HOUSE OF LORDS

SELECT COMMITTEE ON EXTRADITION LAW

Oral and written evidence

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Submission to House of Lords Select Committee on the Extradition Law 2014

Introduction

My name is Syed Talha Ahsan. I am a British citizen born in London, UK. I am 35 years old. I was educated at Dulwich College, South London and the School of Oriental and African Studies (SOAS), University of London. I am diagnosed with Asperger's syndrome – a condition on the autism spectrum.

Eight years ago I was on the verge of becoming a professional librarian. I want to share with the Lords Extradition Law Committee some details of my personal experience with extradition.

My submission is organised as follows:

A. *Events Prior to my Arrest Relating to my Co-Defendant, Babar Ahmad*

B. *My Arrest and Extradition Proceedings*

C. *My Case in the US*

D. *Removal to the US and Conditions of Incarceration*

E. *Sajid Badat – Shoe Bomber and the US government's Co-operating Witness*

F. *Lord Justice Scott Baker's Report and the Inconsistency with his Ruling in* Sheppard and Whittle

G. *Findings of the Judge at Sentencing*

H. *Application of Notification*

I. *Conclusion*

I thank the committee for understanding my current circumstances and extending the deadline for my evidence.

Respectfully submitted,

Syed Talha Ahsan
26 September 2014

A. *Events Prior to my Arrest Relating to my Co-Defendant, Babar Ahmad*

1. On 2 December 2003 four men in my local area were arrested in pre-dawn raids by Metropolitan Police anti-terrorism officers. After six days of questioning all were released without charge.

2. One of the men, Babar Ahmad, was assaulted by arresting officers and sustained 73 physical injuries.

3. In July 2004 the Crown Prosecution Service (CPS) concluded there was insufficient evidence to charge Mr Ahmad with any criminal offence arising from evidence seized in the December 2003 police raid.

4. On 5 August 2004, weeks after the CPS decision, Mr Ahmad was arrested on his way home from work pursuant to an extradition request by the US under the terms of Part 2 of the Extradition Act 2003. He was denied bail and taken into custody.

5. On 18 March 2009 the Metropolitan Police admitted full liability for the 2003 assault and compensated Mr Ahmad £60, 000 while he remained in custody at high security prisons.

6. For further details on Mr Ahmad's case I refer the Committee to his submissions to the Home Office Extradition Review in 2010/11.

B. *My Arrest and Extradition Proceedings*

1. During the searches in December 2003 a floppy disk was found in the house of Mr Ahmad's parents. This disk contained a Word document with a description of movements by US naval ships in Spring 2001.

2. The document was a transcription of an unsolicited near-illegible handwritten letter sent to the Azzam Publications postal box. Azzam Publications was an online media outlet focussing on the conflicts in Bosnia and Chechnya. Mr Ahmad was in charge of Azzam Publications. I typed up that document when in April until September 2001 I was giving occasional help to Mr Ahmad with mail orders for books and tapes sold by Azzam Publications. The file's author name was mine.

3. The CPS did not regard the existence of this document as sufficient grounds for prosecution for him and in turn for me. I have never been questioned by British police arising from this document.

4. On 8 February 2006 my family home was searched by Metropolitan Police at the behest of US authorities. Amongst items taken were two computers which were returned 72 hours later with the contents intact. Personal property belonging to other family members was also taken including my younger brother's music CDs and my nephew's cartoon DVDs.

5. On 19 July 2006 I was arrested at my home for extradition to the United States. The police came to my home under the guise of returning my passport. Before I signed

for its return I was told an accompanying officer wanted to speak to me who promptly arrested me. I was placed in handcuffs and taken to a waiting car. I was denied bail on the basis of information presented in an affidavit by a US assistant attorney from Connecticut. As I had no right to see the evidence for those allegations I could not challenge my denial of bail.

6. On 19 March 2007 the Magistrates Court ordered my extradition. At the High Courts on 10 April 2008 I lost both my appeal against extradition and an appeal for judicial review into the decision of the Director of Public Prosecutions (DPP) to not charge me in the UK.

7. There have been significant parliamentary protest in late 2006 about the extradition of UK citizens to the US particularly when they have never left the UK. As a result there was a UK-US agreement that cases would be carefully looked at as to whether they could be more appropriately prosecuted here. Mine was the first case to raise this but the court said it was too late for me and that my case was already linked to Babar Ahmad.

8. I was classified as a category A prisoner subject to protocols such as regular strip searches. I was held at high security prisons: HMP Belmarsh until 22 January 2008 then the Detainee Unit, HMP Long Lartin where I remained until my extradition on 5 October 2012 (with a stay at HMP Manchester between 13 October 2010 and 6 January 2011 owing to building work at the Detainee Unit). Certain high-profile Muslim preachers, who I avoided when I was growing up for fear they may get me into trouble, were my fellow inmates.

9. On 9 December 2008 the then Governor, Ferdie Parker, prohibited all members of the Detainee Unit without any individualised risk assessment from mixing with the general population of the prison. We were no longer allowed to mix with mainstream prisoners for use of the gym, education or Friday prayers.

10. After a visit to the Detainee Unit on 4 April 2011 HM Inspectorate of Prisons reported that “too little attention was paid to their uniquely isolated and uncertain position.”

11. Ten days after my extradition the Home Secretary allowed Gary McKinnon, with whom I share the same medical conditions, to remain in the UK based upon associative risks. A psychiatric report in 2009 by Dr Quinton Deeley, one of the country’s leading authorities on autism, also described my vulnerabilities to suicidal ideation stating: “It should be noted that by virtue of his Asperger’s syndrome and depressive disorder, Mr Ahsan is an extremely vulnerable individual who, from a psychiatric perspective, would be more appropriately placed in a specialist service for adults with autistic disorders and co-morbid mental health problems, with a level of security dictated by his risk assessment”. I noted that the Home Secretary procrastinated in her decision for Mr Mckinnon, who had long exhausted all remedies against extradition, until my ECtHR case had been dismissed and I had been extradited.

C. *My Case in the US*

1. In the US I was held in solitary confinement at Northern Correctional Institution (NCI), the state supermax of Connecticut. I was housed in the same block as Death Row inmates. There were multiple suicide attempts and incidents of self-harm during my stay there.

2. On 10 December 2013 as part of a plea bargain for a sentence cap at fifteen years and facilitation to serve the sentence in the UK, I pled guilty to one count of conspiracy to provide material support to terrorists and one count of providing material support to terrorists. I was not guilty of either but I otherwise faced the potential of receiving a life sentence if a jury convicted me in an atmosphere of serious prejudice.

3. In February 2012, Lord Carlile QC, the former reviewer of anti-terrorism legislation, described in an interview with Sky news that the plea bargain system in the US was "appalling" and "intimidating." He said about one defendant: "Who can resist that sort of pressure? It is irrelevant whether the evidence he gives here is true or false, whether the plea he gives is true or false. It is the process. If you examine English law, particularly the Police and Criminal Evidence Act, then most American plea bargains would not be admitted as part of the English evidential system."

4. Nigel Farage, leader of UKIP, has also criticised the plea bargain system. In March 2012 Kent News reported Mr Farage saying about one defendant: "It's not a fair judicial system and I think it is unlikely he will get bail due to this as I imagine they will make his stay as unpleasant as possible to make him plead guilty." He also described US prisons as "absolutely brutal." It is not a controversial or radical position to find fault with the US judicial system and its prisons.

5. On 16 July 2014 Judge Janet Hall sentenced me to credit for time served. I was taken into immigration custody and held at medium security county jails. I wore leg shackles and handcuffs tied to a belly chain when transported from the holding centre to the airport up until the point I entered the aeroplane. I returned to the UK on 21 August.

6. During domestic extradition proceedings I was represented by Gareth Peirce of Birnberg Peirce & Partners. In the US I was represented by Richard Reeve and Anand Balakrishnan of Sheehan & Reeve. I have no prior convictions.

D. *Removal to the US and Conditions of Incarceration*

1. Prior to my extradition I had never visited the US. I knew no relatives there or any friends. The first time I set foot in the US, I was wearing a jumpsuit in handcuffs and leg shackles while deprived of sight and sound by goggles and ear muffs.

2. During my time in UK custody I had a clean disciplinary record. I was described by Ferdie Parker, then governor of HMP Long Lartin, as a "model prisoner." Since 2007 after regular reviews I continually maintained Enhanced status as an inmate. I was entitled to the maximum privileges given to inmates at high security prisons,

including wearing my own clothes, cooking my own food and using a fully equipped gym. None of these features were available during my time in solitary confinement.

3. At an RAF base I was processed by US Homeland Security handlers in the presence of British extradition police. During times when I had to wait for others to finish I was made to sit facing a corner as a Homeland Security handler stood over me. I could only use the toilet with the door open in full view of the handler. Our bodies were examined, including below the waist undressed, and photographs were taken. I was not permitted to communicate with my co-defendant sitting beside me. I was boarded separately upon a private jet in handcuffs and leg shackles deprived of sight and hearing flanked by two handlers who took me on a zig-zag route. Once the plane was in flight the goggles and ear muffs were removed. I remained in handcuffs and leg shackles throughout the five - hour flight. When it was time to eat my right hand was uncuffed while my left hand remained secured to the belly chain. Once again, to use the toilet the door had to remain open and in full view of a handler. In every other regard, the FBI agents and the Homeland Security handlers were respectful and polite.

4. When we landed in Connecticut the goggles and ear muffs were put back on. I was escorted into a vehicle and driven to the Federal Courthouse in New Haven where I was guided into a holding cell before the goggles and ear muffs were removed. Our arraignment occurred a few hours later and we had the opportunity to meet our attorneys shortly before. After our arraignment we were placed in handcuffs tied to a belly chain and shackled with leg irons before being taken by the US Marshals in an armed convey of vehicles to NCI.

5. At NCI I was taken into a small holding cell. I was surrounded by Correctional Officers (COs) who held me as they took off my clothes. My hair and beard were examined. My glasses were confiscated. I was made to squat and cough while undressed below the waist. I was placed in a Ferguson anti-suicide smock – a one piece garment made of polyester held together with velcro. I had no undergarments. My shoes and socks were confiscated and I was given paper slippers. I was handcuffed behind my back and tethered to leg shackles. I was examined by medical staff and then escorted by COs down a long concrete tunnel with no natural light.

6. I was placed in a concrete cell which had only a metal bed frame, a mattress and a safety blanket. There was also a steel sink-toilet unit. I was told to lie face down on the bunk. The leg shackles were removed. The paper slippers were taken too. I attempted to get up but I was told to remain in place. After the door closed I was told to approach the trap and the handcuffs were removed too.

7. I was not allowed soap, a toothbrush or a pen. I had to request toilet paper from COs who passed my cell for inspection every 15 minutes. The toilet could only be flushed by a CO with a switch outside the cell. The faucet water ran for one minute with a one minute delay. Meals were served in polystyrene cups without utensils. I requested vegetarian food but was refused. There was a window in the door a few inches wide and two feet long for observation. There was a similar window at the back of the cell that faced onto a brick wall. There was no way to know the time

without asking a CO. Some of the COs were telling inmates that a terrorist has been placed in the cell.

8. After four days in these conditions I was taken out to see the doctor. I was strip searched and placed in handcuffs tethered to leg shackles behind my back. I walked barefoot on concrete to the medical room. I was then placed in a normal cell that had a metal desk and stool. I was given two yellow jumpsuits and 3 changes of undergarment. My glasses were returned a few days later. It was only after the Vice-Consul, Jacqueline Greenlaw, visited that I received basic toiletries, pens and shower shoes.

9. Some of the COs, in particular Mssrs. Orcutt and Congelos, had a campaign of hostility against me. At breakfast time they would recite the pledge of allegiance outside my door. They told other inmates I was a terrorist. They would conduct frequent "shake down" searches of my cell. They would be excessive in strip searches. I also believed they tampered with my food as my cell was in a blind spot. I raised the matter with the prison chaplain, Deacon Bernd, and the counsellor. They were eventually moved.

10. I was unable to make a telephone call to my family for over a month. Every time I left my cell I was strip searched and placed in handcuffs tethered to leg shackles. I had showers wearing leg shackles. I exercised alone in the recreation yard. I was always polite and respectful with staff. I never got a "ticket" or disciplinary offence. After some months I no longer had to leave my cell wearing handcuffs or leg shackles unless during lockdowns or for transportation.

E. ***Sajid Badat – Shoe Bomber and the US government's Co-operating Witness***

1. On 9 to 10 April 2014 the government's witness Sajid Badat gave evidence via videolink. Mr Badat was in an undisclosed location in the UK. My co-defendant, Babar Ahmad and I, were in the Federal building in Hartford, Connecticut. We wore leg shackles throughout the proceedings. Our attorneys flew to London to cross-examine the witness.

2. On February 28, 2005 Mr Badat had pleaded guilty to involvement in a conspiracy to destroy a US-bound aircraft with explosives concealed in his shoes. He still has an outstanding indictment against him and refused to travel to the US to give his deposition in person. Investigators learned how he regularly met with senior Al-Qaeda members, including Usama bin Laden and Khalid Sheikh Mohammed.

3. Altogether he served just over six years in prison. By comparison I served eight years with two in solitary confinement.

4. We had access to four large binders of verbatim transcripts and summaries of interviews he had with UK police and the FBI since 2004.

5. We also had transcripts of interviews with British detainees at Guantanamo Bay by the investigating officers in our cases.

6. In April 2012 the Home Select Committee expressed concern that the British taxpayer has been supporting Mr Badat with accommodation and expenses after his release.

F. *Lord Justice Scott Baker's Report and the Inconsistency with his Ruling in* Sheppard and Whittle

1. On 29 January 2010, in the Court of Appeal, in the case of Sheppard and Whittle, two British white supremacists who ran a website in the UK with a hosting server in California, USA, Lord Justice Scott Baker determined that the UK was the natural forum for their prosecution. He ruled the UK was the appropriate forum for prosecution since a "substantial measure of the activities constituting the crime that took place in England" namely the writing and uploading of the contents all took place in the UK. This case was indistinguishable from our case yet Lord Justice Scott Baker failed to properly examine the implications of this ruling in his report.

G. *Findings of the Judge at Sentencing*

1. I was unusually fortunate that the judge gave close attention to details without prejudice. She accepted what I and my attorneys argued especially through the expert reports and a detailed examination of the government's evidence. She rejected much of the government's version of events and their interpretations. The government also withdrew the testimony of their terrorism expert, Evan Kohlmann.

2. At sentencing Judge Hall stated: "In my view, the Jihad does not equal terrorism…my understanding is that the concept of Jihad in Islam is struggle, and it's both an internal and defensive struggle, but it's never what happened on 9-11."

3. She made clear that I was not a supporter of Al-Qaeda in any form: "Mr. Ahsan went to Afghanistan and I don't believe he was radicalised by his experience or the people he met there" and "The cooperating witness also testified that Ahsan did not support Al Qaeda or its terrorist actions against civilians. And unlike the cooperating witness, Mr. Ahsan did not join Al Qaeda."

4. On the so-called Battle Group Document, she made clear: "Mr. Ahsan had absolutely no interest in operational terrorist actions that would harm the United States…I can only draw the conclusion that it supports what I have concluded and will conclude generally, that neither of these two defendants were interested in what is commonly known as terrorism."

5. She recognised I had never contributed to the websites in either content or maintenance which was the basis of my extradition: "I find that you were not an administrator of the website. I find you were aware of the website and what was on it, and that you were assisting Azzam Publications in furthering its work, but that you did not place anything on the website. And I don't think that you were involved, and

the government can correct me later, in answering e-mail." The government conceded there was no evidence I had access to the website email accounts.

6. She described my character:
    - "You had, and have, a nonviolent, I guess, outlook on life"
    - "I would, again, comment that he's conducted himself in a way which reflects well upon him while in custody. I'm not sure that, I, myself could have conducted myself that way."
    - "A moderate person who has peaceful views"
    - "You strike the Court as a gentle person."
    - "In all, you appear and strike me as a man who is sensitive and curious, intelligent and talented. And as I say, there are many letters in support of you as well who speak about you and your character as one which is not violent and not aligned with the views of people who are violent."

7. She repeatedly made clear I was not a terrorist and I had no connection to terrorism:
    - "In my view, the conclusion I draw is that that's evidence that you never intended to be a part of what I will call the false Jihad of terrorism."
    - "You never engaged in any violent actions."
    - "You did not support the bombings at 9-11 or the July London subway bombings. Indeed, before you were arrested, you are on record as denouncing them."
    - "There is no sign that Mr. Ahsan's view of what is Jihad in an Islamic sense should be equated with terrorism. There is no evidence that he adopted beliefs of people who believe in terrorism, attacks on civilians."
    - "And I don't see you in any way involved in anything that could smack of terrorism or material support of conduct which we describe as terrorism."

8. She spoke about my likelihood to "reoffend":
    - "He's certainly not likely to recidivate"
    - "I will add as a condition of supervision and hope that it will be respected by the U.K. authorities in the supervision of you, that you receive mental health treatment and counselling as is appropriate and needed for you."
    - "I don't think it's in your nature to, as we use a legal criminal term, recidivate here, to go and do again what you did when you were 19 and 20 years old, but I do worry that to the extent you struggle with depressive periods, that at those times things might look different to you. But I don't see that as a reason to conclude that you will recidivate, particularly if you receive appropriate treatment and support."

H. *Application of Notification*

1. As a result of my having to plead guilty, so as not to risk a conviction by a jury which would have led to a far greater sentence, I now have a conviction for a terrorism-related offence of which I am not guilty. My attorneys gave the judge an expert report by Max Hill QC, a senior UK prosecuting barrister, to say that no one had ever been prosecuted in the UK for the allegations I faced during the relevant decade.

2. On 28 August 2014 Metropolitan Police officers served an application of notification upon me. It is a request to a court for an order that I have further restrictions placed upon me for the next thirty years including such measures as signing at a police station annually, reporting any stay away from my home address for more than seven days, reporting upon leaving the country for more than three days as well as further demands.

3. The solicitor for the Metropolitan Police, Andy Fairbrother, falsely describes my case in his statement dated 26 August 2014. He claims, for example, in paragraph 8 that the naval document was uploaded to the Azzam.com website from my home. He not only contradicts the findings of Judge Hall but also the stipulation of facts agreed upon by the parties in my plea deal that he attaches to his statement.

4. On 9 September 2014 the Legal Aid Agency denied my solicitor funding to challenge the application.

G*. Conclusion*

1. I have spent six years of my life in British high security prisons without trial and two years in solitary confinement in a country I had never visited all for conduct that was lawful in the UK. My criminality was not attending training camps which the Probation Officer and Judge after reading the expert reports refused to describe as "terrorist" training camps. My criminality was not transcribing an unsolicited letter that described the movements of a US navy fleet and its perceived vulnerabilities. My crime was the occasional help I gave to a local friend to sell books and tapes some of which were available in my university library. Now the Metropolitan Police want to apply further restrictions upon me.

2. I am attempting to resettle without the benefit of a UK probation officer to explain my options and entitlements. I fear if I attempt to renew my passport it will be confiscated. I would like to make special mention of all those who supported my family throughout these years. This is only a flavour of what has occurred in the last eight years. I am happy to assist the committee in further solicitations.

26 September 2014

Amnesty International Secretariat – Written evidence (EXL0070)

Amnesty International's submission to the Lords Select Committee on Extradition Law

Amnesty International opposes the extradition of individuals to the USA where they may be held in isolation in "super-maximum security" facilities. Prisoners extradited to the USA on terrorism-related charges will likely be held in pre-trial isolation in the Security Housing Unit (SHU) of the federal Metropolitan Correctional Centre (MCC) in New York, and following conviction may be transferred to the federal government's United States Penitentiary, Administrative Maximum (ADX) facility in Colorado.
As noted below and detailed in AI's report, '*Entombed. Isolation in the federal prison system'* (submitted to the Committee), Amnesty International considers that conditions of isolation at ADX and MCC SHU breach international standards for humane treatment and, especially when applied for a prolonged period or indefinitely, amount to cruel, inhuman or degrading treatment or punishment in violation of international law. Additionally, Amnesty International considers that conditions under which detainees have been confined in the MCC SHU are incompatible with the presumption of innocence in the case of untried prisoners whose detention should not be a form of punishment.
Amnesty International recommends that the United Kingdom authorities do not extradite individuals to the USA who may be held in MCC SHU or ADX, or in any other facility with comparable conditions.

United States Penitentiary, Administrative Maximum (ADX) facility in Colorado: With capacity for 490 male inmates, the vast majority of ADX prisoners are confined to solitary cells for 22-24 hours a day in conditions of severe physical and social isolation. The cells have solid walls preventing prisoners from seeing or having direct contact with those in adjacent cells. Most cells have an interior barred door as well as a solid outer door, compounding the sense of isolation. Prisoners eat all meals inside their cells, and in most units each cell contains a shower and a toilet, minimising the need for the inmate to leave his cell. Visits by prison staff, including routine checks by medical and mental health staff, take place at the cell door and medical and psychiatric consultations are sometimes conducted remotely through tele-conferencing. All visits are non-contact, with prisoners separated from their visitors by a glass screen. Prisoners in the General Population (the majority of prisoners at ADX) are allowed out-of-cell exercise for up to ten hours a week, in a bare interior room or in small individual yards or cages, with no view of the natural world. Prisoners in some other units receive even less out of cell time.
Prisoners convicted of terrorism-related offences may also have Special Administrative Measures (SAMS) placed on them by the Department of Justice which further restricts their communications with the outside world.

There is no detailed publicly available information on the time that prisoners spend in isolation in ADX; at a minimum individuals must spend a year at the most restrictive level of confinement before becoming eligible for a step-down program (SDP) to work their way to a less restrictive facility. However, a Federal Bureau of Prisons (BOP) analysis based on a limited survey of 30 inmates in 2011 for a case before the European Court of Human Rights showed prisoners were likely to spend at least three years in General Population GP before being admitted to the SDP. Other sources based on a wider sample of prisoners have found

that scores of prisoners have spent more than twice as long in solitary confinement. Advocates have criticised the internal review procedures – including those for deciding when a prisoner can access and progress through the SDP as over-discretionary and lacking clear criteria. According to lawsuits and other sources, this means that some prisoners effectively remain in isolation indefinitely, without being able to change their circumstances.

Metropolitan Correctional Center (MCC): Some prisoners held on terrorism-related charges in the federal system have been held in prolonged isolation in punitive conditions while awaiting trial. There is particular concern about conditions in the Security Housing Unit (SHU) on the 10th floor of the federal Metropolitan Correctional Center (MCC) in New York, where pre-trial detainees are confined for 23-24 hours a day to solitary cells which have little natural light and no provision for outdoor exercise. Lack of access to natural light and fresh air are in clear breach of international standards for humane treatment. Detainees housed in the unit have included foreign nationals charged with supporting terrorism who have been extradited to the USA; in addition to their harsh physical conditions of confinement, some have had only limited contact with their families and few or no social visits. Several prisoners have spent many months or years in the above conditions while awaiting trial. **Syed Fahad Hashmi** who was extradited from the UK in 2007 spent nearly three years in the unit before pleading guilty to one count of conspiring to provide material support to terrorists.

26 September 2014

Dr. Paul Arnell – Written evidence (EXL0016)

Response to Call for Written Evidence by the Select Committee on Extradition Law

1. The United Kingdom's extradition arrangements largely operate satisfactorily. They recognise the importance of addressing international and transnational criminality and the UK's international and EU legal obligations and yet bar the extradition of accused and convicted persons in the light of egregious circumstances.

2. In the vast majority of cases the Extradition Act 2003 (2003 Act) operates to produce just outcomes. Extradition requests to the UK are generally dealt with fairly and timeously, with the various bars to extradition giving requested persons adequate protection. The 2003 Act, Human Rights Act 1998 and ultimately the European Convention of Human Rights 1950 condition all extraditions with human rights protection.

3. An important point that requires emphasis is that the 2003 Act directly gives effect to international treaties and an EU Framework Decision that the UK Government has agreed. These are the product of political negotiation, operate on a reciprocal basis and, in essence, place considerable trust in the criminal law and criminal justice systems of third states. During the course of negotiations it can be reasonably assumed that factors such as the sentencing policies, prison conditions and health systems in these states were taken into account. Parliament enacted the 2003 Act to enable the UK to carry out its international extradition obligations as far as possible in light of its other at times competing obligations in the areas of human rights and international criminal co-operation. It is not for the courts – in the UK or Europe – to usurp or defeat the Government's will as expressed through Parliament in the form of the 2003 Act.

4. UK extradition law is not overly complex. The substantive rules in the area are necessary to ensure that the law is effective and balances the competing interests that will inevitably arise when a request is contested. Admittedly, extradition law gives rise to novel and unusual enquiries, for example into the nature of systemic corruption in Albania and prison conditions in a US 'super-max' gaol. However, the legal tests to be applied to such situations are relatively settled. They are found in European Court of Human Rights (ECtHR) and Supreme Court jurisprudence. Procedurally, the extradition process is rightfully conditioned with relatively strict time limits, which act to address a historic criticism of extradition in the form of the considerable length of time the process has taken to come to conclusion.

5. Crime around the world is increasingly multi-jurisdictional and of an unprecedented scale. The United Nations Office for Drugs and Crime in 2011 estimated that the annual turnover of transnational organised crime groups and networks was $870 billion. The UK is not immune to this. In contrast to the multi-jurisdictional nature of crime is UK criminal law. It has been, and remains, predominately territorial. Particularly, the law generally requires a connection between the act and UK territory for a crime to be committed within it. This is both appropriate and logical but also enhances the importance of extradition. The UK relies on the law of

extradition in order to ensure that criminals are prosecuted – including UK nationals – for crimes committed abroad. The UK cannot be a global policeman, prosecuting crimes committed outside its territory where there exists no other connection to it. A generally territorial criminal law, in conjunction with a thorough and efficient system of extradition is a wholly reasonable approach for the UK to take. Indeed, there is not another approach that is readily apparent or appropriate.

6. Extradition is not properly conceived as a first resort, or any resort, in the prosecution of crime committed in non-UK jurisdictions. Instead, it is a tool that allows the transfer of accused and convicted persons where authorities in third states make a request. Admittedly, the question of a UK prosecution has arisen in the light of a request, for instance in the cases of the 'NatWest Three' and Gary McKinnon. The Forum Bar also requires consideration of prosecutorial decisions in England and Wales and Northern Ireland in certain circumstances. However, possible prosecution within the UK and decisions on extradition are rightfully distinct, being based upon different considerations.

7. The EAW has greatly improved extradition arrangements between EU Member States. The system of judicial surrender, based upon a Framework List of offences and foregoing the provision of evidence properly reflects the principles of trust and co-operation upon which the EU is founded. This is not to suggest that there are not concerns. The prosecution policies of Poland and the prison conditions and delays in criminal justice in members including Greece are factors that should be addressed. The responsibility for so-doing, however, is not the UK's, but rather is that of the Member States in question and the EU. The EU's Charter of Fundamental Rights and Freedoms, together with the fact that all EU Member States are party to the ECHR, provide an avenue to those subjected to an EAW where concerns exist as to the human rights situation within a fellow Member State.

8. The existing statutory bars to extradition, including the relatively new forum and proportionality bars, provide sufficient protection to requested persons where the requesting state need not provide the UK evidence of a prima facie case against that person. Regular re-consideration of the list of territories exempt from providing prima facie evidence should take place, with a view to remove those that it is thought no longer appropriate to designate and similarly to add territories where it is thought appropriate to do so. The rationale underlying these decisions must be that the territory and its criminal justice system are such to merit a high degree of trust. This, in turn, must depend upon that state's adherence to the rule of law and the human rights protection it gives accused and convicted persons.

9. The UK's extradition arrangements with the United States are in law similar to those with other territories designated as not having to provide prima facie evidence. The prima facie evidence requirement exists to ensure that extradited persons have committed an offence against the law of the requesting state. It has not been suggested, to the present author's knowledge, that the US has requested individuals who have not committed an offence against its law.

10. The operation of extradition between the UK and the US is notable on account of the relatively high number of requests made to the UK from the US, the notoriety of a number of those cases and certain features of the US criminal justice system including the length of prison sentences imposed, its plea bargaining system and the conditions within certain of its prisons. These have been considered by various courts in the UK and by the ECtHR and have been held to be compatible with human rights.

11. The partial removal of political input and discretion in the extradition process has been beneficial. Political input should be completely removed. The rule of law supports the removal in that the extradition process should apply equally to everyone subjected to it. Political input in the process can lead to justifiable criticisms, and provide the UK's extradition partners and its critics a possible justification for refusing UK requests and/or a ground for criticism. The existing bars to extradition, including that a request that is made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, gender, sexual orientation or political opinions offer adequate protection.

12. Decisions to prosecute and decisions to extradite are, and should be, based upon distinct factors. The former, in England and Wales, turn on the factors within the Code for Crown Prosecutors, January 2013, and in Scotland in the Crown Office and Procurator Fiscal Service's Prosecution Code, May 2001. The latter turn on the place of origin of the request and are based upon the terms of the EU or public international legal obligation to act. That noted, it is not possible to completely disentangle prosecutorial and extradition decisions. This is because single acts can give rise to criminal offences in more than one location and, more specifically, that extradition is barred on account of a previous prosecution according to the rule against double jeopardy.

13. Political and diplomatic considerations should play no role in either prosecutorial or extradition decisions. The rule of law, in a domestic and international sense, mandates that conclusion, as do the EU's Eurojust Guidelines, Making the Decision - Which Jurisdiction Should Prosecute?, found in Annex A of its Annual Report 2003. The guidelines contain the presumption that it is the territorial state – where majority of criminality occurred or where the majority of the loss was sustained that should prosecute. Following these, accused persons should be extradited to that territorial state. As between the UK the US, the Agreement for Handling Criminal Cases with Concurrent Jurisdiction between the United Kingdom and the United States of America 2007 is less precise in iterating the factors that should be considered in coming to decisions about prosecution in the face of concurrent jurisdiction.

14. The extradition and surrender of nationals and the general applicability of the criminal law on the basis of one's nationality or residence are both relevant to the discussion of the relationship between extradition and prosecutorial decisions. The UK's position on both is relatively clear. Historically it has had no qualms in extraditing its nationals. That view continues today. It has only exceptionally extended its criminal law on the basis of nationality or residence. Where it has done

so evidential difficulties, prosecutorial disinclination and deference to third states with a territorial interest have militated against the prosecution of offences on that basis. Both of these positions – the extradition of UK nationals and the exceptionality of non-territorial applications of the criminal law – are wholly reasonable and should be maintained.

15. The human rights bar to extradition, as interpreted by UK courts with reference to ECtHR jurisprudence, operates satisfactorily. It acts to protect requested persons from egregious violations of human rights. The tests developed by the courts set the hurdle quite high. The bar is not easily or readily invoked. This is appropriate in light of the interests served by the extradition process and the trust placed in the national and regional human rights systems of the UK's extradition partners.

16. Where assurances have been received from a third state in regard to the future treatment of a requested person courts should apply a presumption that they will be followed. The question as to the bona fides of the third state is one which is not suited to judicial determination. As such it should be considered to be non-justiciable in all but the most extreme of cases.

17. The responsibility to monitor the implementation of assurances falls to the UK Government. Where assurances are not honoured it becomes a matter for the UK Government to make representations to the authorities in that state. The rendition of persons to that country must cease until it can be demonstrated to the satisfaction of the Government that they will be upheld.

18. The impact of the forum bar will be slight. This is because the facts underlying extradition requests almost always demonstrate a substantial connection with the requesting state in the form of the harm caused occurring within it. To the author's knowledge not a single case over the past several years would be a legitimate candidate for a successful argument based upon forum. Cases such as those concerning Ian Norris, the 'NatWest Three' and Gary McKinnon did indeed have connections to the UK, to the extent that a 'substantial measure' of the requested persons relevant activity took place within it however all of these cases also gave rise to losses and harm in the US.

19. The impact of the entry into force of the proportionality bar is less easily foreseen. This is because a version of it has been applied for some time as developed in ECtHR and UK jurisprudence. Indeed, a growing number of cases can be identified where appeals against extradition orders have been allowed because it was held disproportionate to extradite. Of 279 relevant cases identified via Westlaw and Lexis-Nexis, over the period 1 July 2013 to 30 June 2014 human rights were successfully invoked in 43. An example is Balodis-Klocko v Latvia, [2014] EWHC 2661 (Admin), where it was held that it would be disproportionate to extradite a convicted person where he had served over 8 years of a 10 year sentence for robbery, was HIV positive and had a wife and child in the UK. The proportionality bar as found in s 21A(b) of the 2003 Act is more limited in scope than that developed in the case law (it is also limited to Category 1 accusation extraditions). For example, it limits the matters the judge can take into account in coming to a decision on proportionality in

21A(3)(a)-(c), excluding the health of the individual and the existence of children or other family. As the human rights bar remains alongside the proportionality bar, it is reasonable to assume that both will operate in the same case. In light of this it is not unreasonable to conclude that the proportionality bar will not have a material impact.

20. The present devolution settlement in Scotland is, to this point, fit for purpose in the area of extradition. It is notable that the substantive law in the area of extradition has diverged as between England and Wales and Scotland for the first time relatively recently in that the forum bar has not been brought into force in Scotland. It is desirable for the whole of the UK to act under a single set of extradition rules – where possible and reasonable to do so.

21. Scottish independence will have a significant impact upon extradition within the British Isles. Whilst there is some debate about an independent Scotland's membership of the EU it is reasonable to assume that in due course Scotland would become an EU Member State and as such the EAW scheme will govern extradition between Scotland and the rest of the UK.

27 August 2014

Danae Azaria – Written evidence (EXL0087)

Written Evidence – Response to House of Lords Select Committee on Extradition Law

Dr. Danae Azaria
University College London, Faculty of Laws
1 January 2015

Executive Summary

A. (I) Is the UK permitted to make a reservation to Article 12(2) of the European Convention on Extradition vis-à-vis particular States to the effect that additional documents, and more specifically *prima facie* evidence of the offence for which extradition is requested (i.e. signed witness statements), have to be submitted by the requesting State?

The European Convention on Extradition ('ECE') contains a provision concerning reservations according to which reservations have to be made either upon signature or upon ratification or accession. The late formulation of a reservation would render it invalid. However, modern practice, including under the auspices of the Council of Europe, exceptionally recognises the possibility that the late formulation of a reservation can be valid, if unanimously accepted by other contracting states. A reservation by the UK concerning Article 12 to the effect that *prima facie* evidence of the offence for which extradition is requested (i.e. signed witness statements) has to be submitted by particular requesting States parties would be consistent with the object and purpose of the ECE, but its late formulation would not meet the narrow circumstances in which late formulations of reservations have been accepted, and in any event, such late formulation would require the unanimous acceptance of other contracting States in order to be valid.

Although the formulation of a late reservation would render the reservation invalid, a number of alternative routes may be available. *First*, the UK may denounce the ECE (pursuant to its Article 31) with a view to immediately re-acceding to it and formulating a reservation to Article 12 when acceding. Although such an approach is controversial, there is no rule of customary international law prohibiting it. However, as at 1 January 2014, the UK is party to the Fourth Additional Protocol to the ECE ('Fourth Protocol'). A denunciation of the ECE automatically entails the denunciation of the Fourth Protocol (pursuant to the Fourth Protocol's Article 14(3)), and upon accession to the ECE and to the Fourth Protocol a reservation formulated to the ECE concerning *prima facie* evidence in relation to Article 12 of the ECE would have legal effects only in the relationship of the UK with ECE parties that are not parties to the Fourth Protocol. The UK will be unable to formulate a valid reservation to the Fourth Protocol (concerning Article 12 of the ECE) that applies to the relationship between the UK and other Fourth Protocol parties, because the Fourth Protocol permits only specified reservations but not one in relation to Article 12 to the effect examined here. *Second*, the UK could try to

elicit the establishment of an agreement between ECE parties concerning the interpretation of Articles 12 or 13 to achieve the desired result by triggering the subsequent practice of ECE parties in the treaty's application.

A. (II) What is the effect of doing so on the UK's ECE treaty relations with other States party?

If the late formulation of a reservation is accepted unanimously by all other contracting states, it would be subject to the opposability rules concerning reservations. Between the UK and those that accept the reservation, if they have not raised an objection to the reservation by the end of twelve months after they were notified of the reservation or by the date on which they expressed their consent to be bound by the treaty, whichever is later, the ECE would apply with the reservation. The reservation would modify Article 12 to the extent of the reservation for the reserving State in its relations with the accepting party; and would modify Article 12 to the same extent for the accepting party in its relations with the reserving State. In contrast, between the UK and those that object to the reservation, either the ECE would not enter into force between them, if the objecting states choose to oppose it, or Article 12 will not apply to the extent of the reservation.

If the UK attempted to make a reservation that was in fact not permitted (for instance, because it has been formulated late without the unanimous acceptance of all other parties) and as a result was invalid, and then sought to rely on that reservation notwithstanding its invalidity, the UK would be in breach of its obligations under the ECE.

B. Can the UK consider itself not bound by the ECE in relation to another ECE party that it regards as not performing the ECE in good faith?

Assuming that an ECE (or Fourth Protocol) party is not performing the treaty in good faith, under customary international law and the VCLT the UK remains bound by the ECE or the Fourth Protocol (as applicable). The only available responses open to the UK as a result of non-performance of the ECE by another State are the following.

First, under customary international law on the law of treaties, only in case of a material breach by another State party, if the UK is specially affected by that material breach, will the UK be entitled to suspend the operation in whole or in part of the ECE (or the Fourth Protocol, as applicable) in its relationship between itself and the defaulting State. The suspension of the treaty's operation will release the UK and the defaulting State from the obligation to perform the treaty in their mutual relations during the period of the suspension, but will not otherwise affect the legal relations between the parties established by the treaty.

Second, it is arguable – albeit not beyond doubt – that the UK may withhold performance of its treaty obligations until such time as the other party performs, assuming that the obligations in question are synallagmatic, in the sense that the performance of some treaty obligations may be conditioned upon performance of the

same or closely linked obligations under the same treaty (under the *exceptio inadimpleti contractus*). This is a matter of treaty interpretation. However, it is doubtful that the obligations in the ECE (or the Fourth Protocol, as applicable) are synallagmatic in this way.

Third, under customary international law on state responsibility, if the UK is injured by an internationally wrongful act pertaining to the breach (material or not) of an obligation under the ECE (or the Fourth Protocol, as applicable), it may take a countermeasure against the responsible ECE party (or party to the Fourth Protocol) in the form of suspending compliance with its international obligations under the ECE (or to the Fourth Protocol) or another international obligation owed to the responsible State. The wrongfulness of such suspension would be precluded for as long as the internationally wrongful act persists, but the obligations whose performance is suspended would remain an applicable legal standard between the responsible State and the State taking the countermeasure. However, countermeasures in order to be lawful have to fulfill a number of conditions, and hence their lawfulness will depend on the circumstances of each case. If they are not lawful, the wrongfulness of the countermeasures will not be precluded, and the UK would violate its international obligations and would engage international responsibility.

Question A, Part (I): Is the UK is permitted to make a reservation to Article 12(2) of the European Convention on Extradition vis-à-vis particular States to the effect that additional documents, and more specifically *prima facie* evidence of the offence for which extradition is requested (i.e. signed witness statements), have to be submitted by the requesting state?

1. The Vienna Convention on the Law of Treaties ('VCLT')[1] has entered into force for a number of parties to the ECE, including for instance the UK and Russia. However, it does not apply to the ECE (as between ECE parties that are parties to the VCLT), because the VCLT applies only to treaties, which are concluded by states after the entry into force of the VCLT with regard to such states (VCLT Article 4). Hence, the following analysis examines rules of customary international law, which may coincide in content with some rules set forth in the VCLT.

2. The UK expressed its consent to be bound by European Convention on Extradition ('ECE') on 13 February 1991 without making a reservation to Article 12(2) to the effect that additional documents, and more specifically *prima facie* evidence of the offence for which extradition is requested (i.e. signed witness statements), have to be submitted by the requesting state. The question thus arises as to whether customary international law permits the 'late formulation of reservations', meaning after the State formulating the reservation has expressed its consent to be bound by the treaty.

3. Under customary international law, as reflected in VCLT Article 2(1)(d), a reservation is a 'unilateral statement, however phrased or named, made by a State, when [signing or expressing consent to be bound by a treaty], whereby it purports to exclude or to modify

[1] Vienna Convention on the Law of Treaties (done in Vienna 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

the legal effect of certain provisions of the treaty in their application to that State'. A reservation can be formulated only up to the point when the State that formulates it expresses its consent to be bound by the treaty.[2] This is supported by the fact that the time factor is part of the definition of a reservation in VCLT Article 2(1)(d), and part of the customary rule of permissibility of reservations reflected in VCLT Article 19 ('[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation […]'). If reservations are formulated late, they are of no legal effects and are null and void.[3]

4. There are two exceptions to this rule. *First*, a treaty may expressly permit that reservations are formulated late (*lex specialis*).[4] However, this is not the case for the ECE. Article 26 entitled 'Reservations' reads:

> 1. Any Contracting Party may, *when signing this Convention or when depositing its instrument of ratification or accession*, make a reservation in respect of any provision or provisions of the Convention.
> 2. Any Contracting Party which has made a reservation shall withdraw it as soon as circumstances permit. Such withdrawal shall be made by notification to the Secretary General of the Council of Europe.
> 3. A Contracting Party which has made a reservation in respect of a provision of the Convention may not claim application of the said provision by another Party save in so far as it has itself accepted the provision. [Emphasis added]

Therefore, Article 26 explicitly *requires* that reservations to the ECE are made either upon signature or when the Contracting Party expresses its consent to be bound by ratification or accession and so this first exception is not available in this case.

5. *Second*, modern practice indicates that the other contracting States may *unanimously* accept a late reservation, in the absence of, or even contrary to, treaty provisions concerning reservations, which require that reservations are formulated up to the point when consent to be bound is expressed, such as Article 26(1) of ECE.[5] The consent of the other contracting States can be perceived as 'a collateral agreement extending *ratione temporis*' the formulation of reservations[6] or a treaty amendment.

6. If the late formulation is opposed, the State proposing the late formulation of a reservation remains bound, in accordance with the initial expression of its consent. If the late formulation is unanimously accepted (even tacitly),[7] the normal rules regarding acceptance of and objections to reservations, as codified in VCLT Articles 20-23, apply with

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[2] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 69 at 85, para. 35.
[3] Text of the Guide to Practice, comprising an introduction, the guidelines, and commentaries thereto, an annex on the reservations dialogue and a bibliography, adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10/Add.1), ILCYB 2011-II, ('ILC Commentary to Guide to Practice of Reservations to Treaties'), p. 180, para. 18.
[4] A treaty containing such clause under the auspices of the Council of Europe: Article 30(1), Convention on Mutual Administrative Assistance on Tax Matters, CETS 127 (done in Strasbourg 25 January 1988, in force 1 April 1995).
[5] Letter to governmental official in a Member State, UN Secretariat, 19 June 1984, *UN Juridical Yearbook*, 1984, p. 183; ILC Commentary to Guide to Practice of Reservations to Treaties, p. 177, para. 9 and p. 178, para. 13.
[6] Ibid, p. 177, para. 9.
[7] Ibid, p. 182, para. 2.

regard to the content of reservations whose formulation took place late.[8]

7. The unanimous acceptance can be express or tacit. Tacit acceptance can be presumed if no contracting State opposes the late formulation within a period of time after which a tacit acceptance can be assumed. The VCLT does not touch on the requisite amount of time, nor is practice of depositaries in general established.[9] The United Nations Secretary-General ('UNSG') has elaborated a continuous practice to deal with the late formulation of reservations, including in relation to periods within which the other contracting States are to be consulted and after which a tacit acceptance can be assumed.[10] In contrast, the Council of Europe Secretary-General, who acts as depositary to the treaties concluded under the auspices of the Council of Europe, including the ECE, has not developed a continuous practice in this respect.

8. In 2011, the International Law Commission ('ILC') adopted the Guide to Practice on Reservations to Treaties, which was submitted to the UN General Assembly on 16 December 2013 that took note of the Guide to Practice, annexed it to its Resolution, and encouraged its widest possible dissemination.[11] The Guide is not binding, but some of its Guidelines either constitute a codification of existing law (VCLT or customary international law) or a progressive development of the law. The Guide proposes a 12 month period following the date on which the notification by the depositary was received, unless the treaty otherwise provides or the well-established practice of the depositary differs (Guideline 2.3.1). This proposition is a progressive development of international law,[12] but is guided by the VCLT: it has been guided by and parallels the 12 month period for objecting to a permissible reservation under VCLT Article 20(5).[13]

9. Despite the lack of practice in the Council of Europe as to the precise time-frame during which contracting States have to be consulted and oppose the late formulation of a reservation, reservations to a number of treaties concluded under the auspices of the Council of Europe have been formulated late, including to the ECE, without any opposition having been raised by other contracting States.[14] But, these instances are exceptional: some have been attributed (by the state formulating them) to an administrative error; others have been formulated soon after the expression of consent to be bound and before the treaty has entered into force for the reserving state.

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[8] Ibid, p. 181, para. 23.
[9] ILC Commentary to Guide to Practice of Reservations to Treaties, p. 182, para. 5.
[10] See, Memorandum from the United Nations Legal Counsel addressed to the Permanent Representatives of States Members of the United Nations, 4 April 2000 (LA 41 TR/221 (23-1)). ILC Commentary to Guide to Practice of Reservations to Treaties, p. 183, paras. 6-8.
[11] GA Resolution 68/111, Reservations to treaties, adopted on 16 December 2013, para. 3.
[12] ILC Commentary to Guide to Practice of Reservations to Treaties, p. 183, para. 9.
[13] Ibid, paras. 8-9.
[14] While Portugal ratified the ECE on 25 January 1990, on 12 February 1990, Portugal formulated a reservation to Article 1 of ECE (before the entry into force of the Convention for Portugal on 25 April 1990). In response Belgium (a signatory since 13 December 1957) only objected to Portugal's reservation explaining that it is not compatible with the Convention's object and purpose, but there is no evidence that Belgium opposed the reservation's late formulation. On 17 June 2003, South Africa supplemented with a Note Verbale the reservation it made to Article 2 of ECE on 11 June 2003 (i.e. after its accession on 12 February 2003) according to which '[it] regrets the belated communication of the reservation and declaration regarding the European Convention on Extradition, which is the result of an unfortunate administrative oversight.'

10. Hence, a late formulation of a reservation to Article 12 of the ECE by the UK would face a number of hurdles: *first*, if such reservation were to have legal effect, it would have to be unanimously accepted by all other contracting states to the ECE; *second*, owing to the fact that such reservation would not fall within the limited and exceptional circumstances in which late formulation has been accepted, it is unlikely that it will be accepted unanimously; *third*, during the time between the proposed late reservation and when a unanimous acceptance or an opposition occurs (arguably within twelve months from the date of notification by the Secretary-General of such proposed reservation), there will be legal uncertainty as to the reservation's validity.

11. The question arises as to whether the UK could make an 'interpretative declaration' that Article 12 of the ECE requires that *prima facie* evidence of the offence for which extradition is requested (i.e. signed witness statements) has to be submitted by the requesting State. The VCLT does not define the term 'interpretative declaration'. The ILC Guide to Practice on Reservations to Treaties defines interpretative declarations as 'unilateral statement[s], however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions' (Guideline 1.2).

12. Interpretative declarations can be made at any time after the adoption of the treaty's text, unless the treaty provides that they can be formulated only at a specific time (Guideline 2.4.7). However, such a declaration by the UK would actually purport to modify the effect of Article 12 of ECE in its application to the UK vis-à-vis other ECE parties, rather than to specify or to clarify the meaning or scope of a treaty provision. It would thus constitute a reservation, despite its title as a 'declaration',[15] and the rules concerning the late formulation of reservations, as explained above, would apply.

13. In any event, the UK could endeavour to establish an agreement between parties to the ECE concerning the interpretation of Article 12. This agreement can be achieved through subsequent practice in the application of the ECE, i.e. UK's conduct and the reactive practice of other parties (by positive conduct or tacit acceptance by silence or omission, in circumstances where some reaction would have been the natural conduct).[16] Although not all parties to the treaty being interpreted need to have engaged in the practice, the practice has to establish the agreement of all parties concerning the treaty's interpretation.[17]

[15] See 'however phrased or named' in the definition of a reservation (VCLT Article 2(1)(d)); *Case of Belilos v. Switzerland*, Judgment (Merits and Just Satisfaction), 10328/83, 29 April 1988, para. 49. The ILC Guide to Practice on Reservations to Treaties distinguished reservations from interpretative declarations on the basis of the legal effects that the author of the unilateral statement purports to produce (Guideline 1.3).

[16] Conclusion 9(2), Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-sixth session, 6 August 2014, ILCYB 2014, Vol. II, pp. 168-217; I.C. MacGibbon, Some Observations on the Part of Protest in International Law, 30 *BYIL* (1953) at 307; Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, para. 272.

[17] I.M. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 2nd ed., 1984), p. 48; R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008) 239.

14. Alternatively, the UK could make an interpretative declaration to ECE Article 13[18] pursuant to which it understands this provision to allow the requested State to require the requesting state to submit *prima facie* evidence in relation to the charge made in cases where the requested State cannot conclude that the request as originally formulated is properly founded. Such declaration would purport to clarify the meaning of Article 13, and would be permitted. If such declaration, along with other subsequent practice in the application of the ECE, establish the agreement of treaty parties as to the interpretation of the treaty (to the effect of this interpretative declaration), this subsequent agreement would be taken into account together with the context of the ECE in the interpretation of the Convention, as part of the general rule of treaty interpretation under customary international law set forth in VCLT Article 31(3)(b).[19]

15. The UK could denounce the ECE (pursuant to its Article 31) with a view to immediately re-acceding to it formulating a reservation to Article 12 when depositing the instrument of accession. Such an approach is controversial, as it would essentially defeat the system of reservations in general,[20] but also Article 26 of the ECE specifically. However, there is no rule of customary international law (or in the VCLT) that prohibits such practice.

16. As at 1 January 2015, the UK, Albania, Latvia and Serbia are States party to the Fourth Additional Protocol to the European Convention on Extradition ('Fourth Protocol'),[21] all of which are party to the VCLT,[22] and as between them the VCLT applies to the Fourth Protocol (VCLT Article 4). Under the VCLT the late formulation of reservations is impermissible, as explained in paragraph 3 earlier in this section. Although the VCLT does not specify the legal effects of an impermissible reservation, the correct interpretation of the VCLT is that such a reservation is invalid, and produces no legal effects,[23] while the UK will remain bound by the Fourth Protocol without the impermissible reservation formulated late.

17. In any event, Article 13 of the Fourth Protocol permits reservations only to specific provisions:

> '3. No reservation may be made in respect of the provisions of this Protocol, with the exception of the reservations provided for in Article 10, paragraph 3, and Article 21, paragraph 5, of the Convention as amended by this Protocol, and in Article 6, paragraph 3, of this Protocol. Reciprocity may be applied to any reservation made.'

[18] ECE Article 13 reads: 'If the information communicated by the requesting Party is found to be insufficient to allow the requested Party to make a decision in pursuance of this Convention, the latter Party shall request the necessary supplementary information and may fix a time-limit for the receipt thereof.'

[19] Sinclair, *supra* note 17; Gardiner, *supra* note 17; Conclusion 9(2), Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-sixth session, 6 August 2014, ILCYB 2014, Vol. II, pp. 168-217; Guidelines 4.7.1-4.7.3, ILC Guide to Practice on Reservation to Treaties.

[20] Council of Europe CADHI, Practical Issues regarding Reservations to International Treaties adopted at the 19th meeting (Berlin, 13-14 March 2000), para. 8; A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 3rd edition, 2013), p. 142.

[21] Fourth Additional Protocol to the European Convention on Extradition (done in Vienna 20 September 2012, entered into force 1 June 2014), CETS No. 212.

[22] Information available at UN Treaty Collection: https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en

[23] Guideline 4.5.1, ILC Guide to Practice on Reservations to Treaties. See also reasoning of the ILC: ILC Commentary to Guide to Practice of Reservations to Treaties, p. 510, para. 6, and p. 515, para. 18.

A reservation to Article 2 of the Fourth Protocol, which replaces Article 12 of the ECE, is impermissible, and if formulated – even late – it would be invalid. The UK formulated a (permissible) reservation when it deposited the instrument of its ratification of the Fourth Protocol on 23 September 2014, but none contemplating a reservation concerning *prima facie* evidence in relation to Article 12 of the ECE.

18. Even if the UK formulated late a reservation to the ECE whose late formulation was unanimously accepted by ECE contracting States, reservations made to the provisions of the ECE, which are amended by the Fourth Protocol, such as Article 12 of the ECE, do not apply as between the parties to the Fourth Protocol (see its Article 13(2)). The reservation will apply only between parties to the ECE that are not parties to the Fourth Protocol, in accordance with the rules of opposability.

19. As a result, even if the UK, denounces the ECE with a view to immediately acceding to it with a reservation, such denunciation automatically entails denunciation of the Fourth Protocol (Article 14(3) of the Fourth Protocol), and upon accession to the ECE and the Fourth Protocol a reservation formulated to the ECE concerning *prima facie* evidence in relation to Article 12 of the ECE would first have legal effects only in the relationship of the UK with ECE parties that are not parties to the Fourth Protocol, while second the UK will be unable to formulate a valid reservation to the Fourth Protocol (concerning Article 12 of the ECE) other than those prescribed by the Fourth Protocol (Article 13(3)).

Question A, Part (II): What is the effect of doing so on the UK's ECE treaty relations with other States party?

