



THE SELECT COMMITTEE ON THE EUROPEAN UNION

Justice Sub-Committee

Corrected oral evidence: Brexit: Acquired Rights

Tuesday 25 October 2016

11.25 am

[Watch the meeting](#)

Members present: Lord Cromwell (The Chairman); Baroness Hughes of Stretford; Lord Judd; Earl of Kinnoull; Baroness Ludford; Baroness Neuberger; Baroness Newlove; Lord Oates; Lord Richard.

Evidence Session No. 4

Heard in Public

Questions 27 - 31

Witness

[I](#): The Rt Hon The Lord Howard of Lympne CH QC.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.
2. Any public use of, or reference to, the contents should make clear that neither Members nor witnesses have had the opportunity to correct the record. If in doubt as to the propriety of using the transcript, please contact the Clerk of the Committee.
3. Members and witnesses are asked to send corrections to the Clerk of the Committee within 7 days of receipt.

Examination of witness

The Rt Hon The Lord Howard of Lympne.

The Chairman: Lord Howard, I hope that you are willing to move seamlessly on from one session to the next. It is very nice to have you here and thank you for coming. I am sure that you need no introduction to the Committee both because of your legal expertise and because of your long parliamentary experience.

I will repeat for the sake of form that this session is open to the public. It will be available on the parliamentary website and a transcript will be sent to you. If you wish to correct anything in it, you are of course free to do so, and indeed if after the session you want to amplify on what you have said, please do not be shy in coming forward with anything that you would like to enter into the record. If you would like to make an opening statement or to introduce yourself, you are welcome to do so, or shall we proceed to the questions? What would you prefer?

Lord Howard of Lympne: Thank you. I am here to answer your questions. The only opening statement I would make is that while I may once long ago have laid some claim to legal expertise, it is now more than 30 years since I last practised as a barrister and I am not sure that I can lay any claim to legal expertise any more.

The Chairman: With that caveat ringing in our ears, we will proceed, but thank you.

Q27 **Baroness Hughes of Stretford:** Obviously one of the key questions that our inquiry is concerned with is whether, and if so how far, the panoply of existing rights of EU citizens here should be protected, and if so what the priorities would be. The same question applies equally in regard to UK citizens abroad. I know that you heard the evidence of the French ambassador, who reflected two important points that we have also heard from other ambassadors in this inquiry. First, they have spoken about the great uncertainty and concern of their citizens here as to the future, and we know that our citizens in Europe feel the same.

The second point that both they and the French ambassador have made very clear is that they are waiting for the UK to set out its position on safeguarding rights before their Governments and the 26 together can respond. The ambassadors are understandably constrained because their countries are waiting for us to start and they do not know what their Governments' positions are going to be. You are not so constrained, so if you were advising the UK Government on what their starting position should be on the question of safeguarding rights reciprocally for EU and UK citizens, what would your advice be? How far do you think those rights should be safeguarded, and what would your priorities be?

Lord Howard of Lympne: I have said in a debate in the Chamber that I think that the Government of the United Kingdom should make it clear

now—they should already have made it clear—that those EU citizens who are currently living in this country will be allowed to stay here, to carry on working here, and to carry on studying here. There seem to me to be three most important acquired rights, and I do not think that we should wait for any question of reciprocity. Lord Cormack said yesterday in the Chamber that there is something to be said for leading by example, and I agree entirely with that. In any event, it is inconceivable that either the French Government or the Spanish Government would suddenly start rounding up hundreds of thousands of Brits and deporting them. Indeed, recent history demonstrates that if our own Government inconceivably wanted to do that, they probably would not be able to. I entirely accept what the French ambassador and others have said about the dreadful uncertainty which this must be inflicting on millions of people who are currently living in this country. As she said, many of them have been living here for many years. Although I am very confident that in the end good sense will prevail on all sides and that some reciprocal agreement will be reached, it is certainly my view that we should not wait for that and that the United Kingdom Government should make their position clear now.

Baroness Hughes of Stretford: Would you advise the setting of a threshold for the conferring of that right? Would it be anyone who had been here for no matter what period of time, such as having been here on the date of the referendum, or are you thinking about a five-year right of residency threshold?

