



SELECT COMMITTEE ON THE EUROPEAN UNION

Justice Sub-Committee

Corrected oral evidence: Brexit: acquired rights

Tuesday 1 November 2016

11 am

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Members present: Baroness Kennedy of The Shaws (The Chairman); Lord Cromwell; Baroness Hughes of Stretford; Lord Judd; Earl of Kinnoull; Lord Oates; Lord Polak; Baroness Shackleton of Belgravia.

Evidence Session No. 5

Heard in Public

Questions 32 - 40

Witnesses

I: Professor Catherine Barnard, Professor of European Union Law and Employment Law, Cambridge University; Mr Anthony Speaight QC, Pump Court Chambers.

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Examination of witnesses

Professor Catherine Barnard and Mr Anthony Speaight.

The Chairman: Welcome, Anthony Speaight, an old friend and colleague. It is very nice to see you here. This evidence session is to include another witness but I am afraid she has been delayed; she is in a taxi coming from the railway station and the traffic is very heavy, but at some point she will join us. Still, I want us to get under way. As I say, welcome, and thank you for giving up your precious time. This is a public session so it is open to the public; a webcast of the session goes out live and is subsequently accessible via the parliamentary website; a verbatim transcript will be taken of the evidence, which will be put on the parliamentary website. A few days after this evidence session, you will be sent a copy of the transcript to check for accuracy. We would be grateful if you could advise us of any corrections that you want to make as quickly as you can. If you want to add anything to the evidence that you give—if you felt there was something that was not covered, or you want to amplify any points—then please do that. Any additional points you want to make can be in a supplementary written paper to us, and we would be grateful to receive it. I wanted you to know that before we got under way. Could you introduce yourself for the record, please?

Anthony Speaight QC: I am Anthony Speaight. I am a barrister.

The Chairman: And a Queen's Counsel. Is it right that you have taken a special interest in the European relationship with the British courts?

Anthony Speaight QC: Yes.

Q32 **The Chairman:** I will start post-Brexit. To what extent could the international legal principle of acquired rights be relied upon in the UK to protect rights previously protected by European Union law?

Anthony Speaight QC: I have read the evidence to this Committee from two very distinguished professors of international law and could not possibly add anything to what they have said. The answer is that the international principle of acquired rights will not in itself produce a solution.

The Chairman: So really you are saying that the protections offered by international law are inadequate. Are there protections that could be afforded by any other law—for example, the European Convention on Human Rights?

Anthony Speaight QC: Yes, I can think of one significant situation in which I can imagine a convention argument succeeding. That is the situation of EU or EEA citizens, or their dependants, who on Brexit day will have been in the UK for more than five years. Under EU law, currently embodied in regulations here, a day before Brexit they will have a permanent right of residence in this country. The day after Brexit, if the

EEA immigration regulations are no longer in force, on the face of things they will have no right to remain. On the other hand, a third-country person who has come to this country and been here for five years has the possibility of applying for indefinite leave to remain. Indefinite leave to remain is given on different criteria for different periods of time; the longer you have been here, the easier it is to get it. After five years there is a certain amount of palaver: an application has to be made and English language skills and a knowledge of the British way of life have to be shown, so it is a bit more difficult. If the United Kingdom was not willing in some way to map over from the EU concept of “permanent residence” to our “indefinite leave to remain”, someone who did not want to go through the palaver of applying, or had difficulty in doing so, might have a successful convention argument.

- Q33 Lord Oates:** Following up on that, in your written evidence you quote Article 1 of Protocol 1 of the ECHR and make the point that possessions, which are referred to when you say that no one shall be deprived of their possessions except in the public interest and so on, have been held to extend to intangibles such as patents, contractual rights and so on. Are there circumstances in which not only the convention rights could apply to EU citizens? Is there any basis on which British citizens, who of course at the moment have the right to EU citizenship, could claim they were being deprived of a right under the ECHR? That applies to a British citizen in the UK who will lose their EU citizenship.

Anthony Speaight QC: That is another interesting question. The day after the referendum result, I received an email from a politician who had been a strong remain campaigner saying that he was most distressed at losing his EU citizenship, which he valued, and asking if I could think of a legal argument by which he could claim he would be able to retain it. I cannot think of a legal argument giving UK citizens here any sort of rights to hold on to EU citizenship. I have a modest constructive suggestion of my own—a policy that it seems to me would be rather in the UK’s interests, and would be rather attractive in showing a willingness to embrace open international relations—relating to one facet of EU citizenship: the right to vote and to stand in municipal elections. It would be perfectly possible for the UK to legislate to confer on bodies such as the Scottish Parliament, the Welsh Assembly, the Greater London Assembly and so on the competence to choose, if they wished, to include EU citizens on their electoral roll. If other parts of the country did not want to do that, they would not have to. This makes perfect sense. EU citizens living in London pay council tax and receive all sorts of services, so it is perfectly reasonable that they should be involved in the local and regional election processes. If some parts of the country, such as London or Scotland, wanted to make a particular demonstration of the fact that they were very open to Europe, that is one way in which they could do so.

The Chairman: Thank you, Mr Speaight. I welcome Professor Barnard. I am sorry you had such difficulty getting here.

Professor Catherine Barnard: I apologise for being late; a combination of the marvels of the railway network and the Colombian state visit completely thwarted my limited freedom of movement between Cambridge and London.

