



OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 11 September 2018

Session 5



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CONTENTS

	Col.
INTERESTS	1
DECISIONS ON TAKING BUSINESS IN PRIVATE	1
BREXIT (IMPACT ON CIVIL AND CRIMINAL JUSTICE SYSTEMS AND POLICING)	2
SUBORDINATE LEGISLATION	32
Legal Aid (Employment of Solicitors) (Scotland) Amendment Regulations 2018 (SSI 2018/193).....	32
Sheriff Court Fees Amendment Order 2018 (SSI 2018/194)	32

JUSTICE COMMITTEE
22nd Meeting 2018, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*John Finnie (Highlands and Islands) (Green)
*Jenny Gilruth (Mid Fife and Glenrothes) (SNP)
*Daniel Johnson (Edinburgh Southern) (Lab)
*Liam Kerr (North East Scotland) (Con)
Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Shona Robison (Dundee City East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Linda Hamilton (Scottish Government)
Gavin Henderson (Scottish Government)
Helen Nisbet (Crown Office and Procurator Fiscal Service)
Rt Hon James Wolffe QC (The Lord Advocate)
Humza Yousaf (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament Justice Committee

Tuesday 11 September 2018

[The Convener opened the meeting at 10:00]

Interests

The Convener (Margaret Mitchell): Good morning and welcome to the Justice Committee's 22nd meeting in 2018. We have apologies from Fulton MacGregor, who has rejoined the committee.

Agenda item 1 is a declaration of interests by our new member. It is my pleasure to welcome Shona Robison to the committee, and I ask her to declare any relevant interests.

Shona Robison (Dundee City East) (SNP): I have no interests to declare.

The Convener: That is fine. I believe that Liam Kerr has a declaration.

Liam Kerr (North East Scotland) (Con): Yes. Simply because of the subject matter that we will be discussing today, I declare that I am a practising solicitor and I hold current practising certificates in England and Wales, and Scotland.

Decisions on Taking Business in Private

10:00

The Convener: Agenda item 2 is a decision on taking three items in private. Are we agreed to take in private item 5, which is consideration of our approach to scrutiny of the Scottish Government's draft budget for 2019-20?

Members indicated agreement.

The Convener: Are we agreed to take in private at item 6 today and at any future meetings consideration of a draft report on alternative dispute resolution?

Members indicated agreement.

The Convener: Are we agreed to take in private at item 7 today and at any future meetings consideration of a draft report on professional legal education?

Members indicated agreement.

The Convener: Thank you for that.

Brexit (Impact on Civil and Criminal Justice Systems and Policing)

10:01

The Convener: Agenda item 3 is an evidence session on the impact of Brexit on the civil and criminal justice systems and policing in Scotland. I welcome Humza Yousaf, the Cabinet Secretary for Justice, and congratulate him on his new appointment. We look forward to many appearances by him before the Justice Committee.

The cabinet secretary is accompanied by his Scottish Government officials. Linda Hamilton is deputy director of the defence, security and cyberresilience division and Gavin Henderson is deputy director of the civil law and legal system division.

I also welcome the Lord Advocate, James Wolffe QC, and Helen Nisbet, head of international co-operation at the Crown Office and Procurator Fiscal Service.

I refer members to paper 1, which is a private paper. I understand that both the cabinet secretary and the Lord Advocate wish to make short opening statements.

The Cabinet Secretary for Justice (Humza Yousaf): Thank you, convener, and good morning to you and the committee. Many thanks for your kind words. I noticed the emphasis on "many appearances" before the Justice Committee, to which I look forward.

We are now less than 200 days from the day on which the United Kingdom seems destined to leave the European Union. At this late stage, it is deeply concerning that the UK Government does not know what the future relationship with the EU on justice matters will be. The lack of clarity and detail from the UK Government in relation to negotiations with the EU presents us with considerable challenges, but however regrettable the position that we find ourselves in, the Scottish Government and Scotland's operational partners such as Police Scotland and the Crown Office will continue to make responsible preparations for all exit possibilities. Planning is well under way to prepare for an unfathomable no-deal scenario.

The committee will be aware of the paper "Scotland's Place in Europe: Security, Judicial Co-operation and Law Enforcement", which we published in June. As it demonstrates, Scotland greatly benefits from existing security, law enforcement and criminal justice co-operation with the EU. The paper underlines the importance of the way in which those measures work together in

fighting crime and keeping people safe. Anything other than full membership and participation in those measures will mean a loss of capability. Measures such as the European criminal records information system, the Schengen information system 2, the alert system for missing or wanted persons and the European arrest warrant are all effective in ensuring that those who are accused of crime can swiftly be brought to trial. In some cases, a European arrest warrant has resulted in an arrest being made within five hours.

The prospect of losing several judicial co-operations also presents some real challenges. Reciprocal civil justice measures such as cross-border recognition of contracts and civil orders assist businesses, families and individuals by providing certainty across borders about which laws apply in different jurisdictions.

The Scottish Government shares the aim of having a close relationship with the EU in relation to security, law enforcement and civil judicial co-operation. It is critical that the UK Government negotiates a future relationship with the EU that takes account of Scotland's separate legal system and the independent role of the Lord Advocate and maintains the direct links that our justice agencies have with the EU. Given that the level of engagement from the UK has not always been consistent or meaningful, I hope that the acknowledgement of all those points in the UK Government's white paper in July signals a willingness to protect and promote Scotland's independent system amid negotiations.

We remain committed to working with our partners to prepare for the risks that are involved in losing access to EU justice measures. We will build on existing strong links that we have within Europe to demonstrate Scotland's desire to collaborate on justice issues for the benefit of our citizens.

The Lord Advocate (Rt Hon James Wolffe QC): I will make a few preliminary points from the perspective of my responsibilities in relation to the investigation and prosecution of crime and the associated responsibilities that I have in relation to extradition and mutual legal assistance.

First, I stress the operational importance of mechanisms for cross-border co-operation in the criminal justice field. Some of the most serious crimes with which we deal have a transnational element—serious organised crime, human trafficking, trafficking in illicit goods and cybercrime.

Secondly, against that background, I make the point that Scottish criminal justice agencies—the Crown Office and Procurator Fiscal Service and Police Scotland—co-operate with their counterparts in many other jurisdictions around the

globe. What is special about the EU is that, within it, we benefit from a particularly effective legal regime and a suite of effective and practical arrangements that facilitate and underpin co-operation in the field of criminal justice. I do not think it is controversial to observe that leaving the EU without replacing that regime would significantly and adversely affect our capabilities.

From a professional criminal justice point of view, the realistic issue is the extent to which those detriments can and will be mitigated. In thinking about that, it is perhaps helpful to distinguish between withdrawal—that is, what will happen next March—and the future relationship. The draft withdrawal agreement that the UK Government has been negotiating with the EU, which has been published, envisages that, broadly speaking, we will maintain the current arrangements until December 2020, although there will be some detriments compared with our current position, for example in the potential for other member states not to extradite their nationals to the UK after March 2019. If there is no withdrawal agreement, the UK would, on leaving the EU, immediately lose the benefit of the current arrangements and there would be an immediate and significant impact on operational capabilities.

I turn to the future relationship. If the withdrawal agreement that is under negotiation is entered into, it will provide time for the UK Government to negotiate on the future relationship between the UK and the EU. The committee will have seen the UK Government's ambitious proposal for a future criminal justice and security relationship, which would be significantly more far reaching than any current arrangement in the field between the EU and a third country. I hope that, as we proceed to negotiation of the future relationships, all parties will focus on the practical imperative of putting in place arrangements that will enable us to continue to protect our citizens from crime and harm.

The Convener: Thank you for your opening statements. We move to questions, and I will start with a question on the key theme of the benefits and costs of leaving the EU justice regime. You both touched on that, but can we have some more specific details of the things that the UK and Scotland could perhaps do differently after Brexit?

