

Select Committee on the European Union

Justice Sub-Committee

Corrected oral evidence: Brexit: civil justice co-operation and the CJEU

Tuesday 31 January 2017

10.45 am

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Members present: Baroness Kennedy of The Shaws (The Chairman); Lord Cromwell; Baroness Hughes of Stretford; Lord Judd; Baroness Ludford; Baroness Newlove; Lord Polak.

Evidence Session No. 6

Heard in Public

Questions 38 – 46

Witness

I: Rt Hon Sir Oliver Heald QC MP, Minister of State for Courts and Justice, Ministry of Justice.

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Examination of witness

Sir Oliver Heald QC.

Q38 **The Chairman:** Good morning, Sir Oliver. Thank you very much for coming.

Sir Oliver Heald QC: It is a great pleasure to be here. I hope I am not sitting too far back.

The Chairman: Lean in, as they say nowadays. Minister, I am very grateful to you for giving us your time.

As you know, we have been conducting this very quick evidence session to look at the consequences for civil justice co-operation post Brexit, identifying ways in which there have been benefits to the system of justice through co-operation, mutuality and so forth, and seeing whether there are deficits that should be in the mind of government as part of any negotiations and processes as we go ahead and how one would seek to plug any gaps.

All the witnesses we have heard from have emphasised the importance of certain Regulations in the day-to-day co-operation between the UK and the European Union legal system. Most have focused on the uniformity and the creation of uniformity, which has been a rather useful thing, and on the importance of certainty, which is always so helpful to litigants. It has been emphasised that the Regulations introduced to cross-border situations help the little guy in particular; we are not talking here about the big corporates, which can get the lawyering done by throwing money at it, but about ordinary people doing business or travelling or who have family relations who live elsewhere. All those issues that affect ordinary people are often addressed through the legal system. How we can make sure that we understand the implications?

This is an open evidence session which, as you know, is being webcast live on the parliamentary website. There will be a transcript, which will be sent to you before also being put on to the parliamentary website. You will be given a chance to read it, correct it or add to it if you want to, so that we can get it out there with all that you want to say.

You are deep in the heart of this process. What importance do the Government place on securing a post-Brexit deal on the continued operation of the so-called Brussel regime of Regulations, and what effort have the Government made to consult the interested parties on the important aspects of those Regulations?

Sir Oliver Heald QC: We started, just after the referendum when the new team came in, to consult a wide range of people. We have consulted judges, lawyers, academics and those who represent particular sectors, such as consumers, the little guys you mentioned—

The Chairman: And the small and medium-sized enterprises.

Sir Oliver Heald QC: Exactly. We have had a very wide-ranging set of meetings and discussions, with officials and Ministers involved. There is

no doubt that the clear and consistent message that comes across is that an effective system of cross-border judicial co-operation with common rules is essential to embed certainty and predictability for businesses, particularly for those with a commercial aspect—and for individuals, including families, as you mentioned—where there are international disputes, whether commercial or family. We recognise the importance of the mutual recognition of choices of law, courts and the enforcement of judgments across borders in order to maintain confidence for trade and to help with family disputes.

Of course, it is too early to say to what extent the Brussels regime will feature in any agreement, but these are important principles that will form part of the negotiations, and we will be looking to make a new agreement, a new relationship, with the EU for the future that is constructive and tackles these important issues.

The Chairman: One thing that has become clear to us—and we have all been on a learning curve about this—is the extent to which the law and ordinary people’s lives might be affected, which has perhaps not been in people’s minds, such as when travelling abroad or going on holiday somewhere, hiring a car, perhaps being in an accident and then having to do battle with an insurance company. At the moment, one can go to a court here and get enforcement in Portugal, Italy or Poland. These issues might not be at the forefront of the minds of Ministers wanting trade agreements, but they have a real impact on people’s lives, and I do not think that many people have understood just how much this could affect, say, married couples who divorce and issues of Maintenance and custody of their children. At the moment, we have a regime that lawyers tell us works very effectively and without the delays that there could be if we were to retreat from all that. What will consumers’ rights be? We get so much of our stuff from elsewhere; you will buy something through Amazon and it comes from Liechtenstein. A lot of this is straightforward stuff for people, and people want reassurance that this will be high in the minds of those who are negotiating.

Sir Oliver Heald QC: It is certainly very high in the minds of government. It is true that a lot of the resonance of this is for ordinary people who have ordinary concerns of the sort you describe, but it is also important for business, because doing business with a proper legal underpinning of certainty about how legal matters will be tackled is very important for business. It is important for everybody; it is important in the commercial sector and for individuals. That is why we have had all the meetings that we have had and why we have worked very closely with DExEU on this. The Secretary of State has made it clear that these issues will be part of the negotiations.