The Chairman: It is fine that you are here, and we welcome you. For the purposes of this record, could you give us your name and position, and then I will ask you to cover some of the ground that Anthony Speaight has already been asked about.

Professor Catherine Barnard: My name is Catherine Barnard. I am professor of EU law and employment law at the University of Cambridge and a fellow of Trinity College.

The Chairman: Thank you, Professor. I want to take us back a little. After Brexit, with regard to the international legal principles leading to acquired rights, the idea that you acquire rights by living somewhere—in the case of those who are already living in the UK or UK citizens living abroad—to what extent does that provide protection to people who are living here now and who were previously protected by EU law?

Professor Catherine Barnard: I very much agree with the evidence given by your earlier witnesses like Sionaidh Douglas-Scott: there is a lot of confusion around Article 70 of the Vienna Convention. Yes, it is about acquired rights, but they are the acquired rights of states, not individuals. It is subject to the caveat, “unless the treaty provides otherwise”—and Article 50 may well provide otherwise. So I think the protection is weak. Even if Article 70 of the Vienna convention were read as giving acquired rights to individuals as opposed to states, there is the practical problem of enforcement; how do we set about enforcing those rights? That is a thread that I would like to run through all the evidence I give today: having rights is one thing, but actually trying to enforce them is another. This is a really serious issue.

The one area where EU law will continue to apply even when we leave the EU, and even if we do not join the European Economic Area, is in respect of Article 63 and the free movement of capital. I am sure that you have already heard about Article 63 but, just to remind you, its significant feature, unlike any of the other fundamental freedoms, is that it has extraterritorial effect—in other words, it will give rights to people who are not EU citizens. Where Article 63 is of particular interest to individuals, as opposed to companies, is the whole body of case law on second-home ownership in Austria and the rights in Austria of second-home owners who come from Germany. That was all dealt with under Article 63 on the free movement of capital. The free movement of capital will give rights to UK nationals, in limited circumstances, in the EU. Otherwise the international law principles are really rather weak.

The Chairman: That has been the evidence that we have received about the weakness of international protections. I will ask Lord Oates to reiterate his question, which relates to any other source of protection rather than international law.

Lord Oates: My question is specifically about whether the European Convention on Human Rights affords particular protections. I also asked a specific question about whether British citizens in the UK have any protection of their right to EU citizenship. Is that a tangible right?

The Chairman: Before we move on to the second part of that, I would like an answer to the first. Are protections available as a result of the European Convention on Human Rights that might fill the gap?

Professor Catherine Barnard: There are protections under the convention, most notably property rights and rights to family life, which might perhaps help in respect of any attempt to exercise more stringent UK law measures on the deportation of individuals; they are much more stringent than the current rules under the citizens' rights directive. So EU nationals in the UK and UK nationals in other member states will have protection under the European Convention. Where the European Convention seems to be particularly weak is, surprisingly, in respect of equality rights. There is no freestanding equality right; it has to be piggy-backed onto a breach of another right. It is equality rights, which are so strong under EU law, that will suffer as a result of the departure—but obviously that is the decision that the public took.

The Chairman: Could you help us with the second part of Lord Oates's question?

Professor Catherine Barnard: There is a view that because I am currently a UK national I am therefore an EU citizen, and therefore I cannot be deprived of my rights to EU citizenship on Brexit. Under EU law, that argument just will not wash because in order to be able to enjoy EU citizenship the precursor is to be a national of a member state. Since the UK will be leaving the EU, I will no longer be a national of a member state and therefore will not enjoy EU citizenship.

Q34 **Lord Oates:** Specifically with regard to British citizens resident in EU countries, there was a case before the Court of Justice in 2002 where a statement was made that EU citizenship was destined to be the fundamental status of nationals of the member states. Does that give British citizens in the EU protection under European law?

Professor Catherine Barnard: The case you might be referring to is the unpronounceable Grzelczyk case.

Lord Oates: That is why I did not try.

Professor Catherine Barnard: I do not think that is how it is pronounced, either, but that is the anglicisation of the Polish name. I suggest that that case and one or two others were the high points of EU citizenship case law, where the court was desperate to give citizenship real substance. Since then the court has backed down quite significantly. The other case that may be relevant is one called Rottmann, a case about an Austrian who acquired German citizenship under somewhat false pretences because he did not reveal that he was being prosecuted for fraud in Austria. When the Germans gave him German citizenship, they

discovered what he had been up to and tried to withdraw it. He tried to argue that that would be depriving him of the essence of his citizenship. The court was prepared to hear the case—somewhat surprisingly, because it was a case about giving nationality, which has always been a matter for domestic law, not EU law. The court said yes, EU law would have something to say about it, and it would have to be proportionate to deprive him of German citizenship and thus render him stateless. That seems to me a rather different situation from the situation we are currently in, where arguably you are depriving 65 million people of EU citizenship. However, this is not an arbitrary decision; it is a decision following a lawful referendum, so it is a very different circumstances. The *Rottmann* arguments probably will not wash when it comes to preserving rights to EU citizenship.