1. In the event that a reservation formulated late is accepted unanimously be all other contracting States to the ECE, it would have to be otherwise permissible and it would be subject to the opposability rules concerning reservations. A reservation concerning Article 12 to the effect that additional evidence is required to be submitted by specific ECE parties when they request extradition from the UK would not be incompatible with the object and purpose of the ECE and would be a permissible and valid reservation (VCLT Article 19(c).[24]

2. Between the UK and those that accept the reservation (even tacitly, if they have not raised an objection to the reservation by the end of twelve months after they were notified of the reservation or by the date on which they expressed their consent to be bound by the treaty, whichever is later), the ECE would apply with the reservation (unless the treaty provides otherwise). The reservation would modify for the reserving State in its relations with that other party Article 12 to the extent of the reservation; and would modify Article 12 to the same extent for that other party in its relations with the reserving State.

3. In contrast, between the UK and those that object to the reservation, either the ECE

[24] This is supported by the fact that the Belgium, Luxembourg and the Netherlands have all made reservations according to which they do not apply Article 28 of the ECE in the relationships between themselves (i.e. specifically formulating a reservation in relation to particular states) and no other contracting State has objected to it (on the basis that the reservations are incompatible with the object and purpose of the ECE owing to the fact that they are formulated in relation to particular parties). See reservations by Belgium on 3 June 1997, by Luxembourg on 16 November 1976, and by the Netherlands on 14 February 1969.

would not enter into force between them (if the objecting States choose to oppose such entry into force) or the provision to which the reservation has been made will not apply to the extent of the reservation. Given that the reservation being considered here specifically will refer to particular ECE parties, their reaction (acceptance or objection) is important.

4. On the other hand, if the UK attempted to make a reservation to ECE Article 12 requiring *prima facie* evidence from particular ECE parties that was not permitted (because it has been formulated late without the unanimous acceptance of all other parties) and as a result was invalid, and then sought to rely on that reservation notwithstanding its invalidity, the UK would be in breach of its obligations under the ECE.[25] As a result, if the breach was material, other State parties specially affected by the UK's material breach would be entitled to suspend the operation of the ECE in their relationship with the UK, and injured States would be entitled to resort to countermeasures against the UK pursuant to the law of international responsibility.

Question B: Can the UK consider itself not bound by the ECE in relation to another ECE party that it regards as not performing the ECE in good faith?

1. Assuming that an ECE (or Fourth Protocol) party is not performing the treaty in good faith, under customary international law and the VCLT the UK remains bound by the ECE or the Fourth Protocol (as applicable). The only available responses open to the UK as a result of non-performance of the ECE by another State are the following.

2. First, under customary international law on the law of treaties (and under the VCLT), only *material breaches entitle* other parties to respond. A material breach is a breach of a provision essential to the accomplishment of the treaty's object and purpose. The type of response, which can only involve the unilateral suspension of the treaty's operation (not its termination), depends on the nature of the ECE, as a treaty.

3. Multilateral treaties can create bilateralisable relationships between treaty parties, or they can establish standards that are not reciprocal (integral treaties).[26] In the case of a treaty that creates bundles of bilateral relationships between the parties, the specially affected states are entitled to unilaterally suspend the treaty's operation in whole or in part in their relationship with the defaulting state (VCLT Article 60(2)(b)). In contrast, integral treaties that contain provisions relating to the protection of the human person are not subject to the unilateral (or unanimous) suspension of their operation in response to their material breach (VCLT Article 60(5)). Under the VCLT, only treaty provisions of humanitarian character, as opposed to all treaties of integral character, such as treaties that establish uniform conduct for states, are not subject to unilateral suspension of their operation. Although it could be argued that the treatment of treaty provisions of humanitarian character should be extended to all integral treaties, the fact that only some but not all integral treaties are referred to in VCLT Article 60(5) allows the *a contrario* argument that

[25] The mere formulation of an impermissible reservation does not engage the international responsibility of the State that has formulated it. Guideline 3.3.2, ILC Guide to Practice on Reservation to Treaties.

[26] A third type of treaties are interdependent treaties: those where a material breach of the treaty's provisions by one party radically changes the position of every party with respect to the further performance of their obligations under the treaty (VCLT Article 60(2)(c)). Examples of such treaties are disarmament treaties. This type of treaty is not examined further here, as the ECE is obviously not an interdependent treaty.

the operation of those not mentioned in that provision are unilaterally suspendable, and thus subject to the same rule as treaties establishing bilateralisable obligations (VCLT Article 60(2)(b)). It is not clear whether this is the state of customary international law, but an argument to this effect is logical. Thus the most that can be argued in relation to customary international law and responses to material breaches of treaties is that it is not as yet clear that integral treaties are non-suspendable and are to be treated differently from treaties that establish bilateralisable obligations.

4. Traditionally, extradition as a subject matter is dealt with on the basis of reciprocity, and it could be argued that the ECE is a treaty that creates dyads of bilateral obligations concerning extradition between its parties. The ECE is not a treaty aimed at protecting human persons. Rather, the object and purpose of the treaty found in its Preamble[27] is to 'achieve a greater unity' between the members of the Council of Europe 'by the conclusion of agreements and by common action in legal matters; considering that the acceptance of uniform rules with regard to extradition is likely to assist this work of unification.' That is not to say that individuals involved in extradition proceedings do not have human rights that are relevant in the context of extradition;[28] rather that the cause of engagement of the parties to the ECE is not to protect individuals as such, but to establish uniform rules as between states as to their cooperation in relation to extradition proceedings. In light of the treaty's object and purpose, the ECE establishes self-existent standards of uniform application, but does not as such contain provisions of humanitarian character for the protection of human persons. This protection is rather provided to individuals involved in extradition procedures under the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR').[29]

5. Thus, even assuming that the ECE is classified as an integral treaty, rather than as a treaty that establishes dyads of bilateralisable relationships between its parties, in the current state of customary international law, it is only in the event of a *material* breach by another State party to the ECE that the UK would be *entitled*, if it is a specially affected State, to suspend the ECE's operation in whole or in part in its relationship with the defaulting

[27] The International Court of Justice has identified the object and purpose in the treaty's Preamble: *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, 3 February 1994, ICJ Reports 1994, p. 6, at para. 52; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, 13 July 2009, ICJ Reports 2009, p. 21 at para. 79; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422 at para. 68; *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Merits, Judgment, 31 March 2014, para. 56. See also method for identifying the object and purpose of the treaty proposed by the ILC: Guideline 3.1.5.1, Guide to Practice on Reservations to Treaties, adopted by the ILC at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, [75]), ILCYB 2011-II.

[28] For detailed analysis of human rights of individuals involved in extradition proceedings: D. Azaria, Code of Minimum Standards of Protection to individuals involved in Transnational Proceedings, Expert Report, PC-TJ (2005) 07, Council of Europe, European Committee on Crime Problems (CDPC), Committee of Experts on Transnational Criminal Justice (PC-TJ), Strasbourg, 16 September 2005, available at: http://www.coe.int/t/dghl/standardsetting/pc-oc/PC-TJ%20_2005_%2007%20E.%20Azaria.%20Code%20of%20Minimum%20standards.pdf. See also D. Azaria, Minimum standards of protection to individuals involved in transnational proceedings, in Extradition – European Standards (Council of Europe 2007), pp. 95-155.

[29] Convention for the Protection of Human Rights and Fundamental Freedoms, (signed at Rome 4 November 1950, entered into force on 3 September 1953) 213 UNTS 221 (as subsequently amended).

state.[30] The suspension of the treaty's operation would release the parties between whom the treaty's operation is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension, but does not otherwise affect the legal relations between the parties established by the treaty.

6. Second, it is arguable – albeit not beyond doubt – that the UK may withhold performance of its treaty obligations until such time as the other party performs under the *exceptio inadimpleti contractus* ('*exceptio*'). It has been argued that the *exceptio* exists outside the VCLT and customary international law set forth therein concerning responses to material breaches. Whether the *exceptio* exists is important because it applies also to *immaterial* breaches of treaty obligations, and is not subject to the conditions concerning treaty law responses to material treaty breaches or concerning countermeasures under the law of international responsibility, discussed below.[31] The *exceptio* would apply only to treaty obligations that are synallagmatic, meaning treaty obligations whose performance is conditioned upon performance of the same or a closely linked treaty obligation by another treaty party.[32] This would be a matter of interpretation of the primary treaty obligations in question.[33] However, even assuming that the *exceptio* exists in this limited manner under international law (custom or a general principle of law), the obligations in ECE do not appear synallagmatic. This is consistent with the treaty's object and purpose (see paragraph 3 in this section).

7. Third, under the customary international law on state responsibility, an injured State may resort to countermeasures in response to an internationally wrongful act pertaining to a breach (material or not) of a treaty obligation, such as an obligation under the ECE. Such response can take the form of suspending compliance with international obligations (under the same treaty or another international obligation outside the treaty breached) owed by the State taking the countermeasure to the responsible State. The wrongfulness of such suspension would be precluded for as long as the internationally wrongful act persists.

8. Countermeasures differ from treaty law responses to material breaches. Under treaty law responses to a material breach the treaty's operation is suspended and the treaty does not constitute an applicable legal standard between the relevant parties. In contrast, under countermeasures the treaty obligations apply, but the wrongfulness of non-performance is precluded for as long as the circumstances that preclude the wrongfulness subsist.

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[30] However, it could be argued that some provisions in the ECE are of humanitarian character and are thus not subject to unilateral suspension in response to the ECE's material breach. For instance, the principle of speciality (ECE Article 14) or the principle of *non bis in idem* (ECE Article 9). Even if such argument is unsustainable, a partial suspension of the operation of an ECE provision could be permitted under custom, but could constitute at the same time a violation of the ECHR. For instance, ECHR Article 5(1)(f), 5(2), 5(4)-(5).

[31] J. Crawford and S. Olleson, The Exception of Non-Performance: Links between the Law of Treaties and the Law of State Responsibility, 21 *AustYBIL* (2001) 55–74; D. Azaria, The Exception of Non-Performance, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2014).

[32] See the pleadings of the Hellenic Republic before the ICJ in relation to the *exceptio*: Counter-Memorial of Greece, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, 19 January 2010, paras. 8.7 and 8.26. See also Declaration of Judge Bennouna, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece),* ICJ Reports 2011, p. 709.

[33] Text of the draft Articles on responsibility of States for internationally wrongful acts with commentaries thereto, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001-II, 31–143 at 72, para. 9.

9. However, countermeasures in order to be lawful have to fulfill a number of conditions under customary international law. *First*, in principle they may only be taken by an injured state (or international organization).[34] *Second*, they must be targeted only against the responsible state (or international organization).[35] *Third*, the State taking countermeasures must call upon the wrongdoing State to comply with its obligations of cessation and reparation, notify it of the decision to take countermeasures, and offer to negotiate.[36] *Fourth*, countermeasures have to be temporary and reversible.[37] *Fifth*, they have to be proportionate to the injury suffered taking into account the gravity of the breach and the rights in question.[38] *Sixth*, countermeasures are not forcible and may not affect 'fundamental human rights' obligations, humanitarian character obligations prohibiting reprisals, and *jus cogens* norms.[39] *Seventh*, countermeasures may not be taken, if the internationally wrongful act has ceased and the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties including provisional measures.[40]

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[34] *Responsibilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité). Portugal contre Allemagne. Lausanne, 30 Juin 1930,* RIAA, vol. II, pp. 1035–1077 (30 June 1930) at 1057; *Gabčvkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, p. 7, at para. 83. Contra supporting that customary international law permits States (and international organisations) other than the injured State to resort to countermeasures: L.-A. Sicilianos, Countermeasures in Response to Grave Violations of Obligations owed to the International Community, in J. Crawford, A. Pellet, and S. Olleson (eds.), *The Law of International Responsibility*, (Oxford University Press, 2010), 1137–1148 at 1148.

[35] Article 49(1), Text of the draft Articles on the responsibility of States for internationally wrongful acts, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001-II, 26–30.

[36] Article 52(1), Text of the draft Articles on the responsibility of States for internationally wrongful acts, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001-II, 26–30; *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité) (Portugal contre Allemagne)*, RIAA, vol. II, pp. 1011–1033 (31 July 1928) at 1026; *Gabčvkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, p. 7, at para. 84. Urgent countermeasures may be taken with a view to preserving the rights of the injured State: Article 52(2)), Text of the draft Articles on the responsibility of States for internationally wrongful acts, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001-II, 26–30. Judge Bennouna referred to the obligation to notify and to offer to negotiate although he did not expressly suggest that he considered it to be of customary nature: Declaration of Judge Bennouna, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece),* ICJ Reports 2011, at 710.

[37] Articles 49(2)-(3) and 53, Text of the draft Articles on the responsibility of States for internationally wrongful acts, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001-II, 26–30; Text of the draft Articles on responsibility of States for internationally wrongful acts with commentaries thereto, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001-II, 31–143 at 130–131, para. 7; *Application of the Interim Accord of 13 September 1995(the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, 5 December 2011, ICJ Reports 2011, p. 644 at para. 164; *Gabčvkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Reports 1997, p. 7, at para. 87.

[38] Article 51, Text of the draft Articles on the responsibility of States for internationally wrongful acts, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001-II, 26–30; *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité) (Portugal contre Allemagne)*, RIAA, vol. II, pp. 1011–1033 (31 July 1928) at 1011; *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, RIAA, Vol. XVIII, pp. 417–493 (9 December 1978) at para. 83; *Gabčvkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, p. 7, at para. 83. O.Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford: Clarendon Press, 1988) pp. 83–95.

[39] Article 50, Text of the draft Articles on the responsibility of States for internationally wrongful acts, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001-II, 26–30. For definition of peremptory norms of international law and the law of treaties: VCLT Articles 53, 64, and 71.

[40] Article 52(3), Text of the draft Articles on the responsibility of States for internationally wrongful acts, Report of the Commission to the General Assembly on the work of its fifty-third session, ILCYB 2001-II, 26–30; *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, RIAA, Vol. XVIII, pp. 417–493 (9 December 1978) at paras. 91 and 94-96.

10. Finally, an argument could be made that owing to an implied term in the ECE or the Fourth Protocol (as applicable) according to which the UK is not obliged not to require *prima facie* evidence supporting the extradition request, if the requesting State exercises *its rights* under the ECE or the Fourth Protocol (as applicable) in bad faith. This would be a matter of interpreting the primary rules contained in the ECE or the Fourth Protocol (as applicable). However, this argument is unsustainable. There is no evidence that such a term specifically exists in the ECE (or the Fourth Protocol as applicable).

5 January 2015

Baher Azmy, Sally Eberhardt, Pardiss Kebriaei, Arun Kundnani, William P. Quigley, Laura Rovner, Saskia Sassen, Jeanne Theoharis – Written evidence (EXL0049)

Evidence from US experts to the House of Lords Select Committee on the Extradition Law

1. We are academics, researchers and legal experts who have studied the US system for prosecuting terrorism-related crimes. Our academic and legal research on the US system has appeared in peer-reviewed journals, books and congressional and legal testimony.

2. We have become increasingly concerned in recent years at the human rights issues raised by the extradition of persons from the UK to the US to face terrorism-related charges. Moreover, we believe that the evidence already submitted to the committee on the nature of the US system conveys an inaccurate picture of how terrorism prosecutions in the US are conducted. In particular, we have deep concerns about the pattern of rights abuses in these cases and the conditions of imprisonment that terrorist suspects face in the US both before and after their trial or sentencing hearing.

3. Given the significant proportion of US extradition requests that involve federal terrorism-related charges and the particular concerns that exist in relation to these, we believe that specific attention to this category of extradition is warranted. In our submission, we have restricted our comments to terrorism-related cases and make no claims about cases involving other kinds of charges, although we believe much of our evidence would apply more widely.

4. We are familiar with a number of terrorism-related cases involving extradition requests to the US from the UK since 9/11: Babar Ahmad, Syed Talha Ahsan, Haroon Rashid Aswat, Adel Abdel Bari, Khaled Al-Fawwaz, Syed Fahad Hashmi, Mustafa Kamal Mustafa (commonly known as Abu Hamza) and Lotfi Raissi.

5. Our report outlines the general and legal context of terrorism prosecutions within US federal courts, including the material support ban and use of classified evidence. It offers the most detail on the conditions of confinement that terrorism suspects face pre-trial and post-conviction. These conditions violate European human rights protections but are generally unknown in the UK.

General Context

6. It has generally been recognized that, after 9/11, the US government violated the rights of a number of British citizens and residents through its system of extraordinary rendition and the imprisonment of “enemy combatants” at Guantánamo. However, Guantánamo is not an aberration; terrorism suspects held within the US itself – including those extradited from the UK – face most of the same human rights issues. **There is a continuum between US military prisons abroad and territorial US civilian prisons.** Indeed, the ADX “supermax” prison in Florence, Colorado, where extradited men convicted of terrorism-related crimes are often held

(see *Conditions of Post-Conviction Imprisonment* below), provided the blueprint for imprisonment at Guantánamo. Inhumane practices such as force-feeding of hunger strikers, prolonged and indefinite solitary confinement, sensory deprivation, permanent electronic monitoring, systematic secrecy (including draconian restrictions on legal counsel) and the absence of independent monitoring are common to both military detention and US "supermax" prisons. Moreover, in relation to terrorism cases (and indeed other kinds of cases), the legal process in the US federal system is profoundly flawed for reasons we outline below. The appearance of due process and the public assurances of the US government serve to obscure these flaws and create the impression of an open, adversarial process, even though the reality is substantially different.

7. The 2001 case of **Lotfi Raissi** illustrates the dangers posed by relaxing the requirements that US prosecutors have to meet before an extradition from the UK can take place. Raissi was arrested at gunpoint in his Berkshire home ten days after the 9/11 attacks and accused of having given flight training to the 9/11 hijackers. An extradition request from US prosecutors relating to minor irregularities in his pilot licence was described as "holding charges" that would be added to as the investigation proceeded. A couple of months after he was arrested, intelligence sources told the *Washington Post* that "we put him in the category of maybe or maybe not, leaning towards probably not. Our goal is to get him back here and talk to him to find out more". The motivation for the extradition appeared to be investigative and speculative – an inappropriate use of the process. Raissi was held for almost three more months at HM Prison Belmarsh even after this statement was made. After it became apparent to the court that there was insufficient evidence against him, he was released. The allegations against Raissi were false but, even so, he lost his career as an airline pilot and suffered damage to his health. Had the 2003 US-UK extradition treaty been in place at the time of his arrest, the prima face evidence test would not have prevented his extradition to the US, where he would likely have been placed in pre-trial solitary confinement, with its attendant mental health consequences (see *Conditions of Pre-Trial Imprisonment* below), and faced overwhelming pressure to agree a plea deal, irrespective of the lack of evidence against him.

8. Human Rights Watch and the Columbia Law School Human Rights Institute have produced the only major human rights analysis of terrorism-related cases prosecuted in US federal courts. Based on twenty-seven cases, their study, published in July 2014, found significant patterns of rights concerns: the US's "overly broad" legislation on the "material support" of terrorism is used to punish behaviour that does not involve intent to support terrorism; the right to fair trial is in danger of being violated by reliance on secret evidence or it is foregone as a result of draconian sentences that pressure most defendants to plead guilty; and prolonged solitary confinement and severe restrictions on communicating in pre-trial detention are commonly applied (p4).

Jurisdiction

9. The current ease of extradition to the US to face material support terrorism charges (see *US Federal Terrorism Prosecutions* below) gives rise to the possibility that British citizens living in the UK and engaged in lawful activities under UK law can nevertheless be transferred to the US for prosecution. For this to become a possibility, all that is needed is a tenuous connection to the US, such as the use of a web server hosted in the US. **This effectively means that the US's more punitive terrorism legislation, especially the material support statute, can assume quasi-jurisdiction over the UK and begin to override the provisions of Britain's own legal framework.** This raises particular concerns over sovereignty in light of a recent news report that the FBI is conducting investigations within the UK into potential homegrown terrorism.

10. The dangers of granting extra-territorial jurisdiction of the US's more punitive system to the UK is illustrated in the case of **Babar Ahmad** and **Syed Talha Ahsan**, two British citizens from south London, who were extradited to the US in 2012 to face accusations of running an al Qaeda support operation. For both, it was their *first* time on US soil. The material support charges against them related to a website, Azzam.com; among the many servers used by the site was one hosted in Connecticut from 1999 to 2001. This was the only substantial connection to the US. The website itself covered events in Bosnia, Chechnya and Afghanistan. The Crown Prosecution Service stated on multiple occasions that there was insufficient evidence to charge the pair with any criminal offence under UK law. Upon their arrival in the US, the men were held for two years in solitary confinement at the Northern Correctional Institution, a Connecticut state facility that houses death row prisoners. Babar Ahmad described the fearsome conditions, including the "five pairs of socks and an empty shampoo bottle" that he had to carefully affix every night around his cell door and vent to block out the noise of screaming inmates. Under these conditions and facing potential life sentences, in December 2013, Ahmad and Ahsan each agreed to a US government plea bargain. The deal meant Ahmad faced a maximum sentence of twenty-five years and Ahsan fifteen.

    However, at the sentencing hearing, Judge Janet C. Hall found the US government's case to be flawed in significant respects and stated that the pair were neither supporters of al Qaeda nor engaged in "operational planning or operations that could fall under the term 'terrorism'." She sentenced Ahmad to 150 months and deducted the time he had already served detained in Britain during the extradition process; he will be released in July 2015. Ahsan was sentenced to time served and transferred to the custody of immigration officers to be returned to the UK and released. In this case, a federal judge took the unprecedented step of rejecting much of the government's case, noting that what she was doing might cause "someone in New York to be unhappy with me". However, as the alleged activities had no substantial connection to the US, the extradition of Ahmad and Ahsan from Britain should never have proceeded. As we describe below (see *Conditions of Pre-Trial Imprisonment*), once the two defendants had been transferred to the US and placed in solitary confinement, it was likely difficult for them to resist the considerable pressure to accept a plea deal, irrespective of whether they were innocent of most of the US government's allegations.

US Federal Terrorism Prosecutions

11. Acquittal is extremely rare in US federal terrorism prosecutions. An August 2011 investigation through the Investigative Reporting Program at the University of California-Berkeley of the prosecution of 508 defendants in US terrorism cases found that 333 had pled guilty, 110 were found guilty at trial and 65 were still awaiting trial. **Once terrorism defendants have been indicted, a conviction is almost certain.**

12. Very low acquittal rates are normally regarded (for example, in US State Department country reports) as evidence of a flawed justice system. Defenders of the US terrorism prosecution system argue that the absence of acquittals reflects decision-making by prosecutors to only proceed where there is overwhelming evidence against a defendant. Yet it is apparent from examining actual cases, including the ones described here involving extraditions from the UK, that this is not the case.

13. Moreover, it is important to note that the majority of cases end in plea deals rather than trials. It has been estimated that, between 9/11 and August 2011, **three quarters of the terrorism-related cases that had reached a verdict had ended in a plea deal** rather than a trial. Indeed, almost all federal cases in the US criminal justice system end in plea deals. The decision-making of defendants that leads to such a situation is discussed below (see, especially, *Conditions of Pre-Trial Imprisonment*). Legal watchdog groups in the US, such as the Brennan Center for Justice at the New York University School of Law and the Center for Constitutional Rights, have issued public statements warning of this.

14. Under the federal sentencing system, sentences are not limited to the conduct for which an individual is actually convicted but are based on a judge's determination of a defendant's "actual conduct". As a result, an individual's sentence can be lengthened dramatically based on allegations of conduct that a jury had not assessed. Even if a jury acquits on all but one charge, a federal judge can still issue the sentence that would have applied if the jury had found the defendant guilty on all counts. In addition, the sentencing guidelines use a complicated points system that leads to severely lengthened sentences for allegations of terrorism. This creates an all-or-nothing situation for the defendant, who has to be acquitted of all charges in a terrorism case to avoid the possibility of a sentence of twenty-five years to life. For prosecutors, a perverse incentive structure results in terrorism cases: it makes sense for them to bring multiple charges, often for the same action, and then secure lengthy sentences by making inflammatory allegations at the sentencing stage, even if a jury has acquitted the defendant of most of the charges. It also affects the decision-making of defendants considering a plea deal because they have to be confident of a jury acquitting them of all charges in order to think that going to trial would minimise their time in prison.

15. The majority of US terrorism prosecutions involve the **material support statute**. The statute was instituted in 1996 and thus allows for the criminalisation of conduct prior to 9/11. The statute bans the knowing provision of "any service, training, [or] expert advice or assistance" to a group designated by the federal government as a foreign terrorist organization or to an organization engaging in "terrorist activity". It

has been called the "black box" of federal terrorism prosecutions because of its capacity to criminalise a wide range of conduct, ranging from weapons training to the translation of public texts – what the Department of Justice (DOJ) describes as "strategic over-inclusiveness". To win a conviction, there is no need to show evidence of a plot or even a desire to help terrorists. Material support charges often target small acts and religious and political associations, which take on sinister meaning as ostensible manifestations of forthcoming terrorism. Moreover, each count of material support brought against a defendant carries a sentence of up to 15 years.

16. Human Rights Watch and the Columbia Law School Human Rights Institute state that the expansiveness of the material support statute "has led federal prosecutors to levy criminal charges for religious or political conduct itself, or as the primary evidence of criminal activity." (p62) In other words, the material support statute may be resulting in the criminalisation of legitimate religious and political activism as distinct from any terrorist conduct.

17. The Classified Information Procedures Act was passed in 1980 to enable and protect the use of classified evidence in court. (The intention of the Act was to prevent "greymailing" by former US intelligence officers being prosecuted for espionage who threatened to expose state secrets in court.) Despite its original intentions, since 9/11, it is regularly used in terrorism prosecutions to classify parts of the prosecution's evidence and prevent people being charged with terrorism from seeing portions of the evidence against them.

18. **The first person extradited under the US-UK 2003 law for terrorism-related charges was Syed Fahad Hashmi.** Hashmi was extradited from Britain in May 2007 to face charges of material support of al Qaeda. But prosecutors did not need to show that he was a member of al Qaeda, that he had any direct contact to al Qaeda, or that he was involved in any act by al Qaeda. The charges against Fahad Hashmi were instead based on the allegation that he allowed an acquaintance to use his mobile phone and to stay with him at his flat in London. According to the indictment, the acquaintance had in his luggage waterproof socks and rain ponchos (described by the government as "military gear") and later delivered these to al Qaeda in Pakistan. For this, Hashmi faced four counts of material support and conspiracy, which carried a total possible sentence of seventy years. The Center for Constitutional Rights has noted that the case against Fahad Hashmi "raises many red flags related to the violation of his rights" and "prosecutorial overreach under the material support statute".

Conditions of Pre-Trial Imprisonment

19. Those extradited to the US in terrorism cases are likely to be prosecuted in federal court in the Southern District of New York. Defendants facing charges there are held in the **Metropolitan Correctional Center** (MCC) in lower Manhattan. Terrorism defendants are often held in the highly restrictive "10 South" wing of the MCC or in a "Special Housing Unit" where detainees are also held in solitary confinement.

20. Based on information received from some detainees and their lawyers, suspects in 10 South spend twenty-three hours a day confined to their cells. Detainees shower inside their cells, so that they are alone almost all of the time. They are allowed one hour of recreation outside of their cells, which takes place in an indoor solitary recreation cage. Recreation is periodically denied: detainees can pass days without leaving their cells. No outdoor recreation is allowed for detainees in 10 South and cell windows are frosted. The only fresh air enters through a window in the indoor recreation cage. The conditions at the MCC are dirty and decrepit; detainees and lawyers report that the temperature is not sufficiently regulated and varies between extreme cold and severe heat.

21. There is electronic surveillance inside and outside of the cells – every action, including using the toilet, showering and talking, is monitored. Detainees are strip-searched each time they go to court. These regular searches can be traumatising and degrading. To avoid these strip searches, defendants in some cases have requested not to attend their own court hearings.

22. Solitary confinement has serious **mental health consequences**, as documented by virtually every mental health study that has examined its effects. Dr. Craig Haney, a psychologist at the University of California-Santa Cruz, has studied the effects of solitary confinement for decades. He has conducted his own empirical research as well as an exhaustive review of the existing research – which demonstrate **deleterious effects are clear after sixty days**. His summary of the types of psychological harms suffered by prisoners held in long-term solitary confinement includes "appetite and sleep disturbances, anxiety, panic, rage, loss of control, paranoia, hallucinations, and self- mutilations" as well as "cognitive dysfunction, … hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behavior".[41] Haney writes that "many of the negative effects of solitary confinement are analogous to the acute reactions suffered by torture and trauma victims". He concludes: "There is not a single published study of solitary or supermax-like confinement … that failed to result in negative psychological effects."[42] Stuart Grassian, a former faculty member at Harvard Medical School, has also carried out extensive research with prisoners in solitary confinement. He has documented a specific psychiatric condition brought on by solitary confinement, even among people with no previous psychiatric issues. This includes hyper-responsivity to external stimuli, illusions and hallucinations, panic attacks, difficulty concentrating, intrusive obsessional and aggressive thoughts, paranoia and problems with impulse control.[43]

23. **On top of solitary confinement, some terrorism suspects face added isolation through the imposition of Special Administrative Measures (SAMs)**. SAMs are prisoner-specific confinement and communication rules, imposed by the Attorney General but carried out by the Bureau of Prisons (BOP). The Attorney General may authorise the Director of the BOP to implement SAMs only upon written notification

[41] Expert Report of Dr. Craig Haney, *Silverstein v. Bureau of Prisons*, 07-cv-2471-PAB-KMT (Apr. 13, 2009).
[42] Craig Haney, "Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement", *Crime & Delinquency* 49 (1), 2003.
[43] Stuart Grassian, "Psychiatric Effects of Solitary Confinement", *Journal of Law & Policy* (22, 2006).

"that there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons". The SAMs "may include housing the inmate in administrative detention and/or limiting certain privileges, including but not limited to correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism". The Attorney General does not have to publicly declare his reasons for the introduction of SAMs. The government can impose SAMs for a year and renew annually without limit. SAMs layered on top of solitary confinement produce further isolation by circumscribing communication with the outside world.

24. Under SAMs, typically only the lawyer and immediate family (if cleared) can have contact with a detainee – no other letters, visits, calls or talking through walls are permitted. SAMs spell out in intricate detail the nature of the isolation to be imposed, down to how many pages of paper can be used in a letter or what part of the newspaper is allowed to be read and after what sort of delay. Human Rights Watch and the Columbia Law School Human Rights Institute have found that at least twenty prisoners under SAMs were barred from "making statements audible to other prisoners or sending notes" (p144).

25. The application of solitary confinement and SAMs is typically instituted at the beginning of pre-trial detention and appear to be related to the mere fact of the terrorism charges and not necessarily to behaviour in custody or a specifically demonstrated risk that communications from prison would cause violence. This is particularly pernicious: in the pre-trial period, a presumption of innocence ought to be in place. Solitary confinement generally lasts for the entire pre-trial period.

26. Human Rights Watch and the Columbia Law School Human Rights Institute have documented twenty-two cases of pre-trial solitary confinement in terrorism cases, for an average length of 22 months (p200). Mohammed Warsame, a defendant on federal terrorism charges, was held in pre-trial solitary confinement in a 100 square foot cell for five and a half years. The SAMs he was subjected to gave the government the ability to control who visited him, what he read and whom he talked to. His only allowed interaction with his wife and daughter was via closed circuit television.

27. Terrorism suspects in 10 South at the MCC who are subject to SAMs have been punished for speaking through the walls. One man was given a four-month punishment for saying "Asalaam Aleikum" to another detainee. Another was reprimanded for making the call to prayer. Detainees report going months without any talking with other inmates. In response to these harsh conditions, there have been hunger strikes at the MCC as well as force feeding (which is not permitted in UK prisons) but these have attracted little public attention because disclosure of information on the situation inside the MCC is itself prohibited by the SAMs.

28. Defence lawyers must agree in writing to comply with SAMs. They are then prevented from discussing certain subjects with their client (even including some of

the evidence against him), with his family or with third parties including the media. In this way, the application of SAMs prior to trial distorts the adversarial balance in the courts because the government is able to control the flow of information at the expense of the defence. It has the effect generally of chilling zealous representation by the defence. Family members also have to agree to comply with SAMs and are then unable to share with others the content of conversations they have had with the defendant.

29. **The use of prolonged solitary confinement and SAMs during pre-trial detention raises substantial due process concerns.** Such conditions, and the mental health issues they give rise to, compromise the ability of defendants to participate actively and effectively in their own defence, creating a landscape in which convictions are much easier to secure. Moreover, they undermine the presumption of innocence, as pre-trial solitary and SAMs – extreme conditions that are punitive in their effect – are imposed on defendants whose charges have not been proven.

30. The use of prolonged pre-trial isolation and SAMs can exert extraordinary pressure on a defendant to cooperate or take a plea bargain to escape these conditions, impairing judgment and undermining the voluntariness that is supposed to underpin plea deals and the legitimacy of the resulting convictions. Indeed, it appears that solitary confinement may be applied as a way to pressure defendants to accept a plea, rather than because of genuine security concerns. Often, the restrictions on a defendant are relaxed after conviction or after a plea deal is accepted. In theory, a conviction ought to increase the perceived likelihood that the prisoner represents a security risk; the government's decision to relax restrictions after a conviction is consistent with the assumption that solitary confinement is being used as leverage by the government in the pre-trial period. **Given the harm that solitary confinement inflicts on mental health, defendants have a strong incentive to preserve their sanity by accepting a plea deal that will relax the conditions of their imprisonment, irrespective of the merits of their case**.

31. The Brennan Center for Justice at New York University School of Law notes

> pretrial detention may, whether intentionally or inadvertently, have the practical effect of pressuring [a defendant] into accepting a plea-bargain to which he otherwise might not agree. SAMs are intended to address particularized safety-related concerns. It is highly inappropriate for SAMs to become, either intentionally or collaterally, a bargaining chip in plea negotiations because they provide the government with leverage unrelated to the scope of criminal liability that might be imposed at trial. Further, the SAMs may have the additional consequence of creating an incentive to plead guilty so as to secure a post-conviction imprisonment regime that does not include SAMs.

32. Fahad Hashmi was held in solitary confinement for over six years, three years at the MCC and over three years post-conviction at ADX, during which time he did not touch another human being or set foot on anything other than concrete. Juan E. Méndez, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or

> Degrading Treatment or Punishment, has issued a public statement about the conditions of confinement of Fahad Hashmi at the MCC
>
> > I found no justification for the fact that he was kept in solitary confinement during his prolonged pre-trial detention (in the US although not in the UK during his pre-extradition detention), and that he was later placed under "special administrative measures" amounting to solitary confinement under another name, after a conviction based on a negotiated plea. The explanation I was given made no mention of Mr. Hashmi's behavior in custody as a reason for any disciplinary sanction; it appears that his harsh conditions of detention are related exclusively to the seriousness of the charges he faced. If that is so, then solitary confinement with its oppressive consequences on the psyche of the detainee is no more than a punitive measure that is unworthy of the United States as a civilized democracy.

33. Amnesty International has noted that during pre-trial detention at the MCC "the combined effects of prolonged confinement to sparse cells with little natural light, no outdoor exercise and extreme social isolation amount to cruel, inhuman or degrading treatment."

Conditions of Post-Conviction Imprisonment

34. Following conviction, the US Bureau of Prisons (BOP) says it places the "most dangerous" convicted terrorists at the **Administrative Maximum Facility (ADX)** in Florence, Colorado, the most restrictive prison in the US federal system. ADX houses approximately 400 prisoners, all of whom are held in solitary confinement.

35. In the "general population" unit of ADX, prisoners are in solitary confinement for twenty-two hours a day, five days a week and twenty-four hours a day for the other two days, in cells that measure 87 square feet. Each cell contains a poured concrete bed and desk as well as a steel sink, toilet and shower; a small window gives a view of the cement yard. ADX prisoners eat all meals alone inside their cells, within arm's length of their toilet. Prisoners at ADX cannot see any nature – not the surrounding mountains or even a patch of grass. In a special unit known as "H Unit", prisoners under SAMs are held with additional isolation and restrictions.

36. The only time prisoners are regularly allowed outside of their cells is for limited recreation, which occurs either in an indoor cell that is empty except for a pull-up bar, or in an outdoor solitary cage. The outside recreation cages are only slightly larger in size than the inside cells and are known as "dog runs" because they resemble animal kennels. The warden can cancel recreation for any reason he deems appropriate, including weather, shake-downs or lack of staff. Accordingly, ADX prisoners sometimes pass days without ever leaving their cells. Contact with others is rare. The prison was specifically designed to limit all communication among those it houses. The cells have thick concrete walls and two doors, one with bars and a second made of solid steel. The only "contact" ADX prisoners have with other inmates in the "general population" unit is attempted shouting through the thick cell walls, doors, toilets and vents. All visits are non-contact, meaning the prisoner and

visitor are separated by a glass barrier. Prisoners at ADX under SAMs are held in a Special Security Unit in cells that measure 75.5 square feet.

37. According to the BOP's own policies, prisoners with serious **mental illnesses** should not be assigned to ADX. In practice, the BOP regularly assigns prisoners with serious mental illnesses to ADX. The BOP also fails to monitor ADX prisoners for mental health problems that arise after they arrive at the facility and fails to provide mentally ill prisoners at ADX with adequate mental health care. Mental health checks are often conducted by talking through the prison door. Because of their untreated or poorly treated mental illness, some prisoners at ADX mutilate themselves with razors, shards of glass, sharpened chicken bones, writing utensils or other objects. Many engage in prolonged episodes of screaming and ranting. Others converse aloud with the voices they hear in their heads. Still others spread faeces and other waste throughout their cells. Suicide attempts are common; some have been successful. There is no independent medical oversight at ADX and motions to allow evaluations by independent medical experts have generally been denied. The US government is currently defending a lawsuit asserting that many ADX prisoners are severely mentally ill and are held in extended confinement in isolating conditions that exacerbate their mental illness.

38. Human Rights Watch has noted prisoners at ADX can be subjected to "years of confinement in conditions of extreme social isolation, reduced sensory stimulation, and rigorous security control". It has expressed concerns about the mental health degradation that results from such conditions and about reports of force feeding of inmates on hunger strikes. The inhumane conditions at MCC and ADX have also been criticized by Amnesty International. Erika Guevara-Rosas, Amnesty International's Americas Director has stated: "You cannot overestimate the devastating impact long periods of solitary confinement can have on the mental and physical well-being of a prisoner. Such harsh treatment is happening as a daily practice in the US, and it is in breach of international law."

39. In 2011, Juan E. Méndez, the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, called on all countries to ban the solitary confinement of prisoners except in very exceptional circumstances and for as short a time as possible, with an absolute prohibition for people with mental disabilities.

Legal Remedies and Oversight

40. By placing such extreme restrictions on the flow of information, SAMs construct a **wall of secrecy around the conditions of imprisonment** and the potential human rights issues they give rise to. This severely restricts the possibility for legal remedies to the abuses faced by terrorism defendants. For example, when Fahad Hashmi was under SAMs during his pre-trial detention at the MCC and for a year after his conviction at ADX, no member of the public except for his attorneys and three family members – not a reporter, researcher, or United Nation expert – was able to communicate with him in any form, even by sending a letter. The few people allowed to communicate with him were also forbidden, under threat of criminal

sanction, from speaking to the public about anything he told them. Testimony from prisoners on their treatment is thus almost completely restricted.

41. Arguably, prisoners held under SAMs are more restricted in their ability to communicate with the outside world than those at Guantánamo, where information received by lawyers from detainees is deemed presumptively classified but potentially releasable. By contrast, lawyers representing prisoners under SAMs are often unable to make public important details about conditions. In a legal challenge to the MCC's strip-searching policy, for example, a psychiatrist's report found that strip-searching triggered PTSD in one of the defendants and left him unable to assist in his defence. The psychiatrist's notes, however, could not be made public due to the restrictions imposed by SAMs.

42. Amnesty International and journalists have requested to visit the MCC and ADX to interview detainees. These requests have all been denied, resulting in a lack of publicly available information about the nature of these conditions and their impact on detainees' health and rights.

43. Juan E. Méndez, the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has made repeated requests to visit ADX and the MCC – to no avail. He has also raised with the US government the case of Ahmed Abu Ali who has been held under SAMs for nine years and is currently at ADX: "Due to the lack of information provided by the Government regarding allegations of torture and ill-treatment of Mr. Ali, the Special Rapporteur finds that the Government has violated the rights of Mr. Ali under international law regarding torture and cruel, inhuman or degrading treatment."

44. **The possibility of legal remedies for the human rights abuses in the federal terrorism prosecution and imprisonment system is significantly weakened by a general culture of deference to the US government in national security cases.** Courts are easily intimidated by government claims of national security risks that would supposedly result were a court to rule against the government. This often impedes proper scrutiny of prosecutions and the possibility of legal remedies for rights violations in prisons. Even if pro bono legal representation is obtained for inmates, the DOJ can still refuse to give counsel the necessary security clearance – as happened to the Civil Rights Clinic at the University of Denver when it attempted to represent some inmates at ADX.

45. Human Rights Watch and the Columbia Law School Human Rights Institute state that, in general, there are a number of "serious fair trial concerns" in relation to terrorism prosecutions, including prolonged solitary confinement prior to a trial, the use of anonymous witness evidence (making it difficult for the defence to challenge its reliability), the use of evidence tainted by its being obtained coercively, and the use of classified evidence (which places limits on communication between the defence attorney and the defendant) (p76).

Assurances

46. In terrorism-related extradition cases, the US government often issues assurances that the defendant would not face the death penalty and would be prosecuted before a federal court and not a military commission. In some cases, more specific assurances are issued.

47. In April 2013, the European Court of Human Rights ruled that the extradition of **Haroon Aswat**, who has been diagnosed with paranoid schizophrenia, would violate Article 3 of the Convention (inhuman or degrading treatment or punishment) and stayed his extradition to the US. The Court found "there is a real risk that the applicant's extradition to a different country and to a different and potentially more hostile, prison environment would result in a significant deterioration in his mental and physical health." The US Department of Justice then issued an assurance that, if Haroon Aswat were held pre-trial at MCC, he would have access to mental health services. With this assurance, the British high court then gave the go ahead for Haroon Aswat to be extradited, despite admitting that "there are still detailed gaps about the precise circumstances in which the claimant would be detained in MCC", including whether he would be housed in a single cell, if so, for how long in every 24 hours and what opportunities there would be for contact with others. In effect, the decision meant Haroon Aswat could be subjected to the mental health deterioration that will most likely result from solitary confinement and possibly SAMs at MCC, so long as he enjoys occasional access to a psychiatrist.

48. Haroon Aswat's case points to the underlying weakness of assurances as a remedy for concerns about the treatment of terrorism suspects in US prisons. No mechanism is available for verifying the claims made in the assurances. Even accepting the validity of the assurances at face value, they offer inadequate remedies for the inhumane conditions within ADX and MCC. Unfortunately, the British and European courts have not fully recognised the severity of those conditions, the secrecy that surrounds them or the threats to mental health they present.

Concerns Regarding the ECHR Decision in Babar Ahmad & Others v. the UK

49. In April 2012, the European Court of Human Rights issued a judgement rejecting the claims of Babar Ahmad and others that prison conditions at ADX Florence were incompatible with Article 3 of the Convention and that therefore their extradition to the US should not proceed. During the proceedings, the US Department of Justice submitted a series of declarations about the conditions at ADX. Based on these declarations, the Court found that extradition to the US could proceed without risk of an Article 3 violation.

50. However, there were flaws with the process by which the Court reached its findings.

    a. The Court only considered post-conviction conditions of imprisonment, not pre-trial, where there are serious Article 3 issues, as described above.

    b. The US Department of Justice provided misleading data on the length of time that terrorism convicts are held in solitary confinement at ADX. The Court's decision rested substantially on this question because it held that a prisoner

who was "at real risk of being detained indefinitely at ADX" in solitary confinement would face conditions that potentially reached the minimum level of severity required for a violation of Article 3. The DOJ described the data it submitted as "a random sample of thirty inmates". On the basis of that sample, the government claimed, an inmate was likely to spend 3 years at ADX before being admitted to a different institution. However, a sample of 30 from a prison that holds over 400 is not statistically significant. Additionally, none of those selected in the sample of 30 were from the SAMs "H Unit" at ADX. A more statistically significant sample of 110 ADX prisoners, drawn from legal research conducted in 2010 and 2011, found an average of 8.2 years in solitary confinement.

c. Other US government claims are also called into question by this legal research. For example:

    i. The government claimed there is significant communication between staff and prisoners at ADX. But such "interacting" only takes place through the solid steel door and/or the bars of the prisoner's cell.

    ii. The government claims that ADX prisoners are able to "talk in moderate tones to other inmates". But evidence shows that prisoners must shout to communicate with each other between cells or put their faces in air vents and toilets in order to speak or hear one another

    iii. The government claims that "seriously mentally ill prisoners are not housed at ADX". Yet the BOP itself acknowledges that "a diagnosis of bipolar affective disorder, depression, schizophrenia, or post-traumatic stress disorder would not preclude a designation to the ADX".

d. Juan E. Méndez, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, issued a statement to the ECHR as part of the case: "I think there [are] very good arguments that solitary confinement and SAMs would constitute torture and prevent the UK from extraditing these men."

e. Twenty-five US-based human rights groups and 150 academics signed a letter of concern to the ECHR in 2012 expressing concerns that the US government had given the Court "insufficient and misleading" information on "the nature and duration of conditions" at ADX.

f. Because the US government delayed its submission until right before the deadline, when the rebuttal evidence described above was submitted, it was disallowed by the Court and not considered, on the grounds that the deadline had passed.

12 September 2014
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12 September 2014

Rt Hon. Sir Scott Baker and Anand Doobay – Oral evidence (QQ 1 – 23)

Evidence Session No. 1 *Heard in Public* *Questions 1 – 23*

TUESDAY 8 JULY 2014

10.40 am

Witnesses: Rt Hon Sir Scott Baker and Anand Doobay

Members present

Lord Inglewood (Chairman)
Lord Brown of Eaton-under-Heywood
Baroness Hamwee
Lord Hart of Chilton
Lord Henley
Lord Hussain
Baroness Jay of Paddington
Lord Jones
Lord Mackay of Drumadoon
Lord Rowlands
Baroness Wilcox

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Examination of Witnesses

Sir Scott Baker, lead author of *A Review of the United Kingdom's Extradition Arrangements*, and **Anand Doobay**, Consultant, Business Crime, Peters & Peters, panellist on *A Review of the United Kingdom's Extradition Arrangements*

Q1 The Chairman: Can I extend a warm welcome to the two of you, Sir Scott Baker and Anand Doobay? We are extremely grateful to you for coming to talk to us this morning. We have been fully briefed on your distinguished backgrounds and credentials to help us, not least because you are two of the three joint authors of *A Review of the United Kingdom's Extradition Arrangements*. Quite a lot of the questioning we shall be giving you will be based on that particular document, which, certainly speaking as an individual, I found very helpful in trying to work out the intricacies of the topic we are looking into.

Before proceeding, it is necessary under the rules of the House of Lords that, before our first oral session, anybody who has any relevant interests should declare them in public. I am told that nobody has declared any relevant interests as far as the rules are concerned, so there is nothing more for anyone to say.

Lord Brown of Eaton-under-Heywood: I have already declared, perhaps not as a relevant interest, that I happen to have known one of the witnesses.

Lord Mackay of Drumadoon: I should also declare I have a recollection of playing one of the witnesses at golf many years ago.

The Chairman: What I would like to do is say to you both that, as far as answering the questioning is concerned, please one or both of you respond as you see fit. Before we get into the formal session of questions and answers, if there is anything either or both of you want to say as an opening statement, we would be very pleased to hear from you.

Sir Scott Baker: The only thing that I would say is that we reported nearly three years ago and I have not kept greatly in touch with what has been going on for the last three years— although obviously I read the newspapers and have a reasonable idea. Anand Doobay, however, is at the coalface and he knows virtually everything about what has been going on. Therefore, if issues arise on that front, I would suggest that he is better qualified to answer than I am.

Q2 The Chairman: That is a very modest way of opening the batting. Unless you want to say anything else, can I move into the first part of the session? Obviously, as you have just said, your review was produced three years ago. On the basis of what you know about the way the world has moved on, would you continue to argue the same general line as in your review? Against that background, are there any particular recommendations you would like the Government to have taken up or taken up more strongly than they did?

Sir Scott Baker: Absolutely, I certainly would stand by everything we said in the report. I cannot see that anything has changed in the last three years that would make me recommend anything differently. As far as the recommendations that the Government might have taken forward go, there are two in particular that I am disappointed have not gone further. The first is the review of category 2 destinations. The Government are committed to conducting a review but, three years later, as far as I am aware, they have not actually done so. We set out our reasoning at paragraph 8.93 to 8.96[44] in our report and nothing has changed since then.

The second area that I am disappointed about is that non-means tested legal aid has not come in for extradition cases in the magistrates' court. We were firmly of the view that there would be an overall saving when one looked at how long cases were taking when they were being adjourned, people were being held in custody and so forth.

The Lord Chancellor's department was asked to look into this, promised to do so and eventually did so, but at a very late stage in our deliberations. The Government's view is that the business case is not made out. We can see why it is not very attractive to have automatic legal aid, but we certainly thought then, and I still think, that it would, overall, create a saving, as well as facilitate the administration of justice. We deal with that at paragraph 11.85 of the report, with the suggested possible alternative at paragraph 11.86. Those are, as it were, my views on these points; I do not know what Anand's are.

Anand Doobay: I would certainly agree with Sir Scott's issue: that more could be done on legal aid. The one nuance I would add in terms of what has changed in the last three years is what has been happening at an EU level. When we wrote the report, we were reasonably

[44] Paragraphs 8.93 to 8.96 of the Review of the UK's Extradition Arrangement

optimistic about the developments that might take place at the EU level to deal with what were commonly acknowledged to be issues that were significant: for example, the length and conditions of pre-trial detention, the issue of proportionality and the use of European Arrest Warrants when it was inappropriate for them to be used.

We were entitled to be optimistic at that time, because there was a recent change in the handbook to encourage Member States to carry out a proportionality check. The Commission was talking about taking action in terms of detention conditions. However, that optimism has not proved to be well placed, and there is certainly still a lot that needs to be done about those and other issues. You can see that from the European Parliament's resolution and report earlier this year, where they again call for the Commission to take action on these and other issues to reform the European Arrest Warrant to deal with some of the systemic problems that exist.

I do not resile from what we said at the time, but I do feel that, three years on, some of these issues have not been solved at a European level. Therefore, perhaps, if we were carrying out the review now, we might need to look at taking action on a domestic level. That is what the Government has been trying to do in the recent amendments they have put forward to the Extradition Act.

The Chairman: That is a very helpful starting point. We are going to touch on some of these points later in the session. On one small point as to the question of reviewing the category 2 countries, I gather the Government have said that they will do it, but have not told us either when or how; is that right?

Sir Scott Baker: That is precisely the position as we understand it.

The Chairman: As far as legal aid is concerned, I know Lady Jay wanted to talk about it. She might want to come in now.

Q3 Baroness Jay of Paddington: I am interested that you raised that as one of your points, because, of course, it comes very late in your report. However, you say—I think I quote correctly—the solution to this very serious problem is "essential". Therefore, you must be disappointed. I am interested that you quoted the Government as saying the business case had not been made out, because that does seem to be an argument using the suggestion that efficiency, rather than justice, is paramount. I wondered if you could comment further.

Sir Scott Baker: I am afraid that efficiency and cost saving is always a strong argument against taking steps that may save costs elsewhere. I have not seen any real analysis on why they say the business case is not made out. I do not know whether Anand has seen anything on that.

Anand Doobay: No, I am not sure that we were convinced by the way that it was analysed in terms of the savings they looked at, because we certainly foresaw savings in terms of interpreters not being needed for adjourned hearings and shorter periods of detention for people who were in custody. It did appear that insufficient weight was given to the overall aim of securing the interests of justice and having a fair and speedy process for those people who were undergoing extradition. It is an interesting use of words in the Government's response about the business case not being made out. Certainly I feel that insufficient weight was given to the other side of this, which is not the financial aspect.

The Chairman: Are the Government not inferring that it is for someone else to make the business case rather than for them to look into it, work it out for themselves and show the world what the right outcome is?

Sir Scott Baker: I do not think so; we made it pretty clear. There was a problem about this, because certainly we had the impression that the Lord Chancellor's Department produced

the annexe to our report, which is their response, at a very late stage, having promised it a long time earlier. They were overtaken, they said, by other commitments. It may be unfair—I do not know—but we certainly formed the view that it had been done in haste and had not really been thought through.

Lord Brown of Eaton-under-Heywood: One of your recommendations, which was actually implemented, was that you should have to have permission to appeal. I do not know whether you know, but that has subsequently attracted a certain amount of criticism, not least on the basis that very often the proceedings will have been conducted without representation. This is linked therefore to the question of legal aid. People cannot fund their initial appearance. That, in turn, is said to call for an automatic right of appeal, so that you can, to some extent, ameliorate the problems caused by non-representation. Is there some linkage between those two recommendations?

Sir Scott Baker: I can see where the point is coming from, but that is, to my mind, not the way to solve the problem. It ought to be sorted out at first instance and they ought to be represented in the magistrates' court. There are very few circumstances these days where there is an automatic right of appeal in criminal cases. It has been reduced gradually over the years. The Government accepted our recommendation, but they did not go further and accept our suggestion that the test should be the same as judicial review: "arguable case". There was originally an issue as to whether it should be "reasonable prospects of success", but this has now been resolved in favour of "arguable case", because there was a change and the criminal procedure rules were applied to extradition. That problem, I think, Anand, has been solved.

