



Select Committee on the European Union

Justice Sub-Committee

Corrected oral evidence: Civil justice co-operation post Brexit—follow-up inquiry

Tuesday 22 May 2018

10.45 am

Watch the meeting

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

Evidence Session No. 2

Heard in Public

Questions 11 - 19

Witnesses

I: Ms Jacqueline Renton, 4 Paper Buildings Chambers; Professor Rebecca Bailey-Harris, 1 Hare Court Chambers; Mr Tim Scott QC, 29 Bedford Row 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

Ms Jacqueline Renton, Professor Rebecca Bailey-Harris and Mr Tim Scott QC.

Q11 The Chairman: Welcome. It is very nice to see you. Thank you for coming today and for giving us your time. This session is very important to us. May I express our gratitude to you for coming? I invite you to introduce yourselves and say what your position is and your professional capacity for being here.

Ms Jacqueline Renton: I am a barrister at 4 Paper Buildings. I specialise in international children's law in the context of family law.

Professor Rebecca Bailey-Harris: I was formerly an academic. I came to the Bar late—I became a pupil at the age of 50. I am a barrister at 1 Hare Court and I specialise in international jurisdictional matters, mainly divorce and money.

Mr Tim Scott: I am a barrister in practice at 29 Bedford Row. I specialise in international family matters, mainly divorce and money, but I also do some international children work.

The Chairman: And you are a Queen's Counsel.

Mr Tim Scott: I am.

The Chairman: As you all know, this session is open to the public and a webcast goes out live, which is subsequently accessible on the parliamentary website. A transcript is made of these proceedings. It, too, will be put on the parliamentary website. A few days after this session you will receive a copy of it to check for accuracy. If there is anything you want to amend, please advise us as soon as possible. If, after the session, you decide that there is something that you really wish you had said in the discussion and by oversight had not included, please send it through as additional evidence. We can accept supplementary written evidence, but again there is a need for it to come rapidly.

Thank you very much for being here. You will know that this Committee, which is part of the House of Lords Select Committee on the European Union, published a report that warned that we were not convinced that the Government had a coherent and workable plan to address significant problems in the fields in which you are all experts. This area of family law and the family law system that operates across Europe is, on the evidence we received before, an important part of our international solutions to family problems.

We are concerned to know what alternative will be put in place post Brexit particularly to Brussels IIa and the maintenance regulation, which exist to deal with issues of family law. If they will not be continued, what will be put in their place?

One year on, what is your assessment of the Government's approach to this issue? Have you had interactions with government? What is your assessment of the direction of travel?

Mr Tim Scott: I have been at a number of meetings—I think about three—with civil servants from the MoJ and DExEU, and a meeting in this House with Lord Keen, facilitated by Baroness Butler-Sloss. I am confident that the Government, at ministerial and civil servant level, are aware of the problems. That is the good news.

What is being done about them is another matter. We simply do not know. Very little positive progress has been made, as far as we are aware, since I came before the Committee to give evidence in January last year, the Committee's report in March, the ministerial reply in December and the two reports that the Government put out in the summer of last year, which were, to put it politely, aspirational—ruder words could be used.

The truth is that we are not really any further forward. At the meetings with civil servants, I got the impression—of course, it is only an impression, because they cannot say anything—that they, too, are feeling a sense frustration.

The Chairman: Is that view shared by all three of you?

Ms Jacqueline Renton: Yes, definitely.

Professor Rebecca Bailey-Harris: We are ad idem on the two reports produced last summer, which were, to use academic parlance, gamma minus—extremely superficial analysis and a statement of aspirations without any analysis at all. Those two reports were deeply disappointing compared with the joint paper from Resolution, the FLBA and the IAFL, which was a good piece of work. They were, frankly, utterly superficial.

The Chairman: So the government reports were superficial, but good reports have come from legal organisations—you mentioned a number of acronyms—that did more in-depth studies of the position and presented more analytical approaches.

Professor Rebecca Bailey-Harris: Yes.

The Chairman: For the benefit of those who are tuning in to this and are not familiar with some of the shorthand, I mentioned Brussels IIa and the Maintenance Regulation. Perhaps, Ms Renton, you might want to explain what those two things cover, as briefly as you can, for anyone who is not a lawyer but is thinking, "What's this about family law? I'd like to know, because I am involved in a divorce process with somebody who comes from another part of Europe".

Ms Jacqueline Renton: I might leave the Maintenance Regulation to the finance specialist, but Brussels IIa is the regulation that deals with jurisdiction for divorce and children matters. It is the first port of call for jurisdiction in this country for those issues. It deals with the enforcement of children orders. It also provides co-operation between the central authorities and courts in dealing with international family law. It is the framework within which we operate and the starting point for all our international cases.

The Chairman: Would anyone like to deal with the Maintenance Regulation?

Professor Rebecca Bailey-Harris: The Maintenance Regulation is a special regulation dealing with maintenance and family law. Before the Maintenance Regulation was created in 2009, family maintenance was slotted in as a minor part of the Brussels I Regulation, which I believe you heard a lot about last week in evidence. The Maintenance Regulation was a great innovation in that it brings a more sophisticated approach to jurisdictional and recognition issues in a separate regulation for families, as opposed to being a sideline in Brussels I. It is incredibly important.

The Chairman: Thank you.

Lord Cromwell: Gamma minus—that takes me back to my university days.

The Chairman: I am sure you were not a gamma minus student.

Q12 **Lord Cromwell:** I aspired to gamma minus. Settle down please, Committee.

Can we stay with Brussels IIa and the Maintenance Regulation for a little longer? They are clearly very important, but in their formal response to our report the Government said that if they could not reach agreement with the 27 other members they would consider how, "Ongoing cooperation in this area could be wound down". Would you like to give us your reaction to such a statement?