Humza Yousaf: I am happy to speak first, convener. I think it is worth making the point that any dilution of the arrangements that we have currently—any stepping back or moving away from them—is going to be to the detriment of justice and justice capability, full stop. That was touched on in the Lord Advocate's statement and also in my statement. There are some serious areas of risk, the European arrest warrant being one of the most obvious examples. As I said in my statement, some criminals have been arrested within five

hours of a European arrest warrant being issued. With regard to criminal records and civil matters in relation to divorce and child maintenance, there are huge areas of risk.

If I understood your question correctly, you asked whether there is an opportunity to do things differently. On a number of matters, there may well be fallbacks. For example, the Hague convention may be a fallback in relation to some civil matters. When it comes to not having access to the European arrest warrant, we may be able to go into precedents of legislation, such as extradition treaties and so on. However, none of them is an adequate replacement for the arrangements that we currently have.

The Lord Advocate: It is important to keep in mind that we are dealing with mutual co-operation. By its nature, it is not something that we can do on our own. The essence of criminal justice co-operation across jurisdictional boundaries is that both parties need to be willing to co-operate and have agreed the rules on which they are willing to co-operate.

As I said, we co-operate with our counterparts around the world under a variety of arrangements. In relation to the EU, it is markedly true that we have a set of practical arrangements for co-operation such as Europol and Eurojust, and we also have a legal regime that underpins co-operation, such as the arrest warrant and investigation order regimes, which enable us to co-operate with our counterparts in a particularly effective way. From the policing perspective, there is the very important set of arrangements for exchange of data in the criminal justice field.

We cannot replace that unilaterally. If the question is whether we could do things differently, then, in so far as we want to co-operate with our counterparts in other jurisdictions, we cannot co-operate on a basis on which they are not willing to agree to co-operate with us. Ultimately, it is going to be all about what can be agreed—what the UK will agree with the EU and what the EU will agree with the UK—about the future arrangements.

The Convener: That is helpful. You both concentrated on some of the areas where problems and, probably, disadvantages could occur. Are you both encouraged that Michel Barnier said only yesterday that he thought that there was a lot of common ground on security issues and that many points of convergence exist, particularly on defence and security, between the EU and the UK? Is there anywhere that you see opportunities to build on that, perhaps even for the better, if we look at our glass as being half full as opposed to half empty?

Humza Yousaf: Convener, I am an eternal optimist, I promise you, but I have concerns. On

the one hand, it is absolutely correct to reference Michel Barnier's comments but, on the other, the EU has been absolutely explicit that with a so-called third country there cannot be the same co-operation or the same access that a country has as an EU member.

Let us please not beat around the bush. If there is any detriment to the current arrangements with the European arrest warrant, Europol, Eurojust and many other measures, only one set of people will benefit, and that will be those criminals who are on the run, hopping from country to country across the European continent. Nobody else will benefit from any looser arrangements.

As the Lord Advocate expertly articulated, there is perhaps an opportunity to do things in a different way, but that will involve co-operation between the two. I watched and read over the transcript of the Secretary of State for Scotland's evidence to the Justice Committee last week, and I associate myself with his remarks that we want to have as close co-operation as possible, but the Scottish Government would like the arrangements to be as similar as they can be to what we have. We do not want any detriment to that, for the reasons that I have pointed out. What has been proposed would also require the EU to show some movement, and I have to say that I have not seen too much evidence of that thus far.

10:15

The Lord Advocate: It is absolutely right to point out that there is a level of convergence on strategic aims in the area. Indeed, that has been apparent over some time. The question mark is over how that will translate into detailed provision in a way that reflects the United Kingdom's decision to leave the European Union, fulfils any requirements of the European Union and meets our collective responsibilities on all sides to keep our citizens safe.

For my part, as I said a moment ago, I hope that all parties will keep clearly in their minds the practical imperative of making arrangements that will continue to protect our citizens from harm and from crime, and if the outcome is a partnership arrangement of the sort that the UK has outlined, that would be a satisfactory outcome. I suppose that, at this point, that is in the future.

The Convener: State-sponsored terrorism is just as likely to happen in an EU state as it is in the UK, so there is some obvious sense in co-operation. We should be aware of that.

Rona Mackay (Strathkelvin and Bearsden) (SNP): When the Secretary of State for Scotland gave evidence last week, I asked him about the cost to Scotland of our leaving the EU justice regime. He said:

"I am not aware that the Scottish Government has identified a specific issue in relation to policing for which it would require additional funding if we left the EU with no deal."—[*Official Report, Justice Committee*, 6 September 2018; c 12.]

Can you give me your opinion of that? It seems to be clear that the secretary of state was saying there would be no more money for Scotland to deal with extra border security costs, and so on.

Humza Yousaf: I have read the transcripts of the various evidence sessions that the committee has held with people who are involved in justice. It is fair to say—without putting words in their mouths—that it is certainly not their or other partners' view that there would be no issue. We have seen comments from the Police Service of Northern Ireland over the weekend and last week about the cost to that service.

Michael Russell will make a statement to Parliament later today in which, I expect, he will cover in more detail some of the financial aspects. Clearly, some areas are reserved—Rona Mackay touched on borders—but in the justice portfolio many issues, as you know, are devolved, so we must ensure that there is adequate funding for them. It is imperative that we get some detail on what the withdrawal deal will be. Once we get the detail, no doubt the Government and our justice partners will be able to elaborate on the costs.

The Lord Advocate: I do not think that there is anything I can usefully add, other than to note that, as the committee is aware, additional funding was recently made available to the Crown Office and Procurator Fiscal Service in-year. A small part of that funding is being applied as additional resources to supplement Helen Nisbet's team that is dealing with Brexit over the coming period, when it might be that there will be a particular requirement for more intensive work and engagement with a range of our counterparts.

Daniel Johnson (Edinburgh Southern) (Lab): When people listen to the Brexit debate, it is very much the case that trade and economic matters dominate, but when we hear about issues here in relation to protecting our citizens, access to information that would make our agencies effective, and ensuring that our law has reach, especially given the increasingly international aspect of crime in this day and age, we realise that the impact of Brexit goes far beyond economic matters. Does the cabinet secretary agree with that?

I appreciate what the cabinet secretary said earlier about having full access to some 40 measures that are set out in the UK Government paper. It is easy to talk about full access or full "legally binding" agreement, which I think is the language that is used in the UK Government's white paper, but a lot of complexity lies beneath

that. What, in your view, would have to be put in place to achieve full access or full legally binding agreement?

Humza Yousaf: I will answer the first question, then try to address the second, as far as I can. Daniel Johnson is right about the impact of Brexit.

We talk about criminal justice a lot, which is important. I have touched on one or two examples of high-profile cases that members and the general public will be aware of, in which justice was swiftly served because of our European co-operation. There are many such examples—I could give hundreds, if you want, but I will spare you.

There are also examples on the civil justice side that make the subject real to people: for example, recognition in other jurisdictions of divorces and child maintenance, recognition of contract and procurement law for business owners who do business across Europe, and so on. All are matters that could affect people in their everyday lives.

Daniel Johnson is absolutely right about complexity. The positive, of course, is that we are not a third country coming in from the outside. We are a member state that has links built in; Police Scotland, for example, has an embedded officer in Europol. We have structures in place. I suppose our plea to the UK Government and, in fairness, to the EU negotiating partners, would be that retaining much of that, if not all of it, would be hugely desirable in order for justice to continue to be served as swiftly as it currently is. My officials may want to add something more on the complexity, or give other examples of how we are already embedded. Such structures already exist. I hope that it will not be too complex to retain them, but clearly such matters are for negotiation.

Linda Hamilton (Scottish Government): Daniel Johnson also asked about the mechanism that would have to be put in place. That is up to the UK and the EU to decide. There has been discussion about whether a security treaty or something less could be a mechanism going forward. That is, however, part of the negotiation between the UK and the EU. From the Scottish Government's perspective, we hope to see as many such measures as possible being protected.