Anand Doobay: That is right. The legislation itself did not make plain what the test would be for permission. We had always anticipated it would the judicial review test of "arguable case".

Lord Brown of Eaton-under-Heywood: The fact is that if legal aid was available at first instance, it would then make these objections to the introduction of the permission stage altogether less tenable.

Sir Scott Baker: We would save a great deal more money at that level as well. That is something new that has happened since the report.

Baroness Jay of Paddington: It all stems from the very firm recommendation you made about sorting out the legal aid situation at the early stages of proceedings.

Sir Scott Baker: Yes. All the evidence we had was one way on this, and we did feel that we needed to make a firm recommendation to have any chance of anything happening.

Lord Mackay of Drumadoon: Can I ask you to elaborate on the consequences of an unrepresented party in proceedings in terms of the management of the court on a day-to-day basis?

Sir Scott Baker: Anand, you are probably more on the coalface on this than I am.

Anand Doobay: There are a number of practical consequences of this. First, there are defendants who wish to be represented, but there is a delay in the legal aid process of simply having them apply and be granted legal aid. That would cause repeated hearings that were ineffective. If they did not speak English, that would require the attendance of interpreters at each of those hearings. It would lengthen the process and if they were in detention it would increase the detention cost.

There is also an issue about defendants who, because of all these difficulties, were unrepresented. Extradition is a very technical process. Many of the defendants are not English and do not speak English as a first language. They would struggle to understand

what was going on. Therefore, there are all sorts of difficulties about having unrepresented defendants going through the magistrates' court process. As we have heard, that may lead to issues being raised for the first time on appeal that in fact could have been dealt with at the magistrates' court if the defendant had been represented.

Lord Mackay of Drumadoon: It creates practical difficulties, whoever is on the Bench, irrespective of what level the proceedings are at.

Anand Doobay: Yes, absolutely. That is why the evidence was all one way. We were hearing this from the judges, the prosecutors, the defence lawyers and the people who were subject to proceedings. There was nobody who was saying this was not creating an issue, because every participant in the process was feeling the effects, both in cost terms and practical terms.

The Chairman: We must move on to Lord Jones, so please be quick.

Q4 Baroness Hamwee: My question then moves on a bit to effectiveness, so can I combine them? On the legal aid point, you gave one example of a step that could remedy the situation. I wondered, reading that, whether you were concerned not to give any other get-out to the Government or whether you had a selection of other ideas.

Sir Scott Baker: It is hard to remember three years ago. We floated various thoughts, but we did not think they were really practical, except for the one that we put in the second paragraph.

Anand Doobay: That is right. We did believe there was an issue of principle here. Therefore, while you can suggest practical ameliorations of the problem, it is not really solving the problem. There were some practical issues about the way in which you applied, filling out forms and language issues, but essentially we did not feel those were going to deal with the root cause of the problem.

Baroness Hamwee: There is a second part to my question. Mr Doobay, you mentioned detention conditions, if I heard you correctly. I know there are all sorts of issues around the conditions of detention, but, on the narrow point of causing problems to the extradition proceedings, is there anything we ought to know about how somebody being in detention makes the proceedings more problematic?

Anand Doobay: I was talking about detention conditions in other states, i.e. the countries that were making the requests. The impact of detention conditions on domestic proceedings here is simply the cost. If the process takes longer because there are lots of ineffective hearings, we are obviously paying for that person to be kept in custody during that period.

Q5 Lord Jones: In the Baker review, you wrote that extradition is a form of international co-operation in criminal matters based on comity intended to promote justice. Do you still subscribe to this view and, since you wrote that sentence, do you feel the Government have focused too much on achieving efficient international co-operation on extradition and focused too little on ensuring that the UK's extradition arrangements are just?

Sir Scott Baker: I certainly still do subscribe to that view, and very strongly subscribe to it. The question that you pose is a very, very general one. In my judgment, it is a matter of balance between international co-operation and just extradition arrangements. We made our recommendations on the basis of trying to maintain that balance. I am not aware that the position has changed significantly since then.

There are a number of points that need to be made here. First, it is terribly important to remember that extradition is not a one-way street. We obviously are interested in getting our criminals back from abroad, just as other people are keen to extradite people they say

have committed crimes here. We heard some quite compelling evidence about how advantageous the arrival of the EAW was in 2003 in getting back criminals from Spain, in particular, where there had been all sorts of problems before. Those were largely overcome by the EAW.

The next point is that modern travel and modern communications have made crimes increasingly international. Often crimes are committed in not one, two or three countries but a whole variety of different countries by different individuals playing different parts, moving around in different places or simply staying behind a computer in one country and not moving at all. One has to cope with that situation.

There is another point here that is perhaps worth making. We did touch on this in the report in paragraph 3.73. Many members of the media and readers of Articles in the media have an often not expressed view that British citizens ought to be treated differently in extradition cases from people who are not British citizens. That is not the case and has not been the case for a very long time. It would require a dramatic putting back of the clock to change the situation.

We come back to this when we get to the forum bar; perhaps that is the appropriate time to expand.

Anand Doobay: I would add a couple of things. When we are talking about the promotion of justice, as Sir Scott was saying, there are two aspects. One is to ensure that people who are accused of offences are tried and, if necessary, convicted. If you do not have effective extradition arrangements, essentially you risk your country becoming a haven for those who want to escape prosecution and can come to your country and simply rest there, safe in the knowledge that they will not be tried. However, it is a difficult balance to maintain to ensure that you are not sending people by extradition to face an unfair trial or an improper process or conditions of detention that are in breach of the European Convention on Human Rights.

I would strongly echo what Sir Scott said about nationality, because this is actually one of the issues that lies at the heart of many people's misgivings about the extradition system. There is a sense that if you are a British national or resident and it is possible for you to be prosecuted in the United Kingdom, you should be prosecuted here because that gives you certain advantages in terms of a familiarity with the system, an understanding of the law and a support system of your family and friends. That is an understandable position to hold, but it is not the case in our law as it stands.

One of the things we tried to recommend in the review was that the Government give some thought to clarifying what weight should be given to the fact that somebody is a UK national or resident when making a decision on whether or not to prosecute them. Often in these cases, as Sir Scott says, many countries have the ability to prosecute and the question is: should the UK step in and prosecute? That may involve questions of resources, politics and all sorts of other issues.

Unfortunately, in the Government's response, the Crown Prosecution Service's guidance does not give you any clarity. It simply says it is a factor to be taken into account where the suspect has connections with the UK, but it does not really help us as to what weight it should be given or how you should balance it against the other factors.

Lord Jones: Briefly, Lord Chairman, and for the record, do existing provisions adequately prevent efficiency from superseding justice?

Sir Scott Baker: Again, that is a very general question. They do, but it is difficult to answer the question on such a broad basis.

Anand Doobay: We should also bear in mind that there are a number of amendments to the Act that are not yet in force, which will introduce quite significant changes, certainly in terms of the European Arrest Warrant system, in the UK. The whole aim of those amendments is to introduce more attention to the individual's situation and the proportionality of the request, et cetera. Certainly, we felt the legislation was capable of being operated by the Courts to avoid injustice. Obviously, that does not mean that will be the case in every instance, but we also now have these additional protections, which have yet to come into force.

The Chairman: Is there an inherent robustness in the system that you feel is focused on protecting liberty, for want of a better way of putting it?

Anand Doobay: That is right, but the court is struggling with same problem we were, which is balancing these twin aims. In any one individual case, you can have a different view as to whether they have achieved that outcome.

Q6 Lord Rowlands: Can I ask about the other party to this: the victim? You mention in paragraph 5.26 that you had regard to the interests of the victims when you were preparing your report. I wonder if you could elaborate on that a little. Should we go further and establish rights for victims in the process?

Sir Scott Baker: We probably do not need to establish rights for victims as long as their interests are taken into account properly at key points. One key point where I notice victims do not get a mention is the new proportionality test for the EAW. Section 157 of the Anti-Social Behaviour Crime and Policing Act 2014, which is yet to be brought into force, requires the court to have regard to the seriousness of the conduct, the likely penalty and the possibility of less coercive measures. However, we recommended, in relation to the proportionality test that we thought should be introduced, that consideration should be given to whether there was a reasonable chance of conviction, the level of harm caused, previous convictions of the person sought, the age of the person sought and the views of the victims. I am not clear myself why these have not figured in Section 157.

However, while I am on the subject of proportionality, there is another deficiency in the proportionality test. We recommended that it should be dealt with at the issuing end by the issuing state, because it is much easier for questions of proportionality to be properly dealt with by the person who is making the request, rather than the person who is receiving the request, but that has not been done. How it will work in a country like Poland I do not know. To what extent it would reduce the number of requests is again problematic. What the Government are introducing is at least going some way down the road that we were suggesting.

Anand Doobay: I certainly agree we have to bear in mind the interests of victims. The way you do that is to ensure that people cannot simply evade justice by being in the UK and not be extradited. That is part of the balance you have to put in place. Their interests are represented normally by the issuing country that has made the extradition request, because they are obviously putting forward the case for the prosecution.

Coming on to the issue of proportionality, there is a difficulty in that the measures that have been taken at EU level have not been that robust. They are essentially encouragements to countries to apply a proportionality test and it is not clear that that has succeeded at all. There are some steps being taken in Poland to try to deal with this specific problem, but these steps are very gradual and do not seem to be having much of an impact. Certainly, the European Parliament is still calling for an amendment to the framework decision to allow for a mandatory proportionality test by the issuing Member State.

There remains much to be done and what the UK Government are trying to do is simply to ameliorate the position. However, as Sir Scott says, the better solution would be to ensure that these requests are not made at all.

Lord Rowlands: Are you suggesting that we should amend the section to include the views of victims?

Sir Scott Baker: It is not in yet. That is really a matter for Parliament, as to whether it should or not. We would like to have seen all the factors that we mentioned in the report, obviously, otherwise we would not have mentioned them. Whether it is too late to amend Section 157, I do not know.

Anand Doobay: What we cannot tell is how the court will consider the seriousness of the conduct, because the court may well decide that the seriousness of the conduct includes an assessment of the impact on victims and assessing exactly what has happened to the victims in the offence.

The Chairman: On the proportionality point, there would seem to be two slightly different issues. One is whether it is appropriate and legal—not least of all if we opt back in—under the directive. Secondly, there is the point you made, which is important: if it really works properly, the number of requests will simply decline and therefore there will be less burden on the courts and fewer people in trouble.

Sir Scott Baker: We certainly felt—and I am sure the judges in the magistrates' court felt this—that there are far too many cases coming through that are not really justified. The primary object of the proportionality test is to stop that up.

Lord Henley: If a lot of issuing countries are not observing proportionality at the moment, does it not have to be for this country to do?

Sir Scott Baker: It is a start, but what is going to happen when this country starts rejecting cases hand over fist? There are going to be issues about it. We had hoped that work could be done behind the scenes to get everybody to agree on a sensible way ahead, but that has unfortunately not arisen.

Lord Henley: That is your complaint: that that has not been happening in Europe and at the European Commission.

Sir Scott Baker: Yes.

Q7 Lord Rowlands: There is quite a bit of evidence to suggest that in fact these new tests you would like introduced could fall foul of the decision itself. On EU Sub Committee E, we heard from The Bar Council and we heard it from the Scottish Lord Advocate. Is that a real prospect?

Sir Scott Baker: I cannot second-guess what courts will do on this; we will have to wait and see.

Anand Doobay: There is an issue about whether it is compliant with the framework decision, but essentially if the European Commission is not going to act to deal with this problem by including this legislative obligation on the issuing states to look at it, it is understandable that individual Member States are having to take action to try to deal with it themselves.

The other thing I would add is that, while I would agree it is something that should be done by the issuing Member State, there is one issue that it does not deal with, which is a change in circumstance. If you have had a prosecution in another Member State some years ago and the person's circumstances have completely changed in the intervening period—they have had have children, they have led a blameless life, whatever it is—the proportionality assessment by the issuing Member State will not necessarily take that into account, because

they will not be aware of those changes. There is some call for an assessment again in the executing Member State. That could be done by looking at the Article 8[45] issues of their private and family life in some situations, but there are two aspects to it: one is an assessment at the time the request is made, but that does not necessarily take into account a change in circumstances.

Q8 Lord Brown of Eaton-under-Heywood: Should the courts be ready under Article 8 to look at those sorts of changed circumstances? You know we had a group of cases a couple of years ago in the Supreme Court that involved extraditing caring parents. We were pretty strict in those cases: only one of them was allowed to remain, a Polish case, because it was a very old allegation, not terribly serious and there would be children over here who would be left uncared for. Ought the courts be readier to allow Article 8—to which they have been very resistant—to come to the aid of people who are being sought? I know your views generally on not giving preferential treatment to nationals, but there is additional Article 8 relevance to a case when you are trying to extradite nationals from one country to a foreign country.

Sir Scott Baker: That is a good point, if I may say so. The problem with Article 8 is that it has been misapplied in a variety of different situations—often nothing to do with extradition—and the courts are increasingly cautious about using it. However, there are plainly cases where it is important that it should be used.

Anand Doobay: The other problem with Article 8 is that, again, it is a balancing exercise. The courts do use it in appropriate situations. Very recently, the courts refused a request to the US on Article 8 grounds. However, the problem is, again, the court is struck with weighing up the necessity of having this international co-operation and ensuring that people do not avoid prosecution where they should be prosecuted. I do not know that anything is going to avoid having to deal with the difficult issue of balancing the two factors.

Lord Brown of Eaton-under-Heywood: There still are countries that will not extradite their nationals. France and Germany used not to; now they have to under the European Arrest Warrant, but that is only within the EU.

Sir Scott Baker: France does not extradite to the United States.

Lord Brown of Eaton-under-Heywood: Exactly. They are not required to in respect of non-EU extraditions and probably still do not. Russia, we were told, also does not.

Anand Doobay: That is the bigger question. If you want to have that system where your nationals are entitled to be tried in the UK and not be extradited, that is a very large political decision to take; you have to be willing to prosecute them in situations where you would not otherwise bother, because it is not of interest to you or it is not a policing priority. You also have to be willing to deal with the diplomatic fallout that goes with that. If you look at Russia, when they said they were willing to try the Litvinenko suspect, but they would not extradite him, the UK said, "This is a vital national interest for us to deal with somebody who has been murdered in London". You have to be willing to deal with both the political issues and also the practical issues if you have that system where you refuse extradition of your own nationals and you instead agree to prosecute them.

The Chairman: I have one point before we move on. If, as appears more likely, the country opts back in to the EAW, will the new "Lisbonised"—I know it is a horrid word—procedure that will pertain make any difference to the actual workings of this?

[45] Article 8 of the European Convention of Human Rights

Anand Doobay: It certainly will mean that there will be the possibility of going to the European Court of Justice. There will be more case law, potentially, dealing with cases emanating from the UK. It does also mean that the Commission will have the ability to bring enforcement proceedings. If they do believe that the proportionality bar we are introducing here is not compliant with the framework decision, that will be tested.
The Chairman: From our point of view, that seems to be quite a crucial matter.
Anand Doobay: Yes. That is the hesitation in terms of allowing the "Lisbonisation". The two significant changes it will make to us are the European Court having jurisdiction and the Commission having the ability to bring enforcement proceedings. That will be a significant thing that will change the way in which the system operates, yes.
The Chairman: You may not wish to act as a soothsayer, but are these things likely to stand up?
Anand Doobay: I do not know. I do not know whether the proportionality bar will stand up. There is a complex argument about EU law, which has within it an essential element that you have to consider proportionality when taking actions under EU law. It is going to be a more complicated argument than simply whether the framework decision allows you to do it on its face, because plainly it does not. It is going to be an argument about the underlying fundamental concepts of EU law and whether you can read into it this requirement that it has to be proportionate, because that is a fundamental concept of EU law.
Q9 Lord Rowlands: If you look down at the figures, there are 880 cases from Poland in the last year, which is way above any other country. If you could sort the Polish issue out, would the issue of proportionality at least be less relevant?
Sir Scott Baker: When we looked at this three years ago, it was the Polish issue that was the primary one. In terms of numbers of requests, they were miles ahead of any other country. There were one or two that had a significant number, but nothing remotely like Poland's. If there had not been the Polish problem, I suspect we would never have been looking at this question of proportionality at all.
Anand Doobay: There are some attempts to deal with the Polish problem. There was evidence given before the European Parliament earlier this year by a Polish representative and they were explaining the particular problems they face. They have a principle of legality, which they believe means that in every case they have to prosecute and in every case they have to make a European Arrest Warrant. They also do not tend to use fines. Instead, they have suspended sentences, but that means that as soon as somebody leaves Poland their sentence is put into effect and there is a huge issue of emigration from Poland. They are trying to deal with the issues, they say. They are trying to bring in legislative amendments to take effect in 2015; they are trying to bring in training. So far, however, there is little sign this has had a real effect in terms of how it is working in the UK.
Sir Scott Baker: This does illustrate an even more general problem, which is that no two countries have identical criminal justice systems. The framework decision is really designed to draw together all 27, or however many, Member States to have a procedure that accommodates everybody. However, perhaps it is natural that we in this country think our system is best and, therefore, anybody who does anything differently has got it wrong. There will have to be some accommodation to achieve an answer to these problems. For example, we heard of a case, I think in Poland, that chicken-stealing, in the country rather than the towns, is regarded as a very serious matter; they see things differently from us.
The Chairman: Can we move on to talk about forum bar issues, which are obviously not far away from the topic?

Q10 Lord Mackay of Drumadoon: In your report, you advise, on balance, against the introduction of a forum bar. Are you in a position to give views on the consequences of the forum bar that was, in the event, introduced in 2013?

Sir Scott Baker: We were against it for reasons that we set out in the report, and I will not go through all those again. The option that we have I would describe as the least bad option. After we had reported, I did spend a number of sessions with the Home Office when they floated drafts of what the forum bar might contain. I looked at these and tried to point out the pitfalls there might be if they were introduced in that form. We are asked what the effect of the forum bar that has been introduced will be. I can only answer by saying that that depends on how the courts interpret it, but I would be very surprised if this forum bar results in many cases where extradition will not take place where it would otherwise have taken place. The forum bar creates an additional bar to extradition. One needs to ask: what void is it there to fill? It was interesting that the magistrates dealing with extradition cases said that they could not think of any single case where the result would have been different if the original forum bar had been introduced. I certainly wonder how many cases there will be where this will result in a different solution.

The ultimate point is that there are seven aspects the court has to take into account on the interests-of-justice test, which is the second of the two limbs that get to first base. The first limb is that there has to be substantial measure of relevant activity in the United Kingdom, and then it also has to be in the interests of justice. The interests of justice require the court to look at where most of the harm or loss occurred, the interests of the victims, the belief of the prosecutor that the United Kingdom is not the most appropriate place for trial, the availability of evidence in the United Kingdom, delay, desirability of all prosecutions taking place in one place and the individual's connections with the United Kingdom. The critical question is how much weight, in assessing the interests-of-justice test, is going to be given to the person's connections with the United Kingdom. It will be difficult to give a great deal of weight to that in most cases.

Why, fundamentally, I do not like the idea of a forum bar is that the question of forum, as Lord Lloyd of Berwick said in one of the debates, is essentially a prosecutorial decision. It is very difficult for the courts to get into the kind of issues that prosecutors would be considering perhaps on a cross-Atlantic basis with issues of confidential information and so forth to be assessed. All I can answer to the question is that it is a matter of "wait and see".

Anand Doobay: I would add two things, Lord Chairman. The first is that it does not address the issue of where prosecution should take place. The forum bar is simply looking at where it should not take place. The court may be presented with quite a stark choice, which is to refuse extradition in the knowledge the person may never be prosecuted, even if there appears to be significant evidence that an offence has been committed, or to allow extradition even though the person is British, with ties here and there would be significant effects on them if they had to leave the UK.

I share Sir Scott's view that we will have to see how the court deals with it. What we have not had so far is any appeals that have been heard that deal with this issue. When the first of those comes through, which will probably be in the next month or two, we will see how the High Court is going to lay down the principles of how it will approach this and, particularly, how it will deal with the weight to be given to a person's connections with the UK.

The problem I have with the bar as drafted is actually the prosecutor's certificate. It is not appropriate for a prosecutor to have the right of veto. That is essentially what is given here,

because if the prosecutor issues a certificate the court cannot consider the forum bar. The prosecutor, in issuing a certificate, is looking at specific things. One of them is not the interests of justice. If the idea of this bar is that you are supposed to weigh up the interests of justice as to whether or not it is appropriate to extradite, I do not understand how a prosecutor can have the right of veto to stop the court from doing that. That would be a personal reservation I have in terms of the way in which the bar is drafted, but we will have to see how the court approaches the interpretation.

Q11 The Chairman: I am interested that you say that, because it struck me that there is an interesting question as to whether or not the proper way for a prosecutor to determine whether or not to bring a prosecution takes into account precisely the same things as a court or any judicial process should, in deciding what the just outcome to the facts are. You tend to think they are in fact different, and hence we should be clear they are different, and processes and systems should recognise that difference.

Sir Scott Baker: We would like to have seen a set of guidelines published so that it was transparent as to the factors the prosecutor takes into account in these cases. A set of guidelines has been issued, but it is very much along the lines of the Eurojust guidelines and does not really add very much to telling us what really goes on.

Anand Doobay: No. What we had really hoped was that there would be some detailed explanation of how you assess the weight to be given to the residence and links of the suspect with the UK. When the CPS is taking their decision, should they be prepared to spend more money to prosecute here? Should they be prepared to put a lot of effort into getting evidence from overseas to prosecute here? All of these are quite significant practical issues and they are unanswered by the guidance that has been issued, which simply lists the location of the accused as one of the factors.

However, I certainly would agree, my Lord Chairman, with your analysis: they are not the same things. If you look at the test to be applied under the forum bar in assessing whether the interests of justice are engaged, that is not the same thing a prosecutor will do when deciding whether or not to issue a certificate.

Baroness Jay of Paddington: Can I ask a factual question? Have the Director of Public Prosecution's (DPP) guidelines been challenged legally?

Sir Scott Baker: I do not think they have.

Lord Mackay of Drumadoon: Have the Crown Prosecution Service (CPS) made public their views on this?

Sir Scott Baker: They produced the guidelines.

Lord Mackay of Drumadoon: I appreciate that.

Sir Scott Baker: They have not gone any further than that.

Lord Mackay of Drumadoon: I would like to know whether they are enthusiastic or they think it is a useful role they are being asked to play, or whether they are just having to put up with it.

Sir Scott Baker: My recollection is that the then DPP, Keir Starmer, was not enthusiastic about the forum bar or any forum bar, and was enthusiastic about some guidelines but the guidelines have not gone as far as we perhaps hoped.

Anand Doobay: Obviously, they were consulted as part of the process of formulating the forum bar. One of the things that is not yet clear, because we have not had very many cases, is in how many situations they will in fact issue a certificate, because my fear had been that they would do it simply based upon looking at the extradition request and saying, "Actually, there does not appear to be enough here to warrant a prosecution in the UK". However, it

appears they may not do that. In fact, what they will do is say, "In order for us to issue a certificate, there has to have been an investigation in the United Kingdom. The police actually have to have investigated, gathered evidence and sent us a file before we will issue a certificate." If that is the case, I would have fewer concerns about how it will operate in practice. However, it is too early to say for sure how it will operate in practice.

Q12 Lord Mackay of Drumadoon: Is there any evidence to suggest that any foreign country has taken account of the existence of a forum bar and not proceeded with a request for extradition?

Sir Scott Baker: We did not hear of anybody who has a forum bar anywhere.

Anand Doobay: I imagine that most countries will be waiting to see how it is dealt with at the appeal stage, because all of us are guessing how the court will lay down the principles on how it should be dealt with.

Lord Rowlands: Does this raise the question of whether Parliament should have been more explicit anyway? Should the legislation have been more explicit, rather than just waiting for the courts to define our legislation for us.

Sir Scott Baker: I belong to the school that says, if you have a knotty problem, let the judges work it out.

Anand Doobay: However specific you are, because there will be a number of factors that are going to be weighed together, it is going to require, first, some interpretation of the actual words they use, but also some indication of how the courts are going to weigh the different factors. I am not sure. It would have been possible to say, for example, "Greater weight should be given to the individual's connections with the UK". That was an option, but it is not the one that the Government have taken.

The Chairman: Can I ask you to clarify that? In particular, what you are saying, Mr Doobay, is that if you are going to have a forum bar—if—you actually need enhanced and improved guidelines to make it work as well as it ought to. Is that right?

Anand Doobay: Actually, what I am trying to say is that the forum bar is a longstop. It is there to avoid the problem at the end of the process. What is better is to make the right prosecution decision at the start. Where there are cases where a number of countries should prosecute and it is appropriate for the UK to prosecute, that should be what happens, because then you will never have a successful extradition request, because if the UK does prosecute then it will stop any extradition proceedings. If the UK prosecutes and there is a conviction or an acquittal, double jeopardy will stop any extradition proceedings. The better way to deal with this problem is to deal with it at the beginning of the process and make the right decision prosecution decision, because the forum bar otherwise simply presents the court at the end of the process with a very unattractive choice, which is stop extradition and potentially the person does not get prosecuted anywhere or allow extradition despite the fact that it is going to have a significant impact on the person being taken from the UK.

Sir Scott Baker: Going back a step, I was quite impressed by evidence that we received from prosecuting authorities, which was that with cross-border crime very often there is an early meeting between the prosecutors of the various countries who may be involved and then a decision is taken as to who is going to investigate it. In one sense, the die is cast pretty early on as to where the prosecution is going to take place and the courts have to live with that later, which illustrates the difference between the prosecutorial decision about where the case should be heard and the forum bar, which leaves it to the court.

Q13 Lord Brown of Eaton-under-Heywood: What sort of appeals are anticipated here? Are these appeals against the court's decision on striking the balance in the interests of justice, or are these appeals against the prosecutor's certificate, which is, as you say, when it is in being, going to operate as a veto?
Sir Scott Baker: I tried to find out yesterday what the position was and the Lord Chief Justice was not aware whether there were any immediate cases for hearing in the High Court, but he would not necessarily know that. Mr Doobay thinks that there is a little group of cases raising various points to be heard together probably sometime later this month, but we do not know in any detail what the cases involve or what the issues are; at least I do not.
Anand Doobay: I do not think they involve a prosecutor's certificate. That is why I understand the CPS are adopting, at least at this stage, that approach of not issuing a certificate unless there has been an effective police investigation. My understanding is that these initial cases do not involve a prosecutor's certificate. They are about the way in which the court has balanced its factors.
Lord Brown of Eaton-under-Heywood: They are Section 19(b) appeals, not 19(c) or 19(e) appeals?[46]
Anand Doobay: Yes.
Lord Brown of Eaton-under-Heywood: The suggestion that the legislation should be yet more explicit seems to me difficult to reconcile with these convoluted and endless pages, which I find very difficult to track my way through.
Anand Doobay: It is interesting that the legislation prescribes what the judge can look at. It is not the normal situation where it is simply the interests of justice and it is determined by the court what the interests of justice are. It is a prescriptive and exhaustive list of factors the court can take into account when assessing the interests of justice.
Sir Scott Baker: It is a rather dangerous line of legislation, because it is always possible that something quite important has been overlooked.
Baroness Jay of Paddington: Does it not underline a point made by the Chairman: that the guidelines should be looked at again and made more precise?
Sir Scott Baker: Yes.
The Chairman: Are the Eurojust guidelines a bit generalised? If we are going to focus on certain aspects of this, I am trying to work out where we should be looking.
Sir Scott Baker: The Eurojust guidelines have been picked up and adopted by the Crown Prosecution Service. I am trying to remember what they contain, but they cover pretty wide territory. However, the area they do not really touch on is the person's connections with the United Kingdom.
The Chairman: Or any other country, for that matter.
Sir Scott Baker: Yes, or any other country.
Anand Doobay: The problem with the guidelines is that each of the factors is very sensible to take into account, but they often point in opposite directions. For example, the first and main factor is that you should bring the prosecution where most of the criminality occurred or most of the loss or harm occurred. What if those are two completely different countries? What if you sat in the UK and carried out all of your acts in the UK, but, in fact, the harm you caused was entirely in France? The problem with the list is not that the list is not sensible; it is how you apply it to the facts of a given case where each of the factors may point in a

[46] Sections 19(b), 19(c) and 19(e) of the Extradition Act 2003.

different direction or each of the factors may require you to spend more money to bring the prosecution. How do you reconcile these things when you are making your overall decision?
Sir Scott Baker: There can be issues about admissibility of evidence, where evidence that is not admissible in one country is admissible in another: phone-tapping, for example.
The Chairman: One point on this more generally is that, obviously, we have had the introduction of the forum bar here. Do we know whether there has been any impact on US prosecutors, in whether or not they try to bring a case and seek the extradition of people from here? It is a question of fact.
Sir Scott Baker: I think we would hear about it. I would imagine the American authorities would simply press on and wait and see what happened. They would not take any different course because of our forum bar, at least until the courts had interpreted it. However, I cannot really second-guess what the Americans would do.
Anand Doobay: I am sorry: I do not know.
Q14 Lord Hart of Chilton: For some of us who have had no experience of this subject before, there is a steep learning curve involved here. One of the things, however, that appeared to be reasonably clear early on is that the equivalence of the two tests "probable cause" and "reasonable suspicion" do seem to be roughly equivalent. There does not appear to be any major dispute about that. What is, however, emerging from all the papers we have is that there are other things surrounding circumstances where there are differences between the two countries. There are 50 different states with different legislatures. In respect of judges in America, some are elected and some see their election programme as being enhanced by stiff sentencing. There is plea-bargaining and the longer sentences that induce plea-bargaining. America is far more enthusiastic and zealous about extending their extraterritorial claims.
In those circumstances, one is left with impression that while the two tests may be similar, the surrounding circumstances may produce a situation that is slightly unbalanced. I would like your views on that.
Sir Scott Baker: There are certainly features of the American criminal justice system that are unattractive to UK residents. Their plea-bargaining is a great deal more vigorous, if I can use that word, than ours is, although we do have plea-bargaining in this country to a degree. It is very unsatisfactory to see people who have been extradited for white-collar crime being led off in chains from the aircraft by US marshals. The prison conditions, in some instances, leave a great deal to be desired.
However, the bottom line on all of this is: are we satisfied that individuals can have a fair trial in the United States or whatever other country it may be? That is a value judgment that has to be made and looked at in individual cases. To my mind, I cannot recollect any individual case where the courts have said they will not extradite on the basis that the individual would not have a fair trial. By fair trial, I am looking at the whole of the surrounding circumstances. One has to be a little bit careful, because, in some instances, in the media the focus has been on very narrow aspects of particular cases, which have been built up to present a picture that is not, perhaps, entirely the fair one. I seem to recollect that Lord Brown, in one of these cases in the House of Lords—not the Supreme Court—had something to say about plea-bargaining in the United States not being quite as vigorous in some instances as was being portrayed. That was in the McKinnon case. Yes, there certainly is a point here, but the bottom line is: when does one, as it were, pull the plug on extradition arrangements with a friendly country?

Lord Hart of Chilton: There is also the point that it appears to be the case that if you have challenged extradition you get an extra whack. Is that fair?
Sir Scott Baker: I am not specifically aware of that having been the case, but it may be my memory is wrong.
Anand Doobay: There is certainly an impact in terms of getting bail: if you have challenged extradition here, it is very unlikely that you will get bail, but that is not specific to the US. My sense is that there are very significant differences between the US and the UK systems of justice. However, the problem is that the way we assess all other countries' systems when we are looking at extradition is whether they are compliant with the European Convention on Human Rights. That is our baseline. If the countries we are extraditing to do comply with the ECHR, we will extradite. All these issues and aspects we are talking about have been considered by the courts and have been found to be compliant with the ECHR. That leaves us in a difficult position where, if we want to say they are unacceptable, we would have to do it on the basis not that they are not compliant with the ECHR, but that they are aspects that we just do not like and we do not think people should be exposed to.
That brings us back around in a circle to the prosecution decision in the UK. We have to be careful about our use of the word "extraterritorial", because that would imply the US is claiming jurisdiction for things that happen entirely outside of the US. To my mind and my knowledge, that has not been the case in any of these situations. There has been some conduct in the US and some conduct outside of the US. The US may certainly take a more robust view than we would in the UK as to which situations it will prosecute in if there is only 10% of the conduct in the US, but that is not extraterritorial; that is simply that they are taking a decision that we would not take ourselves. We have to work out on what basis we are going to complain about these aspects of their system if it is not that they are not compliant with the European Convention on Human Rights.
Q15 Baroness Jay of Paddington: We have failed so far to get a clear position on—or at least I have; that may well be my lack of understanding—the relationship between the federal courts and the federal authorities and the state authorities on this. One of the papers which Lord Hart referred to, which we have had circulated in the last two weeks, has referred to the state Supreme Court judges increasingly resembling ordinary politicians in partisan mud-fights. We have seen some background about the programmes on which these judges have been elected in individual states. It is unclear to me still the extent to which the individual states have complete jurisdiction over some of these matters and the extent to which this is federally organised. It is the state situation that I find more immediately concerning.
Sir Scott Baker: A lot of extradition operates across the board in the same way in all the—
Baroness Jay of Paddington: And is interpreted in the same way? Is there any latitude for a state supreme court?
Sir Scott Baker: There may be some different nuances, but the principles are the same.
Baroness Jay of Paddington: The principles may be same, but is the actual practice and legal constraint on an individual state's supreme court the same, or indeed a state's legal system?
Anand Doobay: There are two separate systems within the US. My understanding of the system is that there are particular offences that the federal system prosecutes and then there are state offences that the state prosecutes. Either can lead to an extradition request.
Baroness Jay of Paddington: Yes, exactly.
Anand Doobay: In many cases, they are federal prosecutions that lead to requests to the UK, but that is not to say that they cannot be state prosecutions. There may be more

concerns over the treatment that an individual received if they are subject to a state prosecution, because, as you say, there may be a perception that there are less robust checks in terms of what happens at a state level.

Baroness Jay of Paddington: In general, my concern is that, obviously, a very authoritative survey and report like yours, in terms of the balance between the UK and the US on this matter, said that it was imbalanced for the reasons Lord Hart expressed. However, there is a much more general—one would call it "diplomatic", as you said before, Mr Doobay—or political context to this about the way the systems operate, which actually does make it possible to say that it is not imbalanced.

Anand Doobay: Yes, it is possible to say it is different. It is certainly true that there are significant differences between the two systems and it is whether those differences are unacceptable. If they are, what do you do about them? As I say, the problem is that ordinarily under extradition law all you are looking for is compliance with the European Convention on Human Rights.

Lord Rowlands: Are there any figures on the numbers of requests coming from state or federal authorities?

Anand Doobay: I am sorry; I do not know.

Sir Scott Baker: We got some figures on requests from the United States in an annexe to the report and I did ask for those to be updated before today's hearing. They present a broadly similar picture, but they do not distinguish between one state and another, and between federal and state requests. I imagine that it would be possible to obtain such figures.

Lord Brown of Eaton-under-Heywood: You point out at paragraph 7.85 of your report that, actually, in proportionate terms, in proportion to the overall population of both the United States and the UK, we get back from them significantly more than we extradite to them.

Sir Scott Baker: Per head of population, yes.

Baroness Hamwee: Lord Hart mentioned issues like plea-bargaining. One would add delay, prison conditions and so on. I saw somewhere in the reading that the Netherlands imposes conditions before it will agree to extradition in some cases. I wondered whether that was something that you had considered.

Sir Scott Baker: We certainly considered assurances, and I am not sure if assurances and conditions are terribly different. You ask us later on in one of the questions, or may be asking us, about assurances and whether they are effective or not. With a country like the United States, if one assurance is not maintained there will not be any more. There is a big interest in making sure they are maintained. With other countries, the real difficulty is in policing what actually happens and whether the assurance has actually been maintained afterwards, or whether, if you call it a condition, the condition has been met.

Anand Doobay: One of the things we did look at was repatriation, because that is often a significant issue for people who are facing extradition to the US: their desire to serve any sentence that is imposed in the UK. We did try to explore whether it would be possible to make certain of that in advance so that they could know before they went to the US that that is what would happen and also to make it speedier. The difficulty we found, when speaking to the US authorities, was that their system did not really allow for that, because it is a bureaucratic and administrative process that involves the consent of a number of different federal entities. It involves the prison, the DoJ and also lots of other actors. What they were saying was, "It is not possible for us to say in advance, 'You will be able to be

repatriated to the UK to serve a sentence', or to say, 'You will be able to have this happen quickly'". I know that is often an issue for people who are undergoing extradition to the US.
Sir Scott Baker: We had quite a lengthy session in Washington with the US prosecutors. This was one of the issues we talked about at some length. They were not unco-operative at all; they were anxious to try to help. However, they did explain to us the difficulties. For example, after the case, there may be issues of reparation for victims and so forth, which have to be sorted out, or confiscation. These all take time. It has certainly not escaped our notice that there have been quite a number of cases, or at least a handful, where there have been arrangements made before extradition that would result in a significant part of the sentence being served in the UK. It is certainly our view that this is a pretty important quid pro quo to extraditing somebody from this country who has done little or nothing to facilitate the offence out of this country. Yes, there are good reasons why they should be extradited, but there are pretty compelling reasons why any sentence should be served in the home state. It is going to need quite a bit of work to get to that point, however.
The Chairman: While you have been debating this, a question has come into my mind. In conceptual terms, we extradite where the person who is being extradited can get a fair trial. Is there a conceptual difference that one ought to think about between the trial and the process of determining guilt and what happens subsequently?
Sir Scott Baker: It is not only subsequently but beforehand as well. We just picked up the point that it may be more difficult to get bail if you have resisted extradition. There are also prison conditions and so forth. It is a fair point, but it is really a political one.
The Chairman: I do not disagree about that. It is what we are here for, is it not?
Sir Scott Baker: That means we are not much help.
The Chairman: I would not say that.
Anand Doobay: From a legal point of view, though, there is a great deal of acceptance that it is better for a person to be imprisoned, if they are going to be imprisoned, in their home state, where they have much greater prospects of being rehabilitated and reintegrated into their community. That has certainly been accepted at an EU level. There is a great deal of emphasis being placed on that, so it is something which most people agree is desirable. It is the practicalities of ensuring that it happens quickly and reliably that is really the problem.
Q16 Lord Henley: On the whole process of looking for assurances and assurances from the Americans, could I take this opportunity to go just a bit wider? Should there be a process of some sort of systematic monitoring of all assurances? As you say, one failure by the States and that would be it. What would happen, however, with other countries?
Sir Scott Baker: In a perfect world, that would be ideal, but it is very, very difficult to achieve. Anand, you probably have more experience of this in the cases you have run.
Anand Doobay: Yes, the problem with assurances is that you have to guard against them becoming a panacea for all ills. In any case where there is any risk that is raised, the answer is, "That is okay. We will give you an assurance." We have to bear in mind, if there is a risk raised, why that is. If there is a risk of torture, that is because the requesting state allows torture to occur. When we are looking at assurances, the European Court has laid down a very good list of factors that have to be taken into account in weighing assurances up in terms of whether they are effective and practically going to be a safeguard. The courts in the UK have to rigidly apply those and be very careful not to allow assurances to be accepted in every instances where there is a risk raised.
It is especially important that they are monitored, otherwise it will become a vicious circle. A country will give an assurance that does not have any monitoring; the next time that

country makes a request, the court will say, "They gave an assurance last time and nobody has complained about it." If the reason nobody has complained is because there has been no monitoring of what has happened, you steadily get to the position where any assurance given is given a great deal of weight, despite the fact that, actually, none of the assurances is being honoured.

The Chairman: Lord Brown, I know you want to talk about prima facie evidence. You might move us in that direction.

Q17 Lord Brown of Eaton-under-Heywood: Not everybody would agree that there is no significant difference between probable cause and reasonable suspicion, but assume, for this purpose, that that is indeed the case and that in practical terms there is difference between them. There is a plain difference between probable cause and a prima facie case. Regarding the designation process in respect of part 2, as I understand it, there are two lots of designation. There is designation, so to speak, within the general scope of part 2, and then there is a further designation. It is the further designation of those countries that are already designated within part 2 that determines whether they have to produce a prima facie case or merely probable cause. Is that right?

Anand Doobay: That is correct.

Lord Brown of Eaton-under-Heywood: Is there a different Home Office process for deciding who in the first place is prima facie designated for part 2 purposes and, separately, one for those within that designation that are further designated as being sufficiently reliable that you only need from them probable cause?

Anand Doobay: The way you become designated as a category 2 territory is that you have either a bilateral or multilateral extradition treaty with the UK. That is the default position. Countries that have become further designated to remove this prima facie evidence requirement fall into two groups. The first are parties to the European Convention on Extradition—the Council of Europe convention. There are about 20 of those. We have no choice, under international law, because by becoming a party to that convention we agreed that all the other parties would have this requirement removed from them.

Then there are the others, which are essentially the Commonwealth countries—Australia, Canada, New Zealand—and the US. The UK took the position that, given that we had all of these parties to the Council of Europe convention that did not have to provide prima facie evidence, there was no reason why we should require Australia, New Zealand and Canada to provide it, given that they were longstanding trusted Commonwealth partners. For the US, the designation came as result of the 2003 treaty that we signed with the US. Those are the two groups that have had the requirement removed.

Lord Brown of Eaton-under-Heywood: The further designated group, which does not have to produce a prima facie case, includes some rather unlikely-looking countries, such as the Republic of Korea, Ukraine and Azerbaijan. They only have to produce a probable-cause basis for extradition, not a prima facie case.

Anand Doobay: All the countries you listed there are parties to the European Convention on Extradition. The Republic of Korea is a non-state party. Obviously, it is not within the Council of Europe's geographic scope, but it has been allowed to become a party to this convention. Each time a country becomes a party to that convention, the UK has no choice but to designate them to remove the prima facie requirement. It does have a choice if a non-state party wants to join. If somebody outside the Council of Europe wants to become a party to that convention, the UK has a right of veto, essentially. Each new Member State of

the Council of Europe has the opportunity to join the convention and, if it does, the UK has to remove the prima facie requirement.
The Chairman: Can I just clarify? The Republic of Korea, first of all, is South Korea, is it not, and not North Korea?
Sir Scott Baker: Yes.
The Chairman: Secondly, it has signed the European convention as a non-state party and, as a result, we have an option as to whether or not to designate them for the purposes of this part of the act; is that right?
Sir Scott Baker: No.
The Chairman: Is it our choice or is it automatic?
Anand Doobay: It is our choice whether they become a non-state party.
The Chairman: If you wanted to stop it, the way to do that would be veto them becoming a non-state party.
Anand Doobay: Yes, exactly.
Sir Scott Baker: The challenge has to be at that point.
Lord Brown of Eaton-under-Heywood: Has anybody ever challenged a country that wished to join that convention?
Anand Doobay: I am not sure. That would happen very privately. If countries want to express an interest to become a non-state party, they would have a private discussion with all of the other members before making in public. They would only really make it public once everybody else was agreed that they were happy for them to join.
Lord Brown of Eaton-under-Heywood: Having become a party, there is no possibility of subsequent review as to whether, after all, they ought to be allowed to continue to extradite without the requirement for a prima facie case.
Anand Doobay: There is an ability for review, but not at a UK level. There would be an ability for review at the Council of Europe level of how state parties are behaving in terms of their obligations under the convention. The difficulty the UK has is that if it wants to reimpose the prima facie evidence requirement for any of these convention parties, it has to withdraw from the convention. That leaves it without treaty arrangements with about 20 countries. It would have to negotiate bilateral treaties to replace the multilateral convention. It is quite a difficult thing to reimpose the prima facie obligation for any one of these Council of Europe parties.
Lord Rowlands: What is the situation with Russia?
Anand Doobay: Russia is a party to the Council of Europe convention, and that is why it has had its prima facie evidence requirement removed.
Lord Brown of Eaton-under-Heywood: There is nothing we can do unless, in the Council of Europe, a sufficient number of states are prepared to block Russia's future participation in the treaty.
Anand Doobay: Yes, that is right. The way the courts have tried to deal with this issue is to use the abuse-of-process jurisdiction, because even though there is no requirement to provide prima facie evidence, if the court is concerned that its process might be being abused, it can call for evidence. If it does not receive that evidence, it can draw an adverse inference that it has not received the evidence. For example, in Russian cases, where there has been a concern that the prosecutions are politically motivated and without merit, the courts have been able to consider the evidence about the allegations through the abuse of process jurisdiction, rather than because the country has to provide prima facie evidence.

Lord Brown of Eaton-under-Heywood: That is only if there is a possibility of political thinking behind the prosecution. You cannot ask for evidence just because you are extremely concerned about way trials are proceeding in a particular country.
Anand Doobay: No. You would have to be asking for evidence about the way the trials are proceeding. If your concern is that there is not sufficient evidence or it is improperly motivated or it has been improperly gathered, you can investigate that through the abuse-of-process jurisdiction.
The Chairman: We are all a bit unclear up here. Going back to your recommendation that the category 2 designation should be looked at, it would seem to follow—this is just so that we are all clear—from what has been said that any country that is a signatory to the European Convention on Extradition could only be reviewed in the context of the convention as a whole and the country's membership of the Council of Europe. However, there are certain bilateral individual agreements, some of which are long-standing. They could be reviewed on a case-by-case basis.
Sir Scott Baker: Yes.
The Chairman: There is also the London agreement? Is it called that? It is a multilateral Commonwealth agreement. You would then have to review that, would you not?
Sir Scott Baker: Basically, it is the treaties underlying the arrangements that are not as transparent as they might be.
Anand Doobay: The problem is that, when you review the designations, there is a limit to what you can do when you are reviewing the designations.
The Chairman: You mean once you have reviewed them.
Anand Doobay: You are reviewing the designation of a country like Russia, which is a party to the Council of Europe convention. What you cannot do is say, "We are going to impose a prima facie evidence requirement on you, because you have behaved badly", because we do not have the ability to do that without withdrawing from the convention. What you can do as a result of your review is probably only say, "Diplomatically, this is unacceptable. We need you to stop doing it." There is, practically, a limit to what you can do.
The Chairman: The wiggle room we have is that under other aspects, such as abuse-of-process procedures and things, there is both an inherent power in the court and, possibly, a forum bar provision that would enable you to mitigate the process, even if you cannot deal with the evidential requirements. Is that right?
Sir Scott Baker: I am less sure it would be the forum bar that would be used than the European Convention on Human Rights.
Q18 The Chairman: Can I ask a question that has puzzled me about all this? We tend to talk about the United States, Canada, Australia, New Zealand and South Africa in one breath, yet nobody ever talks about the last four. They just come in, because they are thought to be "good countries".
Sir Scott Baker: Okay people.
The Chairman: Is that right?
Anand Doobay: When the 2003 act was coming in, the US was added because the treaty had already been signed and that is what the treaty says. Australia, Canada and New Zealand were proposed by the UK Government at the time on the basis of, "We allow all these other people who are parties to the European convention not to have to do this. Look at them: surely we trust Australia, Canada and New Zealand."
The Chairman: They are not non-state members. They are just—

Anand Doobay: They are countries we have had long-standing close extradition arrangements with, which are members of the Commonwealth. We have the same level of trust in them as we do in all of these Council of Europe convention party members.
Baroness Wilcox: I assume we are talking about common law. That is what we are talking about, is it not, or have I got lost along the way?
Anand Doobay: No, it is common law.
Baroness Wilcox: That seems to me to be the underlying point.
The Chairman: It may make us more confident in what they are doing. We may or may not be right in thinking that.
Lord Brown of Eaton-under-Heywood: Not all commonlaw countries have a designation that allows them to escape the prima facie case requirement.
Anand Doobay: That is right. I cannot remember the exact wording, but in the review it was proposed on the basis that they were long-standing Commonwealth partners. Essentially, the rationale was, "If we do not require it from Azerbaijan, why do we require it from Canada?"
Baroness Jay of Paddington: Could I make the general observation that this precisely illustrates the political and diplomatic context for all this, which is what we are concerned about with the United States?
Sir Scott Baker: The treaty with the United States was negotiated without the public having any real idea of what was going on. That is the complaint, in a sense: a lack of transparency, which leads to the designation.
The Chairman: I have just been told by those who advise me that in the case of Canada we do not demand prima facie evidence from them, but they demand prima facie evidence from us. Is that right?
Sir Scott Baker: It is news to me.
Anand Doobay: The UK does not insist on reciprocity as a policy position, so it does not require the same from other countries as we give to them.
The Chairman: There is one final point, if I might, on this general topic. When there are special extradition arrangement, in general did the way it all worked work in a way that safeguarded those requested properly? It is cases outside the general scheme.
Sir Scott Baker: These are cases where there is a memorandum of understanding reached with the requesting country.
The Chairman: Yes, or some other convention.
Sir Scott Baker: The Secretary of State then certifies that the case is dealt with under part 2. We have the fallback of the European Convention on Human Rights, however, and all of the other bars to extradition. I do not have any real problem here.
Anand Doobay: The significant stage is the Secretary of State deciding which countries to enter into discussions with about this, because there is no obligation to do it for the ad hoc arrangements. It is a decision for a particular individual in a particular case whether to have this discussion. The UK is probably quite circumspect as to whom it speaks to about these cases, because there has only been one so far, in Rwanda, and in that case, in fact, the request did not succeed. There has been another request now brought, but the first request did not succeed.
The focus has to be on the Government's decision to engage in a discussion to draw up a memorandum of understanding to make sure it only does so in appropriate cases and also to make sure the memorandum of understanding has sufficient protections within it. Once that has happened, you go into a normal extradition process, where the person concerned

has the ability to raise all the ordinary challenges and there is a prime facie evidence requirement for those countries that have these special extradition arrangements.
The only part we should really focus on and be concerned about is the bit at the beginning: who do we talk to about these and what exactly does the memorandum of understanding have in it?
The Chairman: That is helpful. Thank you very much.
Q19 Lord Henley: Over the years, it seems that the Home Secretary—as Secretary of State—has given up a lot of his or her discretion on a great deal of matters. I am grateful for the "history" section in your report, which was very enlightening on that. However, more importantly, in very recent years, particularly after she used it in McKinnon, she has now given up her discretion on making a decision on human rights as a bar to extradition. I would interested to know what you think the long-term effects of that will be and whether it might not be more appropriate that matters of this sort were decided by a politician, rather than by the courts.
Sir Scott Baker: This was a recommendation that was, to my mind, a very important one. It was critical in improving the extradition arrangements. What will it do? It will simply take out one layer from the extradition process, because whereas the previous position was that the Secretary of State had human-rights issues to consider right at the end of the case, when it had been through the courts, she made a decision that X, Y or Z should be extradited and should go and then it goes back to the courts and the decision is reviewed by the courts, which is, to my mind, totally unsatisfactory. The courts deal with the situation. They have to look at the human rights bar. They deal with it up to the moment that the judge gives judgment. This is simply to deal with situations that arise after the matter has been through the courts for hopefully the final time. The courts have a way of dealing with these situations in civil cases where, for example, some completely unforeseen event occurs after the court has given judgment. There is the case of Taylor and Lawrence, which gives an opportunity, in very restricted circumstances, to go back to the court for it to reconsider the position.
Whatever one's views about the McKinnon case, the one point nobody could really disagree about is that it took far, far, far too long before a final decision was made. This recommendation is designed to speed up the process. It is also consistent with the way that extradition has been moving over past years. Whereas it started by being an entirely political decision, it has now moved much more into the courts. These are matters that can really be dealt with judicially with relevant provisions in the appropriate statute. In this recommendation, we are moving matters one stage down further down a line that has already been moving quite a way in that direction.
Lord Henley: It speeds up the process, but the Home Secretary is left in an almost Pontius Pilate-like position where she can only wash her hands.
Sir Scott Baker: That is probably a very good thing from her point of view, because she then does not have a desperately difficult decision to make. "What on earth do I do?" She does not have to be guided by political considerations; it is trying to take the politics out of it at that stage.
Anand Doobay: I wonder if I can also focus on what the Home Secretary is doing, because she does not have discretion. She is looking at whether there is a risk a person's human rights will be violated. She is essentially making a judicial decision as to whether or not there is sufficient evidence presented to her to suggest that the person's human rights will be violated and, therefore, she should not order extradition. The problem has always been

that, even though that is the process she is supposed to be undertaking, many people assume that she actually takes into account political considerations, and that they form part of that decision-making process. That, however, is not what is supposed to be happening. Either we have to change the process explicitly to allow for what we used to have, which is that the Home Secretary can make any decision they want to and take into account any factors they want to, including political factors, or we have to have a process that is simply about assessing whether or not there is a risk of human rights being violated. We tried to make the system we have, looking just at human rights, go back to its original purpose, which is that the courts assess whether or not there is a risk of that happening.

Lord Rowlands: Organisations like Liberty want the Home Secretary back into the process.

Sir Scott Baker: Liberty were out on a limb on quite a few of their representations to us, not least on prima facie evidence, which they wanted back across the board. This was very largely driven by Shami Chakrabarti, who feels very strongly about it. However, we had an awful lot of evidence the other way. The evidence was overwhelmingly in favour of taking away the Secretary of State's discretion on human rights matters, in so far as it can be described as a discretion.

Anand Doobay: I cannot think of anyone other than Liberty who wanted to bring back in a political element in the decision-making, because many people thought that that had been a wholly improper way to carry out the extradition process, and that, actually, political considerations should not come into it. I appreciate that that is a point of view, but it was not one that was strongly heard when we were carrying out the review.