Mr Tim Scott: At one level, it is good news if the Government are making preparations for a plan B. The possibility of no overall deal being reached has to be addressed. In that case, it is good that the Government are thinking about it. But I think we all feel that that is a very depressing prospect indeed, and it is not clear what ongoing co-operation being "wound down" would mean. Again, it is a phrase of the utmost vagueness. We do not have the slightest idea what it means.

Whatever it means, it would seem to have to lead on to a replacement set of rules about which we have been given no idea at all. There has been no consultation, even on a fallback "what if?" basis, as to what rules would or might be considered if we were to lose the benefit of the two regulations.

Lord Cromwell: Could I ask a little supplementary question? Answers that we get tend to be one of two: either, "Well, the stuff we've already got will be enough"—the Hague/Lugano approach—or, "Well, we'll invent something new that'll do the same job". From your conversations, do you have any idea which way we are tending on this?

Mr Tim Scott: From my meetings, the Government are clearly hoping somehow or other to keep the two regulations in place or something that closely resembles them. If not, there will by default have to be a fallback to the Hague Conventions, which I think we will come on to in more

detail. We could revert to the rules that were in place before the regulations came into force, but particularly for divorce jurisdiction we are dealing with a very different situation because of the huge number of EU 27 citizens living in this country and of UK citizens living in the 27. It is a completely different position. To fall back on to pre-existing rules would be deeply unsatisfactory.

Ms Jacqueline Renton: The idea that we would stop co-operation is quite depressing. Everything in international family law has been building towards international co-operation, whether in Europe or outside it, because we live in an international world. We have so much movement of children and people coming in and out of this country. Even post Brexit you would hope that we would find a way to be able to co-operate with the other states as much as we co-operate with America, for example. It seems completely counterintuitive that we would wind down co-operation.

Professor Rebecca Bailey-Harris: I echo that. I find the phrase “ongoing cooperation in this area”—family international law—“could be wound down” absolutely incredible in an international context. Frankly, I cannot believe that anybody said that.

Lord Cromwell: I hope it was just a negotiating position, but I guess we will find out.

Q13 **Lord Gold:** I suspect we have a good idea of your answer to my question, but the Bar Council has noted that without the two Regulations the family courts, which are finding it difficult to cope, will find it even harder. Are you aware of the Government addressing this at all or coming up with some ideas?

Mr Tim Scott: Absolutely not. The family court is in the process of modernisation and a lot is being done about this. The present president, Sir James Munby, who is retiring in July, has done a huge amount of work with a view to trying to put a lot more stuff online, having more telephone hearings and all these admirable goals. However, dealing with these things takes up a lot of administrative time. The last thing we are getting any hint of is any additional resources to deal with the extra body of work that we anticipate will happen if we lose these regulations and fall back on the old rules.

Baroness Shackleton of Belgravia: Presumably there will have to be a training process for the judges who have not operated outside these rules.

Professor Rebecca Bailey-Harris: For everybody.

Mr Tim Scott: For everybody. A whole generation of family lawyers has grown up with these rules. The original Brussels II regulation came into force in 2002. We have now had 15 years’ of its operation. We have had seven years’ operation of the Maintenance Regulation, so perhaps most of the judges now sitting have only dealt with the Regulations since they

were appointed. A lot of practitioners have grown up entirely with them. There will be a need for a massive retraining process.

Unless the two Regulations are kept in force, whatever else happens there will be a major change in the law. We have had major changes in the law before, such as the Children Act 1989, which was a great success, but there was a long lead-in time, a lot of consultation and a lot of retraining for practitioners and the judiciary.

Baroness Shackleton of Belgravia: And the courts are in crisis in the division we all operate in, because there are not enough judges to hear under the existing rules. If nothing is done, the muddle and the delay will be accentuated. Do you agree with that?

Mr Tim Scott: Absolutely.

Professor Rebecca Bailey-Harris: It will be compounded by the cuts in legal aid, so there will be a number of litigants in person.

The Chairman: I am so glad to hear you mention that, because to some extent a picture is made once you mention “international”: people imagine high-level divorce actions between fairly comfortably off people, but many ordinary people are affected by this. They are married and they are not well off. The situation has been that they can go to a local court in Britain and get an order on maintenance and have it effected somewhere else without having to embark on the business of finding lawyers in Poland, Italy or wherever. The absence of legal aid in the family courts has created something of a crisis, as I understand it—it is not my field—with people, particularly women but not exclusively, turning up at court unrepresented. The complications of this could be significant.

I have a supplementary question. If there does not seem to be a plan at the moment, when would you expect to see one if we are to get this sorted? How much time do we have? When would you expect a plan to be put on the table to deal with the business of what happens after leaving?

Ms Jacqueline Renton: As soon as possible. It will take extensive consultation once a plan is put on the table in any event. If we are looking at leaving in December 2020, there is already not very much time to play around with.

Professor Rebecca Bailey-Harris: I do not think we want to sound conceited, protectionist or whatever, but there will have to be extensive consultation with people like us working in this field. To date there has nothing systematic like that. As Tim recounted, the civil servants he has met have said, “You’re welcome to send us anything”, but that is very different from hiring experts—I am not saying that they should be us—in the family law field as proper consultants. As far as we know, that is not happening in any systematic way. It should. That is certainly what happens in other countries in which I have worked when there is a new law project.

Mr Tim Scott: It is what happened here when the Maintenance Regulation came in. The civil servants and Lord Keen made it clear that they are very happy to hear from us, but if we do not know what they are working on, what stage they have reached and what problems are troubling them, we do not know how to help.

Lord Lester of Herne Hill: This is not my field either, but I have been reading *The Secret Barrister*, which shows how the criminal justice system is broken. We need to find ways of alerting the public and the politicians to the way the family law system is already gravely damaged and will be much more damaged. Is there any popular writing to point to that could be used to highlight some of your evidence in a way that is not given by lawyers, legalistically?

