



Evidence Session No. 1

Heard in Public

Questions 1 - 8

TUESDAY 13 SEPTEMBER 2016

Members present

Baroness Kennedy of The Shaws (Chairman)
Lord Cromwell
Baroness Hughes of Stretford
Baroness Ludford
Lord Oates
Lord Polak
Baroness Shackleton of Belgravia

Examination of Witnesses

Professor Sionaidh Douglas-Scott, Anniversary Chair in Law, Queen Mary School of Law, University of London and Honorary Research Fellow, Lady Margaret Hall, University of Oxford, and **Professor Vaughan Lowe QC**, Essex Court Chambers

Q1 The Chairman: Professor Lowe, it is very nice to see you again. Given that you are an old hand, you will know the form. This session is being recorded and will appear on the parliamentary channel. You will be sent a transcript. If there is anything you want to change or add, we will be very happy to receive it from you in the next short period. I know you know the rules of the business better than many. Professor Douglas-Scott has been delayed because of transport problems. She will join us as soon as she gets here, but I am anxious to get under way. Thank you for coming to help us.

In this period since the referendum, this Committee has been looking at issues that the public are clamouring for answers to. It seemed to us that, as the EU Justice Committee, we were best placed to have an inquiry quite promptly into the issue of acquired rights. What is the position of those from other European Union countries who are living and working in Britain? Are their rights protected? Does international law provide them with any

sustenance? What is their position? What can they take comfort from? The same question arises relating to British people living in other European Union countries, who are approaching British embassies, consulates and diplomats for some sense of what their position will be. I wondered whether, given your great wealth of experience, you might be able to assist us on some of those questions. You very kindly sent us a paper indicating some of your initial thoughts.

Let me try you with a first question. You say that the protection afforded by the principles of applied rights under international law is likely to be very limited to property and contractual rights. Post-Brexit, to what extent do you think the international law principle can be relied on to protect property and contractual rights derived from European Union law for individuals and companies for whom European Union law will no longer apply once we are out? Can you help us?

Professor Vaughan Lowe: The answer is two-sided. The first is to say that it will protect, as a principle, acquired rights, whether they are acquired under EU law or by operation of any other system. On the second side of the argument, the protection afforded is very limited, both substantively in the range of rights protected by it, and procedurally, in that the legal mechanisms that would be available for individuals and corporations to use to vindicate those rights would be very narrow indeed.

Baroness Shackleton of Belgravia: Could it, for example, be relied on to safeguard the right of establishment for companies under EU law?

Professor Vaughan Lowe: I do not think that people would approach it from quite that perspective. A company that had exercised its right of establishment and had set up a factory, trading operation or whatever would have acquired rights in the factory—in the material it has there. It is those secondary rights, which would be protected: the rights it has acquired consequent on the exercise of its freedom of establishment. It would not, as a legal principle, protect the right to establishment itself.

The Chairman: Professor Lowe, it is always made much easier for those of us who are not lawyers to have a sense of this through examples. You mentioned a factory. Perhaps closer to people's experience is that somebody sets up a small business here in Britain, or sets up a linked business. Their concern is that this stepping away from Europe will somehow not afford them the protections they would normally have for their business interests here in the UK.

Professor Vaughan Lowe: I can change the example and the position would be exactly the same. If I set up a small grocery shop or window-cleaning business, I would have rights in the shop that would be protected—they could not be taken away from me—but the actual right to come and to set up that business itself would not be protected afterwards. That flows from membership of the club, as it were—from the EU.

The Chairman: It is people who produce certain things. You have it, for example, with designers, who design all manner of things, from clothes onwards. They then set up a business here in the UK and there is a market that likes what they produce. They are in a state of flux as to what will happen to the thing they do here in Britain. A lot of it is about creativity. They are very worried.

Professor Vaughan Lowe: I am not surprised that they are worried. The answer has not been put into a proper focus yet. I have to confess that, over the days I have spent thinking about this before coming here, the more I have thought about it the more difficult and complicated it seems to be. To take the example of a designer, the core question is what right they have to stay here, which is a question of the right of residence, rather than of acquired rights, property rights or their right in designs and things of that sort.

Baroness Shackleton of Belgravia: Could they enforce their patents, for example?

Professor Vaughan Lowe: That would count as a property right. Intellectual property would count. This is part of the problem.

