



Select Committee on the European Union

Justice Sub-Committee

Corrected oral evidence

Brexit: enforcement and dispute resolution

Tuesday 27 March 2018

11.05 am

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Members present: Lord Cromwell (The Chairman); Lord Anderson of Swansea; Lord Judd; Lord Lester of Herne Hill; Baroness Neuberger; Baroness Shackleton of Belgravia.

Evidence Session No. 6

Heard in Public

Questions 47 - 57

Witnesses

I: Suella Fernandes MP, Parliamentary Under-Secretary of State at the Department for Exiting the European Union; Lucy Frazer MP, QC, Parliamentary Under-Secretary of State at the Ministry of Justice.

USE OF THE TRANSCRIPT

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

Examination of Witnesses

Suella Fernandes MP and Lucy Frazer MP.

- Q47 **The Chairman:** Welcome, both Ministers, and thank you for coming in to see us. There are a few preambles before we get started, which you may well be familiar with. This is a public session that will be broadcast live as a webcast and will be available thereafter on the parliamentary website. It will be followed by a verbatim transcript, which will be sent to you. If, in due course, you want to add anything or point out any corrections that need to be made, please come back to us as quickly as possible so that we have an accurate record.

This is our sixth and final meeting on this theme. We are delighted to have you here—I notice that you are both very well qualified in law as well—to give us all the answers to our questions.

Please introduce yourselves briefly for the record. You may, if you wish, make a short opening statement. Otherwise, we will proceed to questions. Finally, in case you were expecting Lady Kennedy to chair the meeting, she cannot be with us, so I am standing in on her behalf.

Lucy Frazer MP: I am a junior Minister in the Ministry of Justice.

Suella Fernandes MP: I am Parliamentary Under-Secretary of State at the Department for Exiting the European Union.

- Q48 **The Chairman:** Very early on in the Brexit process, the Government made it very clear that the role of the CJEU was a “red line”, a phrase that has been used many times subsequently. I wonder if it is becoming a bit more of a dotted line, or a permeable line, or a thin red line. You can choose your own adjective. Does it have meaning in practice any more?

Suella Fernandes MP: You are right to identify ending the jurisdiction of the European Court of Justice as a red line as we leave the European Union, but I humbly disagree with you; the red line is still very much intact. The rationale and principles behind this policy decision were well rehearsed during the referendum campaign: to support the restoration of the UK’s legal sovereignty. The most practical manifestation of that is the ECJ no longer having jurisdiction over the UK, or rather its rulings no longer having the status of binding authority for UK courts. The binding nature of ECJ jurisprudence is a fundamental characteristic.

It is also about breaking the intrinsic link between the EU’s legal order and the legal systems of the UK. Withdrawal will mean a return to the EU and the UK having their own autonomous legal orders. Those autonomies are to be respected in the withdrawal agreement and the agreement pertaining to the future economic partnership.

Direct jurisdiction will come to an end when we depart from the European Union. We will no longer be a member state and EU treaties will cease to apply in the UK. By virtue of that, the doctrine of direct effect and the supremacy of EU law will cease to apply in the UK. The practical effect of that is that EU-UK agreements will not automatically form part of the UK

legal order and it will be necessary for domestic legislation to be enacted to give effect to them.

One of your previous witnesses talked very learnedly about dualist and monist legal systems. That step will be a necessary step because of our dualist system. That is it, in a nutshell.

The Chairman: That is a very comprehensive nutshell, thank you. Do you want to add anything before I bring others in?

Lucy Frazer MP: No. I think the Minister is right to say that it is the binding nature of the ECJ that will come to an end.

Lord Lester of Herne Hill: First, may I say what a pleasure it is to have before us Ministers with your professional qualifications before you became MPs? Do either of you have any direct experience before the Luxembourg court?

Suella Fernandes MP: Not me.

Lucy Frazer MP: I have not.

The Chairman: That was a fairly comprehensive nutshell. Please do not be shy about disagreeing with me. It would be very boring if we agree with each other all the time.

As we get into the detail of this, there is also a suggestion that for different stages—during the withdrawal agreement, for the transition period and into the future—we are going to need different enforcement and dispute resolution processes. Do you accept that there are going to be different ways of doing it at these different stages, or is it as simple as a clean break?

Suella Fernandes MP: Yes, there is definitely a variable approach. For example, EU citizens stand, to a large extent, outside the nutshell that I have described. They will have an ultimate right to ECJ jurisdiction. Depending on the subject matter and where we are on our journey outwards, there will be differing dispute resolution mechanisms and aspects of connection between our respective legal orders.

Lucy Frazer MP: That is right. We can already see a distinction between the implementation and post-implementation periods.

The Chairman: Finally, we go back to the thin red line, or the firm red line as you might like me to consider it. During the transition phase, the Government have had to accept that we are going to be subject to the CJEU. Would you agree?

Suella Fernandes MP: After 29 March 2019, we will essentially carry on according to the same rules and regulations that we currently have. As both parties agreed last week, that will be strictly time limited to the end of December 2020

The Chairman: So that is a yes, in effect.

Suella Fernandes MP: The jurisdiction of the ECJ will essentially continue during the implementation period.

Baroness Shackleton of Belgravia: Will we still have a judge there then?

Suella Fernandes MP: No. I am pretty sure that our judges will leave the ECJ in 2019.

Baroness Shackleton of Belgravia: So we will be subject to their jurisdiction without any representation.

Suella Fernandes MP: That might be the position because of the nature of the implementation period. We are in the process of extricating ourselves and taking a step away from the European Union, but because of the need for a smooth exit that will essentially mean that the ECJ will have the final say on legal matters to do with the UK.

Baroness Shackleton of Belgravia: But if the ECJ has the final say on legal matters relating to our departure terms, and we do not have a judge representing us, does that not leave us rather vulnerable?

Suella Fernandes MP: This is where it is important that we have a dialogue, a negotiation and an agreement on the implementation period. In the same way, we will no longer be members of the European Parliament, and we will not have formal political representation at the heart of the EU, after March 2019. However, we will still be following EU rules and regulations. That situation is analogous to the court and legal side of things.

Ultimately, the end state is that the jurisdiction will come to an end and, as set out in Clauses 5 and 6 of the withdrawal Bill, the obligation of UK courts to refer cases to the ECJ will come to an end at the end of the implementation period.

Lucy Frazer MP: May I just expand on one of the points? Baroness Shackleton, you put the question as if we will be significantly disadvantaged. Of course, it is always good to have representatives in any institution, but I think you took evidence from a former judge of the ECJ who quite rightly made clear that once you go to the ECJ you are a member of the court; you are not a representative of your country and you might not even hear the cases that your country brings or intervenes on. It is always valuable to have judges from our country who understand our laws, our ways of thinking and our system. It will not be in individual cases that we might be prejudiced.

Baroness Shackleton of Belgravia: No. It is just that if you are agreeing the terms of reference as to how we finally get divorced from the ECJ, not to have a representative who can see it from the other end of the telescope will be a disadvantage—that is, on that particular issue rather than on the bog-standard case that comes up there.

Baroness Neuberger: That is the point I wanted to make.

Baroness Shackleton of Belgravia: That is the issue, not the run of the mill cases that end up there. It is the specific issue of the terms of disengagement.