Daniel Johnson: That is a very useful point. One of the things that frustrate me is that we often talk in euphemisms in the Brexit debate—for example, we talk about "full legal agreements". Ultimately, we will need some sort of bilateral treaty to establish the mechanisms that will be required. Given that there are some 40 measures within the scope of the matter, do we have sufficient time? What sort of complexity would be involved in establishing such a treaty, given that

we have, as the cabinet secretary pointed out, fewer than 200 days before the Brexit date, and possibly a transition period beyond that that will probably not extend much beyond 18 months? Are there comparisons with other treaty negotiation processes that we can learn from? How complex a treaty does the Scottish Government feel it might be?

Humza Yousaf: A difficulty in answering that question—it is absolutely the correct question to be asking, and I see it as being critical—is caused by the lack of information from the UK Government on reserved matters such as extradition and the European arrest warrant. There are big meaty issues on which we have little detail. The UK Government is quite heavy on aspiration but very light on detail—we heard a lot of aspiration from the Secretary of State for Scotland. I commend that aspiration; it is good to go in with aspiration. However, without that detail, we are, as is prudent for us as the Government, planning for the absolutely worst case of an unfathomable no-deal scenario, but tying everything up in fewer than 200 days is a very big ask.

The Lord Advocate: I will make a couple of points. The key point is that whatever arrangement is put in place will be a matter, as Daniel Johnson rightly observes, for an international treaty between the UK and the EU, and potentially the other member states.

In the draft withdrawal agreement that is under negotiation and which is available publicly, the section on criminal justice is quite short. It merely identifies the legal instruments to which we will continue to be a party during the transition period that is envisaged within the withdrawal agreement, and identifies certain limits and constraints on our continued involvement in the legal regime. That is a relatively short instrument.

What the international security treaty that has been proposed by the UK will ultimately look like is quite a different question; it is obviously for others to negotiate that treaty. From an operational perspective, one would want participation in a legal regime that is equivalent to what we currently have. While there will be, I anticipate, a great deal of good will about co-operation across borders between criminal justice agencies, it is very important to keep in mind that we will be dealing with the rights of individuals—suspects and people accused of crime—so we will need in place a legal regime that is effective. There must, from the operational perspective, be legal instruments and participation in institutional structures that facilitate co-operation and access to data.

One of the challenging but very important questions is how we will continue to participate in a regime that is dynamic. We tend to see the current suite of 40 instruments as a snapshot of

things that we would like to keep. The UK Government, the Scottish Government and I all recognise that it is a suite of arrangements that fit together and work together, and that if you pick away at it and you are part of only part of it, that will not be as effective as the whole.

We also need to recognise that within the EU the regime is dynamic and continues to develop, and we need to recognise where the UK has been a leading player in developing that regime. The trick—the challenge—in a future agreement will be in whether, to what extent and how we can continue to participate in and contribute to that regime as it continues to develop.

Daniel Johnson: I have one final question. In getting that agreement right, the starting point is critical. What are the views of the cabinet secretary and the Lord Advocate of the white paper that has been published as a starting point? I hear what you are saying about the lack of detail, but is the scope of the white paper correct? Does it identify the correct issues? What are your thoughts or comment on it?

Humza Yousaf: My opening remarks alluded to the fact that there are aspects of the white paper and what has been published by the UK Government that I see as positive. For example, the UK Government has clearly taken heed of what we have been saying for quite some time about recognising Scotland's separate legal system, the independent role of the Lord Advocate and, of course, maintaining our direct links between our justice agencies and the EU justice agencies—for example, the Police Scotland and Europol tie-in that. We also published "Scotland's Place in Europe", which is far more substantial than anything that is in the UK Government's paper.

10:30

However, I acknowledge what the Secretary of State for Scotland said last week about further technical notices being imminent. It is fair to say that engagement on justice matters has been mixed. I have had relatively positive discussions with Ministry of Justice officials but it has been—to be polite—a little more difficult with the Home Office. I have requested a discussion with the Home Secretary to discuss matters in more detail, which I think will probably be more feasible once the technical notices have been published. However, the lack of detail and of meaningful engagement is worrying. We are seeing some positive signs from what the Secretary of State for Scotland had to say, but we will judge him on actions, and not simply on words.

Shona Robison: Have you had sight of any of the technical notices that you just mentioned? If

not, do you expect to have sight of them and, if so, when? Clearly the detail is important—not least because David Mundell said something that I do not think any of us could disagree with:

“I am not going to suggest that not reaching an agreement on that would be anything other than suboptimal.”—[*Official Report, Justice Committee*, 6 September 2018; c 5.]

I guess that it is very important that you have sight as soon as possible of the detail in the technical notices that have been or are in the process of being produced.

Humza Yousaf: Yes. I can best describe the situation as a mixed bag. A technical notice on civil judicial co-operation was shared on a confidential basis between officials. It is a matter, obviously, for the UK Government, so I cannot disclose any of the details. I understand that the Secretary of State for Scotland said that he would write to the committee with further information.

Other matters have been a bit more difficult—particularly issues on which we have been dealing with the Home Office. On when we have seen detail and so forth, the level of engagement on justice issues has, as I said, been a mixed bag. It is fair to say that we are getting some information, but it would have been helpful if that information had been shared a lot earlier in order for us to be able to make necessary preparations. Again, I will defer to my officials. I know that in the 10 or 11 weeks that I have been in my role some information has been shared on technical notices, but it has been a long time coming.

Linda Hamilton: On the justice and security side, we are not sure whether the Home Office is going to produce a technical notice. The secretary of state’s evidence last week suggested that there will be one, so the Cabinet Secretary for Justice wrote to the Home Secretary to seek clarification on that and to ensure that we have sight of it before it is published, with a view to our feeding into it. We have not seen one yet. I understand that there will be a technical notice on firearms, which is a different issue, but we do not know yet whether there will be notices on the sorts of issues that we are discussing today.

Shona Robison: It would be helpful for us to know whether a response is forthcoming from the Home Secretary and what it is.

The Lord Advocate: I draw the committee’s attention to the technical note—of course, the question is whether the technical note is the same as a technical notice—that the secretary of state sent to the committee, with its letter on security, law enforcement and criminal justice. It sets out quite a lot of information on that particular field. The question is, as the cabinet secretary and Ms

Hamilton have observed, whether there is another document yet to come.

Shona Robison: I think that a technical notice is a formal procedure, whereas a technical note could just be a note—an interpretation.

Linda Hamilton: As I understand it, the technical note that the Lord Advocate is referring to was from May 2018 and was a document that the UK Government produced in order to discuss the issues with the European Union. It was not shared with us in advance.

The technical notices that I think are being referring to are around the suite of documents that the UK is publishing in relation to a no-deal Brexit, in order to inform the public about issues and to ensure readiness, as far as that is possible. I think that there is some helpful information in that technical note from May, and there is more detail in the documentation that the Scottish Government has published.

The Convener: Certainly, the secretary of state has undertaken to come back to the committee with further information. If we feel that there is something missing from that, there is the opportunity to go back again and request further information.

John Finnie (Highlands and Islands) (Green): I would like to ask about the European Court of Justice and, in particular, the important role of dispute resolution. If I noted it correctly, the Lord Advocate said that, as things stand, the regime is particularly effective. The white paper states that the role of the European Court of Justice will come to an end, but it also recognises that

“Where the UK participates in an EU agency,”

the court is the ultimate legal authority on EU rules. The Scottish Government paper argues that the UK’s opposition to the jurisdiction of the European Court of Justice could result in the

“loss of vital cross border co-operation on information sharing and other criminal justice co-operation measures.”

I would be grateful for your views, particularly on the compromise regarding UK involvement in EU institutions. How do you think that that squares with the position expressed by the UK Government on taking back control?

The Lord Advocate: I will treat any political comment as something for others to engage in.

I make this point about where the European Court of Justice sits in relation to criminal justice co-operation. Instruments such as the European arrest warrant or the European investigation order depend on confidence and mutual trust between the different jurisdictions. Mutual trust and confidence in the jurisprudence of the Luxembourg court are built on the fact that all the member

states are signed up to a common legal regime that includes the Charter of Fundamental Rights of the European Union and is ultimately supervised by the European Court of Justice in order to maintain consistency across the system. In the context of the EU, there is integrity in the way that that fits together.

