

Select Committee on the European Union

Justice Sub-Committee

Corrected oral evidence

Brexit: enforcement and dispute resolution

Tuesday 20 March 2018

10.45 am

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Members present: Baroness Kennedy of The Shaws (The Chairman); Lord Anderson of Swansea; Lord Cashman; Lord Cromwell; Lord Gold; Lord Judd; Earl of Kinnoull; Lord Lester of Herne Hill; Baroness Neuberger.

Evidence Session No. 5

Heard in Public

Questions 38 - 46

Witnesses

[I](#): Martin Howe QC, 8 New Square Chambers; Sir Richard Aikens, former Court of Appeal judge, Brick Court Chambers.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of Witnesses

Martin Howe QC and Sir Richard Aikens.

Q38 The Chairman: Welcome, Sir Richard and Mr Howe. It is very nice to see you both. Thank you very much for coming and giving us your time this morning. Before you start giving your evidence, I will explain how the session works. This is a public session, and I will ask you both to introduce yourselves in a minute. A webcast of the session goes out live—people sit at home watching this, believe it or not—and it is subsequently accessible via the parliamentary website. A verbatim transcript will be taken of your evidence and will also be put on to 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 as quickly as possible. If, after this session, you wish to amplify or add anything, or to present us with written supplementary evidence, having had time for reflection, you are absolutely welcome to do that.

After those preliminaries, please introduce yourselves so that everyone knows exactly who you are.

Sir Richard Aikens: Good morning, Lord Chairman. Thank you very much for inviting me to give evidence. I am a former judge of the Court of Appeal. I retired from that position in November 2015. Subsequently, I have worked as an arbitrator and a lecturer, and I am one of the editors of *Dicey, Morris & Collins on the Conflict of Laws*. I have an interest in the topic with which we are presently concerned, and I am a subscriber to a website called “Brexit briefings”, which is run by my good friend Professor Robert Tombs, formerly a professor of French history at the University of Cambridge.

The Chairman: And you are president of a particular organisation.

Sir Richard Aikens: I was the president of Lawyers for Britain, but for various reasons I could not continue in that position, so I am no longer its president.

The Chairman: I see. It is lovely to have you back. I think you gave evidence in front of this Committee once before—

Sir Richard Aikens: Yes I did, about 15 months ago.

The Chairman: —and we were very grateful for your assistance then. Thank you for coming.

Martin Howe, it is nice to see you. Lord Lester and I declare that we know you well, because we sat with you on the commission into whether there should be a British Bill of Rights. Welcome to this session in giving evidence. Perhaps you could introduce yourself and your background.

Martin Howe QC: I am a practising barrister, principally in the fields of intellectual property law and European Union law, particularly European Union law on the free movement of goods and services. I also take an interest in wider policy and political

matters, of which my membership of the commission that you referred to was one aspect in respect of human rights law—the Human Rights Act 1998 and so forth.

Also on matters relating to the European Union and Brexit, I am chairman of Lawyers for Britain, which was formed as a group of pro-Brexit lawyers to put the case for leaving the European Union during the referendum campaign. We had a discussion after the referendum on whether our purpose had been achieved and whether we should continue or not, and we decided that we should continue because we foresaw that the odd legal issue and difficulty might arise.

The Chairman: There have been plenty of those.

Martin Howe QC: Therefore we continue as an organisation. We have been joined by lawyers who were supporters of remain during the referendum campaign but who none the less want to work constructively towards the best outcome with regard to the way we leave the European Union.

The Chairman: That is interesting. Were you helpful to the Brexiteers in government about creating red lines?

Martin Howe QC: We have our ideas. Basically, all the things that we do are published. I think the words “red line” can be misleading, but there are important principles that should be followed as we leave the European Union.

The basic point, it seems to me, is that there are two possible models for the future of the country. Model number one would have been to remain in the European Union, fully participate in its procedures and have a vote on its path of development and a veto on future treaty changes. That was an intellectually coherent model that many people supported—48% of the electorate in the end.

Another coherent model is to leave and reassume control of both our internal laws and our external affairs, particularly on trade policy but on international relations generally, and then to take advantage of the freedoms that we enjoy to do different things. It seems regrettable to me, and indeed incoherent on any view, to end up in a scenario where we formally leave the European Union but we none the less remain subject to the great body of laws and rules, having lost any right to participate in their making and their direction. As I see it, that is a very serious danger that we are facing at the moment.

Q39 The Chairman: You are taking us right into the issues that we are going to pursue in this session. I want to thank both of you for sending through material for us to read—publications from your organisation, Martin Howe, and the letter that you, Sir Richard, wrote to the Prime Minister and which became an open letter, expressing your concerns. Perhaps we can dig into those concerns.

The UK Government have identified the continued jurisdiction of the Court of Justice of the European Union—the CJEU—as a red-line issue post Brexit, and whether we like the words or not they give us a clear sense of what we are talking about. What do you think are the most workable alternatives to that court after we

leave the European Union? I am very anxious that we get into the actual workability of something rather than talk in generalities. What would work as an alternative to that court?

Sir Richard Aikens: Of course, it looks as though there is no longer a red line, at least for the transition period, but let us talk about the period when, as things stand at the minute, we definitively leave: that is to say, at the beginning of 2021. There are many areas where the legal issues that arise in relation to our relationship to the EU post exit will be important. Some examples are: citizens' rights; EU law that is retained within our domestic law; and the operation of whatever treaty is arranged with regard to trade and many other matters from 2021 onwards. It seems to me that you cannot have a single solution for all areas.

To take EU law retained, I can see no problem with the UK courts dealing with that themselves. Obviously, they would have due regard to existing EU law on those topics and, frankly, I think that most judges would ask what the CJEU says about the construction of a particular regulation that we have transferred. They would look at it and in 99 cases out of 100 they would probably say, "Right, we will follow that". I see no problem with retained EU law being dealt with simply by the UK courts.

Secondly, I see no difficulty with regard to citizens' rights. UK citizens will deal with their rights largely in UK courts. The only ones who may have problems might be EU citizens who have rights of residence here and who decide to continue those rights of residence. UK courts may say that they want the ability to refer matters to the CJEU after we have left. It strikes me that that is not possible, because we will no longer be part of the European Union, so we cannot be subject to European Union court systems. So, again, I see no difficulty with UK courts dealing with that on the same basis. You very often look at existing EU law in relation to citizens' rights of residence and so forth, and I think UK courts are likely to follow that.

What about the interpretation of the treaty that will be made between the EU and the UK to deal with the position after the end of 2020? Here, it seems to me completely illogical to suggest that the CJEU ought to have jurisdiction. That, in blunt terms, will be a foreign court. We will not be party to its structure, we will not have one judge as a member, we will have no staff there and no advocates-general or anything of that nature. Therefore, the idea that we should be subject to its jurisdiction in cases where there are issues concerning the workings of the treaty and its interpretation seems bizarre to me.

On the other hand, there is an easy solution: a tribunal consisting of judges—they would have to be distinguished judges—from the EU 27 and the United Kingdom, which tribunal would be independent and would deal with any issues. There is already a model for that in CETA, the treaty that is being proposed between Canada and the European Union. There is a specialist tribunal and it is intended that it will consist of judges from both Canada and the EU or lawyers from both Canada and the EU. I think that would cover the main areas. In that circumstance the CJEU would not have jurisdiction. I think that could work. It is a question of whether the

EU is prepared to contemplate letting go of CJEU jurisdiction. It rather feels at the minute that it does not want to. It has to be persuaded that it should.

