HOUSE OF LORDS

# Select Committee on the European Union

## Security and Justice Sub-Committee

## Corrected oral evidence: Post-Brexit co-operation on civil justice and family law

Tuesday 15 September 2020

10 am

Watch the meeting

Members present: Lord Ricketts (The Chair); Lord Anderson of Swansea; Lord Arbuthnot of Edrom; Lord Dholakia; Baroness Finn; Baroness Goudie; Baroness Hamwee; Lord Kirkhope of Harrogate; Lord Polak; Baroness Primarolo; Lord Rowlands.

Evidence Session No. 1 | Virtual Proceeding | Questions 1 - 15

### Witnesses

I: The Rt Hon Lord Keen of Elie QC, Advocate-General for Scotland and Ministry of Justice Spokesperson in the House of Lords; Alasdair Wallace, Deputy Director of Civil, Family and Tribunals, Ministry of Justice; Paul Norris, Head of Private International Law, 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

Lord Keen of Elie, Alasdair Wallace and Paul Norris.

Q1 **The Chair:** Minister, a very warm welcome to this meeting of the EU Justice and Security Sub-Committee, and welcome to your officials. Thank you for giving us your time this morning on a very important issue, which in our view has not had much attention through the Brexit process: what will replace the EU-based instruments for civil justice co-operation.

This subject touches the lives of many people who get involved in civil proceedings across borders in Europe: divorce proceedings, maintenance arrangements, child access rights, problems that consumers and small businesses have with civil claims. We are very grateful to you for the opportunity to go over this set of issues this morning. This is a public meeting. It is being broadcast and will be transcribed. We will make sure that you see a draft of the transcript to correct any errors before it is published.

Minister, before we move on to the main issue of the meeting, there have been some very significant developments in recent days, which have impacted on the negotiations and their tone, particularly in relation to the withdrawal agreement and the protocol, and have caused disquiet across the House.

As a committee, we thought we should take the opportunity of you appearing before us this morning to ask you at the outset to address these developments. As a committee, we have been very concerned that post-Brexit attention has focused on trade. It has not really dealt with significant implications for UK law enforcement and justice co-operation or, indeed, this area of civil justice.

In particular, I want to ask you about the Government's admission at the Dispatch Box that their United Kingdom Internal Market Bill breaks international law. In your view, what implications does that have for the atmosphere of the negotiations and our prospects of reaching an agreement with the EU on future justice and security co-operation?

***Lord Keen of Elie:*** Thank you to all members of the Committee. I have with me two senior officials from the Ministry of Justice, who may seek to address particular points as we go through. When we reach that stage, I will ask them to introduce themselves.

In the meantime, it is entirely appropriate that I address the first question, which you kindly intimated to me last night, on what you say is the Government's recent admission that their internal market Bill breaks international law. That is of fundamental importance and, indeed, of direct relevance to this committee.

Of course, I do not accept the underlying premise of this question, although I appreciate that it was prepared and perhaps prompted by something that my right honourable friend the Secretary of State for Northern Ireland said in the House last week. For reasons that I will elaborate upon in due course, I consider that he answered the wrong question. As a consequence, the whole matter has been taken

out of context. If I might be permitted, I can briefly set out what I perceive to be the position here.

The Northern Ireland protocol begins with a preamble that addresses certain fundamental rights and obligations that will be maintained through the operation of the protocol and future agreement. Those include: the fundamental importance of the peace process and the Belfast agreement; the acknowledgement that there is a need to avoid controls at ports and airports in Northern Ireland; the acknowledgement that Northern Ireland is part of the customs territory of the United Kingdom; and the importance of maintaining the integral place of Northern Ireland in the United Kingdom's internal market. That is then reflected in Articles 1 and 4 of the protocol itself.

There is a provision at Article 16 that says, "If the application of this Protocol leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate safeguard measures". There are then procedures to be followed in respect of that, to be found in both the protocol and the withdrawal agreement itself.

All that has to be read against the background of customary international law. The Vienna Convention on the Law of Treaties does not apply to a treaty between a state and a body such as the EU, but it is widely acknowledged that certain provisions of the convention reflect customary international law. Article 26 requires all parties to discharge their treaty obligations in good faith, and Article 62(3) provides that a party may withhold its treaty obligations in the event of a fundamental change in those obligations, as entered into at the time the treaty was signed.

Against that, I have to look at the factual matrix that has emerged. It may be disputed, but I have to take the factual matrix as it has been identified by Her Majesty's Government. That is reflected in a number of observations made by David Frost, our chief negotiator, and indeed last night in the House by the Prime Minister.

Two areas of very particular concern have arisen. First, the joint committee has not come to an agreement on goods at risk moving into Northern Ireland. There have been suggestions, I am advised, that it may not do so and that it may leave all goods moving into Northern Ireland at risk and therefore subject to controls. That is not an outcome that either party could in good faith have wished for or anticipated with respect to this agreement.

Secondly, an even more fundamental problem is the suggestion that has been made in the course of negotiations that the EU would not list the United Kingdom as a third-party country for the movement of animal-based products and other foodstuffs, with the result that we would be effectively barred from moving such products within our internal market and, in particular, into Northern Ireland. That, in the opinion of the Government, would have a direct impact on the stability of the

Northern Ireland settlement. It would have societal and economic implications. Therefore, they must be in a position to guard against it.