Lord Brown of Eaton-under-Heywood: Liberty's witness sought to rationalise the desire to reintroduce the Secretary of State's final say on the basis that there would be cases where there was a lot of confidential, secret knowledge about what is going on in some particular country that would be impossible or, at any rate, extremely difficult to get before a court on a final human rights challenge.

Anand Doobay: We considered that, because we assumed that the courts deal with these situations ordinarily all the time in terms of confidential—

Lord Brown of Eaton-under-Heywood: I am not saying I agree with it, but that is the way they put it. That is something you did actually have regard to.

Anand Doobay: Yes.

Q20 Baroness Hamwee: You mention the training of lawyers and international communication between judges towards the end of your report. Listening to you comment about the very different systems, particularly in Poland, I wonder if this is desirable but unachievable. Did you have any specific ideas that you felt perhaps were beyond the brief?

Sir Scott Baker: The Government's view on this was that this was a matter for the legal profession and the judiciary.

Baroness Hamwee: Which you said yourselves.

Sir Scott Baker: Any talking is better than no talking in this territory. One only has to look at the degree of communication that goes on between the legal systems of England, Scotland, Northern Ireland and, indeed, southern Ireland. If one could only achieve something like that on a Europe-wide basis, a lot of these problems might go away. There are obvious difficulties such as culture, language and cost. However, I was wondering what steps might be taken now. I see there is a new chairwoman of what used to be called the Judicial Studies Board. Lady Justice Rafferty has just been appointed to that. I do not see why this is not something they could take on board and see what can be arranged. The European Commission also ought to be pushed to do something in this direction.

Baroness Hamwee: Did you take evidence on this area? I should have looked to check.
Sir Scott Baker: Do you know?
Anand Doobay: Yes, we took evidence on the training issue. Most people agreed that it would be a sensible thing to do. The judges certainly thought it would be useful to have practitioners who were expert in the area, who were able to help them more and who would help cases be dealt with more efficiently. We were recommending that legal aid not be means tested. As a quid pro quo, we thought it was fair enough that lawyers who wanted to engage in that type of work should therefore be adequately trained so that they were experts in the area.
At a European level, the Parliament earlier this year was still calling for the Commission to set up a European Arrest Warrant judicial network and a network of defence lawyers, and to fund it adequately at Commission level. That is probably the level at which we need to do it, because, while the UK has made bilateral efforts to bring some Polish judges to the UK, it requires more of a co-ordinated and systematic approach to have regular communication and communication channels to have any real impact.
Q21 Lord Rowlands: I read the interesting exchange the panel had with Lord Justice Thomas. He seemed to be very pessimistic in the context of the European Arrest Warrant. He said at one point, "This all presupposes a kind of mutual confidence and common standards that actually do not exist". Later on he said, "We have mechanisms put in place without unfortunately having brought the judges up to speed". You did not share that pessimism at that time, I gather.
Sir Scott Baker: He is still very keen to achieve the greater degree of co-operation, but he foresaw the difficulties, because he had quite a lot of dealings with various individuals in different parts of Europe.
Anand Doobay: Building trust is still an issue we are facing. We are talking about training in communication, which is one thing, but engendering trust so that judges in one Member State believe that another Member State has the same standards and the same processes and the same fair-trial procedures is a very different thing. We still have a long way to go to achieve that at EU level. In terms of conditions of detention, for example, there are findings before the European Convention on Human Rights that Italy is in systemic violation of its prison conditions, which means that extraditions are being refused to Italy from the UK. That is unlikely to engender trust between the UK judges and Italy. There are significant issues about the systems within individual Member States that would need to be dealt with.
Lord Rowlands: In finding 7, you said an effective European Arrest Warrant system "is likely to bring in its wake improvements in the administration of justice in the single European area". Are there any signs of this happening?
Sir Scott Baker: Not enough.
Anand Doobay: There are some very concerning things that are not happening. As well as the European Arrest Warrant framework decision, there were a number of other mutual recognition measures that were supposed to go with it. For example, they would make the system of transferring fines easier between Member States; they would make the system of transferring probation sentences easier between Member States; and, really significantly, there was the system of Eurobail, which would mean you could be bailed from one country to your home country, subject to conditions.
The problem is, while the EAW has been implemented effectively and with a great deal of zeal in most Member States and is being very well used, many of these other measures have either not been implemented at all or, if they have been implemented, are simply not being

used, which is partly about lack of familiarity—i.e. the people at the coalface, dealing with it—and is partly about a lack of willpower. If you look at the European supervision order, for example, there are still 16 Member States that have not implemented it even though the deadline for implementation was the end of 2012, and the UK is one of them.
It is fine to talk about the European Arrest Warrant, but if you do not have these other measures that are supposed to complement it, you end up with a system where everyone resorts, as a measure of first resort, to the European Arrest Warrant, rather than trying other alternatives that are less coercive. You have somebody who is sentenced to probation, but their probation sentence cannot be transferred, so they fail to do it; they then have a sentence of custody imposed and then they have a European Arrest Warrant imposed. There is still a great deal to be achieved at EU level in terms of ensuring that these other measures are actually implemented effectively and used.
Q22 The Chairman: Are there any measures that we are not proposing to opt back in to? As I gather, we are likely, according to the newspapers, to opt back in to the 35 measures or whatever it is. Are there any measures that we have declined to opt back in to that you think are crucial to the working of this general area of the law?
Anand Doobay: Yes, there is the framework decision on probation and alternative sanctions, which we have indicated we are not minded to opt back in to. There has been a lot of criticism of that decision by the House of Commons Justice Committee and lots of other committees have reported that this is not a sensible thing to do. My understanding, however, is that the Government's current position is that they are not minded to opt back into that.
The example I have just given you explains why that is difficult: because the idea is to make these things transportable. If someone is prosecuted in Italy but they do not live in Italy and they are sentenced to probation, ordinarily they would want to go back to the UK, where they live, to carry out their probation sentence. Otherwise, how do they have somewhere to live? How do they have a job? If you do not have this working effectively, they will not be able to do that. If they do not perform their probation, they will have a sentence of custody imposed and a European Arrest Warrant issued.
The Chairman: The other thought that occurred to me—we were talking about this in the context of European/UK relationships—was that we have also spent a lot of time talking about US/UK problems. Are you happy that this kind of dialogue that is going on between ourselves and the various elements involved in the US is moving in the right direction, as it were?
Sir Scott Baker: It is difficult to know precisely what has been happening since the McKinnon case. I do not know, Anand, if you have any more knowledge than I have, but the American authorities were certainly receptive, helpful and keen to make things work
Anand Doobay: There is a great deal of dialogue between the UK and the US, not least because there are many cases that involve both countries: for example, the LIBOR cases and the foreign-currency trading cases. There are all sorts of cases that involve co-operation between the two countries. I am not sure at what level the communication rises above the case. There are obviously very specific communications about these cases. I am not sure whether there is a broader discussion going on about the overall extradition relationship.
The Chairman: We are getting to the end of the questions we had prepared for you, but I would like to ask the Members of the Committee if there is anything anybody else would like to ask. Are there any points you would like to raise?

Q23 Lord Brown of Eaton-under-Heywood: I just wondered about the new provisions 12(a) and 21(b), the provisions about an absence of a prosecution decision and a request for temporary transfer. In practice, are they having any impact? I take it they are now in force. Are they in force?
Anand Doobay: They are not in force.
Lord Brown of Eaton-under-Heywood: They are not yet in force. Forgive me. Are they promising advantages for the future or not?
Anand Doobay: I certainly think about the temporary transfer that it will depend on how much it is used in practice. It is a very good idea. We thought in the report that the ideal scenario would be that in the pre-trial phase you would remain on bail in your home country, making your appearances by video link and then only attending the trial when you needed to in person. This mechanism of temporary transfer would give you that ability, albeit within the European Arrest Warrant framework. However, again, my concern is whether, in reality, it will be used in practice. It requires the consent of the issuing Member State. It is whether, in practice, people will actually make use of it. I am sure many defendants would wish to use it, but it is whether the other country will agree to it.
Sir Scott Baker: Again, it is a question of education, if we can achieve it. The bottom line with the EAW is that it would be a great pity if the baby was flushed out with the bathwater. a lot of progress could be made.
The Chairman: Finally, before formally thanking you both, is there anything either of you would like to say to us that you think it is important we hear that we have not touched on?
Sir Scott Baker: We have covered most things.
The Chairman: All I can say to both of you is thank you very, very much indeed. It has been, so to speak, personally very helpful indeed. Thank you.
Sir Scott Baker: We look forward to reading your report; we hope it is not as long as ours.
The Chairman: So do I.

David Bermingham – Written evidence (EXL0052)

Written Submission to the House of Lords Extradition Committee 12th September 2014

Introduction

I am one of the so-called 'NatWest Three', extradited to Texas in July 2006. I am not a lawyer but would hope that my personal experience on the subject matter at hand gives the following evidence some weight. In that regard:

1. Prior to extradition in 2006, I was heavily involved in efforts by the Conservatives and Liberal Democrats to introduce a 'forum' amendment to the Extradition Act. I wrote numerous briefs for MPs and Peers during the passage of the Police & Justice Bill, which efforts continued after my extradition.
2. I have direct knowledge of the workings of the US criminal justice system.
3. I have direct knowledge of the US penal system, having spent time incarcerated in 5 separate institutions there.
4. I have direct knowledge of the workings of Convention on the Transfer of Sentenced Persons, having been repatriated to the UK from America in late 2008.
5. I have extensive knowledge of most of the high profile US extradition cases since 2004, as I regularly give help and advice to people facing extradition to the US.
6. I have given oral and written evidence to the Joint Committee on Human Rights (see http://www.parliamentlive.tv/Main/Player.aspx?meetingId=7722)
7. I have given oral and written evidence to the Home Affairs Select Committee (see http://news.bbc.co.uk/democracylive/hi/house_of_commons/newsid_9674000/9674227.stm)
8. I made a detailed written submission to the Scott Baker review, although I was not called to give oral evidence.
9. I wrote a book about our case which includes extensive commentary on the practical workings of the Extradition Act, the politics behind it, and the impact that it has on those on the receiving end of it. http://www.amazon.co.uk/A-Price-Pay-David-Bermingham/dp/1492890170
10. I regularly give keynote talks at business conferences about the practical aspects of US long arm enforcement, and how the US authorities go about their business.

This note focuses exclusively on the UK's extradition arrangements with the US, on which the Committee has already taken certain oral evidence. I would be most happy to give oral evidence to the Committee if called, and I believe I have something to contribute to the process.

Executive Summary

This note deals with three specific areas within the purview of the Committee:

1. The practical consequences of the Treaty imbalance
2. The hard realities of the US criminal justice system
3. The 'forum' amendment

Members of the Committee should be in no doubt that the almost certain consequences of extradition to the US are a plea bargain and consequent conviction. The current system not only permits but encourages aggressive US prosecutors to seek the extradition of people who may never have set foot in America, safe in the knowledge that conviction is all but assured, irrespective of the merits of the case.

The lack of any requirement for a US prosecutor to support a request for extradition with any evidence effectively means that we are subjecting our citizens to a regime in which accusation becomes guilt, and all concepts of innocence until proven guilty, let alone habeas corpus, are entirely eradicated. It is incredibly difficult to understand why Parliamentarians continue to support this situation, given that the first duty of any Government should be the protection of its own citizens, something which all other countries (including most notably America) seem to understand.

The extent of the one-sided nature of the arrangements and their advantages to US prosecutors is perhaps best demonstrated by the zeal with which the American embassy has lobbied over the last few years to maintain the status quo even when successive Parliamentary Committees have urged meaningful change.

Practical Consequences of the Treaty Imbalance

There are three most obvious consequences of the imbalance in the Treaty, which permits US prosecutors to request extraditions of UK citizens without the need for any evidence.

1. An increase and imbalance in the volume of extradition requests by US prosecutors.
2. A wholly disproportionate number of requests for the extradition of UK citizens, many of whom have never previously set foot in America.
3. A growing tendency by UK prosecutors to 'outsource' our criminal justice system by encouraging the US to prosecute a case which demonstrably belongs in the UK.

Increase and imbalance in the volume of US extradition requests

Home Office statistics reveal a significant rise in the number of requests from America after the coming into force of the Extradition Act on 1 January 2004. During the period to 30 June 2014, there have been a total of 173 requests, as against 65 requests in the other direction.

Disproportionate number of requests for the extradition of UK citizens.

Over the last few years, the supporters of the Treaty have argued that as America has roughly five times the population of the UK, it is quite logical that it should make more extradition requests of the UK than the UK makes of it. Indeed in her evidence to this Committee Ms Amy Jeffress ran this argument, much as the US embassy had done to the Scott Baker Review team, who dealt with the matter at paragraph 7.85 of the review:

> *There has been some comment about the respective numbers of extraditions between the United States and the United Kingdom. The United States has a population about five times the size of the United Kingdom. However, the United States has less than twice as many people extradited to it than the United Kingdom. Therefore, the difference in population would be one factor that would suggest that the United States would have more people extradited to it.*

There might be some force to this argument but for an analysis of the nationality of those whose extradition is sought.

To support the argument, the US should logically be seeking the extradition of US nationals from the UK, because they are five times more populous, which would then justify the difference in overall numbers of requests, as explained by Sir Scott Baker above.

On the contrary, however, Home Office statistics show that the US most routinely requests the extradition of UK citizens. In the period 1 January 2004 to 30 June 2014, 73 out of 173 people whose extradition to the US was sought were UK citizens, or 42% of all extradition requests. By contrast, only 40 (23%) were US citizens.

In the opposite direction, the ratio is reversed. The UK pursues the extradition of very few US citizens (only 10 out of a total of 65, or 15%, in the period January 2004 to June 2014), and largely concentrates on its own (32 out of 65, or 49%).

In other words, whilst the US may have five times as many citizens as the UK, apparently the vast majority of the criminals are British (accounting for an aggregate of 105 requests), and very few are American (50). Some people might regard this as a little odd, and it certainly does not support the conclusion reached by Sir Scott Baker's panel. Quite the contrary, in fact.

Attached at Appendix 1 is the Freedom of Information Request that provides the above statistics.

Outsourcing of the UK Criminal Justice System

There have been a significant number of cases where the UK authorities not only had jurisdiction to bring a case, but on any sensible analysis of the case most definitely should have done if there were any evidence to support it. The case of the NatWest Three was probably the first of such cases, but there have been many since, some truly shocking.

Perhaps the most egregious example was the case of Babar Ahmad and Syed Talha Ahsan, extradited in October 2012 on the same plane as Abu Hamza and two other terrorist suspects (with whom Ahmad and Ahsan had absolutely no connection, other than in the eyes of Home Secretary Theresa May).

Ahmad and Ahsan were charged with running websites at the turn of the last century and through to the middle of 2002 which incited violent jihad in Chechnya and Afghanistan. Neither man had ever been to America. The only nexus with America was that one of the

websites was temporarily hosted on a server based in Connecticut, and that the men had been in receipt of an unsolicited e-mail from a US citizen attaching a classified US document (with which they did nothing).

The Metropolitan Police had found no basis to charge the men, after arresting Ahmad at his home in December 2003 and seizing his home and work computers and large amounts of documentary material. During the course of the arrest Ahmad sustained very serious injuries for which he was eventually awarded £60,000 in compensation by the police. Having been released without charge in December 2003, Ahmad made a complaint to the Metropolitan Police Complaints Authority about the assault during his arrest. In August 2004, he was re-arrested on an extradition warrant from the US, after the Met had sent all of the materials that they had seized from him to America. Ahsan was arrested in connection with the same allegations in 2006.

After their extradition in 2012, having spent many years incarcerated in the UK pending extradition, the two men were held in solitary confinement in a Supermax prison in Connecticut, in conditions described by the US public defenders' office as horrific and inhuman, before finally entering into a plea bargain on one count of providing material support to terrorism.

At sentencing in July of this year, the judge was at great pains to say that she saw no terrorist tendencies whatsoever in either of the men, whom she described as being fundamentally good people. She sentenced Ahsan to time served (he returned to the UK a few weeks ago), and Ahmad to a further 13 months incarceration (the US was seeking a sentence of 25 years).

Most recently, the Libor fixing cases have produced some examples of the US charging British citizens (resident in Britain) in cases which have no obvious connections whatsoever with the US, and with the full concurrence of the UK authorities.

The Hard Realities of the US Criminal Justice System

The iniquities of our extradition arrangements with the US are only properly understood by reference to the practical workings of the US criminal justice system. The Committee has already highlighted certain areas of concern such as excessive use of plea bargaining, and elected judges.

It would be wrong to say that all US prosecutors or judges are bad people. This would be a preposterous statement. But no more preposterous than blindly assuming that all US prosecutors and judges are good people, which is what our extradition arrangements do.

Our extradition courts take it on trust that what is contained in a prosecutor's affidavit or charging document is true. They take it on trust that if extradited to the US, a defendant will receive a fair trial before an impartial jury. And they do this largely because the US has strong constitutional protections that are designed to guarantee both of these assumptions.

Regrettably, life just isn't like that. Human nature isn't like that. There are bad people working for the Department of Justice just as there are in the police force and almost all other walks of life. It would be nice to think that we had some checks and balances against such people before carting our citizens off to the other side of the world in chains to be incarcerated in some hellhole prison pre-trial, but seemingly we do not feel this is necessary, and that strikes me as a dereliction of Parliament's duty to protect its citizens.

By way of example, I believe that the Committee should read the following recent report (March 2014) from the US Project on Government Oversight, citing the Department of Justice's own internal investigations unit the Office of Professional Responsibility, which has released statistics showing that literally hundreds of prosecutors have engaged in abusive behaviour.

http://www.pogo.org/our-work/reports/2014/hundreds-of-justice-attorneys-violated-standards.html

As the report states, the violations include instances in which attorneys who have a duty to uphold justice have, according to the internal affairs office, misled courts, withheld evidence that could have helped defendants, abused prosecutorial and investigative power, and violated constitutional rights.

One of the most egregious examples was the prosecution and conviction of Senator Ted Stevens, which cost one of the Senate's longest serving members his seat, and altered the balance of power in the Senate. The prosecutorial abuse might have gone undiscovered had it not been for a whistle-blower inside the FBI, and a judge in the case who diligently and tenaciously uncovered what had been going on (witness tampering, withholding patently exculpatory material and other violations). He was so incensed that he ordered a criminal investigation into the prosecutors, one of whom subsequently committed suicide. Senator Stevens' conviction was overturned, but by then he had narrowly lost his seat in the Senate.

If members of the Committee are interested in the subject matter, I would recommend the book Licensed to Lie by Texas defense Attorney Sidney Powell, which deals in detail not just with the Stevens case, but also the conduct of the Enron prosecutions, in which Ms Powell labels accusations of gross abuse not just at the prosecutors, but at the presiding judge who in her view routinely turned a blind eye to clear examples of prosecutorial abuse. See http://www.amazon.co.uk/Licensed-Lie-Exposing-Corruption-Department/dp/1612541496

Indeed, former Enron CEO Jeff Skilling (convicted in 2006 and sentenced to 24 years in prison) eventually agreed in 2013 to drop a motion alleging gross prosecutorial abuse in return for the prosecutors not opposing him being resentenced to 14 years, which would see him released from prison in 2017.

It must be reasonable to assume that if the DoJ's own internal investigations unit have uncovered this amount of abusive behaviour, then the true scale of the problem is likely to be larger, since many more cases of abuse have almost certainly not been discovered.

During the time that I was in Texas post extradition, there was a very public example of prosecutorial abuse in the case of several students at Duke University who were accused of raping a stripper at a frat house party in 2006. The conduct of the case by District Attorney Mike Nifong led to his removal from office and disbarment.

As noted above, the fact that there are bad people working in the Department of Justice, and judges who may condone or turn a blind eye to their behaviour, does not mean that all prosecutors or judges are bad, but it should give us paus for thought, and in particular when it comes to sacrificing the liberty of our citizens on the word of a prosecutor, it should give us cause to consider some checks and balances.

The most notable such checks and balances would be a restoration of the requirement for a evidence (called for by the Home Affairs Select Committee in their March 2012 Report) and the introduction of a sensible and workable forum provision (ditto).

It is not just corrupt prosecutors that we need to protect ourselves from, however. Prosecutors make honest mistakes too. A classic example would be the case of Lotfi Raissi, a man of Algerian extraction living in the UK at the time of 9/11, and whose extradition was sought by the US shortly thereafter on allegations that he had trained the 9/11 pilots. As the case pre-dated the Extradition Act 2003, the US was required to submit evidence in support of its allegations at the magistrates hearing on extradition.

The prosecutors could not, as it turned out, because Raissi was wholly innocent, and a video that the US produced which purported to show Raissi with one of the hijackers was in fact a video of Raissi with his cousin at a barbeque.

The presiding magistrate, District Judge Timothy Workman, testified to the Home Affairs Committee in November 2005 that if the case had been brought under the 2003 Act, where no evidence was required, he would almost certainly have been powerless to prevent the extradition.

Judge Workman also presided over the later case of Babar Ahmad, conducted under the new Extradition Act, which he described as ‘deeply troubling’, because it so clearly belonged in the UK, and yet he was indeed powerless to prevent it because there was no evidential requirement and no forum provision in the legislation. This is a chilling thought, given the recent experiences of Messrs Ahmad and Ahsan in US custody, even eleven years after 9/11 when much of the heat and righteous fury of America has perhaps being drawn from the subject matter.

The Committee has taken oral evidence from Amy Jeffress, formerly the Department of Justice Legal Attaché to the US embassy in London, and Roger Burlingame, formerly a Federal Prosecutor. Both have attested to the constitutional protections offered by the US criminal justice system, and in the case of Mr Burlingame to the practicalities of reaching charging decisions and discussions between prosecutors where there is concurrent jurisdiction. Both would have the Committee believe that there is no cause for concern.

I beg to differ. Mr Burlingame in particular managed inadvertently to highlight many aspects of the practice of bringing prosecutions in the US on which the Committee should have serious concern.

Agreeing that the rate of plea bargains in the Federal system in America is in the high nineties percent, Mr Burlingame was at pains to attribute this statistic to the rigorous standards set by US prosecutors when making charging decisions, indicating that prosecutors in the US indict only on a 'guilty beyond reasonable doubt' standard. With respect to Mr Burlingame, this is palpable nonsense, for a variety of reasons.

The first is that it is belied by the evidence of prosecutorial abuse described above. The second is that the case of Lotfi Raissi demonstrates that prosecutors have a habit of charging first and endeavouring to find evidence later. The third is that the sentencing judge in Ahmad and Ahsan ridiculed the prosecution theory (which was the central plank of their extradition) that the defendants were engaged in a conspiracy to murder US citizens. The fourth is that the Innocence Project in the US exists largely because there are so many innocent people in prison in the US.

Beyond the above, however, the legal process of charging itself is worth examination because it does not exactly scream 'checks and balances':

The Federal Grand Jury is a panel comprised of up to 23 and no less than 16 members of the public, whose job it is to review a case produced by a prosecutor to determine whether, in their view, there is "probable cause" of an offence. This panel, which sits secretly and will likely hear only the prosecutor's side of the case, involves no judicial scrutiny whatsoever. The defendant has no rights, can produce no evidence, and indeed may not even be aware that the proceedings are happening. Mr Burlingame has attested to all of the above.

To that extent, it is widely regarded as a rubber stamp, the plaything of the prosecutor, and rarely comes up with an answer other than "a true bill", meaning that the indictment (the charging document) can be brought against the defendant. The defendant has no rights in the Grand Jury proceedings, and indeed may not even be aware that they are happening. In 1985, Sol Wachtler, former chief judge of New York's court of appeals, was quoted as saying that a determined prosecutor could get a Grand Jury to "indict a ham sandwich."

If that were not bad enough, however, even an indictment is not required in order for a US prosecutor to bring an extradition case. He can do so on the basis of a criminal complaint, which as Mr Burlingame explained is a much more informal version of the charge, dispensing with the need for a grand jury, and simply asking a magistrate to sign a piece of paper.

Mr Burlingame was asked by the Committee why a prosecutor would use this route rather than opt for an indictment. Historically, in fact, a criminal complaint would be used where there was a real risk of flight, and the possibility of the defendant becoming aware that a grand jury was sitting in contemplation of an indictment, and fleeing the jurisdiction. And yet criminal complaints are now absolutely standard practice across a whole variety of cases, but in particular white collar cases, because (as Mr Burlingame hinted) they give the

prosecutor leverage over a defendant before any charges become formal, and this is an absolutely critical feature of the modern US criminal justice system, which is all about threat and bargain, and largely explains why so few cases ever make it to trial. It works as follows:

In a white collar case, the standard prosecutorial position is to allege a conspiracy, which by definition involves more than one person. Prosecutors do this for two reasons. The first is that having a co-operating witness for the prosecution is close to being a guarantee of conviction at trial, and defendants and their lawyers know it, irrespective of the merits of the case. The second reason, which is linked to the first, is that by alleging a conspiracy, the prosecutor can then engage in game theory, using what is called 'the prisoner's dilemma', which in effect means that they will approach a potential target, and offer him either immunity or a massively reduced sentence if he agrees to plead guilty to something and give evidence against others. But if he does not accept this, then they will move on to one of the others with the same proposition, such that the first person now becomes the hunted rather than the hunter.

And this is where the criminal complaint comes in handy. As an informal charge, it does not appear on any Federal statistics in the way that an indictment does (an indictment will have a specific Federal judge assigned to the case, and so becomes a statistic). So the prosecutor can use it as leverage to get the first witness to turn, because he can see a charging document, but the prosecutor is at liberty either to rip it up, or turn it into an indictment.

In reality, therefore, the criminal complaint is now a standard tool for prosecutors to coerce co-operation out of witnesses or potential defendants.

A criminal complaint has been used in many of the UK extradition cases. Our case began with a criminal complaint, but back in 2006 we had no idea as to how the game was played, and that what the prosecutors were really doing was sending us a message that they wanted our co-operation against Enron officers. Our failure to play by the prosecutors rules ensured that the one count complaint would be turned into a seven count indictment, therefore increasing the sentencing penalty from five to thirty five years.

A good example of how the flexible criminal complaint can be used was the case of Richard O'Dwyer, whose extradition was sought on allegations of copyright infringement. Because the case had never been indicted, Mr O'Dwyer's attorneys were able to negotiate a deferred prosecution agreement which saw him pay a sum of money and promise to be good, in return for which the charges against him would be withdrawn. This would have been significantly more difficult if the case had been indicted.

In the Libor fixing scandal, the man allegedly at the epicentre of the global conspiracy is an Englishman called Tom Hayes, who used to work for a Swiss bank in Tokyo trading Yen swaps. Mr Hayes was charged by the US in December 2012 using a criminal complaint. The SFO charged him in the UK shortly thereafter, causing no small angst in the corridors of the DoJ in Washington. Some two years later, the criminal complaint is still outstanding, and Mr Hayes has never been formally indicted.

Prosecutors use the threat of a multi-count indictment (and potentially hundreds of years in prison as a consequence of conviction) to secure plea bargains and co-operation agreements from people who may be entirely innocent. With a co-operating witness, potentially complex white collar cases (which are difficult to try because juries have trouble understanding voluminous documentary cases) become much simpler for prosecutors, because if forced to go to trial they will rely much more on their witness, who is primed to remember whatever suits the prosecution, and who will already have admitted his own 'culpability', thereby rendering them far more powerful as a witness.

The above is at least partially responsible for the plea bargain rate of over 97% in Federal cases, which knocks Stalinist Russia and China into a cocked hat. When Mr Burlingame told the Committee that prosecutors will only indict a case where they are sure of a conviction, I found myself agreeing with him, therefore, but perhaps not in the way that he would imagine.

The Committee should take note of the US prison statistics that show that the US incarcerates more people both in absolute terms (2.3 million) and per head of population (nearly 800 per 100,000) than any other country on earth. The US has roughly a quarter of the entire world's prisoners, despite having only five percent of its population.

To put it in perspective, if the UK were to incarcerate the same proportion of its population we would have half a million people in prison, as opposed to below ninety thousand which is the current historically high level of UK incarceration.

Once extradited, the overwhelming likelihood is that a UK citizen will be incarcerated in a Federal Detention Center. Mr Burlingame explained why this was the likely outcome and I agree with his analysis, particularly with respect to flight risk which tends to be determinative.

Federal Detention Centers are grim places which will ensure that the pressure to enter into a plea bargain is significantly increased, as if the pressures were not high enough already. Costs of taking a case to trial in a US court can run into millions of dollars, none of which is recoverable even if you are found not guilty.

The prosecutor holds all of the cards, therefore. He can negotiate a plea agreement that effectively locks in your sentence without any input from a judge (we entered into exactly such a plea agreement, over which the judge is just a rubber stamp). And if he is dealing with an extradited person, he has the ace card up his sleeve which is repatriation, because he has it within his power to stop any repatriation if a person goes to trial and loses. So a prosecutor will regularly tell a defendant that if he agrees to a plea bargain he will support early repatriation, and if he doesn't then he will seek the maximum sentence on conviction and oppose any application for repatriation, which will inevitably be determinative because of the way the process works.

To re-iterate, therefore. Our extradition arrangements expose our citizens to this system with absolutely no checks and balances whatsoever. It remains incomprehensible to me all these years later why successive Governments are willing to allow this, other than through a collective failure of moral courage.

I would finally observe this on the topic. If the Committee is minded to accept Mr Burlingame's testimony as to the evidential rigour that precedes a US charging decision, then it should surely be very straightforward for the US to provide sufficient of this evidence to satisfy a UK extradition court that there is a case to answer. It would produce no delay in the extradition proceedings because the timetable for Category 2 countries is the same whether they are required to produce evidence or not. Given that the US Constitution requires a probable cause hearing in such circumstances, I have always found it odd that the US is so against the concept of reciprocity.

The Forum Amendment

The forum bar recently incorporated into the Extradition Act 2003 is a dog's breakfast. It is extremely long, complicated, prescriptive as to what may be considered in the interests of justice, and horribly skewed against defendants. Mr Doobay's observations to the Committee on 8th July on his fears about the prosecutor's certificate were well founded in my view.

It is difficult to escape the conclusion that the Home Secretary, faced with a mountain of evidence that a forum bar was necessary (see for instance the March 2012 Report of the Home Affairs Select Committee) asked her civil servants to concoct something that would enable her to say she had dealt with the issue whilst in fact ensuring that the status quo would remain, allowing the US to extradite whoever it would wish to.

Attached as Appendix 2 hereto is the written submission that I made to the Home Affairs Committee in December 2011 on the subject matter, which was in effect a critique of the Baker Review on matters including but not limited to forum. I believe that the vast majority of the subject matter remains relevant to this Committee and I would urge the Committee to read this note, not least because the Home Affairs Select Committee seemed to agree with most of what is in it, and their recommendations in their report of March 2012 largely mirrored my own thoughts. Perhaps my biggest criticism of the Baker Review is that the panel did not take evidence from one single person who had either been the subject of extradition or involved in the defence of these people, or who defends criminal cases in the US. Their witnesses were almost exclusively Government and prosecutorial authority representatives, and this seems to have coloured their views very significantly on matters including forum.

What the Home Office has implemented by way of a forum bar now effectively enables a UK prosecutor to ensure that the court cannot have any deliberation on forum by presenting the magistrates court with a certificate. In theory, the matter can be challenged on appeal in the High Court, but since automatic appeal rights have also now been curtailed, the practical consequence of a prosecutor's certificate is likely to be that forum can never be discussed at all.

The lunacy of this provision is that the new provision runs to literally pages of legislation, when the provision that it replaced (which was never brought into effect) ran to eight lines, and the original proposal put forward by the Conservatives and Liberal Democrats in 2006 ran to just four lines.

Indeed, every single member of the current cabinet that was then in Parliament, including Prime Minister, Deputy Prime Minister, Attorney General and Home Secretary, together with the current Immigration Minister James Brokenshire MP, was involved in an attempt in 2006 to introduce an infinitely simpler forum bar, which would actually have had some meaningful impact.

Attached at Appendix 3 is an extract from the Commons Standing Committee Meeting of 28 March 2006, during the Passage of the Police & Justice Bill. The Conservatives and Liberal Democrats joined forces to try to introduce a forum bar which incorporated the simple presumption that if a trial *could* take place in the UK, then it *should* take place in the UK, and that it would be for the requesting state to demonstrate why extradition would be preferable. The wording of the entire clause was as follows:

> *If the conduct disclosed by the request was committed partly in the United Kingdom, the judge shall not order the extradition of the person unless it appears, in the light of all the circumstances, that it would be in the interests of justice that the person should be tried in the category [1 or 2] territory*

The proposed amendments were rejected at Committee stage by the Labour majority, and then again in the latter stages of the Bill, becoming highly contentious in October and November 2006 because the Lords insisted on the amendments and the Labour Majority in the Commons consistently rejected them. Eventually Mr Cameron ordered his Peers to abstain so that the Parliament Act would not have to be invoked, much to the disgust of the Liberal Democrats.

The Commons Hansard from 24 October and 6 November 2006 reveals that every single member of the current Cabinet that was then in Parliament voted in favour of the very simple forum formulation that appears above. It is puzzling as to why these same people should now be in favour of something so ludicrously complex that demonstrably provides no substantive protections whatsoever for defendants and constrains a judge in what he may consider as being in the interest of justice, even assuming that a prosecutor allows the judge to consider the matter at all.

Whilst early days, it seems unlikely that many if any cases will be defeated on forum grounds.

12 September 2014

Appendix 1

Home Office

International and Immigration Policy Group
2 Marsham Street
London SW1P 4DF

Tel: 020 7035 4848(switchboard)
www.homeoffice.gov.uk

David Bermingham

Our Ref: 32460

12 September 2014

Dear Mr Bermingham,

YOUR REQUEST FOR INFORMATION IN RELATION TO UK-US EXTRADITION

Thank you for your email of 31 July 2014, in which you ask for information regarding extradition between the UK and the US. Your request has been handled as a request for information under the Freedom of Information Act 2000 ("the Act"). I am sorry for the delay in replying.

We are able to disclose the information requested, which is set out in the enclosed annex.

If you are dissatisfied with this response you may request an independent internal review of our handling of your request by submitting a complaint within two months to the address below, quoting reference **32460**.

Information
Access Team
Home Office
Ground Floor, Seacole
Building 2 Marsham
Street
London SW1P 4DF

e-mail: info.access@homeoffice.gsi.gov.uk

As part of any internal review the Department's handling of your information request will be reassessed by colleagues who were not involved in providing you with this response. If you remain dissatisfied after this internal review, you would have a right of complaint

to the Information Commissioner as established by section 50 of the FoI Act.

If you ask for an internal review, it would be helpful if you could say why you are dissatisfied with the response.

Yours sincerely,

Amanda Shiels
International and Immigration Policy Group

Annex - Freedom of Information request from David Bermingham (reference 32460)

You have requested the following information:

1. Since 1 Jan 2004, how many requests have been made by the US for the extradition of persons from the UK?
2. Of the numbers in 1 above, above, how many of the persons whose extradition were requested were UK citizens?
3. Of the numbers in 1 above, how many of the persons whose extradition was requested were US citizens?
4. Since 1 Jan 2004, how many requests have been made by the UK for the extradition of persons from the US?
5. Of the numbers in 4 above, above, how many of the persons whose extradition were requested were UK citizens?
6. Of the numbers in 4 above, how many of the persons whose extradition was requested were US citizens?

Information

As a person's nationality has never been a bar to extradition between the UK and the US, the nationality of the person whose extradition was sought was not, before 2010, always recorded.

The information provided reflects this qualification.

Q1: Between 1 January 2004 and 30 June 2014, 173 extradition requests have been made by the US to the UK.
Q2: Of those 173 requests, there have been 73 requests from the US for the extradition of known UK citizens.
Q3: Of those 173 requests, there have been 40 requests from the US for the extradition of known US citizens.

Q4: Between 1 January 2004 and 30 June 2014, 65 extradition requests have been made

by the UK to the US.
Q5: Of those 65 requests, there have been 32 requests made to the US for the extradition of known UK citizens.
Q6: Of those 65 requests, there have been 10 requests made to the US for the extradition of known US citizens

The figures above include dual British and dual American nationals.

Please note that these figures do not include Scotland. The Home Office deals with extradition requests on behalf of England, Wales and Northern Ireland only. Scotland deals with its own extradition cases.

Appendix 2

Appendix 2 referred to written evidence submitted by David Bermingham to House of Commons Home Affairs Committee, *The US-UK Extradition Treaty* (20th Report, Session 2010-12, HC Paper 644)

Appendix 3

Appendix 3 referred to House of Commons Standing Committee D debate on 28 March 2006 (cols. 271-309) published online at http://www.publications.parliament.uk/pa/cm200506/cmstand/d/st060328/am/60328s03.htm

David Bermingham – Oral evidence (QQ 238 - 254)

Evidence Session No. 15 *Heard in Public* *Questions 238 - 254*

WEDNESDAY 21 JANUARY 2015

10.10 am

Members present

Lord Inglewood (Chairman)
Lord Brown of Eaton-under-Heywood
Lord Empey
Baroness Hamwee
Lord Hart of Chilton
Lord Henley
Lord Hussain
Baroness Jay of Paddington
Lord Jones
Lord Mackay of Drumadoon
Lord Rowlands CBE
Baroness Wilcox

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Examination of Witness

David Bermingham

Q238 The Chairman: Good morning, Mr Bermingham. Thank you for coming to talk to us. We appreciate your doing so. As I think I mentioned to you outside, we are interested in knowing your experience of and feelings about being extradited, at the time and since, and what happened subsequently in the United States. You have kindly given us quite a lot of written material. I am sure I speak for everybody by saying we have read that, except for the article you produced last night. It was a bit too late to get it to people in enough time to give them an opportunity to read it. I am sure they will do so. Normally we ask witnesses whether they would like to make an introductory statement. I do not know whether you think that is appropriate in your case.

David Bermingham: If you would not mind, Lord Chairman, I could give you 30 seconds.

The Chairman: If you could keep it concise, because we have quite a lot of questions, as I think you have been alerted to. Could you begin by saying who you are so that that goes on the record? We are obviously going to take a copy of your evidence.

David Bermingham: Yes, Lord Chairman. I am David Bermingham. Thank you very much for inviting me to speak today. As you mentioned, you have a large amount of material from me. My views on the subject of our extradition arrangements are well known and have been for the last 10 years or so. I have not moved one inch from them. I think it is a bad law. I understand that I am here today to talk about my personal experience. The significance of the article that I sent last night is that it is very easy in situations like this for a committee to say, "His evidence on this, that or the other is entirely self-serving". I accept that. What was wonderful about what I circulated last night—although obviously the Committee has not yet had the time to read it—is that it supports in almost every material detail what I have said about the workings of the US justice system, which is my bone of contention. It was written by a currently serving district judge in the Southern District of New York, who is genuinely appalled by the way their justice system has evolved over the last 20 years. I would like to leave that out there.

Q239 The Chairman: If I might get the ball rolling, at what point of the investigations against you was extradition raised as a possibility? What steps, if any, were made to tell you about the process and its implications? In parallel to that, did you take steps of your own, and if so what steps, to find out about extradition at this first point in the story?

David Bermingham: Our story is an interesting one because it spanned two different extradition systems. When we were originally charged, which was by way of a criminal complaint rather than indictment, we had no idea that this was coming. We had never been interviewed or talked to by any member of the US—

The Chairman: Sorry, were you charged while in America or in the UK?

David Bermingham: We were very much in the UK. To take half a step back, we had made what turned out to be an extraordinarily stupid decision to go to the Financial Services Authority and report our suspicions of a fraud at Enron in a transaction in which we had been involved. The FSA, with our concurrence, passed all those materials to the American authorities for them to look at. Nothing happened for nine months. The first thing we knew about it was waking up one morning and finding ourselves having been accused of fraud on the BBC "Breakfast" news. Now, the charges that were brought against us were an informal charge—a thing called a criminal complaint as distinct from an indictment. The difference is that it does not involve a grand jury. A prosecutor goes to a magistrate judge and says, "I think these people are very bad. Please sign this piece of paper". That is all that is required now to commence extradition proceedings.

The Chairman: When you say you that received the charge, did someone knock on your door in the middle of the night? Did it come through the post?

David Bermingham: No, it came on the BBC "Breakfast" news.

The Chairman: That was information about what was happening, but what happened to you? Did you get a letter?

David Bermingham: No.

The Chairman: Anything?

David Bermingham: No. The first thing I did, after alerting my wife to the fact that I had just been accused of fraud, was to ring our attorneys in London. We did not have any criminal attorneys; not for one moment had we ever contemplated being involved in any kind of criminal action. We had to hire attorneys because to go to the FSA we needed to be represented. It was a civil matter. I was starting from scratch. The very first thing I knew was that I had been charged with fraud, along with my two compatriots. We had to ring our

attorneys in London and say, “What the hell just happened?”. By the time I got to London at half past nine that morning, they had found the charging document online, which was an American criminal complaint, and the affidavit in support of that. There never was, and to this day never has been, any sort of proceeding against us in the UK. We were faced with an allegation from the US Government that we had committed fraud against our own bank in London. We sat with a bunch of lawyers in their offices in London who had no criminal expertise at all. Luckily, one of them said, “I need to get hold of an extradition expert, because they could be calling for your extradition this afternoon”. They very kindly got hold of Alun Jones QC, who had literally written the book on extradition. He sat down with us the following morning and explained that there was little or no chance of an extradition proceeding any time soon, and moreover that if the Americans wanted to extradite us on these charges they would effectively have to make out a case under the Theft Act.

The Chairman: Can I just stop you so we are absolutely clear on what happened? You heard about the issuing of the complaint in America in the way you described. At that point, you then advised your lawyers in the UK of what was going on. Had it got as far as being processed for extradition?

David Bermingham: No.

The Chairman: So they then said to you, “If this goes forward you may be susceptible to being extradited. It will be some time down the line and various processes will have to be gone through before that happens”.

David Bermingham: Correct.

The Chairman: At that point you were aware that it was a possibility, but there was no certainty about it and you were in receipt of your own legal advice at this end.

David Bermingham: Yes. To put that into a bit of context, at no stage were we given any kind of advice on extradition from the authorities here in the UK or any form of communication, one to one, from the authorities in the US.

The Chairman: Presumably at that point you had no interface with any kind of UK court system at all, or with any prosecutors of any sort in the UK.

David Bermingham: Correct.

Lord Hart of Chilton: Nor would the authorities here have anything to do with it either.

David Bermingham: No. In fact, we are still unique in British legal history for suing the Serious Fraud Office for refusing to investigate our case.

The Chairman: So this is the position you were in. What happened next?

David Bermingham: Then we had to engage US counsel. Our London lawyers found independent counsel. You are required under US law to be separately represented, which struck us as a humungous waste of money, because obviously we were all three joined at the hip. But they made the point, not unreasonably, that in the US system people have a habit of becoming unjoined at the hip relatively quickly when there are multiple defendants in one case. Each of us had to find a separate US law firm to represent us. These lawyers then got on a plane, came to the UK and said to us, "The first thing we need to do is talk to the prosecutors to find out what they really want".

The Chairman: The US prosecutors?

David Bermingham: Yes, exactly, bearing in mind there were no proceedings against us in the UK.

The Chairman: Lady Wilcox, do you want to continue eliciting the story?

Q240 Baroness Wilcox: My question, which you will have received, flows from that. A lot of what I was going to ask you is already in your written evidence. It is clear that you were

utterly confused. I would have been. Lord knows what you and your family would have felt at that time. I am interested in what information you were given as to how you were supposed to proceed. Were you given a piece of paper that said, "You will receive this and then you will do that", from either the United States or the United Kingdom?

David Bermingham: No, neither.

Baroness Wilcox: Nothing?

David Bermingham: No.

Baroness Wilcox: Did you ask for any?

David Bermingham: As I said, the US attorneys who we instructed came to London. We sat down with them and they said, "Procedurally, what we want to do now is to go and talk to the prosecutors in the US and find out what it is that they really want". That is what happened.

Baroness Wilcox: And that is all that happened at that stage?

David Bermingham: At that stage, yes.

Baroness Wilcox: And then going forward from that?

David Bermingham: Our UK legal advice from Alun Jones was that they were very unlikely to bring a case of extradition against us under the Extradition Act because they would need to make out a case under the Theft Act. Conspiracy, for instance, was not extraditable prior to 1 January 2004. The affidavit in support of the prosecutor's charges clearly made out what sounded like a common law conspiracy. He said, "Conspiracy is not extraditable. Therefore they'll have to make out a case under the Theft Act".

The Chairman: Can you give us some dates? When did this happen?

David Bermingham: Yes. This happened in June 2002.

Lord Rowlands CBE: So it predates the Extradition Act.

David Bermingham: It predates the Extradition Act 2003. Our advice was, "It's very unlikely they're going to come after you, because if it is hogwash, as you say it is, they're going to have to have evidence to support it. They're not going to be able to make it out". So we sat in legal limbo for 18 months until 1 January 2004, when the new Extradition Act came into force. Within a couple of weeks thereafter the Americans conveniently slipped in an extradition request.

Baroness Wilcox: Were you still working at this time? Were you employed? Was everybody retreating from you?

David Bermingham: They were running a mile. Frankly, I cannot blame them. I would have done exactly the same.

Baroness Wilcox: Yes, but were you and your family suffering financially?

David Bermingham: Yes and no. The short answer is that we were all self-employed at the time. We had ceased to be bankers.

Baroness Wilcox: That is fine, thank you.

Q241 Baroness Jay of Paddington: What has just been said probably answers my question. It seems to me that you obviously took enormous personal initiative, but I had thought, before you answered Lady Wilcox, that you were still employed and therefore you should have gone initially to your corporate employers.

David Bermingham: That was the biggest problem we had: because we were no longer employed there were no directors and no office insurance policy. There was nothing.

Baroness Jay of Paddington: No, but although, as you said, you were self-employed, did you still have a contractual relationship with the bank, which I imagine would have enabled you to ring them up and say, "For goodness sake, what's going on? Can I talk to the lawyers?"?

David Bermingham: No. Taking half a step back, when we first went to the Financial Services Authority in November 2001 to report our suspicions of a fraud, we were working for an

institution called the Royal Bank of Canada. We agreed with them that we would resign at that point. About six months previously they had been on the wrong end of an insider trader scandal in Canada. At this stage, Enron was all over the news on a daily basis—not as a criminal enterprise at that stage, just as a civil case. However, they did not want the reputational risk of being associated with an SEC investigation into Enron with three of their employees. By arrangement with the bank, we resigned. When all this blew up seven or eight months later, we were not working for a bank.

The Chairman: Just to be clear: when you made the complaint your employer asked you to resign.

David Bermingham: Yes, that would be the best way to put it.

The Chairman: I am not trying to put words in your mouth, I am just trying to get the story clear in our minds.

David Bermingham: Yes.

Q242 Lord Brown of Eaton-under-Heywood: When was the extradition request made?

David Bermingham: I think it was 12 February 2004.

Lord Brown of Eaton-under-Heywood: So that was just after the test had changed from one of prima facie evidence.

David Bermingham: Yes, so for 18 months nothing happened. Then pretty quickly thereafter when the law changed, they—

Lord Brown of Eaton-under-Heywood: Who were your London solicitors?

David Bermingham: Our problem was originally that they were McDermott Will & Emery, which is a big American firm with a large London presence, but they had no criminal expertise in the UK. We had to drop them and we took on a gentleman by the name of Mark

Spragg, who worked at the time for a company called Jeffrey Green Russell. He was a specialist in criminal and extradition work.

Lord Brown of Eaton-under-Heywood: When did you bring proceedings against the SFO?

David Bermingham: That would have been in 2005. The first thing we did was go to the Financial Services Authority. We said, "We don't know if you recall, but here's a taped and transcribed session where you congratulated us for coming forward, telling our story and giving you all these documents. Now, under the Financial Services and Markets Act you guys have enormous power to prosecute crime. We are three London bankers who live and work in the UK who are accused by a foreign Government of robbing our own bank in London. Don't you think you ought to take an interest in that, seeing as we brought you the materials that you gave to the SEC, which are now being used against us?". They put up their hands and said, "Sorry, it's nothing to do with us". Then we went to the Serious Fraud Office and said, "Look, we've been accused of a $7 million fraud here in London. Don't you think that's within your jurisdiction? You ought to take an interest". They said, "We're really sorry. It's got nothing to do with us". When they said that in writing we brought a judicial review against them for their refusal to investigate us.

The Chairman: This took place some time after the extradition request was submitted.

David Bermingham: Yes, correct.

Lord Rowlands CBE: You said that the initial application was not expected, is that right?

David Bermingham: Yes. The initial allegation and the affidavit made out a conspiracy. Conspiracy, prior to 1 January 2004, was not extraditable.

Lord Brown of Eaton-under-Heywood: What happened to your judicial review?

David Bermingham: It was heard in parallel by the same court that heard the appeal on our extradition proceedings. They dismissed it out of hand. They said that the Serious Fraud

Office had no statutory requirement to investigate a case; if they choose not to, it is up to them.

Lord Brown of Eaton-under-Heywood: So the Court of Appeal, at one and the same time, approved the extradition and rejected the judicial review challenge?

David Bermingham: Yes. They were separate hearings but in parallel.

The Chairman: From our point of view, one of the interesting things that we want to be absolutely clear about is that what you are telling us is that at no point during the extradition aspect of this was any information given to you, from either the US or UK authorities, about the implications of what all this entailed.

David Bermingham: No, not to the best of my knowledge.

The Chairman: So you had to rely on your own legal advisers.

David Bermingham: Yes. When the extradition request was served on us in February 2012 by arrangement or agreement with the Metropolitan Police, we turned up to be arrested at Charing Cross police station, where each of us was presented with a large binder full of the extradition materials that had been provided by the US to the UK to enable the warrant to be served.

The Chairman: To probe that a tiny bit further, the police then contacted you, or somebody prosecuted you—

David Bermingham: Yes, the extradition squad.

The Chairman: So they approached you or your lawyers and said, "We would like to arrest these guys. Will you make sure that they turn up at a particular time and place so we can do it?".

David Bermingham: Yes.

The Chairman: But it was not a case of somebody knocking on the door at two in the morning?

David Bermingham: No. One of the reasons for that was that in June 2002, when it first blew up, our lawyers had gone to the extradition squad of the Metropolitan Police and said, "Be aware, there's this. If an extradition request comes in, would you mind not knocking on the door at two in the morning? They will happily turn up to be arrested, pursuant to an extradition warrant. Just let us know when and where". Fair play to them, the extradition squad were good to their word.

The Chairman: How much warning did you get?

David Bermingham: A couple of days, I believe.

Lord Rowlands CBE: Did this big binder of information make a case against you?

David Bermingham: In a manner of speaking, yes. It was all affidavit stuff. Evidence was lacking, but the evidence did not need to be there.

The Chairman: Lord Mackay, I know that you want to come in at this stage of the questioning.

Lord Mackay of Drumadoon: Can I clarify one thing? Was it your London lawyer who spoke to the police and made arrangements for your detention?

David Bermingham: Yes, it was.

Lord Mackay of Drumadoon: Was he present when you were arrested?

David Bermingham: It was two different sets of lawyers. Originally, in June 2002, it was McDermott Will & Emery, so a lawyer from there made that arrangement. Eighteen months later, when the extradition came in, it was Mark Spragg.

Lord Mackay of Drumadoon: Was he present?

David Bermingham: Yes, he was.

Lord Mackay of Drumadoon: How long after you went through this procedure did you have the opportunity to discuss matters with your London lawyer?

David Bermingham: We were constantly discussing them.

Q243 Lord Mackay of Drumadoon: The question it has been suggested I might ask is on forum bar. I think you are familiar with the two statutory types of forum bar and the history of when one of them came into force.

David Bermingham: Yes.

Lord Mackay of Drumadoon: Looking back at what happened to you over a period of time, what is your reaction to this question: would the forum bar that is now in force in the United Kingdom have made any difference in the way your case unfolded, in your opinion?

David Bermingham: This is obviously a hypothetical question. The short and correct answer has to be that I have no idea because it is hypothetical. But in my view, there was absolutely no chance. The forum bar, as currently on the statute book, is a complete dog's breakfast. I have said as much. In particular, we came to the conclusion, during the course of what was a long and very public struggle against extradition, that there were forces at work that were going to damn well ensure that we were put on a plane. There was no doubt in our minds whatever.

Lord Mackay of Drumadoon: When you say "forces", were these forces based in the United Kingdom or the US?

David Bermingham: A combination of both, but yes. I am a great conspiracy theorist. The key thing with the forum bar as it is currently drafted, quite apart from the fact that it is about four pages long when four lines would have done, is there is in there the ability for a UK prosecutor to serve a certificate on the court that then becomes determinative. He can essentially say, "I've looked at this. We don't want to prosecute it, and therefore you, the magistrate, should order their extradition". Almost inevitably that would have happened to

us because we had already sued the Serious Fraud Office and said, "We want you to prosecute". We had been to all the prosecuting authorities. We had written to the DPP, the FSA, the SFO, and everybody just said, "Nothing to do with us". I am damn sure that a prosecutor in our case would have written that certificate. Of course, under the new law there are no longer automatic appeal rights. That would essentially have become determinative.

Lord Brown of Eaton-under-Heywood: That certificate is subject to appeal.

David Bermingham: It is, my Lord, but as I just said, under the new law there are no longer automatic appeal rights.

Lord Brown of Eaton-under-Heywood: We know that, but that is a different point entirely. In your case it would have been subject to an appeal.

David Bermingham: Sorry, I thought the question I was answering was "what would happen if you applied today's law to our case"? I suppose if we are just talking about forum and not automatic appeal rights, I would agree with you.