Baroness Shackleton of Belgravia: Would it wither away?

Professor Vaughan Lowe: No: if you have a property right now it stays and will not be affected by leaving the EU.

Baroness Shackleton of Belgravia: And it will be equally enforceable in all EU countries?

Professor Vaughan Lowe: In the same way that if I buy a tube of toothpaste at Boots around the corner I acquire legal rights over it. Those rights would be recognised in any European state or any other state in the world. There is nothing particularly magical about the persistence of those property rights. The difficulty comes in defining the limits of property. You touched on it with intellectual property rights, which count as property, but there are arguments, for example, that people's interests in some welfare benefits—in pensions and so on—may also count as property rights and be protected.

The Chairman: I invite Lord Cromwell to ask a question.

Q2 Lord Cromwell: Good morning. Are we trying here to bang a square peg into a rather poorly defined round hole with acquired rights? Should the Committee just say, "This doesn't work. Let's start again with something else"? The illustrations you are giving us suggest to me that for people to whom EU law no longer applies, a huge, complex range of questions arise out of acquired rights and what they do and do not apply to. Should we just say that we are looking down the wrong pipe and we should look down a different one?

Professor Vaughan Lowe: Part of the problem is that the notion of acquired rights is a very useful label to describe people's expectations, having relied on EU rights in the past and wanting them to persist. But the actual doctrine of acquired rights under international law is much narrower. Frankly, I do not think it is useful. As I have said in my written comments, the substantive protection given by the international law doctrine of acquired rights is pretty well eclipsed by the protection given by the European Convention on Human Rights, for example. There is no obvious reason why anyone would try to rely on the acquired rights doctrine, rather than rely on the European Convention.

The Chairman: To take us back to that, the European Convention on Human Rights, of course, does not come out of our belonging to the European Union. It comes from a separate association: our membership of the Council of Europe. Would you then say that the best way to give assurances to European peoples living here in Britain, creating jobs, working, whatever, is that they are given and acquire rights through our membership of the Council of Europe and being part of the tapestry of the European Convention on Human Rights, and that therefore it is an argument for retaining the European convention?

Professor Vaughan Lowe: The European Convention is about the way Governments treat people. The question of the persistence of rights of British nationals abroad and EU nationals in Britain comes down to that very question: how will the Government treat them in terms of rights or residence, and so on? Even when you talk about rights that they have as against those of other people, such as employers, it is a question of how far the Government will go in laying down a legislative framework for their protection. There is a common focus in the two. The fact that the European Convention happens to come out of the Council of Europe rather than the EU is not particularly material in this context.

The Chairman: Lord Oates will pick up on that theme.

Q3 Lord Oates: Just following on from that answer, Professor Lowe, you anticipate in the written evidence you have given us that any claims against the UK arising out of Brexit will

be likely to be brought under the ECHR or investment treaties. Is it possible to define the scope of rights that might be protected under the ECHR—potentially Article 1 of Protocol 1?

Professor Vaughan Lowe: It is. I did not quite say that any claim against the United Kingdom arising from Brexit would be likely to be brought under that Convention. I said that any claim that relates to acquired rights would be likely to be brought under it. That is a reference to the narrow international law doctrine protecting property interests. To the extent of the protection of property interests, it is true that it is likely that claims would be brought under the European Convention. So, to answer your question, yes, you can define the scope, and the list of rights that are protected are set out in the European Convention—the right to a fair trial, the right to family life and so on. In the context of acquired rights, Article 1 of Protocol 1 refers to the right to enjoyment of possessions, which in substance is a protection of property rights under the European Convention. The same is true under investment protection treaties.

The Chairman: Welcome, Professor Douglas-Scott. We know that you have had troubles—you do not have to explain at all. It is very nice to see you.

Professor Sionaidh Douglas-Scott: London Underground was not at its best.

The Chairman: Thank you very much. Fire away, Professor Lowe; you were talking about the protections that are available under the European Convention on Human Rights. You mentioned that Article 1 of Protocol 1 provides the protection of property rights.

Professor Vaughan Lowe: Yes, and it refers to them as possessions, but the Court [sc., European Court of Human Rights] itself has drawn an equivalence between the notion of possessions and the notion of property rights. It is almost a non-technical point. Because the notion of possessions is wide, it spills over into interests in pension rights and other matters of that kind. It is a fairly wide concept, more like the continental concept of patrimony or “bien”, as they would have it in French law, for example.