Lord Judd: I sometimes wonder whether there is any value in a complete layman like me being on the Committee, but on the other hand sometimes I am very convinced that there is. Dealing with what you have just said, I think that for the layman and the general public it would be very helpful if for the record you could spell out exactly where it is stipulated that, should Britain decide to leave the EU, EU citizenship would lapse. We deduce that from existing law but this question is for the ordinary citizen, who might have arranged their whole life and plans for their future on the basis of EU citizenship.

Professor Catherine Barnard: There is no clear rule that says so in the wonderfully attractive and simple way that you have helpfully expressed. All we can do is work with what we have. There is the rather limited Article 50, which lays down the process for withdrawal but is more remarkable for what it does not say than for what it does, while Article 20 of the Treaty on the Functioning of the European Union says clearly that everyone who holds the nationality of a member state will be a citizen of the Union. By a process of deduction, we say that withdrawal of the UK from the EU means that the individual no longer holds the nationality of a member state of the EU and therefore will no longer be an EU citizen. But the consequences of that loss of citizenship rights are very serious for a lot of individuals, for the reasons that you have given.

The Chairman: Professor, I have a supplementary question, which I think you have been given notice of. Post Brexit, UK nationals in EU member states may have rights under EU law as third-country nationals. I think you knew that this question was coming. Can you tell us in what circumstances third-country nationals' rights arise and what those rights may be?

Professor Catherine Barnard: In respect of third-country nationals, there are rights under domestic law—whatever the domestic law might provide for non-nationals living in that country. In addition, EU law provides rights under the long-term residence directive. That directive gives right of residence to those who have been there for five years as third-country nationals, provided that they have sufficient resources and medical insurance.

If you had asked this question even 15 years ago, the answer would have been, "It's entirely a matter for domestic law what rights to give to non-nationals". You have the national layer in the picture, and then you have the EU layer that started to be added from the early-2000s onwards. I am afraid that again there is a mixed bag of rights that you cannot find all in one place: you have the long-term residents directive, which gives rights of residence to those third country nationals (TCNs) who have been resident in the EU state for five years, and reasonably generous provisions on equal treatment, and other directives that have moved increasingly into the field of giving rights to third-country nationals in an EU state.

Probably the most significant is the blue card directive for highly skilled migrants who want to come and work in the EU. That was basically meant to be a response to the US's green card scheme, but in fact it has been a pretty poor programme; the number of people taking advantage of those rights is only around 15,000 because they sit rather uncomfortably with the rights laid down by domestic law, and usually people find that the domestic regime is more favourable than the EU regime so they go down the domestic route instead. This specific regime for the highly skilled has now been supplemented by rights for intra-corporate transfers and seasonal workers, so it is spreading. The paradox behind all this is that the UK has not signed up to or opted into those directives. Yet, it may be that once we leave the EU, UK citizens will take advantage of the rights in those directives in order to gain access to the labour market in other EU countries.

The Chairman: That was very helpful. Thank you for that answer. Anthony Speaight, would you like to say anything about that supplementary question?

Anthony Speaight QC: It goes without saying that I can say nothing on this matter with the authority of Professor Barnard. I would add only that anyone who wants to argue seriously that EU citizens' rights ought somehow to continue for us after we have ceased to be a member of the EU has only to look at the fact that one of those rights is the right to vote and stand in European Parliament elections. It could not possibly be appropriate for people in countries outside the organisation to enjoy that sort of right.

Lord Judd: Sorry, this is the voice of the layman again. I thought we had advanced in most societies to the understanding that citizenship means citizenship. You are suggesting that because of the imperfection of the law covering this citizenship, people can be deprived of their citizenship. If someone is being deprived of their citizenship, in most civilised countries that is taken as a very serious matter and there are opportunities for appeal in pursuing that situation. Can you give any reassurance to European citizens in Britain that there are going to be rights of appeal?

Professor Catherine Barnard: The point you make is interesting. Obviously I am here as an objective observer; I am not here to defend

the Government's line or any other line. I would say that EU citizenship is a rather partial beast. It is not like national citizenship, which comes with a very comprehensive range of rights. EU citizenship is dependent first on being a national of a Member States. So the member states are the gatekeepers to access to EU citizenship. Furthermore, the rights that you get as an EU citizen are actually rather limited. They include the right to free movement—very important to those who move but less so to those who do not—the right to vote in European elections and national elections, the right to consult the ombudsman of the EU and so forth. Compare that with the notion of US citizenship, where you have fundamental rights; indeed, there is a Bill of Rights in the US. Okay, you have the Charter of Fundamental Rights in the EU, but the fact is that in the US you are a US citizen. You do not have to be a citizen of a state of the US before you become a US citizen. In the case of the EU, you have to be a citizen of a member state. If I were being deprived of my British nationality, that would render me stateless. By being deprived of EU citizenship, though, I am not being rendered stateless. It deprives me of some of the good things that I might enjoy as an EU citizen but I am not stateless. Being stateless is a very difficult and dangerous legal position to be in, which is why there is so much protection of the status of citizenship at national level.

The Chairman: I really want us to put to bed the business of there being parity between being a citizen of the state, as we are as citizens of the UK, and being a citizen of the EU. It is really of a different value, Lord Judd. Article 20 says that, "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship". The point there is that it sort of piggybacks on it; it is almost parasitic, if you like. It is in addition. It is not your fundamental citizenship in relation to the state to which you belong. I do not want us to spend more time on this business of it being dealt with as if it were exactly the same, because in law it really is not. That is not an accident of law but a quite deliberate position. I will take us on to Lord Polak.