Q39 **The Chairman:** Which aspects of the three Brussels Regulations—Brussels I recast, Brussels IIa and the Maintenance Regulation—will the Government be most keen to retain when the UK leaves the EU?

Sir Oliver Heald QC: All three cover areas that are important. Brussels I recast provides recognition of the jurisdiction of law—the law of, say, a

contract. It also deals with mutual recognition and the recognition by other countries of judgments and their enforcement, so it clearly deals with very important issues.

Brussels IIa is very important, particularly in the field of matrimonial law, because there are no Hague Conventions dealing with some of the matrimonial side. It is also very much a system that has been worked out in a carefully balanced way to meet the needs of the countries concerned, which is important.

The Maintenance Regulation means that if you have an international family, the payments can be made and enforced for the sake of the children and the family. So they are all important. Their content will have to be part of the negotiations. I am not necessarily saying that we will argue for these Regulations; it is the content that is key, especially with regard to mutuality and reciprocity. As you will appreciate as a senior lawyer, if you were to have parallel proceedings in different countries over family matters or commercial matters, that would create a range of problems. Apart from being chaotic, one party could exercise an economic dominance over another, whereas, if there is one set of proceedings in one country under one set of rules, that is less likely. These are all important and will all form part of what we are negotiating.

The Chairman: Are there areas that the Government believe we can afford to abandon?

Sir Oliver Heald QC: These packages of Regulations have been carefully worked out; each of them is a balanced package. I would not want to say that there are parts to be abandoned. The issues covered by these Regulations should form part of the negotiations. Of course, it would be difficult for me to express a priority, because we have said that we do not want to do that ahead of the negotiations. We want to enter the negotiations with our position intact and not fully known. But, yes, they are important and there is nothing that I would offer up.

The Chairman: There are those, although not many, in our experience of taking evidence and looking at the literature, who say, "We can all go back to how it was before, in the pre-EU days. Let's go back 50 years to how it was in the old days"—they think rather glowingly of the old days. But it is hard to find one practitioner who will not say, "Not on your life. These new arrangements, which have often been driven by British lawyers, are so important to the way in which our world has evolved over the last 40 years that to imagine that the common law or the old rules will be able to deliver is just not the case". Do you agree with that?

Sir Oliver Heald QC: Yes, I do. Under the old rules, there was more flexibility and the judge had more say, but of course that made things less predictable. We still use conflict of laws in disputes involving other countries outside the EU, but it is a complex area of law with much more flexibility to it. In the process, it is less predictable. Of course, these packages of Regulations have been worked up to meet those problems. We now have reciprocity, which is very important. If we were simply to

fall back on common-law rules, we would not have the reciprocity and the mutual agreement, which is the benefit—we know that other countries will follow the same rules as we do. That is the great advantage. Some academics may say that a fallback on domestic law might be possible, but it is certainly not our choice.

Q40 Lord Polak: It is nice to see you, Minister. I want to push you a little further on this area of common law. Negotiations will not necessarily be done and dusted on the day that you expect. There may be a bit of a hiatus. We have been told that the common law might be able to come in in that space and might suffice and that there would be no loss of performance. Do you agree with that? If there is no agreement, what rules will govern cross-border civil and commercial disputes? It is all very well saying that it will be done on this date, but it may not be.

Sir Oliver Heald QC: Obviously the preference is to reach agreement within the two-year period and for it to be implemented thereafter. If that were not possible, there are common-law rules. We do business with other parts of the world and it is not impossible to decide what conflict of laws would mean so that a particular jurisdiction would hear a particular case. There are rules. The point about the Brussels Regulation is that it has been carefully negotiated over the years to provide a bit more than that and to guarantee the reciprocity. That is the strength of it, but it is not impossible to do business without it.

Lord Judd: You said that there is room for concern in business and family matters. We are parties to the UN Convention on the Rights of the Child. Indeed, we were the drivers in its drafting. There really cannot be a hiatus. We have to be certain that the rights are being upheld. We have heard in evidence given to us that things have moved light years forward on cross-border issues and so on, which are very real. I quite understand that you do not want to say where our priorities are, but can you give a categorical assurance that the rights of the child will be central in your considerations?

Sir Oliver Heald QC: It is a very important consideration for the Government. We have signed up to the Convention as a country and we are strong advocates of it, so there is no question but that I can give that assurance. The other point to make is that there will be no hiatus. We have promised that we will bring forward the great repeal Bill, whose purpose is to ensure that all existing EU law that applies in our country—the *acquis*, as it is known—will be imported into UK law. We will, of course, be making our own laws after that, but we will not have a gap where there is no provision in those areas. We will be able to have a new start in our relationship with the EU and we may well want to make changes after that, but there will not be a gap.