As against that, Article 4 of the withdrawal agreement provides that EU law will have direct effect and that there will be domestic remedies in respect of that direct effect. Therefore, it would be very difficult to take the steps required in the event that Article 16 is triggered in the face of Article 4 of the withdrawal agreement. That is because, in view of our dualist system, we have already drawn down that international treaty obligation into our domestic law by virtue of Section 7A of the withdrawal Act.

We are in a situation where, at the 11th hour, we might be required to respond to what we regard as a failure of good faith on the part of the EU and a fundamental change in the obligations undertaken in the protocol, and yet be faced with primary legislation that is already enforced. In order to cope with that eventuality, which we hope does not arise at the end of the day, we have to be in a position to move quite swiftly. That is why the Government have taken the powers in the internal market Bill to proceed and deal with these matters by way of regulations, which will be presented to Parliament under the affirmative procedure. To contemplate trying to deal with it by way of primary legislation would simply be a nightmare.

Let me be clear: if the Government take these steps in response to what they perceive to be a breach of the treaty obligations and the obligation of good faith in the face of what they perceive to be a fundamental change in their obligations under the protocol, they will not be acting in breach of the treaties; they will be drawing in the rights and obligations provided for in the treaty, in the protocol and in customary international law, to resolve the issue. The dispute mechanism under the treaty would then come into place, but it would not be a breach of the treaty for the Government to do this and it would not, therefore, be a breach of international law. Therefore, the Government are adhering to the rule of law in respect of this matter.

There may be some complaint that the provisions of the Bill are widely drawn. As a matter of drafting, that can be addressed in due course, if it is required to be. I would emphasise that the straightforward proposition that the internal market Bill breaks international law is not, in my opinion, correct. Therefore, I am concerned that it has coloured so much of the debate in the last few days. I am concerned that it has clearly impacted upon our perception of how we can deal with Lugano and other international relationships going forward.

I wanted to make my view on the position clear in regard to this matter. I hope to an extent that is reflected in the comments which the Prime Minister made last night and the comments which Michael Gove, the Chancellor of the Duchy of Lancaster, made last night in the debate in the Commons.

**The Chair:** Thank you very much, Minister. That is a very comprehensive and important statement, which goes well beyond the remit of this particular sub-committee, although we have a meeting of our EU Select Committee this afternoon,

which is very much concerned with this.

I suggest that we now move on to our main business. Each member will put questions to you. If any member wishes to follow up on the important statement that you have made, of course they are free to do so. Rather than develop into a broad discussion of that important statement now, I will come back to the main issues, and thank you very much for making that clear.

***Lord Keen of Elie:*** Before we proceed, I will ask the MoJ officials to introduce themselves, because members of your Committee may wish to direct particular questions to them.

***Paul Norris:*** Good morning, Committee. I am the head of private international law policy at the Ministry of Justice.

***Alasdair Wallace:*** I am head of the civil, family courts and tribunals team in the Ministry of Justice's legal advisers.

Q2 **The Chair:** Thank you very much. You are both extremely welcome. By all means, signal if you would like to follow on any of the Minister's replies.

Minister, let us come to issues of civil and family law. You assured the House in December 2017 that the Government would seek a "close and comprehensive" agreement with the EU on civil justice co-operation. In February this year, the Government confirmed that they were no longer asking for a deal with the EU in this area at all. Could you set the context for us by explaining why the Government have changed their mind in that fundamental way?

***Lord Keen of Elie:*** I am not sure that it is simply a change of mind, if I can put it that way. It is clear, and has become clearer, that civil justice agreements do not normally feature as an aspect of future trade agreements. Therefore, while carrying on the negotiations for the future relationship, it became apparent that it was rather difficult to maintain civil justice co-operation as part of the negotiations.

Furthermore, it was perceived that there were alternative routes to ensuring that we have a suitable relationship with the EU 27 members after the end of the transition period, such as by way of the Hague convention and appropriate changes to domestic law, which we sought to make by way of a number of statutory instruments, some of which are still on their way through Parliament and some of which have yet to be presented to Parliament. It does not reflect a desire not to have civil justice co-operation with the EU 27 any more than with all other third-party countries.

Q3 **Baroness Primarolo:** Could I draw attention to my entry in the Register of Members' Interests? I am not sure it is relevant, but I would rather make sure that I have done that before starting.

Good morning, Minister. It is very nice to see you. Members have been told repeatedly that extensive work with the EU 27 to replace the Brussels regime was being undertaken by the Government behind the scenes. Why did this work not

appear to bear any fruit?

***Lord Keen of Elie:*** The view is that we are not seeking to mimic the Brussels regime. We are of the view that the Hague convention regime, which the EU itself operates for third-party countries to a very large extent, is a suitable substitute when you allow for appropriate changes to domestic law. There are some differences between the Brussels regime and the Hague convention regime. There are those who would suggest that there are advantages in the Brussels regime and those who would suggest that there are advantages in the Hague regime. As I say, we are not engaging with the Brussels regime because it is available only to EU members, and we will have ceased to be a member, and no longer a party to it, after the end of the transition period.