The Chairman: Your response in some ways reflects your distinguished career, because you were, as I understand it, a lawyer in the field of commercial law, dealing with trading and so, so arbitration is close to your experience.

I want to raise with you matters that will be closer to the experience of others around the table. Unfortunately, Baroness Shackleton cannot be here today. She is a family lawyer. One of the things that this model that you are presenting does not deal with is areas where there is a very deep level of reciprocity. This is not mutual recognition but something more than that; it is reciprocity where there is mutual recognition to a level where enforcement is possible between different jurisdictions.

Brussels I and II are used to refer to this, and include the Brussels II maintenance arrangements that cover family law and the arrangements for much less grand litigation such as when a small business in Britain is trading with Poland and something goes wrong. You can easily get an order here in the local county court if, say, a debt is owed to you here, and you can have it enforced in the other European country. What do you do about those matters? How are those dealt with where you need a level of reciprocity and it is not about trading? You do not want arbitration; it is a different order.

Secondly—you can deal with both questions together—what do you do about crime? Cross-border crime is a phenomenon that we know all about. It can be trafficking, drug importation and the like. The European arrest warrant has been a very valuable resource to us in dealing with that in both directions, as has Eurojust in deciding where to prosecute and where there is best evidence. There is great collaboration. What do you do about that?

This is about more than trading. This is about the liberty of the subject, so you cannot deal with it in a tribunal. You have to deal with it in a court of high order if it goes all the way through the system. What is your answer to the rest of Europe saying, “We’re sorry, but if it comes to the European arrest warrant, we need a court that is independent and is at the apex of a system”?

Sir Richard Aikens: I was going to come on to the European arrest warrant when we deal with question 7, but I can deal with it now.

The Chairman: Your model does not deal with it.

Sir Richard Aikens: It seems to me that they are completely different things. I take your point that I have not been able, when making my answer, to deal with everything; one cannot. There are two completely different problems.

The first is to work out what the nature of the arrangements will be between the United Kingdom and the European Union, bearing in mind that the United Kingdom, ex hypothesi, will no longer be part of the European Union. It will be a separate state. In anything you arrange, you have to have as your premise the fact that you

are dealing with two sovereign entities. You have to forget for this purpose that the United Kingdom was a part of the EU.

Once you start with that premise, you can work out what your arrangements are going to be, whether for trade, jurisdiction in civil matters, the EAW or maintenance in family cases. In my view, there is no reason in principle why you should not use what we currently have as the basis for your new treaty arrangements.

Take the EAW as an example. It was, after all, an EU Framework Decision. We have not transposed a regulation into UK legislation. We used the Framework Decision to create an Act of Parliament and we added an enormous amount of extra safeguards. I had a lot to do with extradition in my final two years in the Court of Appeal, because they decided to put me in charge of extradition cases. I have a lot of experience in that area.

It strikes me that you can use the same model and agree on those provisions which will be part of UK law. The only question then is what happens when there is an issue with the interpretation of those treaty provisions, as they all have to be in a treaty between the UK and the EU. I repeat that I cannot see why you cannot have an independent tribunal—I would not call it an arbitration tribunal, but it would be some kind of court, for want of a better word, that would deal with issues of interpretation, of the treaty or treaties and provisions under those treaties, such as the EAW, where you had a dispute about how they were to be interpreted.

As for things such as maintenance and other cross-border matters such as the recognition and enforcement of judgments, there is again no difficulty in principle, to my mind, in arranging those in a treaty. If there are difficulties in interpretation, the tribunal could deal with that, too.

The Chairman: You are talking about us creating another international court, so we would have the equivalent of the European Court of Justice but by another name. Is that what you are saying?

Sir Richard Aikens: With great respect, it is not the equivalent of the European Court of Justice; it is entirely different. The ECJ or CJEU is an EU institution; it is not an international institution in the sense that it deals with disputes between two sovereign entities. The EU court deals with internal matters. It deals with everything to do with EU law; it does not go outside the EU or its member states.

The idea of having that court dealing with matters that are *ex hypothesi* outside the EU—our premise is that the UK will be outside the EU—is bizarre. It is no different, frankly, from the situation in late 19th-century China when British courts decided what British citizens could and could not do in China.

The Chairman: Some of the hard-line Brexiteers would say that that would not bring back control, because control would still be with a court that is external to the United Kingdom.

Sir Richard Aikens: No, but we are dealing on a treaty level, and on a treaty level if you have two parties to a treaty and you contemplate that there might be issues of interpretation—

The Chairman: Conflict.

Sir Richard Aikens: Let us hope that they are not too conflictual.

The Chairman: Disputes.

Sir Richard Aikens: Disputes. You have to have a recognised mechanism for dealing with them.

The Chairman: You need a court.

Sir Richard Aikens: You need a court. It seems completely bizarre to me to suggest that you have the court of one sovereign entity deciding issues that affect another sovereign entity that has no control over that court.

The Chairman: One can understand that. It is just that it does not deal with the gut instinct of many Brexiteers who feel that bringing back control was all about not having to deal with any external court.

Sir Richard Aikens: If you decide that you are not going to have any treaty arrangements with the EU and no withdrawal agreement in whatever form it finally takes—

The Chairman: A treaty.

Sir Richard Aikens: If you have nothing like that, fine, you can do that. However, speaking for myself, that is not practical politics. We will have to have some kind of treaty that deals with a great many things, including issues such as arrest warrants and the enforcement of judgments.¹ Quite where they will fit in we do not know unfortunately, because in the vast majority of cases we have no idea what this UK Government think about them, which is lamentable, to put it mildly. At least the EU has had the good sense to produce drafts of what it wants. Why we (the UK) have not, I do not know, but we should have done.

Assuming that you have a treaty, you have to have a court to deal with issues of interpretation, and it is no good thinking otherwise.

The Chairman: Many people have garnered the idea from debates and discussions that you can function in trading relationships with other nations without there being, on occasion, disputes that require an independent court. Do you agree that there will have to be some kind of court?

Sir Richard Aikens: Indeed, and as I say, there is already a model for it in the proposed EU-Canada treaty.

¹ And family issues such as maintenance or custody of children.

Martin Howe QC: I agree with Sir Richard, but I want to make a couple of extra points. In the paper that I submitted and authored with Dr Gunnar Beck and Mr Francis Hoar—

The Chairman: Thank you for that. It was very helpful.

Martin Howe QC: I am sorry that it was a great slab of material. I emphasise how completely incompatible with generally accepted international practice it would be for the United Kingdom to accept the continuing jurisdiction of the Luxembourg court after leaving. I put on one side issues such as the transition and jurisdiction over events that take place before we leave, as they are in a different category.

The Chairman: We are talking about the final point.

Martin Howe QC: We are talking about the final long-term position. It is virtually unknown in international relations for a state to accept the judicial or other organs of the other treaty party as interpreters of the treaty in providing binding interpretation.

The exceptions that Sir Richard mentioned were the agreements between various western powers and China under which, for example, the Supreme Court for China was set up in Shanghai exercising criminal and civil jurisdiction over British subjects in China—

The Chairman: Not a happy situation.