As far as the investment treaties are concerned, these are for investors: that is, anyone who sets up a business in one of the States party to the treaties. They would be protected against discriminatory, unreasonable and other measures; expropriation and things of that sort. So anything that was done to the property of somebody who had set up a business in a State party would be protected. The key thing about both the European Convention and investment treaties is that they both have mechanisms that are available to individual litigants. An individual or a company can themselves initiate a case against the State under

both those processes, in a way that would not be possible under international law generally. Under international law generally, the British Government would take action against a foreign Government to vindicate the rights of the British citizen.

The Chairman: Just to make it clear—I am sorry if this sounds pedantic—the protections under international law for property rights are one thing, and you say that they are limited. Does Article 1 of Protocol 1 under the European Convention on Human Rights give us a stronger set of rights? Is it more powerful than international law, which, as you say, has its limits?

Professor Vaughan Lowe: On the question of whether it is wider and stronger, I think it is stronger in that Protocol 1 has the ECHR mechanism behind it, so it is easy to use that to vindicate rights, whereas it is not easy to vindicate rights under public international law generally. In terms of its breadth, arguably Article 1 is wider than that. The difficulty under international law is that there are not so many cases where the doctrine of acquired rights has been used explicitly. We have a very clear sense of what its boundaries are. Often, international courts and tribunals will take steps to protect property rights, but they may refer to it as taking action to prevent unlawful expropriation or something of that kind, so they may not use the precise language that allows us to delineate with any precision a doctrine of acquired rights.

The Chairman: So the ECHR offers us better protection than international law does at the moment.

Professor Vaughan Lowe: That is a perfectly reasonable generalisation.

The Chairman: Thank you. I wanted to welcome you properly, Professor Douglas-Scott, because you have also presented us with a paper that has been very helpful to us. I want to explain that we started simply because of the pressures of time and other commitments that people have to fulfil. However, you probably have a sense of where we are going. We are trying to establish the extent to which people can take comfort from any law that is currently available to them over and above what might be written into any treaty that comes out of negotiations. For the time being, we want to see what comfort can be afforded to those who are concerned about their position—both people here from other European countries and people from Britain who have business interests or have settled in other places and are worried about their position. Would you like to contribute anything to that discussion, part of which you might have overheard?

Professor Sionaidh Douglas-Scott: I may have missed something and therefore I may repeat what has already been said. However, as a general observation, a lot of the rights that are derived from EU law are simply not replicated in other instruments, so there is a real deficit. Although there are a lot of rights that seem to be the subject matter of this Committee's investigation, most of them, strictly speaking, would not be classified as acquired rights in international law. There is just a very small intersection of property and contractual rights. For the large part, the rights that citizens enjoy under EU law will not be covered by other instruments. The ECHR does a certain job with property rights, which you have already discussed, and I also think that Article 8 could be usefully—

The Chairman: On family rights.

Professor Sionaidh Douglas-Scott: That is right. Certainly in some cases there might be a legitimate expectation under that article, and the act of deportation could be a breach of Article 8. But there will be many, many rights that simply do not find a home in any of these other instruments, particularly rights of free movement and, for example, social rights, which are provided for in EU law. Again, workers' rights do not find a home in the European convention because it is a civil and political rights charter. Importantly in the case of some of those social rights, they gain their force in UK law through statutory instruments, parented by the European Communities Act. Once that goes, those rights also go in UK law. So there is quite a complicated situation.

Very briefly, in answer to your first question on the extent to which the principle of acquired rights could be relied on to protect rights derived from EU law—specifically property and contractual rights—I think the answer is very little.

The Chairman: Very little. It has been very helpful to have that clarified.

Q4 Baroness Hughes of Stretford: In both your submissions, you said that, whatever we can do, the negotiation of withdrawal agreement is key to safeguarding some of the rights that exist at the moment under EU law. Can you give us any pointers or views in relation to the drafting? Could or would a withdrawal agreement safeguard those rights both, as we have said, for non-UK EU nationals and companies here and for UK nationals and companies in other member states?