The Chairman: Just for clarification, because I was not clear from what you were saying, are you saying that the bodies that you invited to prosecute you—let us put it that way—did or did not properly consider the possibility of doing that?

David Bermingham: They all considered, but they refused to entertain the possibility of investigating it.

The Chairman: You are not saying that they came to that conclusion improperly?

David Bermingham: It is probably better that I do not, because I really do not know.

The Chairman: You can say what you like here. It does not matter. Tell us the truth as you see it.

David Bermingham: In my view, yes.

The Chairman: Right, fine, thank you. That is all I wanted to be clear about.

Q244 Lord Jones: The question I have been asked to put to you, hearing the distressing detail of your struggle, is: as the extradition process in this country moved forward, did you have any legal representation in the United States, and if you did to what extent was this of benefit to you?

David Bermingham: Yes, we did. In June 2002 when the charges were brought against us, and as I mentioned, we immediately got hold of some US lawyers, who talked to the prosecutor—it was a single prosecutor—who said, "The only basis on which I am interested in talking to these guys is if they waive their rights in extradition, come to America and enter a guilty plea". So that was a relatively short conversation. Thereafter, our US lawyers said, "Right. On the basis of that, I would do everything in your power not to come to America".

Lord Jones: Thank you.

David Bermingham: Might I go back to the last question, as I did not really give a complete answer on forum. You mentioned, my Lord, two statutory forum provisions. There were actually three. The third one is often forgotten, but never by me because I drafted it. I refer to it in my written evidence. Back in 2006, when we were simultaneously trying to avoid extradition and get the law changed, we drafted a forum amendment that was no more than four lines long. The difference between that and what ended up dormant on the statute book was that in ours the presumption was against extradition if the case could be heard in the UK. The philosophy behind that was very straightforward. The whole point about extradition is that the moment you put someone on a plane, you have effectively exercised summary judgment over them. They are going to be thrown into a hellhole prison somewhere. It may be a very long way away. They may have difficulty understanding the language. They are going to have difficulty with a foreign legal system. They are away from their home, their family. It is a terrible thing to happen. My view, and I am not anti

extradition, is that extradition should be akin to a last resort. It is absolutely imperative that the interests of justice are served, but do they necessarily have to be served in the first instance by carting people off in chains to the far side of the world? Answer: no. If a case could be heard here, we ought to think very carefully about the fact that, as a first priority, it ought to be. I do not think that is a radical proposition, not least because that is, in terms, the way the whole of the rest of the world behaves. If you are France, for instance, you will never put one of your own citizens on a plane to America, simply because he is French, and if you are Irish you will not put him on a plane to America if the case could be heard in Ireland. This is the point: no one is suggesting for one moment that a forum bar ought to prevent all extraditions. We are saying that it should be incumbent upon a requesting state to make the case as to why putting someone on a plane in chains to the far side of the world to be locked up in prison is better than the case being dealt with in the UK. I genuinely do not think that is a radical proposition, and the fact that so many parliamentarians over the years have refused point blank to recognise that does a massive disservice to our citizens. I am absolutely ashamed of the legislation that we have enacted, and continue to defend. All the Conservatives and Liberal Democrats, in opposition in 2006, tried jolly hard to put in place exactly the four-line forum bar that I have just set out.

Lord Henley: Was it your amendment?

David Bermingham: Yes, it was. It was taken up by the Conservatives. *Hansard* is clear on it. In fact, your Lordships' House kept batting it back to the House of Commons. Tony Blair parked his parliamentary majority on the lawn to ensure this would not happen. It was only because David Cameron had a case of utter moral cowardice, backed down and instructed his Peers at the third attempt to oppose no longer that we did not get it through. This House wanted it to go through by a substantial majority. It is a very straightforward proposition

that would have solved an awful lot of the issues that have been faced, were faced then, and are still faced today.

Lord Brown of Eaton-under-Heywood: We still have the interests of justice test. You set all this out in the penultimate page of your statement.

David Bermingham: Absolutely, but the difference is one of presumption, and while we pay lip service to that it is jolly important.

Lord Rowlands CBE: In fact, none of the UK authorities wanted to prosecute in any shape or form.

David Bermingham: They did not.

Lord Rowlands CBE: So the forum bar would not have done anything.

David Bermingham: On the contrary; if you had taken the Eurojust test, put it into the hands of a judge and said, "Where does this case belong?", he would have said, "It belongs in the UK". At that point, having said, "These guys are not going to get extradited to the US", the UK authorities might just have taken a different view.

The Chairman: The thing that is important to establish from our point of view is whether your US legal advisers were a help to you.

David Bermingham: Yes, there were a huge help, because they gave us an insight into how the system worked over there. It took us a long time fully to understand it, because being British we were all very much of the belief that if you had done nothing wrong, everything would be fine. It took a very long time and an awful lot of money for us to understand that that is not how the game is played in America.

Q245 Baroness Jay of Paddington: Obviously your main critique is of the American system, as you have just demonstrated, but you are also very critical of the British system.

David Bermingham: Completely. I am absolutely livid, in case that is not abundantly clear. I cannot believe that successive Governments—

Baroness Jay of Paddington: Leaving aside the politics, you are very critical of the legal system.

David Bermingham: I am sorry, do you mean the criminal justice system or the extradition system?

Baroness Jay of Paddington: You have talked quite vividly about the way in which you were handled, as it were, by the British criminal justice system.

David Bermingham: I know for a fact that they were leaned on. The Financial Services Authority and the Serious Fraud Office were told in no uncertain terms by the FBI, "We need these guys. Step away".

Lord Brown of Eaton-under-Heywood: Sorry, you were told in no uncertain terms by—

David Bermingham: They were told by the Federal Bureau of Investigation, who came to London by plane on 12 June 2006, visited the FSA and the SFO and told them to get out of the way because they needed us.

Lord Brown of Eaton-under-Heywood: Where is the evidence of this?

David Bermingham: I have been told by somebody whose name I cannot give you.

The Chairman: You talked earlier about extradition and people—I think I quote you accurately—being sent off in chains to America. Just so we are absolutely clear, when you went to America, were you in chains?

David Bermingham: No, I was not.

The Chairman: It is terribly important that we are absolutely clear about these things. Tell us about that.

David Bermingham: Here is the thing. We had probably the most delightful extradition you could ever have to America, and because we had become such political hot potatoes the Attorney-General here, Lord Goldsmith, personally contacted the Attorney-General in the US and said, "Give these guys bail", which had never been done before. We were delivered to the US marshals who came to take us on the plane at the elbow prior to the door to the plane at Gatwick Airport. The marshal said, "Under normal circumstances you guys would be in chains at this stage. However, we are not going to do that". Whether that was because someone had told them not to I do not know, but they made it absolutely clear that that would be the normal protocol. As soon as we arrived in the US, we were put in chains.

The Chairman: So you got on to the plane as you described, in your ordinary clothes, with the rest of the passengers.

David Bermingham: Most of the rest of the passengers were the UK press corps. It was rather extraordinary.

Lord Hart of Chilton: Did you travel first class?

David Bermingham: Regrettably we did not. We were very much at the back of the bus.

The Chairman: When you got to JFK, Newark, Washington, or wherever it was, what happened then?

David Bermingham: It was Houston, Texas. It was hotter than hell. When we arrived we were met by a wall of law enforcement. You could not have made this stuff up: there were guys with more badges and guns than you could shake a stick at. We were taken to the Immigration and Customs Enforcement department. We were put in our hand chains, foot chains, belts and everything else, strip-searched and then taken off to what we thought was the Federal Detention Center in downtown Houston. In fact, it turned out to be the federal courthouse. We were processed there. At this stage, we were expecting to be remanded

into custody in the Federal Detention Center when a representative of the US Attorney-General turned up in a very smart suit and said, "Guys, don't worry, everything's going to be fine". He took the marshals outside and loud voices ensued. The marshals then said, "We don't really know what's going on". They took us out of our chains, took us downstairs, put us into a couple of cars and drove us to the Marriott hotel, where they put us up in a room for the night prior to a bail hearing the following day.

Baroness Jay of Paddington: You said earlier, not in reply to the Chairman's question, that you were delivered to a "hellhole" prison.

David Bermingham: I have been in several hellhole prisons.

Baroness Jay of Paddington: As I say, we are trying to get the narrative straight.

David Bermingham: No, we were not then, absolutely. We had an extraordinary adventure, which I do not think anybody else has come close to having.

Lord Hart of Chilton: That is all thanks to Lord Goldsmith.

David Bermingham: I think it was down to the pressure on Tony Blair. For about a week prior to our extradition, if you look at the morning and afternoon daily press conferences with the Prime Minister, which is all online, you will see what was happening.

Lord Rowlands CBE: Were any assurances sought or given by the US authorities as to how you were going to be treated?

David Bermingham: No, we had made clear that we expected to be treated very badly. In that sense, they surprised us greatly. We were treated extremely well.

Lord Rowlands CBE: Neither the court nor anybody else sought assurances about how you were going to be treated?

David Bermingham: No.

Q246 The Chairman: Can I ask you briefly about the bail proceedings you referred to? I understand, from the story as I read it, that you were given bail.

David Bermingham: Yes.

The Chairman: Who provided the bail?

David Bermingham: What happens is that you go before a US magistrate judge for the bail hearing. Everyone was in uncharted water. The *United States Attorneys' Manual* requires that the US attorneys oppose bail. You have to make out a case as to why you should be granted bail. The problem was that we were not US citizens: we did not have green cards or anything like that. We had no social security numbers, we had no place of abode and no means of earning income. We would have failed every one of the tests. The US attorneys therefore did not oppose our bail because they had been instructed to do so by the US Attorney-General's office. The judge was then left in a quandary as to what to do. He rightly said, "If I release these guys, where are they going to go? They haven't got any homes to go to, they've got no money, they can't support themselves. They're not US citizens; they're effectively deportable aliens. I have to think about this". At that point my US lawyer, who I had met for the first time only an hour previously, stepped in and said, "Your honour, if it helps I will take them into my house", and he did.

The Chairman: So he dealt with the surety.

David Bermingham: Yes, he gave the judge the ability to let us go on bail. I think the judge was genuinely scratching his head—I do not blame him—about what he was going to do with us.

Lord Hart of Chilton: What other sureties had to be given? He gave surety because your lawyer was going to put you up.

David Bermingham: Yes. There was no monetary surety. It was a temporary arrangement pending a more detailed hearing the following week. For a week we lived with him.

The Chairman: All three of you together?

David Bermingham: All three of us; we lived in his house. We were subject to electronic monitoring. That day they put electronic monitors on us, which meant that we could not move outside a fairly narrow circumference. After a week, more formal bail conditions were put in place, by which time we had secured, through my lawyer, accommodation in various apartments, so we could demonstrate that we had somewhere to live. We were required by the US court to find work, which was relatively funny. We therefore satisfied the conditions. It was acknowledged by all as fairly extraordinary.

The Chairman: Who put the money up?

David Bermingham: We had to put it up.

The Chairman: Each of you put your own money up?

David Bermingham: Yes, so I had to put up $0.5 million in cash.

Q247 Lord Brown of Eaton-under-Heywood: Mr Bermingham, among other points you raised was an Article 8(2) defence, on the basis that extradition would interfere gravely with your family life and all the rest. Dare I mention this: it cannot surprise you that that aspect of your defence failed.

David Bermingham: Funnily enough, I am a born optimist, my Lord. It surprised me greatly. The reason for that, very simply, although I am not a lawyer, is that it was put to us by our lawyers that we had a strong case because Article 8 is a qualified right. It is inevitable that there would be an interference with our right to a family life because we were being carted off to the other side of the world. The question is: is it necessary and proportionate? In our case we said that it was not necessary or proportionate because the case could and should be heard in London. I did not think that was a particularly difficult concept. I do not blame

the judges—much as I would like to I cannot. They were deciding the case based on the law. Essentially, we were endeavouring to use Article 8 to put a forum provision in place, because it did not exist in the law. To this day I could tell you that it was not necessary, for the interests of justice to be served, to extradite us to America. If the Americans had wanted that case to be heard in the UK, all they had to do was say to the Serious Fraud Office, "Prosecute it". It is as simple as that.

Lord Brown of Eaton-under-Heywood: Really, therefore, you are running this defence very much in conjunction with the forum point.

David Bermingham: Yes.

Lord Brown of Eaton-under-Heywood: If it was right from a forum standpoint that you should stand trial in the States rather than in the UK, Article 8 cannot have tipped the balance against any prosecution at all.

David Bermingham: I agree. That is exactly why we ran it, though, because there was no forum provision.

Lord Brown of Eaton-under-Heywood: I do not know whether you are alive to the developments in the law following the case of HH: it is thought that the Article 8 defence now has an altogether better prospect of success. How far that is so perhaps remains to be seen, but do you think that you would be significantly better off today than you were then on an Article 8 defence basis?

David Bermingham: We would obviously be running a different or perhaps no Article 8 argument. Today you would be trying to run that argument under the forum provision. As I said earlier, I think we would fail on that. I honestly believe that the courts' interpretation of Article 8 is pretty draconian. Underpinning it very clearly in both Norris and HH is a very strong presumption that we must honour our extradition arrangements and that those take

priority over an individual's case or circumstances in all but the most exceptional cases. I genuinely do not take that view because, as I say, I think the whole framework that we have is flawed. It is completely out of kilter with all other countries, including America, most notably—they look after their own and will try cases locally before considering putting people on a plane. I think that is where we fail. While our analysis of Article 8 may be correct in terms of meshing it with European precedent, the whole framework is flawed. Within that, therefore, the Article 8 test is the wrong one.

Lord Rowlands CBE: You mentioned proportionality. That has been introduced in European arrest warrant cases, but they do not apply or extend to Article 8(2) cases. Should they apply to Part 2 cases? Secondly, would proportionality have been a defence in your case?

David Bermingham: No, I do not think it was. We were accused of a major fraud.

Lord Rowlands CBE: It was $7 million.

David Bermingham: Absolutely. I think the short answer is yes. There have been an awful lot of cases where you would say, "What on earth are we doing putting these people on a plane to America?". It would be great if the Part 2 countries had proportionality testing. The problem I have is how you would make that work in practice. As things stand, the court has to assess the affidavit that is in front of it: it is the charge, the narrative of the conduct. A prosecutor in America can draft whatever narrative he wants. If he knows that he has to meet a proportionality test, he will just draft the narrative that does. In practice, it would be a difficult one.

Q248 Lord Hart of Chilton: Your lawyers argued that you would receive an unfair trial in America. That was ruled against you. There are various aspects of the American system that we have had evidence on. I am particularly interested in plea bargaining. I would like you to describe what happened to you in relation to plea bargaining. How did it come about? What were the arguments? What happened to you in terms of making a decision, and so on?

David Bermingham: As I said, in the very first conversation between our US lawyers and the prosecutor in June 2002, he said, "The only basis on which I'm prepared to entertain a discussion with your clients is if they will waive their rights to an extradition, come to the UK, plead guilty to a potentially lesser offence and give evidence against other people". Of course, many years then passed. We got extradited and we set about endeavouring to defend our case. We were all separately advised and they were all very good lawyers. In fact, the lawyer of one of my co-defendants, Gary Mulgrew, was formerly a prosecutor in the Department of Justice. He had been the head of the fraud squad. He knew very well how the system worked. The plea bargain is always there for any defendant and it was always there for us. We made the best fist we could of endeavouring to defend this. As it transpired—

The Chairman: Can you explain how the plea bargaining occurred? Who said what to whom?

David Bermingham: I was going to come on to that, Lord Chairman. As it transpired, a cumulative series of things eventually led us to a decision to plea bargain. The first was that the trial was continually put back. We were living in a legal la-la land. Every day in Houston, Texas was a day out of our lives. It was not being credited against any sentence, should we end up being found guilty. We were spending an enormous amount of money. Every time they put the trial back another four months it was another four months of having to pay to be somewhere you did not want to be.

That was one thing. The other was that we tried desperately hard to get access to all the written materials that we wanted to conduct our defence, but also, more importantly, to witnesses from the UK. We had flagged this in the extradition proceedings. Because there were no proceedings against us in the UK when we were still here, we had no rights to

subpoena. We could not get any preparatory work done: we could not interview witnesses or get documents. It is only when you get to America that you can start to engage processes. To give you an analogy, someone once said—

The Chairman: Can I just stop you there for a moment? Is that because of the law or just the mechanics of it?

David Bermingham: Yes, it is the law.

The Chairman: You are saying that if you are outside the US jurisdiction, you cannot subpoena witnesses. Is that right?

David Bermingham: That is absolutely correct. We had no right to subpoena. When we got to the US we had rights of subpoena but only through the US system. Now we are endeavouring to subpoena witnesses who are in the UK through the US justice system. It is a bit like trying to wallpaper your house through the letterbox. We were endeavouring to engage a mutual legal assistance programme through a US district judge in a court in Houston, Texas. We failed miserably. All this is a matter of public record. We told them all the documents and the witnesses that we wanted, but we were entirely unable to get them. We never came close. At that point you are faced with, "We might really struggle to defend this case. If the trial is continually being put back, let us entertain the concept of a plea bargain". What actually happened, before we ever went to them, was that the prosecutors approached one of my co-defendants, Giles Darby. Giles was the person against whom there was minimal—that is the best way I can put it—evidence of any involvement but for the fact that the three of us were supposedly co-conspirators. They approached him with a view to him entering into a plea bargain, which would have been along the lines of him pleading guilty to something very, very minor, getting a slap on the wrist and getting sent home. The quid pro quo would be that he had to give evidence against us. Giles said no. The

prosecutors then moved on to me through our lawyers and made much the same advances to me, and I said no. Then they moved on to Gary.

The Chairman: Can you be slightly more precise about the nature of this process? The American prosecutors approached your lawyers. Trying to describe it in simple layman's language, neither in legal language nor necessarily in slang, what was the proposition?

David Bermingham: The proposition was that you, the defendant—me, in my case—are willing to plead guilty to something significantly less serious than was charged in the indictment. Much more importantly, you are also willing to give evidence against your co-conspirators.

The Chairman: Of what?

David Bermingham: Of the conspiracy that was charged.

The Chairman: Right. I think I am right in saying that there were seven charges against you.

David Bermingham: There were seven counts on the indictment. The original criminal complaint was one count of wire fraud. The indictment was seven counts of wire fraud.

The Chairman: And the offer was that all but one would be dropped.

David Bermingham: Yes, essentially.

Lord Hart of Chilton: Just for the record, how many witnesses did you seek to subpoena?

David Bermingham: Thirty-six.

Lord Hart of Chilton: And they were all rejected?

David Bermingham: Yes. It is not quite that simple. The vast majority of them were former or current employees of the Royal Bank of Scotland and had fallen under the umbrella of the Royal Bank of Scotland's legal advisers, who put themselves between us and those people and said, "They don't want to talk to you". Of course, that is determinative. If the US judge

had given the order that we sought, we could, through the mutual legal assistance treaty, have forced them to give evidence, which is what we were seeking to do.

The Chairman: Why did that not happen?

David Bermingham: Because the judge never made the order. He sat on it.

The Chairman: So he just ignored what you requested.

David Bermingham: Yes.

Lord Hart of Chilton: Please go on with the narrative of what happened.

David Bermingham: When I said no, they moved on to Gary, and Gary subsequently said no. At that stage, Gary's lawyer, who, as I say, had been the former prosecutor, said, "Right, if there is ever a good time, now is the time to go back to the prosecutors and say, 'We will entertain the prospect of a deal, but it is a deal for all three or a deal for none'". This was when the trial had been put back yet again, so we were facing a further six-month delay. That was a relatively short conversation, because they said, "Of course. If all three plead guilty, happiness, no trial, lovely jubbly". We then entered into a rather extraordinary series of negotiations, where for about two weeks we decided what the punishment would be, and after we had agreed on what it would be we then had to agree on what we had done that would support that level of punishment under US sentencing guidelines.

The Chairman: This was done on a prosecutor to defence basis without the involvement of any of the judiciary, was it not?

David Bermingham: Correct. The judge was presented, ultimately, with a take-it-or-leave-it piece of paper that said, "This is the sentence, this is what they've done, and we the prosecutors agree that by signing this piece of paper we will agree (a) to drop the rest of these charges and (b) to expedite their repatriation". That was the key thing: the prosecutors made it clear to us that if we signed a piece of paper saying that we had done

something wrong, not only would they not oppose but they would support and expedite a transfer home to the UK so that we could spend the majority of our sentence here.

Lord Hart of Chilton: So it was all part of the deal?

David Bermingham: It was all part of the deal. If, by contrast, we turned down the deal, went to trial and lost, they would ensure that we never got back. That was within their gift because of the way the prisoner transfer works.

Lord Hart of Chilton: And they said that to you, did they?

David Bermingham: Oh yes. They said exactly the same to Gary McKinnon in the US embassy here in London. This is exactly how it works. It is a very, very powerful weapon.

The Chairman: In the context of the circumstances in which this alleged fraud was supposed to have taken place, there were other—for want of a better way of putting it—co-conspirators who were Americans, were there not?

David Bermingham: Supposedly, yes.

The Chairman: What happened to them? How did their circumstances relate to yours? What was the impact on them of your pleading guilty, and vice versa?

David Bermingham: None at all. They had pleaded guilty to a litany of other offences way before us. We were kind of the last men standing.

Lord Brown of Eaton-under-Heywood: They had, in fact, incriminated you, or Kopper had.

David Bermingham: Michael Kopper. Yes he did, absolutely. Dear old Michael Kopper. No, Michael Kopper signed up to exactly the theory as part of his plea agreement. He was the smartest guy in the room.

The Chairman: Then there was a Mr Fastow, was there not?

David Bermingham: There was a Mr Fastow.

The Chairman: What happened to him?

David Bermingham: He was originally indicted on 98 counts. He ended up making a plea bargain—only after they charged his wife, I might add, which was kind of underhand. He pleaded guilty to two offences, and was sentenced to six years in prison.

The Chairman: What they said and did had no impact on your trial?

David Bermingham: No, not at all. In fact, oddly enough, Mr Fastow, from his prison cell, was required to go and give all kinds of civil depositions, which were supposed to be in camera but we got hold of the transcript of one of them. In that, he all but exonerated us, which was kind of funny, but we had already pleaded guilty by then. But such is life.

Q249 Baroness Jay of Paddington: On the point that Lord Hart raised about the witnesses in the UK who you said you could not access because the judge did not act appropriately, given that you obviously felt that they were very strong—and 36 of them is a formidable number—would it not have been better, given the legal circumstances, for your lawyers to have acted in trying to influence the judge on that rather than being involved in plea bargaining. Did they make the steps in the first instance before they started the plea bargaining negotiation? It seems a funny sort of lacuna.

David Bermingham: I am sorry if I am not clear on this. It will vary on a judge-by-judge basis. Jed Rakoff, who wrote the article in front of you, is at the other end of the spectrum. There are different judges in America. We had a judge who was known to be enormously pro-prosecution. It is just a fact of life; it is a lottery. One of the tools in a judge's armoury is to introduce delay into the process. That is what he did: he sat on it. We endeavoured to get him to respond to it but he did not.

Lord Rowlands CBE: Do you believe plea bargaining is utterly wrong, as a consequence?

David Bermingham: No. We have always had plea bargaining here, to a limited degree. My issue with the American system is that over the last 20 years it has got completely out of kilter because the prosecutor is now effectively judge, jury and executioner. The judge had

absolutely nothing to do with the plea bargain that we put in front of him, other than to agree with it.

The Chairman: Or to disagree with it.

David Bermingham: Or to disagree. If he disagreed the whole deal was off and we walked away. That is what happened with Mr Fastow's wife. They charged her. Her prosecutor put together a plea bargain, which was basically a slap on the wrist for her because that way they got Mr Fastow's co-operation. The judge said, "This is a complete and utter farrago. I'm not going to sign off on this", at which point all bets were off. The prosecutors had to go back and be very creative in their charging decision. They charged her with something completely different, such that the sentencing that the judge imposed would be so small.

Lord Rowlands CBE: Do you think what has happened to the plea bargaining system is now a justification for never extraditing to the States?

David Bermingham: No, not at all. Let me make clear: I am not anti-extradition or anti-American. I just think that we have to have checks and balances. We need to recognise that there are aspects of their system of plea bargaining that are anathema to us. There is a 97% plea bargain rate in the federal system in the US. That beats Stalinist Russia and China into a cocked hat. There has to be something wrong with that and there is. That is why I commend you to read the article by Judge Rakoff.

Q250 The Chairman: Can I go back to your own circumstances, when you were faced with what you described? When you decided to plead guilty you felt that the pressures were coming in on you. What exactly was the main driver of that decision? Was it the fact that you would get a reduced sentence? Was it the fact that the judge would not pursue the mutual legal assistance? Or was it frankly just the general length of time that this was taking and being spun out for and so on? What propelled you and your co-defendants to change your minds and say, "Okay"?

David Bermingham: It was a combination of all those things. The final straw was in August 2007. Our wives had come out during the summer holidays with the children. We learnt that day that the trial had been put back another six months. The wives just said, "Done. Forget it. Get out of here. Sign a piece of paper, do what you need to do". When you have, between us, 12 children and three wives—not each, obviously—that bears upon you, the human consequences of this.

Lord Hart of Chilton: So getting home was a very important factor?

David Bermingham: Absolutely. That was why it was important to us that the nature of the plea deal that we did took out the judge—we were not confident in him—and wrote in black and white that they were going to get us home and get us home fast.

Lord Brown of Eaton-under-Heywood: By the time you got to the sentencing process, you say that 37 months' imprisonment was already a fixed term?

David Bermingham: Yes, it was in the plea deal.

Lord Brown of Eaton-under-Heywood: In those circumstances, what are we to make of your co-accused saying to the sentencing judge that they regretted their lack of integrity, that they had no one to blame but themselves and deeply regretting involvement in the whole affair?

David Bermingham: I stand by everything we said. Just in case I am unclear on this, the conduct to which we pled guilty and the affidavit against which we pled guilty bore an uncanny resemblance to exactly what we said to the Financial Services Authority. I am not proud of what we did. We made a crass error of judgment in not telling the Royal Bank of Scotland what we had done. It was a spectacularly stupid thing to do. If somebody who had worked for me had done the same thing, I would have fired him on the spot. I am not proud

of what we did, but there is a very great difference between not being proud of some conduct and signing up to some cockamamie theory of massive criminal conspiracy.

Q251 Lord Hart of Chilton: You have frequently described prisons in America as "hellholes". You were not in a hellhole, were you?

David Bermingham: I was for a brief period of time, yes. Before you come back to the UK, if you are the subject of a prisoner transfer or if you are held on remand pre-trial you will be in the same kind of thing: you will be in a federal detention centre. The one through which you must come back, if you are transferred, is the Metropolitan Correctional Center in downtown Manhattan. The federal detention centres are all much of a muchness: they are multi-storey buildings with very little light, two to a cell. Statistically, you will be in with a drug dealer. They are not nice places. They are designed not to be nice places because it is all part of the process of ensuring that remand prisoners plead.

The Chairman: How long were you physically inside this place?

David Bermingham: I was in MCC only for a month. I went into prison in California first of all. I knew that I would have to stage out of New York.

The Chairman: What was the Californian one like?

David Bermingham: From my perspective it was marvellous. I had never been to California before and the weather was very nice. They build prisons over there in complexes. They build a high-security, a medium and a low, and they might have a prison camp, which is the minimum. If you are a foreigner you cannot go into an open prison: the Bureau of Prisons will not allow it. The best you will do is a low, which will typically have wire around the outside, but you get a fair degree of freedom during the day to walk around and exercise. Once you get into a medium or a high you get prison walls, so you cannot see the outside, and you are incarcerated in a cell a lot of the time. From my perspective, being incarcerated

in a room where there were 250 inmates in bunk beds two feet apart was not a bad place to be, oddly enough—I was in the army; to me it was a bit like basic training on steroids. It did not faze me greatly. The fact that I could move around and the weather was nice bear upon the time you will have there. It was low security.

In a federal prison, you are unlikely—unless you are a fool or a child molester—to be in great danger. They are almost all run along gang lines, so typically in California in any given prison 60% of the inmates will be Hispanics with English as a second language, 20% black and 20% white. The Hispanics and the black inmates will be organised along gang lines. If you are a white and not a child molester, you should be able to stay out of trouble; no one is going to go after you. My time there was fine. What they have, which I think we could learn a lot from in the UK, gives you an absolute incentive never to step half a pace across the line because they build prisons in these complexes. They have absolutely regimented rules. If you are in a low and you have a fair degree of freedom, you can see the medium over there and the high over there. You know full well that if you infract, as they would say, you would be over there or over there in five minutes flat and you know you do not want to be there.

The Chairman: How much of your time was in this low prison?

David Bermingham: I was there for five months. It took five months for my transfer to go through and then I began an odyssey through several other prisons. I wrote a book and I was going to talk about prison in a chapter called “Planes, Chains and Automobiles”. I did the prison bus thing and the prison plane thing—con air does exist. I eventually ended up in the Metropolitan Correctional Center in New York.

The Chairman: Were the ones you went to from the Californian prison “hellholes”, or were they more akin to the one in California.

David Bermingham: No, they are all horrible places. All the transit prisons are high security because they deal with all kinds of inmates.

The Chairman: Were you being transited deliberately towards New York?

David Bermingham: Yes, but in a roundabout way. For instance, I went variously to Oklahoma, then to Pennsylvania, which is quite close to New York, and from there down to Atlanta, which is not, and from there up to New York.

The Chairman: What length of time did all this take?

David Bermingham: That took two weeks.

The Chairman: Two weeks to go on this journey?

David Bermingham: Yes.

The Chairman: Then you were in New York.

David Bermingham: Then I was in New York. I was there for a month, because we had to wait for a magistrates' hearing. The transfer process has three stages. First, you have to apply for a transfer from within prison. You have to be in prison to make the transfer application. It goes through various desks on its way up to an office in Washington called the OEO, which is part of the International Prisoner Transfer Unit. They have absolute discretion over whether to say yea or nay. If they say no, there is no right of appeal and you must wait two years before you can submit another request. In our case, because it was written into the plea agreement that the prosecutor would support and expedite a transfer, we were relatively confident, although you can never be 100% sure, that they would say yes. They said yes. Once that has happened, then and only then are papers sent by the Office of International Affairs in Washington to what was the Home Office and is now the justice department here. The UK end of that process then clicks into gear. Really, that is all about: first, whether there was dual criminality in the thing of which he was convicted or pleaded

guilty to; secondly, whether he has a minimum six months left to serve once he is repatriated; and, thirdly, whether he is a UK citizen. It ought to take about five minutes. It regularly takes 10 to 12 weeks. Once that process has been gone through, then and only then will they move you to New York. Then you have to have a magistrates' hearing in which you put up your hand and say, "Yes, I understand all that I am giving up by leaving America and going back to the UK, and I want to do that".

The Chairman: In a sense, one of the important aspects of this episode is that you spent all the time that you were sentenced to be detained for in California. At the end of that period, in order to get out to go home, you then went through the other prisons.

David Bermingham: Yes, but I was going home to serve more time in UK prisons.

The Chairman: Absolutely, but still, that was the characteristic of it.

David Bermingham: That is it. Behind me is Christopher Tappin. He would be able to tell you at first hand about the hellhole he was in in the New Mexico desert. If you are extradited, the likely course of events is that you will first be put into a very unpleasant place immediately after extradition. We expected to be in that place in Houston but were not. Then you may or may not get bail; most people who are extradited do not. If you do not, you will spend all your time there until such time, statistically, as you make your plea bargain. When you have made your plea bargain, you have to wait several months before sentencing. When you have been sentenced, then and only then will they allocate you to a prison that is commensurate with your sentence and the nature of the offence. So there is a jolly good chance, if you are extradited, that you will spend most of your time in a very nasty place.

Lord Hart of Chilton: Up to the point of the plea bargain, what amount of time was counted as part of the sentence?

David Bermingham: None.

Lord Hart of Chilton: And after the plea bargain?

David Bermingham: None, until sentencing. Sorry, even that is wrong. The plea bargain was in November 2007. Sentencing was in February 2008. We were not told to report to prison until May 2008. Many people would say, and they would be right, that that last bit was entirely our fault, because we could have volunteered to walk straight into prison the moment we were sentenced—the moment the plea deal was agreed by the judge. The problem with doing that is that you will go into a hellhole, whereas if you wait until they tell you to report to a prison you will report to somewhere much nicer, which is what we did. So that was not until May 2008.

Lord Empey: Before I ask you the set question that I was going to ask you, Mr Bermingham, you are effectively saying that if you are extradited, whether you are innocent or guilty, at the end of the process you will effectively have conceded to some degree of guilt, whether you are guilty or not.

David Bermingham: Yes.

Lord Empey: You are quoting a statistic of 97% for that.

David Bermingham: Yes.

Lord Empey: You would argue that a certain percentage of those people in all probability could very well be innocent, but the practicalities of it are that it is not really possible, either because of a lack of knowledge, a lack of resources, family pressures, to have the type of trial that, in the latest paper that you circulated, would be the American ideal. That just does not happen.

David Bermingham: In practice, that is correct.

Q252 Lord Empey: Okay. Could I just take you to the situation back in the UK? Part of this sentence was served here. I understand the process of getting you eventually to New York, although I am bound to say that I do not know why you cannot go from California to New York, but anyway. What happened then when you got to this stage and you left the United States?

David Bermingham: It is exactly the reverse of extradition. You are handed to the UK marshals at JFK airport. We were on the apron of the runway, and there was a BA jet sitting above me. We had been delivered by the US marshals to the UK marshals. They then put you in handcuffs and take you back to the UK where you are processed through Wandsworth. You will spend a couple of weeks in Wandsworth while the UK determines what security classification to give you, and assuming that you are a category D prisoner, which is what happened to us, you will be assigned an open prison. We were then put on a bus and sent to Ford. I actually ended up in five different UK prisons, but my case was ever so slightly unusual. For the most part, you start in Wandsworth and end up somewhere else. That will be your lot.

Lord Empey: How much of the remainder of your sentence was it determined that you would serve?

David Bermingham: It is a specific formula. Under the Convention on the Transfer of Sentenced Persons, the UK has the ability to say, "If somebody is transferred back to serve a prison sentence in the UK, we can determine how much time they will spend". The other default position to which the UK has signed up is, "We will essentially enforce the sentence that has been mandated abroad". A calculation is done on the date of your departure from America. A piece of paper is given to the UK marshal by the US saying, "The original sentence was"—in our case, 37 months—"This man has physically served X number of months, and he also gets what is called good time credit". While there is no parole in the

federal system, there is potentially 15% good time credit. You are credited for days that you have not served. In our case, I had physically spent just over six months in prison. I was credited with seven months. Therefore 30 months of my sentence were unserved. What then happens is that those 30 months effectively become a new UK sentence of 30 months. It is as if you have been sentenced in the UK to 30 months' imprisonment. You get automatic release at the halfway point, at 15 months, and then the potential to be released early on a home detention curfew, as they call it—electronic tagging—135 days prior to that. That is exactly what happened with us. We came back, had 30 months to serve, actually spent ten and a half months in prison and a further four and a half months on a home detention curfew.

Lord Mackay of Drumadoon: Just one small point. When you were doing this tour of American prisons, were the three of you together the whole time?

David Bermingham: No, they always separate you. This is a very important point. In multi-defendant cases, they will never incarcerate defendants together, because there is a jolly good chance that one or other of them will turn on the others and end up murdering them. They always separate you; they will send you to different prisons. Giles was in Pennsylvania and Gary was in Texas.

Baroness Wilcox: Before we got started, I was keen on a question that Baroness Jay suggested she ask, and I still think it would be a good question to ask.

Baroness Jay of Paddington: You ask it.

Q253 Baroness Wilcox: It has been really interesting to hear what you have had to say from your own experience, which is the great thing for us today. The question I think Baroness Jay was going to ask if we had the time was: from everything that you have told us, what is the one thing that you want to do, the one thing that you want to change?

David Bermingham: I want to put a presumption into our extradition law that extradition should not be a first stop, in particular with respect to America. America stands out, not because I am anti-American, but simply because of the way prosecutors over there are now all-powerful and Americans regularly exercise exorbitant jurisdiction. They are criminalising the acts of people who have never set foot in their country, and they are asking us to put these people on a plane. The case that has perhaps most affected me over the last 10 years—and I have met many, many people and have helped to a small extent many, many people—is that of Babar Ahmad and Talha Ahsan. It is a stain on our legal system that those two men were put on a plane. I feel sick to my stomach about what happened to them, I really do.

The Chairman: Unless anybody else has any questions—

Q254 Lord Empey: Just one, if I may. You obviously do not have to answer this in any way, but I think some members of the Committee might be interested. There are financial aspects to this. Clearly you had access to your own resources, but very many people might not.

David Bermingham: Absolutely.

Lord Empey: Presumably between the three of you this must have cost a fortune.

David Bermingham: Yes.

Lord Empey: Had you not had those resources, presumably you would have ended up permanently incarcerated.

David Bermingham: That is a hypothetical question. I do not know. We were enormously well and very expensively advised, and we ended up paying an enormous amount of money back to the US Government. It was a horribly expensive adventure all round and not one that I would ever wish to repeat. Arguably, it was entirely our own fault, so I do not demur from that. However, it is undoubtedly the case that if you do not have significant financial resources, in America you gets what you pays for. The public defenders' offices over there

have very varying standards of people, many of whom are incredibly hardworking and very well meaning but are absolutely overburdened. God bless the public defender who Babar Ahmad and Talha Ahsan found. It is a very rare public defender who will not just say, "Too difficult. Here's the piece of paper. Just sign it now".

The Chairman: That is certainly a good moment to draw the evidence to a conclusion, so thank you very much indeed for having come to talk to us and tell us about things that happened to you.

David Bermingham: You are welcome.

William Bergstrom and Mariusz Wolkowicz – Oral evidence (QQ 255 - 263)

Evidence Session No. 16 *Heard in Public* *Questions 255 - 263*

WEDNESDAY 21 JANUARY 2015

1 pm

Members present

Lord Inglewood (Chairman)
Lord Brown of Eaton-under-Heywood
Lord Empey
Baroness Hamwee
Lord Hart of Chilton
Lord Henley
Lord Hussain
Baroness Jay of Paddington
Lord Jones
Lord Mackay of Drumadoon
Lord Rowlands CBE
Baroness Wilcox

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Examination of Witnesses

Mariusz Wolkowicz, and **William Bergstrom**, Solicitor, TV Edwards

Q255 The Chairman: I extend a welcome on behalf of the Committee to our two witnesses, Mariusz Wolkowicz and William Bergstrom—you are his solicitor and you are from TV Edwards.

William Bergstrom: That is correct. I am my Lord Chairman.

The Chairman: We are going to have translation.

Alex Nowak: That is from me.

The Chairman: That is you, yes. You would like us to speak in short chunks.

Alex Nowak: Please, yes, if you can.

The Chairman: As I explained to the witnesses outside, we are interested in hearing Mr Wolkowicz's experiences.

Mariusz Wolkowicz: Yes, I understand that, my Lord.

The Chairman: Please feel free, both of you, to say whatever you would like to tell us.

William Bergstrom: Thank you.

The Chairman: For the purpose of getting the record right, could you each introduce yourselves?

William Bergstrom: My name is William Bergstrom. I am a solicitor and I represented Mr Wolkowicz between 2011 and 2013 for his extradition proceedings.

Mariusz Wolkowicz: My name is Mariusz Wolkowicz. I am the object of this.

Q256 The Chairman: Yes, thank you. If I may, I will start with my first question to Mr Wolkowicz, which is: what information was given to you when you were first arrested on the European arrest warrant? Do you feel that you received sufficient information, and was it in the right format and at the right point in the process?

Mariusz Wolkowicz: I have no objection to the first meeting with the police, who handed me the European arrest warrant and practically transported me to London with the purpose of putting me in detention. I understood what the whole thing was about, but the issues about the arrest were explained to me by my solicitor, who I had the opportunity to meet on the first day of my detention.

The Chairman: Just so we are clear, did you have legal advice before you were arrested by the police or was it a solicitor who you acquired at that point?

Mariusz Wolkowicz: Not exactly. Basically when the police first stopped me I had a legal adviser. I had been in the police station only one day. The next day they took me to London and basically gave me a chance to take legal advice from my solicitor.

The Chairman: Mr Bergstrom, you were involved with Mr Wolkowicz's case right from the start?

William Bergstrom: I did not represent Mr Wolkowicz at the initial hearing, but one of my colleagues from my firm did. So from the point of the initial appearance at the court, Mr Wolkowicz had legal advice and representation.

The Chairman: Your firm was allocated to him, was it? How did it come about that you represented him?

William Bergstrom: I believe that my firm was allocated under the duty scheme. My colleague was acting as a duty solicitor at City of Westminster Magistrates' Court. That is how he came to meet Mr Wolkowicz.

The Chairman: You have been representing him ever since?

William Bergstrom: I have, yes.

Lord Rowlands CBE: Was the duty solicitor well versed in extradition issues?

William Bergstrom: He was. He was one of my colleagues from the firm at the time. He was very well experienced in extraditions.

Q257 Baroness Jay of Paddington: Mr Wolkowicz, has your case been handled with legal aid? I thought it had from what you said before, but perhaps you could tell us about that.

Mariusz Wolkowicz: To be honest, I have experience of the legal system in my own country. In comparison, I am really very satisfied with the system in the UK and what I experienced here. Despite the fact that I lost in my extradition proceedings, my solicitors were fantastic. They gave everything and I trusted them during the whole process. They visited me in prison. We prepared our line of defence together. I had no objections or problems with them at all.

Baroness Jay of Paddington: So you had no problems getting legal aid, financial aid?

Mariusz Wolkowicz: No, not at all, because they dealt with it in a professional manner.

Baroness Jay of Paddington: Did you also have lawyers working for you in Poland and legal representation in your own country?

Mariusz Wolkowicz: I wish I had. I wish the situation in our country was similar to here. I did not have anything like legal aid because our system does not provide for this sort of opportunity. If you have money and you can afford it you can hire a lawyer. Otherwise, there is no legal aid.

Q258 Lord Henley: Mr Wolkowicz, you are in a wheelchair and you obviously have severe medical concerns. You raised a number of medical considerations in your case. I was really just wondering how you felt those were dealt with by the United Kingdom courts.

Mariusz Wolkowicz: I have some reservations in this matter, not with the system itself but with the judge's approach to my medical problem. Despite many medical reports from medical specialists, not all aspects of my medical conditions were taken into account by the judge. While in detention in this country, when I had rehabilitation I was transported on a wheelchair. I was treated, I was taken care of. I had a chance then to stop using my wheelchair, to start walking again, but at the point of extradition that chance disappeared.

In Poland I experienced a nightmare. I could talk for a long time about my experiences in Poland, but I think it would be a better solution if I hand over my complaint to the Strasbourg tribunal about my treatment, in which you have a description of everything that happened to me from the first day of the extradition.

Lord Henley: I am anxious to hear about your experiences in the United Kingdom. You seem to be saying that the courts did not take those conditions sufficiently into account, but you think the system itself is okay and you were looked after right from detention.

Mariusz Wolkowicz: Maybe I was just unlucky or maybe the judge did not look into the problem with sufficient care or attention.

The Chairman: Can I ask a question to Mr Bergstrom? Is Mr Wolkowicz putting in evidence to this Committee his application that he has referred to the Strasbourg court?

William Bergstrom: He is, my Lord Chairman.

The Chairman: He wants to give it to us?

William Bergstrom: He does want to, yes.

The Chairman: Thank you.

Baroness Hamwee: This may be for Mr Bergstrom. Was expert evidence sought over the medical considerations? Was there any problem with getting legal aid to cover it?

William Bergstrom: Yes. We instructed various medical experts from different fields. The legal aid system worked particularly well in relation to that, so it was all publicly funded. On a positive note relating the way the UK court handled problems, we were allowed sufficient time to prepare the case and instruct experts.

Q259 Lord Brown of Eaton-under-Heywood: We have the judgment of the Divisional Court from 30 January 2013 following a hearing in December 2012. Can you confirm this chronology, Mr Bergstrom? Mr Wolkowicz came to this country in 2009, SOCA certified the warrant in August 2011, and the proceedings before Westminster magistrates' lasted for some 14 months until 15 October 2012, when the senior district judge gave judgment against you and ordered extradition. Is that right?

William Bergstrom: That is correct so far.

Lord Brown of Eaton-under-Heywood: He had heard from two basically competing specialists, Dr Pierzchniak and Dr Joseph, is that right?

William Bergstrom: That is right.

Lord Brown of Eaton-under-Heywood: The matter then goes on appeal to the Divisional Court, which has further medical evidence from Dr Rix, is that right?

William Bergstrom: That is right.

Lord Brown of Eaton-under-Heywood: He sees your client on 20 December of that year, which must have been just after the hearing date and before judgment.

William Bergstrom: That is correct.

Lord Brown of Eaton-under-Heywood: All this is set out in a lengthy judgment in the Divisional Court, which dealt at the same time with two other cases. Is that right?

William Bergstrom: That is right.

Lord Brown of Eaton-under-Heywood: At the Divisional Court, you had instructed counsel—all this, perfectly properly, on legal aid—David Josse QC and Ben Keith, from whom we have already had general evidence.

William Bergstrom: That is correct.

Lord Brown of Eaton-under-Heywood: The Divisional Court came to the conclusion that they had no basis for upsetting the judgment of the senior district judge on which medical evidence he preferred, but actually then said that even if they had they still regarded the Polish system as able to deal with the question of your client's health conditions.

William Bergstrom: Yes, that is correct.

Q260 Lord Hussain: What assurances were given by Poland and to what extent were you informed of the nature of the assurances?

Mariusz Wolkowicz: Poland gave assurances to me and to the judge in this country that I would have proper conditions for medical treatment in Poland, that I would have a cell that would be adjusted for the wheelchair and where I would be able to move around in a wheelchair, and that I would be able to use all the facilities available to other prisoners, such as using the common room, visiting church, this sort of stuff. However, the reality is that Poland cheated me and this country because none of the assurances has been kept. I have been moved from one prison to another like a rotten apple. The reality was that nobody was

able to take proper care of me because there were no proper conditions for that. In Polish prisons, there are no specialist physicians; there is only one general practitioner who is not a neurologist or urologist. I had to spend practically 24 hours a day in bed because I could not even go to the toilet in my wheelchair.

In Poland, like here, every prisoner has his rights, such as one hour's outside exercise or walk a day. There is a common room, and I have the opportunity or right to attend church services. I had practically nothing. I was deprived of those rights because of the wheelchair. The premises were on lots of different levels, with stairs. That is why the lawyers hired by my family sued the prisons for depriving me of my rights. That is why I was moved from one prison to another.

The biggest problem was my state of health. I have a permanent, chronic infection of my urinary tract. I often have urine retention problems and the prison doctors could not cope with it. Every time my condition deteriorated and threatened my life they were forced to call an ambulance and drive me to a local hospital to save my life. This happened dozens of times. During the year I had lots of instances of internal bleeding. Muscular wasting in my legs progressed much more than it had here. They moved me to all the possible prisons where supposedly there were proper conditions for me, but in reality nobody wanted me because I was constantly in a state that threatened my life. Despite my custodial sentence of 10 years, Polish authorities let me off.

Lord Rowlands CBE: How much longer did you have to spend in prison?

Mariusz Wolkowicz: Four years remain from my sentence, because the time I spent in prison here was included in my sentence in Poland, plus the 14 months I spent in prison recently. Poland seemed desperately to want me back; nobody knows why they wanted me back so much. They got me back but did not provide proper conditions for me, so they had

to release me. In practice, they damaged my health and took away my opportunities. Despite the fact that I am suing 10 prisons in Poland, I have started proceedings in the Strasburg tribunal, where the Helsinki Foundation sent their observers. I do not draw any satisfaction from all these legal proceedings because my family and life are here. I do not really care whether I win or lose those cases. I appreciate the British mentality and logic. Poland is 50 years behind the UK as far as the penal system and people's attitudes are concerned. If my health is to improve, my chances are better here. I have been here for six or eight months. I have had advice from several specialists, medical visits and so on.

Q261 The Chairman: I wanted to ask two things. Can you talk very simply through what physically happened to you from the time the Divisional Court said that you had to go back to Poland and the moment you arrived there?

Mariusz Wolkowicz: It might be better for William to talk about it. What happened is also in this document.

The Chairman: Very concisely, you were in the court room, and the police then took you where? What happened?

William Bergstrom: First, my Lord, there were further legal applications to avoid Mr Wolkowicz's extradition. In fact, it did not take place until March 2013.

The Chairman: Was he in detention at that stage?

William Bergstrom: He was. He was at HM Prison Leeds.

The Chairman: Had he sought bail or did he decide not to?

William Bergstrom: Overall, during the proceedings he sought bail between 10 and 15 times, but the applications were refused. He was remanded in custody and then removed from the United Kingdom.

The Chairman: Can you tell us about the process of removal? Was he taken to an airport?

William Bergstrom: Yes.

The Chairman: What happened next? Was he handcuffed?

William Bergstrom: My understanding is that the United Kingdom police took him to the airport and handed him over to the Polish authorities. He was then taken in a military plane to Poland. My understanding from Mr Wolkowicz—he can obviously tell you about this—is that he experienced some problems during the transport to Poland.

The Chairman: Does he want to, briefly?

Lord Rowlands CBE: Could you remind the Committee what offences the Polish authorities wanted to charge him with?

Lord Brown of Eaton-under-Heywood: Is it right that he got 16 years imprisonment for a variety of offences: burglary, forgery, theft, assault, robbery, escaping from custody and so forth?

William Bergstrom: Yes

Lord Brown of Eaton-under-Heywood: He had nine years at least still to serve at the time when he was the subject of the arrest warrant.

William Bergstrom: That is fairly accurate.

Lord Brown of Eaton-under-Heywood: Did he go back to Poland in March 2013?

William Bergstrom: I cannot recall.

Lord Brown of Eaton-under-Heywood: I thought somebody said March. What proceedings did he take after the Divisional Court rejected his appeal? Did he try to petition for leave?

William Bergstrom: Following the rejection of the appeal we made an application for leave to appeal to the Supreme Court on points of law.

Lord Brown of Eaton-under-Heywood: That was rejected, and then out he went.

William Bergstrom: Indeed. My recollection is that Poland requested an extension for the removal process.

Lord Brown of Eaton-under-Heywood: Okay, so he leaves apparently in March 2013. When is he eventually released from prison in Poland in 2014? What month?

William Bergstrom: My recollection is that it was May or June.

Lord Brown of Eaton-under-Heywood: So he spent just over a year in prison or in several prisons in Poland on his return, is that right? How many different prisons?

Mariusz Wolkowicz: Ten.

Lord Brown of Eaton-under-Heywood: When did he instruct his lawyer in Poland? He told us that he did so.

Mariusz Wolkowicz: Yes I have. The lawyers took proceedings against the prison authorities in Poland.

Lord Brown of Eaton-under-Heywood: When?

Mariusz Wolkowicz: From the very beginning.

Lord Brown of Eaton-under-Heywood: So they were monitoring the extent to which the Polish authorities complied with their assurances?

Mariusz Wolkowicz: Yes, from the very beginning, from the time I was put into my first prison, when my wheelchair would not even fit into my cell.

Lord Brown of Eaton-under-Heywood: The various lawyers were aware of that and were taking it up with the authorities?

Mariusz Wolkowicz: Yes, and there is documentation to support that.

Lord Brown of Eaton-under-Heywood: After he returned to Poland, did he have any contact with his English solicitor, Mr Bergstrom?

Mariusz Wolkowicz: I was thinking about getting in touch with Mr Bergstrom again to ask him for help.

Lord Brown of Eaton-under-Heywood: I did not ask whether he was thinking about it. I will ask you, Mr Bergstrom: did you have any further contact with your client after he left for Poland?

William Bergstrom: Not until towards the end of 2013. Mr Wolkowicz's Polish lawyer contacted me and explained the difficulties that he was experiencing, and in relation to other legal matters.

Lord Brown of Eaton-under-Heywood: Did you tell him of the assurance that had been obtained from the Polish authorities as a condition of extradition?

William Bergstrom: Indeed I did, I beg your pardon. During 2013, one of Mr Wolkowicz's lawyers contacted me and asked for copies of the assurances, which I forwarded to them.

Lord Brown of Eaton-under-Heywood: When was that, roughly?

William Bergstrom: Off the top of my head, during summertime in 2013.

Lord Brown of Eaton-under-Heywood: So within two or three months after he returned to Poland?

William Bergstrom: Yes.

Lord Rowlands CBE: So your experience of these assurances was that they were pretty meaningless?

William Bergstrom: Yes, that is correct.

Lord Rowlands CBE: Is that your experience in other cases you have dealt with?

William Bergstrom: I cannot say that that is my experience.

Lord Rowlands CBE: I want to know whether this is a very specific case or whether it is true of other cases.

William Bergstrom: It is not, in my experience, common. These assurances are obviously formal promises by foreign authorities. The expectation is that they are honoured. There are

other cases where we have had problems with assurances being kept by certain authorities, but I would not say that it is a common problem.

Lord Hart of Chilton: But here we have a case where a wheelchair does not even fit into a cell on day one, he is frequently being transported off to hospital and he is in locations that are architecturally split in such a way that his wheelchair does not allow him to move from floor to floor. There are lawyers who are aware of all this. Who are they making their protests to to get the assurances met?

Mariusz Wolkowicz: In the first instance they would appeal to the management of the prisons I was kept in. If nothing changed, the next step would be to appeal to the penitentiary judge, who has responsibility for the prison. I met those judges quite often. Still nothing happened. Nothing changed because it could not change: in Poland we do not have a prison like the prison in Leeds, which is suitable for a wheelchair. So the judge could not send me anywhere because there was nowhere to send me.