Lord Howard of Lympne: No, I do not think I would. It would be perfectly reasonable to say that on the day the announcement was made, the same would not necessarily apply to people who came here after the date of the announcement.

Baroness Hughes of Stretford: Is that the announcement of the result of the referendum?

Lord Howard of Lympne: No. It would be the announcement of the Government's position. If the Government said on, say, 1 November that this is what they were going to do, anyone who comes here after 1 November cannot necessarily be entitled to these rights. I think that would be a perfectly reasonable position to take.

Lord Judd: I wonder if I can put the same question to you as I did to the French ambassador. I am concerned about what was really conveyed by the decision at Maastricht? Was there any reason for people who were going to change their whole pattern of life—start a new career, set up a new home and so on—to believe that this was a provisional possibility and that it would depend on Britain deciding that it was going to remain a member of the European Union?

Lord Howard of Lympne: Are you asking me why the Government have taken the decision they have taken?

Lord Judd: I am just wondering whether, as someone who was around

at the time of Maastricht—

Lord Howard of Lympne: I am sorry: someone who was at the time of where?

Lord Judd: Maastricht. Was there any reason to suppose that this was a provisional arrangement? People changed their whole lifestyle to come and live here.

Lord Howard of Lympne: The Maastricht agreement was reached on the basis that we would remain a member of the European Union, so the question in the form in which you have put it to me did not arise at the time of that treaty. The Maastricht treaty was made on the basis that we were going to stay in.

The Chairman: If it helps to clarify the point, my understanding is that EU citizenship, when acquired, is additional and does not replace national citizenship. I think that is written into the treaty.

Lord Richard: I am going to ask about what Lord Howard said in his introduction. There are the three categories of rights that you think are really important and should be dealt with quickly, but what about benefits?

Lord Howard of Lympne: In the case of benefits and things like the entitlement to stand for election to Parliament and so on, there is a stronger case for seeking reciprocity in respect of those rights. I would distinguish between the rights to live, work and study and some of the other rights. There is a stronger case for saying that they should be the subject of reciprocity.

Lord Richard: So you are in favour of those rights being acquired so long as they are similarly acquired by British citizens in reciprocal countries.

Lord Howard of Lympne: Yes.

Q28 **The Chairman:** I should like to return to free movement, which is clearly a very live issue both inside and outside Parliament. The British Medical Association has submitted evidence to us underlining the importance of EU doctors and nurses—migrant EU members, if we should call them that now—and the contribution they are making to the NHS. Do you think there is any degree to which bits of free movement may end up being safeguarded and other bits jettisoned, or is this a sort of “all or nothing” in your mind?

Lord Howard of Lympne: I think it is clearly all or nothing. I have read the evidence of the British Medical Association and it did not ask for bits of free movement to continue. It asked for the new immigration laws, which this country will put in place after we have left the European Union, to be flexible enough to recognise the needs of the medical profession. That is a perfectly reasonable position to take and I agree with it. I hope we will have Immigration Rules when we leave the European Union that

will be sufficiently flexible to take account of our need for different skills. I do not, however, see any need to carve out exceptions in terms of free movement, which will end—as it should, in my opinion—when we leave the European Union.

The Chairman: What about special pleading—which I agree with you this is not—by particular groups? Are we moving towards a points-based system or just total free movement?

Lord Howard of Lympne: That is a matter for the Government to decide in due course. It could be a combination of points and work permits. That is for the Government to work out.

Lord Oates: I think Lord Howard has answered the question I was going to ask very clearly, so I will follow up on the question raised by Lord Richard. You mentioned the three specific categories and then, perhaps, reciprocity for other areas. You said at the beginning that uncertainty was a big problem. Do you not accept that access to health benefits at least is equally critical to citizens, whether they are EU citizens in the UK or British citizens in France and so on? That is fundamental to their ability to stay where they are.

Lord Howard of Lympne: Yes, but I do not think it is quite on the same footing as the right to live and work in the country. But obviously you are quite right: it could lead to a degree of uncertainty. There are other factors to be taken into consideration, such as the cost to the NHS of people who are not UK citizens. I am quite confident that it will be perfectly possible to reach reciprocal arrangements on things such as access to free healthcare and so on, but there is a stronger case for dealing with those on a reciprocal basis than there is for the three rights I referred to.