Professor Sionaidh Douglas-Scott: There are very few precedents here. Obviously, the UK Government are not going to give much away in how they negotiate this withdrawal agreement, but one could draft it fairly broadly or quite specifically. The only sort of

precedent I could find was the Greenland treaty. In 1985, part of Denmark, and by referendum those in Greenland, decided to leave the EU, and the issue of acquired rights arose then. As part of the treaty that was drafted, there was a protocol and it was very vague. It talked about the rights that individuals had but did not specify their nature. That suggests that one could draft this agreement quite broadly or be quite specific. The problem with drafting specifically and identifying all the rights is that the more specific you are, the more you are open to quibbling arising among the 28 different interests that are at stake.

The Chairman: And in general there will be quibbling, too, because it is likely to give rise to very strong vested interests and arguments one way or another over what those rights are.

Professor Sionaidh Douglas-Scott: Exactly.

The Chairman: I just want to ask you whether in a negotiation an agreement might not be wrapped up in a nationalising of all the law that we have from the European Union and then basically be brought home and, in the years to come, be gone over piece by piece to see what you did and did not want to keep. That would be one version, would it not?

Professor Sionaidh Douglas-Scott: It would, but I have to say that that is one problem with it: that quite a lot of the existing law makes specific reference to EU institutions, and there would be a problem where that was the case, even with the treaty but also with secondary EU legislation. You do not necessarily have a provision of law that just sets out the law and says that these are the rights or whatever that people have; there may be a reference to the duties of the Commission. So you would have to go through the law quite carefully to see what you would do in such cases; otherwise, you would have a reference to an institution that we were no longer bound by treaty to have any relations with.

The Chairman: Professor Lowe, what is your response to the idea that following a negotiation the eventual treaty basically nationalises everything that has come to us from Europe, we make it British law and incorporate it but then work through it in our own good time, having left Europe?

Professor Vaughan Lowe: Logically, that must be the case. Either you enumerate the rights that are going to persist or you freeze the legal situation at the moment of exit and say that all rights that exist today will carry on until such time as they are repealed and altered by Parliament. Of the two, the latter seems much the safer and more sensible way of doing it. In each case, you can couple the treaty with provisions saying that certain rights will not be phased out or that some will be phased out over a certain period of time.

However, there are two problems. One is that the withdrawal agreement really addresses two audiences. One is the technical, legal audience, which is concerned with making decisions on the precise limits of rights that persist and rights that do not. The second is the broader public audience, where people want to know what the position is and want to be able to point to provisions *in the treaty* that guarantee those rights, and not simply to political commentaries on the treaty. Getting the balance between those two things is very difficult.

The other problem is that I am not clear—perhaps I should be, but I am not—whether it is envisaged that the withdrawal agreement will relate only to the rights of existing EU citizens or whether it is intended that it should include some provisions that apply to future generations—the people who come after—and whether it will be an open-ended commitment for Britain nationals’ rights in the EU generally or whether it will simply apply to children and people who are [sc., currently] foreseeable citizens of the EU.

The question of scope is also quite important in looking at the way in which the treaty is drafted. If it were drafted with future citizens in mind, I think you would take a very different view from that which you would take if you were dealing with the phasing out of rights that would be lost by natural mortality and by time-limiting rights that corporations and so on had as a transitional measure.

Baroness Hughes of Stretford: Assuming that through some process or another of the withdrawal agreement, some defined acquired rights were agreed, how do you foresee those rights being enforced by national courts in the UK and in EU member states? Would the relevant judgments of the Court of Justice have to be taken into account in that regard?

Professor Sionaidh Douglas-Scott: There is a variety of mechanisms here depending on the nature of the claim that is brought. If we are looking at the situation of an EU citizen in the UK, they are not going to have much in the way of options when it comes to EU law because presumably EU law as such will cease to apply. So in that case they will be reliant on national law and possibly international law. However, as already stated, international law is of limited utility, so one would need to look at the situation in national law and the extent to which there was any commensurate protection of vested interests, acquired rights and legitimate expectations. One would look at domestic public law and the application of the Human Rights Act in so far as it is enforced in the European convention. The problem there is that you would not have an overlap with the rights of free movement protection that you get

under EU law. There would certainly be a requirement that any rights had actually been exercised to start with, so you would have to be dealing with an EU citizen who was present and working here, but the extent to which they could make use of any rights under national law would be limited. I think you would be thrown back on UK immigration law.

