



## Select Committee on the European Union

### Justice Sub-Committee

#### Corrected oral evidence: Brexit: civil justice cooperation and the CJEU

Tuesday 6 December 2016

11.30 am

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Members present: Baroness Kennedy of The Shaws (Chairman); Lord Cromwell; Lord Judd; Baroness Ludford; Baroness Newlove; Lord Oates; Lord Polak; Baroness Shackleton of Belgravia.

Evidence Session No. 2

Heard in Public

Questions 6 - 12

### Witnesses

I: Mr David Williams QC, 4 Paper Buildings; Ms Jacqueline Renton, 4 Paper Buildings; Professor Rebecca Bailey-Harris, 1 Hare Court.

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## Examination of witnesses

Mr David Williams QC, Ms Jacqueline Renton and Professor Rebecca Bailey-Harris.

Q6 **The Chairman:** I welcome our next three witnesses. We are grateful to you for coming. I will first explain the rules of the session. This session is open to the public. A webcast of the session goes out live and is subsequently accessible on the parliamentary website. A verbatim transcript will be taken of the evidence and will also go on to the website. You will be sent a copy of it, and if there is anything that you would like to correct, please do so, but as quickly as you can. If there is anything after the session that on reflection you feel you would have liked to have said, please send it to us by way of written evidence as a supplementary and we will include it in your evidence. Please introduce yourselves for the record and just tell us who you are, starting from the left.

**David Williams QC:** I am David Williams QC. I am a family law practitioner specialising in international family law. I have had the pleasure of visiting the Court of Justice of the European Union in Luxembourg a couple of times, dealing with these particular matters, as well as making various appearances in the Supreme Court.

**Jacqueline Renton:** I am Jacqueline Renton. I, too, am a barrister in family law. I specialise in international children law. I have been in the Supreme Court on various occasions and at the Court of Appeal.

**Professor Rebecca Bailey-Harris:** I am an academic turned barrister. I was an academic for 30 years and then came to the Bar full time. I practise in Hare Court. I am an emerita professor from the University of Bristol and my main practice is international jurisdictional disputes, mainly about divorce and money, whereas my colleagues specialise more in children.

**The Chairman:** And your full name is Rebecca Bailey-Harris.

**Professor Rebecca Bailey-Harris:** Yes.

Q7 **The Chairman:** Thank you very much indeed. How important do you think the Brussels Regulations are, most particularly the Maintenance Regulation, to the UK's family law system? How helpful are they to us?

**Professor Rebecca Bailey-Harris:** We had decided before we came in that I would answer questions about finance and my colleagues would focus primarily on other aspects, if that is all right with the Committee.

**The Chairman:** That seems perfectly sensible.

**Professor Rebecca Bailey-Harris:** As family practitioners, we regard the Brussels Regulations as incredibly important in providing certainty and effectiveness for individuals—children and their parents and adult partners—across what is a very global Europe. Unlike in some areas of law, in family law we do not have a concept of applicable law, so we have not opted in to any of the applicable law provisions. For instance, the

Maintenance Regulation deals only with jurisdiction and reciprocal enforcement. As a family practitioner, I see that Regulation, albeit that it has its technical hitches of interpretation, as important in providing, first, certainty in jurisdictional rules; it provides uniform jurisdictional rules, which are particularly useful to vulnerable maintenance creditors, who are largely women with children. It is also important in providing a straightforward reciprocal enforcement system. For instance, if a woman obtains a maintenance order in this country, it is automatically enforceable elsewhere in the EU, so if the maintenance debtor gets a job in Paris, Warsaw or wherever, variation and enforcement applications are easily taken. To take that reciprocity away, as well as uniform jurisdictional rules, is a serious question for families across Europe. We are in a completely different sphere from commercial litigation; we are talking about individuals.

**The Chairman:** Professor Bailey-Harris, when you say that your expertise is in the field of finance and maintenance, do you also cover issues of inheritance?

**Professor Rebecca Bailey-Harris:** No. We do a lot of divorce jurisdiction for international families.

**The Chairman:** So it is divorce, separation of assets and maintenance of children. On assets, are you also assisted in enforceability by these arrangements?

**Professor Rebecca Bailey-Harris:** No. A number of decisions of what used to be the European Court of Justice, now the CJEU, and domestic decisions confined the old Brussels I, which applied to maintenance before we had the Maintenance Regulation. Maintenance is given a purposive interpretation, not an interpretation as to form, so an order, whether it is for a lump sum or even for a transfer of property, is capable of being characterised as maintenance and therefore enforceable. It is a purposive construction.