Mr Tim Scott: I am not on Twitter myself, but I know there is a person on Twitter who goes by the name of Mandy in Listing who apparently spills the beans on the Family Division in the way the secret barrister does in the criminal court.

The Chairman: I would love to know the name. Mandy who?

Mr Tim Scott: Mandy in Listing, who is understood to be a family law barrister. Even if I could reveal it, I do not know their identity.

The Chairman: There used to be someone like that who worked for *Private Eye*. We all used to try to discover the identity. I was one of the few who knew it.

Lord Judd: Chairman, you mentioned women and people of limited means. What burns with me on this issue, which seems to me virtually criminal irresponsibility, is that we are talking about children. We have the UN Convention on the Rights of the Child and all our pious declarations about policy towards children. In the middle of one of the most sensitive but potentially hurtful and damaging situations, we have a void. Am I right?

Baroness Shackleton of Belgravia: Lord Judd is right, because the first criterion any judge has when sorting out money is to look at the children. That is directed by the statute. He is absolutely correct.

Ms Jacqueline Renton: The delay in the family court already in dealing with children cases is very bad and is getting much worse. The children are the ones caught up in it when there is uncertainty over legal issues, which means that you have to live off what will happen about their welfare until you have sorted out the jurisdiction. The more uncertainty there is, the more the only people who will benefit will be the lawyers, because we will have to recreate all the law that we have already made. In the middle of it will be normal families.

Professor Rebecca Bailey-Harris: And it cuts across all fields. Jacqueline is the greater specialist among us in children matters, properly so-called, but the welfare of children, as Baroness Shackleton has said,

cuts across money. The Maintenance Regulation is about protecting children as maintenance creditors.

In relation to automatic recognition of divorces, you are going to have children whose parents' status, married or not, is thrown into confusion if we do not have proper recognition rules on divorce. They are affected at all levels of these Regulations. It is incredible, as was said, that so little time is left to sort this out.

Mr Tim Scott: One story of the sort of thing that the family court has to cope with comes from my own experience of sitting as a recorder in a Midland county court. This was before the family court. I had a couple before me, neither of whom spoke English. This concerned the welfare of children. The mother was accompanied by her brother, who spoke English. He was ostensibly there as her interpreter, but he clearly had his own agenda. It was very difficult to work out what either party was saying, let alone what was best for the children. The idea of having to consider a complex jurisdictional issue in that context is simply unthinkable.

Lord Polak: Can I try to see if there is any balance here? In this country, we are blessed with some very fine civil servants, and we have some experienced and learned Ministers too. I have listened to what you have said already. Is there any chance that the Government are in fact moving forward but have just not told us and you?

Mr Tim Scott: It is possible. I would like to think so. As I said, I am completely confident that they are aware of the problems. I know that some of the very bright civil servants, working incredibly hard, know and understand what these problems are. It may simply be that they are not allowed to tell us at this stage what is going on. I would love to think that, but I am dubious.

Professor Rebecca Bailey-Harris: I fear it is compounding, because everything is so behind. There are such insurmountable issues as the Irish border that we get the sense that the matters that we are talking to you about are being put on the back burner. That is our anxiety. There is so much high politics left to be sorted out, and so little time, that we just do not think, Lord Judd, that the prominence is being given to children matters when everything else is so behind the eight-ball. It is terrible.

Ms Jacqueline Renton: I think they think that, because there are other international conventions, that is their get-out clause, so we are not left with a vacuum of nothing.

The Chairman: Baroness Neuberger is nodding in agreement.

Baroness Ludford: You said that there is high politics involved. Of course, it is not just the urgent taking priority over the important, because the Irish border is also extremely important. It is the interest of journalists, partly. Would it be worth getting some journalists involved? They are always interested in the humaninterest angle. It has been

demonstrated that these are not just dry, legal, court issues and the interests of lawyers. It is about the welfare and fate of individuals and families.

Ms Jacqueline Renton: That is a really good idea. The family court is certainly now more open—journalists are allowed in and allowed to report certain things. You do not see them showing up very often, but I would have thought that that sort of involvement would be very welcome, because it brings it to life.

Baroness Ludford: You need an Amelia Gentleman to do the job on family law in the international context that she did on the Windrush generation.

Professor Rebecca Bailey-Harris: Certainly the *Times* has been addressing quite a lot of internal family law issues, so when some of those are sorted out perhaps they will do that. The trouble is that it is quite difficult to distil the stuff to make it popularly acceptable.

The Chairman: I am going to move us on to the issue of international conventions, which is interesting.

Q14 **Lord Cashman:** The discussion on how we get these stories out is interesting. Baroness Ludford and I served as Members of the European Parliament for a great number of years and saw at first hand, in our casework, the problems of people trying to get access to justice on custody, maintenance and the enforcement of such orders. That has been hugely improved by the regulations that we now have.

During our debates on the EU Withdrawal Bill, it was argued, with regard to family law, that, “the Hague alternatives will be perfectly adequate and satisfactory on our leaving the EU”. Do you think that is a statement of hope and aspiration? Do you agree with it? If not, I would love to hear your main areas of concern.

Mr Tim Scott: We have discussed between ourselves how we can best help the Committee with this. Essentially, there are three separate aspects to it. One is divorce jurisdiction, another is children, and the third is maintenance. It might be helpful if I address divorce jurisdiction, Jacqueline deals with children, which is her special area, and Becky deals with maintenance.

So far as divorce jurisdiction is concerned, there are no Hague Conventions that provide any fallback position at all. If we lose the divorce jurisdiction provisions of Brussels IIa, we are going to have to create our own jurisdictional rules. We could fall back on the pre-Brussels II rules. That would create various problems, one of which—this is a very important point that has not been much addressed—relates to the recognition by other countries of divorce decrees granted in England.

There is a Hague Convention that deals with the recognition of divorces and legal separations. The UK was one of the first countries to sign up to that, but there are only a small number of signatories. Only nine or 10 of

the EU 27 are signatories to it, and those nine or 10 do not include Ireland, France or Germany, which are countries with which we have particularly close connections.

