption of innocence under the proposed new test as it would under the law currently in force, since it is the language used that is determinative." While in a purely formal sense this is true, because refusals of compensation under the new test can continue to be expressed in terms of whether there has been a "miscarriage of justice", without referring to guilt or innocence, in substance the new test in clause 161 requires the applicant for compensation to show "beyond reasonable doubt that the person was innocent of the offence". While different language can be used to express the outcome of the application of this substantive test, the European Court of Human Rights will look to the substance of the underlying test applied, and in our view it is a test which unavoidably requires the applicant to show that the new evidence proves innocence, which is incompatible with Article 6(2).

29 JCHR first Report on the Bill, chapter 5, paras 140–158.

30 Letter dated 11 November 2013 from Norman Baker MP, Minister for Crime Prevention.

31 Application no. 30178/09, decision of 3 September 2013.

45. The Government’s reliance in its response on the language used when declining an application for compensation under the new test therefore does not meet our concern about the presumption of innocence.

Parliamentary debates

46. Since our first Report on the Bill, the clause on compensation for miscarriages of justice has been debated three times: at Report stage in the Commons,³² and on Second Reading³³ and in Committee³⁴ in the Lords.

47. One important matter which has emerged from the parliamentary debates on the clause is that there is a widely shared concern that the law as it stands is not clear and that the Government is therefore right to seek to introduce greater certainty by way of statutory clarification of the test to be applied.³⁵ In light of that concern, and of ongoing litigation of the question in the European Court of Human Rights, we have revisited our original recommendation that the clause be deleted.

48. It has also become clear in the course of the parliamentary debates that the Government’s principal objective in bringing forward the clause is to save public money not by reducing the amount of compensation that is paid out to victims of miscarriages of justice, but by reducing the amount of litigation that currently takes place challenging refusals of compensation, by providing greater legal certainty about who is eligible for such compensation.³⁶ We have also taken this into account in our further consideration of the clause.

49. The debates also suggest a lack of consensus thus far about what the statutory test should be. Considerable concern has been expressed that the test contained in the clause as currently drafted is too narrow because it requires people to demonstrate that the new fact proves their innocence, when in practice this will often be very difficult to do, and will therefore lead to manifest injustice in cases such as Sally Clark’s case.³⁷ On the other hand, anxiety has also been expressed about the width of the alternative test which has so far been proposed in the amendment advocated by Lord Beecham, which seeks to enshrine in statute the formulation of the test by the Divisional Court in the case of *Ali*.³⁸

50. In the light of these debates, we have considered whether there is a formulation of the test to be applied which meets both of these concerns about the tests currently on offer, at the same time as providing greater legal certainty and avoiding the risk of legal challenge on the basis that it is incompatible with the presumption of innocence in Article 6(2) ECHR. For the reasons we set out below, we consider that there is such a formulation and we recommend that the Bill be amended accordingly.

32 HC Deb 15 Oct 2013.

33 HL Deb 29 Oct 2013.

34 HL Deb 12 Nov 2013 cols 688–707.

35 See e.g. Lord Faulks, HL Deb 12 Nov 2013 col 698; Lord Hope of Craighead, HL Deb 12 Nov 2013 col 699.

36 See e.g. Lord McNally, HL Deb 12 Nov 2013 col. 705.

37 See e.g. Baroness Kennedy of the Shaws and Lord Hope of Craighead.

38 See e.g. Lord Brown of Eaton-under-Heywood and Lord Hope of Craighead.

Concerns of the House of Lords Constitution Committee

51. The House of Lords Constitution Committee has had an exchange of correspondence with the Government in which it has raised a number of questions about this clause in the Bill. One of the questions asked was “whether it is appropriate for Parliament to use its legislative supremacy to overrule a decision of the Supreme Court which was concerned with the application of a statutory provision giving effect to the UK’s international treaty obligations, especially where a ground for overruling the decision is that it results in too much expense.”³⁹ The Government replied that it was perfectly constitutionally proper for it to legislate to provide clarity in an area in which it believes the law to be unclear following the decision of the Supreme Court in *Adams*.⁴⁰

52. We agree with the Government that it is perfectly proper, in constitutional terms, for it to invite Parliament to consider whether statutory clarification of the law is required, where the Government believes that court judgments are not providing sufficient legal certainty.⁴¹ It is equally proper, constitutionally, for Parliament to scrutinise carefully whether there is a need for such statutory clarification, and whether the proposed clarification is consistent with other constitutional fundamentals such as the presumption of innocence recognised and protected by both the common law and the ECHR.