**Baroness Primarolo:** The evidence taken by this committee from witnesses described the Brussels regime as the gold standard and acknowledged that there are international conventions and instruments which the UK could fall back on when we step away at the end of this year. They were unanimous in the view that none of these alternatives offered as good a system as the Brussels regime of EU regulations and therefore would be detrimental in the area of civil law. Could you comment on that? Do you not agree with it as a statement?

***Lord Keen of Elie:*** I do not agree with it as an unqualified statement. There is a respectable body of opinion from practitioners that many aspects of the Hague convention regime are preferable to that of Brussels. One example is the Brussels rule on lis pendens, which means that the first person to start, say, divorce proceedings secures jurisdiction, which prompts an unnecessary rush to court. That feature is not in the Hague convention regime. There are elements of Brussels that I acknowledge may be seen as more effective, in some respects, than the Hague regime, but there are other aspects where people will say, “No, actually we prefer to be in the Hague regime”. Let us remember that the Hague regime has worked perfectly well as between the EU and third country parties as well.

**Baroness Primarolo:** Would I be right in saying that you are confident that, when we leave at the end of this year, the arrangements we have in place in this area of law, complex and interrelated as it is, will be as good as, if not better than, the arrangements we currently have?

***Lord Keen of Elie:*** That is a subjective judgment. They will be, in my view, entirely satisfactory. They will be workable to ensure that families and children do have the rights and protections that they require in this area.

**Baroness Primarolo:** Satisfactory does not necessarily imply the best or the gold standard, does it?

***Lord Keen of Elie:*** It is a question of who regards what as the gold standard. As I say, there is no uniformity of opinion that Brussels forms the gold standard. There are those who would say it does; there are those who would say it does not. I would not

say either is a gold standard. I would say that both seek to achieve the same general objectives, sometimes in different ways but with equal efficacy.

**The Chair:** A legal expert we had evidence from earlier suggested that one reason the Hague convention was preferable to the Brussels regulation was in child abduction. It was an issue of speed at which cases could be heard and settled. Of course, where it comes to child abduction issues, delay can be very damaging.

***Lord Keen of Elie:*** There is also the point that, in the context of child abduction, the Brussels regime can trump orders of courts, as it were. Some people see that as an advantage, others see it as a disadvantage, in this context. I acknowledge that there are differences, but there is no clear, uniform opinion that one is superior to the other. It is a case of saying, "Yes, they are different to some extent".

Q4 **Lord Dholakia:** Minister, can I take you back to December 2017? You told the House that there would be no cliff edge in this area. The transition period ends in three months. There are no negotiations with the EU to replace these arrangements. What is the Government's plan for European civil justice co-operation?

***Lord Keen of Elie:*** It falls into two parts. First, on the Hague convention regime, which I have just mentioned, we are at present a party to many of the conventions. However, as regards some of the more recent conventions, we are a party by virtue of our membership of the EU. That is why in the private international law Bill we are taking steps to sign up directly to membership of those conventions, which cover a wide variety of areas, including matters pertaining to maintenance. We are already a direct party, as regards divorce, to the 1970 convention, and as regards child abduction to the 1980 convention. That is part of it.

The second part is our negotiations to join the Lugano convention. That has very little direct impact on family law, except in the area of maintenance. It has wider implications, as the noble Lord knows, in regard to civil justice co-operation and issues of jurisdiction and enforcement. We made our application on 8 April. It has been supported already by Switzerland, Norway and Iceland. Of course, it will also require the consent of the EU, and indeed of Denmark, which happens to have opted out of the Brussels regime. Therefore we await that.

We have put into Clause 2 of the private international law Bill a provision whereby we can proceed by way of regulations to deal with this, in order to avoid the delays that would be incurred if we needed primary legislation. Once we have brought it into domestic law, we can lodge our instrument of accession with the council of the Lugano convention and it will take a minimum of two months before we are actually a member. If all goes well, we hope that we can achieve membership within at least a short time of the end of the transition period, but we cannot dictate to the EU on whether it will consent to our membership.

It occurs to me that it would be in the interests of all EU members, as well as the UK, if we were members of Lugano. I find it very difficult to conceive of why they would not wish to have us as a member.

**Lord Dholakia:** Thank you for clarity in this matter.

Q5 **Baroness Goudie:** Good morning, Minister. It is nice to see you. On the Lugano convention, on 28 January this year the Government announced that they had received messages of support from Norway, Iceland and Switzerland. What progress are the Government making, going further on this, as to the scrutiny, under the provisions of the Constitutional Reform and Governance Act, of the relevant international agreement? It is really important that we get this moving.

***Lord Keen of Elie:*** I entirely agree, and we are taking forward the need to address the Constitutional Reform and Governance Act process. We will shortly commence the scrutiny process of the Lugano convention in terms of that 2010 Act.