Lord Richard: If we do not get reciprocity, what will happen? Take health—if you cannot get everyone to agree that the health card system should broadly continue, where do we go from there?

Lord Howard of Lympne: We will have to decide on the basis of what the European Union is prepared to agree to. It may be, for example, that some countries in the EU will agree to reciprocity but others will not. If the European Union as a whole said no to reciprocity—"We are not going to give UK citizens in our countries access to healthcare"—and all 27 signed up to that, we would have to take that into account in any decision we made.

Lord Richard: Presumably we would go on. There would have to be reciprocity on our side as well as on theirs.

Lord Howard of Lympne: Yes.

Lord Richard: We would have to say no.

Lord Howard of Lympne: We would not have to say no. We would be free to take our own decision, but there would be quite a case for saying no in those circumstances.

The Chairman: Thank you. There is the question not only of which rights but which rights when. I think Lord Kinnoull wanted to come in on that.

- Q29 **Earl of Kinnoull:** We have taken some interesting evidence on the legal practicalities of preserving rights. In particular, I shall just read out a quote from Professor Lowe, who said, "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". Of course, rights are not absolute; there are some fetherings. I wondered which of Professor Lowe's two choices you favoured and whether you could explain why.

Lord Howard of Lympne: I would have thought it would be the law as it was at the time of Brexit. That is the position that everyone would be considering and would have in front of them when the negotiations are taking place. It would be quite difficult to sign up to some unknown future evolution of European Union law. It would have to be the law as it was at the point of exit. If changes are made in the future, they would be a matter for further negotiations. If, for example, the European Union decided to provide some extra benefit, which I cannot identify at the moment but which it also conferred on UK citizens living in EU countries, we would consider at that stage whether we wanted to reciprocate. The starting point, however, must be EU law at the point of exit.

The Chairman: I see the logic of your point, but in commercial contracts it is not unusual to have an EU regulation referred to "and further amendments thereof", or words to that effect. Your position on this is that it should be as it was on the day, that everything else should be case by case, and the two systems may diverge. Do I understand correctly?

Lord Howard of Lympne: Yes, the systems will diverge; we will be an independent country again.

Lord Richard: The Chair has made my point

The Chairman: I have shot your fox; forgive me.

- Q30 **Baroness Newlove:** There have been many discussions about laws. What status in the UK courts should judgments of the EU Court of Justice have on EU rights that are safeguarded in the UK as a consequence of the withdrawal agreement?

Lord Howard of Lympne: Do you mean after Brexit? None. If the question before the United Kingdom court was a question that had arisen in the European Court of Justice, it could look at it and give it the same kind of weight that it would give to courts in other parts of the world that had considered similar questions. It would probably not give it as much weight as is given to Commonwealth courts because their system of law is much more similar to ours than those of the EU. Once we have left, all

questions will be determined under United Kingdom law by the courts of the United Kingdom.

The Chairman: Baroness Ludford, I think you had slight *déjà vu* from the questions we asked the ambassadors, but it would be interesting to probe your views on this.

Baroness Ludford: Thank you, Lord Chairman. Lord Howard, you were here when I asked the French ambassador about this. I am afraid I am bit like a dog with a bone on this question of people who have five years' residence. What status they will have keeps coming up, not least in our own Chamber. I think it has been confirmed by Ministers that there is a right under EU law to permanent residence after five years. It does not have status in UK law and it would have to be translated. Would you wish to see the UK adopting legislation to give all lawfully resident EU citizens a right of permanent residence under UK law, or at least those who have been here for five years and have therefore acquired it under EU law? You have to go through a sort of translation exercise.

Lord Howard of Lympne: Yes, you do, and you will have to do that with all sorts of other things that are part of EU law, too. I am not a member of the Government so I do not know, but I would imagine that the Great Repeal Bill will make provision for what is to happen to EU law after Brexit. A sensible starting point would be for all EU law to be translated into UK law and then, over a period—not all EU law is bad; we would not want to get rid of it all—Parliament and the Government would consider which bits of EU law they wanted to keep and which bits they did not. You are quite right; it would have to be translated into UK law, and for the reasons that I have given I think it should be.