Looking at the situation in reverse, British citizens who are resident and working abroad may have slightly more in terms of the spectrum of law on which they can draw because there will be a limited amount of EU law. I say limited because, when Britain withdraws from the EU, presumably they will no longer be EU citizens, so it will be difficult to bring themselves within the scope of EU law. None the less, the EU has to a certain extent harmonised the position of third-country nationals, which we would then become. However, it has not done so particularly generously in comparison with what we have under EU law for EU citizens. So there are those two possibilities.

This is all less generous than we have at present. You would be thrown back on national law, a certain amount of EU law in the rest of the EU and, importantly, the European convention, but that is limited to the protection of certain rights such as the right to a private life, the right to property and perhaps the right to a fair trial.

Professor Vaughan Lowe: I agree with everything that Professor Douglas-Scott says and would add two points. One picks up your question on the European Court. If, for example, there were a safeguarding of rights of workers to move around for a certain period of time, it would be important to decide whether what was safeguarded was the law as it stood at the moment of exit or the law as it continued to evolve within the EU. I would have thought that the political logic of Brexit dictates the former, but that puts you in the curious position of referring back to a body of law that has ceased to exist for practical purposes.

Secondly, it is absolutely true that the mechanisms for enforcement will be the normal mechanisms of national legal systems, but of course it would be possible to add on to the withdrawal agreement some mechanism for handling the matter at a higher level. If the United Kingdom Government considered that another member State was not adequately respecting the rights that they believed they had safeguarded for British citizens abroad, that failure could then be taken up by the British Government through some mechanism with the EU and/or the member State concerned. So you could sit over the top of the immediate, day-to-day, enforcement system another mechanism that would deal with it.

The Chairman: So the drafting of the withdrawal agreement would be rather vital to that. Baroness Ludford has some questions on rights in the drafting of the withdrawal agreement.

Q5 Baroness Ludford: I could not help smiling at the thought of the possible involvement of the European Court of Justice, but anyway. I should declare that I have a pension from the European Parliament. That is in my declaration of interests. If you were drafting the withdrawal agreement, what order of priority of EU rights would you seek to ensure the agreement safeguarded?

Professor Sionaidh Douglas-Scott: You ask for a view. I am not the UK Government.

Baroness Ludford: What would you advise?

Professor Sionaidh Douglas-Scott: My order of priority would be different, perhaps. I looked at the White Paper, *The Process for Withdrawing from the European Union*, produced earlier this year. It identifies areas for UK citizens living in the EU that should form the subject matter of negotiations. They make a list to which I would add certain things. It mentions, quite obviously, the right to live, work and own property in all 28 EU states; the ability to retire to another EU country; the right to receive healthcare that is free at the point of use, paid for by the NHS, using the European health insurance card; the right to vote in local elections in other EU countries. We might want to add to that to stand for office, too, because there are quite a lot of UK nationals who are—

The Chairman: There are British people who are on councils in parts of France and Spain.

Professor Sionaidh Douglas-Scott: That is right, and there are MEPs. The White Paper says that there should be mutual recognition of child custody decisions across the EU. The EU deals with a huge swathe of civil justice matters. It also mentions the use of the European small claims procedure and the right to use public services in other EU countries. That is what the Government say in their White Paper. I added to that the enforcement of judgments. If you have a right, you have to be able to enforce it. Given the degree of integration that we have had, we have reasonably streamlined procedures for the enforcement of judgments under EU law. Will that go? I also added social rights, which exist under the charter and in the body of the treaties. To what extent would they be maintained?

The Chairman: You are thinking of employment rights?

Professor Sionaidh Douglas-Scott: That is right, such as working time law. Presumably the working time regulations will go if the European Communities Act is repealed. Prison transfer is another matter: the right of prisoners to serve their term in a British prison after a

certain period of time. There is study abroad and Erasmus—that students have some continuing ability to study in other countries. I also added pensions and the right to receive the triple lock, with the state pension increasing. These were things that came to mind in a fairly cursory look. I imagine that the right to live, work and own property is fairly important, but how do you negotiate that if free movement is something there are a lot of arguments about because of different views on immigration?

Baroness Ludford: Do you think that the withdrawal agreement will have to address the position of EU and third-country nationals lawfully resident in the UK, as well as UK nationals living elsewhere in the EU?

Professor Sionaidh Douglas-Scott: Yes, I do.

Baroness Ludford: It would be a similar list?