**The Chairman:** Can you explain “purposive” for those who are listening and watching?

**Professor Rebecca Bailey-Harris:** It is a technical term. You look at the objective of an order. For instance, if a parent is awarded a lump sum, that could be by way of capitalised maintenance. Even the transfer of a specific asset could be for that—for instance, a property that you could let out. The question is the purpose of the award, not the form. You do not simply say that because it is an asset transfer it is outside the Maintenance Regulation. But there is a gap that we are all very aware of in family law. We are concerned that that would rather become the norm if all this falls away. For orders in respect of the division of assets which are not characterised as maintenance, there is no reciprocal enforcement system and you have to rely on jurisdiction for enforcement in the foreign forum.

**The Chairman:** Thank you very much. Perhaps we can move along the

table. How important do you see the Regulations in the field in which you operate: children's rights?

**Jacqueline Renton:** The Brussels IIa Regulation has certainly streamlined jurisdiction and the enforcement of orders in a children context, and has provided much more certainty as a framework for children cases than we had before. The risk without it is that children enter a forum where there is less certainty of outcome and there is likely to be more litigation. We would view that as harmful and against their best interests. We could pick on various aspects of the way in which the Regulation has developed our law generally. It is specific not just to EU cases but to non-EU cases in the international movement of children.

I will give you one example. Article 11.2 of Brussels II Revised deals with hearing from the child and stresses the importance of the voice of the child. Back in 2006, in a decision in re D in what was then the House of Lords, Baroness Hale made clear that the importance of hearing the child should apply to EU cases because of the Regulation but that it should also apply to non-EU cases. That was a seminal decision, because it has led to a vast amount of jurisprudence with the aim of enfranchising children and hearing their voice more.

There are numerous examples that we could give you from the High Court all the way up to the Supreme Court. Mr Williams and I represented a 13 year-old in the Supreme Court based on the ability for her to be a separate party and to be enfranchised, leading to a change of the law in respect of an issue of habitual residence that is based fundamentally on the development that came fundamentally from the European Regulation and has now, as I say, spread through the cases. So the Regulation in that respect is certainly very important and has that wide knock-on consequence for all cases involving children.

**David Williams QC:** Because Brussels II has direct effect, it has overlaid all our pre-existing domestic legislation, so it spreads into every area of our domestic law. In terms of its importance, it has transformed the way family law has operated over the last 11 years.

Another specific example of its impact is that prior to Brussels II our grounds for jurisdiction over children were largely centred on whether the parties were divorcing. That was the central feature of the Family Law Act, and the Brussels II Regulation introduced the habitual residence of the child as being of central importance because it provided a connection between the child and the court that was best placed to assess their welfare.

Prior to Brussels II, the English courts had always focused on the parents' intentions in determining habitual residence. It was a very adult-focused approach. The European Regulation and its interpretation by the Court of Justice of the European Union resulted in a quantum shift away from the adults to a focus on the child, and the Supreme Court in England followed on from that. The protection that that has given children by creating a

link between them and the country rather than between the adults and the country certainly serves their best interests.

Perhaps a recent example of its importance was a decision by the Supreme Court in a hearing about this time last year. The biological mother of a child had abducted the child to Pakistan and the non-biological mother of a child had been left behind in England. In the first instance, the court applied the old English test, which was based on the intentions of the person with parental responsibility. If they intended to leave the country they could shift the child's habitual residence and we would have no jurisdiction over the child. The Supreme Court said, "No, that's wrong. We're not looking at adults. We're looking at children and what's important for them". They applied the more European approach, so the English courts retained jurisdiction over that child and were able to make orders. That has a very important effect particularly for parents who do not have parental responsibility for a child and for others who do not have parental responsibility for a child but who might be caring for them: grandparents, aunts, uncles, local authorities even.

**The Chairman:** Grandparents?

**David Williams QC:** Yes, grandparents, very importantly, but also same-sex couples who have had a child but for one reason or another have not acquired parental responsibility. It makes a much better protective net for the child. That is just one example. We could probably speak for hours about the various ways in which the various articles provide better protection for children because they are child-centred.

