



Select Committee on the European Union

Justice Sub-Committee

Corrected oral evidence: Rights after Brexit

Tuesday 11 June 2019

10.35 am

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Members present: Baroness Kennedy of The Shaws (The Chairman); Lord Anderson of Swansea; Lord Cromwell; Lord Dholakia; Lord Judd; The Earl of Kinnoull; Baroness Neuberger; Lord Polak; Baroness Shackleton of Belgravia; Lord Wasserman.

Evidence Session No. 4

Heard in Public

Questions 41 - 50

Witnesses

I. Edward Argar MP, Parliamentary Under-Secretary of State for Justice; Alice Adamson, Deputy Director of Global Strategy and Rights, 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

Edward Argar MP and Alice Adamson.

Q41 The Chairman: Welcome to you both. We are completing our inquiry into rights after Brexit, and in two weeks' time we will consider a draft letter to set out our conclusions to the Government.

Today, we have the opportunity to speak to you in that regard, Minister, but first the preliminaries. As you know, the session is open to the public. A webcast of it will go out live and will be available via the parliamentary website. A verbatim transcript of the evidence is being taken and will also be put on to the parliamentary website. You will be sent a copy of the transcript in a few days to check for accuracy, and we would like you to advise us of any corrections as quickly as possible. If, after the session, you wish to clarify or amplify any points made during the session or you have additional points to make, you are of course welcome to submit supplementary evidence.

Having dealt with those preliminaries, I welcome you again. How nice it is to see you, and Miss Adamson, from the justice department.

To kick off, you recently made a statement to the House of Commons in the following terms: "Both the political declaration and the White Paper make it clear that our future relationship with the EU should be underpinned by our shared values of respect for human rights and fundamental freedoms, and this includes our ongoing commitment to the ECHR. As I have just made clear, the HRA gives further effect to the ECHR in our domestic law, and we are not considering amending or repealing it".

Given that assurance, we were slightly concerned that there was a shift between the first and second drafts of the political declaration. The first draft said precisely that, but the second was somewhat more mealy-mouthed. We were rather concerned that the second, current, draft appears to weaken the Government's commitment to the convention. The change of words flagged up some sort of difference of opinion on this. We really wanted you to help us as to why we have a different iteration the second time.

Edward Argar MP: Thank you, and thank you for your welcome, Chair.

As you have alluded to, I reaffirmed that point not only in the House but in a letter to the noble Lord, Lord Boswell, which I think the Committee has seen and referenced in some of its oral evidence sessions. I know that the Committee had a concern about the change from the initial draft in mid-November to the final draft a week or so later.

We have made clear, and I have made clear, that we fully intend to maintain our leading role in the promotion and protection of human rights, democracy and the rule of law. I appreciate your point in a previous oral evidence session that there is always significance in language—I think that was what you said. However, there is no

significance in this context that would suggest anything mealy-mouthed or a diminution in that commitment.

In essence, the use of the term “framework”, I would argue, is a linguistic device that reflects the convention system as a whole, whereas the initial language was very specific. This reflects the broader convention system rather than just the ECHR. The import and intent is the same, but it recognises the broader convention system, which goes a little beyond the initial, narrow definition.

The Chairman: I raise this, because there was a point towards the end of the coalition Government when a report was published that concerned whether there should be a British Bill of Rights. It looked very much as though the Conservative Party was committed to getting rid of the Human Rights Act and replacing it with something different. There were question marks as to whether this something different would have the same kind of relationship with, for example, the framework that includes the European Court of Human Rights.

I want to tease out from you the extent to which there has been any change. We were told that there would certainly be no move against the Human Rights Act while Brexit was going on. How long can we be confident that that is the case?

Edward Argar MP: I will not seek to predict how long the implementation of Brexit will go on or other changes, although we are clear that we intend to leave by 31 October.

You allude in your question to exactly the point I was seeking to make, which is that the word “framework” goes beyond it to include the court and the broader convention system, which is why—

The Chairman: It does?

Edward Argar MP: It refers to the broader convention system, which would obviously include what you allude to.

The Chairman: I want to hear you say it. Are you committed to the European Court of Human Rights being part of the framework protecting human rights in this country?

Edward Argar MP: The ECHR is part of the convention system. Forgive me if I was not clear in saying that I am committed to the ECHR and our continuing membership of it. I would assume that one follows from the other, because that is its enforcement mechanism.

You mentioned the references to a Bill of Rights. I go back to the statement I have made on behalf of this Government. You have been kind in not referencing yet the fact that while I may be a member of the Government after six weeks, I may not be when there is a new Government. I can speak only for this Government, so the timing of this session is interesting.

We are clear that we have no plans at this point to change the framework or to remove us from the ECHR or the Human Rights Act 1998, which I have been on the record as saying I believe is an important piece of legislation, giving domestic effect to the ECHR rights.

Lord Anderson of Swansea: If the commitment is as strong, why change? Words have meaning. Can it be construed as other than a delusion? There is no "framework"; there is the convention.

Edward Argar MP: As I alluded to in answering the Chair, there is the convention system that includes not just the convention but the enforcement mechanisms: the court and other parts. Our view was that that language, that change, reflects the convention system as a whole, whereas the original language was narrower. So the framework would include the ECHR, which was the original language, and could, I suggest, be drawn more widely in a broader convention system.

Lord Anderson of Swansea: What other parts?

Edward Argar MP: I just alluded, in response to the Chair, to the actual enforcement mechanism and the commitments to the court.

Lord Anderson of Swansea: Why did you not say "convention" and "court", then?

Edward Argar MP: I would suggest that "framework" covers those in a fewer a number of words.

Q42 **The Chairman:** It does not frighten the horses like you wanting references to courts.

We move on. One of your responsibilities relates to lawfare. I have never quite understood what that meant. Can you explain what the Government mean by it and what your role involves?

Edward Argar MP: It is, in truth, a responsibility that sits in a number of places across government, and it is the extent to which the rights of a state in defence of its national rights and the operation of its armed forces can or cannot be affected by the courts.