I spoke to an Irish senior counsel about this, and he told me that the law in Ireland is such that if a divorce is granted in any of the UK jurisdictions post Brexit, and the parties are Irish citizens, that divorce will not be recognised in the Republic of Ireland unless at least one of the parties was domiciled in the jurisdiction—England and Wales, Scotland or Northern Ireland—where the divorce was granted. So there is the potential for a lot of people finding themselves in the situation where they do not know whether their divorce is recognised in the country with which they have a very close connection.

The question of domicile is particularly complicated in England and Ireland, where the law is similar, and in Scotland and Northern Ireland. So there is the possibility of what we call limping marriages, where people simply do not know if their divorce is valid in the country where all members of their family may live. They do not know whether they are entitled to remarry or whether, under Irish law, they would be committing bigamy if they did.

The number of Irish citizens here makes that a particularly important point. I have not yet been able to find out whether it applies in other countries where we have large numbers of citizens living here. I do know in very general terms that the French rules on recognition of divorce are much less generous than our rules under the Hague Convention, but I do not know the details on that.

The Chairman: That is very helpful, because we had not contemplated those sorts of difficulties in any way. That is a new issue for us. Thank you for introducing it.

Ms Jacqueline Renton: In terms of children, there is the 1980 Hague Convention on child abduction, which gives you a return remedy if your child is abducted to this country.

The Chairman: Date?

Ms Jacqueline Renton: 1980. Brussels IIa is the EU law that supplements child abduction. So when you have a case where a child is abducted from, say, Spain to England, you apply the EU law and the 1980 Hague convention. The benefit of the EU law is that it bolsters protection for children who have been abducted and makes it more straightforward for the parent who has had their child abducted to secure a return. For example, there is something built into Article 11 that we would call an assumption of protection: in other words, you can assume that the other EU country would protect the child upon return until they get into that court.

That is one protection that is missing without Brussels IIa. One of the other remedies that parents have is that if there are 1980 Hague

Convention proceedings in the other country—say your child has been abducted the other way, England to Spain—if the Spanish court refuses a return, depending on the reasons for the return the parent can try to secure a return in England. We call it a second bite of the cherry. In other words, they have a second attempt at securing the return of their abducted child. That protection is also built into the convention that would be missing.

The convention also builds on UN Convention on the Rights of the Child, so it bolsters the need for children to be heard, which now runs through all our domestic jurisprudence and has been substantially built up over the last decade or so when it comes to enfranchising children.

Those are three examples of the child abduction rules that would be missing without Brussels II revised and that are not replicated in the 1980 Hague. That is one part of it.

The other part of it is whether the 1996 Hague Convention is enough in effect to replicate Brussels IIa. The answer is that they are quite similar, but they are not exactly the same. So it is not sufficient to say that it does not matter because we could rely on the 1996 Hague Convention.

There are various examples. I will use Spain again as one example. If I have a Spanish access order for contact with my child, that can be automatically enforced in England under Brussels IIa. Under the 1996 Hague Convention, there is no automatic enforcement, so you have to go through a recognition and enforcement process. That gives less certainty to a parent, and less certainty and less certainty to a child as to what is likely to happen to them. They can be moved from one country to the other. Will the access order stick, or will it be the subject of quite a complicated piece of litigation? That is one significant loss.

Another significant loss is that the jurisdictional rules under Brussels IIa are not the same as the 1996 Hague Convention, so there are more rules under Brussels II revised that help parents to have a gateway into a jurisdiction. One of them is something that we call prorogation, which is under Article 12 of Brussels IIa, which allows parents to accept that the English court could deal with matters even if they have not had a divorce in England. That sort of prorogation is missing from the 1996 Hague.

Those are just a few examples, but I am concerned when I read everything that the Government think that they are similar enough and therefore it is good enough if you let the regulation fall away and have something else in its place. It is simply not the case, but it involves quite a lot of detailed analysis to be able to show why in practice it is not the same.

Professor Rebecca Bailey-Harris: Finally, on maintenance, there is the Hague Convention on the Recovery of Maintenance 2007. That also has quite significant gaps. It has no general jurisdictional rules showing the link between the country and the court of action. It has no rules for working out priority between competing jurisdictions, because under the

Maintenance Regulation the simple first come, first served is the *lis pendens* rule. The Hague Convention has nothing there, so you fall back on *forum conveniens*, which is a discretionary system where the judge decides which is the most appropriate forum. That is expensive to argue, like all discretionary jurisdiction.

As I say, the Hague Maintenance Convention is principally about enforcement, but interestingly, in relation to enforcement of child maintenance orders, you can have the assistance of the central authority—REMO—but if you are trying to enforce a spouse maintenance order, you cannot.

The Chairman: Baroness Shackleton is our in-house expert on family law.

Baroness Shackleton of Belgravia: I want to direct a question to Mr Scott, if I may.

Do you have any concerns about coming out of this set of rules as to the first past the post for divorce and/or the bifurcation of money and divorce if we do not have adequate replacement rules?

Mr Tim Scott: I think a lot of us found it difficult to get used to the first past the post rules, but we are now used to them. I think that probably most, not all, family lawyers now recognise that the benefits of the first past the post system in terms of speed and certainty outweigh the loss of discretion.

So, yes, if we fall out of Brussels IIa in relation to divorce jurisdiction, it seems inevitable that we will fall back on *forum conveniens* in circumstances where we have vastly more people who are likely to be affected by it. This is one big part of the problem we mentioned earlier about the additional pressure on the courts. Even if only a small percentage of the EU 27 citizens living here have divorces and have enough money to argue on the question of *forum conveniens* and where the divorce should take place, that is one area that will put a lot more pressure on court time. So it concerns me a lot.