**Professor Rebecca Bailey-Harris:** Sorry to butt in, but just to reinforce that, what David is bringing out very clearly is that, in family law jurisdiction, because the Regulations are of direct application, that is our domestic law. We are not just talking about reciprocity and international cases. Article 3 of Brussels IIR is our domestic divorce law on jurisdiction, the law of first call, and similarly with the Maintenance Regulation, whether it is a case with an international dimension or not. There is the fundamental question of what you want to do about that. It is not just a question of international cases. If I were being divorced, God forbid, by my husband in London, it is Article 3 of Brussels IIR that is the domestic law. That is a fundamental issue.

**The Chairman:** And does it give you more protections? Is it better as a result of coming from that source?

**Professor Rebecca Bailey-Harris:** That is the question. The jurisdictional rules in Article 3 are various permutations of habitual residence, which vary according to whether it is the habitual residence of both spouses, their last habitual residence, the habitual residence of the applicant or just of the respondent. There are various links, and the objective of Article 3, in a fairly sophisticated way, as explained in an explanatory report by Professor Borrás from Spain, was to designate a real link with the country in which the divorce case is brought. So there are various sophisticated permutations of habitual residence.

There is also common nationality for all countries except England, Wales, Ireland and Scotland, where it is common domicile. We would have to think about what we want our domestic law to be post-Brexit. Do we want to enact Article 3, which I think is a very sophisticated provision, into domestic law, or do we want to go back to the jurisdictional rules in the Domicile and Matrimonial Proceedings Act 1973, which has a flatter, less sophisticated concept of habitual residence than the concept of habitual residence used under Brussels IIR in divorce jurisdiction? Our English courts have hitherto taken the lead from the Court de Cassation in France and have said that habitual residence in this mobile, global-type society is a qualitative test and not simply a quantitative test of counting days. So the centre of interest is the established test under Brussels IIR.

There has not yet been a case by the European court on that, but it is very well accepted in England and Wales. Would that go? Would we go back to what in my view is the cruder test of habitual residence of simply counting days? To lose the centre-of-interest test in a mobile society is, in my view, very detrimental.

**Lord Cromwell:** May I just ask you to answer your own question? You have all made it clear that Brussels II is very pervasive. Are you saying that if it had not been invented, or if we stop having it, we should reinvent it, or that we should go back to our old ways and re-embody them? How should we do it?

**The Chairman:** I think Professor Bailey-Harris is saying that this is a much more sophisticated thing, and that to go back to the 1973 rules would be a detrimental step.

**Professor Rebecca Bailey-Harris:** But who is going to decide that? Post-Brexit, we have to do something about our domestic law. The normal course is for the Law Commission to look at it. Should the Law Commission spend years deciding whether we should simply re-enact Article 3 divorce jurisdiction into domestic law or whether we should go back to the previous grounds? It is a huge task.

**The Chairman:** Other hands are going up. I would like my other witnesses to come in—briefly, if you can, because there are questions from everyone around the table.

**David Williams QC:** I think we are going to say the same thing, which is that there is a default position for the UK, because we are signatories to the 1996 Hague Convention, which provided the source material for much of Brussels II anyway. Brussels II added to the 1996 Hague Convention, so if we exit the European Union the 1996 Hague Convention will apply, provided steps are taken to re-enact it, because it is currently designated as an EU treaty. That will provide a safety net, as it were. The provisions of the 1996 Hague Convention are not as extensive as Brussels II.

**The Chairman:** So we have a backstop.

**David Williams QC:** There is a backstop on children. It does not provide

a divorce backstop.

**The Chairman:** It is not a divorce backstop.

**Jacqueline Renton:** It is also not a complete backstop, because unless you enter into Brussels II Revised again with all the EU states, some of the scheme of the 1996 Hague will be there—jurisdiction, and so on—but there will be no reciprocal enforcement; you will effectively be talking to yourself. So it is not a complete backstop. There is a safety net in some provisions, more than there is with finance, but it is not a complete picture, so you would have to look at how you recalibrate everything.

Q8 **Lord Judd:** I have found all this immensely interesting. If I may say so as a complete layman, it strikes me that one thing that has flowed from our membership of the European Union has been an enhancement of our fulfilment of the UN Convention on the Rights of the Child. I find that very significant.

I now ask a much more down-to-earth, bread and butter question: what are the implications for the UK's legal market if the UK no longer participates in European legislation addressing conflict of laws?

**David Williams QC:** If this is directed to the lawyers and our work, we find it very difficult to predict. In all our discussions so far, we have focused very much on the impact on families whom we help. We have identified the deficits that will affect them.