Martin Howe QC: —with appeal going to the Privy Council in London.

It is virtually unprecedented in international relations, and we did a systematic study of the European Union's agreements with non-member states. We could not find one in which there was acceptance of the direct jurisdiction of the ECJ over a non-member state. There was the slightly frivolous example of Andorra and San Marino, which have conventional bilateral international arbitration clauses in their agreements. There were three instances of indirect jurisdiction and the first was via the EFTA Court, which is not formally subject to the Luxembourg court but in practice shadows it.

The second and third examples are the Turkey-European Union customs union agreement, in which Turkey has agreed to follow ECJ jurisprudence in relation to customs and related matters, and an agreement with Moldova. All three examples are scenarios in which those countries have chosen to sign up to belonging to an evolving body of rules. In the case of Turkey, that is to the evolving rules of the customs union, and in the case of Norway and the other EEA states—

The Chairman: EFTA.

Martin Howe QC: They are the three EEA states that are members of EFTA, but not Switzerland, which is slightly different being a member of EFTA but not of the EEA. Those three EEA states have chosen to sign up to the evolving body of rules of the

EU internal market—hence they must accept a mechanism under which their courts can be subordinated, albeit indirectly.

So us accepting long-term jurisdiction of the Luxembourg court after we have left strikes me as completely unacceptable and, indeed, incompatible with the view that we will again become a sovereign entity.

The Chairman: Martin Howe, I asked Sir Richard what model he would present. He said that there would not just be one, and he dealt with the issues and how you would deal with them in different ways.

There is a coherence in what Sir Richard is saying about European citizens living here just having to accept that they are subject to British law, and that our courts would deal with that, and that when it came to the law that we have brought home, again it would be the British courts that would deal with that. He also said that the new treaty, in all its expansiveness, would have to have its own court to deal with disputes, and he spoke about something new—call it a court, call it what you will—having to be created.

Is that your position exactly, or do you have a different position?

Martin Howe: No. I think my position is the same on that. I should make a clear distinction: there is nothing wrong—indeed, it is highly desirable in a number of fields—with our courts continuing to look at judgments of the Court of Justice. Indeed, it is a general principle of international judicial comity that when countries or other entities are party to the same treaty, their courts will look with respect to the judgments of the courts of other treaty parties—

The Chairman: Of course.

Martin Howe: —and will try to be consistent in their interpretation. That is not to do with the European Union; it applies to all sorts of treaties and conventions. There is nothing wrong with that principle; it is desirable. However, it is critical that they are not bound to follow the other court and that they retain the power to say, “We don’t agree”, particularly with regard to the policy-driven interpretation of treaties, which is a very important consideration in the case of the Court of Justice of the European Union because of its history, if I can put it in neutral terms.

If your country does not share the underlying policy, according to which the court on occasions interprets treaties, reassesses previous judgments and perhaps goes further, your courts should be free to depart from it.

The Chairman: The matter that I was pressing Richard on, and I will move this point around everyone else in the Committee, is that you watch these programmes in which people take part in public debate or are stopped in the street to explain their positions, but the general public do not know that bringing back control and having our courts make all these decisions has not been quite what has to be on the table, because if you are trading with other nations you have to have some ultimate place to which you take disputes.

We all know that as lawyers, but the general public were misled in the discussions leading up to the referendum. That is one of the things that has been a source of concern, because they keep thinking that everything will be decided in British courts and that none of these foreigners will be involved in the process. The reality is that other lawyers and judges will have to be involved, because that is the nature of trading, doing business or having good relationships and relationships that cross borders: you need to have some mechanism for dealing with conflict and dispute.

Martin Howe QC: Can I neither agree with nor dissent from your comment about what the British public were led to expect, because it may cause me to branch out on a political point rather than on the evidence on the matters before this Committee.

The Chairman: I am just talking about the law. People thought that it would all be brought back in. In fact, that is impossible, and we should be frank with the public about the fact that it is not possible.

Martin Howe QC: Indeed. I do not know who has not been frank, but the point is this: if you have treaties and trading relationships that involve treaties with other countries, there has to be some form of dispute settlement mechanism. Actually, you can sometimes have treaties without a dispute mechanism; the Swiss-EU treaties have a joint committee but no formal court or arbitral system at the top.

Certainly, even if we have no specific trade agreement with the European Union after we leave, the final arbiter of trade disputes that might arise between us and the European Union would be the World Trade Organization disputes panels and appeal body. So, in a sense, there is an international rules-based system—

The Chairman: There always has to be one.

Martin Howe QC: —a form of mechanism. I am certainly not advocating that there should be no mechanism in our relations with the European Union.

The Chairman: It is just that it does not deal with all the other matters that Baroness Shackleton would talk about in relation to the ending of marriages, the well-being of children or the arrangements that we have not just in relation to the arrest warrant but in relation to protection orders and domestic violence, violence towards women and children in trafficking—all those other things. Where does an argument or a dispute go when you want it to be dealt with?

Martin Howe QC: The WTO agreement and CETA, which Sir Richard mentioned, both work on conventional bilateral treaty dispute settlement procedures, under which each party nominates a distinguished arbitrator, and there is a chairman or umpire of the arbitrators chosen by a neutral mechanism between the parties and preferably from a neutral country. That is quite conventional.

Your suggestion, I think, is that this sort of mechanism might not work or would not necessarily work in family-type disputes.

The Chairman: I am looking for an answer.

Martin Howe QC: We addressed this issue in the quite lengthy paper that we sent. There is a distinction between the adjudication of individual cases and international disputes. There could be very large numbers of individual cases in the fields that you mentioned, but it does not follow that all those individual cases should find their way up to an international body. The practical solution that we proposed in our Lawyers for Britain paper is to create inside the United Kingdom a court that takes references from other courts within the UK on treaty-based questions.

At the moment under the EU system there are references to Luxembourg. You could have references to the internal UK court instead. The point about that is that that would mop up almost all individual cases, and one would hope that the circumstances in which a bilateral dispute between us and the European Union that led to a divergence of view that had to be resolved at the international level would be very rare indeed and very much a fallback.

Lord Gold: Is that the joint treaty tribunal that you refer to in your paper?

Martin Howe QC: No, the internal one we refer to as the international treaties court. In our paper there is a diagram just after page 3 which I think explains it all. I do not know whether the Committee has seen it.

The Chairman: So it does involve us having to set up a whole other new system of courts.

Martin Howe QC: It is an internal system, an internal UK court.

The Chairman: It is comparatively rare now that anything goes to the Court of Justice. Where would it go if someone was dissatisfied with the decisions of the court that you are describing?

Martin Howe QC: We propose that in an individual case the internal court would be final. To go to the international level, it would be either the European Union via the Commission, or, if we were dissatisfied with some decision by the Luxembourg court, the United Kingdom Government would then need to invoke the joint treaty tribunal. That is our proposal.

Q40 Lord Lester of Herne Hill: The question that I put to you—I will explain how on the way—is whether both of you are in fact saying that citizens' rights will be diminished. I think I am right in saying that if I were an Italian woman living in this country now, I would have the right to a court that would include the Luxembourg court and the Strasbourg court, so that if my rights were infringed by, shall we say, our Parliament in scrapping the Equality Act 2010 I would still be able to go to Luxembourg or Strasbourg. That is right at the moment, is it not?