I may be wrong, and I would never dream of leading you in a direction, but I suspect that you may be going along the route of the MoD and the recent announcement in the letter from the Secretary of State to the Prime Minister. That is handled mainly by the MoD, but of course as domestic human rights Minister I have an interest in that, although that refers to operations overseas, so it does not quite shade into my areas. It is a complex mix.

The Chairman: So lawfare is a way of referencing ways in which limitations should be put on the remit of the Human Rights Act when we are dealing with the military abroad.

Edward Argar MP: As we have seen, that derogation right under the convention is there in a particular context, which is what the Secretary of

Defence wrote to the Prime Minister about recently. It exists within that context.

The Chairman: So lawfare refers only to that, does it?

Edward Argar MP: No, it is a broader point. It is perhaps an imprecise point. I am not sure that in your lexical encounters it would be tight legal language. I think it has grown up as common parlance in debate with think tanks, with academics and others about the impact of the law and the broader framework on the operation of states in the context of the use of their armed forces, their foreign policy, and otherwise.

The Chairman: Lawfare to me would mean legal aid being available for the poor. It would have been nice if it did mean that. Unfortunately it does not.

Edward Argar MP: We may yet touch on that, I sense, Chair.

The Chairman: Fine.

Lord Dholakia: Minister, have you had sight of the letter written by Lord Lester of Herne Hill in last Saturday's *Times*?

Edward Argar MP: I did not, my Lord.

Lord Dholakia: I will paraphrase it very briefly. He wrote that in the absence of a written constitutional Bill of Rights it would be hazardous to allow the Government to tamper with the HRA post Brexit.

Edward Argar MP: I had not seen that, so thank you very much for highlighting it to me. I would go back to my response to one of the Chair's opening questions and say that the Government, I on behalf of the Government, the Lord Chancellor and others have made clear that there is no intention to amend or alter the HRA or our membership of the ECHR. That is the statement of the current position. I caveat it by saying that I may or may not be a Minister in six weeks' time, but speaking on behalf of the Government at the moment I can say that that is the Government's position.

So the noble Lord rightly highlights what I know is a concern, and an understandable one. Jonathan Sumption, speaking recently in one of his Reith lectures—I appreciate that his views may or may not be shared by everyone on the Committee, but it was certainly an interesting excursus on this—highlighted as one of the two key categories freedom of speech and similar among the core rights for the functioning of a democratic society, or in a functional society, alongside the other basket of rights, which are fundamental human rights, to live free from violence and from might being a right. He is absolutely right to highlight the importance of those rights.

Yes, the court has played an important role in the protection of those rights, and I would argue that since the ECHR, and in the context of the aftermath of the Second World War and suchlike, the convention system

and the strengthening of that have also played an important part in that. You can then, as I suspect we might, shade into the EU, but I would go back to the ECHR as the codification at an international level of some of those rights.

So you are right to highlight this, but I would argue that the Government's commitment as stated by me and other Ministers at the time is clear.

The Chairman: It is also right that the Foreign Secretary has launched a big initiative on media freedom, which will be international now. He is partnering on it with the Foreign Secretary from Canada and it will draw in other nations to protect freedom of the press at a time when it is particularly under threat globally. Many journalists are being detained, jailed and even killed, so there is an initiative afoot to strengthen freedom of the press.

Edward Argar MP: You are absolutely right. The UK represented the Committee of Ministers at the Council of Europe summit in Helsinki two or three weeks ago, and among the various messages that I wished to get out on behalf of the UK Government was to other countries there: "Please come. Please be involved. You are very welcome. It's a hugely important initiative".

Q43 **Lord Cromwell:** Good morning. We note your reassurances in response to the Chair's first question to you, but I think what has been bothering this Committee throughout is that all the witnesses we have had—I will stand to be corrected—have been concerned that rights protection in the UK will be weakened by the removal of the Charter of Fundamental Rights and the supremacy of EU law; there will be weaker enforcement and the reduction in some rights such as privacy or data, and the removal of the ability to take cases to the CJEU will affect people doing business, or just travelling actually, post Brexit in the EU.

Could you help us by explaining the Government's response to those concerns?

Edward Argar MP: You are absolutely right to highlight concerns of a number of your previous witnesses in this context. Unless the Chair directs otherwise, I will answer the narrow point that you raise, which I suspect shades into devolution and a different relationship with Northern Ireland, Scotland and so on, although I suspect we may reach that in due course.

The Charter of Fundamental Rights and the underlying rights and principles that it reaffirms always apply, as you will be aware, to EU institutions but only to member states when they are acting within the scope of EU law. If the withdrawal agreement were at some point to be passed and we had a transition period, that status quo would continue for some time afterwards. However, they apply only in that context. The substantive rights protected in many articles of the charter I would contend are largely also protected in domestic law via the common law of our other domestic legislation.

In addition, many of the charter's articles set out general principles, and unlike specific rights these are not judiciable, which means that they cannot be relied on directly by individuals through the courts as can discrete rights, for want of a better way of putting it; I am conscious of the number of lawyers around the table, so if my language is not legally perfect I hope I will be forgiven, or possibly corrected.

A number of articles—eight, I think—in the charter constitute rights that are intrinsically linked, for example, to EU citizenship and therefore EU membership, and so would make sense only in the context of the relationship between a member state and the Union.

The remaining articles do include rights which we believe will continue to be reflected UK law in a number of ways, including through Clause 4 of the EU withdrawal Bill, should it be passed by our House and your Lordships' House, which will preserve treaty rights that are directly affected through the retention in UK law of general principles of EU law.

Lord Anderson of Swansea: If I may, the question is not whether there will be a dissolving of any rights. The concern has been that there will be a reduction in rights. Are you saying that all the witnesses we have had before us are mistaken in that regard?