In terms of the impact on us, first, we are not at all sure that there will be a lessening in cross-border movement of people as a result of us leaving the European Union, even if free movement of people goes, because there are of course many millions of people here who have cross-border relationships. That movement will continue. The system of immigration that we adopt will still presumably permit movement of people. Abductions will still happen. One of the most significant deficits that we will lose with Brussels IIa going and the recast Regulation is the abduction protections. As far as we can tell, it will be good for lawyers. Any uncertainty in the law will be good for us.

**The Chairman:** Is always good for us.

**David Williams QC:** We may make a few more authorities in the Supreme Court on the interpretation of the 1996 Hague Convention, but for families and children we are absolutely clear that serious problems will arise and some children, if you reduce it to that, will suffer very serious consequences. The Committee is probably aware of research being done by Professor Marilyn Freeman of the University of Westminster on the effects of child abduction. With regard to unremedied child abduction in particular, 75% of the children who were abducted and then interviewed as adults had suffered significant effects, including mental health problems. There will be children who will be exposed to that level of harm as a result of the loss of this Regulation. There may not be that many in England, but a few children who suffer those consequences is a few too many.

**Professor Rebecca Bailey-Harris:** Just from the money perspective of the business, England and Wales is generally regarded as a very favourable forum for wives in finance cases. That is because of English domestic law, the Matrimonial Causes Act 1973, and the way it has been interpreted by the House of Lords and the Supreme Court. Presumably, that business will continue to be attracted, but of course it will depend on the jurisdiction rules for divorce. If we lose the qualitative concept of habitual residence, that business may diminish. Sorry, I am not interrupting, but that is from the finance point of view.

**The Chairman:** No, it is helpful to know that.

Q9 **Baroness Ludford:** My question is about the European court. I am going to stick my neck out and make an outrageous wager that the child focus in the Brussels II Regulation might have something to do with the input of the European Parliament. I was there for 15 years. I did entirely criminal law, but I suspect, knowing the kind of negotiations that take place, that it would have been the Parliament that championed the child focus, not member states. Perhaps I will be proved wrong in my outrageous bias.

My question is about the implications for the UK's post-Brexit participation in EU family law legislation of the Prime Minister's assertion that we are not leaving the EU only to return to the jurisdiction of the European Court of Justice. That is not going to happen. What is the implication for the scenario that you envisage?

**David Williams QC:** One of the big advantages of Brussels II was that it brought a supranational court into the CJEU, which brought uniformity of interpretation to the Regulation. We had been operating the 1988 Convention for many years, but the big deficit with that is that it does not have a supranational court to provide uniformity of interpretation, so different concepts are applied differently in different countries. If you looked at the American approach to habitual residence compared with the New Zealand approach or the British approach, you would find huge variations, which has adverse consequences in itself.

The advantage of the CJEU was that we were applying uniform interpretations across 28 states. If we exit, whatever system we are applying, assuming that we apply the 1996 Hague Convention, we then do not have a supranational court to determine that. The 27 other member states will carry on interpreting and applying Brussels II and the recast Regulation with the assistance of the CJEU. We will be operating a different system and the two do not speak to each other very well.

**Professor Rebecca Bailey-Harris:** That is a real danger across the board. Just to take the standard concept of habitual residence, that applies to children, divorce and maintenance. There is a real danger of slipping back into a lack of uniformity.

**Jacqueline Renton:** It is an especial shame because we are pioneers in international children law. Our jurisprudence is often relied on by other



countries. The development of the law has come in large number from our jurisdiction, so the progression will simply happen without us.

**Professor Rebecca Bailey-Harris:** In thinking of a way in which a role for the court could be kept, I am thinking of the analogy with the Lugano Convention on maintenance, which applies between the members of the European Union, Switzerland, Iceland, and I cannot remember who else. Although it does not have its own court, it takes on the CJEU's jurisprudence as advisory. Whether there is a mechanism for doing that I do not know. Of course, politically there are lots of in my view ill-founded objections to this.

**Jacqueline Renton:** The analogy would be more with the European Court of Human Rights. Its jurisprudence is persuasive on us now, but it is not binding, because we are not talking about direct-effect legislation. You could have that persuasive impact, but you would have nothing more.

Q10 **Baroness Shackleton of Belgravia:** First, I must declare my interests. I brief all three of you, so I have been and am in a financial relationship with all of you, and I practise in this field. That is my interest declared.