Baroness Neuberger: And does it not leave us more vulnerable than we would otherwise have been in that particular period not to have a UK judge on the court? That is the problem.

The Chairman: I think, Lucy Frazer, you were entering into the battle on that question, so I will bring you in. It is about being part of the conversation, not necessarily individual cases.

Lucy Frazer MP: It depends on what conversation we are talking about. If you are talking about ensuring that we have the right framework in our system and that we will have Brussels regulation, the maintenance regulation—all those regulations—that is a political discussion that will take place. Of course it is important for third parties to put our case in other fora, and I would hope that the judges are currently doing that, but our negotiation on the relationship will, I suspect, be agreed in a political discussion.

Suella Fernandes MP: During the implementation period, it has been agreed that there will be some kind of mechanism. First of all, there is an article of good faith in the withdrawal agreement that both the EU and the UK will subscribe to, which means that the EU should take no action that would harm the interests of the UK, and vice versa. Hopefully, if that is fully agreed and becomes a treaty and domestic legislation, it will be a guiding principle that will need to be applied to any disputes in that implementation period. That is very important.

We are also discussing a mechanism, not from a judicial point of view but from a legislative point of view, whereby in this implementation period, when the UK will not have technical representation at the heart of the EU, if there are measures, rules, regulations, directives that emerge from the EU that have an adverse effect on the UK, the UK will have a right to intervene and have some kind of say as to whether those rules continue to apply or how they might be modified. That is all subject to negotiations.

The Chairman: Thank you. One of my concerns is that in many of these sessions we are told that there will be a mechanism for this and a mechanism for that. The question is the evidence of these mechanisms actually being put in place. Many of them might take years. But let us park that one, because I am conscious that others are keen to get in.

Suella Fernandes MP: I would like to come back to that point later, if I may.

The Chairman: Fine. We have two more questions on this, and there are points for brevity.

Lord Lester of Herne Hill: Both of you, like me, have been brought up in the common-law tradition, have you not? I would have thought that

one of the great disadvantages of not having a British judge on the Luxembourg court is that the common-law tradition will not be properly reflected in arguments before them. Do you agree?

Lucy Frazer MP: Like a brilliant barrister, a closed question.

Lord Lester of Herne Hill: No, not at all.

Lucy Frazer MP: As a barrister who has operated in what I think is a first-class legal system, with a first-class system of law and with first-class advocates, of course I think it is desirable for our system to be represented in any sphere internationally, because we have lots of lessons that people can learn.

But I do not think that the common law will fade away from every country other than our own. Outside Europe, for example, we are establishing courts in Dubai and in Qatar that are drawing on our common-law system, and we can still influence international law through a number of other means.

The Chairman: So “some loss, but not a great loss” would be a layman’s summary of your eloquently expressed answer.

Lucy Frazer MP: Some loss, but other scope.

Lord Anderson of Swansea: It is possible, of course, that a formal right for the UK to intervene will be negotiated on any matters directly relevant to the UK, but surely one advantage of having a British judge there during the transition period is that, given the collegiate nature of the court, even if they are not involved in a particular case, they are there informally to advise others. That will certainly be lost, will it not?

Lucy Frazer MP: If that is a role that a British judge plays and there is no British judge there, of course that is a consequence that will ensue.

The Chairman: Did you want to add anything on this issue about British judges?

Suella Fernandes MP: No.

The Chairman: Right. Lord Lester has the next question.

Q49 **Lord Lester of Herne Hill:** May I ask you about the withdrawal agreement? The Commission has said that it would favour the Luxembourg court having jurisdiction over the final withdrawal agreement. What is the Government’s view on that?

Suella Fernandes MP: You will have followed the negotiations and the announcements last week. Subsections (3) and (4) of Article 162 of the agreement sets out that point: that the European Court of Justice “shall have jurisdiction over such cases” and “shall be binding” on both parties. That article is not in green—it is not agreed—so you are right: that is the EU’s position, and the UK does not agree with that proposition from the EU.

We disagree for two reasons. First, it is very rare for the highest court of one party to an international agreement to be the final arbiter of disputes under that agreement where another nation state is involved. A previous witness before this Committee, the lady representing the Institute for Government, made it very clear in her evidence that it is not international practice and not the practice of international agreements. Indeed, it is not even the practice of the EU, if you look at other third-country agreements that the EU has struck.

The Chairman: Just for the record, the witness was male. Be that as it may, please proceed.

Suella Fernandes MP: Sorry, that is my oversight.

Secondly, this will mean that there will be a bias or a steer towards EU interpretation of EU laws, EU principles, EU tools when it comes to resolving questions. Those principles would pertain to the integrity of the internal market and the pillars of EU law, which would be very different from what would be required in an international agreement between the EU and a third country such as the UK.

Lord Lester of Herne Hill: Then what is the Government's view on the nature of the withdrawal agreement itself? Is it simply an international agreement that can be subject to a standard international dispute-resolution process, or does it contain elements of EU law?

Suella Fernandes MP: From the EU's perspective, of course it would have aspects of EU law when it comes to the position of EU citizens. That is very much flavoured and informed by principles of EU law and ECJ jurisprudence, as would the financial settlement, for example. However, our position is that there should be a joint committee that provides the dispute resolution mechanism. That is set out in quite a lot of detail in Article 157 of the agreement. It is a mechanism that is common to many international agreements whereby a committee, comprising representatives of the Union and the UK, will meet to resolve disputes.

In subsection (4) of Article 157 there is a whole raft covering the remit of this joint committee. There is a principle of flexibility inherent there; it is not exhaustive. That would be the mechanism for resolving disputes, which is something that we see in many international agreements.

Lord Lester of Herne Hill: We will come later to citizens' rights. You are not suggesting, are you, that in the last resort those rights will be subject to a committee rather than the protection of the Luxembourg court?

Suella Fernandes MP: Citizens' rights stand apart, as I have said. They would be subject to the Luxembourg court.

Lord Lester of Herne Hill: I will come back to that later, if I may.

Q50 **Lord Anderson of Swansea:** The recent concessions, particularly relating to the agencies, suggest that the red line is not as red as it was

in the past. The Court of Justice of the European Union is obviously very jealous of its prerogatives, as we saw with the decision on the European Convention on Human Rights. If the UK were to seek completely to exclude the jurisdiction of the Luxembourg court, do you think there is a significant risk of the court finding the withdrawal agreement contrary to EU law?

Suella Fernandes MP: That is always a possibility, yes. It is always possible to legally challenge an agreement in court. However, I consider that to be very unlikely, for one main reason: assuming that we proceed as planned and intended, the agreement will receive the approval and agreement of the EU and the UK.

In practice, that means that it will have the agreement of the Council, of the Parliament and of the Commission, which all have to expressly endorse this agreement. The member states have to be part of that decision-making process. It would be quite surprising, if we initially get that agreement after considerable involvement from all those various parties at the European Union level, for one of those parties then to turn around and legally challenge it.

There is also a time pressure inherent in this process, of which all parties are aware. I am very confident that there is immense good will, on both sides of the channel, to strike an agreement and implement it.

Lord Anderson of Swansea: You are relying on good will, but that is not the case, for example, in relation to the EU becoming part of the Strasbourg convention. Even though all the parties that you mentioned were in favour, the court still decided to block it.