On negotiating a future security arrangement, the question that will need to be addressed is whether we can sign up to a similar suite of legal arrangements without the European Court of Justice playing a role. Ultimately, that is a matter for political negotiation and a question of the red lines on each side. That is not for me to comment on, other than to express the hope that, on both sides, those who are involved in the negotiations will not lose sight of the practical imperative to not let artificial constraints get in the way of putting in place a regime that maintains our capabilities.

Humza Yousaf: I suspect that John Finnie and I are not too far apart in our beliefs on this. The Scottish Government welcomes the European Court of Justice's jurisdiction in whatever form is considered necessary to secure and maintain as close a relationship as possible with the EU on justice and security matters.

I should also say that I welcome any evolution in the UK Government's position from where it began initially—from that really hard Brexit, to a slight shifting of the sands, and the line in the sand, to what the Prime Minister has put in her Chequers plan. However, there is no doubt that even that small movement to the Chequers plan—which does not go as far as the Scottish Government would like it to go by any stretch of the imagination—has caused ruptures in the Conservative Party. There may well be pressure to go backwards on that, but I hope that the Prime Minister will not cave into it.

To be honest, I do not think that there is much for me to say about taking back control. It is self-evident that in this world in which we live, where we are interdependent and rely on close co-operation with our neighbours, partners and allies, being 100 per cent in control without any mutual co-operation is an isolationist approach that I would certainly not welcome by any stretch of the imagination. I welcome any movement towards our position on the jurisdiction of the European Court of Justice and I hope that there is no rowing back on that.

John Finnie: I am struggling to be balanced, but I have to say that the secretary of state expressed the view that by choosing to permit reference to the European Court of Justice, the UK would be maintaining control.

I want to ask about a specific factor. The proposed rules would not give rights to

individuals—challenges would be able to be made only in the UK courts. Does the cabinet secretary think that the EU would accept that, given that individuals may be subject to criminal penalties?

Humza Yousaf: The essence of what you said is right. The secretary of state said:

“any reference to the Court of Justice would be made by our choice”—[*Official Report, Justice Committee*, 6 September 2018; c 10.]

That is generally the case now. Under EU law, any UK court may make a reference and only the final court of appeal must make a reference. What remains unclear is the extent to which the UK Government will accept the authoritative interpretation of EU law by the court. That deals with the point about taking back control.

This will undoubtedly come down to the debate—to put it politely—that we are seeing between those who want as hard a Brexit as possible and those who take a more pragmatic view. Those who are pushing for an ideologically hard, isolationist Brexit will not accept the jurisdiction of the European Court of Justice. Given that we want to be a nation that trades globally and is outward looking, I just do not see how we can square that circle.

Liam McArthur (Orkney Islands) (LD): I will follow that issue up briefly before I turn to data sharing. I pursued this matter with the secretary of state last week and I was intrigued by the notion of choice and volition in cases that are referred—it seemed to apply to the areas covered by a common rulebook. I am interested in the Lord Advocate's view on the likelihood of the European Court of Justice or our European Union partners signing up to a regime in which the European Court of Justice has that oversight but there is no clarity about how sanctions would apply or how the European Court of Justice's verdict would be treated. It seems inconceivable that the European Court of Justice would allow itself to be used in a way that was perhaps symbolic or superficial. Is it fair to say that there would have to be meaningful involvement and oversight of those areas of the common rulebook?

The Lord Advocate: There are a couple of points to make. One is that there must be a system that ultimately decides what the rules mean. If, and insofar as, we simply continue to participate in the set of rules that already exist, by definition we will continue to be part of the EU legal regime and the European Court of Justice will ultimately decide what that means.

A good illustration of that is what will happen during the so-called transition period, assuming that we have a withdrawal agreement along the lines of the one that has been published. During that period, we will continue to be subject to the

rules of the EU and we will continue, therefore, to be subject to the interpretation that the European Court of Justice makes of those rules, although during that period we will not have any British judges on that court. That is an illustration of how, if we want to be part of a regime of rules, we will be affected by the way that the court whose job it is to interpret those rules interprets them—regardless of whether we are directly involved in the court by way of having judges there.

10:45

The future security partnership is yet to be negotiated. I do not think that it is right for me to speculate about where the respective positions, or potential positions, of the UK and the EU would ultimately leave the question of dispute resolution. It will be essential that there is some form of dispute resolution. Given that we are dealing with the rights of individuals in this context, it seems likely that there would need to be some form of judicial dispute resolution, but I do not think that it is right for me to try to anticipate or speculate about what that will look like.

Liam McArthur: I turn to data sharing. You both acknowledged earlier that there is a degree of mutual interest on both sides—perhaps more in this area than in other areas where negotiations are taking place at the moment. What does that lead you to conclude about any arrangement for the sharing of data, which is absolutely critical to co-operation between police forces and so on? Assuming that what is in place at the moment cannot be maintained, for the reasons that the cabinet secretary outlined earlier, an alternative arrangement that is considerably more than any third-party country has now would clearly be necessary. Do you have a view as to what that would look like? Is there anything that can be learnt on to inform the committee and the wider public about how such a new arrangement might be made to work?

The Lord Advocate: On what it would look like, I suppose that we start from where we are as at today, with a set of arrangements for the exchange of data. A good example is the Schengen information system 2, which is a system of alerts that helps to underpin the arrest warrant system. If one starts from where we are, one would want our law enforcement agencies to continue to have access to the systems of data that will provide them with useful information in the context of their work, which are two-way. If we issue an arrest warrant for someone who we want to be returned to Scotland and that person is picked up in another EU country, the Schengen information system alerts the police officer in that country that this is someone who is wanted under

an arrest warrant back in the UK, in Scotland. That is how it ties together.

Of course, it is anticipated that this is an area in which there might be developments. The various databases that are available might work differently or more effectively in the future, and we would want to have access to them. Again, it is not for me to speculate, but one does not necessarily have to anticipate a whole new set of databases. It is about having access to the systems and arrangements that the EU has in place already.

The point that underlines that is that there is EU law about the transfer of data to third countries and one anticipates that, from the EU's perspective, any arrangement that we put in place for access to those databases will have to comply with its requirements in relation to the transfer of data outside the EU. The UK has recognised that this is a cross-cutting issue. We will be required to maintain a data protection regime that meets the EU's requirements in relation to the transfer of data outside the EU.

Liam McArthur: I understand that the UK put forward some proposals about how this might work. The response from Michel Barnier, or from the EU side, was not wholly encouraging, but presumably that is around the rules in relation to data sharing as opposed to the Schengen alert system; presumably both sides agree that that would be a sensible basis on which to maintain a relationship post-Brexit.

Humza Yousaf: As we know, data protection is a reserved matter, but you are absolutely right. In fact, even the UK Government's white paper acknowledged that there is no, or very limited, precedent for non-Schengen third countries to participate in data exchange. You are absolutely right in saying that the noises from the EU side are not particularly encouraging. That is undoubtedly because there is not an existing third country precedent that is necessarily helpful in this regard, but also because of the legislation and rules.

The second part of your first question was around arrangements that might exist for other countries outside the EU. There will be other fallbacks or precedents in terms of justice and home affairs measures, but I return to my point that they are not as swift and not as efficient. They are more cumbersome and more onerous than the current measures. I keep coming back to the example of the European arrest warrant. The agreement that Iceland and Norway have is often referred to, but it is deficient in the sense that a number of countries—I think that the Lord Advocate mentioned this—will not extradite their own nationals under those treaties. The arrangements were made in 2006 and they are yet to come into force.

My point in using those examples—I know that we are talking about data exchange—is that whatever we do there will be complexity and it will take a lot of time. Whatever measures are put in place, as good as they may well be, will be deficient in comparison with what we currently have.