Lord Hart of Chilton: Presumably there was a record of each of the protests made about the assurances not being kept.

Mariusz Wolkowicz: Yes. We even have documentation about proceedings in courts.

Baroness Jay of Paddington: Is this in the record of the appeal to Strasbourg that we are going to see?

Mariusz Wolkowicz: The proceedings in Poland are civil cases for abuse and violation of my rights. They are separate from the complaint to the Strasbourg tribunal.

Lord Brown of Eaton-under-Heywood: So you have domestic proceedings in Poland against the Polish authorities and an application to the human rights court in Strasbourg. Is that application only against Poland, or is it also against the United Kingdom?

Mariusz Wolkowicz: The application in Strasburg is only against Poland.

Q262 Lord Empey: Earlier, Mr Wolkowicz mentioned difficulties when he was being transported by the Polish authorities after he was handed over at the airport. Are those concerns in the documentation? Can he elaborate on them now?

Mariusz Wolkowicz: I was in shock. I was taken to the airport by British policemen and the old Polish plane, a military-type CASA plane, arrived. It dates from the Second World War. There was a ramp, on which I was lifted by four Polish policemen. They dropped me from the ramp. It was very steep. I have evidence for that because I was X-rayed after that accident. I was then taken from that airport to the hospital, where they took care of me. I returned the next day, but the flight did take place because the engine caught fire. Fortunately, we were still on the ground, not in the air.

The next day, inside the plane the seats were different from on a normal plane. It was more or less like how we are sitting here. The policemen wanted to tie my wheelchair to the walls of the plane where the luggage was, because we were sitting in the luggage department. So they tied the wheelchair up and then the captain arrived. He said, "He cannot sit here, because all this luggage is going to fly together with him. Please move him and sit him next to the other prisoners". I protested, because I had a certificate from an English doctor saying that I could be transported, but only on the wheelchair without being taken off it. They took me by force. I was hit several times on my chest because I was resisting, but they dragged me by force to this armchair. They tied me up there in every possible way.

Lord Rowlands CBE: Was the plane carrying other prisoners being extradited to Poland?

Mariusz Wolkowicz: Yes, there were other prisoners, but I had assurances that the transport would be suitable for someone who was wheelchair-bound and not only for those other prisoners, but they wanted to move me together with the healthy prisoners. That is how I was transported to Poland.

Q263 The Chairman: Just two quick points please: you mentioned that your family helped you to get the lawyers in Poland. Is that correct?

Mariusz Wolkowicz: Yes.

The Chairman: Is that because they had some money or because they had contacts?

Mariusz Wolkowicz: Only because we had money, my Lord.

The Chairman: If you had not had any family, would you have been able to contact lawyers in Poland to pursue your case.

Mariusz Wolkowicz: No. No chance.

The Chairman: No chance?

Mariusz Wolkowicz: Nobody would take this case because it was a case against the prison, against the system. Nobody wanted to take my case.

The Chairman: If you had not had family, you would not have been able to respond to the circumstances you were in.

Mariusz Wolkowicz: Yes. This would have been the finish for me.

The Chairman: The other point is a separate point before we move on. Bearing in mind that it must have been obvious to anybody who thought about it that your wheelchair could not fit in a cell, are you arguing in Strasbourg that you were given assurances by the Polish Government in bad faith? Are you saying that deliberately misled the UK?

Mariusz Wolkowicz: They acted on purpose. The court in Białystok was determined to get me back to Poland, with the full knowledge that they did not have the conditions to put me in their prisons. When I got off that military plane when I was taken to Poland, even the car that arrived to take me to prison was not suitable for a wheelchair; it was a normal police car. I had to get off the wheelchair and crawl on my knees to the police car. In the UK, every time I went to the court or elsewhere I had transport suitable for the wheelchair. In Poland,

when they had information that someone was arriving on a wheelchair they did not do anything to provide me with suitable transport.

The Chairman: Are you suggesting that there was some sort of vendetta against you from the Polish authorities?

Mariusz Wolkowicz: To tell the truth, I mentioned that possibility to William—Mr Bergstrom—but he told me that maybe it was better not to mention that. When I was young I broke into the flat of a judge in Białystok. From that moment, all my family had to emigrate or move out of my town. This particular judge wanted to damage me.

The Chairman: Thank you. Lord Empey, do you have anything you want to add?

Lord Empey: Very briefly: once you were returned to Poland, what responsibility do you think the UK Government had in your case?

Mariusz Wolkowicz: I knew that at the moment I transferred to Poland the UK Government lost their responsibility towards me. I knew what would happen. Maybe I had illusions that some of the assurances might be partly respected. But the very first day after I landed and went to prison, and they took away my wheelchair and four other prisoners carried me to the third floor, I was already in shock: how could they carry me like that, without proper training, to the third floor? How was I to go for a walk every day from the third floor? There was no lift. I knew what awaited me in that prison. Nobody normal would put a prisoner in a wheelchair on the third floor in a prison building; they would put me on the ground floor, like I was housed here.

The Chairman: Does any other member of the Committee have any further questions they would like to put to either of our witnesses? Is there anything you would like to say to us in conclusion, Mr Wolkowicz and Mr Bergstrom?

William Bergstrom: A couple of questions were asked about whether the application to the European Court of Human Rights contains details of what has happened to Mr Wolkowicz. It does. It summarises what occurred during the transport from the United Kingdom to Poland. It also gives detail about the lack of treatment and the bad time that Mr Wolkowicz had in prison. It also summarises the applications that were made to the various authorities and courts in Poland to improve his situation.

The Chairman: Fine. Thank you very much for that. I thank the two of you, and Mr Novak, very much. Without your help we would have been here for quite some time. We are very grateful for what you have done to help us. Thank you each of you.

William Bergstrom – Written evidence (EXL0093)

The Lord Inglewood
Chairman
Committee Office
House of Lords

By e-mail only

WBM/WBM/NON1/24

13 February 2015

Re: Select Committee on Extradition Law – evidence of Mariusz Wolkowicz

Dear Lord Chairman,

During the evidence session with Mr Wolkowicz we made reference to the assurances provided by the Polish authorities and to Mr Wolkowicz's application to the European Court of Human Rights ('ECtHR'). It may be useful to the Committee to have the text of the assurances:

"*In response to your letter dated 19 January 2012 concerning Mariusz Wolkowicz, wanted under a European Arrest Warrant, the Regional Court III in Bialystok informs as follows:*

Prison inmates in Poland have guaranteed medical care. There are outpatient clinics at the correctional institutions with medical doctors of various specialisms on duty. In case it is found that the medical condition of any convict makes it impossible for him to continue serving his sentence, the Court grants him a furlough until the impediment to serving his sentence has ceased. It should be emphasized that the health status of inmates is under constant supervision, and in case any such need arises, all necessary measure against any possible threats to their lives or health are undertaken"

The Committee may also find it useful to note the text of the judgement of the Polish Court of 7th May 2014 that resulted in the release of Mr Wolkowicz in order to obtain medical treatment and which confirms the concerns of the Polish authorities about their ability to care for him adequately. This order to release him was not granted by the Polish Court on its

own motion, but following numerous applications and appeals against refusals of such applications, lodged by Mr Wolkowicz' Polish lawyer. The order states the following:

"*The sentenced Mariusz Wołkowicz gave as a reason for his request to grant him prison leave, his poor health in connection with the serious spinał injury as a result of which he is moving on a wheel chair, as well as a disease of the urinary tract. Out of the opinion about the health condition submitted by the Penitentiary Institution of Przytuły Stare results that with the sentenced, Mariusz Wołkowicz there was found the state after the broken vertebra L3, paraplegia, sphincter dysfunction and urethral stricture. In conclusion of the opinion of the state of health it was found that the sentenced cannot be treated in the conditions of prison. From such point of view results that further staying of the sentenced under the conditions of the penitentiary institution may pose a threat to his life or cause serious danger to his health. Considering the above mentioned the Court concluded that there are grounds of granting prison leave towards the sentenced, Mariusz Wołkowicz in serving the penalty of deprivation of liberty under Art 153 § 1 of the Executive Penal Code*."

As mentioned in the evidence session, Mr Wolkowicz has made an application to the ECtHR. The principal points raised in his application are the following:

a) Whether the military aircraft which transported the applicant to Poland on 15 March 2013 adapted to the needs of disabled persons?
b) Whether the applicant was subjected to inhuman or degrading treatment by the Polish officials during his transfer to Poland on 14 and 15 March 2013, in breach of Article 3 of the Convention?
c) Has there been a breach of Article 3 of the Convention on account of the inadequate conditions of the applicant's detention in Polish prisons having regard to the nature of the applicant's disability and his special needs?
d) Whether there been a breach of Article 3 of the Convention on account of the alleged deficiencies in the quality of care provided to the applicant in detention?

It may also be useful for the Committee to note the judgment of the European Court of Human Rights in D.G. v Poland (Application no. 45705/07), referred to in Mr Wolkowicz' application to the ECtHR, which features strikingly similar facts to the case of Mr Wolkowicz, of a disabled prisoner in Poland whose Convention rights were breached whilst detained in Polish prisons in similar circumstances.

Should you require any further information I will happily assist in any way I can.

Yours sincerely

William Bergstrom
Solicitor
For and on behalf of TV Edwards LLP

13 February 2015

Jodie Blackstock, Michael Evans, Graham Mitchell and Julia O'Dwyer – Oral Evidence (QQ 172-190)

Evidence Session No. 11 *Heard in Public* *Questions 172 - 190*

WEDNESDAY 26 NOVEMBER 2014

10.10 am

Witnesses: Jodie Blackstock, Michael Evans, Graham Mitchell and Julia O'DwyerMembers present

Lord Inglewood (Chairman)
Lord Brown of Eaton-under-Heywood
Lord Empey
Baroness Hamwee
Lord Hart of Chilton
Lord Henley
Lord Hussain
Baroness Jay of Paddington
Lord Jones
Lord Mackay of Drumadoon
Lord Rowlands
Baroness Wilcox

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Examination of Witnesses

Jodie Blackstock, Director of Criminal and EU Justice Policy, JUSTICE, **Michael Evans**, Extradition Manager, Kaim Todner Solicitors Ltd, **Graham Mitchell** and **Julia O'Dwyer**

Q172 The Chairman: Can I extend a warm welcome to you all and introduce you to the rest of the Committee. First of all, we have Jodie Blackstock who is from JUSTICE. Secondly, we have Michael Evans who is from Kaim Todner Solicitors. Thirdly, we have Graham Mitchell who, as the note tells us, had a very unhappy experience in Portugal. Fourthly, we have Julia O'Dwyer who is Richard O'Dwyer's mother.

We have a series of questions for you and please, each of you, do not feel that you necessarily need respond to all of them, because some of them may not touch on your experience and knowledge of the extradition system. Please feel free to say as much or as

little in response. If you think we are not quite asking the right question, please then interject and tell us what you think we should have asked and what the answer is. What we are here to do is to try to find out—for want of a better way of putting it—the truth behind the system, and so please feel relaxed about the replies you give.

I will start with a general question. Before I do that, if each of you could formally introduce yourselves by name—that is for the benefit of the transcript—and then if you have any absolutely burning issue you want to raise at the outset, as an opening statement, please feel free to do so but keep it concise to a couple of minutes. You will probably find, having seen the kind of questions we are going to ask you, that most of the points will be covered by them. If I could I will start by asking Jodie Blackstock to begin.

Jodie Blackstock: Thank you, my Lord Chairman. I am Jodie Blackstock. I am the Director of Criminal and EU Justice Policy at the law reform organisation JUSTICE.

Michael Evans: Thank you, my Lord Chairman. I am Michael Evans from Kaim Todner Solicitors. I am the Extradition Department Manager. My practice is defence, but I am obviously here to give impartial evidence.

Graham Mitchell: I am Graham Mitchell. Twenty years ago I was wrongfully arrested while on holiday in Portugal. I was cleared of that offence. Two years ago I was arrested on a European Arrest Warrant and charged with murder.

Julia O'Dwyer: Thank you, my Lord Chairman. I am Julia O'Dwyer, mother of Richard O'Dwyer who was threatened with extradition to America in 2011.

Q173 The Chairman: Thank you very much. I will go on to the first of our series of questions. We have heard evidence that the sheer anxiety of waiting for extradition proceedings to conclude is very severe. I would be interested to hear from each of you, from your own perspectives of the way the system works, whether you feel that is a fair comment. Perhaps we can start with Graham Mitchell.

Graham Mitchell: What happened with me was it was a perfectly normal evening. I was sitting indoors with my family. There was a knock at the door and the Serious and Organised Crime Squad, as it was then, entered and said, "We have got a warrant for you for the crime of first degree murder, which you committed in Portugal". Obviously it came as a massive shock. My wife was aware of it but my two children were not aware of it. They obviously went into shock; I went into shock. You just do not know what to do. You are taken from it being a normal run of the mill day and then suddenly, bang, you have something like that on

you. It was 17 or 18 years previously when the original thing had happened. You try your best to forget about it. I suffered from post-traumatic stress disorder and depression as a result of the original offence—the original acquittal rather. Since the European Arrest Warrant I have gone back to square one.

The Chairman: Thank you. Mrs O'Dwyer, what are your experiences in this context?

Julia O'Dwyer: I would describe that initial period when this happens—because it always comes out of the blue, by the nature of serving an extradition warrant, totally unexpected—as sheer terror. When it happened with my son he was already reporting to bail, as requested by the British police who had seen him six months previously and allegedly were investigating a prosecution in this country. He went to report in London to bail and an officer came and said that all the criminal charges in the UK had been dropped. So we had a brief sigh of relief, but then in the next sentence he said, "But here we have an extradition warrant for America instead" and it was like, "What? What is that about?" It was unbelievable.

Richard was taken immediately to the court. There was no explanation. No information was given, not a leaflet about, "This is what is happening", even just something to read. You are waiting around then to go in front of the court and the Westminster court is full of people being extradited. I went into the court waiting for Richard to come in and saw the judge then rubberstamping everybody off. They were mainly eastern European people being extradited to their own home country, which is a bit different from being extradited to somewhere that is not your home country and that you have never been to. So it was frightening for me to observe all these other people being told, "Yes, come back next week. Get into a van at the back of the court and you will be taken to the airport". I just thought, "Oh, my goodness, that is going to be happening to Richard in a few minutes". So that was terrifying at that point. That was the most terrifying day that I can remember, the first day when it happened.

The rest of the time was less frightening because I was working on exploring whatever avenues there might be, researching about the Extradition Act and getting help, getting lawyers and things sorted out. But, yes, I think that was the most immediately terrifying part.

Then it is frightening. As you go through the legal processes, you see it is less and less likely that you are going to win and that your son is going to be extradited, which I said in my statement that I was not going to be letting happen if I could avoid it.

The Chairman: Jodie Blackstock, what do you think?

Jodie Blackstock: Naturally I have not been through this process and I do not directly litigate these cases, like Mike does, so I do not have that direct contact with clients. But I suppose what I can say from a step back is that extradition proceedings are a heightened form of arrest. Of course the police will not consult in the process usually towards arrest with individuals in this country, and that is just compounded in an extradition scenario because the—

The Chairman: Can you say exactly what you mean by "this is compounded in an extradition scenario"?

Jodie Blackstock: The conversation about whether to arrest or not is one that takes place between the issuing and executing authorities. There is no room at that point for involvement of the affected person. It is slightly different sometimes in—

The Chairman: It is not the case in any arrest, is it? My understanding is if you are arrested you are arrested.

Jodie Blackstock: That is the point I am making, other than perhaps in the white collar fraud types of cases where there is sometimes information in advance that gets to the affected person because of the nature of that work. There may be an investigation, for example, of a particular business, so perhaps a person is on notice. The majority of cases, particularly in the extradition field that we are talking about, are as our other witnesses have described. It is a knock on the door and that is the first you hear about it.

The other aspect of it is the waiting after that, and in fact in part 1 cases there may not be that much waiting. It may be very swift, and there are problems with that swiftness. The aim of the framework decision is to have a speedy return and it may be for some people that they are not even able to get legal representation in time. They may not understand the process if they are not familiar with the English language, and so forth. They find themselves in the court with the process you saw of effectively being rubberstamped through from their perspective, and put on a plane and sent home when the proceedings then begin against them. So there is a balance between those two extremes I suppose.

The Chairman: Mr Evans, do you have any thoughts on this, please?

Michael Evans: Yes. Obviously my evidence is anecdotal. It is based on experiences through clients, what I see at Westminster Magistrates' Court and what I see and hear through my clients. I agree that to an extent there is an issue with the sheer anxiety that comes out of the length of the extradition proceedings—the wait until they conclude—I think more important is the anxiety that arises—and I would say unnecessarily—out of the fear and the expectation of what waits on the other side. I think that is more important, from what I see about where the anxiety comes from. Not about how long the proceedings take to extradite but that it is almost inevitable in most cases and what is going to happen when you get to the other side.

Q174 The Chairman: Particularly for the last two of you at this point, it has been suggested to us that if you find yourself in this predicament it may well be better voluntarily to return to the place where the charge is being brought rather than fight the extradition procedure. Do you have any thoughts about that?

Michael Evans: For me it is completely case by case and person by person, and I note you say return home. There are a lot of people who are facing extradition to a country they do not speak the language of, that they have never been to, that they were perhaps on holiday once in, and that is it. They have no ties with it. It might be a situation where if you are talking about a very minor crime and there is going to be no custody, it might well be the case that you might be better off to go but—I think we might be coming on to it later in this session—I would not advise someone to just go blind. I would never advise someone to consent. I have advised many people not to contest. Those are different things.

You would want to look at likely penalties, likely sentences, not full maximum sentences, and you would want to talk to a lawyer in the other state because you can, with dual representation, solve many problems and avoid extradition.

Jodie Blackstock: I would add to that from the experiences I had conducting our report in 2012, and the two years before that, that voluntary return is perhaps more useful in other countries where there is a land border; it is easy to return and perhaps it is only an hour across the border. It works well in the context of an agreement between defence lawyer in the issuing state and prosecutor in that state. So this is where dual representation applies, and we will speak to that in detail I think in a later question. That arrangement is such that the prosecutor or the court is able to agree for a hearing to take place—it might be before an investigating judge and it is certainly at a preliminary stage—following which the person

can then return home. Home in this context is the requesting state. It may be that that can be done in the course of a matter of hours, so that it is not necessary to resort to an arrest warrant.

I think this is where we say repeatedly that it is a draconian measure and there are lesser measures that could be looked at before resorting to the arrest warrant. But the reality is that this is the most effective method for police officers and courts across the European Union at least, and perhaps worldwide, to deal with the problem of prosecuting crime. It is a swift and sudden mechanism, rather than using letters, regulatory and mutual legal assistance.

The Chairman: Before we go on, do you want to say more? Mr Mitchell, you stood trial in Portugal. Is there anything you would like to say about that before we go on to Lady Hamwee?

Graham Mitchell: The public in general tend to accept that the legal system—and the quality of the law for that matter—in all countries is similar to what we have in this country. From my point of view, nothing could be further from the truth. My case and my acquittal were filmed by BBC "Panorama". During the course of the filming the prosecuting judge was found at the bench sound asleep. The whole witness circle—if you would like to call it that—from the police officers involved to the two supposed witnesses gave evidence. Only since the European Arrest Warrant has been dropped, for want of a better word, there was a civil procedure instigated by a solicitor in Germany for the victim. New evidence came to light in the paperwork that was served regarding the—

The Chairman: Can I interject one question here? Is it right that you did not have proper legal representation in the circumstances of your problem?

Graham Mitchell: Originally or during the European Arrest Warrant?

The Chairman: During the first phase when you first were in Portugal.

Graham Mitchell: At the beginning, no. Towards the end, yes. We were held on remand for a year without any trial, without any charge.

The Chairman: Did you have any legal representation?

Graham Mitchell: Yes.

The Chairman: Was it satisfactory?

Graham Mitchell: Yes, but it was arranged privately.

Baroness Hamwee: I want to follow up the point Mrs O'Dwyer made about a leaflet, and it is a question for Mr Evans. Without for a moment impugning your ability to explain things to your clients, from your experience would a leaflet be useful explaining the principles of extradition, or is one situation so different from another that a leaflet could be more unhelpful than helpful?

Michael Evans: I think a leaflet—and I have seen other sessions here where a video has been suggested—is an excellent idea and I would not say there was a single thing wrong with it. A video would have to be very carefully drafted or scripted. I send to every client at the beginning of the case not just a standard file-opening letter but a six-page letter. It is a standard letter, so as and when you get a new language you can have it translated. It explains the procedure, the structure of the Extradition Act and what stages the judge will go through, that they have a right of appeal and then how to appeal and what addresses—

The Chairman: Will you send us a copy, please?

Michael Evans: Yes. I might have to update it first.

Jodie Blackstock: The directive from the right to information, which came into force in June last year, requires Member States to provide a letter of rights, not only in domestic cases but in EAW cases as well. So this is something that we should already be doing, and it should be available at the police station for people who are arrested on a European Arrest Warrant. I have not seen that. I know that the Police and Criminal Evidence Act codes of practice were updated for domestic cases, largely in a way that we at JUSTICE believe is compliant, although there are some teething aspects of it. But certainly on the issue of European Arrest Warrants there is not, as far as I am aware, a dedicated leaflet.

Baroness Jay of Paddington: Can I ask a practical follow-up to that? Are you suggesting that it should be the responsibility of the police to hand this leaflet if the leaflet was available, because Mr Evans' helpful letter would not be available until he had been brought into the case?

Jodie Blackstock: No, indeed. It is already the responsibility of the police to give the notice of rights and entitlements to people who are arrested domestically on domestic charges, which has been agreed in association with the Law Society, is published by the Home Office and available on the Home Office website in multiple languages. So it would not be too much effort to do exactly the same in European Arrest Warrant cases.

Q175 Lord Rowlands: The process is draconian and Mr Rees-Mogg, the Member of Parliament who gave evidence to this Committee a couple of weeks back, passionately argued that the European Arrest Warrant cuts across the fundamental rights of habeas corpus. Do witnesses agree?

Jodie Blackstock: In my view extradition is a legitimate process, so long as it follows the rules that are in place between whichever treaty is in place, or Act of Parliament that is in place, and of course we have the part 1 and part 2 arrangement and bilateral arrangements. If they are followed then it serves a legitimate purpose and it would be difficult to find it in breach of habeas corpus. But it is ensuring that the procedural safeguards surrounding it apply appropriately and the procedural safeguards available are appropriate to mitigate the impact of it. I imagine anyone who is arrested anywhere feels it is a draconian process and, as I say, it is just compounded in the extradition scenario because of the language barrier and the lack of knowledge about, as Mike says, where you are going and what you are going to. But I am not sure I could agree to say that it in itself breaches habeas corpus

Julia O'Dwyer: Can I go back to the point about information in a leaflet at the time of being served an extradition warrant? This happens suddenly, as I have described. In my son's case, he said the extradition warrant was just wafted in front of his eyes, so nothing was given to him to read. Then, when you go to the Magistrates' Court for the first time, you do not have a lawyer and a legal team. You have a duty solicitor, and so you do not know anything about your case because at that point there is no case. You are completely in the dark and so is the duty solicitor who turns up to represent you, although they will be an expert in extradition. So there is a gap and, until you leave the court, go home and start doing your research for yourself, you may know very little.

When I say a leaflet—and I have already drafted a leaflet as well—I think it is a simple leaflet explaining, "This is what is happening to you, this is what you need to do and what can be done", in basic language so that anybody in the country can understand it, not full of legal jargon. Then there might be some contact numbers on it to enable them to start looking for what help it is they need in the first instance.

Q176 Lord Mackay of Drumadoon: May I ask two questions, which are not unrelated to what you have been saying so far? We will take them separately, but just to alert you to that. To what extent, from your respective experiences, do you feel that the reason why a

prosecution has been brought in one jurisdiction rather than another is a transparent decision and one that is open to challenge? Perhaps you would like to begin, Mr Evans.

Michael Evans: The issue of prosecution decisions, as to where the prosecution takes place, happens and is decided well before we become involved. When we become involved that person is a requested person who, by the legitimate aim of the Act, therefore must be ready for trial in terms of accusation. Essentially these decisions must have been made already, so it is very difficult to challenge it.

Lord Mackay of Drumadoon: At the first stage is it transparent and obvious to you, as an experienced practitioner, what the reason for the decision was?

Michael Evans: No. We would not be given those reasons straight off. You could ask for them and it depends. The CPS may give you those reasons, the requesting state may give you those reasons, but equally they do not have to.

Lord Mackay of Drumadoon: As far as challenging it, you say there is really no means of challenging it at that stage?

Michael Evans: I once challenged, by way of judicial review, a refusal to prosecute, which is rather interesting as a defence practitioner. I took the Metropolitan Police for failure to investigate and the DPP for failure to charge to judicial review. It was an Argentinean extradition request about importation of drugs. A signed statement was given and it really could have taken place. But on legal advice–the judge said quite rightly—we did have to drop it. It was more than an uphill struggle and you just would not be able to challenge it in that sense.

Jodie Blackstock: I can perhaps comment in a European context on the available legislation that covers it. We have a Council of Europe treaty and a European convention on mutual legal assistance that, although they do not expressly deal with the issue of conflicts of jurisdiction, are the mechanisms by which a conversation is had as to which country is the appropriate country for prosecution.

That context is supposed to take into account the Eurojust Guidelines 2003 on which is the most appropriate country. Those guidelines state within them that they have to take account of human rights considerations but they do not go as far as to say due process considerations, which in my view would be incorporating the view of the suspect. It is very difficult to do that of course, naturally, in an arrest context, an investigatory stage context, but when you are considering the best place to prosecute someone—one of the

considerations that you must take into account is where the suspect is and where the majority of the criminal activity took place—one might think that the representations that could be made by the suspect were necessary to comply with due process rules.

The scenario that we have at the moment across the world does not incorporate that stage. In the legislation that might be used to do that in Europe, which is a framework decision on the conflicts of jurisdiction, there is not one on the list of 35 that the UK is going to opt back into, so it is not something that we could use. I should say that that legislation does not provide for this expressly either, but again it does say it has to comply with Article 6 of the Treaty on the European Union and, therefore, the Charter of Fundamental Rights. I imagine from a defence perspective we would start to incorporate due process into that instrument, but we will not have it in December, unfortunately.

Lord Mackay of Drumadoon: Mrs O'Dwyer, is there anything you would like to say on that?

Julia O'Dwyer: I do strongly feel that extradition in some cases has been treated as the first rather than the last resort. Generally the public would think that extradition is a tool used to return fugitives to the scene of a crime in a country that they have fled away from. As you know, we have had people who have been requested to be extradited to America who have never set foot in that country. Other people have alluded to this in their evidence, that America has lots of money to spend on prosecuting cases, and sometimes I think that the CPS just leave it to them because they have the resources. In my son's case we had a letter from the then DPP—our lawyer questioned whether the prosecution guidelines had been followed, because there are guidelines for prosecutors in cases of concurrent jurisdiction—who said, more or less, "We only use those for the serious cases". So I question: then why are they using extradition for a non-serious case in the first instance?

We were also told towards the end of proceedings, by the prosecutor from America, that Richard had been invited previously to America to sort out this matter. I am not sure that an extradition warrant would be regarded as an invitation, but certainly we had no other invitation.

Lord Mackay of Drumadoon: No, not one you would RSVP to.

Julia O'Dwyer: I can say that because all of Richard's mail came to the home address at that time because he was in university and he had changed his address every year. I would know if there was an invitation because I was opening the mail, and there was not. So I am assuming that they thought the extradition warrant was the invitation.

Lord Mackay of Drumadoon: Mr Mitchell, is there anything that you would want to add?

Graham Mitchell: In my case I was branded a fugitive from justice, someone who had supposedly been living under the radar for 17 years in this country. They said that they had served several attempts to get me to return to Portugal, none of which I had ever received or had any knowledge of.

Q177 Lord Mackay of Drumadoon: Can we move on to the next question I have to ask you? Our Committee has heard that the Crown Prosecution Service will pursue a domestic prosecution if it is in the public interest, even if this prejudices another state's prosecution. To what extent do you agree that that happens and that it should happen?

Michael Evans: All I would say is that the Crown Prosecution Service can tell you how many times and what those cases are, and should do if they are relying on the fact that they do so often or it is their policy to. The point is that these decisions are made well before the extradition request comes along and we are not party to those decisions. It might well be that if they have made that decision to prosecute here then an extradition request does not come. There may have been discussions beforehand. But, as I say, we are not party to them. They certainly should be able to give you precise figures on how many cases that has happened in.

Jodie Blackstock: I have nothing to add to that.

Lord Mackay of Drumadoon: Do you have anything you wish to add?

Julia O'Dwyer: Not to that, no.

Q178 Lord Hart of Chilton: We have had a lot of evidence about the differences between the approaches of the United States and the United Kingdom. In the United States, the prosecutor who approaches his job with a great deal of zeal, often having come from a major law firm and this is part of his career pattern, in fact has the complete power to direct proceedings. He can go to a grand jury and he can ask it to issue subpoenas to gather evidence. In this country it is totally different because the CPS comments and makes suggestions on the police investigation, but it is a rather different approach from that in America. Do you have any comments on what you have seen in action?

Michael Evans: I think I would agree that the American approach is very different. My experience of it again only comes through what clients have told me once they have gone there and the way you see the extradition proceedings progress. They do not like giving you all the information. They like to wait until their hand is forced. In a recent US case for a

husband and wife we started to argue, and it looked realistic, that Article 8 was in play with one of them, that the evidence against the wife was lacking. It is only then that they come out with a further statement. So once you are there, I suppose the way that they deal with you is very different.

In my view, they use extradition as a bargaining tool with you and also extradition to the US forms part of the punishment. The punishment should not exist until there is any sort of sentence imposed and any finding of guilt, whereas it really does because you are being taken somewhere where you do not have any actual guarantee that you are ever coming home. When you get there, as the couple I am talking about found out, the prosecution suddenly say, "You fought extradition" and that is what they use to block your bail in the United States. Essentially, what that means is, "You used your legal rights in your home country. You did not disappear. You did not run off. You did not hide. You were on bail. You have now been extradited. Oh, you are a risk of flight because you fought extradition. You did not want to come here".

In my view they are very different and they are over-zealous. You have to remember that these are the people who decide to investigate and then decide whether or not to apply for extradition. I would say it is one person, who is often an elected official, making all of the decisions really on a political basis of, "Look at me, I am tough on crime and I will sort them. I take no nonsense". It is wrong that all that power should be vested in one body. Just like in Europe we say it must be judge to judge, it must be a judicial authority that looks at this. It is not the case in America. It is a government-to-government request. But, unfortunately, all the power lies in one person and I do not think that is fair.

Lord Rowlands: Mr Evans, you acted in the Eileen Clark case; is that right?

Michael Evans: I did up until Liberty took over.

Lord Rowlands: The Committee was interested in an interview by Mr Clark in the *Independent*. Have you any thoughts or observations about the case? That was quite a high profile case.

Michael Evans: Eileen Clark is American but she had lived here for a very long time. The simple fact is that she was extradited, she was jailed and then eventually she was bailed to a bail hostel, but the prosecution did not want her out. From what I have read in the *Independent* newspaper, she agreed to plead guilty in exchange for no jail time,

unsupervised probation and the ability to fly straight back home. It is a complete and utter waste of the court time that was used here and a wrongfully used extradition process.

If it really is the case that the total sum of her criminality is viewed in the sense that she should never set foot in jail, then she does not meet the criteria for extradition. But when they threaten, "You will be in jail for X amount of years" and that is all they need to say to the UK, then it is a different story when the judge is looking at it because he does not have what the reality is, what the real sentence is going to be. I think anyone, when faced with the possibility of going to jail in the US for a very long time or agreeing to plead to this but serve no jail time and go straight home, would be a fool not to.

Q179 Lord Jones: This question is about specialist legal advice. The Committee has heard evidence, in regard to the European Arrest Warrant, that the most effective way to stop extradition is for the requested person to have a lawyer in the requesting state. Does that reflect your experience?

Graham Mitchell: Absolutely. It was exactly my experience. I was lucky enough to have had the help of Fair Trials Abroad, originally in Portugal. I told my wife to get in touch with them. She did, and through that process we were given a specialist extradition lawyer in this country who in turn arranged for a similar thing in Portugal.

Julia O'Dwyer: Although my son's case was not under the European Arrest Warrant, I think the same can be applied with the US cases because that certainly did help us to sort the matter out with my son. We were not made aware of the need for that. We had a lawyer in America who would do the report about prison conditions and so on, but we did not go further than that. So a lot of the information I got about possible remedies and ways to stop this extradition came from a person who had been extradited, David Bermingham, one of the NatWest Three. He advised me from nearly day one on how to go about stopping the extradition, so it was on his advice that eventually we did seek a specialist. Actually, the specialist lawyer in America approached us. We did not need to go looking for one. So it was beneficial and that was very helpful in helping us to sort matters out. But I have to say that the most priceless support and information came from David Bermingham, because he had a lot of experience and knowledge of the way the US system worked. We followed his advice and we had the best outcome that we could have had, thanks to him.

Jodie Blackstock: I would say that dual representation—namely, having a lawyer in both countries, or indeed wider than that if another country is involved—is essential in

extradition cases. When a warrant comes through the lawyer who receives it—like Mike, who is extremely specialised in this area, but I do not know that he would suggest that he knows everything about Romanian law or the law of any other of the 27 Member States of the EU—needs to verify every assertion in that warrant as to the appropriate sentence for an offence, the appropriateness of the arrest in the circumstances, the passage of time, the statute of limitation issues. All of those things need to be verified by someone who knows the law in the issuing state. You then have your client's instructions. They may well assert all sorts of things, if they are from that country, as to problems in that country and their concerns about what they face. I imagine every single person does who is faced with an arrest warrant from that country but, as the lawyer in the executing state, you have no knowledge about whether any of those things are true.

What you see consistently across all of the cases in these courts, where people are arguing against extradition, is that they have to have sufficient evidence to do so. It is not enough to go before a court and assert a problem exists without having sufficient evidence to back it up and particularly on human rights grounds. There has to be clear and cogent evidence of a very high threshold to establish a human rights issue. That cannot be established without the assistance of someone with expert knowledge in the country. It does not have to be an extradition lawyer but it does have to be a criminal lawyer who is regularly undertaking criminal cases and can point you in the right direction of the appropriate academic experts as well. This is the finding that we made in our 2013 report from looking at cases across Europe, and I imagine you can extrapolate that to the world in general.

The deficiency at the moment is the lack of a functioning network of defence lawyers, particularly in the European Union. It is something that has been called for for some time, but the nature of defence work is that you have individual practices and each individual creates their own network. Mike probably has one of the largest. But there are concerns about people receiving these cases on a duty list who perhaps are not so experienced and would not know who to go to for that sort of assistance.

The European Criminal Bar Association has a "find a lawyer" section on its website, but it asserts suggestions for criminal lawyers in different Member States. The question is: how do you know the quality of that lawyer? How do you know what their fees are going to be for the work that you want to undertake with them. It may be a very simple question: is this the correct sentence for this offence? They should know that off the top of their heads. I know

from colleagues that people can be charged a lot of money for a very simple question and that causes problems in itself.

The principle of dual representation is vital, in my view. That has been recognised by the European Union in the directive on the right of access to a lawyer. It appears in there. It is also a matter currently being considered in the context of a legal aid directive, neither of which the UK is opting into at the moment.

The Chairman: Are you saying to us that we should, or is there something else we should do in domestic law to remedy what you see as a deficiency?

Jodie Blackstock: The UK probably uses dual representation more than anywhere else. It is possible on legal aid—although tortuous, I imagine—to make these arguments to obtain legal assistance in the issuing state from a lawyer as an expert. Legal aid can be provided in certain circumstances for that evidence to be produced before our courts. It is not so much a problem here of us not complying with that principle; it is an issue of demonstrating to other Member States that this is an essential mechanism. We do that most successfully by agreeing to opt in to a measure from Europe that provides for it.

Michael Evans: I would agree totally with everything that has been said. There are plenty of European Arrest Warrants where the issue is a fine. The issue is a hire purchase loan for a laptop that did not get paid off and the person came here. Five years later they are found and they are being threatened with—the European Arrest Warrant just says what the maximum sentence is for fraud. So they might look at this and say, "Seven years in prison for not paying this", but if you have a lawyer in the requesting state—we always advise people straightaway, "If you can, get a lawyer in the requesting state"—the lawyer will go to the court and say, "He is in the UK. He is living a good life. He can pay the fine. Is that okay?" "Yes, fine." Pay the fine; warrant disappears. A large majority of cases are from Poland and Lithuania, but other countries as well, where you have somebody who has served the custodial element of their sentence and been released or they have just been given a suspended sentence. I find it interesting that these people do not know each other but they all seem to say, "But I did say to my probation officer I cannot get work here and so I am going to go to the UK and they said fine" and then quite a lot later—I say that because it is too frequent to be just a group of people that meet each other and share information and say, "We will just say that"—you get somebody to go and say, "Look, what you said they

needed to do was find work. Well, they found work. They pay taxes. They have a family and he supports two kids. Can you resuspend the sentence?" and the judge says yes.

Then you get the cases where you do not have that dual assistance. The person goes and then they phone you a month later and say, "I am back now. I was there for about two weeks in custody and the judge heard what I had to say and just said, 'Fine, I will resuspend it. Go back'". That is where dual representation really works. It is so effective and it would reduce the workload of the courts here.

Q180 Baroness Jay of Paddington: Can we return to the question of legal representation? Mr Evans, you said in your written evidence that no case on extradition should be considered without specialist legal representation but, as we have heard, there are all kinds of difficulties about that and one of them may be the question of means testing legal aid. What is your position on that from the point of view exclusively, of course, of extradition cases?

Michael Evans: I absolutely stand by my view in my written submissions and what I am going to say here. Extradition should not be means tested in terms of legal aid. It is interests of justice tested, and it passes that because it is agreed that it is a breach of your human rights in a sense. Extradition is a serious thing. So it passes the interests of justice test and the means test should not come into it, and does not come into it at a later stage. When you appeal there is no means test and you get solicitor and barrister, and you find that the appeal court works much more efficiently than the lower court and—

Baroness Jay of Paddington: Sorry to interrupt you, but are you suggesting that if there was that kind of representation at the earlier stage things might not go to appeal?

Michael Evans: Absolutely. I think there would be far fewer appeals if you had from day one a specialist extradition lawyer, who is qualified in extradition law, has a duty solicitor extradition qualification, which does not exist but should, and that you are represented by a solicitor immediately and throughout, and if it is serious you get a certificate for counsel. But, absolutely, I think that would reduce the work of the Magistrates' Court, it would reduce the number of adjournments pending legal aid that eventually is granted, and would reduce the number of hearings needed. Things could be done administratively, agreed and proper advice could be given.

The other thing we do as defence practitioners is we advise our clients, "You cannot argue that. That is unarguable. So let us remove that and let us focus on what is arguable". It is

such a specialist niche area of law that there are specialist judges and specialist prosecutors. There is a special unit for prosecutors. There is a specialist extradition duty solicitor rota just to deal with first appearances, and there is only one court that deals with extradition. So how on earth would somebody who might not even be able to read and speaks a foreign language be capable of navigating through this minefield? It is not the same, in my view, as a domestic prosecution for common assault where you are standing trial in your own country, in your own language, and it is because you have hit somebody once, where you might be then looking at: do they need a solicitor if they can understand the process and they understand what is going on? They are not the same as domestic proceedings. They are niche and they should have a lawyer at all stages. But I think it would save money as well, I really do.

Baroness Jay of Paddington: The cost benefit analysis you think—

Michael Evans: I absolutely do. I have not carried that out. I do not have the figures, but from what I see in court it would go faster. It would have much fewer hearings and the hearings themselves would go a lot quicker.

Baroness Jay of Paddington: Lord Inglewood, our Chairman, asked the Government recently whether they were prepared to look again at the cost benefit analysis and I believe the answer was they had no plans to do so.

The Chairman: No plans at present.

Baroness Jay of Paddington: It is interesting to hear the strength of your view on that. Do you share that view, Jodie Blackstock?

Jodie Blackstock: I absolutely share that view. We have said that for many years before the Scott Baker review, and in briefings to Parliament when the changes were proposed for a leave hearing, I should say, because it does affect the issues about a leave hearing before the appeal courts. We were concerned about legal aid at that stage. I can go with everything that you have said there, Michael, about the need for legal aid at the first stage, bearing in mind in particular the experience that Mrs O'Dwyer has indicated about not knowing what you face. The person does not have legal aid in place. There is no requirement, and indeed no lawyer should be expected to undertake work without being paid for it.

A person will appear for their first hearing in the Magistrates' Court, maybe not even speaking English very well, and have no clue what is going on, because they do not have any legal representation with them. The judge will probably adjourn the hearing. In almost all

circumstances they will adjourn the hearing. That does not mean that the person has still not gone through a traumatic experience. Moreover, the costs of that hearing, the interpreter, their detention pending the next hearing and throughout the proceedings, all have to be taken into account. You will have seen the Scott Baker evidence. All the district judges who gave evidence at that point—I see the *Green Book* on your table there—indicated that it was a matter that needed to be addressed very swiftly. In their view, the cost benefit analysis outweighed the arguments that there are savings to be made from doing a means test. I think that cost benefit analysis has to take into account not only the funding but the delay to the individual and the impact on the individual if they do not have a lawyer to navigate them through the process.

Baroness Jay of Paddington: I think both Mrs O'Dwyer and Mr Mitchell previously this morning, or in their written evidence, have spoken about the personal financial cost. Would you like to give us some background on your own experience of legal aid and legal costs?

Julia O'Dwyer: My son did get legal aid. There were additional costs, like travel and so on up and down to London and going to America and things. I am not sure whether without the legal aid—I had to fund all the extras—I would have been able to afford the legal costs, so that was really appreciated. But it was never in question because it was given. Although I have to say that, two years after my son's case, our legal team are still having to appeal for their costs through legal aid. They have not been, which is slightly worrying for them. But I do agree and the Scott Baker report does recommend that cases should be legally aided.

Baroness Jay of Paddington: Mr Mitchell, I think you spoke about some private legal help you had.

Graham Mitchell: Yes. First of all, I agree we definitely need legal aid. I did not meet the threshold. I was just over the threshold to get legal aid. I was very lucky in that the solicitor and barrister who were doing the work for us were fairly confident that the extradition warrant would not come to fruition and that I would stay here and, therefore, they would get paid, however lawyers and barristers get paid.

Q181 Lord Brown of Eaton-under-Heywood: I want to ask a couple of questions on a broad basis about the European Arrest Warrant, and I entirely understand and sympathise with your reaction. You are always going to get some draconian process and it ought to be used as a last resort instead of, as readily seems to happen, as a first resort. Therefore, I want to explore—I think mostly with Mr Evans and Ms Blackstock—what alternative and

lesser measures can deal with these problems and ensure that it is only used in extremis—only when it is absolutely necessary. Are European Investigation Orders one thing that ought to be happening? What is the state of play with that?

Jodie Blackstock: It has been adopted in Brussels, so the instrument will come into force in 2017, I think. I had not double checked that before I came here today but I can check it. I think it is 2017. It is a Lisbon Treaty measure that the UK has opted into and will apply in this country. Hopefully, what the investigation order will assist with is all of those pre-arrest warrant possibilities of communication of evidence to be received from another country, and also I think most significantly for taking evidence by a live link, a video-link, between the countries prior to issuing the European Arrest Warrant.

It is not yet known how it will function. It is the hope that it will interplay and make the arrest warrant a measure of last resort. But I think it is going to be some time before it will function in that way, and it will require Member States to work together in acknowledging that the European Arrest Warrant can apply disproportionately and to use this in its stead. I think it is clear, from looking at the final instrument, that that intention is there because there is a proportionality requirement in that instrument. There are human rights bars in that instrument that do not appear in the framework decision for the European Arrest Warrant. There are various validity checks that are required, so the sort of standards that we would hope to see in the European Arrest Warrant framework decision are there in this new directive, and those conversations did take place as it was being arranged.

Lord Brown of Eaton-under-Heywood: I follow. But when it takes effect, the consequence will be what? In a case that is not yet ready for trial will they use it rather than the European Arrest Warrant in order to carry the investigation that stage further?

Jodie Blackstock: Indeed, that is the hope. In the context of many countries that have investigating magistrates and require that magistrate to endorse the charge and pursue the prosecution, often I hear from colleagues that the European Arrest Warrant is currently used for that stage to take place, whereas with the European Investigation Order it is hoped that that can be used instead. That will take away some of the instances of prematurity that people are concerned about. The European Supervision Order is another that will work in that way because this is the—

Lord Brown of Eaton-under-Heywood: Just before we come to the European Supervision Order, which is a bail arrangement, I want to marry up the European Investigation Orders with mutual legal assistance requests. How do they come into play?

Jodie Blackstock: It will assist mutual legal assistance requests between Member States of the European Union. It will require parity with every request that comes in with domestic investigations. It places a requirement to consider an investigation order request with urgency and within a set timeframe, which currently is not required.

Lord Brown of Eaton-under-Heywood: The EIO is a replacement and a better and more effective and streamlined form of mutual legal assistance?

Jodie Blackstock: Yes. There are some aspects that are not included in that for more technical matters, but for the majority of measures currently where mutual legal assistance is used, the investigation order should be able to replace it.

Lord Brown of Eaton-under-Heywood: Perhaps just before we come to Mr Evans, you want to move on to the European Supervision Orders. How do they relate to Eurobail?

Jodie Blackstock: It is Eurobail.

Lord Brown of Eaton-under-Heywood: That is Eurobail?

Jodie Blackstock: That was the final name for it when the measure was adopted. It has just been colloquialised as Eurobail.

Lord Brown of Eaton-under-Heywood: How do matters stand on that? Are we in that?

Jodie Blackstock: We will be in that. It is one of the 35 measures that we will adopt next week.

Lord Brown of Eaton-under-Heywood: So that will make it easier to get bail here pending the possible removal of the person for actual trial to a foreign state, to the requesting state?

Jodie Blackstock: Yes, again, that is the intention of the measure. What is not clear is whether it will be possible to do that in the context of a European Arrest Warrant proceeding as it is ongoing, or whether it will apply in the context of a domestic proceeding pre-European Arrest Warrant where the person is wanting to be in another country, either because they are a foreign national already and they are on holiday and they are picked up, or some other reason why they would prefer to be in another country, which is their country of residence, pending the trial coming on. The primary aim of this instrument is to prevent lengthy pre-trial detention essentially in the requesting state, the trial state. That should

mitigate some of the concerns about overcrowding in prison and the length of that detention pre-trial.

Michael Evans: Again, I agree with everything that Jodie Blackstock has said. My view is that, as you said in the beginning of your question, the European Arrest Warrant is used at first instance when it should be the last resort. These measures and other measures that should be in place would lessen or take the sting out of the European Arrest Warrant. You would have the European Arrest Warrant used at the very end of a process where you are talking about a fugitive and you are talking about somebody who has been through the pre-trial investigation, who has been through video-link hearings, who has been on bail from the district court in Warsaw but that bail is supervised by Westminster Magistrates' Court. So they set the conditions but Westminster supervise the conditions, the police, bail and the tagging and what have you. After all of this, knowing everything, having participated, the person goes missing or refused to go, then you are looking at that. I would say, in answer to the question that you asked before, Lord Rowlands, that is where you reduce the draconian part of the European Arrest Warrant when you put all of the proper measures in place before it.

One of the things that should be introduced, which would also help as well—and I am really passionate about this—is guaranteed repatriation: you cannot assist them from another country unless they are guaranteed to be returned to serve the sentence here. I also think that if you are going to be able to do things by video-link and there is a sentence involved, after a guilty plea, for example, then you do not need to go. You should be able to serve that sentence here because you should be able to be transferred. I think there is a directive on that as well.

Jodie Blackstock: First, that provision exists in the European Arrest Warrant framework decision. It is one that we have been asking the Government for many years to introduce. Unfortunately in the Anti-social Behaviour, Crime and Policing Act, where all these measures were introduced, that was not one of them. It would be a very simple measure for British citizens not to be sent abroad to serve their sentence.

There is an additional measure, the transfer of prisoners framework decision, which the UK has opted into on the list of 35 measures, which would deal with the problem when the person is in the other state and has been tried and convicted there, to then be returned home, again under a mechanism that is swifter and requires more priority than the mutual

legal assistance arrangements that we currently have. Those two would mitigate some of the horrors people are finding in prison conditions and the concerns about prison conditions, because they would not even need to be there for any particular length of time.

Video-links is one that I think is important and can be used, particularly as the quality of electronic equipment is improved. People often use a Skype link informally to contact friends and family around the world now. Our courts should catch up with this use of modern technology, because it—

Lord Brown of Eaton-under-Heywood: What would you be using the video-link for, what part of the extradition process?

Jodie Blackstock: Any procedural hearing, short of trial, where actual evidence needs to be taken, in my view, could be considered through video link. Of course that—

Lord Brown of Eaton-under-Heywood: Does that link up with the European Investigation Order?

Jodie Blackstock: Yes, it does. I am just reinforcing the point that I think it is a measure that we should be using. It would deal with that issue. I think I was talking more about prison conditions in relation to the European Investigation Order and underlining the point about fairness of proceedings and swiftness of proceedings. The video-link is a good and easy mechanism to deal with that problem.

The other one—if I might briefly just state—is about financial penalties. Again, we have a framework decision in place among European nations Member States to deal with the problem of non-payment of fines. As Mike indicated, it is quite usual that a conviction warrant is issued because someone has not paid a fine and they have left the country. This is a mechanism; breach of that sentence endorses a custodial term. This measure was brought in to deal with that problem and it is not used as often as it could be. I think it is one where we need to have a lot more co-operation between Member States to deal with that problem.

The Chairman: Can I come in on a point? What you are describing would undoubtedly relieve some of the terrible sensations that went through Mrs O'Dwyer and Mr Mitchell when the knock on the door came. On the other hand, would this not—and I am now trying to put myself in the shoes of the prosecutor—be a means where any serious criminal would be alerted that the powers of justice were on his tail, particularly if he was abroad and away

from his own home country? Would that not be an invitation for him to do a midnight flit, disappear under the radar?

Jodie Blackstock: It might be, but then that is when the arrest warrant comes into play. We have a very sophisticated Schengen information system and Interpol system by which alerts are processed and triggered when someone crosses borders, and they would hopefully be caught through that scenario. In my view, the risk of career criminals and serious criminals taking flight ought not to prevent its use in cases such as the two we have heard about, where people genuinely would be prepared to comply with the investigation and prosecution against them but they have had no knowledge that it was there. Indeed, they may very quickly be able to put forward evidence to show their innocence or that the facts are flawed by way of a communication mechanism that currently does not exist.

Q182 Lord Brown of Eaton-under-Heywood: I was going to explore a bit more on the transfer from prison. Who is going to be serving their sentence over here? Only British citizens? How is it going to work?

Jodie Blackstock: Nationals and residents are on the list, and I think a resident is someone of five years or more who would qualify for it. But not having read it recently and having it in my pack, I do not think you want me to spend time extracting it.

Lord Brown of Eaton-under-Heywood: No. I see. But you say that as a right if you are a British citizen, or have been an ordinary resident here for five years, you are entitled to serve your sentence here; and subject to our own release provisions, you only serve half the time or you are eligible for release on licence after a year. A completely different regime applies to those people. Whatever the sentence may have been in some foreign country, they serve it according to the way we operate domestic prison sentences?

Jodie Blackstock: Yes. The request would have to come from the issuing state that the sentence that they have imposed, so far as possible, is given effect to in this jurisdiction. At the same time, it would have to acknowledge that our sentencing provisions require release after a certain period of time for that particular offence. There is a mechanism in that instrument to deal with consultation about that. Of course it works the other way as well. If a request comes for a British person or a person here who has committed a serious offence and now requests serving their sentence in the other state, we would perhaps have concerns about ensuring that they serve a duly lengthy sentence for their crime. So there is that negotiation and communication possibility there, and ultimately the legislation provides

for the issuing state to withdraw it if they are not happy with the sentence as it would be proceeded with in the other country.

Michael Evans: Just very quickly, in terms of repatriation from a part 2 territory, for example, or repatriation for sentence in general, the principle is quite simply that if you had a four-year sentence and you served a year of it abroad, and you have three years left, you are repatriated. Then your sentence becomes a three-year UK sentence and you are released at the halfway point on licence. If you breach those conditions you go back in. It then becomes a UK sentence for what you have left. It is not always beneficial because you will not just serve half of it, you will probably serve a bit more than half of it, but what you have left when you land in the UK becomes a domestic UK sentence.

Q183 Lord Rowlands: There are some other directives in the pipeline on the criminal procedure and I want to ask you whether you think these will have any effect. There is one on presumption of innocence, one on procedural safeguards for child suspects and there is a directive on access to provisional legal aid. Both Government and, indeed our European Committees, have been agonising over these three. Will any of these be of any particular use to ameliorate the effects of the European Arrest Warrant?

Jodie Blackstock: I should first record that we already have three measures that have been adopted by the European Union, two of which will apply and are applying in this country; the right to interpretation and the right to information, which I mentioned earlier.

Lord Rowlands: Yes. We have already been through them.

Jodie Blackstock: They are being monitored by the European Commission as to whether they are being implemented appropriately. They will make a significant difference, because what I have heard a lot in other Member States is that the lack of quality interpretation is a real problem in European Arrest Warrant cases. The right of access to a lawyer, again, I mentioned briefly earlier. We already do it in this country. It would not add anything domestically other than obviously the commitment to an important development of safeguards, which we do not do.