We heard from your predecessors on the commercial angle of post-Brexit that they considered that one of the worst dangers will be the hiatus that will be forced on us the day after Brexit. I think Mr Williams referred to previous legislation that we can rely on. Should anything be happening now to avoid that hiatus that would be useful in interpretation? That goes to both children and to jurisdiction. For example, first past the post is something that people who do not practise in this field probably do not understand, but if you are a member of the EU and the first person to file, you would garner the jurisdiction, even if there is a competing jurisdiction, provided that you can stick with it. That will create an enormous problem if we find ourselves in no man's land between the two. Is there anything that you recommend should be done to stop the uncertainty?

**The Chairman:** To explain to those who may be watching, first past the post refers to someone filing for divorce here whose partner is Italian, and the divorce will be dealt with here. Is that right?

**Baroness Shackleton of Belgravia:** Yes.

**The Chairman:** If you are from outside the European Union—imagine you are married to someone from Pakistan—what would the situation be there?

**Baroness Shackleton of Belgravia:** It would be the old *forum non conveniens* argument, as opposed to first past the post. But two French nationals living in England with French passports can file and would get the jurisdiction in which they filed first—one of them in Paris, or wherever in France they come from. It is to do with your domicile and your husband's or partner's domicile. In the EU, there are very clear rules as to who gets there first. There has been criticism because it expedites

some divorces because people have to file quickly to garner the jurisdiction, when there are other matters, such as reconciliation, that could be gone through. If that were suddenly to go away, we could be flooded with *forum non conveniens* arguments on every European case and no one knows what the rules are; do we apply them or not?

**Professor Rebecca Bailey-Harris:** On the holding mechanism, if we went down the track of simply re-enacting the jurisdictional rules in Brussels IIR, which relates to divorce, children and in the Maintenance Regulation, they all contain this simple *lis pendens* rule, which is the court first seized. That court keeps the case until it decides that it does not have jurisdiction or it completes the proceedings. It would be perfectly possible to enact that as a matter of domestic law. Some countries that do not belong to the EU, such as Switzerland, have a first-in-time rule as part of their domestic conflicts of law code, as do some other countries. We could do that but, again, it is a question of law reform. What do we want to do? We cannot just enact everything without the usual debate. It is a huge task to decide what we think. I am in favour of the simple rule of first in time, others prefer *forum conveniens*, but it is a question that must be looked at by the Law Commission and Parliament. You could have it as a holding measure, but do you want it as your long-term law system?

Q11 **Baroness Newlove:** You may have already mentioned some of this, but I am looking at possible alternatives for post-Brexit UK family law co-operation with EU member states. Are there adequate alternative replacements for current EU legislation? I think you mentioned the Law Commission.

**Jacqueline Renton:** We have said that you would have the safety net of the 1996 Hague Convention. You could implement some of the Brussels II Revised into domestic law; how that would be done has just been discussed. You could also rely on the archaic Family Law Act 1986. But some of it will require more thought because of the issue of reciprocity, which would have to be dealt with when you were negotiating with the EU, because it would be part of the EU's competence. It depends on what track you go down. That is the difficulty.

**The Chairman:** Are we going to be helped by the great repeal Act? Will that somehow manage to deal with this?

**Jacqueline Renton:** It will just get rid of Brussels II Revised, and then you will have to say to yourself, "What then?"

**Professor Rebecca Bailey-Harris:** It will not. It could freeze it. It could just say, "We will just hold all the Regulations that are directly applicable as part of domestic law", and think, over the following 10 years, what we want to do with the substance of that. That is possible.

**Lord Cromwell:** Would that not be a better outcome than this rather hole-filled safety net?

**Professor Rebecca Bailey-Harris:** Yes. That is my personal view.

**Jacqueline Renton:** The only difficult is the CJEU. If you want to freeze it and remain part of the Regulation, you will remain part of the CJEU governing the interpretation of the Regulation, which may be acceptable but may not be. It may be acceptable *pro tem*.

**The Chairman:** Hold on. Could it not be that you take the substance of the Regulations and introduce them into domestic law and cut out the role of the European Court of Justice? Then you would get the law brought in but the role of the supranational court removed. Is that not an option?

**Professor Rebecca Bailey-Harris:** The problem is what Jacqueline has alerted the Committee to. You lose the autonomous interpretation of habitual residence of adults and children and you start this fragmentation back into domestic law. That is the danger.