Lord Judd: That is a perfectly valid position for a lawyer who is well briefed on these matters to take. My point is that in terms of basic justice for an ordinary person, where on earth, when they thought they had taken European citizenship or were about to enjoy it, was there the slightest indication that these qualifications would be applied to that citizenship? There is a fundamental issue of natural justice in this matter.

Lord Cromwell: As a supplementary to this discussion, were you suggesting, Mr Speaight, that there is a kind of EU citizenship rights-lite that might apply in some situations, where you will not have the right to stand or vote in elections but you would seek to retain other rights as an EU citizen?

Anthony Speaight QC: The only right in the list of rights that EU citizens have under the treaties, and the only one that I can see any

point in the UK deciding to replicate in its own domestic legislation, is that in relation to municipal elections. As I said, it would be perfectly possible for Scotland or London, for instance, to say, "We would like EU citizens in London, or in Scotland, to vote in London elections or Scottish Parliament elections". I cannot see that there would be any objection to facilitating that. It might be in UK nationals' interests as an imaginative gesture to show that, notwithstanding our leaving the EU, we are still very much part of what one might call the European cultural area.

Q35 Lord Polak: Professor, I was quite interested in your comment about enforcement; that should be at the forefront of all these discussions. I would like to look at the bilateral investment treaties part of this, rather than the individual. Post Brexit, to what extent will these treaties be relied upon in the UK to protect the rights that were previously protected by EU law?

Professor Catherine Barnard: That is a difficult question. The trouble with bilateral investment treaties is the lack of certainty and the secrecy surrounding them—and, in particular, the secrecy of the method of adjudication under them. Of course, by definition bilateral investment treaties protect only investment; they do not protect the whole range of rights that Lord Judd and others referred to. And, yes, they all contain some form of investor state dispute settlement process. But, as you know from the recent controversy over CETA, the Canadian trade deal with the EU, one of the objections that the Walloon parliament had was to the enforcement mechanism—ISDS—clause in the CETA agreement.

The concern about ISDS provisions is that, first, for ordinary investors it is quite difficult to access them because this form of dispute resolution tends to be expensive. So, in reality, those who benefit from it are big companies. Okay, they can absolutely afford it. Cases go to an arbitral tribunal where the rules are regulated either by the rules of the World Bank or by the rules of the UN or by other rules. There is a remarkable lack of transparency in the process, although CETA is more sophisticated in that respect and, indeed, CETA does have provisions for appeal, which most agreements do not. But, generally, bilateral investment treaties—BITs—deal with only one very specific issue and do not provide an answer to the concerns raised by your colleague here.

There is a further problem in respect of BITs in connection with EU law, which is that the Court of Justice does not like BITs because it does not like the fact that there are arbitral tribunals ruling in areas that might have an effect on EU law. I go back to the points I made about Article 63. The Court of Justice has been very keen to make it clear that it should have the final say on EU law, and not some arbitral tribunal. So BITs raise a lot of interesting questions, but their role is at best limited and, from a natural justice point of view, they raise difficult questions about transparency and the reporting of what is agreed.

There is also the issue of enforceability if you as an investor get a judgment in your favour. A number of states, particularly in Latin America, think that the costs are so great that they have refused to pay.

That is a further problem. It is one thing to get an order in your favour; but that is only half the story.

The Chairman: Anthony, do you have some experience or view of this? With bilateral investment treaties, what sort of protections might be afforded to citizens by way of rights? If you take the same position as Professor Barnard, we can move on to the next question.

Anthony Speaight QC: I do not really have anything to add to what Professor Barnard said.

The Chairman: Thank you. We will move on to Lord Judd's question.

Q36 **Lord Judd:** To what extent do you believe that the EU withdrawal agreement itself should provide for the preservation of EU rights, as agreed between negotiators, rather than leaving their protection to other sources of law?

Anthony Speaight QC: The more that can be clearly covered by agreements between the UK and the EU, the better. There are a number of problems in this area. First, will there be one huge agreement, or will there be more than one agreement? Article 50 refers to a withdrawal agreement and states that the agreement will be made by qualified majority voting. There is an unclear issue about whether the withdrawal agreement is one dealing merely with the nuts and bolts of a country leaving or whether it is also dealing with that country's entire future relationship with the Union.

I have read the evidence of Sir David Edward to this Committee last year and I have vast respect for anything that he says in this area. Based on the German text, he thought that the article might mean that the withdrawal agreement by qualified majority voting could cover the entire future relationship. But I have to say that I believe that that is a minority legal view and that it does not seem to me to have much political reality when one bears in mind all the difficulties there have been, which Professor Barnard mentioned, in relation to the Canadian treaty and the fact that a recurrent unclear topic in the EU is the extent to which the international agreements that the EU is negotiating can be dealt with by majority voting as pure trade matters, or whether they are mixed agreements ranging more widely. It seems to me highly likely that there will be pressure to treat an agreement covering the entire future relationship with Britain as a mixed agreement requiring unanimous consent.

From that, it seems to me that the UK might have a go at trying to persuade the EU to segregate its entire future relationship into different bits, with more than one agreement, so that the easier bits might get through first and the rights of citizens, and some reciprocal arrangements which this Committee has talked about with past witnesses, including the French ambassador, could be in a separate agreement that might get through a bit quicker.