Sir Richard Aikens: At the moment, yes.

Lord Lester of Herne Hill: The Government have already indicated that when they finish with EU law they will have a good look at the European Convention on Human

Rights. I do not know whether we will see that in the manifesto next time, but leaving that to one side, your argument, it seems to me, leads inevitably to the situation where the Italian woman living in this country will no longer have indirect access to the Luxembourg court. That is right, is it not?

Martin Howe QC: Indeed, and nor should she if we are an independent state.

Lord Lester of Herne Hill: I am simply looking objectively at her situation. So you are saying that she will lose her right of access to the Luxembourg court and will be subject to parliamentary sovereignty, because living in this country she will be subject to whatever the Government dominating the House of Commons decide. Is that not right?

Martin Howe QC: Not quite, because this country takes its international treaty commitments seriously. I do not know of any incidents of Parliament consciously legislating contrary to the clear terms of an international treaty.

Lord Lester of Herne Hill: I will give you an example: equal pay. Under Mrs Thatcher, regulations were deliberately passed knowing that they would violate EU law. The Luxembourg court had to decide that that was contrary to the treaty, and eventually the British Government bowed down.

Martin Howe QC: I am sorry, I cannot comment on that.

Lord Lester of Herne Hill: I am simply a common lawyer trying to find out the practical effect of what you are saying, which, it seems to me, rightly or wrongly, diminishes the rights of European citizens living in this country.

Sir Richard Aikens: With respect, you are not putting the position clearly. You are putting it as an advocate, but the difference is that at the moment the Italian lady living in the United Kingdom has rights because she is living in an EU state and as such she has rights under EU law. Under EU law, if she is not satisfied with the domestic courts, she can ask for a reference to the Luxembourg court, which may or may not be granted. After 2020, the Italian lady who is living here will still be an EU citizen, but she will not be living in an EU state. If she chooses to live in a non-EU state, why should she have rights that are otherwise available only to EU citizens living in EU states? That is the difference.

Lord Lester of Herne Hill: I am not arguing the rights and wrongs, I am simply trying to establish the facts.

Sir Richard Aikens: I know, but with great respect, putting it the way you are putting it enables you to say that she is losing some citizens' rights. The difference is that the lady has chosen to continue to live in a state that has decided—we will assume legally—not to stay in the European Union.

Lord Lester of Herne Hill: Yes, so the answer to my question is: yes, her rights may well be diminished, but so be it.

Sir Richard Aikens: No, with respect, I do not think her rights have “diminished”. They have changed. Her rights have changed because she has decided to continue to live in a state that is no longer a member of the EU.

Lord Judd: I am a layman. This subject interests me profoundly. She chose to live in an EU member state and she did so confident of her European citizenship. She has not chosen to leave the jurisdiction of the European court, we have forced her to do that, and by doing that we have limited her rights.

Sir Richard Aikens: No, we have not forced her. A democratic decision has been taken, and assuming that we are going to leave, you cannot say that somebody’s rights are diminished when the whole legal framework has changed. It is the same as saying that a country that was part of the UK but then ceased to be so—Ireland—had to maintain all the rights that there were before it became independent, even after it became independent. Ireland became independent in 1922, and things were changed. Happily, we had arrangements, because we had the treaty then to enable things to go pretty smoothly for a long time, but citizens’ rights changed because of that change in the status of Ireland, apart from the six counties. It is no different to what is about to happen.

Q41 **The Earl of Kinnoull:** As we have got there, I am going leap forward in the set of questions. This is a quote from the position paper of August last year, *Enforcement and Dispute Resolution*: “Ending the direct jurisdiction of the CJEU in the UK will not weaken the rights of individuals, nor call into question the UK’s commitment to complying with its obligations under international agreements”.

It seems to me that you have been arguing that if you change the umpires, as it were, the rights have not changed; it is just the umpiring system that has changed. I am sure you will correct me if that is a wrong simplification. One of things that will have disappeared completely for UK citizens is their rights, such as they are, under the EU Charter of Fundamental Rights. That line of rights has completely disappeared.

How can you tie up the Government’s statement that I have just read out with the removal of those rights? Will you comment on my simplification that what you are saying is that the umpiring will change but the rights are the same?

Martin Howe QC: There is a distinction between the substantive content of rights and the mechanisms by which they are adjudicated on or enforced. The substantive rights of EU citizens resident in this country will not change. Under the substantive terms of the provisional agreement reached on the rights of EU citizens, those who are established here can carry on.

You raised the charter of fundamental rights. What cannot be read into that comment is a suggestion that all the surrounding laws in the United Kingdom will not be altered just because that would, in common with affecting UK citizens, affect EU citizens resident here. I think you have to read it in the context, which is the specific rights of residence and so forth and the right not to be discriminated against possessed by EU citizens here in that capacity.

Lord Lester of Herne Hill: What about parliamentary sovereignty? We are the only country in Europe, almost the only country in the world, with a Parliament that can do whatever it likes, subject to treaties. Surely you are changing the game in a big way if you take the rights of the individual citizen and make them subject to whatever a future Parliament decides to do.

Martin Howe QC: Yes, but the overturning of parliamentary sovereignty as a consequence of our membership of the European Union and the enactment of Section 2(4) of the 1972 Act flows from an obligation that we undertook when we became a member. It has deeply affected our constitution. In my view, one of the major benefits of leaving is the ability to overturn that and no longer to have a scenario in which courts can overturn or disapply Acts of Parliament.

Actually, something I am very concerned about in what has been agreed in principle by the Government in their negotiations with the European Union in Article 4(1) of the draft transitional agreement—I have the version that was issued yesterday, which has the green text indicating that the British Government have agreed to it—that states, in the context of citizens’ rights, “In particular, Union citizens and United Kingdom nationals shall be able to rely directly on the provisions contained or referred to in Part Two. Any provisions inconsistent or incompatible with that Part shall be disapplied”.

It seems that the Government have agreed with the European Union, although not yet in binding treaty form, to re-enact Section 2(4) of the 1972 Act, or an equivalent provision, in relation to citizens’ rights. I think that Lord Lester may welcome that.

Lord Lester of Herne Hill: I do.

Martin Howe QC: I am appalled by it.

Sir Richard Aikens: Lord Lester, it obviously depends on your view on parliamentary sovereignty. You do not like it, and I do not think you have ever liked it. Other people do like it. If you asked parliamentarians whether they like the idea of parliamentary sovereignty, I suspect that the majority of them would say yes. If you asked the general public whether they prefer the sovereignty of the UK Parliament or control by some other body, be it the EU Commission, the Luxembourg court or someone else, I think they would say that they prefer the UK Parliament to be sovereign.

The question that we have to address here is whether the general public have appreciated the extent to which, as a result of EU law evolving in the way it has, in particular with the charter of fundamental rights and freedoms, it can override the UK Parliament. The Benkharbouche case is a very clear example of that. Parliament passed the State Immunity Act 1978, but along came that case, in which it was decided that in effect there are matters in it that are contrary to the rights given in the charter, and The State Immunity Act had to be disapplied pro tanto.