53. We would point out, however, in this context, that this is not a case in which there is any disagreement between the UK Supreme Court and the European Court of Human Rights. As we explain below, there is clear agreement between the Supreme Court and the European Court of Human Rights on the test to be applied to determine whether compensation should be paid for a miscarriage of justice without compromising the presumption of innocence. This is therefore an unusual case of the Government seeking to persuade Parliament to depart from the position that has been taken by both the Supreme Court and the European Court of Human Rights.

Recent decisions of the European Court of Human Rights

K.F. v UK

54. As we noted above, the Government’s response to our first Report argues that a recent decision of the European Court of Human Rights, *K.F. v UK*,⁴² “provides support for our view that there is no incompatibility between the test proposed in clause [161] and Article 6(2).” We have subjected this claim to careful scrutiny.

55. KF’s application for compensation was decided by the Secretary of State in October 2008, when the test applied was “clear innocence”, based on Lord Steyn’s definition of a miscarriage of justice in the case of *Mullen*. The Government argues that KF’s application to the European Court claimed that denying him compensation “on this basis” breached the presumption of innocence. It says that the Court reiterated that what is determinative

39 Letter dated 6 November 2013 from the Chair of the House of Lords Constitution Committee to Lord Taylor of Holbeach (available on the Constitution Committee’s website). The question was also raised by Lord Cullen of Whitekirk at the Bill’s Committee stage: HL Deb 12 Nov 2013 col 691.

40 Letter dated 11 November 2013 from Lord Taylor of Holbeach to the Chair of the Constitution Committee.

41 Lord McNally, 12 Nov 2013 col 704.

42 Application no. 30178/09, decision of 3 September 2013.

for Article 6(2) compliance is the language employed by the Secretary of State in the compensation decision, and the Court found that the Secretary of State, in concluding that *KF* had not suffered a miscarriage of justice, did not breach the presumption of innocence. The Government considers that the case therefore supports its view that the proposed “clear innocence” test in clause 161 of the Bill is not incompatible with Article 6(2).

56. The applicant’s conviction on five counts of indecent assault of his daughter was quashed by the Court of Appeal on the ground that the conviction was unsafe in the light of new medical evidence which suggested that the medical evidence relied on at trial to establish that abuse had taken place was flawed. The applicant’s claim for compensation under s. 133 of the Criminal Justice Act 1988 was refused by the Secretary of State on the basis that he did not accept that the applicant’s conviction was quashed on the grounds that the facts showed beyond reasonable doubt that there had been a miscarriage of justice. The language used by the Secretary of State in refusing compensation was this: “All that can be said is that the jury may or may not have convicted [the applicant] had the new evidence been available.”⁴³

57. The basis on which the Secretary of State’s decision was challenged by the applicant is recorded at para. 13 of the judgment. He complained that the refusal of compensation for his wrongful conviction was in breach of the presumption of innocence “because judicial interpretation of section 133 of the 1988 Act had established that no compensation was payable where a person whose conviction was quashed on appeal might still have been convicted by a jury had the medical evidence been available to it.”

58. The Court found no breach of the presumption of innocence in Article 6(2) because the Secretary of State “did not comment whether, on the basis of the evidence as it stood at the appeal, the applicant should be, or would likely be, convicted. He did not comment on whether the evidence was indicative of the applicant’s guilt or innocence”.⁴⁴ He simply considered that all that could be said was that a jury “may or may not” have convicted the applicant had the new evidence been available at the trial.

59. The *KF v UK* case is therefore not a decision about the application of a “clear innocence” test at all. The Secretary of State did not apply such a test when refusing compensation and the challenge was not to the application of a clear innocence test. It was not necessary for the Secretary of State to apply that narrow test in order to reject the application. Like the applicant in *Allen v UK*,⁴⁵ the applicant in *KF* would fail to qualify for compensation even on the wider test contained in the law as it currently stands: that is, as formulated by the Divisional Court in *Ali*, that the new evidence establishes, beyond reasonable doubt, that no reasonable jury, properly directed as to the law, could convict on the evidence now to be considered. In *KF*, all that could be said was that the jury may or may not have convicted had the new evidence been available. The case, in other words, was a “category 3 case”, for which nobody contends compensation should be available.