Q41 Baroness Newlove: Good morning. Professor Bailey-Harris told us that the Brussels IIa Regulation “is our domestic law. We are not just talking about reciprocity and international cases. Article 3 of Brussels IIR is our domestic divorce law”. How do the Government intend to solve this fundamental issue in their Brexit negotiation?

Sir Oliver Heald QC: As I mentioned, the great repeal Bill will bring into UK law all the laws of the EU that we currently have in force for our country. That law will become part of UK law and there will be no gap. But it is an important part of our law. In some of the areas of concern, The Hague Conventions cover the same ground, although not with such good procedures in some cases. Matrimonial law, apart from the law regarding child abductions, which is in the Hague Conventions, is not covered by the Hague Conventions, so we would need to bring it home into our law from the EU in order to maintain the area of law that you mentioned. That is what we are going to do.

Baroness Hughes of Stretford: Could I just follow up on that in relation to children's welfare generally and child abduction in particular? We heard some worrying views that this area would be seriously negatively affected. My first question—I have a couple to follow—relates to the Brussels II Regulations, which currently police international child abduction within the EU. If there is no arrangement between the UK and the EU in this area, what rules do you see applying in their place? Will those rules be adequate replacements?

Sir Oliver Heald QC: Just to start on this, when I became a Minister in this department we had to decide whether we wanted to remain part of the discussions about the revision of Brussels IIa, which is going on at the moment. I thought that we should stay in, so that when the law is transferred into UK law it is the very latest law and we are part of the Brussels I recast and Brussels IIa as well as the current arrangements, because it is a good system that helps with the arrangements for children and with matrimonial matters. What we would fall back on if we were not in Brussels IIa would be the 1980 Hague Convention, which is the main international instrument that deals with child abduction. Of course, other countries such as America are part of that, so it is an important international Convention that would provide many of the things that are in Brussels IIa. But as I mentioned, I think we should negotiate on the points that are in Brussels IIa.

Q42 **Baroness Hughes of Stretford:** Two points have been made by a number of our witnesses in relation to that. One point, in evidence from the Law Society, is that there is no precedent for a non-EU state participating in Brussels IIa. You mentioned the 1980 Hague Convention as an alternative back-stop. The other point that was made was that the great repeal Bill will give no comfort here, because the essential element of the arrangements that we are talking about now, as they apply to children's welfare, is the reciprocity between the courts in relation to recognition and enforcement. In your view, does the Hague Convention give the same level of reciprocity? We would certainly not get it through the great repeal Bill, would we? That was the view expressed to us by witnesses: that that reciprocity would not be incorporated through the great repeal Bill. Does the Hague Convention give us that?

Sir Oliver Heald QC: It certainly gives us an element of mutuality, but you are right: the procedures that have been developed with Brussels IIa are certainly better and swifter, and they are the sort of things that in

reaching agreement with our EU partners on a way forward after Brexit we would want to negotiate in this area. I think there will be considerable good will towards us in negotiations on Brussels IIa, because the issues that it covers are of great importance to other EU countries. For some countries, hundreds of thousands of their nationals live in the UK, many of them married or in relationships with UK nationals, so it is very important to have an ordered arrangement for families across the various countries concerned. In informal discussions that I have had with Ministers from other states they have all recognised that these arrangements need to be of good quality, and Brussels IIa is a good thing because it gives that. On the idea that we will not get a reasonably warm welcome and a proper discussion on this, I have to say that I think we will. I think the provisions of Brussels IIa are good. We are in the revision, and I am hopeful that we can come to a sensible outcome on it.

Baroness Hughes of Stretford: Finally, if I may paraphrase, you seem to agree that, with regard to the Brussels IIa Regulations as they apply to children's welfare and abduction in particular, we cannot get that level of reciprocity and protection through any other existing mechanism unless we have a negotiation that binds us in some way to those and the other member states work with us to do that.

Sir Oliver Heald QC: The only thing I would say is that I agree that the content of Brussels IIa and its mechanisms are very helpful, but in reaching agreement with our EU partners we will reach a new agreement. We will not necessarily ask to be in Brussels IIa; we may well make a separate agreement that one hopes has the main provisions. Exactly what will come from the negotiations we do not know, but we will want to negotiate on these issues, which have been raised with us as being very important.

The Chairman: So you want the contents of the tin but perhaps a different label on the outside.

Sir Oliver Heald QC: It is a new relationship, so exactly how it is delivered and what the final agreement will be are unknown.