**David Williams QC:** There is a difficulty in re-enacting the entirety of Brussels II, because you will then have Brussels II rules applying to England, but in any dispute between England and France you would have 1996 Hague Convention rules applying. Having the whole of Brussels II re-enacted would introduce an element of confusion. If one were trying to salvage something from Brussels II, it would be possible to identify the parts that are not replicated in the 1996 Hague Convention, re-enact them—which might then have a domestic effect—and bolt them on to the 1996 Hague Convention, which would have a reciprocal effect across the European Union member states, which are all signatories to the Convention. You could try to recreate something similar to Brussels IIa by these bolt-ons, but the difficulty is that that would have to be negotiated with the EU. All these matters are within the material scope of EU law, so you could not do it through bilateral agreements with Portugal or Germany.

**The Chairman:** It sounds like a very busy time for Parliament.

**Professor Rebecca Bailey-Harris:** It is a massive task.

**Lord Cromwell:** It is interesting, because mention of 10 years to sort all this out has come up in a number of our inquiries. There is a terrific project there somewhere to say, “Okay, we like this bit. Let’s make it happen”. Really, what I am hearing from you is that on Brexit day plus one there will be a safety net with holes in it, which we may fall into and will have to do our best on in the interim. Longer term, we should be trying to get to something like the Brussels thing but with the court problem you have referred to. Even if we are cut off from it, precedent within it will be looked to by our courts, I am sure.

**Jacqueline Renton:** Yes, as we do with the European Court of Human Rights.

**Professor Rebecca Bailey-Harris:** With divorce, we do not have the Hague Convention. There is no international convention about divorce. The argument for just enacting the divorce parts of Brussels IIR into

domestic legislation and trying to achieve reciprocity by negotiation is clearer there. There is just no divorce safety net.

**The Chairman:** There is no safety net in that case.

Q12 **Lord Polak:** I like to be practical, a bit like my friend Lord Judd. Something was said a little earlier that worried me. I think you said it, Mr Williams. The children involved in these cases are necessarily in vulnerable positions. It is difficult. I have a real problem with uncertainty being good for lawyers but not good for some children or even one child. Thinking about it from the point of view of the child, who we are all trying to help as opposed to making money, could not the current regime be maintained in the UK EU withdrawal treaty, which will have to be made, to ensure continuity so that we look after the children, who we are supposed to be looking after?

**David Williams QC:** Our first choice would be to maintain Brussels II or the recast Regulation—whatever shape that eventually takes—in force as part of the negotiation, if we could, but I think that necessarily involves the Court of Justice of the European Union having the interpretive role. If there was some way of maintaining Brussels II and cutting out the CJEU, if that is what the Government decide they must do, I suppose most family lawyers would say, “Let us try to keep Brussels II and the recast, because that is what is in the interests of the children”.

If you cannot divorce Brussels II and the CJEU from each other and we have to move to something else, maintaining Brussels II in the great repeal Act is of very limited use, because the great advantage of Brussels II is all the reciprocal parts of it: the enforcement issues, the abduction enhanced safety provision and the corporation provisions. If we have it domestically but it does not bite with the other 27 member states, it is almost worthless. It is better then, perhaps, to shift to the 1996 Hague Convention, which does bite as between all of us, if we are no longer members of the European Union.

**Lord Polak:** But if you think that is a good idea as practitioners, are you saying that to the Government? Are you saying to the people negotiating, “For the sake of the children, this is important”?

**Jacqueline Renton:** Yes, the Bar Council is pursuing it.

**David Williams QC:** Yes.

**The Chairman:** The Bar Council’s position is to say, “Keep Brussels II and make it part of the withdrawal agreement”?

**Professor Rebecca Bailey-Harris:** As I understand it, the Bar Council’s position, in both general civil law and family law, is to attempt to negotiate something like the Denmark jurisdiction agreement, whereby Denmark has not opted straight in to the Regulations but has a special arrangement.

**David Williams QC:** The Family Law Bar Association has provided a paper supporting the continuation of Brussels IIa if at all possible and the recast Brussels IIa, which has even more added protection. At the moment, they are in the process of enhancing Brussels II. Of course, we will miss out on those advantages.

**The Chairman:** But allowing the Prime Minister to stick to her line that the European Court of Justice will be out of the picture?