Liam McArthur: Perhaps I should have prefaced my remarks by making it absolutely clear that I need no convincing whatsoever that the vote in 2016 was an act of self-harm unparalleled in recent times. Nevertheless, given where we are and given that this is an area of crucial importance, in which there appears to be a level of mutual interest in maintaining as smooth a transition and on-going relationship as possible, and in which the UK, as an exiting EU member state, has a relationship that is unlike that of any of the third parties that have been referred to, is there a way of envisaging an entirely separate, unique and bespoke third-party relationship that may not deliver all the benefits—I fully accept that—but which would maintain a number of the most significant and could perhaps be developed over time? As the Lord Advocate pointed out, this is a dynamic process in which the rules, whatever is agreed now, will evolve over time.

The Lord Advocate: I think that we all hope so.

Humza Yousaf: I return to the Lord Advocate's point, which was well made. Even if we have that arrangement in place—again, I hope that we do—our ability to contribute to that process as it develops and evolves will undoubtedly be extremely limited. We know how quickly technology in particular moves, and information and communication technology systems and everything else move at a pace. Our ability to influence that will be extraordinarily limited.

The Convener: Jenny Gilruth has some questions on the European arrest warrant, EU agencies and Europol.

Jenny Gilruth (Mid Fife and Glenrothes) (SNP): Cabinet secretary, you spoke in your opening statement about the swiftness of the European arrest warrant; for example, someone can be arrested within five hours of issue. In response to Liam McArthur you also said that Norway is perhaps closest in terms of non-membership and security co-operation, but we know that Norway is not a full participant in Europol. It does not have access to all EU databases and it has a much more complex extradition agreement. Is there any extradition agreement that could be as effective as the European arrest warrant?

Humza Yousaf: It could not be as effective. I keep making the point, and I reiterate, that any arrangement that we have will be deficient in

comparison with what we currently have. That can be seen time and again, and in example after example. My strong belief is that if we have any measures, any structure, any governance, or any mechanisms that are deficient in comparison with what we currently have—and, inevitably, we will—whether that is for European arrest warrants, Europol, Eurojust or ECRIS, the only people who will benefit from that will be those who are trying to evade justice.

The Lord Advocate: I have a certain amount of very direct practical experience of conducting extradition proceedings under what is called part 2, which is the part of the Extradition Act 2003 that deals with non-arrest warrant extraditions. Of course, as Lord Advocate I am now responsible for representing requesting states from around the world that want to extradite from the UK and for dealing with our own requests to other countries, with the help of Helen Nisbet and her staff.

Part 2 extraditions are significantly more cumbersome than extraditions using the arrest warrant. I saw somewhere—I do not know precisely what dataset was being looked at—a statement that the average time for the execution of a European arrest warrant is 42 days and the average time for a part 2 extradition is between nine and 10 months, which gives some illustration of the difference.

The reason for that difference in operation is that the arrest warrant is, in effect, built on a system of mutual trust and confidence and is an entirely judicial process, in which if a warrant has been issued by the relevant authority in another member state the working assumption is that that will be executed subject to a set of protections for suspects. With the arrest warrant, we have relative speed and relative simplicity, and in this context speed is important. Justice benefits. People are brought to trial in the right forum within a reasonable time, whether they are acquitted or convicted. There is a very marked practical difference between the two procedures.

The other important practical difference is that the arrest warrant is plugged into the SIS 2 system. It sits alongside the system of alerts, which means that if we issue an arrest warrant for a suspect whom we want for trial in Scotland, they may be picked up very quickly through the operation of the SIS 2 system. A good example of that is Marek Harcar, the man who was accused and ultimately convicted of the murder of Moira Jones. We issued an arrest warrant and, following that, he was picked up very quickly in his home country of Slovakia and ultimately returned for trial. There are alert systems through Interpol, but alerts do not go up on to the system as quickly as they do through the SIS 2 system.

In moving from the current regime under the arrest warrant to an alternative, we are working on the basis that we can fall back on the European Convention on Extradition, which is a treaty arrangement that applies to quite a number of countries that are not in the EU and which sit under part 2 of the Extradition Act 2003. There are some technical issues that will have to be resolved. Some member states, as I understand it, repealed their domestic legislation, which would allow them to rely on the 1957 convention vis-à-vis the UK. That issue will need to be worked through and resolved.

The other difference is that, under the arrest warrant system, member states are obliged to extradite in accordance with the system regardless of whether the person wanted is a national of that country. Outside the arrest warrant system—we see this even in the transition arrangements that are envisaged—a number of countries within the EU will not extradite their own nationals. Germany, for example, has a constitutional bar to extraditing its own nationals, but that is trumped by the arrest warrant.

11:00

I return to Marek Harcar. I understand that Slovakia is a country that will not normally extradite its own nationals, so outside the arrest warrant system a question would have arisen about whether we would have been able to secure the extradition of that individual. One of the concerns is that because the arrest warrant system is relatively speedy and operates according to timetables that are laid down, there is a risk that our extradition requests, if they are made outside that system, will not be treated with the same priority as those that sit within the system. One can see a set of detriments, from a professional criminal justice perspective, if we have to operate outside the arrest warrant system.

Liam Kerr: There is at least the possibility of a no-deal scenario. The cabinet secretary talked in his opening statement about planning being under way for a no deal. The Lord Advocate talked about practical arrangements being in place. That rather begs the question: can you tell us what practical contingency planning you have done or the Scottish Government has done for that scenario? Given the cabinet secretary's point about how explicit the EU has been throughout this process, when did that contingency planning start?

Humza Yousaf: I will give you as much detail as I can; if you want me to supplement that, I will write to the convener and to the committee more widely.

Obviously, Mr Kerr knows very well our position on Scotland not wishing to leave the EU and it

being regrettable that we are even having to think about contingency for a no-deal scenario. That notwithstanding, you will be aware that Mr Russell made a statement to Parliament in June setting out the Scottish Government's planning for all exit scenarios; of course, that involves contingency planning for a no-deal scenario. Some of that has been made difficult. We have talked about the lack of clear information in what has been provided to us. Nonetheless, we have been doing what we can. Let me give you some examples of how we have been preparing for that no-deal scenario.

First and foremost, it has been important for us to identify where legislative deficiencies would occur within the justice portfolio upon leaving the EU. We are prioritising preparing legislation that it will be absolutely necessary to amend in the event of a no deal. Again, I can revert to the committee with more detail in due course when that legislation comes forward. That involves discussions with the UK Government as well as internally within the Scottish Government.

We are also liaising with a number of agencies and bodies such as Police Scotland to assist them with workforce planning in the event of a no deal to help them prepare for exit from the EU. A number of regular meetings are held to discuss that contingency planning, and that too is very much focused on a possible no-deal scenario.

On readiness within the justice portfolio, we have recruited extra staff and we now have the justice and safer communities EU hub. Mr Kerr will know of the justice board, which brings together the stakeholders and experts in the justice field.

On the question about practical action, we also have the sub-board of the justice board, which is looking at readiness and planning for Brexit; of course, that includes a no-deal scenario. We have had a number of engagements with the UK Government and other devolved Administrations in that regard, from civil service level where we have a directors group all the way through to some of the ministerial forums that exist to discuss this issue.

A whole load of practical measures are being taken, from identifying the appropriate legislation that would be deficient upon exit from the EU right the way through to some very practical measures that several justice organisations, from Police Scotland to the Crown Office and anybody in between, will have to think about. That is very much under way and has been under way for a period of time now.

Liam Kerr: Can you say specifically when that planning for no deal started? You mentioned June of this year, but one would assume that it has been going on for some time. Does the Scottish Government intend to publish the planning for no

deal, such that the various agencies can prepare? If so, when?

Humza Yousaf: I think that all of us around the table, regardless of where we sit on the Brexit debate, would have found that no-deal scenario unfathomable. As we have all witnessed and noticed, there has undoubtedly been some talking up of the possibility of that scenario. My understanding is that in June that preparation began for a no-deal scenario. Other contingency measures were undoubtedly discussed before then, but certainly the no-deal scenario has been discussed since then. That would not have prevented other justice agencies and bodies from, for example, exploring that specific no-deal scenario before then, but I think that some of the more detailed work on that has been done since June.