The Chairman: I think, Sir Oliver, that what is coming through from you—and do correct me if I am wrong—is that this has evolved with a great deal of input from British lawyers. An impression is often given by certain tabloid newspapers that a wash of law comes at us from Europe. In fact, what has become very clear is the extent to which British lawyers have been actively involved and major contributors to the development of this law, because the law is something that we are all good at in this country. You are saying that this is a benefit that has developed over the years and has greatly improved law, that the reciprocity and mutuality are essential things to negotiate for in any negotiation process in a couple of years to come, and that you would want to see that. The great repeal Act will not be able to deliver that, because the mutual element that Baroness Hughes pointed out is so important in this. You are hopeful that the benefits will be recognised by others in Europe, but you would agree that it has to be right there in the negotiation.

Sir Oliver Heald QC: Yes. I would not necessarily adopt every single word that you have just said, but I certainly agree that it should be in the discussions.

The Chairman: Tell me the ones that you do not agree with. Go on.

Sir Oliver Heald QC: Well, you did say a lot. You said a good deal. The point that I am making is that we recognise that the recognition, mutuality and reciprocity that we have been discussing are important and should be part of the negotiations. The Secretary of State has made that clear. There is also a lot of warmth towards us from our EU partners when it comes to issues such as having sensible arrangements for family disputes across borders, and it is in everybody's interests to sort out these issues because of the people we all represent, who have international relationships and where there are children involved. So yes, I do accept that.

On your more general point about UK lawyers, I could not agree more; we are amazing in the way we affect international affairs. Every court that you can think of in the international arena has a very strong presence from British lawyers, and we have been involved in improving arrangements around the world and in the EU. In this country, we have approaching half of the 200 top global law firms, so we are strong in law, to the tune of £25 billion a year.

The Chairman: Those law firms tell us that they will be rather anxious about their prospects if we do not get these negotiations right. I am going to ask Lord Cromwell to come in on this.

Lord Cromwell: Just before I do so, I will go back to something that you said earlier in answer to the last question. You made the point, I think, that if different countries with different strengths, and different power if you like, have separate agreements between each other, that makes life a lot more complicated and is not very desirable. Yet is that not that exactly what we are about to try to do—to have, to use our Chairman's phrase, our own tin, albeit with the *acquis* in effect photocopied into it?

Sir Oliver Heald QC: We have a decision of the people, which is to leave the EU, the effect of which is that we need to find a good agreement between ourselves and our partners in the EU for the future. I hope that it will include the important elements that we have been discussing, which will be part of the negotiations. It should be possible to reach a sensible agreement, and I do not think that it will be disorderly in any way.

Lord Cromwell: A bit more clunky, perhaps, but effectively the same arrangement in a different tin.

Sir Oliver Heald QC: That is your word, clunky. As a defeated remainer—

Lord Cromwell: We will leave it there, then.

The Chairman: We will leave it there and share your pain.

Q43 **Lord Cromwell:** I have a much more commercial question for you. You have highlighted the value of reciprocity and mutuality in these cross-border arrangements, but our witnesses have certainly expressed anxiety that the uncertainty that this will create will mean that people take elsewhere business that currently comes to London. Holland, Germany, Paris, Geneva, Stockholm, New York and Singapore have all been mentioned to us in evidence as possible cases. The Law Society's written evidence said: "Foreign businesses are already voicing concerns around recognition and enforcement of English judgments or choosing of English law to govern the disputes. If this continues it will be detrimental to the legal services sector in England Wales and the economic contribution it makes to the UK economy". How are we going to deal with those concerns?

Sir Oliver Heald QC: The first thing I would say is a continuation of the point that I was making to the Chairman. UK law, particularly English law, is renowned across the globe; 40% of commercial contracts are written in English law. We have a lot of competition from other countries, particularly the USA. Having said that, we have excellent judges who are internationally renowned and seen as incorruptible, and our reach, as I was just discussing, goes into almost every aspect of international law. All these things mean that we have a very strong position for the future and will have every opportunity to improve our position.

We are the world leader in commercial arbitration, for example, so my feeling is that we have a very strong sector here. You are absolutely right that we need to negotiate on the important points that we have been discussing, but America is able to compete in the legal sphere in London, and it is not part of the EU. We are right up there. We are a very important legal power, if you like, and my feeling is that although we need to reach a sensible agreement we should not be too nervous about our future.

The Secretary of State for Exiting the EU, David Davis, is fully aware of the importance of this sector. The legal world is part of the Global Britain strategy, and we will have a summit in the spring where leading figures in the law will explain for the world exactly what we have to offer. We have a lot of support from the judges. The Lord Chief Justice has been very strong in looking at the whole area of what needs to happen post Brexit, but also making the point that we are a world leader in legal services. So I have a lot of confidence in the lawyers; I probably should have declared that I am one. We are a very strong part of UK plc.