The Chairman: But you are still saying that, post the activation of Article

50, we could move into another phase and the start of that phase would be to deal with the rights of persons from the rest of the EU living in Britain and the rights of people from the UK living in the EU. Are you saying that that could be in the early stages of the post-Article 50 declaration of leaving?

Lord Judd: Just for the layman, that would specifically mean that the other bits were being approached by a non-member state of the European Union.

Anthony Speaight QC: No, it would mean that when it came to the other bits, for instance the terms on which motorcars would be sold to and from and the terms on which financial services would be sold to and from, those which are perceived as likely to be more controversial and to involve harder bargaining would be the subject of negotiations that hopefully would be completed within two years.

Lord Judd: Forgive me: if we have withdrawn and that has been agreed, we are presumably approaching those agreements as a non-member state.

Professor Catherine Barnard: Perhaps I may add something here. I think that we will have to approach these agreements as a non-member state. In order to have a future relationship, the legal basis will be Articles 207 and 218. They require negotiations and agreements to be with a third state. This is why it seems to me that we are heading for a hard Brexit. We will have the divorce under Article 50, which will be done by qualified majority voting, but my understanding is that the EU at the moment is playing hardball. Instead of saying that we can have the divorce and the future relationship negotiations running alongside each other, the EU is saying that the future relationship will be negotiated only once we are a third country. That is why there risks being a gap, and why it is important that we have in the divorce settlement transitional arrangements that will bridge the gap between where we are at the moment and where we will be in a number of years' time. This goes back to the nature of the question that you posed. Therefore, if my analysis is correct and there will be a gap, the hardness or otherwise of Brexit can be softened, or not, by the transitional arrangements to get you to the future relationship. It therefore becomes imperative that the divorce agreement says something about the position of EU nationals who are currently living and working in the UK, and UK nationals living and working in other member states.

To pick up on the theme of enforcement, what legal effect those clauses have then becomes very important. If I am a Polish national and I am going to be deprived of the rights that have been negotiated in that divorce agreement, what can I do about it? Will those rights, to use EU jargon, be directly effective, which means that I can go to the court in my local town (eg Cambridge) and get those rights enforced? What happens if there is uncertainty about those transitional provisions? Will the British courts that are enforcing my rights be able to ask the Court of Justice

what those rules mean? What does the withdrawal agreement, the divorce agreement, actually mean?

Of course, people who voted to leave thought they were severing all links with the Court of Justice, but it is important to remember that the Court of Justice has always been there to uphold EU law, which has often been to the UK's benefit.

The Chairman: Thank you very much for an answer on a difficult area.

Q37 **Earl of Kinnoull:** I am sorry if this question is a bit repetitive, but it is important for our report. Could you give us your views on which EU rights currently enjoyed either by EU nationals in the UK or by UK nationals in member states should be preserved post Brexit, and why?

Anthony Speaight QC: That is a question for my personal opinion rather than a matter of law. I venture to suggest a two-element policy to the UK on this. The UK, probably as soon as possible, should unilaterally declare its intention to convert the rights of permanent residence, which is what is acquired after five years by EU citizens, into indefinite leave to remain for any EU, EEA, Swiss national or any dependant of them—you would not need to be a national of those countries at all—on Brexit day.

The Chairman: When you say “on Brexit day”, are you talking about when we give a declaration under Article 50 that we intend to leave, or about the endgame after the two years?

Anthony Speaight QC: I am sorry, I mean on the day the UK actually leaves the EU.

The Chairman: So you are talking about when all the negotiations are complete two years down the line—when we have a decree nisi and further on complete divorce. You are saying at the finale, on the day of leaving.

Anthony Speaight QC: I am saying on the day of leaving. Of course, we do not know that negotiations will have been successfully completed, but we do know that, unless there is an agreed extension, two years after giving the Article 50 notice the UK will leave. On that day, whenever it comes, I am suggesting that the UK should unilaterally announce, not as a bargaining matter, that it will convert all five-year permanent residence rights under the EU arrangements into our concept of indefinite leave to remain. Beyond that, all other rights of EU citizens and the position of those who are on the way on that date—that is to say, they have been here for less than five years, maybe for two or three—would, I suggest, be a matter for discussion in the negotiations but with the hoped-for outcome that if such persons remained in the UK for the rest of the five-year period they would then be automatically granted indefinite leave to remain.

Professor Catherine Barnard: I would like to make a couple of additional points. While of course in principle I am in favour of people who have five years' lawful residence being given indefinite leave to

remain, it is a lot easier said than done. My concern about moving them on to indefinite leave to remain is that they would have to apply for it, which comes with a significant price tag attached: it currently costs £1500 but from March 2016 about £1,875 to apply and, furthermore, it is an intensely bureaucratic process. We note that while academics and those working in the NHS can produce the paperwork, the contracts and so forth to prove that they have been here for five years, there are a lot of people here doing low-skilled jobs who do not have such documentation. If they are seasonal workers, they may have come for the summer, gone back and then come over again; they have very peripatetic lifestyles. It would be an enormous burden on the Home Office to have to deal with all these applications. We do not know because of course we do not record these things, but we think there might be up to 3 million EU nationals living here. The administrative burden is vast, and there will be hard cases. As Lord Judd rightly said, there will be a need to have a process of appeal because there will always be hard cases in difficult circumstances where we have never had any documentation. There is no documentation about who is coming into the country and going out, so it would be very difficult to prove that if I come and go because half my life is—

The Chairman: We do not stamp passports.