Suella Fernandes MP: I am aware of that. That is why I began my answer by saying that it is always technically possible for an agreement to be legally challenged in the courts. The Government are mindful of that possibility, and it will affect the journey that this agreement will take.

The Chairman: To go back a little, am I right that you are suggesting that there will in effect be a joint committee for dispute resolution? What is the judicial mechanism? Is there one?

Suella Fernandes MP: The joint committee is the dispute resolution mechanism to govern disputes arising out of the withdrawal agreement. It would be made up of representatives from the UK and the EU; a mixture of executive and ministerial appointments.

As set out in subsection (4), it would supervise the implementation of the agreement, seek appropriate ways and methods of preventing problems that might arise in areas covered by the agreement, and resolve disputes. It may adopt its own rules of procedure, as well as those for specialist committees.

The Chairman: We have the agreement, thank you. But essentially it is not a judicial process, it is an arbitration group of people as yet to be

assembled. Is that a fair summary?

Suella Fernandes MP: That is correct, yes.

Q51 **Lord Judd:** Michel Barnier told the European Union Select Committee that he envisaged a future relationship divided into four pillars: a free trade agreement; co-operation and arrangements on matters of mutual interest, such as aviation and research co-operation; co-operation in the civil law and justice fields; and a future partnership on security and defence, which would also be essential.

Do you agree that those are the four pillars that we should accept? From what you have already said, I deduce that you take the view that there might be different dispute resolution procedures under each of these pillars.

Suella Fernandes MP: That illustration of the breakdown of the new EU-UK relationship is very interesting and helpful. It is not the Government's official reflection of how we would see the relationship panning out. It is not our position. But I agree that it appears to be very comprehensive.

The way forward on dispute resolution mechanisms is similar to what you suggest. There may well be different dispute resolution mechanisms for different areas. None of this is agreed—it is all subject to negotiation—but the UK Government are exploring many options as to how those new dispute resolution systems may operate.

In our trading relationship with the EU, for example, we may well find that an arbitration mechanism is the most appropriate. It would be completely independent of both parties. Again, one can see that in many free trade agreements around the world. It would have authority to be the final forum to resolve disputes. However, it is easy to see how an arbitration model might not work for security, defence, crime co-operation or law enforcement. For those areas, you might have a joint committee mechanism similar to the one I have just set out.

For trade and the economic relationship, the investor state dispute settlement is a mechanism that is out there and used. That may also inform the options. I am not saying that that is what the Government are going to do, but it is definitely a medium that is currently employed.

Lord Judd: So everything is still very much in the air.

Suella Fernandes MP: On the future economic partnership, last week we pretty much agreed the terms of the implementation period. It is really good that we can now move on to discussing with the EU what we want that partnership to be. That will necessarily involve the various dispute resolution mechanisms that relate to those different aspects.

Lord Judd: But these are crucial areas, as you would agree, because it is not just a matter of a formal leave agreement. The point is that we build up a whole culture and spirit of co-operation and understanding in these spheres, which must not be jeopardised. Do you agree?

Suella Fernandes MP: I agree that it is of fundamental importance.

Baroness Shackleton of Belgravia: One of our witnesses, who was previously head of the judiciary, suggested that we will be in real difficulties in relation to digital law, which is one of the fastest-growing areas of jurisprudence. Are there facilities in the current arrangements for us to help in the creation of this and not just the enforcement and application? It is developing quickly. The evidence that we took suggested that, standing alone, we would be rather helpless and we would have to join up with either Europe or America.

Suella Fernandes MP: It was telling that the Prime Minister in her Mansion House speech talked specifically about broadcasting and data. That is a reflection of the importance which the Government attach to it. As she said in that speech, there is an intention and a commitment to safeguard that vital relationship on broadcasting and data, as so many actors in our various countries who operate in these industries rely on the regulations. So, yes, there is a real commitment to ensuring continued participation.

Lord Lester of Herne Hill: As you probably know, we are party to about 32 EU agency agreements. Lord Judd mentioned aviation, for example. So that all the planes can fly, we are party to the aviation agreement in Europe, which is all subject to the Luxembourg court.

I welcome what you are saying about the importance of co-operation, et cetera, but I do not understand how that squares with the idea that when we leave the EU we will leave all these agencies and have to go back into them in some way later on. What is your position on that, taking aeroplanes as an example? It would be nice to feel that, when we leave the EU, we can still take flights safely.

Suella Fernandes MP: Again, as the Prime Minister set out in her Mansion House speech, there may well be subject areas and regimes that the UK still wants to participate in, and indeed be a member of. Those will include some EU agencies. The decision is yet to be made which agencies, regimes and frameworks those will be.

In some areas, the UK Government, Parliament and negotiating teams will want to take the view that divergence is not be desirable and that co-operation and working together is the objective that we want to maintain. If that meant continuing our membership of some agencies, that would be acceptable to our overall programme of Brexit.

Lord Lester of Herne Hill: I put down too many questions about this a year or so ago and got no proper answers from Ministers. Is it your position that even at this stage no decision has been taken about any of these agencies?

Suella Fernandes MP: We are on the brink of commencing the negotiations on these particular issues. Some agencies have been referenced—the aviation and medicines agencies. Those are agencies

with which we have extensive dependency, you could say, and co-operation. They may well be agencies that we want to maintain our membership of.

Lucy Frazer MP: I want to make a general point. Obviously, in a number of sectors and areas, people want certainty as to the future. The EU and the UK have set out a timetable for our negotiations; the Minister has made this point, but I just want to reiterate it. They said that we first had to agree the separation, which we have done. They said that after that we would agree the implementation and the terms of the implementation, which we have done. They said that only then would we discuss the future relationship.

That is why there are a number of things on which we do not yet know what the answer will be. We have aspirations and ambitions. We have said that we want to be very linked—we are not leaving Europe—and that we want to continue our relationship in a number of areas and sectors. We are at the outset and we have just had the guidelines from the European Council on how it wants to discuss the negotiation going forward. This is now the time when we will resolve the questions that you are asking us.

Lord Anderson of Swansea: A necessary price to pay, if we wish to retain membership of the agencies that are important to our national interest, is that we will have to be subject to the European court.

Suella Fernandes MP: The Prime Minister referenced three specific sectors—chemicals, medicines and aviation—and their associate agencies. We would respect the remit of the ECJ in those instances.

Lord Judd: There is the issue of what an agency is and what it is not. The Government have firmly decided that we are going to leave Euratom, and all these points arise in the Euratom context.

Let me come to the European arrest warrant, which is dependent on EU law. Can you envisage any circumstances at all in which we could continue to make use of such mechanisms while refusing to recognise the continuing jurisdiction of the court?

Suella Fernandes MP: We value the effect that our participation in the European arrest warrant brings to our criminal justice and law enforcement frameworks. It is our intention to seek a new agreement, potentially in the form of a new treaty with the EU, which would enable us to continue that access to the European arrest warrant and other criminal justice co-operation and security measures, from which both parties benefit.

Lord Judd: But I return to a point that I made earlier about our national interest and the co-operation, good will and team spirit that have been built up, as with the operation of the European arrest warrant, which I am sure you will agree works extremely well, with a lot to be lost if we do not continue to have those advantages.

There is much at stake and a very high price here. Surely the most sensible arrangement is to have a specific agreement that the European court will continue to apply in this sphere. Everyone has to be on board and sharing in the spirit of what is being done. We should be doing it not just because something tells us that we have to do it but because we subscribe to what it is trying to achieve and we see its value. Is this not a very serious issue indeed?