60. We therefore conclude that the decision of the European Court of Human Rights in *KF v UK* is not a decision that a “clear innocence” test is compatible with Article 6(2),

43 Para. 9 of judgment.

44 Para. 28.

45 *Allen v UK* was also a case in which “all that is established is that, if new evidence had been available, a properly directed jury might have reached a different conclusion”: see paras 30 and 33.

and therefore does not support the Government's view that there is no incompatibility between clause 161 and Article 6(2) ECHR.

Adams v UK and A.L.F. v UK

61. Much more significantly, since our first Report, the compatibility of the UK's current approach to awarding compensation for miscarriages of justice with the presumption of innocence in Article 6(2) ECHR has been considered again by the European Court of Human Rights in two decisions, *Adams v UK* and *A.L.F. v UK*. In both cases the challenge to the ECHR compatibility of the current law failed and the complaints were rejected as inadmissible. The reasoning of the Court in reaching that conclusion is significant for Parliament's debate about the ECHR compatibility of clause 161 of the Bill and about the text of any amendment to that clause in order to render it compatible.

62. *Adams v UK* is the same case as the one in which the Supreme Court (in *R v Adams*) established the approach to interpreting s. 133 of the Criminal Justice Act 1988 that the Government now seeks to overturn by clause 161 of the Bill. The Court rejected the complaint that s. 133 of the 1988 Act is itself incompatible with the presumption of innocence, because "there is nothing in the section 133 criteria which calls into question the innocence of an acquitted person and the legislation itself does not require an assessment of the applicant's criminal guilt."⁴⁶ However, the applicant also complained that, in applying s. 133, the Supreme Court had effectively required that the applicant conclusively demonstrate his innocence, and the Court therefore went on to assess whether the interpretation of "miscarriage of justice" by the Supreme Court in *Adams* complied with the presumption of innocence in Article 6(2) ECHR. The Court's reasoning in dealing with this complaint warrants citation in full:

40. All nine justices in the Supreme Court agreed that an acquittal in itself was not enough to demonstrate that a miscarriage of justice had occurred. In *Allen*, cited above, § 129 the Grand Chamber accepted that the domestic courts were entitled to conclude that more than an acquittal was required in order for a miscarriage of justice to be established, within the meaning of section 133, provided that they did not call into question the applicant's innocence. Lord Phillips explained that the test for a miscarriage of justice would be satisfied where a new fact so undermined the evidence against the defendant that no conviction could possibly be based upon it. That test was broadly approved by the other four Justices in the majority (see paragraph 24 and 26–29 above). The application of the test did not undermine the applicant's acquittal or treat him in a manner inconsistent with his innocence. The test did not oblige the court to comment on whether, on the basis of the evidence as it stood at the appeal, the applicant should be, or would likely be, acquitted or convicted. Equally, it did not require the court to comment on whether the evidence was indicative of the applicant's guilt or innocence.

⁴⁶ Para. 39. In so deciding, the Court was merely following the decision of the Grand Chamber in the case of *Allen v UK*, which we considered in our first Report. In *Allen* the Court held, in reaching its decision that there had been no violation of the presumption of innocence, that "what is important above all is that the judgments [...] did not require the applicant to satisfy Lord Steyn's test of demonstrating her innocence."

41. It is true that in the course of the Supreme Court judgment there was some reference to the question of innocence. In particular, the Justices discussed whether section 133 required that a claimant conclusively prove his innocence in order to be eligible for compensation. However, it is clear that this was roundly rejected by the majority of Justices in the case in favour of the broader test formulated by Lord Phillips. It is unfortunate that some of the language used in the judgment was liable to create confusion and an undesirable impression in the mind of the applicant as to the standard required for compensation. But in light of the clear test articulated by Lord Phillips, it should be apparent to any future claimant that questions of guilt and innocence are irrelevant to proceedings brought under section 133 of the 1988 Act.

63. The Court was therefore satisfied that the refusal of compensation in Adams's case did not demonstrate a lack of respect for the presumption of innocence.