**Baroness Goudie:** When will that be?

***Lord Keen of Elie:*** It will be shortly, when time allows. It is certainly imminent and we are concerned to try to achieve a situation in which we can have Lugano membership by the end of the transition period. That may be very tight, because although we have the process under CRaG we still await the consent of other members, including the EU, and we require legislation in the form of the private international law Bill to bring this into domestic law.

**Baroness Goudie:** It would be helpful if we had some form of timetable, so that we as a committee and parliamentarians could monitor this, because it is a really serious issue.

***Lord Keen of Elie:*** I quite understand that. This matter has been the subject of ongoing discussion within the Lord Chancellor's private international law advisory committee, including the issue of what we do if there is a gap between the end of the transition period and our accession to Lugano. I am not sure if officials can give any more detail, but I understand that it will be done within weeks. I commit to that, but I cannot commit further than that.

**Lord Rowlands:** Minister, you have mentioned that it might not be agreed to by the end of the period. What mood are you in on this issue? Do you have any feedback from the European Commission and others as to whether they will be favourable?

***Lord Keen of Elie:*** No, I am not in a position to say that. I can say that Switzerland, Norway and Iceland have responded very positively and publicly to our application. I hope that will influence member states, but at the end of the day this is a Commission competence; it is an EU competence. Therefore, trying to engage with individual member states may not be terribly productive. For my own part, I find it very difficult to conceive of any reason why the EU would not want to see us as members of Lugano. These are reciprocal arrangements that benefit all parties, but I cannot second-guess their position.

**Lord Arbuthnot of Edrom:** If we do not accede to Lugano, or even if there is uncertainty about it, is there a risk of divergence between the UK and EU jurisdiction judgment-enforcing processes? That might cause litigants, some of

whom, many of whom or perhaps all of whom might not be in the UK, to start parallel proceedings both in Europe and in the UK, which would be extremely expensive and damaging to business as a whole.

***Lord Keen of Elie:*** There is that distinct risk and I acknowledge it. However, the risk of double proceedings, sometimes referred to as the Italian torpedo, exists even under the Lugano convention. That criticism is sometimes made of Lugano in comparison with the Brussels position. One would hope that if we are members of Lugano, we would make the same positive contribution to the development of that convention as we did for the Brussels regime.

I quite acknowledge that issues of jurisdiction, recognition and enforcement may become more complex if we are not members of Lugano after the end of the transition period. We will then rely upon our domestic law, but without any reciprocal enforcement, because each country will in turn rely upon its domestic law in dealing with us.

Q6 **Baroness Finn:** Good morning, Lord Keen. I am transferring attention to family law at this stage. The EU's negotiating mandate offered to "explore options for enhanced judicial co-operation in matrimonial, parental responsibility and other related matters", yet so far, despite numerous recommendations from this committee, the Government do not seem to have proposed anything. We want to ask, and it might be an unfair representation, why you have not tried to secure a deal with the EU 27 on family law matters.

***Lord Keen of Elie:*** As I indicated earlier, there are a number of strands to this. Generally speaking, civil justice co-operation does not feature as part of an FTA negotiation. In a sense, you might say that it has been left behind to that extent. There is a further strand, which is consideration of the Hague convention regime and the perception that this may provide a perfectly stable platform going forward.

In addition, we have brought forward further SIs to try to ensure that our domestic law is in a suitable position at the end of the transition period. We have a number of further SIs coming forward in this area and we will shortly publish guidance on the transition on family law.

In addition, I understand that my officials have been working with the Law Society to deliver a series of webinars to the family law sector, beginning on 1 October. We are preparing for the end of the transition period on the basis of Hague convention provisions and the adjustments we have made to domestic law, and to keep family law practitioners and, indeed, families informed as to the effect of these changes.

**The Chair:** Minister, to your point that these matters are not normally covered in free trade agreements, one could reply that there has never been a precedent for a country with as close relations and as intense population exchange as we have with the EU to seek a free trade agreement that makes us more distant from that other group of countries.

I am not sure that precedents in this area are a very good guide, because we are

doing something completely unprecedented, where the lives of an awful lot of people will be impacted by the decision that the Government take. I think you acknowledged that in your response.

***Lord Keen of Elie:*** I do acknowledge that. Of course, precedents are only of limited value. It would also require two parties to decide that they wanted to engage in the civil justice negotiation in order to take it forward. As I say, although we made our application to Lugano in April, we still do not know the EU position on that.

That gives you some insight as to what may be going on. There is a vast interest in some EU member states. Poland is a prime example of where family law issues will be of critical importance to people after the end of the transition period. We are very conscious of that.

**The Chair:** That is a nice transition to the committee's expert on family law, Lord Rowlands, who has campaigned on these subjects for many years.

Q7 **Lord Rowlands:** Minister, may I remind you first of all of an observation made by the Justice Sub-Committee in March 2017? "Save for the provisions of the Lugano convention on cases involving maintenance, there is no satisfactory fall-back position in respect of family law". Over the last three years, what actual measures have the Government taken to address those fundamental concerns?

***Lord Keen of Elie:*** We have been looking at the Hague conventions. As I say, we have taken steps to ensure that we become full members of the Hague conventions that we are currently members of in terms of our EU membership and the transition period. We have the 1970 Hague convention on divorce, the 2007 Hague convention on maintenance, and the 1980 Hague convention on child abduction. We have taken steps to introduce, by way of regulations, appropriate changes to our domestic law to ensure that all these provisions are workable when we cease to be a member of the EU.