You have to make your choice: do you like that or do you not like it? It is a question of whether you trust your MPs and the House of Lords or you prefer the courts. You have always preferred the courts. I am rather sceptical about the courts' ability to deal with a whole host of matters that I would rather leave to parliamentarians to deal with. That will come to be further considered when we discuss the ambit of Clause 6(2) of the European Union (Withdrawal) Bill, taking into account, "anything done on or after exit day by the European Court, another EU entity or the EU", if a court considers it right to do so.

That puts a very great power into the courts and the judges. In fact, it may put power into the courts that could override the UK Parliament. It is certainly a very political power. Is that a right thing to do? You have to take a policy view on that. My policy view is no: I think that the courts have to be kept in check and subject to Parliament. You and I will disagree on that.

Lord Lester of Herne Hill: I think you misunderstand my position entirely. Therefore, let me explain. I believe that the Human Rights Act is a fair compromise between parliamentary sovereignty and individual rights. It allows our courts to make declarations of incompatibility, but not to strike down Acts of Parliament. That system, together with the convention, enables this country, alone in the world except for New Zealand, to manage without a written constitutional Bill of Rights. I think that is fine. I would leave it like that, but I fear that some of your colleagues may take a different view.

Sir Richard Aikens: I do not think that I have misunderstood your position—and with regard to the Human Rights Act and the convention, I am entirely in agreement.

Lord Lester of Herne Hill: Excellent.

Sir Richard Aikens: It is an excellent way of dealing with it.

The Chairman: So that we do not confuse anyone who is watching, we are talking about the European Convention on Human Rights as distinct from the European Court of Justice. Two different courts deal with those things, and people are confused enough as it is.

Sir Richard mentioned Clause 6(2), which Lord Lester was going to deal with. I will bring him in now so that we can deal with it as a piece.

Q42 Lord Lester of Herne Hill: Clause 6(2) of the withdrawal Bill, as you know, gives a UK court discretion to address judgments of the Luxembourg court where it considers "it appropriate to do so". Is that a reasonable way to deal with Luxembourg judgments that are given post Brexit?

What is your view of the suggestion that a more suitable way of doing it would be to say that our courts should have regard to or take account of Luxembourg judgments?

Sir Richard Aikens: I do not think there is a great deal of difference between the two. If it were just the European Court's judgments that we were concerned with, I would have no difficulty with that. An English court would be bound to look at the CJEU's judgments on any issue that concerned EU law and on which the CJEU had given a judgment. The first stop of a judge would be, "Was this not an EU regulation that has now become some statutory instrument or whatever?" "Yes, it was". "Has the CJEU made any comment on the interpretation of Article 2.1 (or this or that provision)?" "Yes, it has". "Well, what does it say?" "Here's the case". "All right. What's wrong with it?"

That is the kind of argument that there would be in court. Counsel may say, "The following is wrong with it", or "No, with respect, we entirely agree with it. That is the interpretation we want". In those circumstances, I suspect that the court would say, "Right. That's what the CJEU has said. It seems to me it's perfectly right. I am going to follow it".

On the other hand, there may be the odd case where the judge scratches his or her head and says, "Well, I think that's a bit bizarre. I'm not sure I like that. I've got to take that European Court judgment into account, I've got to consider it. It's appropriate to do so, but I am going to disagree". There is nothing wrong with that.

I am concerned about another EU entity, or the EU as a whole as the clause states, and what that might involve. Could there be arguments in court? For example, let us assume that the charter is kept out of things for the moment. The EU has this charter that affects rights and so on and so forth and gives people powers. It is appropriate that you consider that that charter exists when you are considering what the rights of a citizen are under this statutory instrument or whatever. If we assume that the charter is left out of it by the express terms of the Withdrawal Act, yet, it might bring that back in by the back door, and by this provision in clause 6(2) the court would be permitted to do so, which might be a bit of a political hot potato.

Lord Lester of Herne Hill: Take the case of gender equality and equal pay. Now suppose that the framers of the withdrawal Bill were to come to the conclusion that area, now in the Equality Act 2010, should be preserved, protected and not diminished by a future Parliament. Of course, that can always be overridden by a future Parliament. Do you think that the withdrawal Bill should designate that kind of area as a special protected area against future change?

The Chairman: It is a very important one.

Sir Richard Aikens: That is so much a political matter that I do not really feel—

The Chairman: Equal pay?

Sir Richard Aikens: It is not that, with respect. It is whether or not there are particular areas that ought to be identified specifically as being protected areas

rather than having the general Clause 6(2). That is a political matter that I am not sure I am qualified to comment on.

Equal pay is plainly a very important matter, but the question is whether that should have specific and special status in the Bill, and that is a highly political matter.

The Chairman: If you agree with Sir Richard, there are so many people wanting to get in—

Martin Howe QC: All I would say is that that general formula—

The Chairman: Is one you would agree with.

Martin Howe QC: The problem is that if you try to get more specific, it gets very complicated, so I would prefer to leave it to the courts. I am worried by the precedent of the interpretation of Section 2 of the Human Rights Act adopted in the Ullah case where “must take account of” Strasbourg jurisprudence was interpreted as meaning “must follow”.

The Chairman: There has been a drift away from that. That has been cleared up now. I see Sir Richard nodding.

Sir Richard Aikens: Yes.

The Chairman: There was a moment when there was enthusiasm, but there has been a reassertion of the position.

Martin Howe QC: My fundamental concern is that, yes, it is very sensible in many circumstances for our courts to continue to look at Luxembourg judgments, but they should not be binding on our courts, except in very specific and limited circumstances.

Lord Cromwell: Standing back from this, and as a non-lawyer, you make a very vigorous case for—I think these were Sir Richards’s words—not being subject to a foreign court. That was probably an initial government position, the red line that was talked about so much, although that red line has become quite permeable, or even dotted. I think that is one of the things that have given you concern.

The alternative you seem to be positing is either an internal or an international—I got lost in the nomenclature, because it is international in your paper—treaties court. I do not want to get hung up on which one it is at this stage. The benefit would be that we would be involved in it and have representation in it rather than being the recipient of its judgment.

In the paper, you call that a fair, balanced and workable proposal. My question is on the practical aspect of that. What indications do you have that EU member states are prepared to agree to that, to participate in it, and even perhaps to pay for it? As a pragmatist, it may be a beautiful design, but is anybody buying?

Martin Howe QC: This is what has been agreed in CETA and in every other EU external agreement. I should make it clear that in the picture diagram the court on the left is the Luxembourg court, an existing structure. That has existing jurisdiction to interpret agreements which the European Union reaches with other countries, but it is binding internally within the EU only. It interpreted the EU-Turkey association agreement, and its interpretation was binding on Germany, but it would not be binding on Turkey.

That is the standard scenario in the EU's external agreements. The body at the top is the only international element, and that, we propose, is simply a conventional international arbitral body or treaty court modelled exactly on, say, the CETA model. There is nothing new about that. The element on the right is, if you like, optional and would not require any agreement by the European Union about whether or not we do it.

The alternative is simply to have treaty issues going through the normal court system and ending up being decided by the Supreme Court.

The Chairman: It may be difficult for people who are listening and who do not have the document to follow. It can be found on the Lawyers for Britain website and is called *Adjudicating Treaty Rights in Post-Brexit Britain*. It is written by you and a number of colleagues.