Baroness Ludford: Just to pursue that, what about people who have five years' residency under EU law? I must confess that my knowledge of domestic law is absent, but people who want to acquire indefinite leave to remain under UK law have to make an application at the moment. We are being told that that is not seamless; there are quite a few hoops. Do you have any knowledge of that process? In some broad terms I expect you have, as a former Home Secretary.

Lord Howard of Lympne: I think that you could take away the hoops for people who have the acquired rights as EU citizens, and you should. There is no reason at all why it should not be a simple and straightforward process. You would have to establish that you had actually been here for however many years, and so on. I am not quite sure how complicated it is at the moment, but I can quite see that you could have a simpler process, if need be, for EU citizens.

Q31 **Lord Richard:** Perhaps I could a rather more general question. The Government keep saying that they are not going to use the acquired rights of EU citizens in this country as bargaining chips but that they are going to negotiate about it. Can you see any real distinction between those things?

Lord Howard of Lympne: No.

Lord Richard: Neither can I. This is a remarkable morning, Lord Chairman.

The Chairman: I do not think you could be much clearer than that. Are you satisfied with that answer, Lord Richard? If you do not want to pursue it anywhere, I think that the Earl of Kinnoull wanted to have a go.

Earl of Kinnoull: I wanted to come back to bargaining chips. I am sorry to ask you to repeat something that I think you said earlier, but the counterargument to your bargaining-chips argument runs something like this: if we issue a unilateral assurance on our side, the UK citizens living abroad themselves become bargaining chips the other way. You were confident earlier on that that would not be the case and that if we did something generous it would be unconscionable for our European partners to do something nasty back. Could you talk a bit more around that, as it might be quite important for this Committee?

Lord Howard of Lympne: What I said in my speech in the Chamber on this issue was that if, after the UK Government had made their position clear, Governments in other countries decided not to give UK citizens the right to remain in their countries, let them wear that badge of shame.

Lord Judd: I really am very interested in the practicalities of our future. Do you agree that if Parliament is ever to give proper consideration to what is happening in this sphere, it will be very important to be able to see the specific arrangements being made to cover areas of mutual interest which we cannot escape? Defence is an obvious one. To reach a satisfactory conclusion, we must see what is going to be put in its place.

Lord Howard of Lympne: By we, I take it that you mean—

Lord Judd: I meant Parliament.

Lord Howard of Lympne: I have been fairly critical of the Government so far, but I have rather more sympathy with their position on the extent to which Parliament can be kept informed with a running commentary on the negotiations. Things will emerge and Parliament will undoubtedly have a say; the Prime Minister made it clear yesterday that there would be debates. The Opposition in the House of Commons can at any time use their time to have a debate and a vote on things as they proceed. I dare say that there will be leaks and so on during these negotiations as they proceed, so I think that Parliament will have ample opportunity to debate and, if it so wishes, to vote on some of these questions. But the Government are reasonable to say "We can't give you a running commentary and we're certainly not going to disclose our negotiating hand in advance". Doing that would really weaken and undermine our position, so it is unreasonable. There are some who ask for the Government to set out their negotiating position in advance. I certainly do not share that view. I think that is an unreasonable request to make.

Lord Judd: My supplementary, if I may, is just this. When I served on

the Home Affairs Select Committee, we took evidence from people working in the security and police spheres on the security of Britain and the implications of working with Europe. We were left in no doubt whatever by the overwhelming majority of witnesses that this co-operation with Europe was absolutely vital. Would it not be irresponsible to come to an ultimate conclusion about whether what had been negotiated was right or wrong, unless we could see specifically what the alternative arrangements would be?

Lord Howard of Lympne: Parliament will have a vote at the end of the process. I think that is absolutely clear and recognised on all sides, and at the end of the process we will all be able to see clearly what the deal is and what the outcome of the negotiations are. I share your view that co-operation on these matters is important and I am confident that it can continue. But on the specific point that you raise, when the moment to leave comes at the end of the process, Parliament will have the deal before it—no question of that.