Edward Argar MP: No, I am not saying that. I am saying that I do not believe that there would be a reduction in rights. I know that there are some that have specifically come up. One example is personal data, which you alluded to in your question. Article 8 of the ECHR has been held, to give one example, to encompass rights to personal data protection, so we would argue that there are analogous—not necessarily identical, but analogous—rights there.

It is a point of debate, it is contentious, as your witnesses have said. We would argue that the Data Protection Act 2018, for example, would become retained EU law, and we intend to have an adequacy agreement. Article 8, as I say, also confirms protections.

It is not identical, and I use only one example—I could come up with others, but I will not detain the Committee unless you wish to press me—but I would argue that while it is not identical, it is analogous. So I would not see it as a diminution of rights but as a slight altering in the way they are framed, and I would argue that the rights and the protections are still there.

Lord Cromwell: We are back to the difference between words, I suspect.

Edward Argar MP: I suspect that much of our evidence session will hinge on exactly that.

Lord Cromwell: I will perhaps leave it there. I think there is a diminution, but one could argue the toss. Let us agree to disagree on that.

Q44 **Baroness Neuberger:** Schedule 1 to the EU withdrawal Act 2018

provides: "There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law ... There is no right in domestic law on or after exit day to damages in accordance with the rule in *Francovich*". What is the Government's view on the intended aim of those provisions?

Edward Argar MP: If I might, I will invite Alice to talk about the technical detail and then I will give you a political perspective on behalf of Her Majesty's Government.

Alice Adamson: Thank you, Minister. On the specific point about the *Francovich* damages, we have been clear that they will not apply, but that does not mean that we do not believe that other remedies are available under our domestic law, which will include the application of damages where it is appropriate.

Baroness Neuberger: But there will be a loss for people who are in the middle of a case at that time.

The Chairman: Ms Adamson, could you explain the rule in *Francovich*, because we have the general public watching and listening in and they might not be familiar with it?

Alice Adamson: Yes, of course. *Francovich* is—

Edward Argar MP: If I may, essentially my understanding—you will correct me if I am wrong, Chair—is that it is a rule developed by the European court to provide effective protection to individuals for breaches of EU legal rights. It provides that if a breach is sufficiently serious and has caused demonstrable loss, the state is liable to damages to compensate the individual for the loss. I may be corrected by any one of your Lordships, but I think, in summary, that is the rule overall.

Baroness Neuberger: I am not a lawyer, but I think in summary that is it. But there is a real question: what happens when something is in process, because things take for ever?

The Chairman: It is the transition. Will there be a sort of interregnum in which things that happened at the edges of this might still be able to draw down entitlements?

Edward Argar MP: As you will have heard from witnesses, during the transition period it would be the status quo; we would operate in essentially the same way. Who knows what either House will decide, but I hope that it will be passed and therefore we will have that. A delay provision is already envisaged within that which would cover this after two years so as to avoid, or to seek to avoid, "You've started but you can't finish".

Baroness Neuberger: But at the moment the provision says, "on or after exit day". That needs some clarification. I do not know whether it is possible, but if we could have some further clarification from you after this session it would be enormously useful.

Edward Argar MP: With the Chair's permission, if your legal adviser or clerk lets us know of any detailed points that come up, I will be very happy to give written supplementary evidence to the Committee.

The Chairman: I think the concern is that it has not been mapped out very clearly. You have just said that in the transition period the position will of course be as is and people will have the same protections. Sometimes there will be a much longer period, because legal actions may require their position of evidence and so on before they are launched. There are whole issues to do with when the final line comes down. It would be good for the general public to know exactly what the position is, and certainly good for lawyers because they would be advising clients.

Edward Argar MP: I will endeavour to do that, but the caveat is that it is obviously in the context of broader uncertainty at the moment as to which exit route is acceptable to both Houses of this Parliament.

The Chairman: It is really just to give some reassurance that people are not going to find that the guillotine comes down on an action and they lose out on appropriate and proper compensation for things that have gone wrong.

Baroness Neuberger: It is really important for the general public, because, as phrased at the moment, it says, "on or after exit day", which suggests an absolute cut-off.

Q45 **Baroness Shackleton of Belgravia:** If I may, I will ask my question now. We have taken evidence on the transition period. It is suggested that UK judges who currently sit on the CJEU will not be welcome there in the future.

The Chairman: No, it is not a question of their not being welcome; it is our side saying that we are not going to sit.

Baroness Shackleton of Belgravia: Okay, they are not going to be allowed to do it, which may or may not be unlawful because their contract is with the court and not with the UK. What is the Government's position on keeping on that court super-qualified people who are useful and not dependent on the state of being British during the transition period?

One thing picked up in articles, particularly by Joshua Rozenberg, is the uncertainty in this; there is no specific statement. The judges themselves do not seem to know what they are doing. When it comes to enforcement, as Baroness Neuberger said, uncertainty for the public is deeply concerning.

Edward Argar MP: You highlight an important point; I think that Joshua Rozenberg in the *Law Society Gazette*, among others, has written articles about this and flagged it recently. Although not on this specific point, I had a useful meeting in Helsinki with the president of the court discussing more broadly the skills base of the judges and the huge value that each

of those individuals brings not only internationally but for their own domestic legal system and the wealth of experience built up there.

Baroness Shackleton of Belgravia: I am sorry to interrupt you, but perhaps I may cite just one, Eleanor Sharpston. She looks from her job description to be an assistant to all the judges to help them do their job better. Her situation is uncertain, as is others'. I was wrong in saying that they are unwelcome, but we have not made sure that they are going to continue.

The Chairman: Let me tell you that I understand that the court would be very happy for them to stay and complete their terms. I think you probably agree that we take great pride in the fact that we produce—

Edward Argar MP: Rather a fine judiciary, internationally as well as domestically.

Baroness Shackleton of Belgravia: We are the architects.

The Chairman: They enrich courts wherever they are. As I understand it, there is real enthusiasm for them to remain through their contractual period. The question is whether we would go along with that.