Lord Cromwell: Before we took evidence, I would have been very comforted by what you say, and naturally I still am; we are not going to go from hero to zero overnight. But the Dutch and the Germans are setting up English language commercial courts to compete directly with the sort of business that we do. I am sure that you are not suggesting that we should be complacent about this, but we may slip down the rankings, so my question is: given that that is something that I think we

agree is likely to happen, how can we shore it up?

Sir Oliver Heald QC: First, I do not think that we will fall down the rankings. We are a world brand in this area, and we can go out and sell. Our services are excellent, which is well understood internationally. Having said that, it is right to bang the drum for legal services, to have the sort of summit that I mentioned and to treat this as a very important part of the negotiations post Brexit. I do not think that we should be too shy about our legal services; they are world class. We are also doing quite a lot to make it not just the best legal system in the world but the most modern. There is a huge programme of modernisation in the courts. The Rolls Building, which is our commercial court centre on Fetter Lane, it is absolutely world beating, with all the technology. It is really fantastic. About a third of the cases dealt with there are international cases.

Q44 **Baroness Ludford:** I am encouraged by the substance of what you have said and your recognition of the importance of reciprocity and mutuality and so on, but I wonder how we could achieve a situation in which we keep those elements, because the Prime Minister has rejected any post-Brexit role for the EU Court of Justice. What alternatives for post-Brexit UK co-operation with the rest of the EU could the Government seek in the areas covered by these Regulations? Denmark has an international agreement where the Court of Justice features. Some evidence that we took suggested that we could try to seek an international agreement without that but taking due account. In the Lugano Convention of the EEA countries there is due account. It seems quite difficult one way or another to get away from the court. Indeed, if you are going to have a system of reciprocity, mutuality and recognition, it is hard to see what scheme you can have without that umbrella supervision by the Luxembourg court. How do you think the principles that you want could be reflected in the post-Brexit arrangement?

Sir Oliver Heald QC: Of course, there is a negotiation to be had and we will have it. Having said that, the agreements that have been achieved with Canada or some other countries, South Korea for example, do not have the CJEU overseeing them, although the court has relevance to the EU side of the agreement, because the EU is obviously compliant with EU law and it is the CJEU that decides such issues. That would be the EU part of the agreement, not the overall agreement, which would have to have mechanisms in it so that in the event of non-compliance there were ways in which to tackle the issue, but it would not be necessary for the CJEU to oversee the agreement, and it does not do so with major countries such as Canada and South Korea. It will always be important for the EU side of the agreement in the sense that it will have to be compliant with EU law, and so on, but in terms of the agreement itself, and our side of it, we would not be subject to the court.

Baroness Ludford: Can I just come back on that? As far as I know, Canada and South Korea do not have those civil justice mechanisms; they have FTAs. I just do not see how we can have reciprocity in a situation in which the 27 member states are applying, for instance, a court judgment that affects one interpretation of Brussels IIa recast, or

whatever, and we are not.

Sir Oliver Heald QC: The issue is really how the agreement is enforced. You might well have an agreement that had equivalent provisions to those of the EU in some area, but they would not be EU provisions, they would be your own provisions and they would not be exactly the same. I think you will find that that happens with the Lugano Convention itself; it has its own mechanism for resolving disputes. So it is not impossible to find a way through this.

Baroness Ludford: But you seem to be saying that in practice we would have to implement EU law and the judgments of the court if we were going to retain the benefits of reciprocity and mutual recognition.

Sir Oliver Heald QC: No, I am saying the opposite; I am saying that we would not have the CJEU overseeing anything that we do. It would be English law made in England, and then obviously the devolved Administrations would make their laws. It would be our courts in charge of everything that we do. As for the agreement that we make with the EU, we would need to find mechanisms and tools to ensure that the agreement was satisfactory to both sides. You mentioned Lugano, which may be one of them.

The Chairman: Let us not have this discussion in the abstract, because there will be people who are interested who are not lawyers and who are not familiar with the workings of the law. Let us say that you have a family who are deeply divided over who should have custody of the children, and it ends up in the courts. Let us say that it is a British mother who is married to an Italian. Her husband takes the children on vacation and then says that he is not coming back. The children are with him, his mother and his sisters, and he says that he wants them brought up somewhere else and that they will be well brought up by all of them together. The mother goes to the British courts, which say that an order should be made for the children to be returned. The father does not accept that and challenges enforcement through the Italian courts, which say, "Actually, having heard the evidence about the nature of this mother, and so on, we think that the children should be here in Italy". So there is a conflict. How do you resolve that?

The purpose of us having a European Union court was that when you got that kind of problem you would have somewhere ultimately to go. What becomes the court of appeal in those circumstances, where it ends up being a direct clash and involves the lives of young children? What do you do? You mentioned a mechanism, but I am interested to understand which one.