We initially introduced a series of SIs when it was contemplated that there would be a no-deal exit. We have had to adjust those SIs and will continue to adjust them to reflect, for example, obligations undertaken in the withdrawal agreement. That process is ongoing and we are conscious of the need to complete it before the end of the transition period.

**Lord Rowlands:** Can you identify some of these SIs for us?

***Lord Keen of Elie:*** I probably can, but officials will be in a far stronger position to do it with accuracy. Can I call upon Paul to list the ones we are talking about, rather than me reading his prompt?

***Paul Norris:*** We have two main SIs still to come between now and the end of the transition period. One is a fixing SI, which makes some small changes to SIs that we did previously in preparation for a potential no deal, where stakeholders have identified a number of small technical errors. We originally brought that SI forward

in October last year, which then lapsed because of the election. We need to bring that SI back before Parliament.

Then there is an SI that will focus on doing what the Minister has just said, which is making sure that the no-deal wind-down provisions are amended to reflect the wind-down obligations that we have under the withdrawal agreement. Just to remind the committee, for both us and the EU, where cases are already commenced prior to the end of the transition period, they will continue under those rules until the end of those proceedings. This is to make sure that our SIs, as we had prepared them for no deal, now reflect those wind-down provisions in the withdrawal agreement.

**Lord Rowlands:** May I focus for a moment on one aspect, which is child maintenance? Anyone who has been dealing with child maintenance cases, as I certainly have, knows the frustration and anguish, for example, of a young, poor mother pursuing an errant father, even when that father is a local, leave alone the nightmarish thought of trying to pursue one across Europe. One of the great success stories, in all the evidence we have been given, appears to be the maintenance regulation. Everybody who has testified has deemed that a real success story. Could you tell us whether you share the belief in that success?

***Lord Keen of Elie:*** Of course it has been successful, but equally we have the 2007 Hague convention on maintenance. That too has been a success. It is applied by the EU in relation to third-party countries. These are often vexed issues, I quite accept. Even domestically, as you point out, they create very real problems. But I do not believe that there is any real difficulty in shifting from the Brussels regime to the Hague convention regime in this respect. In addition, there are provisions in Lugano that deal with maintenance. We would hope to have that in place going forward.

Lugano reflects the early iterations of the Brussels regulations. It is very much in line with them. Some people say it is still catching up with the developments in the Brussels regime, but Lugano is very much in the same place as the Brussel regime. With that, we would hope to be able to address these problems directly and effectively.

**Lord Rowlands:** If we have not acceded to Lugano when the transition period ends in December, what will happen in the area of maintenance?

***Lord Keen of Elie:*** As regards international co-operation, we will operate under the Hague convention 2007. We hope that would be sufficiently effective, but I am not going to say that it is every bit as good as what you have under Lugano or the Brussels regime. That is why we are so hopeful that we can accede to Lugano.

**Lord Rowlands:** Why did we not think about having some bespoke arrangement with the EU on child maintenance in order to mirror the success of the actual maintenance regulation?

***Lord Keen of Elie:*** That would be of very limited assistance, at the end of the day, because we will be dealing not just with the EU 27 but with the rest of the world. We are dealing with the USA, Canada, Australia, New Zealand, places where these issues still arise. It is far better that we should embrace a regime that covers all these third-party countries, rather than a select few.

**Lord Rowlands:** For maintenance, in sheer numbers terms, surely there are many more cases in relation to Europe than there are to the United States, Canada or any other country. Is that not the case?

***Lord Keen of Elie:*** I would expect that to be the case with regard to individual member states in Europe, such as Poland, but that is no reason to abandon our notion that some universal agreement is far better than individual bespoke agreements. Therefore, we would consider it appropriate to proceed by way of Lugano and to look again at Hague. We have always been a very important actor in developing these regimes at the level of international law, whether it be Hague or Brussels. We will continue to be an active actor in that respect.

**Lord Rowlands:** Finally, might I just press you on the existing situation? Are you aware of any UK cases at present going through the processes that are laid down under the existing European regulations? If there are, what happens to them after 31 December?

***Lord Keen of Elie:*** My understanding is that, where those proceedings are commenced before the end of the transition period, they will proceed through and effectively be enforceable under the Brussels regime, even after the end of the transition period.

**Lord Rowlands:** We can offer reassurance on cases that have begun that there will not be a cut-off point on 31 December. We will allow the cases to be carried through.

***Lord Keen of Elie:*** Absolutely, we will.

**Lord Rowlands:** It is very important that you assure us.

***Lord Keen of Elie:*** I agree entirely. The EU member states will do the same. That is what is so important. This will be a reciprocal position after the end of the transition period.

**Lord Rowlands:** That is agreed by both sides.

***Lord Keen of Elie:*** Yes, it is.

Q8 **Lord Kirkhope of Harrogate:** I declare an interest as a lawyer, but I have not practised in family law for some years.