Lord Gold: Quite understandably, everything we are discussing is looking at this issue from a UK perspective, but it occurs to me that exactly the same issues will be suffered by the other EU countries if we do not reach agreement. Indeed, it may be worse in the sense that there are more countries there. Is there not pressure from European lawyers practising in this area on their Governments to try to just allow this to continue? It does not seem to me that anyone is prejudiced if we agree that the regulations that we have been discussing just carry on.

Mr Tim Scott: In February this year, the European Chapter of the International Academy of Family Lawyers conducted a survey of as many of its members in the 27 as possible. There were 16 responses. The response was frankly not quite as positive as one might have hoped. There was quite a divergence of approach, but the general message was,

"You've created this problem. It's your problem. Get on with sorting it out".

This is compounded by the fact that the Government have not yet put forward any specific plan for what should take the place of the regulations. The view is, "It's not for us to put forward something in its place. You tell us what you've in mind".

Professor Rebecca Bailey-Harris: Indeed, continuing full reciprocity is the position favoured in the joint paper put out by the Family Law Bar Association, Resolution and the International Academy of Matrimonial Lawyers, but when we put that paper forward, we recognised the political issues. It is very difficult to simply say, "We're leaving the club but we want all the benefits". We said this last time. That is the problem; it comes down to political negotiations. Clearly, that would be the ideal solution, as Lord Gold suggested, but it is a question of politics. Why leave, if that is what we want?

We do think that our colleagues in other countries hope that in the end this will never happen. That is why they are not really active on this.

Ms Jacqueline Renton: The main political issue is the CJEU. Would it be so terrible to say that we will keep in place this family law regulation that we know protects children, instead of reinventing the wheel? It will help us and help countries abroad. The difficulty is that if the CJEU is the one that interprets the regulation, politically that is the difficulty for the Government.

The Chairman: That is the sticking point, absolutely, and drawing the red line around that.

Ms Jacqueline Renton: It is that misnomer that the CJEU is interpreting and governing what we do in the domestic court. The reality is in the field of children. I had one case referred to the CJEU, but it is the fourth case ever to be referred. This has to be put into a proper context. Most of the time we are using our domestic law to interpret what happens. Unfortunately, the political perception is completely different.

Mr Tim Scott: I was in Brussels last week at a meeting arranged by the Law Society to which MEPs were invited to come to discuss this. Only one or two MEPs came, but a lot of their assistants came. They, too, are aware of the problem, and I understand that one or two of the eastern member states—in particular, Latvia, although I am not quite sure why—do regard family law as a particular problem with Brexit.

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Again, first, the individual states can do nothing because of exclusive external competence. Secondly, they are waiting for the UK to put a foot forward.

The Chairman: Put something on the table.

Professor Rebecca Bailey-Harris: Nothing has happened since this paper last summer. I think the second paper was probably worse than gamma minus; it was delta. It has nothing except platitudes in relation to which body is going to oversee anything.

Q15 **The Earl of Kinnoull:** Following on a little from what Lord Gold said, I just wonder how the neighbouring third countries of the EU are dealing with cross-border family matters at the moment. I am thinking in particular of Switzerland and Norway. Jacqueline Renton mentioned the USA earlier, and it might be quite interesting to hear about the USA as well.

Ms Jacqueline Renton: Norway and Switzerland are both signed up to the 1980 child abduction Convention, the Hague Convention and the 1996 Hague Convention. That is how they deal with their disputes. America is signed up to the 1980 Hague Convention, but that is a child abduction convention, so all its rules on jurisdiction are domestic and are governed by its statute, and there is no reciprocity of enforcement, so you have to make an application for an America order to be enforced in England.

The Chairman: So essentially you would have to get American lawyers if you were involved in a dispute.

Ms Jacqueline Renton: Yes, you have to have mirror orders and you have to go through a different process. It is very different.

The Earl of Kinnoull: It is purely a Hague environment.

Ms Jacqueline Renton: Yes. The 1980 Hague is for children who have been abducted, so it is a very specific piece of international family law. Jurisdiction and enforcement are either Brussels IIa or the 1996 Hague. All signatories to the 1996 Hague are signatories to Brussels IIa as well, and then there are a few add-ons to the 1996 Hague such as Norway, Switzerland and Morocco.

The Chairman: This is really important. This is a sub-committee of the European Union Select Committee and the Secretary of State, David Davis, appears in front of the European Union Select Committee. He has referred there, as he often does, to the fact that we get on perfectly well with the United States, so what is the problem?

I just want to make clear that you are saying that if there is a dispute involving divorce, children, maintenance and so on, there is support if there is an abduction, but if there is no abduction there are no arrangements with the United States with regard to jurisdiction or enforcement of orders. Therefore, if you get involved in a dispute on divorce, maintenance or children, you have to lawyer yourself up in the United States if that is where your partner, your spouse, is located.

Ms Jacqueline Renton: Yes. Let us take one practical example. I relocate with my children to America. What does the father left behind in England do about his contact with the children? Does he have automatic

enforcement? No, he does not. He has to make sure that there is a mirror order in place, which, without becoming too technical, is not a complete answer anyway because it is not automatic enforcement. You would probably ultimately have to fight it out in an American court if there were an issue. So it is not the same at all.

Jurisdiction is a bit different, because if you have a case that involves America and England and you are trying to access the English court, at the moment you have the English rules of jurisdiction, with the first port of call of Brussels IIa r. However, I could start children proceedings in England, the other parent could start children proceedings in America, and it would then be an argument about forum, which, as Rebecca has said, is much more complicated, costly and confusing in the divorce context, whereas in an EU context it is about who was first seized, and there are then rules about transfer of children cases. It is not the same thing at all.

The Earl of Kinnoull: Going back to Norway and Switzerland, the UK sort of mirrors them, because we are signatories to the 1996 Hague. True?

Ms Jacqueline Renton: Yes.