When the Secretary of State for Scotland was in front of the committee last week, he mentioned that certain technical notices would be published. It would be impossible for us to publish all the detail on all those matters if some of it relies on information that we await from the UK Government on areas such as the EAW and extradition, for example. These are reserved matters. To do that, we would have to wait for those gaps to be filled by the UK Government and the technical notices.

I do not want to pre-empt Mr Russell's statement to Parliament, which is scheduled to take place later today. He will touch on contingency planning and the potential publishing of information. From the perspective of my portfolio, when the committee asks me for particular information I will give as much detail as I can on that, on what is appropriate.

Liam Kerr: You have talked about various contingencies having to be made. It sounds as though planning commenced fairly recently and is very much a fluid process. In that case, presumably there is no way to tell, or plans have not been made to quantify, the spend that will be required to address the practicalities. If that is right, who is expected to fund the practical contingencies? Will they be funded by the agencies in question or by the Scottish Government?

Humza Yousaf: The Scottish Government would not expect to pay a penny towards meeting costs related to EU exit preparatory work. Scotland must have its fair share of any UK Government resources to support EU exit preparatory work. That is important. Some of that will, of course, come out depending on the deal. In some respects, Liam Kerr is absolutely right about the process being fluid, depending on what type of deal we end up getting. However, we are talking specifically about the worst-case scenario, which is the no-deal scenario. We can make some

preparations for that, but some of that undoubtedly relies on what comes forward from the UK Government in the technical notices that it publishes.

Liam Kerr: In effect, we have known for some time that there could be a no-deal scenario in six, seven or eight months, which would have a cost attached to various agencies in Scotland, but the Scottish Government does not have a concrete plan for how much the cost to each agency might be but simply asserts that the UK Government should meet whatever that cost is. Am I right? Am I summarising the position correctly?

Humza Yousaf: No, the position is that we are in this situation because of the UK Government, which is, of course, negotiating on our behalf. We would expect the costs of preparatory work for a no-deal exit from the EU to be met by the UK Government. All of us around the table—

Liam Kerr: Forgive me for interrupting—this is a genuine intervention. Presumably, you have made those representations to the UK Government.

Humza Yousaf: Certainly.

Liam Kerr: You have said, "We anticipate that the cost of no deal will be this. What do you propose?"

Humza Yousaf: The point that I was coming to—I think that I made it in my first answer—was that some of this certainly relies on the UK Government coming forward with more detailed information. For example, it is responsible for extradition and other legislative matters. We can give some detail and, of course, we share that with the UK Government. We have a relatively good dialogue with the Ministry of Justice, although not necessarily with the Home Office, so we can give some information on that. Clearly, we are awaiting some of the detailed information from the UK Government.

The Convener: I was just going to ask whether the Crown Office had made any estimate of the cost.

The Lord Advocate: I was going to make an observation about the no-deal scenario, which, like the cabinet secretary, I think that we all agree is not the desired outcome. The effect of no deal is that we effectively drop out of the existing set of arrangements for co-operation. A significant part of the contingency planning is around identifying what alternative systems and legal instruments are already in place that we could fall back on—in relation to extradition, the Council of Europe 1957 convention. The issue with using that convention rather than the European arrest warrant system is that it is slower and more cumbersome. There is a detriment in terms of the effectiveness of the system.

When we fall out of the Schengen exchange of information arrangement, again the key detriments are around the effect on the overall effectiveness of the system. In contingency planning, there has been a careful look at the extent to which alternative arrangements are already in place. As the cabinet secretary has observed, areas such as extradition are essentially reserved areas, which are for the United Kingdom Government to deal with. My officials in the Crown Office and officials from the Scottish Government have been involved in contingency planning within the Home Office's judicial co-operation board in relation to these matters. Part of that is also about looking at what legislative steps may be necessary to deal with the consequences of no deal, and that work is on-going.

I made the point earlier that I am applying a small part of the additional funding that the Scottish Government has made available to me in-year to additional resource to support Helen Nisbet and her staff who deal with this work. That is in anticipation of the potential for additional work, particularly in relation to engagement with our counterparts in other member states, both to enhance our existing good relations with them but also where there may be a need for more intensive discussion with counterparts on individual cases that may straddle the boundary. We also have in mind the possibility that there will be additional work on an on-going basis.

Liam Kerr: I know that the cabinet secretary wants to come back in, but I have a very brief question. When did the Crown Office start planning for a no-deal Brexit? Will you publish your conclusions at any point?

The Lord Advocate: We have had in mind for some time the range of options, and Crown Office officials have been part of the UK's contingency planning since the beginning of the year. As I understand it, that work has covered the range of possible scenarios. It is the case that there has been an intensity of interest or focus on the no-deal scenario as we have progressed through this year.

11:15

The Convener: The cabinet secretary wants to come in, and we have two supplementaries.

Humza Yousaf: I am conscious of time, but I have two brief points to make. I think that Liam Kerr is asking the question genuinely to get some reassurance for those involved in the justice sector. The reassurance that I hope that I can give is that, as Scottish ministers, we take very seriously our responsibility, so we are ensuring that resources are allocated to meet priority areas of expenditure and monitoring whether those are

sufficient for the challenges ahead. I hope that, if we get the information from the UK Government, we will be able to give more detail and more reassurance around the preparations for funding consequential for portfolios. Those will be confirmed as part of the autumn budget revision, which is expected to be laid before Parliament before the end of this month. More details on that will be made available shortly.

It is also worth also making the point that UK Government departments are only now getting to the point of costing no deal. As the Lord Advocate says, although it has only been a matter of months, we are starting to see the no-deal scenario becoming a real possibility. I hope that that gives some element of reassurance.

The Lord Advocate: I do not in any sense to seek to shift responsibility to make the point that, in this area, the negotiation with the EU is a matter for the UK Government. Therefore, in an area that, in the context of extradition, is reserved, the focus for us in terms of contingency planning is very much one in which we depend on the Home Office for the approach that has been taken.

Rona Mackay: I have a brief question on that theme. The Secretary of State for Scotland said that the UK Government had done a gap analysis in the event of no deal. Was that shared with the Scottish Government?

Humza Yousaf: I am looking at my officials; I am not entirely sure.

Linda Hamilton: Not in any great detail. We have on-going work with the Home Office, in particular on my side, where we have the judicial co-operation board that the Lord Advocate talked about. To address Mr Kerr's point, that is about contingency planning for a no-deal Brexit. That work started with a look at a range of different potential Brexits but is now focusing more heavily on a no-deal Brexit.

We have not seen huge detail on gap analysis. An increasing amount of information is being made available, but not the full analysis and data that I suspect the Home Office has. We are working quite hard to try to tally up as much as we can for our own planning purposes. For example, on Europol, the Scottish Government has no control in the negotiations around what a no-deal Brexit might look like, what its impact might be, or ultimately what the arrangements might be. We need to work closely with the Home Office to try to get that information to make sure that we are, and Police Scotland is, in as good a position as possible. That is where costing and so on come in.

A load of work is going on and we are getting ourselves in as strong a position as possible, but for us to be able to do that, the information flow from the Home Office is crucial, in terms of both

the analysis that it is doing and feedback on what is happening at the EU level with those negotiations.

Rona Mackay: Presumably, more detailed analysis would help the Scottish Government make contingency plans.

Linda Hamilton: Absolutely.

Shona Robison: On that point, I think that any reasonable person listening to this evidence session would conclude that it is incredibly difficult for the Scottish Government or any other body to try to plan for contingency arrangements against a backdrop of various possible outcomes. The Lord Advocate has gone into the one issue—extradition—that I think exemplifies that. If the EAW goes, would we be operating under part 2 of the Extradition Act 2003, with a longer timeframe? If so, what are the financial implications of that, if there are any, for the Crown Office or Police Scotland? Without knowing that, and without knowing the Home Office's assessment of the implications for the English system, it is very difficult to plan detailed costs around that one issue in that one possible outcome.