Sir Oliver Heald QC: Let us start with the fact that we would have agreed, as we discussed earlier, the rules about who had jurisdiction and which judgment was to be enforced, so it is most unlikely that it would go any further than that. Certainly there have not been huge disputes over the Brussels IIa procedures; they have been well accepted. So if we can negotiate something that has the features that we discussed earlier, I do

not see that there would be any issue of that sort. But if we make a broad agreement with the EU, there will be a need to have mechanisms that apply if there are disagreements and so on, and it is just a question of what they should be. We are saying that we do not accept that the CJEU would be the answer, but that does not mean that there is no answer.

The Chairman: I hear what you are saying in relation to that, but let us look at another matter. We have had evidence from lawyers who are deeply immersed in family law, for example, who say that if we are going to have this reciprocity and mutuality and we are going to continue to have, even on the outside, a special regard for each other's judgments, that will involve us having to keep up to speed on the development of law across Europe on these matters. As finer developments are made in making things more effective, we will have to keep pace with that; we cannot be out of step. Therefore, we will have to give due regard to decisions that are made. Our courts will not be obliged or controlled by decisions from the European Court of Justice, but they will have to give due regard to the decisions that it makes to keep in step with the countries with which we want to have a mutual and reciprocal agreement. Do you accept that?

Sir Oliver Heald QC: We take account already of the legal decisions of, say, the American Supreme Court for certain purposes.

The Chairman: We do not do that very often in relation to American ones. We do it in relation to Canada.

Sir Oliver Heald QC: But there are conditions for trade with many countries that have a legal aspect to them, and if we were not compliant with their trade regime we would not be able to trade with them. That is true of a number of our major trading areas, so I do not think that it is unusual that our courts would take into account developments elsewhere. Clearly, if we were to do something entirely contrary to the agreement that we have reached with the EU on family law, say, that would probably be a deal breaker. But there is no reason to think that we will do that, and the exact nature of the laws that we would have in place and they would have in place would be judged at the time. Our Parliament would decide.

The Chairman: I think that what was really in the minds of the lawyers involved in this area—and it is in the minds of this Committee—is that the nature of law is that it is a living, breathing thing that develops as societies change, and so forth. Therefore, if we want to work closely with our European Union neighbours and have this closeness with regard to how our law works out in the practical application in people's lives, we will have to be in tune with it. Therefore, we will have a rather close regard to the way in which the law develops on these issues in Europe. So it is not just a question of occasionally looking to how matters are resolved in courts in other parts of the world; it will have to be much closer than that.

Sir Oliver Heald QC: If we had agreed that the first court to become seized of an issue, whether a foreign court or one in this country, would be the court to make the decision, and we then passed a law that conflicted with it, there would no doubt be a need for a renegotiation or there would be withdrawals from the agreement. Clearly we would have to maintain the agreements that we had reached, but we would reach them after discussions and negotiations, and if we wanted to change them, no doubt there would be procedures for that. It is no different from any agreement that we might make with any country. Indeed, we already take on international obligations—everything from human rights obligations to all sorts of other ones—in the UN and other international bodies, and we are known for sticking to them, so I do not really see that it will be a problem.

Baroness Ludford: But is not the reality that we are going to have to follow any evolution of EU law, whether it is in the substance and the content of Regulations or in judgments of the court, otherwise we will lose the reciprocity advantages? Is that not the reality? The political declarations that we are all going to be with one bound free of the jurisdiction of the court is political rhetoric that is not borne out by the reality.

Sir Oliver Heald QC: There is always going to be the opportunity to discuss these things and negotiate and so on, and I do not really see a situation in which a problem would arise. It is not as though the courts have been making decisions that we disagree with in this area as a matter of course. We have had no problems in this area as a member of the EU. There is a very common understanding across Europe about family law matters. I cannot really see that this is any more than a hypothetical situation that you are describing.

The Chairman: But do you see any role for the European Union Court of Justice?

Sir Oliver Heald QC: It will obviously have an important role for the EU, which is our partner in the agreement that we are going to make. So, yes, it will be important in that sense for the party that we are making an agreement with. That is the importance of it, but we will not be subject to it.

The Chairman: Do you think that the UK will have any role, as a persuasive authority even?

Sir Oliver Heald QC: That we will have a role? Of course, we will have a role. We will decide—

The Chairman: No, will the court have a role for Britain at all?

Sir Oliver Heald QC: As you know, our senior courts will look at decisions from America and other Commonwealth jurisdictions. They will look at decisions from the EU, and they will all have persuasive power. It just depends on the issue and that side of it.

The Chairman: So you would not seek to have a due regard clause included in a negotiation?

Sir Oliver Heald QC: Obviously, we have not started the negotiations yet, and I am no position to say what our negotiating position is, but we are very clear that we do not want the UK to be subject to the jurisdiction of the CJEU, so that will be a key part of our discussions.