Professor Sionaidh Douglas-Scott: I do not think that anything will be possible without reciprocity. This is the way the EU tends to work: whatever visa regulations it makes for third countries, it demands similar treatment for its own nationals. The question of third-country nationals in the UK will be relevant to the extent that they are currently protected by EU law if they are spouses or family members of EU citizens resident here. The situation of the so-called static EU citizen—the British person who has a third-country national spouse who has not exercised their rights—I presume would not be included in the original agreement. It does not seem to raise an issue of EU law.

The Chairman: Professor Lowe, would you like to add anything to that?

Professor Vaughan Lowe: No. Predictably, I agree with everything that Professor Douglas-Scott said. I was a bit puzzled by the question. I do not see it as a question of priority. The question is what goes in and what does not. The order in which it appears in the withdrawal agreement is neither here nor there and can be adjusted. The order in which it is negotiated can be adjusted, and seems to me to depend on factors other than the importance of the rights themselves.

Baroness Ludford: It is a question of scope: how hard do you fight for these different things? What are your red lines? It is not the order of negotiation but how important it is that the withdrawal agreement covers these issues.

The Chairman: It is not the order, but the priority.

Professor Vaughan Lowe: Then I agree completely with the tenor of Professor Douglas-Scott's argument. It is a matter of very considerable concern to a lot of people in this country

and abroad. My focus would clearly be on the concerns of those people. I add one thing: safeguarding their rights is not necessarily the only way to serve their interests. If they lose rights in the context of negotiation of a withdrawal agreement, that may be something for which the British Government should pick up the tab itself in some way or another.

The Chairman: So it would involve compensation?

Professor Vaughan Lowe: Through compensation or through some alternative mechanism. If, for example, British nationals abroad lost some access to healthcare provision abroad, maybe the British Government should take on responsibility for that.

The Chairman: I will come to this question later.

Q6 Lord Polak: Thank you for today. For the average non-professor and non-lawyer you have confirmed that this is not quite as easy as it was portrayed during the campaign. I was intrigued by the list the Government have: to live, work and own property. You have added a number of other things. I am a bit concerned that this withdrawal agreement may not have all the things in there that it should have. For the ones that are in, how optimistic are you that those rights will be safeguarded, and what factors may put this in danger? It is confusing for the average person out there.

The Chairman: Lord Polak is not actually the average person.

Lord Polak: He is. There is a real problem. If I may, Professor Douglas-Scott portrayed it by adding a list to what the Government have already said. It is a real concern. What are the dangers that things will be missed out?

Professor Sionaidh Douglas-Scott: There are two danger factors, if we want to look at it that way. One is the sheer factor I mentioned earlier of 28 different states getting together and seeing this as a negotiation where there might be something to be gained and something to be lost. That brings a certain unpredictability to it. Each state may have its own interests. There is, of course, this problem of free movement: statements by certain members of our Government that there will have to be restrictions on free movement. That will make the negotiation more difficult. The other aspect is the transparency of any withdrawal agreement. How much knowledge will anybody have, including Parliaments and devolved Parliaments, of what the content or subject matter will be? From statements made by our Minister for Brexit yesterday, I get the impression that the intention, at least at the earlier stages, is not to give too much away. I imagine that is par for the course in a lot of treaty negotiations. There is a problem of transparency, but there is also the inevitable factor that

the other member states have their own worries and interests. That has too often been forgotten in the context of discussing Brexit. There are 27 other countries. How do they feel about this? They do not all have the same interests. Those, very broadly, are some problematic issues.

Q7 The Chairman: This issue of transparency is one of the problems. You are right that yesterday the Secretary of State for Brexit, David Davis, gave evidence to the European Union Select Committee on the process. It has been made very clear by the Prime Minister and other Ministers that there will not be a running commentary. The question is the extent to which the public—many of whom I hope will be watching you give this evidence today—want to know what will be said, what will be argued for with real vehemence in this list of rights, and what will be considered less valuable and something that can be negotiated away. The priority given to them will vary between people and between those who are negotiating. They may lose priority in terms of the seriousness they attach to some of these rights. It is worrying, and I just want to ask this question. Frequently in the House of Lords, and in the House of Commons too, a week does not go by without somebody raising the issue of whether comfort can be given to European Union nationals living in this country who are fearful about their position and wondering how they should plan for the future—the future of their businesses, their lives and their children’s lives. They want reassurances now, not after the triggering of Article 50, not when we ultimately have a negotiation treaty on the table to be presented to the public. They want reassurances sooner rather than later. From the discussion we have had, does it look possible to give those reassurances sooner rather than later? It sounds to me as though you are saying no.