Suella Fernandes MP: I agree that it is very serious, because, as I said, there is a lot of value in our participation in and access to the European arrest warrant.

However, there are also constitutional and jurisdictional issues, which do not necessarily align with our principle of restoring UK legal sovereignty and coming out of the jurisdiction of the ECJ. Our intention is to work towards securing a bespoke agreement with the EU that would reflect those two principles, whereby we would still be able to contribute to and participate in the extradition process or the general framework of the European arrest warrant but we would also ensure that we were striking the right balance when it comes to reclaiming our jurisdiction from the ECJ.

The Chairman: But as you rightly point out, this is a negotiation, and this pick-and-mix approach to what we do and do not want to play with relies on 27 other parties feeling the same. We are back to the “m” word, I am afraid—mechanisms. It is easy to stare into the abyss in these Committees, but I think you would have to acknowledge that there is a lot of good faith and trust in the fact that we will manage to agree consistently which agencies we are going to be in and which we are not.

Suella Fernandes MP: Yes, that will all be part of the agreement. We can draw on the progress that has been made. According to some commentators and observers, 12 months ago we were looking into an abyss where there was no chance of solving these issues; there was no common ground to be found. Yet in December we saw the Prime Minister strike agreement on seemingly intractable issues. Again, last week, we saw previously insoluble problems resolved to a large extent. We now have substantive agreement on very complex issues. Looking back on that progress provides me with confidence about going forward with the agreement.

We are starting from an unprecedented position of alignment with the EU, unlike other nations that have been negotiating with it. So it is not difficult to envisage what things might look like. I feel very confident about the prospect of identifying what these mechanisms might look like.

The Chairman: I am sure we are all warmed by that stirring speech.

Lucy Frazer MP: The Prime Minister made very clear in her recent speech that every agreement has an element of pick and mix in it. The Canada and Moldova agreements are what those parties agreed. As the Minister said, we are starting from a very different position. We have the

EEA agreement, which is not quite the same as the agreement for everyone in the EU. The EU has entered into a number of different arrangements. It is in their interests that we have the right agreement on security. We have one of the best intelligence security services there is, and it is in everybody's interest that we come to a mutual arrangement that suits both parties. We all want to protect our citizens.

Lord Judd: I must say as a non-lawyer that we have come to a point that is very testing for lay people. Is the law an ass or not? If a thing is working very well, why do you put it in jeopardy for the sake of all sorts of theoretical arguments? The thing works well under the present arrangement. For God's sake, leave it.

The Chairman: I think we are in danger of re-fighting the Brexit debate. I always try to avoid the "If it ain't broke, why fix it?" debate.

Lord Judd: May I move to my next point?

The Chairman: I wish you would, Lord Judd.

Lord Judd: The draft of the withdrawal agreement, published on 19 March, contains a provision, at Article 168, that would allow member states to refuse to surrender their nationals under the European arrest warrant during the transition period. Why was this text included? Is this a forerunner of the future difficulties which the UK might face negotiating a co-operation agreement on justice and security?

Suella Fernandes MP: Are you referring to Article 168 of the withdrawal agreement?

The Chairman: Yes.

Suella Fernandes MP: Article 168 does not refer to the European arrest warrant. I am looking at it now.

Lucy Frazer MP: Article 168 is about entry into force and application.

The Chairman: Is surrendering suspects not covered by it? Please confer with your colleagues.

The underlying part of this question goes back to your rather happy prospect of the future. If we can find a mechanism to remain party to the European arrest warrant, that is great. However, we are already starting to see, in Ireland for example, people using their right to refuse to send people under the warrant. Is that a taste of things to come, or is it all going to work smoothly. I did not articulate that very well, but I think you get my point. You are looking puzzled, Minister.

Lucy Frazer MP: I am disappointed, because we are still subject to the rules that are in place. That is the case throughout the implementation period. Countries should therefore be abiding by the rules that they signed up to.

The Chairman: But if the agreement that is going to be signed up to—

the expression used was “are on the brink of commencing”—gives them an opt-out from following that process, do you think it is going to be used?

Lucy Frazer MP: That is a very specific question that we should come back to you on.¹

Q52 **Baroness Neuberger:** I will move on to the indirect effect of Court of Justice judgments—I am not a lawyer, by the way—such as those on data sharing and the Schrems judgment, which led to the invalidation of the EU-US Safe Harbor agreement, and the impact of EU law on domestic common law.

How far do you think it is feasible to exclude the influence of EU law norms post Brexit? You have already said that we will be bound by the Court of Justice where there are particular agreements. In a more general indirect way, how far can that go?

Suella Fernandes MP: I set out earlier how I understood the way in which direct jurisdiction will come to an end. That is what we are committed to. There may be scenarios where the indirect jurisdiction of the European Court of Justice, to which you refer, continues to apply. For example, where there are agreements with the EU that replicate language, EU principles or EU jurisprudential terms, it may be agreed that those terms should be interpreted and applied in line with the relevant interpretations from the ECJ.

Baroness Neuberger: I accept that. You said that about agreements. What happens when it is not an agreement but nevertheless has an indirect effect of influencing our laws?

Suella Fernandes MP: If there is a piece of domestic legislation that has a concept of EU law in it, for example, there may well be scope for the ECJ interpretation of those principles and language to be relevant in domestic law.

Lord Lester of Herne Hill: An example is the Equality Act 2010, which, as I am sure you know, replicates a great deal of EU law in British statutory form. If a woman complains now of unequal pay or sex discrimination, she can have regard to EU law to interpret the 2010 Act. After we leave the European Union, will she still have that opportunity and facility?

Lucy Frazer MP: The idea is that the judges will be able to take account of it if they think it is appropriate, but they are not bound to do so. That is the case with law in any foreign jurisdiction. If there was a Canadian case that was very similar, counsel in the case would be poring over it.

¹ The Ministers subsequently provided a written response on this point, which is included as written evidence on the inquiry’s webpage:

<https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-justice-subcommittee/inquiries/parliament-2017/brexit-enforcement-and-dispute-resolution/brexit-citizens-rights-publications/>

You can look to it, and it would be appropriate to look to it, if it was exactly the same.

The answer is that you can look to it if it is appropriate, as I am sure it probably would be in the case that you cite, if it is exactly the same, but you are not bound by it.

Lord Lester of Herne Hill: The point I am trying to make, as a person guilty of going to Luxembourg again and again to try to get our statute book to reflect EU law, is this: that would no longer be possible, would it? The woman would no longer get the benefit of what I regard as a more progressive interpretation. She would have to be stuck with parliamentary sovereignty.

Lucy Frazer MP: Some would regard being stuck with parliamentary sovereignty as a good thing, but you are right; there would be no reference. But the court could take into account any decisions that had been made. If laws in other member states are not appropriate, they will be taken to the ECJ, and our court can of course look at those references if it wants to.

Baroness Shackleton of Belgravia: That is not true in family courts, because family courts apply only English law. There is only an obiter decision when applying, for example, Nigerian law because two Nigerians are getting divorced, as in a case called *Otobo*. Otherwise, the English court applies English law.