Lord Rowlands: But the Government has balked on that one, has it not?

Jodie Blackstock: Yes. Of the three measures that are currently being considered, the presumption of innocence one would require changes to domestic law because it would enhance the right to silence in a way that we do not currently recognise in this country. Obviously from JUSTICE's perspective that is a good thing because we do feel that the right

to silence has been eroded over the past 30 years domestically in this country and it would help to bolster that. The measure on child suspects largely is enforced in this country, but there are certain things about procedural safeguards that perhaps would be enhanced by it.

It is very difficult to see what the measure on legal aid will look like when it is finally determined. It does very little at the moment. Politically it is very difficult to produce it. At the moment it only covers the police station emergency defence for someone who has been arrested and European Arrest Warrant proceedings, both of which are already covered in this country anyway.

But the really important thing about this package of measures is that it aims to enhance and improve domestic standards across the European Union. These are measures that change domestic law, so they do not particularly deal with cross-border criminal investigation. They try to attempt to deal with concerns about what people will face when they get there. The fair trial rights concerns are being alleviated by the use of these instruments. In our view it would be incredibly helpful for the UK to commit to that improvement of standards across Europe. In the political climate it has not chosen to do so, but we have the opportunity at any stage to opt in once they are adopted and it is something we would certainly encourage the UK to do.

Lord Rowlands: Despite the stringent criticisms of the present European Arrest Warrant, you would support us opting in at this stage?

Jodie Blackstock: Yes. Our reasons for that are that we believe it can be reformed most successfully from being a member of it. We have much more persuasive opportunities within Europe to obtain reform on a European stage than we do from being on the sidelines and not continuing to engage. The other aspect of that is we continue to need extradition. There has to be an extradition procedure in place of some form or another. What the European Arrest Warrant does is replace a procedure that allows executive decision-making behind closed doors to affect the lives of people, as it has done previously in part 2 cases. It now places the obligation on the courts to transparently and openly, with legal representation, decide these issues under scrutiny.

Q184 Lord Henley: I was going to get on to the whole question of trials of requested persons taking place where possible in this country rather than abroad if the offence could have been committed in both countries, which is sometimes the case. To what extent do you think that the forum bar would assist with that process and whether that is desirable?

Michael Evans: Personally, I can say quite briefly that I do not think it has any teeth to it. I do not think it is going to work. As I said before, when you get to become a requested person, when you get that title, after you have been arrested for extradition, ready for trial allegedly, these decisions about prosecutions have already been made behind closed doors. You have not been a party to them. When you look at the forum bar and you see that a prosecutor can veto it, essentially, when you look realistically at the terms of it—and as you have heard before, the courts have to consider interests of justice but you are not allowed to consider anything other than these narrow points that we have suggested—I personally do not think that it is going to have any significant effect.

Lord Henley: You have made that clear in your written evidence where you said that you need to remove "the possibility of any political or diplomatic considerations". Do you think it could be redrafted in such a way?

Michael Evans: Yes, I think it could. I am not a draftsman and I have not thought particularly on how. A proper consultation could take place specifically on forum and done so in a way as open as this where you have heard from all parties involved in these proceedings. It could be, but we would need to hear from a lot of people and it would need very careful consideration. One of the things that does not necessarily happen is that when amendments to Acts are drafted or statutes are drafted in this sense I do not think they really go to the coalface practitioners and say, "Argue against it. Show how that is really that wrong". From what I believe the judges in the Scott Baker report have said, the district judges had said they could not think of a case where forum would have barred extradition. It is not going to be overused, I would say.

Jodie Blackstock: I would entirely agree. The problem with the forum bar is that a judge will ask the prosecution service what it intends to do. If the prosecution service says, "We are not going to prosecute in this country" then the judge is not going to apply forum bar. That is the end of it really. If you look at the Dibden and Friends decision that was decided recently, you essentially see that set out. When this went through Parliament our organisation, Fair Trials International, the Extradition Lawyers Association and probably the Criminal Bar Association—although I may not be correct in that—all responded saying, "This will not work as drafted", but unfortunately it was put in very late in the day in the Anti-social Behaviour, Crime and Policing Act and it was not given time for debate and that is why

it now appears on the statute book. Unfortunately it is the way the legislative procedure goes sometimes.

What we advocated was the removal of the certificate that the prosecutor could put in place to veto the exercise of the forum bar because the prosecutor's decision is already taken into account within the legislative framework anyway. We sought a discretion for the judge to consider more aspects than the four limited ones available as to what the interests of justice are. Those have been determined by Parliament but there may be other considerations that are not incorporated in the legislation that may have an effect on where the case should be tried. The judge cannot consider those under the current legislative framework.

The Chairman: Is there any specific one you think has been missed out? That may be a slightly fast ball.

Jodie Blackstock: No, not off the top of my head, no.

The Chairman: No, that is fine.

Jodie Blackstock: I think it would have to be a case-by-case basis.

Lord Henley: Put simply the House of Lords failed in its role as the revising Chamber and I had better be very careful as to where I was at the time.

The Chairman: You may be in a glasshouse.

Jodie Blackstock: There was an awful lot in that Bill, as there is in the current one, and legislative timetabling does not enable everything to be looked at in detail as it should. I will leave it at that.

The Chairman: I am conscious that we are talking rather lawyers' stuff here, but Julia O'Dwyer or Graham Mitchell, is there anything you would like to add on this?

Graham Mitchell: I do not think I am qualified.

The Chairman: That does not necessarily stop people having opinions.

Julia O'Dwyer: I would just like to add something on the forum bar. Jodie and Michael will know that some years ago a forum bar was revised but was not enacted. In terms of, for example, the United States, the gist of that forum bar was that whenever an alleged crime took place predominantly in this country, that case would be tried in this country. A lot of work was put into the wording which was a bit more extensive than what I have described. As I said, it was never enacted. Here we have now been lumbered with a pretty watered-down version of the forum bar, which others know more about but I think we will not see anybody benefiting from that very much at all.

Lord Brown of Eaton-under-Heywood: Ms Blackstock, you said there were only three or four considerations. It is the new section 19B(3) and then it goes (a) to (g).

Jodie Blackstock: I cannot count. I apologise, Lord Brown.

Lord Brown of Eaton-under-Heywood: It includes a whole host of things, including the extraditee's connections with the United Kingdom. What is missing? The interests of justice are very widely defined here, are they not?

Jodie Blackstock: They are, but they are limited to that list. The judge shall only take into account matters (a) to (g).

Lord Brown of Eaton-under-Heywood: No, but I am struggling to think of anything that the judge cannot take into account that he might otherwise want to.

Jodie Blackstock: As am I off the top of my head, Lord Brown, but as I say there may well be a case-by-case basis that would require the judges to exercise their discretion differently and at the moment it is fettered by this mandatory list.

The Chairman: Maybe if you have any thoughts you could write and tell us, please?

Jodie Blackstock: I will.

Baroness Hamwee: Just to follow that up, the comment was made that the judge asks whether there is going to be a prosecution here and if the answer is no, end of story, so maybe there is something about practice that you might like to follow up on, as well as what is or is not in the amended statute.

Jodie Blackstock: Yes. The difficulty ultimately arises that judges will not want to be taking a decision that will prevent a prosecution taking place anywhere. If they have the indication from the Crown Prosecution Service that they do not have sufficient evidence to satisfy their full code test, that it is both procedurally and publicly in the interests of justice to proceed with an investigation and prosecution in this country, then the judge is not going to make a different decision from that. That is ultimately the problem with a forum bar anyway. It is hard to see any form of words that can get around that difficulty. Unless the court were to be advised by legislation that their decision must not take into account whether a prosecution would take place at all and merely consider the interests of justice as a concept affecting the victim and defendant or suspect of the crime, I do not see how we will avoid judges giving effect to a prosecution decision.

Q185 Baroness Hamwee: Thank you. I think our Chairman was asking me to ask about Article 8. Mr Evans, you have said that it is still the main proportionality argument despite

the introduction of a proportionality bar. The question is about the relevance of proportionality, as you have all experienced it in your own cases and observed it in others. I do not know where you would like to start. The observation came from Mr Evans.

Michael Evans: My view is that the Article 8 consideration for the judge should technically really come at the very end of his consideration of every other bar to extradition. It is recognised that extradition would amount to a breach of your Article 8 rights but the question is whether or not it is a proportionate breach. Proportionality as the balancing exercise in Article 8 is always going to be used, in my view, because it is always going to be relevant. If you have not succeeded on every other bar, then you have a safeguard at the end that says that you might not quite be there on section 14, which is passage of time, because the judge has decided you are a fugitive, not in the classic Goodyear and Gomes sense because you actually fled a jurisdiction but that you were here when you were convicted in your absence. The judge may have decided that that still makes you a fugitive. You cannot use section 14 there for an oppression argument but you might fit it into Article 8.

Article 8 also does not just look at what your crime is or what the level of the offence is, but it looks at the effect on other people. That effect on other people also really importantly could be when you are weighing up what the level of the offending alleged is. Taken at the prosecution's highest in the European Arrest Warrant or the request, factors to consider are that this guy might be the sole provider for a young family or a carer for a wife or a child. He might be, more interestingly, an employer whose business would go completely down the drain if sent abroad to another country, put in pre-trial detention, only to come back, found not guilty but the business has gone and the 15 local employees have all lost their jobs and are claiming unemployment benefits.

Article 8 is something that you can use to weigh up all of these factors in one argument where you look and say, "Well, where do the scales lie?" and you ask the judge to look at everything. That is why Article 8 will always still be used, should always still be used, but the proportionality bar is a codification of some of the Article 8 considerations that are already made.

Baroness Hamwee: To the supplementary, "Should the proportionality bar be extended beyond the part 1 European Arrest Warrant accusation cases?", you would say, "Well, it is not going to make so much difference"?

Michael Evans: I think it should be. It should be conviction cases as well because, as I have talked about already, you have these cases where the person has been convicted in their absence. You have these cases where the person has served their sentence custodial element and has come over here and they are on a conviction warrant or a fine, but realistically if they pay the fine, the problem goes away. So it should be applicable to part 1 conviction as well and it should be applicable to part 2 because it matters. It is proportionate.

Baroness Hamwee: Yes, but you would be arguing Article 8 most of the time?

Michael Evans: If you do not succeed on that, you will move on to Article 8.

Baroness Hamwee: That is what I meant really.

Michael Evans: But procedurally it comes before Article 8.

The Chairman: Again, we are rather on legal matters. Do either of the non-lawyers have any thoughts?

Graham Mitchell: With my case, the passage of time was the thing that swung it in the end although I was, and still am, the primary carer for my two stepchildren. The Article 8 was something that the legal guys talked about with us at the time.

Lord Brown of Eaton-under-Heywood: Could I just ask one supplementary of Mr Mitchell? You were acquitted when you were initially tried in Portugal in 1995.

Graham Mitchell: That is right.

Lord Brown of Eaton-under-Heywood: Not unnaturally, back you come. Then apparently in 1996 the Supreme Court of Portugal overturned your acquittal. Is that something you ever learned about?

Graham Mitchell: No. Not until—

Lord Brown of Eaton-under-Heywood: Not until you were arrested 17 years later. Is that it?

Graham Mitchell: Even later than that. Not until we got the services of our lawyer in Portugal was the first time we became aware of that.

Lord Brown of Eaton-under-Heywood: I see. After your rearrest 17 years later?

Graham Mitchell: Yes.

Lord Brown of Eaton-under-Heywood: Do you happen to know what efforts they made to notify you of this?

Graham Mitchell: No. Again, it is one of the great unsolved questions. These European Arrest Warrants come along and wreck your life and when it is finished and it has been

thrown away, as it was in my case, that is it. You have no recourse. You cannot say to them, "Why did you do this?"

Lord Brown of Eaton-under-Heywood: Had you been living a peripatetic life in this country?

Graham Mitchell: Absolutely not. I am a press photographer. I have been vetted to enter Downing Street and Buckingham Palace. I receive a military pension. I was very far from being under the radar.

Jodie Blackstock: Perhaps I may add about proportionality from our perspective here. I should firstly say it is welcomed that the Government has made an effort to introduce this stage here. If a case really does engage a very minor offence and it is one that the Lord Chief Justice has listed in the practice direction, the matter may fall away then without having to proceed to any further argument. That will mitigate some of the impact and stress upon the individual, but the Article 8 argument still remains, for all of the reasons that Michael said and that is very important.

It is something that needs to be done on an EU level. The European Parliament has produced a resolution and recommendations for reform, which I have mentioned in my written evidence. There is a list there of reforms that they think are necessary that would attempt to mitigate this, as well as a proportionality check in the issuing state because there is little that the executing state can do once the arrest warrant is produced. We are then in the scenario of trying to balance international obligations against the impact on the individual. If that can be mitigated even before that commences because EU legislation says these minor offences ought not to be sought, the problem does not even arise.

One of the other things that we recommended, coming from Baroness Hamwee's suggestion about notification and Lord Brown's suggestion about notification, is a measure to deal with the issuing of summons for prosecutions against people, which would be a prearrest warrant procedure. Lots of lawyers I have spoken to in other EU countries have raised this as an issue because, like Mr Mitchell, there are many business people who find themselves on a European Arrest Warrant who have international websites, who are freely available to be found and served with a summons, and who certainly say in the hypothetical that they would be more than willing to support the investigation against them in any way that they can, but they only hear about it on a European Arrest Warrant. There was one particular case that went all the way to the German Constitutional Court on this very issue of proportionality in that context, from Greece, who was freely available to be found but no

effort was made to do so. That is an area I think, where efforts could be made to prevent the draconian impact of the arrest warrant.

Lord Brown of Eaton-under-Heywood: That is another thing in the list, like the European Investigation Orders?

Jodie Blackstock: It is just in my head at the moment. It is not something on the table unfortunately.

The Chairman: Can we just think about category 2 cases in this context, because category 2 is a more complicated and convoluted procedure. Is there evidence of any proliferation of disproportionate attempts to extradite under category 2 or is in practice the fact that the procedure is more complicated a sift?

Michael Evans: I do not think that it is a sift. I do not think so in that sense. The requests that I have seen from part 2 territories do tend to be serious allegations. I am not suggesting that that is necessarily exactly what it turns out to be at the end or anything like that, but the requests contain serious allegations. When you are looking at proportionality, the prosecution's case at its highest is a really weighty factor in that balancing exercise. The Article 8 consideration does come into part 2 requests. It can do and it will do if we were to receive a request from a part 2 territory for what we would say was quite a minor offence, and we could because all it is about is what the maximum sentence for that type of crime is. A very minor fraud or a theft on a very low level still might carry an equivalent sentence here and a sentence there that could meet the criteria for extradition. In that case, you might have a very strong Article 8 proportionality argument.

Yes, it could happen and there are serious cases. Article 8 has stepped in on part 2 cases, I believe, but it is not so prevalent that that does not mean that it should not be legislated that there is a bar available for the day that it comes along.

The Chairman: Any other thoughts? Otherwise we will move on.

Jodie Blackstock: I simply agree with that.

Q186 Lord Empey: Good morning. May I ask you a question about the role of the Home Secretary? Obviously the Home Secretary's role in the extradition process has been greatly reduced. We have heard that moving decision-making to the courts was critical in improving the extradition arrangements. To what extent would you agree with that statement?

Michael Evans: I would not really. I would not for the reason that is often overlooked that the Home Secretary's involvement begins with receiving the request, then the Home

Secretary certifies that request, "Is it made in the right form? Is it from the right territory?", produces a certificate and sends it to the court where the court takes over. The court has always has a human rights consideration in terms of its decision whether to send it back to the Secretary of State. Then it goes back to the Secretary of State. She is still involved; she was involved at the beginning and she is still involved then. She does have powers to stop the extradition. I would say they are really limited powers so they are very rarely going to be used.

The other observation I would make is that the amendment has said that the Home Secretary will not consider or cannot consider human rights considerations when making a decision. I would disagree. I would still like to one day argue that she does.

The Chairman: Are you telling us that it is wrong that she cannot or are you telling us that the provisions that say that she cannot are, in fact, in breach of the human rights legislation anyway?

Jodie Blackstock: That is the argument we made at the time when it was suggested. It was a remarkable small bit of drafting in a very large Bill, again, which purports to suggest that the human rights obligations under the Human Rights Act that apply to the Home Secretary no longer apply. That cannot be right, but Parliament can do so if it had issued a section 19 notice, if it deems it appropriate. I do not believe the Government took that course in presenting that piece of legislation to Parliament, but it is another thing that has sneaked through unfortunately. As Michael says, nevertheless I cannot see how the obligation to comply with our human rights obligations can be removed in such a way anyway because it is implicit irrespective of whether the Human Rights Act is expressly disavowed or not.

Lord Empey: Can I just pick you up before Mrs O'Dwyer and Mr Mitchell come in? You said it had been sneaked in. Why do you think the Government wanted to diminish the role of the Home Secretary in this process?

Jodie Blackstock: The intention is laudable. It is to ensure that proceedings take place before the courts in an open and transparent fashion. Why it was necessary to remove the human rights obligation I do not know. The only thing I can think is that it was an attempt to reduce delay by having repeat review after the courts have determined an issue, which is what occurs in part 2 cases.

Lord Empey: You do not think there was a political consideration that perhaps the Home Secretary would be enabled in future to keep her head down in controversial cases?

Jodie Blackstock: I could not possibly comment on the intention in that regard, but I would certainly want to argue that it still applies nevertheless. Indeed, it is incredibly important in the context of information that may come to light that is not available to the courts, it is not available to the requested person, but perhaps comes in through diplomatic channels and must be contemplated before the return. If there were to be a sudden military coup in the particular jurisdiction, for example, or any other intelligence came about that affected this individual in particular, that information comes to the Home Secretary not to the court or to the requested person. It is somewhat unfortunate in the lowest terms that this provision purports to remove the obligation for those matters to be taken into account.

Q187 Baroness Jay of Paddington: This is a progression from the discussion about the human rights issue, but can I ask you to comment because it is something we have talked about in previous sessions, which is the political issue that Lord Empey has raised about getting assurances from other countries about the human rights concerns you may have in an extradition case? I think it was Mr Evans who rather trenchantly said cultural norms and practices in countries do not simply change overnight with a letter from a government minister in one country assuring a government minister in another country that all will be fine. In a sense, again this involves the political and diplomatic issues. Do you want to expand on how you do in fact get assurances fulfilled?

Michael Evans: Currently there is an issue with Lithuanian cases and I am sure you are aware of it and understand and know that Kaunas Prison is the prison that is the subject of the assurances and that people will go to Kaunas. The assurance was breached and then they have come back and said, "It was a technical problem. We will make sure it does not happen again" and we are currently back in with some new witness statements of people who are in police detention and in different prisons. As this Committee has touched on before, the real problem with assurances is the monitoring of them once somebody disappears into the ether of wherever it is they have been sent.

If they are a British national with a strong family network and the assurance is that they will go only to such and such a prison, it may be that that can be monitored very well because that strong family will keep on finding out what is going on. They will fly out there and keep checking. But when we send somebody who is, let us say, a Lithuanian to Lithuania and there is no legal aid to follow it up and there is no one following it up, I would say that person gets lost and there is no way of checking that these assurances are being abided by.

It should be very obvious to other Member States and to requesting states in part 2 that if you give this country an assurance and you breach that assurance then my view is you should realise you do not get a second chance.

Baroness Jay of Paddington: But if it is one of the political considerations that you touched on with Lord Empey that the Home Secretary is no longer formally part of this process, presumably an assurance given to a senior member of the British Cabinet is very significant in political and diplomatic terms and that might give it better authority. That is the question I am getting at.

Michael Evans: I agree, but a part 2 assurance should come through diplomatic channels to be a proper assurance. Again, I do not think that we can say that the role of the Home Secretary has just been removed apart from a notional point. The Home Secretary and future Home Secretaries will still have to be involved in these processes. I think it is right that when you get to this sort of state level of assurance from state to state that human rights consideration might come back in.

Lord Empey: Do Mrs O'Dwyer or Mr Mitchell wish to make a comment?

Julia O'Dwyer: I cannot comment on a personal experience of conditions in other countries but I am aware that, for example, assurances have been given in respect of people being extradited to America, assurances have been given to the European Court of Human Rights on prison conditions, and extradition has then taken place. As this Committee has not yet heard from any people who have actually been extradited, for example to America, it might be useful and I think it would give added value to the work of this Committee if it was to call oral evidence from some people who have been extradited just to see how that stacks up. Do those assurances reflect the experience of the people who have been subjected to those prisons, for example in America?

Jodie Blackstock: Bearing in mind that there does not seem to be any mechanism for monitoring the assurance, perhaps that is something that ought to be looked at more closely as to how the UK is monitoring assurances given to it and accepted by our courts so that we can ensure that in future cases where people are returned those assurances can be relied on. I accept that it is a difficult thing to do because if you accept an assurance then by the nature of it you are saying that you believe the assurance as it is given to you. The line of cases we have seen recently, particularly with Lithuania, are very interesting on the facts on the ground as to how those assurances have not been complied with. A monitoring

mechanism and a requirement to report, perhaps to Parliament, would be very useful in this field.

The Chairman: Can I follow that up before we move on? First to the point from Mrs O'Dwyer, we have had quite of lot good, valuable written evidence from people who have been extradited and of course that is exactly equivalent in every respect to oral evidence. Just to move on, we have talked about monitoring and we have talked about enforcing assurances. I would like to ask you what you think would be appropriate. When Don Pacifico was insulted by the Greeks, Lord Palmerston sent in a gunboat. We clearly cannot do that. How do you think this kind of thing ought to work in the real world?

Jodie Blackstock: We cannot enforce a legal remedy once someone has left the UK. That is certainly clear. We can seek that at a European level. It is one of the things in the parliamentary report that is suggested as an amendment to the European Arrest Warrant framework decision and that legal remedy could explore how assurances are upheld. But I think the monitoring mechanism and the requirement to report on monitoring is really vital to defence lawyers in subsequent cases. Where they are able to demonstrate that assurances are not being complied with, that is very relevant information for the court to know in a subsequent assurance.

The Lithuanian example is telling. The practice that appeared to be happening—you will know more than me, I have simply read the judgment—is that if they were UK nationals there was a requirement to put them in the assured prison but if they were Lithuanian nationals they did not get the benefit of that, even though the assurance had been given to the UK courts before their return. That is a stark example of it not being upheld. Why it should differ if you are a UK national or a Lithuanian as to whether or not you get poor conditions is not a decision for Lithuania to take if a UK court has said that we accept the assurance.

Michael Evans: I think the wording of the assurances perhaps should be tighter. Where you need an assurance alarm bells should start to ring because it means that potentially there is an issue in that country. Where you have specific assurances about one individual, they are quite easy to monitor. It would not take somebody long to follow up on whether or not that person is where they should be. It is very difficult where you have a group assurance that no person will go to these prisons.

Jodie Blackstock: I would just add to that that it is an interesting pattern that has arisen from looking through the cases and monitoring it. The difficulty for people who are trying to prevent their extradition in circumstances where they believe their human rights will be violated is bad enough. The threshold they have to satisfy because this is a prospective breach—it is not something that has already happened—is they have to produce cogent evidence to satisfy that there is a real risk that this will happen. That has to be right, otherwise how do we have any functioning system at all. But once they have satisfied that, they now have to defeat a diplomatic assurance that is coming from that country as well in circumstances where it is clear their human rights would be violated but for the assurance. That is incredibly difficult to defeat because you are in a position where you now have to say, "I know the prison is terribly overcrowded. I know I am facing physical violence when I go there, but I cannot assert that I am not going to be placed in this new shiny prison that has been made particularly for UK nationals to be housed in when they are returned". It becomes incredibly problematic to keep defeating these levels of evidence and that is why the monitor will be so important.

Lord Brown of Eaton-under-Heywood: One suggestion we had at an earlier session was that at the same time as the assurance is given the requesting state likewise assures us that there can be diplomatic monitoring of the compliance with that assurance. Why could not that be the way ahead and it then be incumbent on the diplomatic representation to notify the National Crime Agency, who deal with all these cases, what the upshot is of that monitoring so that that would inform future cases?

Jodie Blackstock: When you said diplomatic monitoring, do you mean by the issuing state authorities or by the requesting state?

Lord Brown of Eaton-under-Heywood: No, by our representative, the consular representative.

Jodie Blackstock: That sounds very sensible.

Michael Evans: I would agree.

Lord Hussain: In your experience are there any recent examples whereby non-British citizens have been extradited and an alarm has been raised that the promises have not been kept, the conditions have not been kept, and what has been the result of that?

Michael Evans: This is the Lithuanian example. It is Lithuanians being extradited to Lithuania and there is evidence to say that the courts have accepted here that the prisons are not

Article 3 compliant but one is, so the assurance is that those Lithuanians will go to that prison and it is not happening, or if they do they are then moving on.

Lord Hussain: Is there any way that they can be helped?

Michael Evans: That comes down to diplomatic relations because the courts here will not have jurisdiction over the Lithuanian authorities. Again I suppose it is the issue of we are now getting evidence to say, "Well, hang on second, you are not complying with this, we are not sending anyone else", at which point they will send another assurance. I think we might be back at the situation again now.

Jodie Blackstock: Of course it is whether there is a national remedy available to them in Lithuania to then seek damages for wrongful imprisonment or something. It may come back to the question of dual representation continuing after the extradition to work in both ways to assist, but really once they have gone from our shores we do not have any jurisdiction over them at that point.

Q188 Lord Rowlands: Will the forthcoming removal of the automatic right to appeal remove an important safeguard or help us to filter out hopeless cases because they have been used to delay?

Michael Evans: I think it is a real shame. I do not think it will filter out hopeless cases. If I start with the procedure, what they have changed is the appellant's notice: it is an application for leave to appeal. We are using these forms now anyway, they have asked us to, but when it comes in we will have seven days in part 1 cases—14 days in part 2— from the date of the extradition order, including that date, to complete all of the information that they require. They are requiring full grounds, all the evidence from below to be attached to it, who it was served on. They are asking us to provide all relevant authorities, fact summaries and any documents required for the appeal that will later on be used in the appeal. It is hard enough to get to see your client within seven days and just issue an appeal. Let us say we get these issued and they are decided on paper; once we have issued it we will get a representation order for a solicitor and counsel. As soon as we have issued it and it has been decided on paper, we will go to see the client, as we would normally do, and we will take the client's instructions and advise them. If it is a hopeless appeal that is unarguable, as barristers and solicitors do in our duty to the court, we tell them that the appeal is unarguable and that provides a filter. If it then comes back on paper as a decision to refuse permission, the amendment allows us to renew that orally. We already have solicitor and

counsel so therefore we are now having an automatic oral hearing that was already listed in the previous right to appeal.

Lord Rowlands: So it is a form of appeal anyway, is it?

Michael Evans: Yes, but I think the way that it was working before was more effective because you have to trust barristers. Counsel instructed would not advance unarguable arguments and the test for permission to appeal is "is it arguable", but if that test fails on paper we get to renew it orally. I do not see how it is going to change anything.

Lord Rowlands: Have you had experience yet?

Michael Evans: No, because it is not in force.

Lord Rowlands: It is not in force yet?

Michael Evans: It is not in force yet, so we are still on the old system. I think more importantly about injustice. If this is designed to filter out appeals that they think are unarguable, in a lot of the Article 8 cases that came on, especially through my firm, we have picked up cases where the person has been arrested, taken straight to the Magistrates' Court, had their extradition order the same day and not really known what has gone on. The person has been advised by a duty solicitor who has put him or herself down on the rota as being an extradition specialist—there are over 400 listed and I can tell you now that is not even close; there are far fewer people who specialise in extradition—who has said, "You should not contest this extradition". The extradition is ordered, the person is remanded in custody, we have managed to get to see them, and then when we go with counsel and take full instructions and analyse everything we find there is a serious problem. They are the sole carer for perhaps a mentally ill partner or they are the breadwinner for the family, and you think why has nobody considered to ask them about their circumstances when there is a clear Article 8 bar.

In those Article 8 cases on appeal where extradition was ordered at first instance or very quickly after that we then took on—and many other solicitors take on in the same way—the very fact that they succeeded and that the appeal was allowed means that that automatic right of appeal is not only necessary but it is vital and should not be taken away. The other thing is if you did not have a representative at the Magistrates' Court because of means testing then you have to do all of this on your own. If you did have a solicitor at the Magistrates' Court, their rep order can cover issuing the appeal because it covers that

seven-day period, but the legal aid agency will strike out any legal research because solicitors apparently are not allowed to do any legal research.

Lord Rowlands: What about the arguable case? Is that appropriate?

Michael Evans: It is what happens anyway. Barristers would not go and stand in front of a judge, unless they had their full armour on, and argue something totally unarguable. They would have said beforehand, "It is unarguable. We will go and advise the client". What we then do is advise the client that it is unarguable and they should withdraw and if they refuse to withdraw then we say we have to withdraw representation and they would then decide that they want to continue or not.

Lord Rowlands: There are a very large number of appeals.

Michael Evans: There are, but a lot of those appeals get withdrawn. If you had a longer timescale and legal aid from the beginning of that for solicitor and counsel before you had to issue the appeal then maybe that would work, but in a seven-day period in a Part 1 case it is not feasible. You cannot do it.

The Chairman: Is there a cause of the problem right at the start of the process with the 400 solicitors, some of whom perhaps are not as good at it as they might be, or is the fault somewhere else in the process?

Michael Evans: I think we have touched on a lot of it already. The first thing is that it is means tested, so in the lower court if you had a solicitor representing you all the way through and they said it was arguable they could get the appeal put in, instruct counsel and then go further with it, but if they said it is unarguable then you would be properly advised that you have no grounds to appeal. I think Jodie is going to come on to the unrepresented, which is where it strikes hard and is totally unfair, especially in a different language and in custody. You are only relying on the kindness of prison officers to help you fill out a form with no interpreter and agree to fax it to the court and then on the CPS. If that officer is not there that day then you do not have your appeal and off you go.

Q189 Lord Rowlands: Reading your CV, you have been rather successful in both Westminster Magistrates and in the High Court on quite a significant number of appeals. Is there a common pattern to your success? Are most of these Article 8 successes?

Michael Evans: No. There are Article 3s, Article 8s and section 2s. I think this is to do with extradition being a political issue as well, as in between states and diplomatic relations, and unfortunately you have to make every case individual. You are saying to a judge, "The prison

conditions are atrocious, they breach Article 3 in respect of my client's situation", and it is through that experience that good extradition lawyers who know how to argue these points do seem to succeed more than others but there is no training. To be a duty solicitor there is absolutely no element of extradition training whatsoever, so to go on that duty list at Westminster you just have to say, "I want to go on the duty list because I know extradition". It does not mean you practise it or you have ever managed a case in extradition or you have even had an extradition case before. You might just want to say, "I have read the Act and I am fine with it". That is only the list of cases I have represented in. We have a team of nine or 10 people and we have lots of others.

Lord Rowlands: What I am trying to get at is are there proportionately more appeals in extradition cases than in any other kind of case?

Michael Evans: You mean criminal cases?

Lord Rowlands: Yes.

Michael Evans: I would have thought there must be.

Jodie Blackstock: Yes, because there is a leave requirement as much as anything else. In the majority of criminal cases currently there is legal representation. The consideration is entirely different. In criminal cases you are dealing with appeals on a decision that is wrong in fact or law on the substantive law. In extradition cases you are dealing with whether the test has been applied properly and whether you can scrabble together sufficient evidence to support your human rights claim. The reason why these sorts of cases taken by Kaim Todner and so forth are successful is that they are able to get the evidence together because they have strong links across the world with lawyers and academics in those countries who can assist them, and through battle scars they have appreciated what you need to do.

If you do not have a representative—and a significant number of these cases fall into that category—you are having to attempt to put your own appeal in without really knowing how to argue or articulate your case in a way that will satisfy a leave-stage sifting judge on the papers. The danger from our perspective is that people will not have representation in time and not be able to satisfy the tests that apply. The Supreme Court considered that aspect in 2012 in the Lukaszewski case, which was a Polish case where it was apparent that the prison officers in Wandsworth were doing their best to help individuals fill out the forms for appeal and perhaps doing not a very good job of it. What we now have is a situation where they will be sifted out and I do think that is of real concern. Coupled with the means testing at the

initial stage and the very short time in which you have to appeal, that may well reduce the number of appeals but perhaps not for the right reasons.

Michael Evans: I would finally add to that the reason why in this country in a lot of other matters you need leave to appeal—I am not sure of the exact reasons but the difference in extradition proceedings is that in the proceedings in this country you are still here, you are still with your family, they can still visit you and you always have the CCRC.

Lord Rowlands: The stakes are even higher.

Michael Evans: The stakes are huge. If you do not get your appeal in on time or you do not get your automatic right to say, "This is wrong and it should be appealed" then you might be off to Argentina, Brazil, America or Poland. You do not know when you are coming back, if you are coming back, and the stakes are huge in that sense. They are not the same; they are not comparable.

Q190 The Chairman: We have gone on now for more than two hours and I am conscious of that and feel that you have all given us a very full measure, so thank you. Before finally concluding, is there anything any of you would like to say to us to cover something you think matters and we have not touched on?

Michael Evans: I do, very briefly. It is an issue about post-extradition matters. I feel that once people are gone, British citizens for example, especially to America—and I have former clients there at the moment—this country does forget about them. They are still citizens of this country and there are two examples I would use; one is bail and one is healthcare. If you are extradited to America and you actually manage to convince a judge to say, "I will give you bail if you have an address", your average Joe Bloggs is not going to have the money or the wherewithal to find an apartment and pay for it while they are not allowed to work and are restricted to being inside that apartment. Unless you are lucky enough to know somebody who is willing to put you up or willing to go out on a limb for you, you are stuck. I would like to see this country saying, "You are an accused person. Our presumption is innocent until proven guilty and we have had you on bail here for the whole time and you have not committed any bail offences. You have complied with your bail and we will therefore fund accommodation for you". I do think it is right. You should not be forced to be in prison because you have been extradited against your will to a land where you do not speak the language or you cannot afford to live without working.

The other issue is healthcare. Another client who is out in America—he has actually managed to be on bail—needed a heart operation for a longstanding condition and he wrote, through his MP, to the UK Government who advised him that they could not fund anything. It was going to cost $28,000, and they advised him he should go back to jail because he would get healthcare if he went to jail and gave up his liberty. I think that needs to be brought to the attention. It is also post-extradition matters that are very important that need to be considered when we are talking about sending someone away and hopefully bringing them back one day as well. As it happens, he has had the operation; the doctors agreed to do it for I think $3,000 to be paid later. But again, like the Wandsworth prison officers and like the people who have managed to persuade someone to let them stay at their house, it is relying on the kindness of individuals and not relying on the state and your country that you have paid taxes to and been a citizen of for your whole life.

Lord Brown of Eaton-under-Heywood: This is a proposal exclusively for UK nationals who are removed abroad, is it?

Michael Evans: Yes, UK residents and UK nationals.

Lord Brown of Eaton-under-Heywood: Resident for five years?

Michael Evans: I think it is not something that has been considered and it should be thought about and brought to the attention of the powers that be. There is a sense that you are completely forgotten once you are gone and certainly not supported. Other than that, I would just like to thank you for the opportunity.

Julia O'Dwyer: I would like to say, Lord Chairman, that I do commend the work that you are doing on this Committee, but it is really not necessarily possible for you to be in the shoes of someone who has been extradited, and nobody is immune to that. It might be a bit of a joke at the moment but we might see the Mayor of London being served with an extradition warrant to America for not paying his taxes there, as has been in the press recently. Potentially that could happen, so nobody is immune.

I know we alluded earlier to the evidence that has been provided from some victims and many other stakeholders in extradition, but I really feel that some of those people who have been extradited have some terrible, upsetting, distressing stories and experiences to tell and it is not necessarily all going to come across on paper. I feel that it would be a shame if you did not hear some of those stories. I know that, for example, there are three or four people who have been extradited to America and returned home who have given written evidence

and I am sure some of them would give oral evidence. I think it would be a real shame if that was not included in this piece of work that you are doing.

Jodie Blackstock: May I add one final comment from JUSTICE? Now that the UK has committed to opting back into the European Arrest Warrant and the other measures that flank it, I think we are in a unique position to be calling for reform in Europe of this instrument. There is the mechanism for a Member State initiative for proposing new legislation in Brussels. It is something the UK could put effort into. As we approach the potential referendum for reform of our position in Europe, which may or may not occur under a new Government, it is something where the work has already been done to a large extent by the European Parliament and we could have significant impact upon the European Arrest Warrant if it was amended at a European level.

The Chairman: Thank you very much indeed to each of you. We are very grateful.

Rt Hon. David Blunkett – Written evidence (EXL0018)

Evidence from the Rt Hon David Blunkett MP to the Select Committee on Extradition Law

1. I am happy to submit written evidence to this inquiry but it has to be said that there is little new to add to the almost continuous questioning of the principle of extradition under the guise of querying the implementation and detail.

2. There are few areas of policy where preconception and therefore downright prejudice influence the approach, as extensively as on the issue of extradition.

3. This was demonstrated most graphically by the reaction to the review led by Justice Scott where it was absolutely clear that the failure to come up with 'the right answer' irritated many elements in the national media and if I am blunt, many parliamentarians who are very happy for extradition to be 'one way'.

4. All agreements and Treaties within Europe or internationally, are of course influenced by events and can so easily be caught in a moment in time. Therefore, updating and revising is sensible on a rational timescale and with a desire to improve rather than to undermine confidence in the process.

5. Whether the continuing debate around the European Arrest Warrant, or extradition (and Treaty arrangements with the United States), the impact of current events did, and will continue to effect, perceptions.

6. Where there is sympathy for a particular individual or group of individuals, particularly engendered by specific coverage of their case, there is generally a desire to slow down the process, to make it more difficult and to question the judicial system in the country to which someone is being extradited.

7. On the other hand, where we are as a nation trying to eject someone from the country, the desire is to speed up the extradition arrangements and to question the legitimacy of legal prevarication!

8. Many of those commentating, take without a moment's reflection on the irony of the situation, exact opposite standpoints, when it suits them.

9. There are of course times when there is a quid pro quo. Such a time was in 2003 in respect of agreements (Treaty) with the United States which had of course run its course. Gaining agreement to exemption from the death penalty for anyone extradited to the United States was undoubtedly not only an important proviso but a priority. Without this exemption, no renewal of extradition arrangements could have been agreed to. In the circumstances following the September 2001 attacks, failure to have an extradition agreement with the world's most powerful democracy and our ally, would have been unthinkable.

10. Let me therefore turn to the largest change in circumstance which does affect future arrangements for extradition and where I hope the committee will be able to shed light on both the important underpinning issues, and potential avenues for exploring solutions.

11. Namely, those aspects of modern communication (and in particular cybercrime, terrorism and breach of security) which directly impinges on a jurisdiction out with the residency of the individual or groups of individuals committing the offence.

12. Immunity from investigation and subsequent prosecution would allow terrorist or criminal acts to be carried out with impunity. The criminal activity and worse, may take a different form (simply a modern means of achieving long standing and unacceptable objectives) but it should not be judged differently because the method of attack takes a different form.

13. We are in these circumstances therefore, not dealing with someone who has committed a crime in a particular jurisdiction and then escaped investigation and punishment by moving to another jurisdiction but rather that they are able to perpetrate the offence from across the globe.

14. In simple terms, what otherwise would have been an offence, should remain an offence and action should be possible (where of course extradition agreements exist) to ensure justice takes its course.

4 September 2014

Moray Bowater – Written evidence (EXL0033)

I urge the Committee to make very careful consideration of the views expressed on the Liberty website (www.liberty-human-rights.org.uk/campaigning/extradition-watch). These include the suggestion that if alleged activity took place wholly or substantially in the UK, a judge should be able to bar extradition, whether or not the CPS decides to prosecute in the UK. Liberty also suggests that the automatic right of appeal against an extradition order should be reinstated and that extradition being part legal and part political, that the Home Secretary should once more be obliged to block extraditions that would breach human rights and that legal aid in extradition cases should not be means tested.

Most importantly, I would urge you to ensure that British residents should NEVER be extradited without a basic (prima facie) case against them being tested in a UK court. This last one seems to me to be an absolutely BASIC protection that any citizen of our country would expect.

21 August 2014

Michael Boyd – Written evidence (EXL0011)

I strongly believe: British residents should not be extradited without a basic (prima facie) case against them being tested in a UK court

- If their alleged activity took place wholly or substantially in the UK, a judge should be able to bar their extradition – whether or not the CPS decides to prosecute in the UK

- The automatic right of appeal against an extradition order should be reinstated

- Extradition is part legal and part political – the Home Secretary should once more be obliged to block extraditions that would breach human rights

- Legal aid in extradition cases should not be means tested

22 August 2014

James Brokenshire MP – Oral evidence (QQ 36 - 53)

Evidence Session No. 3 *Heard in Public* *Questions 36 - 53*

WEDNESDAY 16 JULY 2014

11.30 am

Witness: James Brokenshire MP

Members present

Lord Inglewood (Chairman)
Lord Brown of Eaton-under-Heywood
Lord Empey
Lord Hart of Chilton
Lord Henley
Lord Hussain
Baroness Jay of Paddington
Lord Jones
Lord Mackay of Drumadoon
Lord Rowlands CBE
Baroness Wilcox

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Examination of Witness

James Brokenshire MP, Minister for Immigration and Security

Q36 The Chairman: I would just to welcome James Brokenshire. As everybody knows, he is the Minister for Immigration and Security. One small point: I gather we do not have any special interests to declare before the hearing—although, Lord Henley, you would like to say something.
Lord Henley: It is just to say that, having served as a colleague during this Parliament with the Minister in the Home Office, I will not ask any questions, but I will listen to the answers.
The Chairman: Minister, perhaps you could introduce yourself for the purposes of putting it on the record and say anything you would like to say at the outset, after which we will move into the questioning proper.
James Brokenshire: Thank you, Lord Inglewood. Thank you for this opportunity to appear before the Committee this morning. Extradition policy is one that rightly has a significant amount of focus attached to it, given the impact that an extradition request can have on a British citizen. Indeed, your inquiry comes at a time when there has been relatively

significant change to the original Extradition Act in terms of forum, the European Arrest Warrant, proportionality and a range of other issues. I therefore welcome your Committee's inquiry and investigations in terms of assembling the evidence.

I am conscious that this is a complex area of law, particularly for non-practitioners in this area like me. My officials have put together a briefing note surrounding the Act, some of the reviews that have taken place and, indeed, the subsequent legislation that has sought to amend the original Act. That has come before me and I am content with the form of it. I am planning to get this issued to you straightaway. I hope that that will act as a guide to assist and help in terms of what I accept is quite a complex area of law that has been changed in a number of ways in recent years.

The Chairman: Thank you very much indeed for that introduction and for telling us that this material will be with us shortly. Perhaps I might ask a general opening question. We live in a world where increasing numbers of people are moving around the world and across our borders. Crime seems to be increasingly trans-border and, indeed, global, as does terrorism. We have seen the development of things like the Schengen Information System II and also an extension, in a number of instances, of criminal extraterritoriality. How, as a Government, are we in this country looking at responding to these kinds of changes in the way the world seems to be working?

James Brokenshire: There is certainly a challenge in terms of being able to facilitate requests. You rightly highlighted the situation in relation to the Schengen Information System II, SIS II, which has the ability to put European Arrest Warrants on to a computer system and share those in real time. Certainly, it is something that I have been a supporter of over a number of years. We will be able to respond to the challenge and ensure we have clarity on information that is flowing across the EU. Schengen Information System II remains on track to be delivered, subject to some further discussions with the Commission and other Member States, by quarter 4 of this year. That will give us some additional benefits, rather than a paper-based system.

You are right in flagging up this issue around the cross-border nature of criminality. When I look at most organised crime cases now, they have some form of cross-border element. Therefore, yes, it is about our ability to make extradition requests ourselves and recognise that there are extradition requests that we will be receiving inbound, and how to manage that in terms of an assessment of where the right place should be for a case to be brought. In some ways, that does get us on to issues of forum. I know the consideration the Committee has already given to that on assessing where we should be looking to bring prosecutions, and having greater transparency in respect of where those cases should occur, which is what the forum bar provisions were intended to provide.

Q37 The Chairman: Is it the Government's view that the way in which the world is moving is that this is going to become a more severe problem over time rather than the opposite? Are there bigger challenges ahead?

James Brokenshire: We are moving to a more challenging environment, because of the connected and cross-border nature of the criminality that we see. The National Crime Agency, which obviously receives and manages inbound requests for the European Arrest Warrant, for example, has overseas liaison: that sense of how we are able to respond to criminality that may be stemming from outside our shores but equally has a direct impact in the UK as well. That is obviously straying much broader than your Committee in relation to extradition, but it does have connections. When we look at types of crime like cybercrime, where criminality may be perpetrated against citizens in this country from overseas, where

we are able to take action against those individuals, there is a balance as to whether there is liaison and prosecution taking place, for example, within the particular country where that individual may be located and the support that is provided, or our ability to extradite as well, and how that works vice versa, and building relationships with countries to ensure that we have not simply strong extradition but also mutual legal assistance.

There is an interesting read-across here between where, within Europe, we have the new European investigation order (EIO), for example, sitting alongside the European Arrest Warrant. I have always been struck by the balance between the two and when you should be using a European investigation order, which is now obviously coming into effect and being adopted, as against the European Arrest Warrant, given that, interestingly, within the EIO specifically there is a proportionality filter.

Obviously, we have sought through domestic law to put in proportionality arrangements in relation to the European Arrest Warrant, but it is an interesting balance, looking at those two instruments, where one would argue that the EIO is less intrusive but has a proportionality provision specifically in its terms, whereas the European Arrest Warrant—although it provides flexibility to Member States to make arrangements domestically—does not have it in such specific terms, in part, perhaps, because of the way the law has evolved over time. It is interesting to compare those two instruments on what can be described as mutual legal assistance between two countries.

The Chairman: Before moving on to Lord Hart, are we making any efforts to try to secure amendments to the European Arrest Warrant—or the framework decision/directive?

James Brokenshire: Discussions obviously do continue at EU level; there has been some interest from within the Parliament as well, although that has not progressed as far as some perhaps had anticipated that it may have done. Now we have the EIO on the European statute book, those issues become even more relevant than they were before, because of this potential distinction between the two orders. It is something we are raising and continue to raise in relation to the European Arrest Warrant—recognising, however, that a reform package takes time, albeit that the EIO has given greater clarity to that debate. That is obviously a point we will be underlining in the months ahead.

Q38 Lord Hart of Chilton: We are going to be quite interested in how the policy on extradition evolves and how the Government actually take carriage of the evolution of extradition. Your department, presumably, is in the lead. Do you have a full-time policy unit that looks at extradition all the time, examines the cases as they happen, and reflects on whether the particular consequences or results of a particular case seem to require a bit more tinkering, or is there no specialist policy unit in charge? How do you liaise with other departments, for example the Ministry of Justice and the Foreign and Commonwealth Office? How do you consult externally to your department with stakeholders? I am interested in seeing the nuts and bolts of how it happens.

James Brokenshire: Obviously, extradition is a core policy area as part of the Home Office, including the handling of requests that come through and, indeed, the residual requirements that do exist for Ministers to consider extradition requests from Part 2 countries. There is an extradition unit that is contained within the Home Office. It obviously handles those cases, puts up submissions to Ministers surrounding them and, equally, will flag up potential policy issues that may arise that particular cases may be indicating. There is that iterative process, if I can put it like that, for examining how case law is developing and, indeed, what individual cases may be saying as to whether the pattern of law is changing.

There is a good connection between us, the Ministry of Justice and the Foreign and Commonwealth Office in respect of those arrangements. If issues do arise, clearly we are able to escalate them within the other departments that have those responsibilities to see that the system works well. When you take that step back, clearly we have made number of changes to extradition law over the course of this Government, when we look at issues with the forum bar and, indeed, some of the changes we are enacting in domestic legislation for the European Arrest Warrant that will take effect at the end of this month. There has been that ongoing policy examination of issues that have arisen. Obviously, it is something that we keep under review. We do not have any current plans to change extradition law. What we want to see is the existing changes now bedding in, because when I look at the issues of, for example, forum, they were introduced in relation to Part 2 countries at the end of October last year. The cases are slowly starting to come through. It is a question of assessing those as to how the law is being applied by the courts. There is that ongoing process that does exist.

Engagement with others would be on a case-by-case basis. I could not say that to my knowledge there is a systematic approach that exists in relation to external stakeholders—albeit that, if issues arise and there are particular representations that are made or particular issues come to the fore, obviously we will contact stakeholders as appropriate.

Q39 Lord Hart of Chilton: From time to time, the searchlight of publicity strays into the cupboard that you are in charge of. Does that trouble you from time to time—in particular the cases that get maximum publicity in terms of extradition to the United States? When you see that, does that concern you at all?

James Brokenshire: Sometimes, a focus on an individual case certainly brings to life a number of the factors and elements that sit alongside this. Sometimes, individual cases can shine a light on particular challenges or the way in which the law is being applied. Inevitably, because these issues relate to the liberty of individuals—and, therefore, what happens to them if they are extradited—there will of course be a focus that will be given to this by the press and others outside of this place and outside of government. I do not see that as a bad thing: I see that as a healthy challenge at times for us to ensure that the law is being applied as we intend and that, if issues are being flagged up, that we have the ability to respond.

I should also correct that, obviously, the forum provisions apply to Part 1 and Part 2 countries—just to be clear on that in terms of the record. Obviously, however, in respect of the forum bar challenges, we have had one of particular specific reference that has occurred since October. Clearly, we will keep these issues under review.

Lord Hart of Chilton: You think that in the main everything is going along alright. You are not troubled by anything.

James Brokenshire: It is rather that, as I say, with further changes formally introduced to the statute book at the end of this month, our focus is on seeing how implementation beds in and keeping this under review, given the changes that have taken place. It is now a question of assessing what the courts do, how they apply and interpret the changes that have been made and then assessing whether further change may be needed thereafter. Do the Government have any plans to change extradition law again? As I sit here today, I cannot say to this Committee that we do have any current plans to do so.

Lord Rowlands: I wondered, in the context of external agencies, how much attention you are paying to the interests and needs of victims. There is a great deal of interest in the defendant's rights—and that is very understandable—but what about the victims of these

crimes? Are their interests and rights being observed, or should we actually encourage or develop them further?

James Brokenshire: You are right to highlight this issue of the interests of victims in the context of extradition. I hope, Lord Rowlands, that you will see, when you see the note on some of the changes being introduced around the forum provisions contained in the Crime and Courts Act, that one of the specific provisions that has to be taken into account is the interests of justice and the interests of any victims. It is relevant. The voice of victims should not be lost in this context of seeing that justice occurs for their closure and benefit, and seeing that a criminal has been brought to justice, which is why extradition does matter in seeking to fulfil that.

Q40 Lord Jones: Very briefly, one of our witnesses previously was the chief executive officer of Fair Trials International. It is a pretty big-hearted lobby—and quite vociferous, perhaps. Have you encountered it? Have you sought to engage with it? Do you listen to it? Does it submit to you? Is there any impact upon your work?

James Brokenshire: Yes, it has. We do have representations and have met a number of different non-governmental organisations that do make important cases on reform of the law. For example, when I look at things like the changes to the European Arrest Warrant and the trial-ready provisions that are contained within it, because of the concern that individuals might be extradited simply to languish in a foreign prison because the other country had not been prepared for trial, it is those representations from organisations like that that have been heard, and the Government have sought to respond in a number of different ways around that.

Lord Jones: Have you yourself met this chief executive?

James Brokenshire: Please remind me of his name.

Lord Jones: His name is Jago Russell.

James Brokenshire: Yes, I have met Jago Russell.

Lord Jones: I need say no more.

James Brokenshire: It was in the context of the time when we were looking at the European Arrest Warrant provisions and the trial-ready nature of them, because I know that his organisation has advocated on behalf of some families who have been affected by some of these issues. So yes, I can say that to you, Lord Jones.

Q41 Baroness Jay of Paddington: We had a very useful evidence session last week with Sir Scott Baker, who obviously referred back to his report. One of the things he raised—we did not have to ask him about it—was his continuing concern about the legal aid position. He obviously accepted, as the Committee has noted, that the Government made the case that there was not really a business case for restoring the legal aid rights that had previously been there. If it has not disappeared from my iPad, I will just quote him. He said, "We were firmly of the view that there would be an overall saving when one looked at how long cases were taking when they were being adjourned—people were being held in custody and so forth." I wanted you to reflect, if you would, on that comment, and also on the general balance between the objective of justice and the objective of efficiency, which seem in some tension there.