Lord Oates: To follow up on that, how do you think that the Government can square that position with the position that I understand the Prime Minister, as the then Home Secretary, took at the time of the JHA opt-in debates? She insisted then that the negotiating position of the United Kingdom would be put before Parliament before the discussions and voted on and, I believe, voted on afterwards as well.

Lord Howard of Lympne: I am sorry, when was this?

Lord Oates: The Justice and Home Affairs opt-ins.

Baroness Ludford: To opt back in.

Lord Howard of Lympne: Oh yes, when we opted back in. I do not know. You might have to ask the Prime Minister. I think there are differences between the two. That was not really the beginning of a prolonged negotiation. My recollection—I may be wrong—is that we had the right to opt in and out of certain aspects of that agreement, so she put before Parliament what the Government were going to do. It was not quite the same in terms of negotiation.

Lord Richard: There was no question at all of a Brexit.

Lord Howard of Lympne: No.

Lord Richard: I was on the sub-committee that looked at all this. The position was that the Government decided that they were going to opt out of a whole series of European projects, all of which they have the right to opt out of, and then they would opt back in.

Lord Howard of Lympne: Exactly.

Lord Richard: When we went through it in great detail, it was perfectly clear that the ones they were opting out of did not amount to a row of beans anyway, so whether we were in or out did not really matter very

much. But symbolically one can understand that the politics of the exercise at that stage was very much that we seemed to be saying, "Yes, we want to remain a member of the EU but look, we can nevertheless do all these things to preserve British independence".

Lord Howard of Lympne: But I think I am right in saying that they were things we had the right to do. They were not going to be the subject of negotiation; that is the distinction between that and this.

Lord Richard: Yes.

The Chairman: Thank you for clarifying that.

Baroness Neuberger: This goes back to what you said, Lord Howard, when you were in fact quoting yourself when you said about other European nations, "Let them wear the badge of shame". You continued, "which will forever be associated with such actions" and, even more strongly, "Let such a badge of shame never be allowed to besmirch the reputation of Her Majesty's Government". But yesterday when Lord Dubs asked his Question, the Government continued to say that this is effectively a bargaining tool. Will you continue to press your case?

Lord Howard of Lympne: Well, hang on—the badge of shame was something that I thought would be associated with the rounding-up and deportation of people. I would not quite go so far as to say that the current government position on reciprocity—

Baroness Neuberger: I assume that you did not, but it reads beautifully.

Lord Howard of Lympne: I think there is a distinction to be drawn there. Will I continue to press the case? I have no influence whatever, but I have not changed my views and, as you will have seen, I am not shy in expressing them.

The Chairman: You sat in on the evidence of the French ambassador. Can I take you back to that? I was interested in her comment when I tried to draw her into the idea that this is a live issue for everybody and we should solve it at the beginning and then get on with the rest of it. She was quite resistant to that. She was trained to think that nothing is agreed until everything is agreed. With your lengthy political experience, do you think that is really going to be the case, or is there some vehicle by which this could be sort of pre-agreed?

Lord Howard of Lympne: I am afraid that I think she is probably right. There is a vehicle, which would be for the United Kingdom Government to make a unilateral decision. That might then—although it might not—provide the example, as Lord Cormack said yesterday, of leadership that others would follow. I think that is the only vehicle. I am afraid she is right that if it is left to go into the negotiations, we are not going to get bits of the agreement in advance. Nothing is agreed until everything is agreed; that is bound to be the basis on which negotiations are conducted.

The Chairman: That is very interesting, thank you. I am conscious again of time, but I just wondered, as I said to the previous witnesses, whether there was anything that you wanted to land on us. Is there anything further that you want to mention to us which you thought we really should have asked you about, or that you wanted to contribute?

Lord Howard of Lympne: No, thank you. I would not dream of suggesting that there were things you should have asked me about and did not.

The Chairman: We are very humble on this Committee and open to suggestions. If that is the case, thank you again for joining us. Thank you for your time and testimony, which has been very interesting.

Lord Howard of Lympne: Thank you very much. Good luck in your labours.