My question comes on the back of Lord Rowlands's, in a way. He referred to maintenance regulation. I want to look more specifically at Brussels IIa, which as we know extended the areas of parental responsibility or dealing with parental

responsibility very widely, including not only the direct responsibilities of parents but those of local authorities in respect of foster families or institutional care.

My noble and learned friend has referred to the Hague convention. I am sure he is pleased from a Scottish perspective that the Hague convention describes a child as up to 16, whereas national laws, which are understood and accepted under Brussels IIa, allow England to define that as 18. There little things like that, which actually are quite complicated.

What I am concerned about, as is the Law Society in England and Wales and as was the previous Justice Sub-Committee in 2017, is when we make changes here, which are inevitable. We know that Brussels IIa is accountable to the ECJ, for instance, which is one of the big problems. How are we going to fill this vacuum and deal with the substantial cases that are currently ongoing, of which there are quite a few? What will the processes be for effecting parental responsibility?

It is all right for us to have general arguments and broad-brush approaches to this—"Everything will be all right on the night". Of course, it will or will not. What specifically are we going to do to replace Brussels IIa, for all its imperfections?

***Lord Keen of Elie:*** All actions that have commenced before the end of the transition period will continue under the Brussels regime, including issues of enforcement and recognition by all member states. That has already been addressed. More widely on the issue of parental responsibility and parental responsibility jurisdiction, we have the Hague convention of 1996. I accept that there are some differences between the 1996 convention and the Brussels IIa regulation, one being the issue of habitual residence, where it is recognised for three months after a child has lawfully changed habitual residence, but it is not for the Hague jurisdiction.

We acknowledge that we will have a responsibility to ensure that family law practitioners and families are kept informed about what these changes will be. That is why we intend to put out material on the government website to ensure that people are alerted to this.

**Lord Kirkhope of Harrogate:** It is terribly important that family law practitioners and their representatives, whether it be the Law Society or the Bar Council, are kept in the loop better than they have been. You may feel that they are supposedly being kept fully informed. For instance, it is only in the last few days that the Law Society has put out an area of direct concern in this field. Surely we need to be keeping them better informed of what will happen or might have to happen with regard to the continuation of cases or, indeed, covering this vital area of family law.

***Lord Keen of Elie:*** I accept that. That is why we have arranged with the Law Society to have a webinar on 1 October, in the hope that we can generate interest in this area and ensure that those who have a concern are kept properly informed about the implications of the end of the transition period, both for ongoing cases and for new cases arising thereafter. We are endeavouring to do that.

Q9 **Lord Polak:** Hello, Lord Keen. Your clarity on the internal market Bill was

appreciated. Some people may still be confused, but I thought your explanation was quite clear and precise. No doubt you will be repeating that in a few minutes' time in the House.

Specifically on this, our committee has heard repeated evidence from practitioners about deep concerns regarding the loss of these arrangements in the context of cases of child abduction. I will always try to be practical. What advice would you have for a parent whose child is removed to an EU member state after 31 December this year?

***Lord Keen of Elie:*** They should proceed under the 1980 Hague convention. That involves the utilisation of the appropriate child abduction agency. In these circumstances, they would get advice similar to that which they would receive under the Brussels convention. They would go to the same agency in England to secure the orders that are required. The only material distinction between the Hague convention regime and Brussels IIa on child abduction is, as I mentioned earlier in passing, the ability of the IIa regime to override a court order that has already been made under the Hague convention.

Some people regard that, frankly, as an inappropriate power under the Brussels regime; others think it is an appropriate power. Families must be reassured that, because after the transition period we do not have the Brussels IIa regime, that does not leave a void. They will have the 1980 child abduction convention and the same agency available to them to secure resolution of such an issue.

Q10 **Baroness Hamwee:** Good morning, Lord Keen. Can I become domestic for a moment and ask you about the position in our own courts? We have had warnings about the increasing backlog, including in the Family Division. I know that most of the coverage has been about criminal cases, but obviously I am talking about family cases. Can you tell the committee the Government's assessment of the impact on our family courts of the likely increase in litigation, which used to be solved by the Brussels regime?

***Lord Keen of Elie:*** I am not sure that there will be an increase in litigation because of our departure from the Brussels regime. To put this into context, in 2019 there were about 420 cases involving child abduction in England and Wales. That includes issues not only with the EU but with third-party states. It is a relatively small number.

Of course, there are pressures on the family courts in general. That has been exacerbated, for example, by Covid and the ability to carry on cases within the courts. We are conscious of that and seeking to address it. As you say, it is not just a matter of the criminal courts and the criminal law; there are very real concerns about the ability of people to secure appropriate access to courts in the Family Division during this period. We are conscious of that and seeking to address it.

**Baroness Hamwee:** To coin a phrase, I may have asked the wrong question.

***Lord Keen of Elie:*** I am not sure about that.

**Baroness Hamwee:** There are far more EU citizens in the UK than there are UK citizens in the EU. Are there not bound to be disputes over forum? It is a matter not just of training, but of quantity. I know you will be aware of this, but it is worth saying. It is not only the judges, but the whole court structure: the officials, the masters and all the staff. Do you have any information you can share with the committee about the use of the Nightingale courts for family matters?