Professor Rebecca Bailey-Harris: With maintenance, both Switzerland and Norway are parties to the Lugano Convention 2007, which is very similar to the Brussels I Regulation that you heard about last week. It is not as sophisticated an instrument as Brussels I Recast, which you also heard about, but it has rules about jurisdiction, clear rules about lis pendens and rules about enforcement. So on maintenance, Norway and Switzerland are party with us to a similar system.

The Earl of Kinnoull: And we, of course, would have to persuade all the signatories to the Lugano Convention to allow us in.

Professor Rebecca Bailey-Harris: As you heard very eloquently. We have all read the transcripts of last week's evidence, and the various routes for acceding to Lugano post Brexit were explained more eloquently than we think any of the three of us could do.

The Earl of Kinnoull: To finish off on my question, I turn to Mr Scott. In jurisdictional terms, Lugano would mean that we ended up with the Italian torpedo.

The Chairman: Please explain the Italian torpedo. My friend Earl Kinnoull is very attracted by this.

Mr Tim Scott: The Italian torpedo is a term that I believe was originally coined by an Italian commercial lawyer, so there is nothing racist about it. It means that you start proceedings in a country that has jurisdiction but where the courts are notoriously slow—as, for instance, in Italy—so that you are first in time and you prevent the proceedings being started in what is probably the more obvious jurisdiction, where the proceedings would be quicker.

Classically, in a commercial context, you start proceedings in Italy by claiming a declaration of non-liability in relation to an alleged breach of contract, and in that way you prevent any other party from suing in England for damages for breach of contract.

The Chairman: You drive people towards a settlement, perhaps, in circumstances where they want to avoid delay.

Mr Tim Scott: Yes. You get it so bogged down that everyone has to settle.

Lord Lester of Herne Hill: Then you go to Strasbourg, and after several years the Strasbourg court condemns Italy for delay, and nothing happens.

Professor Rebecca Bailey-Harris: Yes. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 has been violated, but nothing happens.

The Chairman: I am not going down the side road that Lord Lester was trying to take down. Lord Judd has the next question.

Q16 **Lord Judd:** We are faced with the obsessional preoccupation in some quarters of government with this red line in relation to the European Court. Are there any alternatives available to the UK to operate in the way we have in recent years that do not involve the European Court?

Mr Tim Scott: There is the EFTA Court, which I know you heard about last week, which would be a partial replacement and which would be politically more acceptable because the EFTA Court has to have regard to the Court of Justice of the EU but is not formally bound by it. However, that would require that we signed up to EFTA, and that creates its own set of political problems. As I understand it, the Government have said so far that that is not going to happen.

The Government keep hinting that some further dispute resolution body or bodies can be put in place. However, we do not even have a road map, let alone a plan, of what those bodies might consist of. I find it very difficult to see how such a body could be put in place in time for December 2020, let alone March 2019. You have to decide what powers it has over the UK and anyone else who is a signatory to it. You have to decide what its relationship to the Court of Justice and the EFTA Court is. You have to decide where it sits, who sits on it and who pays for it. Then you have to teach the judges and the professions about all this. I simply cannot see that that can be done in the time available.

Professor Rebecca Bailey-Harris: The CJEU is also important to interpreting the Lugano Convention, because decisions of the European Court are highly persuasive in the interpretation of the Lugano Convention, so it has a very important role there. The red line would diminish that persuasive quality.

Ms Jacqueline Renton: For children, there is nothing else. It stands and falls with the EU regulation. If you have the EU Regulation, you have to be part of the Court of Justice of the European Union that is interpreting the Regulation. If you want to strip away all of it, you do not need to be part of the CJEU for the purposes of the children work.

The Chairman: It was interesting that you pointed out that in fact you all get on with this stuff and very little of it ends up in the European Court. In all the years, you have said that there have only been four cases, so our anxieties about interference by an external court are actually exaggerated.

Ms Jacqueline Renton: They are grossly exaggerated. Our domestic judges realise that they should try to interpret the law when they can.

Professor Rebecca Bailey-Harris: Even if we have a small number of direct references, the political anxiety is that nevertheless the jurisprudence of the European Court on references from other countries is highly persuasive.

Ms Jacqueline Renton: It feeds in, yes. The CJEU decisions feed into our law as well, of course, but all they have done is ensure that there is a streamlined and uniform approach. It has never been a negative thing.

Mr Tim Scott: I would defy anyone to point to a single decision of the CJEU in the area of family law that could be regarded as an infringement of UK sovereignty.

Lord Judd: Can I follow up my question by asking all three of you whether you take very seriously our obligations under the UN Convention on the Rights of the Child—a Convention, of course, in which Britain played a key part in drafting? If we take that seriously, is there any way in which the conduct as it is at the moment can be reconciled with our obligations under that convention?

Mr Tim Scott: That gives rise to a potentially very interesting challenge at some point down the line.

Ms Jacqueline Renton: It is all interwoven. The voice of the child and the way it has developed have come from the UN Convention and have been woven into European law and then into domestic law. It is so intermingled, and with the European Convention on Human Rights. It is very difficult to see how you would extrapolate one part of it. We just use the international law every day, because it has become our legal oxygen.

Professor Rebecca Bailey-Harris: With regard to the judgments of the European Court and the opinions of the Advocate-General, I think the increasing trend, as Jacqueline has said, is to regard all this as interwoven and that all the international conventions are the same. I read an opinion of the Advocate-General in a judgment last week in a case that concerned access rights of grandparents. In that opinion for the court, the UN convention was cited. So the UN convention is, as it were, built into the CJEU's approach. That is very interesting.

Q17 Baroness Shackleton of Belgravia: When practising in this area of law in particular, certainty and enforceability, sometimes by knowing that the system works, prevent abduction. You cannot possibly do an experiment or get statistics as to how many people do not abduct their children or do not pay maintenance because they know jolly well that the cost of doing is not worth it.

Bearing that in mind, what is your assessment of the as yet unagreed provisions in the draft withdrawal agreement addressing the application of the Brussels regime during the transition period?