Edward Argar MP: What I am about to say may or may not be helpful and, I suspect, open to challenge by you, Chair. I will give what I understand to be the strictly legal answer to this. That is why I fear I may risk challenge, but that comes with doing this job.

You are right about the talent and right to highlight the point. From what I heard from the president, our judges are welcome and valued members of that court and more broadly. The issue comes from the fact that, although we will be in a transition period, we will technically have left the European Union. The treaties set out the basis of membership of the CJEU. They provide for judges from each member state to participate in the court, assisted by the Advocates-General and similar. Having left the EU and with us no longer being a member state, at the start of that transition period we will no longer be legally entitled in the same way to participate in the institutions of the EU; that goes to Article 7 of the withdrawal agreement. That would include not having judges on the CJEU.

Article 128—I will be corrected if I am wrong—of the withdrawal agreement clarifies that point and says that when we cease to be a member we will therefore not have the entitlement to judges. I hear the point that you make, and I understand the sentiment that both you and Baroness Shackleton have expressed, but, as I understand it, that remains the strict international legal and diplomatic position.

The Chairman: It would certainly seem to follow that if you were no longer participating in the institutions you would not have personnel in them, but there is also the issue of contractual obligations to individuals and the compensation involved in that and so on or of finding a resolution with our partners in Europe over this situation.

Lord Anderson of Swansea: Do you not think it is rather unfair to keep those British judges in a state of uncertainty? When will the uncertainty about their future end?

Edward Argar MP: You are absolutely right to highlight the personal impact. That goes to the Chair's point about contracts and two areas of international law running up against each other. The withdrawal agreement is clear about what would happen in the event of that being passed: a transition period and a leaving date.

Your question is to a degree essentially a political one. I have set out what the legal position would be, but the political question is on what date both Houses of this Parliament will reach an agreement that means that we leave. That is where the uncertainty comes from. I do not deny that, but rather than a legal question, it is a political one. The legal position is that when we leave they will cease to have an entitlement to sit. We would argue that we must leave on 31 October, but that is a political decision.

Baroness Shackleton of Belgravia: I go back to Baroness Neuberger's point about the transition period. You cannot just cut off. You may have a judge who is assisting in a case and it is a question of business carrying on. What would happen to an actual case when the sword of Damocles falls? Will the judges dissipate and the staff all fall back to the beginning like a game of snakes and ladders?

Edward Argar MP: You have a point, but as I say I can only revert to what the withdrawal agreement between the UK Government and the European Union says, which is that there will be no right for British judges to sit after we have left, which will be the date of our leaving. We can continue with cases during the transition period, but we will lose our seat.

Baroness Shackleton of Belgravia: But there are practical considerations.

Baroness Neuberger: Can I come in on that? I am sure that technically it is correct that there is no right for them to sit. If there is no right, that does not mean that they cannot sit. If Joshua Rozenberg is right in his article that they would be very welcome because of the huge case load et cetera, why would the Government not support them staying on? It seems to me that this is not only a political question but a practical one. Again, it would be good if the Committee could hear a little more about that.

The Chairman: I want to add to that. This question has been around for a long time, and I would have thought that the ministry would have applied its mind to it before this point, especially since you recently had an opportunity to meet with the president of the court. You could have asked whether there could not have been some resolution of this.

Lord Anderson of Swansea: It is not just a question of case load and

pressure on the court, but of having experts on common law.

Edward Argar MP: I do not disagree with any of the points that have been made about the value that we attach to the expertise of those judges. However, this is essentially a question that was taken in the round in the negotiations conducted by DExEU and the Government as a whole which led to the withdrawal agreement. We now have the withdrawal agreement.

I appreciate that there is a political debate to be had about what will happen, but the EU has stated thus far that the withdrawal agreement will not be reopened. At the moment I can only state the factual position as regards where we have reached with the negotiations. However, as I have alluded to a number of times, it will be for both Houses to determine whether they will accept the withdrawal agreement as a way forward in delivering on the exit from the EU.

Lord Polak: I am not a lawyer, but surely the rule of Magnus Magnusson would work here: I have started, so I will finish. Anything that is ongoing should be finished by whoever is sitting until the new system comes into place.

Edward Argar MP: I can only revert to the text of Article 128 of the withdrawal agreement, which says that from that date we will cease to have the right to have a judge sitting in the court. You are right to highlight any practical but potentially significant impact on an individual who is undertaking a case at the time. The court has many experts, so I would not assume for a moment that it would not be able to handle such a transition, but I take the point.

Q46 **Lord Wasserman:** This is a very interesting discussion, and I am sorry that we have to leave it because we could mine it for some time longer.

Coming back to the withdrawal agreement, I appreciate your comment that it is as it is presently drafted. We are in the middle of an enormous upheaval over this whole business. Article 4 of the withdrawal agreement envisages the UK being granted “the power to disapply” domestic provisions. How contentious do you expect this provision to be, and might it be seen as a precedent underpinning other rights in the future?

Edward Argar MP: You are right to highlight the importance of Article 4, which I know attracted considerable interest in your previous evidence session. Some of the witnesses posed challenges as to whether it breaches the constitutional principle that Parliament is supreme, because it will require us to ensure that our legislation mirrors that of the EU. It allows the courts to strike down domestic law that is not compatible with the withdrawal agreement.

That has been part of the debate on this. We have been clear from the beginning that a key objective in the negotiations was to provide individuals and businesses with as much continuity, certainty and confidence as possible. That goes back to the sentiment underlying a number of questions put by your Lordships. Article 4 ensures that

individuals and businesses with rights under the withdrawal agreement are treated equally in the UK and the EU, including before the court.

Essentially, it seeks to replicate that fairness. In the same way as UK citizens and businesses in the EU can seek to enforce their rights, EU nationals will be able to rely directly on rights derived from the agreement, again to provide that degree of certainty. My colleague, the Chancellor of the Duchy of Lancaster, said in a debate on this with Bill Cash in February, I think, that Article 4 of the withdrawal agreement covers, "the arrangements that are necessary to govern the winding down of this country's membership of the European Union and the residual obligations that derive from that over a period of months".