The Chairman: I am interested because you are a lawyer, and a due regard clause would keep to the Prime Minister's position, which is to withdraw from the court, but it would keep us with the rest of Europe in a way that would enforce the mutuality element. So as a lawyer is it not one of the things that you would want to see very much on the table for discussion?

Sir Oliver Heald QC: I think it is almost implied that one would take account of the decisions of that court, but one would take account of the decisions of others. The key thing is that we do not want to want to be subject to the jurisdiction of the CJEU, so we would avoid that.

sThe Chairman: You would actually avoid a due regard clause.

Sir Oliver Heald QC: We would avoid being subject to the jurisdiction. I am not clear exactly what a due regard clause might mean, so I will not hazard a guess, but I do not think it would be part of our thinking.

Lord Cromwell: This is quite fun, is it not? There is quite a gulf between the two positions: due regard versus being subject to the authority of. I would imagine that our judges, whether we have this clause or not, will take an interest in some of the cases in Europe.

Sir Oliver Heald QC: Yes, of course they will. That is absolutely right.

Lord Cromwell: I will just go back to your point about a court in Italy and a court in the UK having a difference of opinion, to take the case that was painted for us. You said that you did not want the European Court of Justice to have a role in settling that. You seemed to express the idea that something would turn up. Can we do a bit better than that? Are we going to create a new institution then?

Sir Oliver Heald QC: No, I am saying that I believe there would need to be a mechanism for resolving such a dispute, but the CJEU will not be it, and as far as we are concerned we do not want to be subject to its jurisdiction. But that does not mean that there would be no way of doing it. As I mentioned, there are various tools already out there that one could look at. Lugano has been mentioned—

Lord Cromwell: Sorry to interrupt you, but you are not saying that in practice we will need to create a new body to deal with this particular issue if we are not prepared to talk to the European court.

Sir Oliver Heald QC: I do not know, because the negotiations have not got that far. Certainly we are saying that we do not want to be under the

jurisdiction of the CJEU and that other arrangements would have to be made.

Lord Cromwell: It sounds a bit like we are back to clunky again.

The Chairman: We are back to clunky, are we not—to some new entity?

Sir Oliver Heald QC: As I said, there are existing tools that one could look at, such as Lugano, but we are not at that point.

Lord Judd: I must say, listening to all this, that we are in rather a jam as a nation, because the Government are insisting that they do not want to give their cards away in advance of the negotiations—

Sir Oliver Heald QC: Yes, that is right.

Lord Judd: —but everything that you have been saying this morning is that rationally as a nation we can handle our law in these areas only by co-operation and working with others internationally. I believe that the Government themselves, and very important parts of the Government let alone the popular press, have been generating a culture of, “We are coming away from all this legal domination by Europe”. You are saying, “It’s not domination. We’ve got to have co-operation with Europe”. You will have quite a big public relations exercise here at a certain point in telling the British public why we have to go on having all this co-operation. It is terribly important that they understand.

Sir Oliver Heald QC: Of course, there are a lot of instruments for international co-operation that are nothing to do with the EU and to which we are signed up. We mentioned the Hague Conventions earlier. I have never come across anyone on a doorstep when I have been canvassing who has said to me, “Look, you must get out of the Hague Convention”, or, “It’s quite wrong for you to sign up to the UN Convention on this or that”. So I do not think there is any hostility to our country having international agreements, and I think that there is scope in this area to have a good agreement with our EU partners.

Lord Judd: Yes. All I am saying is that your message, which I have enjoyed, is very different from the message that is going out to the public about what the purpose of getting out of Europe is all about.

Sir Oliver Heald QC: We see opportunities for Britain to do well, particularly in the legal sphere, which is my area, because we are world leaders in it, we are very forward looking, we will have the most modern and best legal system in the world, and we will go out and sell our product. So I am optimistic.

Q45 **Lord Judd:** Do you think that the treaty itself on withdrawal has a part to play in what you have been talking about this morning, and if so, how?

Sir Oliver Heald QC: I think it should be a new agreement that looks to the future and does not worry about the past but looks to see how we can co-operate with our partners and have a global Britain that looks out

towards the world in a positive way. I believe that in the area of law we are already a very strong international brand, if you can call it that, and that we will be able to go out and do even better. I do not feel that everything is going the wrong way. We must make sure that we make the most—

Lord Judd: But you do think that the treaty itself should underline what is important?

Sir Oliver Heald QC: I think the treaty should include the provisions that we need for the future to co-operate with the EU, but it should not be on the basis that we are under the CJEU. We have taken back the power to make our own laws and to have our judges decide what those laws mean.