Lord Gold: My issue with this is whether the European court itself has to agree, because we know that it is not likely to accept it and has rejected a proposal for a joint EU-EEA court. "The CJEU found that such a new court system posed a threat to the autonomy of the Community legal order. It concluded that this threat was not reduced by the fact that CJEU judges were to sit on the court". What troubles me is how, in practical terms, we can achieve what you are putting forward.

Martin Howe QC: That is a complicated issue, but that is dealt with—

Lord Gold: But it is a key issue, is it not?

Martin Howe QC: That issue is dealt with in depth on pages 42 onwards of our paper. The point is that the European court will accept both itself and the European Union as a whole being bound by an external treaty court or arbitral body under an international agreement, in general. That is quite compatible with the European Union legal order, because if the European Union enters into external treaties and those treaties contain binding dispute settlement mechanisms, it must be bound by them.

What it will not accept is external bodies dictating to it on the administration of internal European Union law under the EU treaties. That is where the proposed EEA court foundered, because it would involve the EEA court being a structure on top of and binding the Luxembourg court and interpreting the rules of the EU internal market in a way that would have affected the ECJ's internal jurisprudence. We do not think that that is relevant unless the United Kingdom were to enter into an

agreement with the European Union of a completely different nature, such as an agreement to remain in the internal market.

Sir Richard Aikens: I want to emphasise this point, if I may. To my mind, there are two very distinct things. The first is the internal legal order of the EU, of which the CJEU rightly says it must be master. If you have another legal order that, if you like, is an external legal order because it is something between the EU and an external sovereign entity, then with respect to the CJEU it does not have, and nor should it have any, control of that, because it is only an internal EU body. That is the distinction that has to be emphasised.

As Martin Howe says, the CJEU understands and accepts that, and I hope that the EU negotiators also understand and respect that which is already understood by the CJEU.

- Q43 **Lord Cashman:** I would love to develop this further, but I am directed otherwise. I want to take you on to the draft text of the withdrawal agreement published by the European Commission on 28 February. As you know, it envisages that the Court of Justice of the European Union will have jurisdiction over the final withdrawal agreement and during the period of transition.

I have two questions. What would the consequences be if the UK Government acceded to this model? Secondly, the Institute for Government has argued against giving in to current EU demands to give the CJEU the final say, arguing that it would not be neutral in disputes between the UK and the EU. What concerns do you have on this issue? Is it a question of perception, or is it a question of substance?

Sir Richard Aikens: No, it is not a question of perception; it is a question of substance. With regard to the period of transition, it rather looks as though the Government has sold the pass. I have not seen the text that Martin Howe has seen, but, as I understand it, the CJEU is to have jurisdiction during the transition period over pretty well everything that it does currently, so the UK will be in the unfortunate position of not being in the EU but being subject to a foreign court. It is clear to anyone who looks at the way the CJEU works that it is, generally speaking, “pro EU”. It has to be, because that is its job under the EU treaties. It is the guardian of the treaties, so, by definition, it has to be not entirely independent, as it were.

So far as the withdrawal agreement is concerned, plainly the CJEU should not have jurisdiction over it for all the reasons that I have already explained and that Martin Howe has already explained. If you are going to have some kind of dispute resolution mechanism for any disputes that arise in connection with the withdrawal agreement, you have to have some independent body. The body that I propose, and which Martin Howe has proposed in his paper, is this tribunal, or whatever you like to call it, which consists of judges from the EU and the United Kingdom.

Lord Cashman: I would like to develop that. At the moment, we are within the CJEU. Our judges operate within it. You want us now to set up a court of common treaty, I shall call it, with the 27 members and the United Kingdom, which could hand down judgments that we disagree with. We are recreating virtually the same model, but—

this is my question—how are we taking back control and achieving parliamentary sovereignty when we will look to this body to give us judgments on what we have entered into or what we are adhering to?

Martin Howe QC: A conventional, bilateral, international treaty dispute tribunal is a completely different animal in nature from the Court of Justice of the European Union.

Lord Cashman: I am not disputing that.

Martin Howe QC: The Court of Justice of the European Union sees itself as developing the European Union and promoting European integration in the judgments it reaches. It is not neutral, and it would be even more lopsided in its approach if it were adjudicating between the EU and a departed United Kingdom. A neutral body is by definition neutral. It should only apply a treaty.

You have to have confidence that a neutral treaty-interpreting body applies to you only what you have agreed as a state to subject yourself to. If you choose to enter into an international treaty obligation, the other treaty party naturally expects you to obey it. You can argue about whether by entering into a treaty you are inherently giving up a measure of control, but what is important is that you are bound by the treaty you have signed and that is fairly interpreted, not by the treaty used as a basis for a partisan body to write in new obligations.

Lord Cashman: I completely disagree with that analysis. It tends to suggest that the UK has had no influence whatever in the Court of Justice of the European Union and that our justices serving there have had no effect whatever, particularly when cases have gone to the CJEU or where there has been reference to the CJEU. To suggest that Britain has been a victim of the CJEU is a travesty of the truth.

Martin Howe QC: The question of whether Britain has had influence is one question. I am commenting on the nature of the judgments of the court.

Lord Cashman: We have done pretty well.

Martin Howe QC: Unanimously, commentators say that it progresses European integration. It does not neutrally interpret the text. My view, if I am giving evidence to this Committee, is that saying that it is a neutral interpreter of texts is completely untenable. No legal commentator on whatever side of the debate would agree with that.

Lord Lester of Herne Hill: The Vienna Convention on the Law of Treaties is obviously binding on us and all the other states. It lays down principles about treaty interpretation and there is no problem. My difficulty with the evidence of both of you is the legal uncertainty you would create with the kind of model that you are talking about.

For example, page 43 of Martin Howe's interesting paper states: "Rights under the withdrawal agreement by contrast are essentially fixed when the deal is struck and

will not be subject to dynamic evolution in the same way as EU law rights”.

Going back to equal pay, you are saying that the rights under the withdrawal agreement when the deal is struck will no longer be subject to dynamic evolution in the same way as EU law rights.

Martin Howe QC: Exactly.

Lord Lester of Herne Hill: They will be subject instead to parliamentary sovereignty.

Martin Howe QC: Yes. We can choose to develop them in our own Parliament or our own courts. We are saying that because the European Union or the court chooses internally to develop rights, we should not be bound by future jurisprudence. It would be completely contrary to our status as an independent sovereign nation.

Sir Richard Aikens: With respect to Lord Lester, I do not think that what is proposed by Martin Howe and me would produce legal uncertainty. With great respect, I think it would produce much more legal certainty than if it were left to the CJEU to decide what the respective rights of the parties were under the withdrawal agreement. Under the proposal I have made (and Martin Howe has made) you would have an independent body that was not just the court of one of the two parties, which is what the CJEU would be by then.² The proposed court or tribunal would be composed of highly distinguished members. I cannot see why what they produce, if there were arguments on the interpretation of what after all will be an entirely new treaty, should produce any uncertainty whatever.

It is important—you have put your finger on it, Lord Lester—that this withdrawal agreement is subject, as a matter of interpretation, to the Vienna Convention on the Law of Treaties. The big difference between that and how the CJEU works in its interpretation of the EU treaties is that there is an internal EU mechanism for how the CJEU has to approach things. As the CJEU is the guardian of the treaties and one of the treaty aims is European integration—it is in Article 2, I think—that is an element that the CJEU has to take into account when it is considering how to interpret treaties.³ That would not be the case with the withdrawal agreement and an independent tribunal that was subject to the interpretative rules of the Vienna convention.