Professor Catherine Barnard: Nothing. We have no paperwork. It would be enormously difficult just to show who these people were who had done five years residence as workers, self-employed, students or persons of independent means. I suggest that one of the ways forward, although it would not resolve all the practical problems I have highlighted, is the one pushed quite hard by the Immigration Lawyers Practitioners' Association, which says we should not use the language of "indefinite leave to remain" because it comes with quite a lot of—

The Chairman: History and baggage.

Professor Catherine Barnard: History and baggage. Instead we should come up with a new status—

The Chairman: Terminology.

Professor Catherine Barnard: Whether you call it "EU permanent residence" or, if the EU is too controversial, "permanent residence for former EU citizens", the advantage of that would be that if we had a separate status recognising all these uncertainties, it might also be something that British nationals in other EU member states could enjoy as well without getting caught up in domestic—

The Chairman: The immigration system, yes. That is very wise.

Anthony Speaight QC: The second point is all very well, but many of the 3 million people that you refer to will not be able to afford the amount that you mentioned: £1,900.

Professor Catherine Barnard: That would be another advantage to coming up with a different category without the fee.

Q38 **The Chairman:** You have given us another flavour of the issue of the right that Anthony Speaight says he would want to see given special protection. Which of the rights that people have now, and which would ostensibly be lost, would you say should be preserved? What would you like to see retained in any negotiation?

Professor Catherine Barnard: I have a list.

The Chairman: I have my own list, too. We can match lists. What would yours be?

Professor Catherine Barnard: My own list is: the right of residence; the right to rent or buy; the right to equal treatment; the right to access public services, including healthcare; as a minimum, the existing political rights to vote in regional and local elections—which obviously would not include general elections as at present, though we might argue that there is a case for that in future; and family member rights, currently meaning your third-country national spouse or third-country children, including unborn child rights: that is, babes in the womb.

I would also say that there should be the continued right of mutual recognition of qualifications to enable you to run your own business—and, indeed, the right to set up and run your own business. Crucially, I think that quite a lot of thought needs to be given to what is going to happen to social security Regulation 883/04, which gives, among other things, the right of exportability of benefits. If you have accrued your rights to a pension in Spain, can you carry on transferring the pension and getting it while you are living here—and, of course, vice versa?

The Chairman: Those are the ones that people are writing to embassies about and so on. They are very concerned about pension rights, rights to healthcare and so on. I am really grateful for that answer.

Earl of Kinnoull: I will ask just one question. In the middle of your very interesting stream of consciousness—

Professor Catherine Barnard: I would like to call it “structured thinking”.

Earl of Kinnoull: One thing that we do have in people’s records often—although not always—is their national insurance record. They are very accessible and there has recently been help in terms of being able to get into those records and use them for certain purposes. It would seem that this—I am hoping you will confirm it—is at least something that should be explored. I completely agree that we will have to have a new, one-off, 3 million-person system to try to get a whole lot of people over a hump. Do you feel that national insurance records would be a reasonable place to start thinking about this?

Professor Catherine Barnard: They are probably the only place to start, because they are pretty much all we have for a lot of people. But, as Jonathan Portes has shown—he has done some very interesting work on this—by looking at national insurance numbers, or NINos for short, what we see is that the number of EU migrants who are here significantly exceeds the number who appear in the records of the Office for National Statistics. There was a flurry of concern prior to the referendum that, although it was thought that there were about 270,000 EU nationals coming to the UK each year, in fact the NINos suggested that it might be something like 600,000.

The discrepancy can be explained in part by the fact that the Office for National Statistics numbers are based on people who have been here for a year. That is standard practice in counting. The NINo is for people who come even for a very brief period; it may just be a couple of weeks. They might get a NINo even if they are doing very short-term, casual work, because their employer might ask them to have a national insurance number. But they do not swell the immigration figures because they are here for a very short time. So while NINos will help, because they constitute the only official government registration that we have, they do not show that you have a consistent pattern of work and presence in the United Kingdom.

Earl of Kinnoull: But for a good percentage of the 3 million people, it could be very helpful, because they could say, "I have been here for six years and my national insurance number is this"—and you will have six years of records.

Professor Catherine Barnard: So the question for negotiators really is how much of a fight they want. Do they want to require individualised assessments of every single one of those 3 million people or do they want to take a light-touch approach and say, "Look, if you've got a national insurance number and you can produce some other evidence, you will get whatever the new status is going to be called"?

There is one other group who are particularly vulnerable in all of this. They are EEA spouses of British nationals who are not working. Classically, a British husband marries a Polish wife; the wife does not work because she stays at home and looks after the children. The husband supports her so she does not have a national insurance number; she does not have sufficient resources in her own right but she is supported by her British husband. We think that there are a lot of people in that group—again, they may not show up in the statistics—and they will need to be watched out for.

Baroness Shackleton of Belgravia: In the case of the woman staying at home and looking after her children, if the children are born in this country, is that not caught in one of the cases you gave us? To separate the child from their mother would be very difficult to do.