Lucy Frazer MP: I did not practise family law, and I am answering not as a Minister but with my expertise as a barrister. I would often refer to foreign law in my cases, either to distinguish what I was trying to say or to support it. In many areas of law we look at foreign jurisdictions where our law is similar, especially in Commonwealth jurisdictions, but it might not be the case in family law.

Baroness Shackleton of Belgravia: In family law—this is probably the question I was going to ask a bit further down the line—without in effect hooking up to the European conventions that we are already part of, very simple examples such as “Do you have a *forum conveniens* argument?” or “Is it first past the post?” are entirely European law. It is not in our statutes; it is not in 1975 Acts or many of our Acts at all.

So the English judge unable to apply foreign law at the moment will be caught in not knowing whether we are first past the post because we are applying European law or applying English law as if the case was in America, in which case there are arguments as to which jurisdiction the case can proceed in, which is not determined by who files first.

Lucy Frazer MP: The Government have said from the very outset, and this Committee identified, as did the Justice Select Committee in the Commons, that we need to have as close as possible agreements in tandem with the ones that we have at the moment—so all the Brussels regulations that already exist. That is the Government’s ambition. They

set it out in August in their future partnership framework, and it is interesting to see in the family sphere, in the guidelines set out by the European Council at the end of last week, that that they have identified family as an area where they very much want to continue participation.

Baroness Shackleton of Belgravia: Reciprocation is absolutely key.

Lucy Frazer MP: We understand very clearly that the reciprocal arrangements that exist under the Brussels regulations that we are already part of as a member state are very important, and that mutual enforcement and recognition are extremely important, and we would like to ensure as far as possible that we mirror the arrangements that we already have in place.

The Chairman: So we are back again to “We’ve broken the mechanism and we need to create new mechanisms in effect to have the same effect”.

Lucy Frazer MP: Yes. In civil enforcement, there are some international agreements that we can rely on and that we would want to rely on—the various Hague conventions and Lugano—and we can do so even without being a member state. We are party to them because we are a member state, but equally we can be party to them as an individual country.

The Chairman: I am tempted to get into Brussels I and II, but I will resist that temptation.

Just before we move back to Baroness Neuberger, you said that you would come back to us on Article 168. I think the issue here, which may help your officials when they are looking it up, is that a member state can declare during the transition period that it will not surrender its nationals, pursuant to the EAW framework decision.

You said that you would come back to us on that, so I do not propose to provoke you on it now, but I just want it read into the record that that is what we are asking about.

Baroness Neuberger: Still on the question about the indirect effect, as a non-lawyer I want to pursue the logic. You said, Minister, taking Lord Lester’s Equality Act example, which is based on EU law, that you would expect our UK courts to reference that EU law, because that would be the logical thing to do. You did not say that they would have to do it. Yet surely the logic is that if EU legislation has indirect effect, you would do more than just “expect”, would you not? They would have to. Is that not where the real divide lies?

Lucy Frazer MP: It is a matter for the judge determining the case to decide what is relevant for him or her to take into account when he or she comes to make their decision. I am very sure that counsel on both sides will put forward whatever they think suits their case to argue. I am sure that many European decisions will come before our cases, and it will be up to the judge to decide, once we have left the EU, what account they take of that.

Q53 Baroness Neuberger: I want to move on.

Justice Baudenbacher, who had just retired from the EFTA Court, gave evidence to us. I would like to know the views of both of you on the merits, and indeed on the practicability, of docking with the EFTA Court to ensure comprehensive dispute resolution mechanisms as one of the ways of getting round some of this. He was quite persuasive, I have to say.

Suella Fernandes MP: The UK Government are not in favour of docking with the EFTA Court, to put it simply and directly.

Baroness Neuberger: I think that is an answer.

Suella Fernandes MP: It would save a lot of time.

There are many reasons for that. First, we do not feel that the EFTA Court offers the dispute resolution mechanism that we would seek. The EFTA Court does not provide a forum for disputes between the EFTA states and the EU. Rather, it is for disputes within EFTA states. So it is not necessarily a model that we would want or that necessarily applies to our situation.

It is a court within the internal legal order of the three EFTA states, much as the UK Supreme Court is the highest court within the UK's internal legal order. Its decisions do not legally bind the EU, and decisions between the EFTA states and the EU are not resolved by the EFTA Court. That is one reason: it does not really fit our circumstances.

Secondly, it does not cover all areas of EU law. There are jurisdictional gaps. How would we cover those jurisdictional gaps? It is also a creature of its own statute, and although there are debates about this it would require us to become party to the EEA agreement or statute pertaining to that court, which is not what we want to do. Joining the EEA does not fulfil our objectives in leaving the European Union in many ways, for example our say on laws, free movement—issues like that.

We would also say that the EFTA Court, because of its legal basis in the EEA agreement and the surveillance and court agreement, has to apply the principle of homogeneity of EU law via the EEA. By virtue of that, the EFTA Surveillance Authority and the court "shall pay due account to the ECJ". That is in Article 3 of the surveillance and court agreement, and taken with Article 105 of the EEA agreement it does not respect the principles that I talked about at the beginning; we want to restore legal sovereignty to the UK courts.

Q54 Baroness Neuberger: Okay, but given that position, and assuming that the Government hold to that—Judge Baudenbacher made a very good case, but we accept that we are very much larger than the countries involved at the moment—if the UK objects to the continuing jurisdiction of the European Court of Justice, other than under specific agreements, as you have already said, and to docking with the EFTA Court, for the reasons you have already given, what limitations does that place on our

future relationship with the EU? How do we then have a mechanism for sorting stuff out?

Suella Fernandes MP: That is where we have the joint committee and arbitration mechanisms and/or other avenues, as we have referenced.

Baroness Neuberger: So a political rather than a court system.

Suella Fernandes MP: They will be political, in terms of the joint committee. Arbitration models can have a judicial or quasi-judicial character.

Baroness Shackleton of Belgravia: When you talk about arbitration, what law are you applying?

Baroness Neuberger: Exactly.

Suella Fernandes MP: There are arbitration models, which are included in many free trade agreements.

Baroness Shackleton of Belgravia: I understand the process, but any arbitration is determined by the law that you are applying. What are you applying: domestic law or EU law? What is the arbitrator doing to settle the dispute?

Suella Fernandes MP: The arbitration would be created, and would have its legal basis, in any agreement between the EU and the UK, in a treaty and then in domestic legislation. It would apply the legal jurisprudence relevant to that particular area. This is not the Government's position, but if we had an arbitration mechanism for trade disputes, for example, we would apply the relevant international legal agreements that regulated international trade.

Baroness Shackleton of Belgravia: When would the results be published so that you had precedent?

Suella Fernandes MP: You raise a good point about the secrecy or transparency of the arbitration models. That could be subject to agreement. I do not think there is any prohibition that means that arbitration has to be in secret. If it was agreed by the parties, you could lift that and a body of law could emerge.

The Chairman: You are giving very valiant answers to these questions. As a layman, there is the underlying feeling that: "We do not really know. We're just going to work it out as we go along". I hope that is not offensive, but it feels a bit like that.

I have a practical question about the joint committee. Suppose the committee itself cannot reach mutually satisfactory agreement. Who arbitrates the arbitrators?