Again, I would argue that it comes into the category of the transition and of in effect a smooth and orderly withdrawal from the European Union, which is what we committed to and what we are seeking to deliver. That is why it is a necessary element in order to deliver smoothness in the transition and as much certainty in the current times as it is possible to try to give people.

Lord Wasserman: Those last few words just about sum it up.

Edward Argar MP: Forgive me; I appreciate that the Committee is trying to seek as much certainty or clarity as it can, and quite rightly so, because that is its remit. We can discuss points of law or principle around human rights frameworks and setting the retention of them above national politics, but the reality is that a lot of what we are discussing at the moment has as its backdrop the political reality and the state of political change that we are seeing at the moment. I fear that there is a limit to the certainty, continuity or reassurance that I can offer on specific points.

Lord Wasserman: I certainly appreciate that.

Q47 **The Earl of Kinnoull:** Perhaps we could go north of the border to my own country. Early on in her term of office, Nicola Sturgeon set up the snappily named First Minister's Advisory Group on Human Rights Leadership. That group reported in December last year.

In the report, the group essentially develops three themes. There is the theme of non-regression from the current package of human rights. The second theme was that of wanting Scotland to, as the group put it, keep pace with future developments in human rights. The third theme is about achieving human rights leadership.

The report discusses these themes and recommends a new Act from the Scottish Parliament which it saw as being at the Bill stage early on in the future Session of the Parliament: that is, starting in 2021. Can you give us the UK Government's reaction to that initiative and its divergence from the UK framework? Perhaps taking the first of those themes, how would you see human rights leadership within that process?

Edward Argar MP: You are right to highlight that report, which I think was published last December. It has a number of themes in it. I suppose

that the report develops the idea of human rights in the context of perhaps going further than that set out by Jonathan Sumption, which is that it not only reflects the fundamental human rights of life being free from might being right and those about functioning democracy but starts to shade more broadly into values and underlying socioeconomic human rights, which is part of its theme.

There is a lively academic, philosophical, and indeed political, debate, as we saw in the Reith lectures, as to where that boundary lies, but it is a very interesting report.

Perhaps the best way of responding to that very specific point is by saying that it was highlighted by Alison Thewliss MP in April in the House of Commons in Questions to the Attorney-General. She highlighted the three elements—non-regression from current EU rights, keeping pace with future EU rights developments, and continuing to demonstrate leadership in human rights—as the three principles.

She asked whether the Attorney-General agreed with those principles and whether he would share them with his colleagues in government. I suspect that she and others were encouraged by his response: “I find myself in total agreement with what the hon. Lady has said. I will share them with my colleagues”. He said he would share it, and we are looking very carefully at it. As I say, there is a broader philosophical and political debate about what that report proposes, but for someone standing at the Dispatch Box the Attorney-General was pretty clear in his positive welcome of that.

A couple of different points flow from it. I am conscious that there is a different regime in Scotland for this, in the context of Scottish law. I think it is the Scotland Act, Sections 29, 57 and 101, which give the power to strike down incompatible legislation, whereas here you can make a declaration of incompatibility but it does not have the power to disapply or strike down the Act. So there is a different regime there already in that context. However, in the devolution settlement the Human Rights Act 1998 is a protected piece of legislation, so it remains with the Westminster/UK Parliament.

However, in what the First Minister has said in that report, there is, as I understand it, no constitutional or legal bar to the Scottish Parliament seeking to legislate on those matters which are devolved in the context of human rights—for example, equality of opportunity. Equalities are devolved, they have a power and a competence over that, so I would argue that there is a scope for them to consider it within the framework of the devolution settlement. That is possibly a less than clear answer to you, but my argument is that while they can do it in some contexts, the HRA remains protected.

The Earl of Kinnoull: It is clearly a lengthy answer. It is quite a complex situation, because you have the Human Rights Act at a UK level, with the powers you have described at a Scottish level. I have a couple of supplementary questions. Taking the non-regression theme, can you set

out whether you feel it is possible to ensure non-regression, or whether the new Act that is being proposed for the Scottish Parliament would be able to do that?

Edward Argar MP: I would argue, picking up on the regression or progress point, that at a high level, statements by the Government indicate a clear commitment to human rights. I argue that that would be non-regressive. I appreciate that other members of the Committee have challenged that and questioned it with different witnesses, so I accept that it is a point of political debate.

Do the Scottish Government or Parliament have the power, notwithstanding that caveat, to be more progressive in particular areas? I would argue that it does if it so determines those areas within the context of the devolution settlement and those devolved areas. At the level of the Human Rights Act 1998, it does not, but I would argue that that is already an impressive and progressive piece of legislation. It already sets a very high standard, but there is the ability in devolved areas for devolved Administrations, such as Scotland, to continue to be dynamic in their approach to those rights.

I take issue, in a very polite way, with the argument that there is an intention to regress, or a certainty of that, at a macro level. More broadly, I do not think that in devolved matters the settlement would prevent the Scottish Government proceeding to pursue the particular policies they wished to.

The Earl of Kinnoull: The final follow-up question is about governmental philosophy: the First Minister was extremely enthusiastic about the report. The Scottish Government's approach to human rights seems much more open to the idea of keeping pace with future rights developments and rather less concerned with questions of national sovereignty, which dominate the debate down here. Perhaps you could square that circle for us, or provide some thoughts and comments.

Edward Argar MP: You are absolutely right to highlight that that is a point of philosophical and political debate: human rights are where law and politics meet, and there will always, I suspect, be a lively debate, and quite rightly so, about where that barrier lies. As we heard in the Reith lectures, there are fundamental human rights: might is not right, the right to life, et cetera. We have those rights—freedom of speech, freedom of the press, et cetera—which are fundamental to the functioning of a democracy, which is the system of government we strongly advocate. Then, there is a broader debate around socioeconomic rights.