Professor Sionaidh Douglas-Scott: I would think no, because it would be a negotiating strategy. I believe the Prime Minister made statements to that effect in July. This will be one bargaining tool that the UK will have in any withdrawal negotiations. I think it unlikely that any firm undertaking might be given—something that would be translatable into some sort of legitimate expectation and law, for example. I might be wrong.

The Chairman: Professor Lowe, what view do you take of this business? We keep having this clamour. Members certainly of this House but also of the Commons stand up and say, “We want a reassurance for people now”. They want to hear now that they can start planning for their children’s education, for their future, for their businesses. You have to think in terms of five years, at least. Can we have assurances so that we can make those plans?

Professor Vaughan Lowe: I am slightly less pessimistic. The answer to your question whether we can be sure that the agreement will safeguard rights is, absolutely no. There is zero chance of having confidence that the existing legal position of British nationals abroad and of EU nationals in Britain will remain unchanged, for the simple reason that all these rights sit in a broader legal context. When they cease to be citizens of an EU State, that is bound to change to some extent. We will not be able to foresee precisely how it will change. No, we cannot be confident; but we could at least adopt the principles and be clear what it is we are aiming to do—to think, in EU terms, more in the nature of a directive than a regulation, to set and define the goals. I do not see why the Government here and the EU should not be absolutely explicit about what they are trying to achieve. That is very different from saying there will be a running commentary on how well they are doing in achieving it.

The Chairman: But we could indicate now what it is they intend to achieve for those people who are full of uncertainty.

Professor Vaughan Lowe: Can and should.

Lord Oates: Professor Douglas-Scott, you mentioned that the withdrawal agreement for Greenland had a very broad clause relating to rights. Do you have any information on how that played out practically in the exercise of rights?

Professor Sionaidh Douglas-Scott: I am not a great expert on Greenland and its relations with Denmark, let alone the EU. I would say two things. One is that the issues in the case of Greenland were pretty narrow. The main problem was fish and fishing rights. It did not seem to turn on much else. The second issue is that, as I have recently read, there have been calls for Greenland to rejoin the EU. Obviously some people are not satisfied with the situation. Personally I do not have enough knowledge of Greenland to know how that played out.

Professor Vaughan Lowe: Perhaps I could just add to that. There is another body of practice that is probably worth looking at. I am not certain it is, but it is worth a go. It is the decolonisation provisions, where independence was given by British statutes to countries such as Ghana, Burma and so on. There is very detailed provision in many of those agreements for transfers of responsibilities for pensions and for the safeguarding of property rights. There is quite a rich body of practice, which might be worth looking at.

The Chairman: That is very interesting. That goes back quite a way in our legal history, but we might find some assistance.

Professor Vaughan Lowe: It is the 1950s and 1960s—not so long ago.

The Chairman: To us as lawyers, but to many people it seems like the olden days. According to my children it is.

Lord Cromwell: Greenland has a small population and you are quite right that it has one industry, fish. It took three years to negotiate that exit. That is worth pinning on the board. But my question to you is: we have all stressed that the withdrawal agreement is key, but it has also emerged that it will be a phased negotiation that will be fraught with complexity, delay and different interests at work—political, commercial, et cetera. Does that mean that what we are likely to end up with in the withdrawal agreement will be very generalised? I would not say that it will be banal but it could be all-embracing and non-controversial, and the reality is that it will have to be worked out on an evolutionary basis over a decade or more.

Professor Sionaidh Douglas-Scott: Yes, it depends on other agreements. Article 50 itself refers to the withdrawal agreement in the context of a framework for future relations that will be taken into account. That is not the actual wording. It seems inevitable to me that when there is negotiation of the withdrawal agreement, the parties have to consider what the future relationship is. If Britain were to take some sort of EEA/Norway-type relationship with the EU, the issue of acquired rights—the right of free movement and other rights under EU law—becomes less salient, so there would be less pressure on the withdrawal agreements. Inevitably, even if it is only a framework, it is not an agreement as such that will have to be taken into account. Some of the issues I mentioned that would have been on my list although perhaps not on the Government's, such as prison transfers and civil judgments, those sorts of things, would not be in an EEA-type agreement. There would have to be a separate agreement between Britain and the EU for that. That would be in the context of another agreement that will have to be taken into account. Inevitably there are these linkages between how you negotiate the withdrawal agreement and what you think your future relationship will be.