64. The Court's decision in *Adams v UK*, that Lord Phillips's test for a miscarriage of justice in *Adams* is compatible with the presumption of innocence, was immediately applied by the Court in another inadmissibility decision of the same date in *A.L.F. v UK*, in which the applicant complained that the test formulated by Lord Phillips in *Adams* was incompatible with the presumption of innocence. The Court's reasoning in rejecting this complaint is again significant for Parliament's consideration of clause 161 of the Bill:

23. The applicant further complained that the test formulated by Lord Phillips in *R (Adams)* was contrary to Article 6 § 2. However, in its decision in *Adams*, cited above, this Court examined the interpretation given to the term "miscarriage of justice" by Lord Phillips, namely that the test would be satisfied where a new fact so undermined the evidence against the defendant that no conviction could possibly be based upon it. It found this interpretation to be compatible with the presumption of innocence.

24. It is true that in his letter the Secretary of State made reference to innocence. Such reference was both unfortunate and unnecessary in light of the test articulated by Lord Phillips, which the Secretary of State clearly applied. In order to demonstrate his entitlement to compensation, the applicant was required to demonstrate that the new fact so undermined the evidence against him that it was beyond reasonable doubt that no conviction could possibly be based on it. The Secretary of State concluded that he had failed to meet this test. In particular, he commented that it was not possible to predict how the jury would have viewed the new evidence (see paragraph 10 above). As the Court explained in *Adams*, cited above, § 41, it should be apparent from the judgment of the Supreme Court in *R (Adams)* that questions of guilt and innocence are irrelevant to proceedings brought under section 133 of the 1988 Act. Having regard to the foregoing, in order to avoid both any possible misconceptions in the minds of future claimants under section 133 and any suggestion of bringing into play the presumption of innocence under Article 6 § 2 of the Convention, it would be more prudent to avoid such language altogether in future decisions made under this section.

65. In our view, a number of important conclusions can be drawn from the reasoning in these two most recent decisions of the European Court.

66. First, as currently drafted, clause 161 of the Bill is incompatible with the presumption of innocence in Article 6(2) ECHR because it uses the language of “innocence” and thereby requires the Secretary of State (and subsequently the courts where the Secretary of State’s decision is challenged) to consider questions of innocence which should be irrelevant to the question of eligibility for compensation for a miscarriage of justice. By introducing into the s. 133 criteria consideration of the innocence of the claimant for compensation, clause 161 would remove the basis on which the Court found, in *Allen, Adams*, and *A.L.F.*, that s. 133 itself is not incompatible with Article 6(2) ECHR. It is therefore clear that the new s. 133, as amended by clause 161, would be vulnerable to inevitable and almost certainly successful challenge in the European Court for being incompatible with the presumption of innocence.

67. Second, the decisions confirm the Government’s view that under the current law there is considerable scope for misconceptions both in the minds of would-be claimants for compensation and in the minds of the Secretary of State when determining eligibility for compensation for miscarriages of justice and the courts when subsequently reviewing those decisions.

68. Third, the decisions confirm that the interpretation given to the term “miscarriage of justice” by Lord Phillips in *Adams*, namely that the test would be satisfied where a new fact so undermined the evidence against the defendant that no conviction could possibly be based upon it, is a “clear test” which is compatible with the presumption of innocence in Article 6(2) ECHR.

69. In light of the reasoning in these decisions, we conclude that the clarification of the law that is required is the articulation of a test which reflects Lord Phillips’s clear test in *Adams*. We recommend below an amendment to the Bill which would achieve this.

70. We wrote to the Minister on 11 December to give the Government an opportunity to provide us with its assessment of the compatibility of clause 161 in the Bill with Article 6(2) ECHR in the light of these two inadmissibility decisions. By letter dated 16 December the Government responded to say that it would not be in a position to provide that assessment in the time available. We make no criticism of the Government for that, as these significant decisions of the European Court of Human Rights have come at a late stage in the Bill’s passage, leaving the Government little time to respond, but Parliament will want to hear the Government’s assessment before the clause is considered again at Report stage.

Recommendation

71. We recommend that the Bill be amended to remove the reference to “innocence” in the proposed statutory test for a miscarriage of justice and to enshrine into law the test formulated by Lord Phillips in the House of Lords in the case of Adams. In our view, this meets both the concern that the current clause is incompatible with the presumption of innocence, and the concern that the law has become so uncertain that statutory clarification is needed in order to avoid unnecessary and costly litigation.

72. The purpose of such an amendment to clause 161 would be to give statutory effect to the test for “miscarriage of justice” formulated by Lord Phillips at para. 55 in the Supreme

Court in *Adams*, with which four other Supreme Court Justices in that case agreed.⁴⁷ This test has now been considered by the Strasbourg Court and considered to be a “clear test”⁴⁸ which is compatible with the presumption of innocence in Article 6(2) ECHR.⁴⁹

73. The proposed test is wider than the proposed test in clause 161 as currently drafted, and would mean compensation would have been granted in Sally Clark’s case; but is narrower than the amendment proposed by Lord Beecham at the Bill’s Committee stage, which was based on the Divisional Court’s modification of Lord Phillips’s test in *Ali*.