Mr Tim Scott: Do you mean Article 63?

Baroness Shackleton of Belgravia: Yes, precisely. Article 63.

Mr Tim Scott: In general terms, I think it is good, but I know that Jacqueline has a specific point in relation to this.

Ms Jacqueline Renton: They seem to have put in place the Brussels IIa jurisdictional rules—the rules on recognition enforcement and the good practice in co-operating with central authorities—and left out Article 11 on all the rules on child abduction. I cannot quite understand why there is that lacuna. I do not know whether it is because they think it is jurisdiction, which it is not.

Aside from that lacuna, which needs to be sorted out, it is obviously ideal if you continue with the regulation in the meantime on the understanding that you would have the CJEU and full reciprocity. It is what happens afterwards that is the difficulty.

Professor Rebecca Bailey-Harris: The only bad thing is that it is only temporary, as I think we all agree.

Mr Tim Scott: And it is not yet agreed—and, I believe, no timetable has yet been established for its negotiation.

The Chairman: Thank you very much. Lord Polak, I think that your question may have been answered.

Lord Polak: It has rather been answered.

The Chairman: But you may have something else to ask. You have a bee in your bonnet, I can tell.

Lord Polak: There is, actually. I am a non-lawyer, and I think there are people watching who are also non-lawyers. You suggested, Tim, that you did not like or did not agree with the first past the post system but that it sort of worked. Is that a fair analysis?

Mr Tim Scott: Yes, because traditionally English courts operate forum conveniens, whereby the court takes time to consider which is the more appropriate forum and which country has the closest connection with the case, and then it makes a judgement. That is a Rolls-Royce system, and like Rolls-Royces it is very expensive and takes time during which the

parties have to wait; their divorce is put on hold for, say, a year while they find out where the divorce is going to take place. Of course, they do not care where the divorce will take place; they care where the money is going to be sorted out, because there are big differences between England and the rest of the world on that.

That is what we were used to, so when we were confronted with the first past the post system in the EU Regulations it was unfamiliar and most of us did not terribly like it. But in the time in which those Regulations have been in force, most of us, probably the great majority but not everybody, has come to accept that the advantages of speed, lesser cost and certainty outweigh the disadvantage of losing the Rolls-Royce system.

Baroness Shackleton of Belgravia: Very quickly, one of the reasons was not the jurisdictional reason that we as practitioners did not like it. Normally when you are consulted about a divorce, you want to try—you are responsible—to see whether a marriage can be salvaged. First past the post makes you expedite the decision to get divorced, which is what most of us found objectionable: having to push somebody into filing a divorce petition, as Professor Bailey-Harris has said, to put their towel down on the sun lounger and be there first. That is what I think most of us objected to, not the jurisdictional point.

Q18 **Lord Polak:** I am going to a different place. From listening to you and others, I know that you are familiar with what you do and familiar with the law as it is. We will be in a new game. New things will be happening, because we are leaving, period. It sounds as if everybody is making efforts to hark back to what they are used to, rather than saying, "We are going to be in a new game". You are talking about whether Lugano, or the EFTA Court could be beefed up and made different. Can we not look at positives and ideas, as people are clearly doing, rather than saying, "It's not working, and it won't work, because we're used to it"? That is just the impression that I am getting.

Professor Rebecca Bailey-Harris: The trouble is the problem that Baroness Shackleton raises: that there are only two ways known to the mind of man or woman in which you can resolve problems of competing proceedings in different jurisdictions, one of which is forum conveniens and the other of which is first past the post. There are no alternatives.

We cannot think of last past the post. There are two ways, and forum conveniens is difficult. Some recent cases have highlighted the fact that countries around the world do not have exactly the same concept of forum conveniens. It was raised in a case in the English High Court recently that the test is somewhat softer in Australia and Malaysia, for instance, than it is in England. I quite understand the impression that we are giving of being very negative, but I cannot think of any other lis pendens solutions than forum conveniens or first past the post. I just cannot think of them.

Baroness Ludford: Are you saying that your objective view is that we are in the best scenario now, and any alternative will be worse?

Mr Tim Scott: It is not worse for us, because it would create a bonanza of work for us.

Baroness Ludford: Yes, but for people?

Ms Jacqueline Renton: The difficulty for children is that all that the Europeans have done has increased protection, co-operation and certainty for them. You talk about reinventing the wheel, but it is difficult to see why you would do that, because everything they have done in international children law is so positive that you would just want to continue that.

The Chairman: Lord Polak is raising something important, which has to be there and must not be the elephant in the room. There is a suspicion in the general public that lawyers like to keep things as they are because that is what they know, and, if you like, it is convenient for lawyers for things to remain the same. Are lawyers any good at thinking of new ways of doing things? Is there a reluctance to adjust to the new? You are saying that actually this has been a story of progress which, particularly in the interests of children, has taken us to a place where everything else looks as though it involves a step backwards.

Ms Jacqueline Renton: It is also a lawyer's dream to reinvent the wheel—

Baroness Shackleton of Belgravia: It is not a dream—we just get more costs. That is the problem.

Ms Jacqueline Renton: —to go to the Supreme Court, reinterpret everything, to have a body of law about the 1996 Hague Convention.

The Chairman: So it is a feast day for lawyers.

Ms Jacqueline Renton: Absolutely. It is a dream.

Mr Tim Scott: Absolutely.

Lord Cashman: Forgive me. I am also a non-lawyer, although I have dealt with and legislated on European law. Is not part of the problem that there is no alternative plan to be positive about?

Ms Jacqueline Renton: Yes.

Mr Tim Scott: Absolutely right.

The Chairman: We have reached a point of consensus around the table: no positive plan is on the table for us to debate.

Lord Judd: This is perhaps not quite in the line of some of the recent questions. First, there is such a thing as personal and professional integrity. In the end, the standing of the legal profession stands or falls on its integrity. In that context, would you not agree that it is terribly important to keep arguing, right to the bitter end, for what you believe is right?