***Lord Keen of Elie:*** I do not have detailed information on the utilisation of the Nightingale courts for Family Division matters or for family matters. I would be happy to write to the committee and set out in writing as much detail as I can secure from officials on that. I would not be tempted to answer that question at present. I hope you will not mind if I simply undertake to write to you on that.

**Baroness Hamwee:** No, of course, and I may not tempt you to comment on my next point, which is about the absence of legal aid. I have not done any family law since I dealt with a defended divorce. You can tell how long ago that was. The specialisation that is required alarms me. It will not just be that there is a shortage of judges. It will be a real problem for solicitors and members of the Bar, I suspect.

***Lord Keen of Elie:*** I acknowledge that. Indeed, the specialisation required in the area of family law alarms me as well when I am appearing before this committee. Minister Chalk was intended to appear and I am answering questions on somebody else's specialist subject.

**Baroness Hamwee:** I will leave it there. Thank you.

Q11 **The Chair:** There is no great sign of you not being across all the detail, Minister. You have partly answered this, but what are the implications for the judiciary of the profound change in the UK's family law system that would be involved in us returning to common law rules for family law cases? Are people prepared for that? Is the whole system ready for that shift away from the practice of the last 40 years?

***Lord Keen of Elie:*** I am not going to suggest that these changes will be seamless, but I believe that the judiciary in general and the legal profession have anticipated these changes. That has been assisted by the transition period, during which they have been able to continue the current regime but anticipate the consequences of that ending on 31 December this year.

I believe that we are well prepared in this area. I believe that the judiciary and the profession in general are well prepared. That said, there is always more to be done. The Government will develop their information on the government website to try to ensure that people are alerted to this, with their webinars with the Law Society for the benefit of the profession and more generally. Of course, we have ongoing liaison with the judiciary.

We must remember that this is not some sudden transition to a new regime. For the past 50 years, we have been operating the Hague convention regime in respect of third-party countries that are not members of the EU. In fact, our courts and our

profession are rather familiar with that regime, albeit they may use it less often than they use the Brussels regime.

**The Chair:** Thank you very much, Minister. We are all conscious that you are answering a PNQ in the House a bit later. We have come to the end of our prepared questions on that set of issues, but I know that your opening statement on the internal market Bill, and the issue of whether it breaks international law has sparked a lot of interest among members of the committee. Lord Arbuthnot has asked whether he could pose you a supplementary question on that issue.

Q12 **Lord Arbuthnot of Edrom:** I thought it was an extremely helpful, very detailed opening statement, which referred to articles and things which I am afraid I do not have in front of me and which will require a bit of detailed rumination. But there was one area in which I remained confused. Brandon Lewis said in the House of Commons that the Bill did break international law, and you said that in your opinion it does not. What is the Government's view on whether this Bill breaks international law or not?

***Lord Keen of Elie:*** In these matters, I speak for the Government, as do other Ministers. From time to time, there may be some dissonance between what is said by one Minister and another. It may be that, in the Commons, the wrong question was being addressed. I will try to put it this way: if you set out a scenario in which I go into a bank, take £1,000 off the table and leave again, you could say, "That's in breach of the law". If you simply omitted the fact that I handed over a signed cheque drawn on a solvent account, you would get a completely different impression of what is going on.

I think we have that sort of situation here. In my view, on the basis that I sought to set out in my opening remarks, the Bill itself does not breach the treaty and does not breach international law. In theory, it could have the effect of breaching the treaty and breaching international law, but that is not its purpose. Its purpose is to address the remedies that the United Kingdom has, quite legitimately under international law, in the event that it perceived there had been an absence of good faith or bona fides on the part of the EU, or in circumstances where it considered that the behaviour of the EU has fundamentally altered the obligations under the protocol.

As the Prime Minister said last night, we hope that these eventualities never emerge, and we are concerned to ensure that we continue negotiations to resolve these matters. I accept that there is controversy around what is said or not said in negotiations, and therefore I have to take the factual matrix given to me by Her Majesty's Government. When there is a perception that these events could occur, we have to prepare ourselves to deal with them. We could not possibly reach the 11th hour and realise that in order to try to prevent the consequences of such action, we had to somehow conjure up primary legislation, for example to deal with Section 7A of the withdrawal Act.

When I answered a very short Question last week, I sought to emphasise that these are contingent powers. We will only do this if it is absolutely necessary. In doing it, we will present the regulations to Parliament with an explanation as to why we require them.

**Lord Arbuthnot of Edrom:** Is the BBC today wrong in saying that Brandon Lewis's precise words were cleared through the government machine?

***Lord Keen of Elie:*** I cannot comment on that.

**The Chair:** You might, though, accept that the way the issue was presented at the Dispatch Box in the House of Commons by the Northern Ireland Secretary has led to concern among our partners, with whom we are trying to conduct a negotiation, about precisely where the Government stand. From that point of view, our concern in this committee was that it could have an effect on the likelihood of reaching an agreement in the areas of criminal justice and civil justice co-operation.

***Lord Keen of Elie:*** I entirely accept that. That is why I appreciated the first question that had been proposed for this committee, and acknowledged that it was an entirely appropriate question to put and for this committee to consider. I might not have answered the same question in the same way, but that is another matter.