Lord Judd: As a non-lawyer listening to lawyers throughout our hearings, I have changed my mind about them as a profession. I think that their wisdom and clarity are vital for a civilised society—the better ones. It seems to me that the problem that we will face in negotiating the treaty will be that it will happen very much in the context of a very lively political debate both in the European Union and in Britain. The things that are being said in a completely different context in Britain will have a political impact on those negotiations, and your reasonableness as a lawyer, which I admire, is not necessarily going to make headway, because there will be so much animosity about the context in which the treaty is being negotiated.

Sir Oliver Heald QC: I have always thought that people do not like lawyers until they need one. I am sure that in reaching an agreement with the EU, lawyers will play an important part, as they have on numerous previous occasions when it was necessary.

Q46 **The Chairman:** Sir Oliver, thank you for coming and being generous with your time and your views. I wanted to ask you about something that is not related to this issue because it is a source of concern to this Committee. We have not had responses to two of our reports. The Committee's report on the UK's justice and home affairs opt-in was published in March 2015. We are talking about two years almost having passed and we have still not had a reply. The Committee's report on the UK's Bill of Rights was published last May, and we have still had no reply. The Government have undertaken to respond in writing to reports of Select Committees of this House; it is part of the practice, and it really causes offence to Members of the House of Lords when they spend time in this way. We are not holding seminars; we do these reports for a purpose. In both cases, we have not heard from the Government, and people are now beginning to lose a bit of patience. I want to know why that has not been done.

Sir Oliver Heald QC: On the opt-in, we are reviewing the policy, so we felt that it would not be helpful to the Committee simply to say that, but that is the case; we are reviewing the policy.

As for the Bill of Rights proposal, when I became a Minister I was concerned that the implications for that policy area of Brexit had not been properly looked into, because the referendum had only just happened, and so on. I asked officials to look into this for me and come up with some advice on what the implications might be. I explained all this when I appeared in front of the Joint Committee on Human Rights. When we looked at it, we thought that what was happening with Brexit was a significant constitutional shift—a big change constitutionally. I thought that it was better to sort out the EU side of matters and the negotiations on that, so that we had a settled position constitutionally from which to look at our proposals on a Bill of Rights.

So there was an initial delay, if you like, when I wrote to Tim Boswell, the Chair of the EU Committee here, explaining that I would like an extension. That was while the civil servants were looking at the implications for me. When I was aware of the detail of that and felt that there was a big constitutional shift and it would not be wise to just plough ahead with the Bill of Rights proposals, there was discussion within government and I announced in the House, as I think the Secretary of State did too, that we are not going to bring forward our proposals on the Bill of Rights until the position on the EU exit is known. So that is quite a delay. That is the background; there is certainly no intention to be discourteous to the Committee in any way, and I have kept in touch with Lord Boswell on that.

The Chairman: Thank you for that. I want to be clear that I understand what you are saying. It is not just a question of the response being slightly delayed; we are really talking about the concept of pulling out of the European Convention on Human Rights, creating a British Bill of Rights, and possibly having nothing to do with the European Court of Human Rights. All that is not just on the back burner; it is being kicked into the long grass until we have got ourselves sorted on the European Union. Is that what you are telling us?

Sir Oliver Heald QC: First, we are not contemplating leaving the European Convention on Human Rights.

The Chairman: What about the European Court of Human Rights?

Sir Oliver Heald QC: No. The proposals that we were looking to bring forward would certainly have changed the Human Rights Act, but there was no question of us leaving the Convention or the jurisdiction of the court. We have a mandate from our manifesto to reform the human rights situation in the UK, and we will return to that once the exit from the EU side of things has been clarified, which will be sometime in future—probably in two years, is it not?

The Chairman: Two years at least.

Sir Oliver Heald QC: It could well be that long, yes.

The Chairman: Really, the question is quite simple: could that not have

been put into a letter in response to us in this Committee?

Sir Oliver Heald QC: I wrote to Lord Boswell asking for the extension and explained that we would not respond—I believe that I did—because of the change in policy. I will check, though, and if we have not completed our correspondence with the Committee, I am more than happy to write to completely clarify the position. But it has been announced publicly that we will not bring forward proposals on the British Bill of Rights until the position is known on the exit from the EU.

The Chairman: I have that correspondence before me today. We have never received anything that makes that clear to us, and I really would be grateful for the courtesy of a formal response.

Sir Oliver Heald QC: I would be more than happy to do that, and I apologise if we have not completed the correspondence.

The Chairman: And if the position on the opt-in is as you say, again it would be nice to have a communication rather than radio silence.

Sir Oliver Heald QC: Yes, I am sorry about that. I shall make sure that we write and clarify that.

The Chairman: Thank you very much. Thank you for coming to us. It was a very useful session.