Q44 Baroness Neuberger: I am also not a lawyer. I am just related to some. I think you have more or less rejected the idea of docking with the EFTA Court, which was one of the things that was put to us.

The Chairman: Is that right?

Baroness Neuberger: I just want to check that.

² The CJEU is a purely internal EU institution, responsible to no one but the EU and its Members.

³ The CJEU has to interpret EU law, and the EU treaties in a way that is consistent with the aims and objectives of the EU, which is, essentially, European integration.

Martin Howe QC: Personally I can see no benefit whatever in docking to the EFTA Court. It is a little poodle that goes yap, yap, yap along behind the Luxembourg court.

Baroness Neuberger: That was my assumption from the way you were speaking.

Supposing we go for your new model, as you describe it. If the Government were to agree to something like that, or to any other model, should UK citizens have direct right of access to that court, or should there be a reference procedure, as there is at the moment with the Court of Justice of the EU?

Martin Howe QC: The answer is that there should be a reference procedure to the Court of Justice for UK citizens, which will arise automatically simply by virtue of the EU becoming bound by the treaty. The Court of Justice then automatically has internal jurisdiction within the EU to interpret it, and its ruling are binding on member states, so that will happen anyway.

Baroness Neuberger: Yes, but is that for our citizens?

Martin Howe QC: For our citizens, there are various mechanisms in the withdrawal agreement for strengthening this, including the right of the UK Government to intervene in cases in Luxembourg where they concern UK citizens and a corresponding right of the Commission to intervene in cases in this country. Those, I think, are perfectly welcome mechanisms.

Baroness Neuberger: You have your new court, your new system. How does that work? Do people just go to it directly?

Martin Howe QC: Under our proposal, they would be referred. Within the European Union, it would be the same as at the moment. The courts and the member states would make a reference if they wanted to or if they were a Supreme Court and it was an undecided point. That is the existing system. The international body in our proposal would be involved only if the European Union via the Commission or the UK Government felt that there was a divergence that needed to be addressed by it. We would not suggest it being flooded with large numbers of individual cases.

Sir Richard Aikens: Nor is the CJEU at the moment.

Baroness Neuberger: Of course.

Q45 Lord Anderson of Swansea: Gentlemen, you have set out your stall and you have given us what appears to be a coherent system, but if there is no chance of your model being accepted, it is surely academic in the pejorative sense. So far as the EU is concerned, the only precedent you cite is that of Canada, and that treaty was very narrow and related to trade. Is there any precedent of a wider treaty? Again, the point has been made about the EFTA precedent.

Mr Howe, you said that you are appalled by some of the concessions made by the Government, but they are in the practical business of negotiating. Have they shown any readiness to accept an international treaty court? As far as I am aware, there is

none. On matters such as the European arrest warrant and the agencies, the Government appear to accept that if we are to retain membership of those agencies, which is in our national interest, we will have to make concessions in respect of the jurisdiction of the Luxembourg court.

How do you answer the position that, first, there are no broad-enough precedents and, secondly, that the Government appear to have moved away from your fairly absolutist position?

Martin Howe QC: First, I will repeat a point I made before: there is no precedent anywhere for any non-EU state accepting the direct jurisdiction of the Luxembourg court. What you are proposing is completely—

Lord Anderson of Swansea: Norway has.

Martin Howe QC: No, it does not accept direct jurisdiction.

Lord Anderson of Swansea: But in effect the EFTA Court shadows it.

Baroness Neuberger: That is presumably why you are quite strongly against it.

Martin Howe QC: That is why I do not agree with the EFTA Court. The EFTA Court reverses its own jurisprudence in order to come into line with later decisions of the European court. As I pointed out, there are only three incidences of indirect jurisdiction of the Luxembourg court. There are none of direct jurisdiction. If the United Kingdom were to agree post exit to the direct jurisdiction of that court, in which we will no longer have any judges or members, it would be completely unprecedented.

The Chairman: You are absolutely right: it is unprecedented. The problem is that a distinction has to be made between some nations that we trade with quite separately and the long historical relationship that we have had with the European Union in which we have built up relationships with the agencies that have been described. That makes a difference.

I agree with you that there is no precedent for this, but what do you do with the fact that arguments are being made to us by others who come before us that these agencies exist and that our relationships with them are valuable? If there is any conflict, how do we resolve it?

Sir Richard Aikens: You are absolutely right that these agencies are extremely valuable in relation to security, pre-eminently, and that the European arrest warrant is very useful, although one must not forget that there are only about 1,200 going outwards (requests to extradite from the UK to other EU Member states) and about 100 coming in (requests by the UK to extradite from other EU Member states): in other words, there are only 100 requests by this country to extradite from elsewhere in the EU.

However, there is a difference between the usefulness, or rather more than usefulness, and the necessity of being involved with those agencies and saying that

we are going to have to be subject to an internal court, the CJEU. If we are going to take part in these agencies, whichever they are, once we are outside the European Union it will have to be done by means of a treaty arrangement, because we will no longer be party to the regulations or whatever under which they were set up or to the framework decision for the EAW, et cetera. They have gone.

The Chairman: A treaty court will not be good enough, with all due respect, when it comes to the liberty of the subject and moving somebody when a British subject is being sought and will be lifted out of Britain and given to some other country, or vice versa.

Say we want a trafficker, let us say a German citizen, who has been bringing women and children into this country and having them sexually abused. We know that they are present in Germany and we want them handed over, but they say, "I refuse to go", you have a conflict over it and it goes up through the court system. Where does it finish?

Sir Richard Aikens: I think this is being overdramatised, with great respect. If you have a treaty, it will lay down all the relevant agreements, whether it is to do with the EAW, data protection or whatever.

Lord Lester of Herne Hill: Aircraft.

Sir Richard Aikens: That is another example. There are treaties throughout the world on how you deal with landing rights and so on. That treaty, so far as the United Kingdom is concerned, will be transposed into domestic law and enforced in the courts in this country. So far as the EU is concerned, whatever the mechanism for each of the 27 members to translate a treaty into their domestic law, that will be done. Therefore it will become the law in each of those 27 member states. Those courts, whether they are a family court dealing with issues of maintenance or a magistrates' court dealing with an EAW, will enforce them.

The only problems that will arise are if there is a dispute about a particular part of a particular provision in this EU-UK treaty dealing with a particular subject. That will, as now, go through the domestic court system. The only difference will be that instead of arriving at the CJEU as it does now, because we are all members of the European Union, it will go to the "treaty court", whether by reference, as suggested in Martin Howe's paper, or by some other mechanism.

Otherwise, by virtue of the fact that you have your treaty between the UK and the EU, which will be put into domestic law on both sides, I cannot see a problem.

Lord Gold: So you would say that from a timing perspective there would be no distinction between what we have now and what you envisage. It would all move through just as quickly.

Sir Richard Aikens: There would be absolutely none, because the domestic courts would be exactly as they are. The only difference is at the top level.

Martin Howe QC: Can I add a point to your question about agencies, Lord Chairman? As I know something about the European Medicines Agency, I will use it as an example. There is a lot of sense in us, post Brexit, having arrangements whereby we do not duplicate the highly technical work of the assessment of the safety of medicines.