Lucy Frazer MP: I think the Minister is giving good answers, as you say, but it is not yet agreed. It is wrong, in a negotiation, to set out what a position ought to be when it is not yet agreed. There are a number of

possibilities that other countries have entered into and that we can follow. One of these has an arbitration clause under which matters of EU law go to the ECJ, and others do different things. You could have final determination by the arbitrator. As we have in disputes between parties in commercial negotiations, you might have arbitration on certain issues where it goes to another jurisdiction. There are a number of examples that we can draw on. It is not yet determined, because we are now looking at it with the EU.

Lord Lester of Herne Hill: But is Parliament not entitled to ask the Government what their position is before the negotiations, so that we understand what is going on?

Lucy Frazer MP: Parliament is absolutely entitled to scrutinise the Government, is right to do so and must ask as many questions as it wants answers to. However, the Government have to draw a balance between showing their hand and getting the right decision, and working out what the right decision is as negotiations develop while keeping Parliament informed.

The Prime Minister has been very clear that Parliament will be updated at various points and will have a vote on the ultimate deal. Only a week or so ago, the Prime Minister set out a number of alternatives. She said very clearly that she wanted a bespoke arrangement and that we would look at a number of these options.

Suella Fernandes MP: There has been a lot of information. I appreciate what you say—that you feel that we are making it up as we go along—but I strongly disagree. The position papers that were put out on law enforcement, dispute resolution and civil and professional dispute resolution have set out the options which the UK is exploring and would be comfortable with.

As we move forward, and with the Prime Minister's speeches at Mansion House and in Munich on issues relevant to justice, we are, step by step, getting a very clear picture of our objectives. As Minister Frazer says, it is now up for negotiation.

The Chairman: I think we all understand that it is an evolving process and that some of it has to be behind the curtain, as it were. However, I find equally in these discussions that as one starts to pick at bits of it the reaction tends to be: "We had not thought of that". I hope that mechanisms will come through that have thought of everything and that it will all be agreed perfectly in the happy way that you have outlined.

Having fired that missile at you, I am now going to move on, because time is against us.

Baroness Shackleton of Belgravia: If EFTA is a dead duck, there is no point asking how we get access to it. That was my question, but it is an academic question that has no validity if the red line seems to be even firmer under EFTA than it is under the European Court.

The Chairman: On that, you gave a number of reasons for saying no to EFTA. The only one that I do not accept *prima facie* is that it does not do everything. The early part of our discussion was that you are going to need different things to do different things anyway. That is outside the scope of this.

Suella Fernandes MP: I do not think we should take it for granted that we would just be able to turn up and get into EFTA. It is very highly dependent on the other EFTA states and the EU 27 agreeing.

Baroness Shackleton of Belgravia: The EU through the back door.

Suella Fernandes MP: There are lots of unknowns that make it quite a speculative, and I agree academic, option.

The Chairman: There is a good deal of speculation here. In the absence of all these new mechanisms, people are trying to grasp for something existing that we can make work. However, I understand your reservations about it.

Lord Lester of Herne Hill: I do not know whether you had a chance to read the evidence last week by Sir Richard Aikens and Martin Howe QC.

Suella Fernandes MP: Unfortunately the transcript is not out yet, so I was unable to read it.

Q55 **Lord Lester of Herne Hill:** What I am going to ask you retraces a lot of the ground that they covered.

The Government claims that "ending the direct jurisdiction of the Luxembourg court in the UK will not weaken the rights of individuals". That is wrong, is it not? It will weaken those rights, because they will no longer have the protection of the Luxembourg court and will be subject to the sovereignty of Parliament.

Lucy Frazer MP: Individuals will still have a right to bring claims through our national courts, as Hugh Mercer said in previous evidence. They will still have a right to go to other member states to pursue claims in their courts.

In the particular area of citizens' rights, they will have a right to go to the ECJ if voluntary reference is made. We have a system in this country of very clear protection of rights, and people will be able to do that through our national courts.

Lord Lester of Herne Hill: I am afraid that I do not understand. It must be my fault. I thought that we had agreed earlier that, to take the equal pay example, somebody will be worse off when we leave than at present because they will no longer have access, direct or indirect, to the Luxembourg court. Instead, they will be subject to whatever an executive-dominated House of Commons decides should happen to a particular measure on equal pay or another measure. I thought that we had agreed that earlier.

Lucy Frazer MP: I think we agreed that on equal pay the judge will in future be able to look to any ECJ decisions, but that there could not be a reference on it.

Lord Lester of Herne Hill: Yes, so there will no longer be cases such as Wendy Smith and Worringham—all those other cases that have gone to Luxembourg. The rights of citizens will therefore be weaker because they will be subject to parliamentary sovereignty without the protection of the Luxembourg court.

Lucy Frazer MP: They will have the protection of the High Court, of the Court of Appeal, and of the Supreme Court.

Lord Lester of Herne Hill: But they will be bound by the doctrine of parliamentary sovereignty.

Lucy Frazer MP: They will be bound by the doctrine of parliamentary sovereignty, and the judge will have the ability to look at the jurisprudence of the ECJ if he thinks it relevant.

Lord Lester of Herne Hill: But they will not have the ability, even under the Human Rights Act, to strike down inconsistent legislation, as they can at the moment under EU law.

Lucy Frazer MP: In relation to any supranational agreement, an individual will not have the ability to take an action against a member state, but they will still have rights and obligations which they can enforce in the courts as individuals.

Lord Lester of Herne Hill: Yes, but my question, again, is: do you agree with the Government's statement that ending the direct jurisdiction of the Luxembourg court in the UK will not weaken the rights of individuals? I put it to you that that statement is wrong.

Lucy Frazer MP: It depends on how you define weakening of the rights of individuals. I think that we have a very strong courts process in our domestic courts, with some extremely able judges, all the way up to the Supreme Court, which has one of the highest reputations worldwide in matters of integrity.

All individuals will be able to bring their cases, both in this jurisdiction and in other member states. In Article 4(1) of the draft withdrawal agreement, it is specifically preserved that European Union citizens and UK nationals can rely directly on provisions contained in Part 2, which is the specific agreement that we have retained in relation to citizens' rights. They will not be able to make references, if that is what you mean.

Lord Lester of Herne Hill: What about the fact that they cannot rely upon the Charter of Fundamental Rights once we leave?

Suella Fernandes MP: I would echo what Minister Frazer has said about the charter. The Government's position is that the charter is not the

source of substantive rights in our UK legal ecology, and that it serves to express them in a document that cannot necessarily be invoked where there is a breach of Article 50—the right to environmental protection.

In those instances, the charter provides not enforceable rights but principles against which other legal bases can be applied. It was never intended to be the source of rights. It is not viewed in that way by the Government.

All the rights contained in the charter's 50 articles have been individually identified as having protection in the relevant domestic legislation. The Government have prepared a right-by-right analysis that goes through all the articles in the charter and sets out where equivalent protections can be invoked by UK citizens in the UK under UK legislation.

Lord Lester of Herne Hill: In a way, this is a question for both of you, because Minister Frazer has answered along the same lines. The British system is unique in Europe, and almost unique in the democratic world as a whole, in having a Parliament that has absolute sovereignty and courts without a written constitution that cannot strike down inconsistent legislation unless it violates EU law. All they can do under the Human Rights Act is make a declaration of incompatibility under the European convention. What I have just said is right, is it not?

