

Rt Hon Sir Richard Aikens

Rt Hon Theresa May MP
Prime Minister and First Lord of the Treasury
10 Downing Street
London SW 1

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Dear Prime Minister

Until my retirement from judicial office in 2015, I was a Lord Justice of Appeal. I am currently President of Lawyers for Britain.

I have been alarmed to see and read stories (such as that by James Forsyth in *The Sun* on 27 November 2017) that non-attributable sources state that the “Inner Brexit Cabinet” is favouring the idea of a so-called “compromise” proposal under which UK courts would make preliminary references for rulings by the Court of Justice of the European Union in Luxemburg (“CJEU” – formerly known as the European Court of Justice or ECJ) on certain issues, but in particular on questions to do with EU citizens’ rights in relation to entry into and residence in the UK. If this is so, then it is extraordinary. First, it obliterates the “red line” that you have said must not be crossed concerning the power of the CJEU to interfere with UK law after Brexit. Secondly, it would put the UK in the humiliating position of being a self-governing, sovereign state which had voluntarily agreed to cede the jurisdiction to deal with the rights of foreign citizens within its territory to a foreign court in which it (the UK) does not have any representation. It is worse than the “unequal treaties” between the Western Powers (including the UK) and China during the 19th century. At least in that case the Western Powers imposed the treaties on a powerless China. If the UK agreed to the CJEU proposal it would be an abject voluntary surrender of sovereignty.

After the UK leaves the European Union, the rights of EU citizens in the UK (and I assume the rights of UK citizens in the EU) will be governed by a bilateral treaty between the UK and the EU. But the UK will not have any judge in the CJEU because it is no longer a Member State of the EU. I know of no instance in current international relations where a sovereign state that has entered into a treaty with another sovereign entity (such as the EU) has accepted as binding the rulings of the court of the other party to the treaty. Nor is there any precedent in treaties between the EU and other non-member states to be bound by rulings of the CJEU, still less their courts making preliminary references to the latter.

It appears that it is contemplated that this would be a permanent arrangement, not one that lasted for a “transitional” period. Therefore the CJEU would have a “blank cheque” to rule on the interpretation of the bilateral treaty between the UK and the EU. One wonders whether there are other areas of the treaty that might be subject to the jurisdiction of the CJEU. If there were then Brexit would not mean Brexit at all.

It is apparently being claimed that the subjection of the UK courts to the rulings of the CJEU would be a “compromise” because the referral of preliminary references would be “voluntary”, so that a reference would only be made if a case arose on a point of law that had not previously been addressed. That is no compromise at all for two reasons. First, as any legal adviser will tell you, at present the courts of all Member States are only obliged to ask the CJEU for its decision on a point of EU law if that issue has not already been decided by the CJEU. The CJEU will reject any reference from a national court of a Member State without even a hearing if it has already ruled on the point that is referred: the “reasoned order” procedure. Secondly, any references from UK courts would not be “voluntary”. I am certain that the EU would insist that there is a provision in the proposed UK/EU treaty equivalent to Article 267 of the Treaty on the Functioning of the European Union, whereby where there is an issue on the interpretation of the EU Treaties pending in the highest court of a Member State, that court *must* refer the matter to the CJEU for its preliminary ruling, which ruling will then bind all courts of the Member State on that issue. In short, under the current proposals the referral would be compulsory and the CJEU ruling that resulted from it would bind all UK courts. Furthermore, in the case of the new proposed UK/EU treaty, nothing in it would have been interpreted by the CJEU and so one can imagine all points of interpretation having to be referred to the that court, with no possibility of the UK exercising any control.

If this point is conceded, it is particularly dangerous, given the track record of the ECJ and the CJEU on rights of residence in Member States. The EU treaties explicitly confer on Member States the right to exclude individuals on the grounds of public security and public policy. Yet the ECJ has persistently and consistently interpreted the treaties so as to restrict and undermine the rights of Member States to protect their public on those grounds. Some commentators have said that the ECJ has transformed EU treaty provisions on the “free movement of persons” into a charter for the “free movement of criminals”. If the CJEU were given the exclusive right to interpret the proposed UK/EU treaty in relation to EU citizens rights to enter and stay in the UK, the right of the UK to “control” UK borders and the rights of all citizens who lived in the UK would be lost forever. That would be tantamount to reversing the result of the 2016 referendum.

Yours sincerely
Richard Aikens.