74. The amendment below would give statutory force to the approach of the House of Lords in *Adams*:

Clause 161, page 128, line 5, leave out “beyond reasonable doubt” and insert “conclusively”

Clause 161, page 128, line 6, leave out “the person was innocent of the offence” and insert “the evidence against the person [at trial] is so undermined that no conviction could possibly be based on it.”

47 See eg. Baroness Hale at para. 114, Lord Clarke at para. 217 and Lord Hope at para. 97.

48 *Adams v UK*, para. 41.

49 *Ibid.*, para. 40.

Conclusions and recommendations

Anti-social Behaviour (Parts 1–6)

1. We welcome the Government’s indication that IPNAs should not be used to stop reasonable, trivial or benign behaviours, but this intention is not so far reflected in the wording of the Bill. We therefore maintain our recommendation that the Bill be amended to introduce an objective element into the definition of anti-social behaviour in Part 1 of the Bill, by inserting a requirement that the conduct in question “might reasonably be regarded as” causing nuisance or annoyance. (Paragraph 12)
2. We welcome the Government’s willingness to consider amendments to these provisions, but it has not so far explained why singling out religious belief for special protection in this provision is necessary. In the absence of such an explanation, we consider that the existing protections for religious beliefs in sections 6(1) and 13 of the Human Rights Act should be sufficient, and we therefore invite the Government to consider whether any legal protection for religious freedom would be lost by accepting our original recommendation that the two provisions in question be deleted from the Bill. (Paragraph 15)
3. However, if the Government remains of the view that this provision is required, notwithstanding the protection provided by the Human Rights Act, we recommend that the current wording is revised to ensure that the absolute right to religious belief must not be interfered with under any circumstances (rather than “so far as practicable”). (Paragraph 16)
4. In our view it is the job of the criminal law, not the civil law, to deter riot-related offences and to administer sanctions when such offences are committed. Nor do we consider the existence of judicial discretion to be a satisfactory answer to our concern about the disproportionate impact of eviction on other members of the household who have not engaged in such behaviour. We maintain our recommendation that clause 91 be deleted from the Bill. (Paragraph 20)

Powers to stop, question, search and detain at ports (Part 10)

5. We have considered the Independent Reviewer’s recommendation that a subjective suspicion threshold be required to be met before the powers to detain and to copy and retain personal electronic data can be exercised, but for the reasons we have explained above we remain of the view that the threshold for the more intrusive powers in Schedule 7 should be reasonable suspicion. (Paragraph 39)
6. In our view, reasonable suspicion is the absolute minimum that is required to qualify as a safeguard because it opens up the possibility of independent scrutiny and review. That scrutiny and review can still be appropriately deferential and sensitive to operational realities, especially if there is good practical guidance for police on the sorts of things that count as reasonable grounds for suspicion. (Paragraph 40)

Compensation for miscarriages of justice (Part 12)

7. The Government's reliance in its response on the language used when declining an application for compensation under the new test therefore does not meet our concern about the presumption of innocence. (Paragraph 45)
8. We therefore conclude that the decision of the European Court of Human Rights in *KF v UK* is not a decision that a "clear innocence" test is compatible with Article 6(2), and therefore does not support the Government's view that there is no incompatibility between clause 161 and Article 6(2) ECHR. (Paragraph 60)
9. We recommend that the Bill be amended to remove the reference to "innocence" in the proposed statutory test for a miscarriage of justice and to enshrine into law the test formulated by Lord Phillips in the House of Lords in the case of *Adams*. In our view, this meets both the concern that the current clause is incompatible with the presumption of innocence, and the concern that the law has become so uncertain that statutory clarification is needed in order to avoid unnecessary and costly litigation. (Paragraph 71)

Formal Minutes

Wednesday 18 December 2013

Members present:

Dr Hywel Francis, in the Chair

Mr Robert Buckland
Rt Hon Simon Hughes
Mr Virendra Sharma

Baroness Berridge
Lord Faulks
Baroness Kennedy of the Shaws
Lord Lester of Herne Hill
Baroness Lister of Burtersett
Baroness O'Loan

Draft Report (Legislative Scrutiny: Anti-social Behaviour, Crime and Policing Bill (second Report)), proposed by the Chairman, brought up and read.