Professor Catherine Barnard: At the moment, under EU law, you are absolutely right that the mother at a minimum would have rights derived

from the child. But those are all under EU law—and, of course, if we leave the European Union, there will be no EU law to fall back on. You might have domestic immigration law and you might have the Human Rights Act.

Baroness Shackleton of Belgravia: The right to family life.

Professor Catherine Barnard: Yes, the right to family life. So you will get some protection there—but that, of course, is dependent on how long the Human Rights Act remains on the statute book.

The Chairman: Baroness Shackleton, I think that question 6 has been answered.

Baroness Shackleton of Belgravia: I agree with you.

The Chairman: I will move on to Lord Cromwell's question.

Q39 **Lord Cromwell:** We talked about safeguarding EU rights, but there are various aspects to those rights—and, indeed, there is the question of when. What is your view on the withdrawal agreements specifying that those rights will be as they existed at the time of exit—or divorce, as we keep referring to it? Would it be better if they continued to evolve as EU law itself evolves, with the rights therein? If you were advising the Government on which option to plump for, which would you favour?

Anthony Speaight QC: Quite apart from the strong political pressure on the Government to plump for the status quo at the moment of exit, that option is also the one that I personally would suggest to the Government that it would be wisest to plump for. The alternative sounds rather like a blank-cheque arrangement under which the UK would enter a treaty agreeing to legislate domestically to match whatever future developments other countries might decide on. I would say to the Government that this could create problems down the line and that it would be better to have something a little less rigid—perhaps an undertaking to give consideration to matching developments but not a firm obligation to do so.

Professor Catherine Barnard: I would add something to that. Of course, much depends on what the future relationship looks like—what any deal going forward looks like. If it were to be a European Economic Area, plus or minus, the answer is already clear: we will have to comply with all the new EU law that comes on to the statute book.

I will make one observation about what I understand to be the Swiss experience. Obviously, Switzerland is not in the EEA. It has a series of 120 bilateral agreements with the EU that are divided into groups. If you breach one, the rest of the group will fall. I was told by Swiss colleagues to whom I was talking last week that, although they have always taken the view that they have a high degree of autonomy, in fact, certainly as far as the courts are concerned, the courts follow very closely the judgments of the Court of Justice. They look at the judgments and, in the past, the judgments of the Court of Justice had “persuasive effect”. They

then waited for a judgment of the Swiss Supreme Court to say, "This does apply in Switzerland". This became very onerous in Switzerland, so, eventually, in 2009, the Swiss Supreme Court said, "We will assume that we will take on the evolution of the Court of Justice case law unless there is good reason not to". So what is happening is that Switzerland very closely mirrors—admittedly in areas covered by the agreements—what is decided at least by the Court of Justice, because Switzerland is very worried that otherwise its law will become out of date. So an undertaking to follow makes absolute sense, and it would be much more compatible with those who voted leave and thought that one of the advantages of voting leave was not to be controlled by the European Union—but I suspect that we need to be much more granular in trying to work out which areas we are talking about.

With competition law, for example, British competition legislation absolutely mirrors what is under EU law—and, it is widely thought, will continue to do so, not least because EU competition law has such strong extraterritorial effect. So in that area it seems inevitable that we will have to not just pay lip service to following what the Court of Justice does but do it and take on board any new changes.

Lord Cromwell: I will pursue that a little more, if I may. That is a very interesting picture, is it not? Once we are out, we are still hooked into the European Court of Justice, one way or the other. We cannot pretend that it does not exist and that no precedents are being set that we have to pay attention to.

Professor Catherine Barnard: That is particularly acute if you follow the logic of what Theresa May said at the Conservative Party conference. She said that under the Great Repeal Bill, all EU law will become part of UK law. Of course, a lot of it already is, because directives have been implemented. But if that is the case going forward, as long as that law remains on our statute books, because it is of EU origin it is very likely that the Court of Justice rulings will have a very strong persuasive effect, if not full precedential value. Of course, it may be that as the years go by we will decide to repeal laws in particular areas, and then we will separate further. Much depends on what the commitments are in respect of a future deal going forward.

The most vulnerable area was thought to be employment law: the working time regulations and the agency work regulations. Theresa May said very clearly at the party conference that, as long as she was Prime Minister, those would not be repealed. But, of course, she will not be Prime Minister for ever, and the question is what will happen after that. Those sorts of areas could be repealed because there will no longer be a floor of rights that EU law provides.

Lord Cromwell: Finally, if we decided to be more independent, how much legal pressure would there be on our system from people saying, "You must pay attention to Court of Justice precedents", for all the reasons you outlined, which I will not repeat? Will we even have the opportunity to say, "We are not interested in what is going on in the

European Court of Justice; we are going to go our own way and diverge”?

Professor Catherine Barnard: Assuming that we do not go down the EEA route, it may well be that it is part of any future agreement that we have got to carry on respecting, for example, EU rules on workers’ rights in order to create a level playing field. So, to answer your question properly, much depends on what is in place going forward. The Swiss experience is that, to their surprise, they follow EU law very closely even when they are not obliged to by their treaties.