The Chairman: It has been invaluable.

Martin Howe QC: Therefore it makes sense, if the right arrangements can be got to, to have an arrangement that still associates us with that agency. We cannot expect to say to the European Union that we no longer want the Court of Justice to be the house court, as it were, controlling the operation of the agency. It just would not agree to it. It is just not realistic to put the whole agency outside the scope of the European legal order just because we want to latch on to it.

On the other hand, it is perfectly feasible for our arrangements with that agency not to compromise our sovereignty. I would expect that in 99.99% of cases, if the agency says either that a drug is unsafe and should be withdrawn or that a drug is safe and can go on the market, we would agree with that.

As long as we retain residual power with respect to drug licensing in the UK for the UK MHRA finally to decide whether a drug goes on the market in this country, we would not be bound by European court jurisdiction in so far as it affects the operation of the agency.

The Chairman: Of course, what European Union countries that are our partners might say is that if we are not going to play ball on the crunchy stuff, the 1% of difficult cases going to the European court, they do not want us in their team.

Martin Howe QC: It would not affect them, because we would just be putting a drug on to our market or taking a drug off our market. We will no longer be part of the single internal market.

The Chairman: Fine.

Lord Anderson of Swansea: That would be the price tag which the European Union would demand, and our Government have already shown a certain flexibility with regard to the implementation period.

The Chairman: Yes. Thank you, Lord Anderson. That was very helpful. I will bring in Lord Judd, because these matters concern him greatly.

Q46 **Lord Judd:** I repeat that I am a layman, but I was very struck when we were taking evidence from very highly qualified legal sources that the people involved said how well the system is working and how it is improving, and that if we really care about families and children we ought to regard it as a very precious achievement and be very careful about what we are doing.

In our report on all this—*Brexit: Justice for Families, Individuals and Businesses?*—we called on the Government to produce a coherent plan for the post-Brexit

application of the so-called Brussels regime of EU regulations to ensure mutual recognition of judgments and judicial orders. To date, no such plan has been forthcoming.

How urgent, from your perspective, do you believe this to be? I must say that I was very struck by those lawyers almost breaking off from their formal legal opinion in effect to say, "For goodness' sake, we care about families and children and things are getting better, so let's be careful".

Sir Richard Aikens: It is urgent. It is perhaps less urgent if, as I understand the position to be, all that exists in relation to civil jurisdiction issues and family law issues remains the same during the transition period, but all that does is give a period of approximately 20 months extra to get things in place.

With great respect, you are right to say, Lord Judd, that so far the Government seem to have done absolutely nothing. I am not a family law specialist, but I sat on a large number of family appeals, particularly in the international sphere, and I respectfully agree with all the specialists who say that this is an important issue. After all, there are so many EU citizens who live in this country and who will continue to live in this country, so there are lots of cross-border family issues that have to be dealt with. They have to get on with it. There may be a number of models that could be adopted, but there is no sign of any kind of work going on in the Government to deal with this.

On civil justice, again, certain things are very straightforward, such as applicable law for contract and tort. We can simply adopt the Rome I and II regulations, and that would be an end of it. It would be perfectly satisfactory. On jurisdictional issues, there are bigger debates that can be had. Certainly the different models are: to try to carry on with Brussels I as it exists; then there is the possibility of becoming a party to the Lugano convention, and, thirdly, the possibility of having an entirely new system for deciding on the jurisdiction regime of the UK courts.

What the Government have not done, which to my mind is fundamental before deciding what model we want to push for, is to find out the extent to which litigants in civil and commercial matters that come to London do so in order to have a judgment that can be enforced in another EU Member State. That is simply a question of gathering the empirical evidence. It would be easy to get. There are a number of City firms that could organise that very easily.

Now, if the evidence is that people regard London as important as a centre for dealing with their commercial and civil disputes because judgments can be enforced in other European Union states, we have to push hard for still being a part of the Brussels I system. If, on the other hand, the evidence is that people come here because they like the system, they like English law, they like the lawyers and they think the judges are okay, but it is not a question of wanting to be able to enforce judgments in other EU states, we would not necessarily have to try to push for the Brussels I arrangement.

It is a question of getting the evidence, and as far as I can see the Government have shown no sign of doing that work or of asking somebody to do it for them. There are plenty of people out there who would do so. I know of City firms that have offered their services to the Government in respect of civil and commercial matters, issues of jurisdiction and so forth, and they have been rejected.

Lord Judd: So you would say that it is really urgent.

Sir Richard Aikens: Of course it is urgent. With great respect, Lord Judd, it is very urgent.⁴

Lord Lester of Herne Hill: I come back to whether planes will fly. This is something I know a bit about. I once wrote a book about aviation law. This question is really to test the views of both of you. When we leave the European Union, I take it you would like us still to be part of the European aviation system, because unless we are our planes cannot fly, can they?

Sir Richard Aikens: I am sure you are right. They can probably fly, but they cannot land at European airports.

The Chairman: Martin Howe, I think you disagree with that.

Martin Howe QC: You say that our planes cannot fly. I do not know how many other non-EU countries there are that fly planes in and out of the European Union with no apparent difficulty without having to be a member of the European Union.

Lord Lester of Herne Hill: Under the Eurocontrol system, European air navigation is regulated by the agency under the supervision of the European Court of Justice. Lord Anderson asked about the agencies. I have asked for the past year and a half for Written Answers about this.

Martin Howe QC: Are we talking about air traffic control?

Lord Lester of Herne Hill: My question is this. We are an island, but one that depends upon European mechanisms to fly planes. Whether they are going to Australia or New Zealand, they have to fly through European air space. Under your model, as I understand it, you would reject the idea of belonging to the agency and being subject to the Luxembourg court, and in that case Ryanair has already said that it will not put any aircraft into the air. Lord Gold rightly keeps saying, "Be practical". What is your practical answer to that question?

Martin Howe QC: My practical answer is that it is not necessary for us to be in the current treaty arrangements or subject to the current rules in order to continue to fly aircraft in and out of the European Union. There are something above 100 other non-EU countries that fly in and out without difficulty. European Union planes fly over many countries, including Ukraine, Russia and elsewhere, under the international system.

⁴ It is also equally urgent in respect of international family law matters.

You quite rightly make the point that, in order for planes from this country to fly to certain destinations, as a matter of geography they necessarily have to fly over European Union countries. Equally, planes from European Union countries in practice need to fly over this country's airspace to get to and from North America. It is clearly in the interests of both parties to agree that the system will continue to run smoothly after we leave. What seems to me to be completely lacking is any reason why in doing that we should accept the continued jurisdiction of the courts of the European Union over international air traffic arrangements.

The Chairman: I am going to draw this session to a conclusion, I am afraid. Thank you. I think you have made it clear that you do not feel that that is necessary, that the new treaty could include matters of aviation and that any matter that was of conflict could go to the treaty court that you have within your model.

It has been important to tease out how an alternative system could work. Until now, we have not really had that made clear for us. This has been a really important and invaluable session. You have been taxed, questioned and tested, and you have dealt with it very generously and helpfully. I thank you both very much for coming and giving us your time this morning. It has been really terrific.

Martin Howe QC: Thank you for the opportunity to give evidence.