Suella Fernandes MP: I agree that the ECJ's strike-out power will no longer be available to UK judges. I consider that to be a desirable outcome. I personally disagree that unelected judges should have the power to strike down legislation when Parliament has democratically decided, as elected representatives of the people, to enact it.

Lord Lester of Herne Hill: So you disagree with the European human rights convention's power given to the European Court of Human Rights? I take that from what you have just said.

Suella Fernandes MP: If Parliament has agreed to allow that power, that is acceptable, but as we are trying to move back to a situation where parliamentary and legal sovereignty is restored to the UK, the strike-down power is not in line with our constitutional heritage.

Lucy Frazer MP: I am happy to talk about some less established examples.

Lord Lester of Herne Hill: To take a concrete example, the Convention on the Rights of the Child has not been fully incorporated into domestic law, has it? That convention is reflected in the charter. Let us suppose that I have a case in which a child needs the protection of the convention and of the charter, because domestic law does not give adequate protection.

Without the charter, and once we leave, the answer will be that a British judge will rule that there is no right, under British constitutional law, to rely upon a convention that has not been incorporated into domestic law.

Suella Fernandes MP: Taking the specific example of Article 24 of the Convention on the Rights of the Child, we consider that adequate protection is enshrined in the UK legal order in, for example, the Children Acts of 1989 and 2004. Section 11 of the 2004 Act places duties on a range of organisations and public bodies to ensure that they discharge the duty to safeguard and promote the welfare of children.

We also have the ECHR and the Human Rights Act. Article 8 of the ECHR relates to respect for private and family life, which is often relevant when children and their family relationships are under consideration. There is extensive and more than adequate coverage within the UK and applying international norms—

Lord Lester of Herne Hill: When you say “more than adequate”, are you hinting, as the Prime Minister has, that you would like to get rid of our commitment to the European human rights convention?

Suella Fernandes MP: No, we are committed to the European Convention on Human Rights and are a signatory to it.

The Chairman: A clear answer.

Lucy Frazer MP: Before we joined the EU, our system was that if the Supreme Court—then the House of Lords—thought that Parliament was wrong, it would say so. Parliament would—should—then change the law. That is the way our system operated and continues to operate.

The Supreme Court’s recent UNISON judgment, for example, said that our legislation on employment tribunal fees is wrong, and the Government are looking at what our legislation on fees in courts should be. That system operated and continues to operate well, because the judges are right to identify that Parliament needs to amend the law. Parliament then acts, as a separate independent body, to do so.

Often, the EU says that our laws are inconsistent and then leaves it to Parliament to change the law. That is a similar type of operation, so I think it is incorrect to say that individuals do not have a remedy. They have an absolute remedy: to go through our court process, which provides that when the Government get it wrong they amend their laws.

In relation to the charter, I read with interest the point you made in a previous evidence session, Lord Lester, when you said that the charter was obviously intended to operate against abuses of power by EU institutions and that it was difficult to see why the charter will matter when we leave and are no longer subject to those institutions. I thought that was a very good point and I just thought that I would reiterate it.

The Chairman: I am sure that, nevertheless, you have picked up the concerns that lay behind, “Our system’s fine. We don’t need this Luxembourg court”. That causes disquiet as to the comprehensiveness of the cover that is provided.

Baroness Shackleton of Belgravia: I will give an illustration of why

this does not quite work. Five or six years ago, I was on the losing side of Granatino in the Supreme Court. The judges, eight to one, decided to uphold a prenuptial agreement, which is not part of our law, and directed that Parliament ought to do something about it. Nothing has been done, and one of my fellow Peers, Baroness Deech, is now having to bring a Private Member's Bill before Parliament.

There is a complete reluctance to touch anything to do with family law for fear of upsetting somebody, although there is a completely united Cross-Bench approach. The system is no longer fit for purpose. Nothing seems to get done at all. The Supreme Court judges say: "We cannot help this. We're going to do this interpretation. It's not in accordance with the law. Parliament please fix it". Six years later, nothing has happened.

Lucy Frazer MP: Absolutely Parliament should act. I am responsible for family law, so I am happy to talk to Baroness Deech about that issue. I do not think you will find that Britain has acted in response to judgments of the ECJ with any greater speed. The ECJ does not necessarily offer a perfect system. We need to ensure that the system that we already have in this country operates well.

Q56 **Baroness Shackleton of Belgravia:** My general question has sort of been dealt with, but I am not quite sure what the mechanism is.

In the Committee's paper entitled *Brexit: Justice for Families, Individuals and Businesses?* we called on the Government to give us a chapter-and-verse view on what was going to happen, particularly in the Brussels regime, when we depart.

I know that you are not a family lawyer, and this is quite specific. We have no information on what work has been done and whether any resolution is in sight. I know that you are bombarded all the time with appeals of, "Help, this is going to be a disaster". If there is no joined-up thinking and there is a gap between leaving the ECJ, not being joined up to Brussels regulations, and the family courts are swamped with old-style litigation under our sovereign powers, it is going to cause a mighty mess.

Quite a lot of people plan divorces and plan to kidnap their children. Without certainty on what the sanctions are and the rules that are being applied, it is very difficult to operate in the system. This is an appeal: is something going on, and when will it be exposed? The uncertainty is causing a great deal of stress.

Lucy Frazer MP: You are very right to raise it, and it is not just family law that is affected; insolvency law and general civil law are too. The Government are absolutely looking at it. You might have been pleased to see that in her Mansion House speech the Prime Minister mentioned specifically the importance of civil and judicial co-operation. I was pleased to see that, as it is a really important part of our negotiation.

This relates not just to family law but to general commercial law too: a lot of our finance depends on the fact that people are willing to sign up to English jurisdiction clauses and have lawyers here to support them. The

legal services market is very much connected to our financial services sector.

For me, this is an absolutely priority. I saw the paper that you put together, and I hope you are pleased that in their partnership paper the Government have committed to a comprehensive reciprocal arrangement. They want to continue to participate in the Hague and Lugano conventions.

Baroness Shackleton of Belgravia: Hague and Lugano existed before we signed up to the ECJ.

Lucy Frazer MP: They did, but we need to ensure not only that we are in them but that there is a seamless transition to them, because there could be a three-month gap.

The Chairman: Minister, my understanding is that Brussels I and II were a significant improvement on those. Falling back on what did not work well enough in the past and ignoring what now works rather well means that you have to create yet another mechanism to make that work. Is that a fair summary?

Lucy Frazer MP: It is a fair summary. For example, the Brussels regulation covers all types of agreements, but the Hague convention does not cover one-way reciprocal agreements or non-exclusive jurisdiction clauses. It is not as extensive as what we already have in the Brussels regulation. As I said, we need to make sure that we have a seamless transition to it.

There is a divergence of view on that. The large body of legal opinion is the one that you have identified. I do not think, for example, that Adrian Briggs shares that view. There are others who think it will all be okay, even if we just sign up to Hague. We are aiming as a Government, and certainly as a department, to ensure that we have alignment that is as close as possible.

The Chairman: So, at the risk of being flippant, Brussels I and II will be replaced by London I and II.

Lucy Frazer MP: I understand your frustration with this, but I cannot tell you, unfortunately, what they will be replaced with. All I can say is that we will ensure that we do what we can in relation to Hague, which we can sign up to. It gives certainty to business, it covers exclusive jurisdiction clauses. It is the type of jurisdiction that is limited. We aim to ensure, from our side in this country, as close as possible alignment, along the lines that we have already got.