The Chairman: All our witnesses are nodding, and there is a consensus around the table from the lawyers in this forum.

Lord Cashman: And the non-lawyers.

Lord Judd: The second point is this: are there not too many lessons from history about too many lawyers succumbing to the argument that we have to come to terms with what is not acceptable and help to make it work?

The Chairman: Can you say that more loudly, because I do not think that people could hear?

Lord Judd: History has taught us that there is plenty of evidence from history of too many lawyers succumbing to pressure to “come to terms with reality” and make things work, with disastrous consequences.

Mr Tim Scott: Lawyers can work only with the law that is legislated. All of us have spent quite a lot of time in the last year doing our best to try to mitigate what we see as the potentially damaging consequences of Brexit in our specialist field. But in the end, we will work with what we are given.

Q19 **Baroness Neuberger:** I think you have answered this, but in her Mansion House speech in March, the Prime Minister said: “We will want our agreement to cover civil judicial cooperation, where the EU has already shown that it can reach agreement with non-member states, such as through the Lugano Convention”. We have talked about a lot today. She continued, “although we would want a broader agreement that reflects our unique starting point”.

You have already said that you cannot see anything on the table. How realistic and achievable is this aspiration before December 2020?

Mr Tim Scott: First, I am not sure exactly what our unique starting point is.

Baroness Neuberger: I was wondering whether you knew, because I did not.

Professor Rebecca Bailey-Harris: I do not know what the unique end point is.

Mr Tim Scott: I do not see that we are exceptional in any way. We have Polish families living here and English families living in France. What is unique?

Professor Rebecca Bailey-Harris: What is unique? Absolutely.

The Chairman: The argument for “unique” would be that we have been part of this and have embedded it in our law, so it is part of the custom and practice of our lawyering now. We are therefore in a different position from somebody who is coming in from outside and wanting to join the European Union from base one. Given that we have had all this in

place, it makes our future relationship somewhat different, so cannot we build on what is already there? I suspect that is the thing. That is why Lord Polak is saying that we could have something like EFTA but with lots of bells and whistles attached that made it much more like what we have now, or we could have a Lugano kind of arrangement but with some more add-ons that might make it workable. Is that possible?

Baroness Neuberger: Would that be possible if we still had the red line with the Court of Justice?

Mr Tim Scott: It would be very difficult.

Professor Rebecca Bailey-Harris: It is not just the Court of Justice either. As you were told last week, the way the EU works, if you have EU competence in a particular legislative field such as divorce, child abduction or maintenance, you cannot negotiate individually with the Member States; nor can they negotiate with outside states. I do not think that the Mansion House speech addresses that. I know that was of great concern to you when it was pointed out last week. If there is concern in the commercial field, the concern is even greater in the individual and children field.

The Chairman: One of the things people who advocate the Brexit position keep saying to us is that we will just have bilateral arrangements, one to one with each of the countries in Europe. The discovery was that that is not possible.

Mr Tim Scott: They will not even talk about it.

Professor Rebecca Bailey-Harris: That is their rules about external competence. If the field is governed by the scope of the Regulations, you cannot say, "I'm going to have a special deal with Latvia".

Mr Tim Scott: One other feature that we stand to lose, which was mentioned last week, is the European Judicial Network, which is particularly important in family cases.

Baroness Neuberger: Picking up the phone.

Ms Jacqueline Renton: It also works both ways, so if you do not have the protection for our children in Spain or wherever, the Spanish do not have the protection in England. So why would they want to reinvent the wheel when they think that the regulation gives their children and families the best protection possible? There is no reason for them to enter into such an agreement.

The Chairman: So the issue of reciprocity is somehow lost in some of this.

Ms Jacqueline Renton: Yes.

Mr Tim Scott: There has already been a case in a Polish court of appeal when it refused to make an order returning the child to England under

the 1980 Hague Convention, and one of the grounds for refusal was because of the uncertainty of the status of EU 27 citizens after Brexit.

The Chairman: That was a recent decision.

Lord Lester of Herne Hill: It seems to me that responsibility for all this does not lie with the legal profession but with Ministers. You are not Ministers; you are doing your best to explain the virtues of what we have and the vices we would have if we replace it. That is the first thing I would like to see whether you agree with.

The second thing is that if you look at the criminal process, on which our Chair is the great expert, once you break the system it is extremely hard to remedy the situation. Therefore, when Lord Polak talks about being positive, as I understand your evidence you are saying, "For heaven's sake, beware. What you are now doing is threatening to break the system, which will not be easy to put back together, and in the end it will be about children, women and men—human beings—not about budgets".

Mr Tim Scott: I think we all feel that we are being positive, because we are trying to help with the transition. As soon as we are given a plan, such as the Prime Minister mentioned in the Mansion House speech, we are ready on the starting blocks to try to help to make it work. But we are not there yet, and we do not know when we will be.

Professor Rebecca Bailey-Harris: No Ministers have approached us—any of us. Maybe I am out in the cold, but they have not approached my two colleagues. It is quite extraordinary. I think Lord Polak thinks we are being very negative, but we are into damage control. There are terrible possible consequences for families, including children.

Baroness Shackleton of Belgravia: Uncertainty is a killer.

Baroness Neuberger: We ought to make sure it is on the record that you have also tried to make it clear to Ministers that this needs to be sorted out. You have been in there, saying, "Come on, we've got to sort it out", and as yet have had no response.

Mr Tim Scott: Ministers have listened very carefully and politely, as have responsible civil servants, so we do not know where the blockage lies. It must lie further upstream at the political level.

The Chairman: I thank all three of you. This has been an illuminating and terrific session—really wonderful. You have put forward complicated issues with great clarity and simplicity. As we all know, it is important that we illuminate the law in accessible ways. It has been very helpful indeed and I thank all three of you.