The original ECHR is focused, understandably, more on the former two, because it grew not just out of a need for positive rights for individuals but out of a need to protect individuals from a totalitarian or overweening state, in the case of Nazi Germany. Therefore, an international framework of values was accepted that would seek to provide protections for the individual.

Since then, we have seen, both through the Council of Europe and more broadly, I would argue, through the European Union, an extension in the debate on those socioeconomic rights. That is still a lively debate. I quoted the Attorney-General as saying that he would share that with colleagues in government, and he has shared it. It is worthy of debate in that broader evolution of human rights question.

The Chairman: Where you part company with what the Scots are seeking to do is that it is all very well when it comes to civil and political rights, but when it comes to economic and social rights it will be politically directed by whether you feel that something like poverty and the right not to live in poverty, for example, should be recognised.

You are saying that when it comes to devolved matters—health; education; Scotland trying to do something on employment rights, replacing the employment protections that were in the Charter of Fundamental Rights, which will now be got rid of, or has been; children's rights; possibly women's rights and such things as equal pay—they might run away ahead of the rest of the United Kingdom if they stand by their commitment.

Edward Argar MP: It depends. Again, it comes back to that political and philosophical debate. I suspect that were it not such a lively philosophical debate, Jonathan Sumption might not have had so much to say in his third lecture; he quite rightly highlights that this is a very live debate. He argued that in certain areas the role is for legislatures and politicians—for democracy.

The Chairman: He also said that it is going to take 50 years to get enough women on the bench, so let us be clear where he comes from.

Edward Argar MP: I was about to say that I know that his views are not, shall we say, universally agreed and are a matter for debate, but he puts an interesting perspective. The fact that he chose that as his theme reflects the fact that this is still a lively and not settled question. That, I argue, is a positive.

I would also say—it is something that he picked up on and was critical of, to a degree—that it can provide for continued devolution, notwithstanding that it is outwith our leaving the EU, even within the context of the ECHR. It is what he referred to as dynamic rights and dynamic provisions and the role of the court. So I do think that there is still a role there, notwithstanding other things.

Do I think that Scotland is more progressive or less progressive? That is a matter for political and philosophical debate, quite rightly, as the noble Lord alluded to. It is certainly an interesting report. I read it last December, over Christmas, as part of my Christmas reading. It is interesting but it is another contribution to a broader philosophical debate.

The Chairman: One thing that is much more tangible is whether you

envisage our keeping in line with developments on rights that take place within the framework of the European Union.

Edward Argar MP: Forgive me, but I will quote directly what the Attorney-General said. Alison Thewliss was very clear in saying that the three principles in that document were “non-regression from current EU rights, keeping pace with future EU rights developments, and continuing to demonstrate leadership in human rights”. The Attorney-General said: “I find myself in total agreement with what the hon. Lady has said”, and he was speaking in his capacity as a Cabinet Minister at the Dispatch Box.

The Chairman: So he envisions keeping pace with what happens in Europe, even on such things as employment rights?

Edward Argar MP: You will be aware of the Prime Minister’s relatively recent announcements on workers’ rights and environmental rights in the context of the current withdrawal agreement. Forgive me, but I come back again to the nature of the political situation at the moment.

The Chairman: That is this Prime Minister; we do not know what a future Prime Minister will say.

Edward Argar MP: It is this Prime Minister, and the Government she leads, in which I serve. I am afraid I can speak only for this Prime Minister and this Government.

The Chairman: Earl Kinnoull, have you anything further to say?

The Earl of Kinnoull: No. We have gone a long way down that road and I thank the Minister for his responses.

Q48 **Lord Judd:** The position of Ireland has been pretty central to our consideration in this Committee. I put one general point to you about the removal of the charter. The Good Friday agreement did not provide the future for Northern Ireland; it created a framework and an opportunity for the future Northern Ireland that has to be shaped by the people.

A great deal of community action has been going on in Northern Ireland between the majority and the minority on building that future. What has been immensely important in that process has been the reassurance for the minority community of the European charter. Do you accept that there is a pretty big challenge, in the context of the removal of the charter and being able to reassure the minority community that it is on an equal footing, as it were, in the discussions and negotiations on all sorts of levels in the community?

Edward Argar MP: Yes. It is a very important question, and I will try to be measured in my answer because I know I am being questioned by an extremely distinguished former Europe Minister who will know exactly what he is talking about.

You are absolutely right that what has been painstakingly built in the 20 years since the Good Friday or Belfast agreement has been built to a large degree upon the efforts of those individuals and communities. It

has been built upon trust, and that trust has been based upon the need for all communities, minority or majority communities, to feel protected and safe to engage in that dialogue. That is why such importance has been attached to Northern Ireland and that agreement in the current negotiations.

Some of the very difficult complexities that we have seen in the negotiations revolve around exactly that. You are right to highlight the impact—again, I will be corrected by the lawyers around the table if I get this wrong—and the importance, particularly in Northern Ireland, that EU law, the charter and similar, has had. Of course, the Equality Act 2010 does not apply in Northern Ireland, and therefore a number of the protections and rights coming from it have instead grown up more recently around the EU charter and EU law.

I know there have been questions, both in the context of the Belfast agreement and in some of your evidence sessions, around the commitment or the ambition to have a Northern Ireland Bill of Rights to address these issues. You are absolutely right to highlight the importance of it. The fact that it is so important is reflected in the fact that at the moment Northern Ireland and those issues are central, not just to the legal debates but to the political debates in both our Houses on how we move forward and how EU exit is delivered. There are some very real challenges there, and neither the Government nor anyone would wish to do anything that put at risk the significant progress and the peace that has been built in the past 20 years.

Lord Judd: So we are agreed that the fact that the Equality Act 2010 does not apply in Northern Ireland, alongside the removal of the charter, is a particularly significant issue?