When more detailed costings begin to emerge from UK departments, it would be helpful for the committee to get sight of as much of that information as possible. I am thinking of information that allows the Scottish Government to do detailed scenario planning for any additional cost to Police Scotland or the courts that may emerge in relation to extradition—and that is just one example.

Humza Yousaf: I am sure that we can furnish the committee with as much detail as possible, and I will look to do that. I do not have too much to add. Shona Robison captures the position absolutely correctly. We do not know what the deal is going to be on withdrawal, and therefore we have to plan for any number of scenarios, almost working backwards from the worst-case scenario. Just one issue, the EAW, raises a number of other issues, let alone looking at civil law, other aspects of criminal law, legislative deficiencies and so on. I would be happy to furnish the committee with any additional information, as and when we can.

John Finnie: We talk a lot about the criminal law. I want to move on to civil law and the important issue of family law, which may not be as high profile as extradition but which can have a big impact on individuals, particularly with regard to cross-border cases, EU rules and the issues around jurisdiction, recognition and enforcement.

The committee held a round-table session on family law at which three main options seemed to come out. The first was to replicate the EU rules in domestic law, which would require negotiation with

the EU and would still maintain a role for the Court of Justice. The second option, and the one favoured by the UK Government, was to have a bespoke deal. The third option was to rely on the default rules in national law and various Hague conventions, which I am sure that we will come back to later.

What are your views on the possible impact of Brexit on family law, particularly with regard to on-going cases and certainty for people who may want to initiate proceedings? That would obviously involve transitional arrangements. What discussions, if any, have there been around that?

The Lord Advocate: That area is not within my portfolio of responsibility, so your questions really have to be directed to the cabinet secretary.

Humza Yousaf: I was deferring to your giant legal brain. [*Laughter.*]

The Lord Advocate: I obviously have an interest in the legal issues, but strictly speaking I am here as head of the prosecution system and speak very much from that perspective.

Humza Yousaf: I read over the transcript of the evidence session that the committee held, which I found very interesting. As tends to happen when you have a number of academics present, you get more opinions than there are academics, but the evidence was interesting to read over. My understanding is that there are various fallback positions, such as those that John Finnie rightly talked about. There are the Hague conventions, and Brussels 2a, Brussels 1a and so on as well.

Real-life, everyday issues are involved—I go back to Daniel Johnson's point about just bringing this back to the everyday. There are questions to ask about maintenance, for example, and regulations that will cease to apply after Brexit. There is a Hague convention but there seem to be deficiencies within that. Some of that came out in the evidence session that the committee held.

There is no doubt that there are fallback positions in relation to a host of family law issues, some of which were explored in your evidence session. Clearly, matters have to be bottomed out in relation to those.

John Finnie: Do those issues form part of on-going discussions with the UK Government?

Humza Yousaf: Undoubtedly.

I forgot to answer your point about cross-border jurisdiction. I go back to our earlier discussion. We would obviously have to rely on mutual recognition, certainly, and on reciprocity. That is an important point to highlight, because for each of the EU member states there may well be constitutional differences that must be ironed out before we are able to get to bottom out jurisdiction.

John Finnie: Does the Scottish Government recognise that, given that Scotland is multicultural and there are people who come here from and subsequently return to different jurisdictions, the situation will cause great uncertainty for many individuals in our constituencies?

Humza Yousaf: Yes. I do not doubt that for a minute. I could talk about many cases where issues have affected us here in Scotland. For example, a mother in Hungary with two children was receiving child maintenance from the children's father in accordance with an order for child support made by the Hungarian courts. However, the father relocated to Glasgow, where he stopped paying maintenance. The mother submitted an application under the EU maintenance regulation to the Hungarian central authority, which helped her to complete the requisite forms and transmitted the application to the Scottish central authority. The Scottish central authority then identified the sheriff court whose jurisdiction the father lived in and sent the Hungarian court order to be registered in the maintenance register, thus facilitating enforcement of the order here.

You are right to raise a valid issue that affects the city that I belong to, where I have a constituency and which I represent. I have given just one example of how, with the mechanisms that are in place, we were able to ensure that a mother got the support that she needed for her children, even though the father had relocated to Glasgow. There are many more such examples right across constituencies from the south to the north and from the east to the west.

John Finnie: For the avoidance of doubt, would that work in reverse with Hungary, if it was a Scottish order?

Humza Yousaf: Yes, I imagine so.

John Finnie: There is a lot of discussion around the agreements that underpin trade in relation to businesses. The options are largely the same as those that I outlined earlier, with the addition of the Lugano convention, which is a treaty between the EU and the European Free Trade Association. Are you able to talk about the implications for businesses and the practical impact of the uncertainty that we have?

Humza Yousaf: That is a hugely important issue. Dispute resolution is a big matter in business, and volumes have been written on this. If there is no common agreement on the rulebook and therefore on what happens when there are disputes—if there is no agreement about the dispute resolution mechanism—why would a business look to invest in the UK if it did not know whether it would have a fair chance in a dispute? On the other hand, it could invest in other parts of

the EU and absolutely know what the rulebook was and that it had an independent arbiter in the European courts. Uncertainty for business is an element, and whatever the uncertainty, businesses do not like it.

The other element that we have not talked about much—and I did not see much about it in the transcripts of other evidence sessions—is consumer protection, which is also hugely important. There could be a profound impact on many of the rights and freedoms that consumers take for granted. For example, it may become more expensive and more bureaucratic to book holidays in EU countries, and there may be an issue with mobile roaming, as the charges may no longer be guaranteed. We know that the issues around the movement of goods and services could limit access to or increase the cost of a range of services, from financial products to energy supply and food and drink. On the business side, I highlighted just one jurisdiction example; there is also the consumer protection aspect, which undoubtedly could be damaged.

I expect Mr Russell will go on about those issues in the Parliament. He has already said that there does not have to be a choice between the hardest of hard Brexits, as is being pushed by some, and the Prime Minister's Chequers plan. The Scottish Government continues to maintain that there is a sensible and pragmatic way forward, which we have proposed.

John Finnie: People would understand that there might be new arrangements under a different regime, but the transitional arrangements are very important for on-going cases. What would the position be for a business that is involved in a dispute and is unlikely to resolve that dispute within the next 200 days?

Humza Yousaf: I do not have any detail from the UK Government on what the transitional arrangements would look like. That is why the need for clarity is so important. As Liam Kerr said, time is relatively short, and, as we know, business does not like uncertainty. I am not in a position to give business certainty because we are very much relying on information from the UK Government. There could be a profound economic impact—I have no doubt about that.

11:30

Daniel Johnson: I would like to ask a couple of brief questions about intergovernmental work. More broadly, it is clear that intergovernmental co-operation is vital and will be key to the success of whatever arrangement you arrive at. In one of your previous answers, cabinet secretary, you mentioned that co-operation and communication with the Ministry of Justice were good and better

than with the Home Office. Will you elaborate on that and highlight what the issues have been and how you are seeking to improve the relationship with the Home Office?

Humza Yousaf: I hope that the member will not mind if I defer slightly to my officials on that in respect of the fact that I have been in the role for only a number of months. I have sat down with them and discussed with them and the clear pattern that is emerging is that the communication flow is certainly better with the Ministry of Justice than with the Home Office. What I have done, when I have been told of that, is to seek to redress it, so I have written to the Home Secretary. I will keep the committee informed of the response that I will undoubtedly get from the Home Secretary and, I hope, of any conversations that I have with the Home Secretary. I thought that the Lord Advocate in his previous answer highlighted why effective and meaningful engagement with the Home Office is so important because of matters around extradition and so on.

I do not know if my officials want to come in.

Linda Hamilton: Gavin Henderson can speak to the situation with the Ministry of Justice and I will speak to that with the Home Office.

We have had to work quite hard to be included in some of the planning arrangements. That has now happened, certainly for the judicial co-operation board, but we have still found it quite difficult for publications that have happened around security. I talked earlier about a technical note and there have been other things around withdrawal agreements, future partnership papers and possible framework slides that have been published that we had little or no input into.