Anthony Speaight QC: I will add that there is a significant difference between binding judgments from the Luxembourg court, which we have now, and judgments that have what the courts call “persuasive authority”. It is entirely normal for our courts to read with interest the judgments of other courts around the world that have “persuasive authority”. Any other judgment can have that, and judgments of senior courts in countries such as Australia, Canada and other Commonwealth jurisdictions often have very great influence on decisions here. I would think it certain that the judgments of the Luxembourg court will continue to be highly persuasive.

The Chairman: I am going to move on to the question from Baroness Hughes. However, I would like the Earl of Kinnoull’s question to be elided with it. Perhaps you could do it together, because they are linked and our witnesses can then answer them together. We will go first to Baroness Hughes.

Q40 **Baroness Hughes of Stretford:** We were wondering how you saw things developing post exit in relation to the question of the reciprocal rights of EU citizens here and UK citizens abroad. If, as will probably be the case, our Government decide to freeze EU rights on exit, do you see a danger that those rights will over time no longer be reciprocal with the rights that UK nationals enjoy abroad, given that we expect those rights in other member states to evolve over time, as they have done? If that dissonance were to emerge, would that matter or have any implications?

Anthony Speaight QC: Are we going to get the Earl of Kinnoull’s question before I am asked to answer?

Earl of Kinnoull: It is very much along the same track. It touches on the edge of a huge area, but we will try to keep it to a small area. This is founded on the assumption that, in the withdrawal agreement, certain EU rights are safeguarded for EU citizens in the UK. The question is: what status in the UK courts would judgments of the Court of Justice of the EU have—both judgments pre-Brexit day and judgments made after Brexit day?

The Chairman: So there we are. A knotty problem.

Anthony Speaight QC: Right. I will begin by drawing a distinction between EU citizens who are already here before the day we leave the EU and those who may come subsequently. No one is keener than me on encouraging the freest possible movement between the EU and the UK

after we leave, consistent with ultimate UK control over its policies. But there is a difference, because it is the people who are already here who have acquired rights and who, I take it, are the subject of our conversation today. If we are focusing on them, it seems to me that an arrangement will be made in some sort of agreement between the UK and EU—or, just conceivably, to some extent, in bilateral agreements between the UK and other member states in areas that are within their national competence. Some sort of agreement will be made on the rights that these persons will have in future.

I would be hesitant about suggesting that we as a country should enter an agreement committing ourselves to unforeseeable and unknowable future developments. I just do not think that that is going to work. However, I can see every sense in agreeing to give careful consideration to keeping things up to date. That would be a matter of statutory instruments or even, conceivably, primary legislation in respect of major matters.

As to the weight of court judgments, when it comes to Luxembourg court judgments in respect of the meaning of rights that currently exist, it seems that the court has unquestionable authority, because the Luxembourg court is the ultimate decider of what EU law means—so if we are entering an international agreement the purpose of which is to preserve existing acquired EU rights, we certainly ought to respect the decisions of the Luxembourg court on what those rights mean.

Professor Catherine Barnard: I would add that as far as the persuasive value of the Court of Justice's judgments are concerned, those that have been handed down pre-Brexit will have the force that they already have under the European Communities Act. In future, the full position is likely to be that they will have persuasive effect but, for so long as they are interpreting provisions of EU law that are currently on our statute book and unamended, the persuasive effect will be very strong. What is trickier is what happens when the EU amends the legislation, because of course the EU does not stop in time the moment we leave. What will happen to legislation on, for example, the public procurement directive? The current version, the 2014 version, is really quite different from the 2004 version. The fact that we implemented the 2014 directive a year ahead of time and copied its contents almost verbatim suggests that we like the directive very much and got what we wanted in the negotiations. What happens when that directive gets amended? By definition, we will not have been involved in the negotiations. What will happen to the amendments? Will we voluntarily assume them in order to keep our regime up to date with the EU regime? In which case, the Court of Justice interpretation, not just of the 2014 law but of any future amendments, will still have quite strong persuasive authority.

In respect of Baroness Hughes's question about the divergence of norms—what will happen to Polish workers who have been here for some time and will their rights degrade in a way that British nationals' rights

might not degrade, in anticipation that British nationals are treated in France in much the same way as Spanish nationals would, because it is easier to apply one set of rules?—it is difficult to work that one out. It is interesting that in the UK context we discriminate at the moment between third-country nationals and EU citizens. It is harder for third-country nationals—Pakistani or Indian nationals, for example—to come in and reside in the UK. Of course, Polish nationals, certainly new arrivals, will no longer enjoy the benefits of EU rights. If the rights of those who are already here degrade, then the question is: under European Convention law, to what extent is it justifiable to carry on treating ex-EU citizens better than and differently from third-country nationals—Indian, Pakistani and so forth? There are complicated factors in play that affect our other international obligations.

The Chairman: That was incredibly helpful. This is complicated stuff, and I am sure that for the viewing public it is hard to disentangle because some of it is so much about law. You have helped us enormously by, as much as you could, presenting it in an accessible way. I thank you especially for doing that, Professor, because it is difficult yet so important. I thank both of you for the time you have given us today on something that is important to the future of so many people, and which will involve a great deal of untangling. Please remember my caution at the beginning: when you see the transcript, if you want to amend or add anything, please take the opportunity to do so. I thank you both for giving us your time today.

Professor Catherine Barnard: Thank you for your time and your interesting questions.