Ordered, That the Chair's draft Report be now considered.

Paragraphs 1 to 74 read and agreed to.

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

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Ordered, That embargoed copies of the Report be made available in accordance with the provisions of Standing Order No. 134.

[Adjourned till Wednesday 8 January at 9.30 am]

Declaration of Lords' Interests

No members present declared interests relevant to this Report.

A full list of members' interests can be found in the Register of Lords' Interests:
<http://www.publications.parliament.uk/pa/ld/ldreg/rego1.htm>

List of Reports from the Committee during the current Parliament

Session 2013–14

First Report	Human Rights of unaccompanied migrant children and young people in the UK	HL Paper 9/HC 196
Second Report	Legislative Scrutiny: Marriage (Same Sex Couples) Bill	HL Paper 24/HC 157
Third Report	Legislative Scrutiny: Children and Families Bill; Energy Bill	HL Paper 29/HC 452
Fourth Report	Legislative Scrutiny: Anti-social Behaviour, Crime and Policing Bill	HL Paper 56/HC 713
Fifth Report	Legislative Scrutiny: Transparency of Lobbying, Non-party Campaigning, and Trade Union Administration Bill	HL Paper 61/HC 755
Sixth Report	Legislative Scrutiny: Offender Rehabilitation Bill	HL Paper 80/HC 829
Seventh Report	The implications for access to justice of the Government's proposals to reform legal aid	HL Paper 100/HC 766
Eighth Report	Legislative Scrutiny: Immigration Bill	HL Paper 102/HC 935
Ninth Report	Legislative Scrutiny: Anti-social Behaviour, Crime and Policing Bill (second Report)	HL Paper 108/HC 951

Session 2012–13

First Report	Draft Sexual Offences Act 2003 (Remedial) Order 2012: second Report	HL Paper 8/HC 166
Second Report	Implementation of the Right of Disabled People to Independent Living: Government Response to the Committee's Twenty-third Report of Session 2010–12	HL Paper 23/HC 429
Third Report	Appointment of the Chair of the Equality and Human Rights Commission	HL Paper 48/HC 634
Fourth Report	Legislative Scrutiny: Justice and Security Bill	HL Paper 59/HC 370
Fifth Report	Legislative Scrutiny: Crime and Courts Bill	HL Paper 67/HC 771
Sixth Report	Reform of the Office of the Children's Commissioner: draft legislation	HL Paper 83/HC 811
Seventh Report	Legislative Scrutiny: Defamation Bill	HL Paper 84/HC 810
Eighth Report	Legislative Scrutiny: Justice and Security Bill (second Report)	HL Paper 128/HC 1014
Ninth Report	Legislative Scrutiny Update	HL Paper 157/HC 1077

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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	Terrorist Asset-Freezing etc Bill (Second Report); and other Bills	HL Paper 53/HC 598
Fifth Report	Proposal for the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010	HL Paper 54/HC 599
Sixth Report	Legislative Scrutiny: (1) Superannuation Bill; (2) Parliamentary Voting System and Constituencies Bill	HL Paper 64/HC 640
Seventh Report	Legislative Scrutiny: Public Bodies Bill; other Bills	HL Paper 86/HC 725
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Eleventh Report	Legislative Scrutiny: Police Reform and Social Responsibility Bill	HL Paper 138/HC 1020
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Thirteenth Report	Legislative Scrutiny: Education Bill	HL Paper 154/HC 1140
Fourteenth Report	Terrorism Act 2000 (Remedial) Order 2011	HL Paper 155/HC 1141
Fifteenth Report	The Human Rights Implications of UK Extradition Policy	HL Paper 156/HC 767
Sixteenth Report	Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill	HL Paper 180/HC 1432
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Eighteenth Report	Legislative Scrutiny: Protection of Freedoms Bill	HL Paper 195/HC 1490
Nineteenth Report	Proposal for the Sexual Offences Act 2003 (Remedial) Order 2011	HL Paper 200/HC 1549
Twentieth Report	Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)	HL Paper 204/HC 1571
Twenty-first Report	Legislative Scrutiny: Welfare Reform Bill	HL Paper 233/HC 1704
Twenty-second Report	Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill	HL Paper 237/HC 1717
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