What has been critical for us in the justice and security sphere is to ensure that Scotland's separate legal system is factored into wider publications and negotiations and that things that are bespoke and special to Scotland, which have developed over hundreds of years, are protected and promoted in the negotiations. Over the past two years, my team and I have in effect tried to ensure that the Scottish system is adequately represented. The cabinet secretary referenced earlier the white paper, which now has a mention of Scotland's separate system for the first time. We do have better co-operation now with the Home Office than we have had and the officials there are definitely working with us within their political authorising environment, but there have been times when documents have been published that we have not seen or that we have not had the opportunity to feed into.

We are trying to work with the UK Government and to ensure that, where possible, we are also facilitating communication with our operational

partners within those for a to ensure that their views are also represented in the discussions.

I will pass over to Gavin Henderson who can talk more about the Ministry of Justice.

Gavin Henderson (Scottish Government): In contrast to the Home Office, which I cannot speak to at all, our relationship with the Ministry of Justice has been relatively productive and we have built reasonably good contacts with officials there and built good working relationships. There is an issue around when we get notification of documents that are to be published and so on—I cannot speak to whether that is as a consequence of late decisions being made in Whitehall. Our main role is to ensure accuracy—that Scotland is accurately represented in publications; we do not often make value judgments about political documents that are going to be published.

We welcome good contact between officials and Whitehall and we hope that it leads to better understanding for the public.

Daniel Johnson: Thank you very much. That provides a degree of clarity and illustration that is very helpful.

It is clear that any arrangements or treaty that we enter into will not be the final destination and that the situation and relationships will evolve. Therefore, the establishment of robust intergovernmental frameworks between the Scottish Government and the UK Government is vital. Does the Scottish Government have a view on what features those frameworks should have and how they should work? The experiences that we have just heard about are clearly instructive.

Humza Yousaf: I will give some initial thoughts. The member will remember that at the joint ministerial committee (European Negotiations) in May this year, there was an agreement that there would be an intensification of engagement at both ministerial level and among officials. However, it cannot be that all engagement is done from the Department for Exiting the European Union or the Cabinet Office. Frankly, we need experts talking to experts, particularly in the justice domain, many of the main aspects of which are devolved. The UK Government needs to ensure that it understands the difference of our legal system, the independence of the Lord Advocate and so on.

My understanding is that the Home Office is now putting in place some senior steering groups and expert groups to deliver some of those expert exchanges. If that is successful, I would hope that the next time that I come before the committee I can be very positive. Those are the kinds of steps that we need to see, with this being led by experts right the way through—from Government and official level to outside bodies, all engaging at a UK and Scottish level.

On common frameworks, I am encouraged by what I heard from the Secretary of State for Scotland last week, but I would be keen to see some more detail on some of that.

Daniel Johnson: Are there any proactive steps that the Scottish Government could take to articulate its view on the important or key features of any future common framework on justice matters?

Humza Yousaf: I think that the member will understand when I say that we have not been shy in giving our opinion on how robust those mechanisms need to be and on the need for them to be more meaningful. Unfortunately, we have not necessarily had reciprocal feedback from the UK Government or a willingness to engage at the level at which we would like it to engage. However, there have been some positives and it would be churlish not to acknowledge some of the progress that has been made and some of the warm words from the Secretary of State for Scotland. Of course, when you say those warm words, they are on the record for ever more, so I will look to follow up on with the secretary of state and with other UK Government members.

Certainly, we have not been shy in coming forward and some of the measures that we now see are because of that. It is not just the Scottish Government who has done that; we should be fair to the Welsh Government and officials from Northern Ireland who have also been engaged in the process.

The Convener: That concludes our line of questioning. I thank the cabinet secretary, the Lord Advocate and their officials for attending. We will now suspend to allow the witnesses to leave and for a five-minute comfort break.

11:38

Meeting suspended.

11:43

On resuming—

Subordinate Legislation

Legal Aid (Employment of Solicitors) (Scotland) Amendment Regulations 2018 (SSI 2018/193)

Sheriff Court Fees Amendment Order 2018 (SSI 2018/194)

The Convener: Agenda item 4 is consideration of two negative instruments. I refer members to paper 2, which is a note by the clerk. Do members have any comments on the instruments?

Liam Kerr: Are we dealing with both together?

The Convener: Yes.

Liam Kerr: I have no substantive comments but simply say in respect of the Sheriff Court Fees Amendment Order 2018 that that is quite a major error that somebody seems to have made somewhere along the way. Jenny Gilruth, I think, or somebody made a point about these briefings but I am curious to understand: how did the error come about? Who has missed the omission of the carve-out in the original legislation? If it was this committee or the Parliament, then that would be concerning. Clearly, we need something that would have flagged it up or a change to our processes so that we can see such things. If it was not us, how confident can we be that whichever agency it was will pick up this sort of thing in future?

The Convener: The short answer is that we do not know, but we can write and get additional information. It is important that we do not just rubberstamp these things and say that it is okay that there has been an omission. It would be good to find out exactly how it occurred. If we want to do that, we could delay approving the order today, get further information and take it from there.

11:45

Liam Kerr: I think that that would be sensible and I would feel much more comfortable if I knew what I was putting my name to. However, is that not the instrument that needs to change to get the carve-out in as soon as possible because of the potential ramifications?

The Convener: We have until 24 September, which would allow us to take it again next week without unduly affecting anything.

John Finnie: I have no issue with what has been proposed but mistakes happen—in lots of

jobs. Understanding that it is not a procedural fault is fine; the important thing is that the mistake has been picked up and we are dealing with it now.

Liam McArthur: John Finnie makes a fair point. My concern is that in the context of what we have just been discussing in relation to Brexit, the Parliament is going to have a considerable volume of statutory instruments coming before it. What this does is highlight very appositely some of the risks that are attendant in that and, with my Scottish Parliament Corporate Body hat on, I will reflect that back to colleagues. We need to find a way of trying to ensure that, as we deal with fairly weighty, substantive and complex issues, we limit the scope for that. John Finnie is right that errors might arise, but we absolutely need to have confidence as we go through the process that it is as robust as it possibly can be.

The Convener: That being the case then, is it the committee's feeling that we want to write and get an explanation? Mistakes do happen but, as Liam McArthur said, we are going to be dealing with an awful lot of legislation and if we have additional questions we are going to be undertaking a needlessly complex activity. We can write and ask for a full explanation—there is no harm in doing that as it will not affect the timing of anything—and bring the Sheriff Court Fees Amendment Order 2018 back for approval next week. Are members agreed?

Rona Mackay: Will it affect the order if we get an explanation?

The Convener: No.

Rona Mackay: So is there really any point in delaying it if it is not going to change and we just have an explanation?

The Convener: We will get an explanation. It is really to underline the point that if we keep just rubberstamping these things, sooner or later we are going to reach—or the possibility is there that we could reach—a mistake that will cause a huge delay. We know that so many SSIs are going to be coming to this committee, and other committees, as a result of the Brexit settlement. We are just making the point that we need to know why these things happen. If it is human error, okay, we can accept that, but we may learn something and we will be making a very definite statement.

John Finnie: I would not want the term “rubberstamp” to be misunderstood. We scrutinise everything that comes before us and the decision taken would have been taken in good faith at the time.

The Convener: Is the committee agreed that we will ask for an explanation, bring the Sheriff Court Fees Amendment Order 2018 back next week and take it from there?

Members indicated agreement.

The Convener: Is the committee content that we make no recommendation in respect of the Legal Aid (Employment of Solicitors) (Scotland) Amendment Regulations 2018?

Members indicated agreement.

The Convener: Thank you for that.

That concludes the public part of today's meeting. Our next meeting will be on Tuesday 18 September, when we will have our first evidence session on post-legislative scrutiny of the Police and Fire Reform (Scotland) Act 2012.

11:49

Meeting continued in private until 13:02.

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