Edward Argar MP: I will briefly respond to that, and I will invite Alice, if she has any technical points, to add to it afterwards. I think what has happened is that the charter and other EU law has effectively fulfilled the role of protecting those rights in Northern Ireland. I do not believe that the absence of the charter would dramatically undermine that, but it must quite rightly be at the forefront of our thinking on how, by whatever means, we protect that trust and the rights and safeguards for all communities if we are to continue building on the progress, which is what everyone wishes to do. That is why, quite rightly, significant attention has been focused on this.

I know there has been some discussion in your Committee that the mechanism to do that might be a Northern Ireland Bill of Rights. The challenge with that remains, of course, adding to the complexity, the absence of a devolved Administration in Northern Ireland, and the recognition that to build on that trust and what has been done with the communities, any changes or developments need to flow from the restoration of devolved power and a devolved Government.

So, yes, it is not simple, it is complex in and of itself. It is complex with its history, it is complex legally and it is complex with the current make-

up of the political situation in Northern Ireland, with the absence of a devolved Assembly. But it is something that we are extremely seized of: it is something that both Houses are seized of in the debate we are having.

Lord Judd: I should perhaps remark that in the context of all this I find your remarks—and I underline the word “your”—not unhelpful in terms of reassurance.

The Chairman: Lord Judd, Miss Adamson was going to come in and be of assistance.

Alice Adamson: It might help to set the context. As the Minister said, we absolutely acknowledge that EU law, particularly protection from discrimination, has formed part of the framework for the guarantees of rights and equality under the Belfast agreement. That is why Article 4.1 of the protocol to the withdrawal agreement on Northern Ireland contains a legally binding commitment on the UK Government of no diminution of rights. We think that is a really important part of what has been agreed with the EU when it comes to rights protections under the Belfast agreement going forward. So if you remove the framework you are still providing the right protections.

The Chairman: You are saying that if there is no withdrawal agreement, there will be a serious problem in Northern Ireland. Because the withdrawal agreement is seeking to fill that gap, while at the same time if it turns out that there is no withdrawal agreement giving those protections to the people of Northern Ireland and we have a no-deal where we walk away, people will be left with diminished rights and no protection against discrimination. That is what you are saying. You have spelled out the problem, but do you agree with me that no deal has serious implications?

Alice Adamson: Of course, EU law is being retained under the EU Withdrawal Act in the event either of a deal or of no deal, so there will be protections in law.

The Chairman: Say that again? The EU what? How would that be possible with no deal? I think your adviser might be making a mistake. What do you mean?

Alice Adamson: Under the Act that is already in place, the Act that has already passed through both Houses, there are plans to retain EU law. That provides a certain level of protection, and of course beyond that the Government will treat the situation in Northern Ireland with utmost priority in any circumstances. As I am sure the Minister would say, this Government he works in are not working towards no deal.

Edward Argar MP: Yes, you will not be surprised, and you may say that you have heard it before many times from colleagues, that my intention is to ensure that we deliver on the referendum result and leave, but leave with a good deal. That is what I am focused on and it is what you will

have seen in various statements from other Ministers is the Government's priority.

The Chairman: I know that that is a priority, but at the moment, as we look at the contenders for the leadership to replace the current Prime Minister, the idea of no deal is looking increasingly not just possible but likely. In those circumstances, I would have thought that the people of Northern Ireland will be in some state of anxiety about what will be involved in that.

Edward Argar MP: You will forgive me if I am not tempted to be drawn on the different stances of the contenders for the leadership.

The Chairman: I am not asking you to do that.

Edward Argar MP: On your underlying point, I think that all who are currently standing for the leadership of the Conservative Party and the Prime Minister have been very clear that one of the issues underpinning their approach is a recognition of the extreme importance of rights in Northern Ireland and of doing nothing that would put at risk the peace which has been built up there.

Baroness Shackleton of Belgravia: I think that the Chair has asked the question very simply: if there is no deal, what happens? Let us not say that we all want a nice deal, because obviously we do, but what if there is no deal? Can we have a straight answer to that?

Edward Argar MP: We are clear that while a negotiated deal is the best option—

The Chairman: If the answer is that you do not know, say that.

Edward Argar MP: —we do not believe that even with no deal, a managed deal, WTO or however you want to term it, it would lead to a significant loss of rights in Northern Ireland. We believe that the existing legislation still provides redress and remedy. The question appears to be: to what degree, and is it analogous or is it similar?

On the specific aspect—correct me if I am not right about this—of whether there would be a loss, or whether it is analogous, similar or identical—I am happy to write to the Committee with a clarification. However, I suspect that that response may also need to come from the Northern Ireland Office, with the permission of the Chair.

Lord Judd: You say “we”. If you were a contender for the leadership, we would be much happier to see that.

Edward Argar MP: You are very kind in one sense, but at the moment I do not think that even my best friends would wish on me the role of Prime Minister. It is a challenging job.

Lord Anderson of Swansea: Building on that, it is said that the Government have contingency plans for no deal. Clearly, given the

timescale, it is very possible that that may come about, not least because of the policies of a number of the contenders. Are you saying that in the event of no deal there would be adequate protections, or that the planning suggests that new measures would have to be taken to protect human rights in Northern Ireland?

Edward Argar MP: There are two issues in that. On the first point, virtually all the contenders I have listened to and spoken to have said that they may be willing to see how no deal may evolve, but that that is not their primary intention.

That is the first political point. However, on your broader point, the EU withdrawal Act passed last year comes into force on exit day. It retains EU law in domestic law and would therefore continue to offer protections in those circumstances, because that is the piece of legislation for our exit in tackling no deal, were that to come about. It is the contingent legislation that has been passed, so it would allow for that. But that does not alter my firm point that this is a significant issue and that we will continue to look at it.

Q49 **The Chairman:** I want to ask you very specifically about the decision that was made in the UK Supreme Court on the business of abortion rights in Northern Ireland. On the basis of the Human Rights Act the court decided that there had been discrimination and a failure to protect the human rights of women in Northern Ireland, but as our system allows, it bowed to Parliament. This place has said that it is a matter for the political world.