Baroness Shackleton of Belgravia: London I and II have to be reciprocal with the EU, because so much good is done between the excellent judges here and the excellent European judges in domestic courts—not the ECJ—on disputes between the various countries. They can just pick up the telephone in relation to a child. We do not know the statistics of how many children who would otherwise be abducted are not

because they are put back pretty quickly. It is better than the Hague convention. It really is a good system. We all hated it when it came in, but it does work. It is difficult to see how we can make this work alone, without the reciprocity.

Lucy Frazer MP: I have read the evidence on family law and I understand it. I operated in cross-border work when I was at the Bar, so I understand completely the importance of mutual recognition.

Baroness Shackleton of Belgravia: Of course, our law applies only English law, so we do not have what you have at the commercial Bar, where different laws are applied.

The Chairman: Lord Judd has been waiting patiently in the wings.

Lord Judd: You have been very absolute on this. Do you not agree that there is one area where the Government's position on the charter needs re-examination? The Government are 100% committed to preserving the Good Friday agreement. Human rights are crucial to that agreement. Crucial to the operation of human rights and the confidence of the population is equivalence in people's understanding of their protection. What is vital for the minority population in Northern Ireland is access to the charter. I do not quite see how the absolute position that you are taking covers that point.

Lucy Frazer MP: As I understand it, the charter was meant to identify and bring together rights that already exist in our law. The underlying rights do not disappear if we do not remain a member of the charter. The underlying rights that we have in many types of legislation, or in common law, continue to exist and will be respected, even if we are not a member of the charter.

Lord Judd: This might seem very clear to you as a lawyer, but in the sensitive community relations of Northern Ireland it is absolutely crucial for the success not just of the theory of the Good Friday agreement but of the agreement itself that the minority population has confidence in equivalence and the reassurance of the Charter of Fundamental Rights at its disposal.

Lucy Frazer MP: You make a really important point about confidence, not only in the charter but generally. It is important that people have confidence that what we are negotiating will maintain their position and give them certainty. That does not mean that we have to retain agreements that we need to leave because people voted to leave the EU. It just means that we need to ensure that they are incorporated into our domestic law and that people know that they are.

A different example is the one we have just discussed in relation to the Brussels convention. It is really important that lawyers around London are telling their clients that we do have certainty with the Hague convention. The Government are doing what they can to make sure that

that convention will apply and that they will have certainty. That communication is very important, as is the one Lord Judd mentioned.

Suella Fernandes MP: The European Convention on Human Rights is something that the United Kingdom has signed up to and it covers Northern Ireland. There are swathes of domestic law covering all 50 articles in the charter that apply in Northern Ireland just as they do in Great Britain. People in Northern Ireland who may want to rely on rights that are referenced in the charter have domestic legislation which they can invoke in court.

Lucy Frazer MP: I would point out that the charter post-dated the Good Friday agreement by 11 years.

Lord Judd: All I can say, and I ask that you consider this point, is that civil society in Northern Ireland, and the Commission itself, is very dubious as to whether equivalence can be maintained if the charter goes out of the game.

Lord Lester of Herne Hill: Trust and confidence are vital in Northern Ireland and elsewhere. The problem is the agreement with the DUP and the absence of any new plan that sorts out the position of the UK. This is undermining trust and confidence, as is the impossibility of solving the border problem. Those are the kinds of matters that are worrying to people in Northern Ireland and to me. What do you say about that?

Suella Fernandes MP: The Government are unequivocal and steadfast in their commitment to the Good Friday agreement and the principles of the Belfast agreement, as is the Prime Minister. That will continue throughout these negotiations. Yes, the issue of the border between Northern Ireland and the republic needs to be bottomed out in legal text, but I am confident that we will find a solution that honours those agreements, does not compromise the constitutional or economic integrity of the United Kingdom by placing a border down the Irish Sea and that does allow us to honour the objectives of the referendum.

Lord Judd: But the Northern Ireland agreement and the Good Friday agreement, in the context of what we are discussing, depend upon trust and confidence. Legal arrangements are no substitute for the progress that has been made between the communities, because the minority community has felt confident with the charter. We are literally playing with fire here. I hope the Government will reconsider this point.

Q57 **The Chairman:** I leave that with you as something to take away. You can feel the passion behind the point and that many people are affected by this.

To return to commercial litigation for a moment, reciprocity and enforceability across borders have been spoken about. How is commercial litigation going to be successfully enforced and arrived at if judgments cannot be enforced across the European Union as they are now?

Lucy Frazer MP: I very much hope we will agree that prior-to-exit cases that are already in train will be subject to mutual enforcement and recognition at separation.

In relation to the implementation period, we have agreed that we are still subject to the continuing rules. There is no question that there will be mutual recognition and enforcement. Going forward, we will either have Hague as a minimum, or something broader that we can join up to unilaterally.

The Chairman: I am glad that you coined London I and London II.

Lucy Frazer MP: You heard it here first.

The Chairman: That is always fun. This is a slightly parochial question. It is not widely understood that British lawyers have played a huge part in shaping European legislation. It is not just imposed on us by the people over there. How will that influence persist post Brexit?

Lucy Frazer MP: You are absolutely right that British lawyers' input has been significant, as counsel and in many other ways, and they are continuing to help shape the future. The Ministry of Justice regularly liaises with the legal profession to shape our future. As I mentioned earlier, there are a large number of opportunities for British lawyers to spread British influence throughout the world. The Dubai court has been set up with a lot of support from the judiciary; Qatar equally so. We have an eminent member of the judiciary leading the court in Kazakhstan. As previously mentioned, we are the leading country in arbitration worldwide. Because our system of law is so well respected, our lawyers are very capable, our judiciary is first rate, people respect our system and we are able to export it. Through that, Britain will continue to play an influential role throughout the world.

The Chairman: A number of non-member and quasi-member countries attended a meeting of the EU Select Committee. One of them said: "You have to understand that after Brexit you are no longer a member, you are a lobbyist". That was an interesting observation.

Lord Lester of Herne Hill: After Brexit, my daughter, who is a member of the Bar, has to go to Ireland to take an exam in constitutional law in order to continue her practice in Luxembourg.

Lucy Frazer MP: I was very pleased to see in the Prime Minister's speech references to the mutual recognition of qualifications as something that she wants to ensure happens. That will protect the legal industry. I was also very interested to hear Hugh Mercer say that he was undertaking cases in a number of jurisdictions that week, or the one before. We already have a number of barristers who operate not only in member states but around the world in countries such as the Cayman Islands and the BVI.

Suella Fernandes MP: I was a barrister who qualified at the New York Bar. That was a very good experience.

The Chairman: Thank you so much, and thank you for allowing us to run a little over time. Could we have a reply on the Article 168 question within 10 days?

Lucy Frazer MP: We will reply formally, but I have just been handed a note that says that this provision is not yet agreed; it is for negotiation. I hope that gives you a bit of assurance, but you will get a fuller answer afterwards.

The Chairman: I look forward to that. As I mentioned at the beginning, if there is anything you want to add, please do. I am glad that you have coined some new terms today and to have got my personal bugbear about mechanisms out in the open. I did not give you the chance to come back on that, but I think you illustrated pretty well what you would have said. Thank you again for your time.