Lord Cromwell: On what Professor Lowe said about directives, will we get a statement of objectives in the withdrawal agreement and that is about it?

Professor Vaughan Lowe: I think so. I can see no practical possibility whatever of getting a withdrawal agreement that ties up all the legal questions. It will have to be an ambulatory and developing process.

Q8 The Chairman: As we draw to a conclusion, I just want to ask you how influential reciprocity will be in agreeing what rights will be safeguarded in any withdrawal agreement. Reciprocity will be one of the rather fundamental aspects of this.

Professor Vaughan Lowe: It is an intuitive moral and political principle, but it is not a necessary component of the bargain, as it were. There may be rights to be traded in against other interests: but that is a matter of government policy and what the Government think they are trying to achieve by negotiations.

Professor Sionaidh Douglas-Scott: We could look at the case of the EU and Switzerland. After a referendum, Switzerland decided to take a step back on certain free-movement rights. The EU reacted very swiftly to that, in turn denying that access would be available for research, Horizon 2020 and other programmes for Switzerland. It looks to me as though the EU has a certain amount of reciprocity in mind—or retaliation, perhaps, in some cases.

The Chairman: A price to be paid.

Professor Sionaidh Douglas-Scott: A price to be paid, yes.

Lord Polak: I am finding this whole thing quite fascinating. Clearly, as I see it, the agreement is being pushed, or negotiated, by a politically motivated group of people, but sitting here are two legal experts. Without going through all the things that we have spoken about today, how worried are you that the agreement that will be made will be political? As individuals, are you concerned and, if so, what can be done about it?

Professor Vaughan Lowe: What concerns me most is that there is very little evidence of people knowing what they are trying to do, whatever their motives might be. I just wish that I had some sense of either an objective or a process by which the Government were moving towards defining an objective. However, at the moment I see neither.

The Chairman: Let us imagine best intentions: that they really want to make sure that people have all the rights that they currently have and that they are protected and preserved, and that they want to win round the rest of Europe, making an agreement on the protection of all those rights for everybody but simply with us not belonging. Let us imagine that that is the purpose. Is it achievable?

Professor Vaughan Lowe: No.

The Chairman: And the reason? Is it achievable only if you have a legal framework that combines it, which takes us to the European court and European law?

Professor Vaughan Lowe: There is no conceivable scenario in which all the rights that flow from EU membership will persist when Britain leaves the EU; otherwise, there would be no point in attaching a price to membership of the EU. Some rights will go. The question is: which ones? Which do the Government regard as important, and what kind of relationship do they see Britain having with the rest of the EU? I do not think that question has yet been answered.

Professor Sionaidh Douglas-Scott: I should like to add something about the negotiation. I am not clear who is going to be doing it. I presume that there will be some politicians and some officials, but which politicians and officials? Will, for example, Members of the devolved Administrations be included in this? They surely have a big interest, but as far as I am aware they have no legal rights under Article 50 or under the devolution Acts. It would make a lot of sense to include them. Will there just be government politicians, or will any opposition politicians be included? I have no idea who is in mind to do this negotiating, but that would surely make a difference.

The Chairman: We should also be mindful of the fact—and there are reports, certainly in the media—that there has been a huge increase in the interest of professional lobbyists, corporate lobbyists and all manner of lobbyists who are trying to access those who will be in the negotiating chairs. An awful lot of people presenting themselves to assist in the negotiation will suddenly, overnight, become the negotiators when they were not the negotiators the day before. We will find a lot of people in the legal, accounting, public relations and consultancy worlds suddenly describing themselves as trade negotiators. I think there will be an awful lot of people around the back of whoever is in the front row of seats, and that in many ways will be how the priorities—what is at the forefront of the minds of those doing the negotiation—are determined. As I understand it, the Prime Minister has stated that she will lead those negotiations. I imagine that on her right hand will be the Secretary of State for Brexit and on her left perhaps the Secretary of State for trade and industry. I do not know.

I thank everyone for participating. I thank the members of my Committee for their contribution, and I especially thank both of you. You are well known to Parliament as independent experts and you have given us your valuable time. We are greatly indebted. It has been a very productive morning. Thank you very much indeed.