Q13 **Baroness Hamwee:** You assured us that not just the Government but lots of parties would shortly need to get on with all the processes related to Lugano and CRaG. Is there the possibility of a gap after the end of the year, which would affect people who are owed maintenance? It sounds as if that is so, but I am worried that it is not just a gap in pursuing enforcement. There might even be a loss of money. In other words, it is more than just a delay. Am I wrong to be worrying about that?

***Lord Keen of Elie:*** There is a concern about what will happen if there is a delay in our accession to Lugano. We would not be able to rely upon the maintenance provisions in Lugano and we would be falling back on the Hague conventions with regard to maintenance. I do not believe that there would ultimately be a loss of money, but I quite appreciate that there could be disruption in the process of recovering maintenance payments.

Q14 **Baroness Primarolo:** Minister, can I come back to the question that Lord Arbuthnot put to you? In your opening statement, very clearly explaining the complex position, you said that Brandon Lewis answered the wrong question. None the less, Brandon Lewis, as Secretary of State, told the House of Commons that the internal market Bill would break international law—I paraphrase. Whether he answered the wrong question or not, he still said that. Are you saying he was wrong?

***Lord Keen of Elie:*** I am merely saying that you have to look at the context of the question that was asked. Theoretically, you could utilise the powers in the Bill to take steps that would be a breach of our treaty obligations under Article 4 and therefore in breach of international law. That is not the intent here. The intent is to ensure that we are prepared to deal with a situation that we hope will not emerge, in which there is a breach by the EU and a change of our fundamental obligations

due to the position of the EU, which requires us to take steps, for example, pursuant to Article 16 of the Northern Ireland protocol.

**Baroness Primarolo:** The draft Bill does provide for the Government to break international law. It is just that you are saying that it is only theoretical, presumably until it becomes an Act and then it provides for it.

***Lord Keen of Elie:*** No, what I am saying is this. There are circumstances in which the Government would be required to act, to respond to what was perceived to be an absence of good faith by the EU or an action that amounted to a fundamental change in obligations. Therefore, they make provision for that in the Bill and in the Act. They hope never to have to use it.

I suppose that any Act could be utilised in a way that is not intended. This is intended to provide the Government with the tools to respond, for example, with Article 16 of the Northern Ireland protocol. The Bill is not in breach of the treaty. It is not in breach of international law. The Act is not in breach of the treaty. It is not in breach of international law. It corresponds with the rule of law.

Q15 **Lord Kirkhope of Harrogate:** Quite a number of us on this call have held ministerial positions in government. As a good lawyer, a clever lawyer, an excellent lawyer, you can describe something effectively and clearly, as you have, but not necessarily in a way that will be understood by anybody other than another lawyer or, indeed, a legislator who is being sympathetic.

If one takes a look wider than this, the perception of what we are doing or legislating for is just as important. We were all taught in taking ministerial roles not only that we have a ministerial code, but that reaction and perception of what we were going to do or intended to do was just as important as what we did in writing, if not more important.

When I was a Minister at the Home Office, a number of issues that seemed very sensible indeed were not proceeded with, not because they would not be good but because the perception of what we meant could not be dealt with in a positive way from a government point of view. It seems to me that this argument about what is right, what is wrong, who said what and who said the other is secondary to the perception that has now built up that we are trying to put ourselves in a position of illegality.

***Lord Keen of Elie:*** We are not endeavouring to do that at all. I would not be sitting here if that was the Government's intention. Let us be absolutely clear about that. The position is this: if we find ourselves having to utilise Article 16 or address a fundamental change in our obligations under the protocol because of the actions or inactions of the EU, we have to be in a position to deal with that swiftly and effectively. We are taking the tools to do a job that we hope we will never have to perform.

It is important that we should do so, because already Article 4 of the withdrawal agreement has been drawn down into domestic law by virtue of Section 7A of the

withdrawal agreement and therefore is there under primary legislation. That is what we have to bear in mind going forward.

**The Chair:** Minister, you have answered our questions very patiently and with great eloquence. One member of our committee, Lord Anderson of Swansea, has been trying to get into our discussion over the telephone. We have now been to solve the technical problems. Lord Anderson, do you have any point that you would like to raise at the end of our exchange with Lord Keen? Are you there? Technology has defeated us.

***Lord Keen of Elie:*** If Lord Anderson has any supplementary questions and would like to write to my private office, I would be happy to respond in writing and copy that to all members of the committee.

**The Chair:** Thank you for that, Minister. Sometimes the technical obstacles prove too difficult for us. Thank you very much indeed for your time and the care with which you have answered our questions. I hope this session has helped to bring out some of the important issues that arise in the area of family law and civil claims for small businesses and consumers. It is an underexplored area of the negotiations. Thank you also for your candour on the issue of the internal market Bill.

We have now come to the end of this session and I know you need to go and prepare for appearing on the Floor of the House. I thank you and your officials for being with us and providing additional information. Thank you, Minister.

***Lord Keen of Elie:*** Could I thank you and all members of the committee for their courtesy and patience?