**Professor Rebecca Bailey-Harris:** Jacqueline's is a good idea: that it can be of persuasive status, not binding.

**Jacqueline Renton:** The other thing that needs to be borne in mind with the Court of Justice of the European Union is that it is not as though all our jurisprudence is framed from that court. There is a huge body of jurisprudence in our field framed from our domestic courts. References are few and far between.

**The Chairman:** References to the European Court of Justice do not happen very often?

**Jacqueline Renton:** Yes. So this issue of sovereignty in the domestic court controlling jurisprudence is actually in the status quo; it is somewhat of a misnomer that we are simply governed in our field by the CJEU now.

**The Chairman:** This is one of those things that it is important for those listening to hear. There is the idea out there that we are the recipients sitting here with a whole wash of law coming at us from Europe. You in particular, Ms Renton, mentioned that British courts, British lawmakers and British lawyers have made a huge contribution to the law in this area—albeit that the idea of putting children at the centre came out of a European urgency, a European sensibility, perhaps. But we have taken the law and run with it. That is always been part of the business of Britain: we are good at law and good at doing it with other people.

**Jacqueline Renton:** Absolutely.

**David Williams QC:** I think we have had four references from this country to the Court of Justice of the European Union since Brussels II came into effect. In that time, if you were to count up the number of important cases just in the House of Lords and the Supreme Court, it would be tens of times more than that, so we are the primary drivers of family law as it currently stands.

**The Chairman:** And we have helped influence the law as it is practised throughout the whole of Europe in the field of children's rights and family law.

**Jacqueline Renton:** Without any doubt.

**Professor Rebecca Bailey-Harris:** On the dreaded topic of the Maintenance Regulation, I would just like to say that easily accessed

measures for reciprocal enforcement of maintenance orders are just as much about the rights of children as abduction cases. We have had reciprocal arrangements. Before we had the Maintenance Regulation which was enacted in 2009, we had the Brussels I Regulation, because maintenance came into that. Before that, we had the Brussels Convention of 1968. If all that goes, maintenance cases are not about high-wealth individuals; they are often about children needing maintenance from a parent. If the parent goes off somewhere else in Europe, it is extremely difficult reciprocally to enforce maintenance without the proper arrangements. That really needs to be salvaged in negotiations. Children's financial rights are actually very important.

**The Chairman:** Lord Judd, your final bite at this.

**Lord Judd:** Perhaps this is a very unhelpful thing to do this late in the session, but listening to all this it strikes me that, meanwhile in the real world, we are being submerged in an ongoing, increasing and endless refugee problem. How far have the things we have been discussing this morning any relevance to the handling of responsibilities towards refugee children, displaced people, and the rest?

**David Williams QC:** They are specifically covered by both Brussels II and the 1996 Hague Convention, which have specific reference to the courts of the country where a refugee child is present having jurisdiction over the child. So there is coverage.

**Lord Judd:** But if I may, there has been a hell of an argument going on between the French and the British about what we do with youngsters who some would argue have every right to come to Britain and who some would say have not.

**Jacqueline Renton:** The reality is that any immigration problem, any issue of asylum, does not go away on the date you leave the European Union. We have vast numbers of cases in our family courts now where people are here illegally. The court does not just turn them away and refuse them access to justice; the court deals with it. Mr Williams and I are involved in a case at the moment with a child who we are representing who has been given a right to asylum. A huge debate will now take place in the High Court about that and how that impacts on the court's ability to return this child to Pakistan, with potentially the Secretary of State intervening.

All those types of cases continue, whether there is Brexit, Brussels II Revised or anything else. That is the reality of the world that we live in.

**David Williams QC:** What Brussels II is particularly good at compared to the 1996 Hague Convention is co-operation between the central authorities. It is not only the central authorities who work very well together in the European judicial network and the Hague network of judges, it is also practitioners. If you are operating in the same system, it makes it much easier to work productively together for the benefit of the child.

The difficulty that we will face, and why children will ultimately suffer, is that while 27 other member states will be focused on Brussels II recast and learning how to operate it—it will not be easy to put into practice—we will be dealing with the 1996 Hague Convention. It is like having a Windows operating system and an Apple operating system: they just do not talk to each other.

**The Chairman:** I thank you on behalf of all my colleagues here on the Committee for your expertise and your very clear way of describing the challenges. We are really grateful to all three of you. Thank you very much indeed. As I said, if there is anything you want to add, please send it in in writing. This has been a very illuminating session.