Given that the Human Rights Act is within your purview, is that not a matter to be dealt with here in the UK to make sure that equality of rights applies across the United Kingdom?

Edward Argar MP: As always, we will consider very carefully any judgment by either an international court or by our own Supreme Court. However, it remains the Government's view, as has been stated by the Secretary of State for Northern Ireland and others, that it is a matter for a restored devolved Government in Northern Ireland, respecting and reflecting the devolution settlement, to carefully consider any declaration of incompatibility or any such ruling. The question the Chair has raised remains a matter under the devolution settlement for a restored Northern Ireland Executive and Assembly to consider.

The Chairman: Whenever that might be.

Edward Argar MP: My colleague the Secretary of State for Northern Ireland continues, amidst everything, to have very frequent and lengthy meetings. She is working hard to do all she can to bring the parties together in order to restore that devolved Administration.

The Chairman: It is just that you say the UK is responsible under international law to protect those rights for women, and I wonder whether you have reflected on that.

Edward Argar MP: The Government continue to reflect on such questions and we keep our position carefully under review. But our position as a Government remains that we believe that it is a matter for a restored devolved Assembly.

The Chairman: You must know that we are being criticised internationally for the fact that in Northern Ireland there are women who are raped but who do not have the protections that other women in our nation have. That is discriminatory and it goes fundamentally to the position of women in our society. It seems that there has been a reluctance to deal with our international obligations.

Edward Argar MP: There is a clear recognition that in this country we have a framework—certainly our legal framework in England and Wales, for example—which I fully endorse and support. However, we must also recognise the constitutional position of the devolution settlement for Northern Ireland, which, as you have alluded to, is not a simple one, particularly at the moment. We believe that it is most appropriate for a restored devolved Administration to consider these issues, reflecting their democratic mandate.

Lord Polak: Timing, of course, is everything. I would guess that if we had met last week, you might have had some supporters around this table for your leadership bid. I want to refer to the comments of the Attorney-General made last March. He said that unless the backstop could be shown to be a temporary arrangement, it would risk breaching Protocol 1 of Article 3 of the convention which protects the right of people to vote in order to choose their legislature. Do you agree with what he said?

Edward Argar MP: You tempt me, my Lord, because I am not a lawyer and thus not a constitutional lawyer. I will defer to the legal opinion of my learned colleague.

Lord Polak: I will not push you on the point.

The Chairman: Lord Anderson, you also have a question on Northern Ireland.

Q50 **Lord Anderson of Swansea:** We have always had a rather peculiar relationship with the common travel area. It is historically a special relationship with the Republic of Ireland, and the common travel area is an example of that. I am particularly concerned about the status of individuals in Northern Ireland who identify as Irish nationals. How will their rights be protected under the withdrawal agreement? There is an element of this issue being relevant to all Irish nationals either in Northern Ireland or in the rest of the UK. Will they have to apply for settled status?

Edward Argar MP: You are absolutely right to highlight the common travel area, and I believe that the Chair has raised it on a number of occasions both here and in the House.

Perhaps I may give a brief update on where we are with the negotiations and discussions about that. On 8 May, the Governments of the UK and Ireland signed a memorandum of understanding codifying the common travel area and all associated reciprocal rights. It is the first agreement of its kind on the CTA, reflecting exactly the point you have made about its importance not just in the context of the recent progress made in Northern Ireland but over many decades. It underpins the relationship between Ireland and Northern Ireland and the United Kingdom.

Whatever the terms of the UK's withdrawal from the EU, that memorandum of understanding demonstrates a very clear commitment to the British-Irish relationship, to maintaining the CTA and to protecting the rights enjoyed by all British and Irish nationals when in each other's states. It commits both Governments to ensuring that administrative and legal steps are taken so that the CTA can continue to function as now after the UK leaves the EU.

Much of this work has been completed or is at a very advanced stage. Some work is still under way, but it is almost there. I believe that the commitment enshrined in the memorandum of understanding and the work underpinning it is a very clear demonstration of the commitment to deliver exactly what you have said: that is, to maintain things as they are in respect of the CTA.

Lord Anderson of Swansea: That is welcome. It means in effect that Irish citizens in Northern Ireland, and presumably more widely—Irish citizens in the rest of the UK—will not be at all concerned about settled status.

Edward Argar MP: Forgive me, but I cannot answer on the detail of the policy on the Home Office settled status scheme because I am not the Minister directly responsible for it, but hopefully in that context the commitment to maintain the operation of the CTA as it works now will give the reassurance you seek in that broader context.

Lord Anderson of Swansea: Hopefully.

The Chairman: You are having to deal with difficult questions because of the uncertainty of our political situation. I and the rest of the Committee recognise that. This has been a difficult set of questions for you to handle. Let me express our appreciation to you for having tried.

Edward Argar MP: You are kind. It has been both politically and intellectually interesting, and at times challenging, to appear before the Committee, but it is important and I am grateful for your time.

The Chairman: This Committee has been doing really important work. It just so happens that you have appeared before us at a moment when it is perhaps becoming more difficult for you to be as frank with us as I imagine you would want to be.

The issue I ask you to take away with you is our concern about the position of the judiciary in the European Court of Justice. Those judges

have been doing important and valuable work. There are legal implications in expecting that they should just quit on leaving day. I think that matters of law could arise in that. Are there any other matters that the Committee would like the Minister to take away with him?

Edward Argar MP: Can I just clarify the other two issues that I may follow up in the same letter? I think you would like me to enlarge a little on the detail of Northern Ireland and specific rights protections. I will touch on abortion rights in that context if you wish.

The Chairman: There is also the issue of Francovich and ongoing cases, because it is important. It feeds into the judicial point, but it is also a standalone about the business of people being able to continue with litigation for compensation in the period after the guillotine comes down. Thank you very much, and to Miss Adamson. You were not called upon for too much technical advice, but where you were it was helpful.

Edward Argar MP: Thank you, Chair.