James Brokenshire: Obviously, legal aid matters are led by my colleagues at the Ministry of Justice rather than being my specific policy lead on that. Obviously, however, we are in contact with the MoJ on extradition matters more generally. It is appropriate to say that legal advice is provided to all arrested individuals at the police station with no means or

merits test. It is then when we look at the cases that are brought, for example, before the magistrates' courts on the substantive cases that arise.
In preparation for this evidence session, I did ask for some figures from the Ministry of Justice to give some sense of numbers. If there are further inquiries, I hope we may be able to assist in getting further data from the MoJ. It is perhaps a snapshot—and I would characterise it in these terms. In the period between the start of August 2012 and the end of June 2014, nearly 2,000 individuals applied for criminal legal aid in order to fund representation at extradition hearings taking place before the City of Westminster magistrates' court. In approximately 95% of these cases, criminal legal aid was granted to the individual. That might give some context as to, perhaps, who is receiving legal aid support. As you will know, there is the merits test as well as the financial means test that applies. However, I appreciate this is something that was obviously flagged in your evidence session last week and is an interest. As I say, it lies slightly beyond my own direct remit, but, if we are able to facilitate information to the Committee, obviously we would be very happy to do so.
Baroness Jay of Paddington: That would be very helpful. What you have said already is obviously helpful. Beyond that, there is the other question of the automatic right of appeal. We are obviously looking at the ways in which justice is effectively dispensed. Earlier this morning, the witness who has already been referred to from Fair Trials International suggested that, because the system was, shall we say, not particularly expert, sometimes there were cases where people who had the right to appeal had things revealed only at that stage that obviously should have been dealt with earlier. In other cases, the right of appeal simply was not there because it was not automatic and cases went by default. Is that something the Government are considering?
James Brokenshire: It is certainly not something that has been flagged to me in terms of an issue that has arisen in relation to rights of appeal being exercised. Certainly, it is something we can raise with the Ministry of Justice, which perhaps would have that more direct purview over these matters in terms of the operation of the courts and appeal rights being exercised. It is not something that has been flagged with me. Going back to the figures that I have provided and that have been given to us by the Ministry of Justice, the question is how many cases would be affected and, therefore, the extent to which these are significant issues or not. It is maybe a question of looking at the evidence and the cases that are being presented.
Baroness Jay of Paddington: Obviously that is true, but it goes back slightly, does it not, to Lord Hart's question earlier about what we need in this area being what is called, in the jargon, joined-up government? On this issue, between the MoJ and the Home Office there perhaps needs to be closer collaboration.
James Brokenshire: If there are issues that impact on broader extradition policy, that may well be the case; however, my sense is this may well reside in legal aid policy, in respect of which the Ministry of Justice obviously does have that direct oversight and policy lead. Therefore, in that sense of where joined-up government and where the interests of individual departments overlap, I would characterise legal aid provision as being a specific policy lead for the Ministry of Justice and, therefore, if there are those issues that are being raised with the Committee, rightly it is the Ministry of Justice that should respond on legal aid. Clearly, however, if there are issues that do cross over into broader extradition policy, absolutely we should respond. That certainly is the case, as far as I can see, in terms of the

join-up between departments where we are seeing issues that go, perhaps, to the fundamentals of the law or the application of the law.
The Chairman: I am conscious that time is moving on, so I am going to slightly edit the sequence that we previously had the questions in. Could I urge both the questioners and you to try to keep it brief?
James Brokenshire: I am sorry.
The Chairman: No, it is all good stuff.
Q42 Baroness Wilcox: My question is quite quick, but I imagine the document you are going to send to us will have the answer in it anyway. Maybe you can quickly answer this. **Will the forum bar be compatible with the Lisbonised framework decision? Is it going to give it more weight?**
James Brokenshire: We believe the forum bar is compatible with the framework decision and that it does meet the provisions of Article 4(7)(a) of the decision. My answer to the Committee is yes.
The Chairman: That was an exemplary reply, if I may say so.
Q43 Lord Empey: The question I was going to ask you was this: what process have you in place to monitor and ensure that assurances given about rights by a requesting state are honoured? For obvious reasons, it is very important. Whose responsibility is it and what sort of assurances does the United Kingdom ask for from other states?
James Brokenshire: In terms of assurances, that will vary from country to country in respect of the nature of the law of a particular country. Therefore, when you look at assurances, it is also important to recognise that there are assurances that are given on extradition; there may be assurances that are given in respect of individual cases as to how someone may be treated; and, also, there is the read-across on to deportation policy as well, in relation to, for example, our policy on deportation with assurances, where we will be seeking specific assurances to be able to deport people. I appreciate that is distinct from extradition, but it is important to understand that in the round.
There is no systematic approach that is taken to assess ongoing compliance. Obviously, the courts have a very direct interest—and indeed we do have an interest ourselves, as does the country giving the assurance, because if it could be shown by an applicant in a particular case that assurances had not been met in a preceding case in some way, obviously that would then have a direct bearing on the weight given to those assurances in the future. Therefore, the Foreign and Commonwealth Office would be the normal avenue of complaint for individuals who allege that assurances have been breached. It would be flagged in that way. Equally, there could be challenges through the courts. I know that the courts do take this issue seriously. If it might help the Committee, there has been the recent case of Khalifa through the courts, which made a very clear finding that the fact that the Algerians had fully maintained their assurances on deportation cases meant that assurances provided in that case could be trusted. I suppose it tends to be that type of iterative approach that is taken, rather than some sort of central mechanism in government that seeks to monitor this.
Lord Empey: Is it fair to characterise your response as saying that in the event of somebody blowing the whistle or raising an objection or going to the court, the matter is then looked at, but as a matter of routine there is no process in place for monitoring individuals and what happens in their cases? Is it only if they complain or try to get back to the court that somebody actually starts to look at it?
James Brokenshire: If complaints are made either to the court or to our posts in a particular country, obviously that would be something that would be looked into seriously. Perhaps,

Lord Empey, in terms of giving you a response on the types of assurances we may be talking about, obviously they relate to things like the death penalty, prison conditions, health and what is known as non-refoulement. If matters come to light in a particular country, that would then be flagged up by a post on their monitoring of relations with those countries and may well be triggered in that way, rather than a specific complaint being made.
The Chairman: Do those countries care? The sorts of countries that break assurances are not the sorts of countries that will care much about being rapped over the knuckles by us.
James Brokenshire: I disagree, actually. A lot of countries do seek to underline their compliance with international law and their international relations. If assurances were ridden roughshod over, that could then have a material impact on relations between countries. Equally, it would mean that, on a bilateral basis, we may change our relationship on requests that were received in the other direction as well. It would be wrong to characterise it as other states would not care. There could be consequences of someone simply ignoring assurances that had been provided.
Q44 Lord Brown of Eaton-under-Heywood: Minister, let us go back to our old friend the forum bar and the new Sections 19B, C, D and all the rest of it. It is pages long and it is quite a complicated provision. This came in at the end of October, I think you said. Was it 14 October? So it has been going for nine months.
James Brokenshire: You could be right, yes.
Lord Brown of Eaton-under-Heywood: That was under the Crime and Courts Act. Just to try and get the shape of all of this, that is a different statute from the anti-social behaviour one.
James Brokenshire: That is correct.
Lord Brown of Eaton-under-Heywood: That is the one bringing in things like proportionality, which you have told us is coming in at the end of this month.
James Brokenshire: It is coming in at the end of this month, yes.
Lord Brown of Eaton-under-Heywood: Thank you very much. On the forum bar, we have had nine months' experience of it. Has it been exercised yet?
James Brokenshire: I am aware of one case that has arisen in relation to the forum bar. Obviously, sometimes these cases do take some time to progress. Therefore, it is still early days. There was a case related to an individual called Shaw, where the court has ordered that extradition should proceed. It has now been appealed, and therefore it is difficult for me to comment further. There is at least one case I am aware of that does touch on the substantive elements of the forum bar.
Lord Brown of Eaton-under-Heywood: That is very helpful. So the bar was refused and it is now under appeal?
James Brokenshire: In that particular case, it is being appealed—hence the reason why it is difficult for me to comment.
Lord Brown of Eaton-under-Heywood: Do you know when it is going to be heard at all?
James Brokenshire: I am afraid I do not have that level of detail, but that is certainly a live case. Whether we are able to provide any further information on that to assist the Committee—I have just been told it will be in September.
Lord Brown of Eaton-under-Heywood: That will be very helpful. What is it called?
James Brokenshire: It is called Shaw.
Q45 Lord Brown of Eaton-under-Heywood: Under the new scheme, prosecutors have enormous influence. Indeed, their certificate is almost decisive, is it not?
James Brokenshire: Certainly, when you look at the new provisions that have been inserted into the 2003 Act, obviously, there is the certificate process, where a prosecutor can issue a

certificate and the relevant grounds are set out there. Again, I hope that the note I will circulate will be able to assist in decoding some of this, because when you are amending an earlier statute it sometimes can be quite complicated to get that level of detail. However, you are right that there is that potential bar where the prosecutor has in essence considered whether prosecution should take place here and, effectively, determines that they have weighed it up, they have balanced it out, they have considered the interests of justice and various other factors that are specified—albeit that that certificate can be challenged by way of appeal to the High Court.

Lord Brown of Eaton-under-Heywood: That is under 19E.

James Brokenshire: That is right, yes.

Lord Brown of Eaton-under-Heywood: In the case of Shaw, however, do you know whether there was a certificate? Perhaps we can learn from your officials behind you.

James Brokenshire: As I say, it is a live case before the courts. Perhaps if I can say to the Committee that if there are further background or basic details of that case that we are able to provide, obviously we will share them with the Committee.

Lord Brown of Eaton-under-Heywood: As matters presently stand, subject to whatever the courts may say in this case or other cases, are you content with these rather elaborate new provisions?

James Brokenshire: Yes, we are. As I say, we will monitor the way in which the courts interpret them, and that will be the clear factor on how they are applied in practice. However, yes, we believe that they do provide greater transparency and do address the issue of forum appropriately.

The Chairman: Does that mean you will look and see how the courts apply the rules, and if they apply them in the way you anticipated they would, you will be satisfied, and if not you will get the law changed?

James Brokenshire: Lord Inglewood, you will know that all Governments keep legislation under review. Indeed, the purpose of your Committee is very much to look at the 2003 Act and see whether it remains appropriate and balanced in that post-legislative scrutiny frame of mind.

The Chairman: Indeed, yes.

James Brokenshire: However, we are content that the law does gain assistance in terms of forum; it does strike the right balance between the interests of the individual and the interests of the prosecutor. Obviously, however, we will continue to monitor it as case law develops.

Q46 Lord Rowlands: In some of our evidence, we have been discussing whether the law should be more prescriptive or less prescriptive. We have taken some rather conflicting evidence on this. Your recent legislation is quite prescriptive, would you agree?

James Brokenshire: It certainly specifies a number of different factors, for example, that the court has to take into account. We touched on factors such as the interests of victims, the balance of justice and the provisions that have been inserted into the 2003 Act as considerations the court has to take into account. You are right: there is a balance to be struck here. We felt, however, that it was important to set those factors out so that there was transparency as to the elements the court does take into account and, on issues of forum, that is appropriate.

Lord Rowlands: You seem in your answers, however, also to be saying, "We are waiting for the courts to define our law".

James Brokenshire: No. Clearly the law is codified here and we believe the changes that have been made remain appropriate. The law does give clarity for all of those involved on the elements that should be considered—and, indeed, on the role of the prosecutor on the certificate as well. I am merely saying that, obviously, we will continue to monitor the situation as we would in relation to any other piece of legislation. It is not that it is specific to this. The law is clear, but obviously we will continue to see the way that the courts continue to interpret it.

Q47 Lord Jones: I have a brief question on category 2 designations. How does the Home Secretary decide which countries should be designated category 2 territories?

James Brokenshire: Category 2 territories in their terms are those where we have a bilateral treaty, those that have ratified the European Convention on Extradition, or Commonwealth countries that have endorsed the London Scheme on Extradition within the Commonwealth. Obviously, the UK will add to the list of those designated where a new treaty is signed or where another country joins the convention or the scheme. I suppose we tend to enter into those on the basis of operational need.

The Chairman: Could you slightly elaborate on what "operational need" is in this context? There are some apparently strange bedfellows to be found in some of these groups of countries.

James Brokenshire: Again, the information that we will be sending to the Committee, from the draft I have seen, will provide a list of the relevant countries as well to inform the Committee on the different categorisations: those that are required to provide, for example, prima facie evidence and those that are not. That is in many respects decided by issues such as the convention itself and also the scheme. When I talk about operational need, it is where we have developed relations with a particular country to such an extent on mutual legal assistance, where we see that there is an operational need because of perhaps criminality, the changing patterns of that, and, therefore, how a relationship with an individual country has evolved over that time.

I do see extradition as something that is—because of the nature of it and the impact on the liberty of citizens—a fair way down the track in terms of a relationship with a particular country. Therefore, you may well have seen mutual legal assistance and other arrangements being entered into first to ensure that there is that understanding of law and practice between the UK and another country. I suppose that is what I mean by "operational need": it is that evolving picture both in terms of relationship and in terms of criminality that may emerge.

Q48 The Chairman: I think I am right that the Government said that they were going to review, in response to the Sir Scott Baker review, the list of designated category 2 countries. Is that under way?

James Brokenshire: It has not formally commenced as yet; however, the Home Secretary has said that she believes the courts currently are able to subject extradition requests to sufficient scrutiny to identify and address injustice or oppression. However, I cannot say to the Committee that we have formally conducted the review that was contemplated.

The Chairman: Are you going to, do you think?

James Brokenshire: There is no current date to start that as yet.

The Chairman: Finally, some territories have to provide a prima facie case and some do not. Is this something you are bearing in mind in the context of the process you are carrying out? You are obligated under the Convention on Extradition to accept that there is no need to provide a prima facie case. It would rather startle many members of the public that some of

the countries that are in the scope of the Convention are countries with which we have this arrangement.

Lord Brown of Eaton-under-Heywood: I am trying to get the overall shape. There are two sorts of designation. There is the overall designation of countries. You are not in Part 2 of the legislation at all unless you are designated for that purpose. Within that designated list, there are fewer countries that are signed up to the 1957 Convention. Then, as you say, there are one or two Commonwealth countries and—I do not think you mentioned it—the United States. They are further designated and they do not have to produce a prima facie case; they merely have to produce information showing probable cause.

James Brokenshire: You are right that there are, within the Part 2 countries, those additional elements as to whether a prima facie case needs to be made out in support of an extradition request. Part of that is set out in Article 12 of the Convention, which the Chairman was alluding to in terms of the specific requirements. Obviously, in relation to Commonwealth countries we have specific requirements for those. Obviously, I am sure you will be familiar from the Sir Scott Baker review with the tests that need to be applied in relation to US/UK extradition requests—albeit that Sir Scott Baker concluded that they were in balance and there was not this distinction that some had advanced between the two natures of the inbound and outbound tests.

It is important to stress as well that extradition requests can be challenged on human rights grounds. Therefore, simply because an extradition request makes out all of the basic requirements does not mean it cannot be challenged and that other factors cannot be brought to the court's attention in respect of this as part of the process. I hope, again, that the notes that we send will specify the list of countries and also flag up those countries that are or are not subject to a prima facie test in order to be able to respond directly and give the Committee clarity on those countries that are bound by the requirements on prima facie or not.

Lord Brown of Eaton-under-Heywood: I am conscious of the time, but take somewhere like Russia, Ukraine or Azerbaijan. They are within the 1957 Convention; therefore, on the face of it, they have to be designated and not required to produce prima facie evidence. Assuming we have reached the point of thinking, "That is really not satisfactory in their cases," what can you do about it? Can you de-designate them consistent with the 1957 Convention?

James Brokenshire: In essence, we are bound by the Convention, because it is specified in Article 12 on the request and supporting documents that are to be made by those countries. It does require that to be followed in that purpose. There are further Articles that, if the information is found to be insufficient, allow the requested party to make a decision in pursuance of the Convention and to request supplementary evidence and to fix a time limit for receipt. There are some safeguards that are built in to allow the requested state to make further requests for information or accept an extradition or not, putting aside the other challenges that are there. So, yes, while it is correct to highlight the requirements that are set out in the European Convention on Extradition, it is also important to understand there are these additional points and challenges that can be made in individual cases if something is seen to be wholly inappropriate.

The Chairman: Before we move on, can I come at this point from a different direction from Lord Brown? Are you telling us that the domestic safeguards that we have and the way in which we handle extradition requests from countries we might have concerns about are such that you are satisfied that justice can be done within the context of our domestic rules

and procedures? Are you saying that, in a sense, reviewing the designated countries is not really a worthwhile thing to do, because we probably cannot—other than in a very complicated and convoluted way under international law—wriggle out and then reinstate ourselves, and that justice's best interests are being served by approaching it the way we are? Is that right?

James Brokenshire: In essence it does come back to the point I made in terms of what the Home Secretary said and being satisfied that there are appropriate means of challenge and protection within our courts and legislation to deal with those issues. For example, on US cases I understand that 14 cases have been discharged by the court. Yes, there are tests that actually have to be satisfied in terms of the form of the request as specified in the relevant requirements under the Act and designation and, therefore, the Convention or the other requirements that sit there. However, there are those additional safeguards bound into our law to ensure that justice is done.

Q49 Lord Hussain: There are obviously countries with which we do not have any treaties for extradition. Are you drawing up any new list of countries or are you drawing any new extradition treaties with countries such as Japan, for example?

James Brokenshire: There are ongoing discussions, obviously, as we have said in terms of how we keep these issues under review. Perhaps I can send a note to the Committee, if that would be helpful, of where we may be in the process of negotiation or where agreements have been set but perhaps have not been added on to the Part 2 list at this point in time. That may, I am sure, assist the Committee in that way.

Lord Rowlands: What is our position with Pakistan? What are our extradition arrangements with Pakistan?

***Home Office Official*:** We do not have a formal treaty with Pakistan; we have ad hoc arrangements on a case-by-case basis. It is the same with Japan and other countries, too. The fact that we do not have formal relations with them does not mean that they cannot make requests to us and we cannot make requests to them. It is just done on an individual circumstance. With Pakistan, if they make a request to us we need to have an individual treaty[47] with them. For example, at the moment we have an individual treaty with Rwanda regarding the cases that are going through the courts at the moment about alleged war criminals. There is a case going through the Scottish courts that relates to Taiwan, so we have a mini-treaty with Taiwan. That is what happens in those circumstances.

James Brokenshire: I am sorry. Again, I hope that answer from my official shows that there are different cases and different circumstances in which you are able to bilaterally come to particular agreements. As I say, perhaps it might be helpful to the Committee if we were able to write to the Committee and perhaps set out some of those processes in order to inform your consideration.

The Chairman: It would be helpful to know exactly how it works in the real world.

Q50 Lord Mackay of Drumadoon: I have been asked to ask you quite a few questions about the US/UK situation. I suspect you may already be aware of what these questions are and have the answers. Is that right?

James Brokenshire: The starting point to this is that the Government believe that the treaty is fair and balanced. Obviously, this was something the Sir Scott Baker review did specifically examine in detail, and the distinction between reasonable suspicion and probable cause and whether that was balanced. Clearly, the panel stated, "In our opinion, there is no significant

[47] From here, references in this section to "treaty" and "mini-treaty" are used as a convenient short-hand, but the arrangement is technically a memorandum of understanding.

difference between the probable cause test and the reasonable suspicion test. We believe that any difference between the two tests is semantic rather than substantive". We obviously did ask Sir Scott Baker and his review to examine this, and we do remain satisfied that it is fair and balanced.

Lord Mackay of Drumadoon: So you have no plans to amend that?

James Brokenshire: No.

Lord Mackay of Drumadoon: We asked a number of other questions about the numbers involved. I am not expecting you to answer them now. I just want to know you have these questions—and then you can answer them. You do not? Right—okay.

The Chairman: Lord Mackay, the specific question you are referring to is not one that has been specifically put to the Minister. If you ask the questions, he can then undertake to give us a reply.

James Brokenshire: If the request is for details of requests that have been made and received from the US to the UK and perhaps those that have been refused, I have already indicated that under the 2003 Act the UK has refused 14 extradition requests from the US, whilst, interestingly, the US has not refused any requests from the UK. If we are able to give a sense of the quantum to the Committee, obviously I am very happy to write to the Committee to provide that detail.

The Chairman: Would it be helpful, before Lady Jay comes in, to give you the specific questions that we hope you might be able to answer?

James Brokenshire: Yes.

The Chairman: If I might, then, reading from the piece of paper: first, how many requested people has the UK extradited to the US since the signing of the US/UK treaty? I will give you these papers. Secondly, how many requested people has the UK extradited from the US since the US ratified the treaty? Thirdly, how many requests from the US have been refused on human rights grounds? Fourthly, how many requested people has the UK extradited to the US after human rights assurances were made? We will give you the questions.

James Brokenshire: Perhaps I can write to the Committee with those statistical details, as I must confess I do not have those numbers in front of me.

The Chairman: That is absolutely fair enough. We have some more questions of this sort.

Q51 Baroness Jay of Paddington: Going back to the point we talked about earlier, we understand the nature of the decision by Sir Scott Baker and others that the treaty is in balance as far as the legal side is concerned, but the Committee have also raised what more generally might be called political jurisprudence questions about the United States in respect of matters such as long sentences, plea bargaining and the differences between the individual state jurisdictions—where judges may well be elected on rather extreme platforms—and the federal system et cetera, which make us concerned that perhaps although you can technically say the relations are legally in balance, there are differences that concern people in a broader sense, particularly citizens of this country who have faced extradition to the United States.

James Brokenshire: As I say, we believe the treaty remains appropriate. Obviously, we have touched on some of the evidential tests. Obviously, this is something—as you know, Baroness Jay—that has been litigated on in the past in human rights cases. One of the most high profile we have seen over the course of the last year or so is probably Abu Hamza, where some of the issues over the nature of prisons were litigated all the way up to the European Court of Human Rights, which upheld the ability to extradite in those circumstances. Our judgment is that the relationship and the treaty are properly balanced.

Obviously, it has been upheld by the courts in a number of different circumstances, but I do point to the fact that extradition has been refused by our courts on 14 occasions, whereas on no occasion has the US refused a request from the UK.

Baroness Jay of Paddington: That is certainly one of the questions we will put in our supplementaries, which I think will come before you.

Lord Brown of Eaton-under-Heywood: When you come to write to us, can you give us in each of the 14 cases an indication of the grounds that we refused them on?

James Brokenshire: I can certainly ask to see the details on the 14 extradition requests. If we are able to break that down in some way as to why extradition was not upheld by the court in those circumstances, certainly we can see what further details could be provided.

The Chairman: Could you also tell us: 14 out of how many?

James Brokenshire: As I said, I will also be able to give you the total number we have seen over the course of the last few years, which I hope will equally give some further context to that.

Q52 Baroness Jay of Paddington: On the question of relative sentencing, for example, do our authorities regularly ask of the US authorities that, where someone has either UK citizenship or a strong relationship with this country, they serve their sentence here?

James Brokenshire: That is going slightly further than pure extradition in those terms. It has become particularly relevant on issues such as forum as well, where we see that cases could be potentially prosecuted here or there. There may be criminality here and criminality in the United States. Therefore, where the balance may lie on whether somebody should be prosecuted here would have to take into account where the evidence is, where the witnesses are, where the harm has been caused and, therefore, what may be in the broader interests of justice in respect of how prosecution should occur. That does draw us back to the forum bar provisions. It is the sense of providing that transparency, which is why I emphasised it in that way.

Baroness Jay of Paddington: One of the things we were specifically concerned with, though, was not the pre-trial arrangement but the sentencing.

James Brokenshire: Ultimately, sentencing would be a matter for the US authorities—as it would be for someone here in this country. Ultimately, that would be a decision for the US, but it would not impact on the decision as to whether extradition could be made out or not, unless there were specific grounds for challenge that could be made—for example on human rights grounds in some way.

The Chairman: Can I just stop you there? For the avoidance of doubt, what you are saying as far as sentence is concerned is that in any extradition case, unless it could be shown that it was in breach of the European Convention, we take view that the detail of whatever sentence may be imposed is not a matter for us.

James Brokenshire: That would be matter for the US authorities in respect of sentencing.

The Chairman: That is just to be clear on what you were saying.

Lord Mackay of Drumadoon: Taking that point one stage further, that would mean that the UK authorities do not raise with the American authorities the possibility of serving a sentence imposed in America in the United Kingdom?

James Brokenshire: Obviously, there are separate arrangements that we have with a number of different countries around prisoner transfer agreements. As I sit before this Committee, I am not aware of the specifics on our relations with the US on that particular aspect, but, again, the facilitation of those arrangements would be led in large measure by the Ministry of Justice rather than the Home Office.

Lord Mackay of Drumadoon: Can I also ask that, when you reply to the various questions you have been asked, you make it clear how many of the requests for extradition originated with prosecutors at state level and how many originated with prosecutors at federal level?
James Brokenshire: I will certainly take those questions on board. I recognise that this inquiry is at the start of its process in terms of seeking to get the evidence together. I expect to return to this Committee at a later stage when obviously you will have had some further information from us on that and, I am sure, other details as well. I hope, therefore, at that stage to be able to respond in terms of your further supplementaries that may arise.
Q53 The Chairman: Thank you. That is helpful, because, as you appreciate, we are still digging around. Finally, I might just ask you—since it is in a sense your role—another question. The role of the Home Secretary has changed recently in dealing with extradition matters, in particular in deciding a human rights bar; has that had any positive or negative effect?
James Brokenshire: It has not had any particularly negative effects on the basis that someone could still raise human rights issues at any stage of the process. It is simply now that people must do that with the courts. In terms of the ability to uphold a human rights challenge, clearly the courts have the ability to consider that and consider the evidence. Obviously, we did examine the question carefully as to whether there should be this retained residual right of the Home Secretary around human rights issues, but it is appropriate that allowing the courts to consider and decide human rights issues should strengthen the extradition process by achieving timely and fair resolutions to requests and having that sense of the court being seen to consider the evidence, rather than the Executive having that residual role. I do not think it has weakened the process or, indeed, weakened in any way the right of those challenges to be made.
The Chairman: Everything the Home Secretary could do, judges can do instead.
James Brokenshire: We think so. The courts are able to consider these matters carefully.
The Chairman: Thank you. You have given us a very helpful overview of a number of topics and aspects of this we are concerned about. Is there anything else you would like to say to us?
James Brokenshire: On the debate around the European Arrest Warrant, sometimes it is always characterised and seen in the context of requests that are made to the UK to extradite UK citizens overseas to other European countries. What I was keen to underline to the Committee is, for example, the utility that the UK has from the European Arrest Warrant in seeing that criminals who have evaded justice here in the UK are brought to justice. I have been a very keen supporter of something called Operation Captura, which is a scheme conducted with Crimestoppers and with the Spanish authorities to see that individuals are brought back to justice from Spain to the UK. It has been very successful. It has seen 60 of our targets now returned to the UK. I wanted to make the point, as something that might be helpful to the Committee in terms of its balanced view on extradition and considering all of these elements, that I do regard the European Arrest Warrant as an important part of our fight against organised criminality and bringing criminals to justice overseas.
Perhaps I may drop the Committee a line on that particular scheme we are operating, because it does give a sense of the power of extradition to see that the rights of victims are properly respected and those who think they can leave this country to evade justice can be brought to book and see that justice is meted out to them.
The Chairman: That is point I hope we will not lose sight of at any point in the proceedings. Thank you very much indeed.

James Brokenshire: Thank you.
The Chairman: We are very grateful.

Dr. Ted R. Bromund and Andrew Southam– Written evidence (EXL0048)

Submission to the House of Lords Committee on Extradition Law
Authors: Ted R. Bromund, PhD, and Andrew Robert James Southam
September 12, 2014

1. Does the UK's extradition law provide just outcomes? Is this law too complex? If so, what is the impact of this complexity on those whose extradition is sought?

1. The bilateral provisions of the UK's extradition law are, with a few exceptions, modern, well-constructed and follow international practice. Like any law, it will on occasion produce results that are displeasing to some observers, or even politically unpopular, but that does not mean it is unjust. Furthermore, like all aspects of the prosecution of crime, it requires the exercise of judgment by the Director of Public Prosecutions and the Crown Prosecution Service. That judgment may be controversial, but a different system would not eliminate the need for difficult judgments.
2. While improved practices can always be adopted, the fundamental problem with the UK's bilateral extradition arrangements is that successive UK governments have failed to defend them with the confidence they deserve. Sensible provisions have therefore been tarnished in the public mind.
3. A fundamental paradox of current law is that, though not unduly complex, it offers so many protections for the rights of the accused that it can be exploited by accused individuals to delay extradition, deny a speedy trial, and so generate sympathy. Even if done as a deliberate strategy, this is still an injustice to the accused's right to a speedy trial. It is equally an injustice to the victims of crime, who also have rights that must be respected. It is vital that UK extradition law protect the rights of all parties, but those protections should not be allowed to become a basis for campaigns against the law. The UK extradition system should offer clarity and protection to the accused, but should not be easily exploitable to its own discredit.

2. Is extradition law fit for purpose in an era of increasingly multi-jurisdictional crime?

4. The prosecution of multi-jurisdictional (including bi-jurisdictional) crimes has produced almost all the controversial extradition cases of the past decade. But in the main, UK extradition law is well-suited to deal with the challenges posed by such cases. The prosecution of all crimes, including multi-jurisdictional crimes, requires judgment on the part of the prosecution. Indeed, the Anglo-American system of justice rests in considerable part on a sequence of judgments by the prosecution, including whether to make a charge at all, what offense to charge, and how to prosecute the case. Extradition is undoubtedly a vital matter, but it is only one of many such vital matters that regularly arise in the pursuit of justice through the Anglo-American system. If prosecutors are not to be allowed to exercise their judgment on matters related to extradition, it is unclear why they should be allowed free judgment on other equally vital matters in the course of their duties.

3. To what extent is extradition used as a first resort when prosecuting a crime committed in another jurisdiction? Should greater use be made of other remedies?

6. Since the start of modern extradition practice, the UK, like the US and many other common law countries, has distinguished between territory and nationality when considering extradition requests. The principle has always been that the person accused of a crime should, irrespective of their nationality, be returned to face trial in the jurisdiction where the alleged offence occurred. Even in the age of the internet, there remain good grounds for this practice. It is the jurisdiction in which the harm was suffered and whose laws were broken where prosecution should occur. The UK Government would be the first to insist on extraditing to this country an individual accused of serious offences where the harm was suffered here.
7. It should also be remembered that in all cases involving extradition (though not the EAW), the UK has the right of first prosecution. In other words, if a criminal act is committed in part in the UK, and it is in the public interest, the UK can prosecute the crime and thereby pre-empt extradition. As a general statement, this is what the UK should do: there are sound reasons for recognizing extradition as an important legal instrument, but also sound reasons to believe that justice should generally begin at home. Yet this should be based on the nature of harm caused rather than matters of nationality, and domestic prosecutions should be manifestly in the public interest. It is hard to see a justification for not agreeing to extradite to other trusted nations British subjects accused of serious offences that were committed in this country but where the majority of the harm was suffered in the requesting nation.
8. When an alleged crime has been committed and the resulting harm has occurred in more than one jurisdiction, other issues arise. It is part of the professional duty of the CPS to decide whether the interests of justice are more effectively served by prosecuting in the UK or by standing aside and allowing another nation to make an extradition request. It is not possible to devise clear rules that will dictate the decision of prosecutors in every case: their exercise of their judgment is a fundamental part of the UK system. But there would be value in setting out on a bilateral basis with other trusted extradition partners the factors that prosecutors on each side will use to inform their judgment about the best course of action to take. This will not end all controversy, but it might help build public confidence in the system, and it could be done through an exchange of official notes by respective legal authorities. The UK has already taken some of the necessary steps by setting out, through the Crown Prosecution Service, sensible criteria for extradition in October 2012, and by transferring these criteria in part to judges through the 2013 Crime and Courts Act. These criteria could be extended by bilateral agreement into the international realm.
9. There are many possible alternatives to extradition when prosecuting offenses committed in other jurisdictions. These include holding a trial under English law in another nation, or seeking financial compensation through a civil action. These alternatives should always be kept in mind for use in genuinely exceptional cases. In the context of certain bilateral relationships, the UK could also benefit from

conducting joint studies examining the feasibility of local prosecutions of crimes committed in the UK against the persons or property of another nation, and vice versa. But in the normal course of affairs, the proper resort of action is to seek extradition. Fundamental to the Anglo-American concept of justice is that the accused has the right to face his accuser in an open court, and no alternative does that more reliably than extradition. Moreover, developing alternatives to extradition will inevitably make the UK system more complex than it already is, and is likely to generate more controversy. Finally, extradition is an old and well-understood concept, and it meets a basic need, which is to ensure that nations do not harbor fugitives from justice. As always, we should be wary of assertions that a more refined and elaborate system would necessarily be a more effective or just system.

4. On balance, has the European Arrest Warrant (EAW) improved extradition arrangements between EU Member States?

11. It is a misconception to describe the EAW as a contribution to extradition arrangements between EU nations. Extradition describes the act of removing an individual from one legal jurisdiction to face charges in another. The essence of the EAW is the creation of a single, EU-wide, legal jurisdiction. As its name implies, it is not an extradition procedure: it is an arrest procedure. The EAW is flawed for several reasons. Unlike the UK's extradition system, it is not based on an objective evidentiary test. It does not have a standard of dual criminality, meaning that it is possible for UK subjects to be prosecuted for acts that are not crimes in the UK. Most fundamentally, there is ample evidence that the standards of justice across the EU are not sufficiently similar to make the EAW either effective or just. While the introduction of a proportionality bar under the Anti-social Behaviour, Crime and Policing Act 2014 is a positive step, it does not remedy most of the EAW's failings. The EAW has increased the ease of removing individuals from one EU Member State to another, but improved efficiency of arrangements should not come at the substantial risk of increased injustice.

5. In circumstances where a prima facie case is not required, do existing statutory bars (the human rights bar, for instance) provide sufficient protection for requested people?

12. The UK moved away from requiring a prima facie case from trusted democratic partners as part of its adherence to the European Convention on Extradition in 1990 (ECE). This move, in turn, reflected a worldwide trend in the design of modern extradition systems, as reflected in the UN's 1990 Model Treaty on Extradition. In the modern age, it is accepted that the jurisdiction where the offence was committed and the harm suffered is the best place to try the crime. It should not be for the requested country to partly try the crime, which replicates the proceedings that will take place in the requested country. There was no public controversy in the UK at the ending of the prima facie standard. The UK system offers ample protection for individuals requested by trusted nations not required to present a prime facie case, which include a dual criminality test, a form of political offence exception, an examination of the

sufficiency of the warrant of arrest and the statutes of the alleged offence together with identification evidence.

13. The problem rests not with the UK's system, but with a number of the nations that are not required to present a prima facie case. For example, as a member of the Council of Europe, Russia is not required to present a prime facie case. By decision of the UK Government, Australia holds the same status. Yet Russia is a lawless autocracy whereas Australia is a respected democracy. Only well-established democracies should be treated as Australia rightfully is: currently, the most serious problem is that too many, not too few, nations hold this status.
14. The UK should seek to create a clear, bright dividing line: all the European democracies, Australia, Canada, New Zealand and the US, and other well-established democracies should not be required to present a prima facie case and should be subject to the same tests, standards, and safeguards, while all other nations should be required to present a prima facie case. This will require reforms to the EAW and the imposition of a prima facie standard on some ECE signatories.
15. It would be sensible to extend the status accorded to other democracies to nations such as Japan, and other well-established democracies, though there is no reason to believe further extensions are urgent at this time. In anticipation of future events, though, the Home Secretary should conduct a review of all nations currently required to present a prime facie case, and propose, subject to parliamentary approval, the extension of this status to suitable nations. In cases where extension is proposed, the Home Secretary should be required to present evidence demonstrating that the nation in question is a well-established democracy, and Parliament should retain the power to review and, if necessary, revoke this status. Because such a revocation would be extremely destructive of Britain's relations with the other nation, it would be wise to extend this status only in the most well-grounded cases.

6. Are the UK's extradition arrangements with the US comparable to other territories that do not need to show a prima facie case? If so, should the US nonetheless be required to provide a prima facie case, and why?

16. The UK's extradition arrangements with the US are identical to those with other nations not required to present a prime facie case. The only difference is that the US has this status by virtue of the 2003 Treaty, while Russia has it by virtue of the ECE and Australia has it by virtue of the decision of the British Government. The UK's arrangements with the US should not be changed. The UK moved towards not requiring a prima facie case from well-established democracies over twenty years ago, for reasons that had nothing to do with its relations with the US. The US is a well-established democracy. Its states provide full access to legal representation, and free access if the accused cannot afford an attorney. There is trial by jury where relevant, a legal standard of guilt beyond a reasonable doubt, evidentiary standards comparable to those in the UK, and complete transparency. There is a well-established system of appeal courts, up to and including the US Supreme Court. Under the terms of the 2003 Treaty, US authorities will not seek or carry out the death penalty in cases of extradition

from the UK. While there is no formal UK equivalent to the US system of plea-bargaining, this difference is more apparent than real, as UK defendants are aware that if they plead guilty, they will likely receive a reduced sentence. Imposing a prima facie requirement on the US would imply that it is less trustworthy and just than Russia, to make only one comparison. Such an imposition would, in effect, be a renunciation of the 2003 Treaty, which is both modern and effective, and is very unlikely to be speedily or satisfactorily replaced.

17. There are no valid arguments for any assertion that the UK's extradition arrangements with the US are unbalanced. It is often suggested that the 2003 Treaty was intended to apply only to terrorism in the wake of 9/11, and has been illegitimately expanded (presumably by the US) to apply to white collar crime. This is untrue. The 2003 Treaty replaced the 1972 and 1985 treaties, both of which were comprehensive, and the 2003 was self-evidently intended to be similarly comprehensive. Another claim is that the US system exercises an unfair degree of extraterritoriality, making it too easy to claim jurisdiction over individuals in other nations, including the UK. Regardless of the truth or falsity of this claim as it relates to the US, the fact is that the 2003 Treaty is based on reciprocity: the US cannot extradite an individual from the UK if the UK could not, under its own law, extradite an individual from the US for a similar offense.
18. Apart from the question of the evidentiary requirements of the 2003 Treaty, the argument most commonly offered against this treaty is that the US extradites more individuals from the UK than the UK does from the US, and that this therefore indicates the Treaty is biased against Britain. But observers should remember that extradition is not a numbers game where the measure of equity is national tit-for-tat: successful extradition requests are the result of a well-defined legal process that must act on individual cases. There is no reason to expect that the flow of accused criminals will be equal: criminals are not that obliging, and even if they were, the fact that they must all be treated as individuals means is not appropriate to compare extradition numbers as we do football scores.
19. On a specific level, the facts refute the claim of imbalance. While the US has not blocked a single British request, the UK between 2004 and 2012 blocked at least nine to the US. In other words, it is objectively harder to extradite an individual from the UK to the US than it is from the US to the UK. In some bilateral relationships, the UK extradites more individuals that it surrenders: this has caused no hue and cry in Britain or other nations. For example, between 2004 and 2008, Spain extradited 104 people to Britain while making only 27 requests. Finally, the ratio of extraditions between the US and the UK is not going up. In the supposedly halcyon days before the 2003 Treaty, from 1964 to 1994, the US filed almost three times as many extradition requests (301) as the UK (108). From 2003 to mid-2012, US requests (130) have outnumbered British requests (54) by less than two and a half to one. If the evidentiary standards of the 2003 Treaty are comparable, the ratio of US-UK extraditions has fallen, and the number of extraditions is stable, the 2003 Treaty cannot be unbalanced.
20. There may be many reasons why the US seeks more extraditions from the UK than the UK does from the US. Because this trend has existed for many decades,

it seems clear that it is connected not to the 2003 Treaty, but to other more fundamental factors. One obvious point is that the US is larger than the UK: if crime rates in each nation are even marginally comparable, then US authorities will have jurisdiction over many more crimes (including many more crimes where extradition is an option) than will UK authorities. Another possibility is that UK authorities may not have pursued certain kinds of crimes – in particular, financial crimes – with the same vigor as their US counterparts. That is, of course, the UK's right, but it does not mean the US has acted wrongly.

21. The question of the test of the issue of warrant of arrest is nonetheless significant. Sir Scott Baker's 2011 independent review found that the evidentiary requirements for a warrant set out in the 2003 Treaty are and were intended to be as similar as the differing legal systems of the two nations allow. But it is true that the US standard is enshrined in the 2003 Treaty, whereas the UK standard is contained in the 2003 Extradition Act, as amended. This gives an appearance – and, we emphasize, only an appearance – of imbalance. We suggest that the UK and the US should conduct a formal exchange of diplomatic notes, in which each side would state and accept that the standards contained in the 2003 Treaty and the 2003 Act are intended to be equivalent in effect. This exchange would also offer an opportunity to set out the standards that prosecutors would use to inform their judgment about whether or not to prosecute a case locally.

7. What effect has the removal of the Home Secretary's role in many aspects of the extradition process had on extradition from the UK?

22. The trend over the past two decades, as UK extradition law has been reformed on successive occasions, has been to seek to reduce the Home Secretary's role in the process. This is the right trend, and especially if the UK moves towards having one clear standard for all well-established democracies, this trend should continue. Extradition to well-established democracies should be, and increasingly has become, a matter for the exercise of judicial and not political judgment. There is no reason to believe that Home Secretaries will be able to apply the law with greater justice than judges, and it is not their role to do so. Nor is there any reason to believe that they will supply a more expert judgment than the Crown Prosecution Service in deciding whether or not to prosecute a case domestically. The involvement of the Home Secretary always tends to make what should be a judicial process into a political one. In particular, the Home Secretary becomes the focal point for high-profile campaigns on behalf of particular individuals, which further politicize the process.
23. Nor does the Home Secretary's involvement do any service to Britain's diplomatic relations. If a foreign nation requests the extradition of an individual, the request is presumptively made in earnest. If the extradition is refused by British courts, the Home Secretary rightly cannot reverse that decision. If the extradition is granted, the Home Secretary can all too easily be caught between the demands of diplomacy abroad and a political campaign at home, and justice (as well as the speed of the process and Britain's diplomatic relations) is likely to suffer as a result. Far from making the situation better, the involvement of the Home Secretary is likely to make it worse. The only reason for having a political actor in

the process as it exists today is that, as long as Britain does not require nations such as Russia to make a prima facie case for extradition, it is useful to have a political block on extraditions to such unreliable partners. But that is in reality a criticism of the ECE, not a defense of the Home Secretary's role in the UK system.

8. To what extent are decisions of where to prosecute certain crimes and whether to extradite influenced by broader political, diplomatic or security considerations?

24. It is not possible for outside observers to say to what extent decisions about where to prosecute and whether to extradite are influenced by wider considerations. Rightly, such details are not made public. The public presumption appears to be that such wider considerations have a substantial and indeed disproportionate effect. In the case of the US, we would disagree: the UK has refused to extradite a number of individuals requested by the US, and there is no reason to believe that individuals who have been extradited were inappropriately charged. But we also recognize that this broader public presumption, if we have characterized it accurately, is damaging: the UK extradition system must ultimately command the confidence of the public if it is to be effective. The largest part of the burden of restoring this confidence falls on the political leadership of the UK, which – regrettably – has spent a good portion of the last decade running the system down. To the extent that change is necessary, we believe that establishing a clear, bright line that separates Britain's extradition relationships with democracies from those with non-democracies, and – in the Anglo-American context – clearly and publicly setting out the factors that will govern prosecutorial decisions on where to prosecute and whether to extradite will help to restore public confidence.

11. What will be the impact of the forum bar brought into force under the Crime and Courts Act 2013?

25. Sir Scott Baker's 2011 review opposed the introduction of forum bar, and stated that "in each of the High Court cases in which forum was raised as an issue, the result would have been no different" if a forum bar had been in place. Furthermore, a prosecutor can prevent the forum bar introduced by the 2013 Act from operating, and UK authorities already had the power to pre-empt any extradition for a multi-jurisdictional offense by opening their own domestic case. In short, little if anything in the forum bar is new, and it therefore gives the unfortunate appearance of playing to the public gallery. This is not harmless: if the forum bar fails to operate as expected, this will fuel a new round of campaigning against Britain's extradition system.
26. Only time will allow us to assess the effect of the introduction of the forum bar by the Crime and Courts Act 2013. But the introduction of a forum bar provides another ground for appeals against extradition, in a system that is already subject to excessive delays. Even worse, there has never been a forum bar in modern Britain. Modern extradition systems around the world have increasingly sought to rely less, not more, on nationality. We believe it is contrary to the traditions of British justice to take this retrograde step. While not condemning everything

associated with the forum bar – the fact that judges are now required to take a number of reasonable criteria into account when deciding to block extradition is valuable – we doubt that the forum bar will achieve its nominal legal aim or its apparent political purpose.

The authors chose to provide no evidence on questions 9, 10, 13, and 14, and, apart from their response in answer to question 4, no evidence on question 12.

12 September 2014

Dr. Phil Brooke – Written evidence (EXL0037)

- I write in response to the call for evidence published at http://www.parliament.uk/documents/lords-committees/extradition-law/Call_for_evidence_FINAL.pdf. There are well-publicised cases that suggest the current situation does not provide just outcomes.
- The first remedy would be to require a prima facie case regardless of both the country requesting extradition, and the mechanism used, including those the subject of a European Arrest Warrant. This prima facie case should be properly tested in a UK court before the requested person is extradited. Having a UK court examine the prima facie case would have avoided the situation of Symeo.
- The second remedy is to strongly prefer that a requested person is tried under UK law in a UK court wherever possible. This would require that the requesting country provides sufficient evidence. Should the CPS decide not to prosecute, there should be a strong presumption that the extradition should be refused.
- Taken together, these remedies are proportionate, as being extradited must be a traumatic process in itself. Being removed to a foreign country, away from family and friends to a potentially unfamiliar place must intrinsically mean that the requested person is at a disadvantage. On the other hand, it is clearly unrealistic to expect a full collection of witnesses to attend from another country, so some balance is required. At the moment it is tilted too far in favour of extradition.
- In relation to question 3 specifically, some cases reported in the media have involved individuals using the Internet from the UK. For example, the case of McKinnon could reasonably have been prosecuted under the Computer Misuse Act 1990 (CMA) if the evidence had been presented to the UK. This would have been a proportionate and reasonable way to proceed.
- Given the gravity and potential impact to a requested person, it is reasonable that legal aid should be available without means testing during extradition proceedings.

Dr Phil Brooke

11 September 2014

Christopher Burke – Written evidence (EXL0012)

1 I am writing this in a personal capacity as a UK citizen to express my outrage about the current state of extradition law. It is unforgiveable that the legislature has allowed a state of affairs whereby British citizens can have their lives wrecked and their liberty taken from them without judicial review from their own legal system.

2 The UK/US extradition arrangements are especially egregious and lacking in reciprocity. It seems to be part of a wider pattern of frankly embarrassing diplomatic deference to the USA. There is also substantial evidence that the USA often treats even remand prisoners harshly and uses torture on detainees.

3 I would urge members of the Committee to recommend that the following measures be made statute as soon as possible:

3.1 British residents should not be extradited without a basic (*prima facie*) case against them being tested in a UK court

3.2 If their alleged activity took place wholly or substantially in the UK, a judge should be able to bar their extradition – whether or not the CPS decides to prosecute in the UK

3.3 The automatic right of appeal against an extradition order should be reinstated

3.4 Extradition is part legal and part political – the Home Secretary should once more be obliged to block extraditions that would breach human rights

3.5 Legal aid in extradition cases should not be means tested

4 I am now in my 60s and am concerned at how British society becomes increasingly inhumane. Please do what you can to at least stem this regrettable trend in the case of extradition law. Thank you for considering my submission.

Dr Christopher Burke

22 August 2014

Roger Burlingame, Kobre & Kim LLP and Liberty - Oral evidence (QQ 54- 66)

Evidence Session No. 4 *Heard in Public.* *Questions 54 - 66*

WEDNESDAY 23 JULY 2014

10.10 am

Witnesses: Roger Burlingame and Isabella Sankey

Members present

Lord Inglewood (Chairman)
Lord Brown of Eaton-under-Heywood
Lord Empey
Lord Hart of Chilton
Lord Henley
Lord Hussain
Lord Mackay of Drumadoon
Lord Rowlands
Baroness Wilcox

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Examination of Witnesses

Roger Burlingame, Kobre & Kim LLP, and **Isabella Sankey**, Director of Policy, Liberty

Q54 The Chairman: I extend a welcome to Roger Burlingame, who is from Kobre & Kim and previously a prosecutor in New York, and Isabella Sankey, who we welcome back, having given us a contribution to our informal seminar some weeks ago. We have had CVs from both of you, so I do not see any need to go over that, if that is alright. From the Committee's point of view, I think I am right in saying there are no declarations of interest to be made, so what I would like to ask is that we go straight into the question-and-answer session. But before we do that, would each of you please explain to the Committee who you are, for the purpose of the record, because the hearing is being recorded.
Isabella Sankey: My name is Isabella Sankey and I am the Policy Director at Liberty, the national council for civil liberties.
Roger Burlingame: My name is Roger Burlingame. I am a partner at Kobre & Kim. I do US-facing white-collar defence work, and I was a US federal prosecutor for just under 10 years in New York City.
The Chairman: I will probably direct, and the other members of the Committee will direct, questions initially to one of you, but the other person please feel free to reply if you want to; there is no compulsion to do that. If I might, starting with Isabella Sankey, when the Home Affairs Select Committee of the House of Commons reported on the UK-US extradition treaty—and for that matter, similarly, Sir Scott Baker's 2011 review, in its

conclusions—it came to the opinion that the evidential requirements in the UK-US treaty are more or less evenly matched, but are there, do you think, other factors that suggest that the UK-US relationship in extradition, in some way or other, may be unbalanced?

Isabella Sankey: Yes, we do. Our concerns about the treaty and about the 2003 Act have never been based on a feeling that there is no reciprocity between the two nations. Our concerns stem from the basic procedural safeguards that no longer exist in domestic law, before somebody is extradited to the US but also to many other jurisdictions. Our view is that, just because the US has taken a decision to allow their citizens and residents to be extradited elsewhere without some fundamental safeguards in place, it does not mean that we should necessarily make that same decision. Our concerns have never been based on the reciprocity point.

With that said, I think that the conclusions of the Sir Scott Baker review and others do not point conclusively to the evidential standard being identical. With respect, the review was a little bit of a fudge around the two evidentiary standards, with the conclusion that it is just very difficult to be precise about whether the two tests are the same. There were no comparisons between court judgments as to reasonable suspicion, on the one hand, and probable cause, on the other. We do not think the matter has necessarily yet been investigated but, as I say, our point has never been about reciprocity, but just about basic safeguards in UK law.

The Chairman: It is essentially an internal UK problem, you think.

Isabella Sankey: Yes. We also think that the statistics on extradition between the two countries demonstrate that there is an imbalance somewhere. If it is not in evidentiary standards that are required, it may be due to resources, the approach of prosecutors in both states and the other arrangements or lack of safeguards.

The Chairman: Mr Burlingame, what do you feel about that please?

Roger Burlingame: As to the imbalance point, I do not see a major imbalance. The two standards to me appear to be functionally the same—the reasonable-suspicion and probable-cause standards. I cannot think of a case that I am aware of that would have turned on the difference between those two standards.

Q55 The Chairman: You have seen it from both sides, as it were, defence and prosecution. Is that right?

Roger Burlingame: I have seen it from both sides, defence and prosecution, and it seems to me that I am unable to think of the situation where the difference between the reasonable-suspicion and the probable-cause standards would make the difference, but it may be that that case is coming. To me it appears that they are functionally the same. The processes that are in place in the two countries are procedurally different, but they are both designed to implement the statute in accordance with the domestic laws, and it seems that they are functionally similar enough to provide that there is not a major imbalance. It seems to me that, if I understand the UK system correctly, one distinction that is an advantage for people being extradited from the United States is that the initial determination from the judge that there is probable cause for the arrest can be challenged in a hearing.

Functionally, the challenge is not that significant, because the prosecution showing will be essentially a restatement of what is in the papers supporting the extradition request. That is a slight added benefit that someone coming back to England would have.

Possibly slightly counterbalancing that, and this is a point that we had discussed earlier, which we might follow up on later, is that there might be a tougher sift on who is being extradited based on the differing standards for seeking extradition in the United States

versus the UK. The situation with federal prosecutors, which I can speak to most authoritatively, but I believe the state standards are the same, is that when you are seeking an indictment of someone, you are putting on that decision the same decision that the jurors will face upon conviction. You are not indicting somebody based on a probable-cause standard; you are indicting them on a guilty-beyond-reasonable-doubt standard. My understanding of the British request is that it is sufficient evidence for a reasonable prospect of conviction and that the prosecution is justified and in the public interest.
I am not an expert on British prosecution by any means, but just from living here and working here for the last year and a half, it is noticeable to me that British prosecutors do not win at the same rate. That might be a reflection of more aggressive charging decisions. The US prosecutor may feel, "This person has certainly committed the crime, but I am not going to be able to convince 12 jurors of that, and so I am not going to charge this person." My sense, and again you should speak to a British prosecutor, is that the standard is somewhat lower in England and that British prosecutors feel it is their duty to bring the case that they might lose, if that is the right decision to make. That is just a different way of approaching that decision, but the way that that trickles down into extradition is that it does provide some added protection to the person who is in the UK and is going to be arrested on a US extradition request, in that the prosecutor back in the US will have had to have cleared that higher hurdle.
The Chairman: Before we move on to Lady Wilcox, do you have guidelines in the US for prosecutors?
Roger Burlingame: Yes. There is a thing called the United States Attorneys' Manual, which you might want to take a look at.
The Chairman: That is where I am coming to. Could you point us in that direction please?
Roger Burlingame: Sure. It is called the USAM or United States Attorneys' Manual. It is what governs federal prosecutors. It is a collection of practices and policies on the various decisions that prosecutors have to make, so there would be a section in there on charging decisions related to extradition. I would be happy to provide the Committee with follow-up, a link to the website, et cetera.
Q56 Baroness Wilcox: That pretty well helps me too—that question that has already been made by our Lord Chairman. We have already seen the controversy over the difference between probable cause and reasonable suspicion, so I would like to know to what extent misunderstandings arise in the US-UK extradition process as a result of complexities in legal terminology. I will tell you that I am coming from a background of being Chairman of the National Consumer Council. I am very interested that the general public gets a much better view of what is going on. As you know, we have, for example, national newspapers in this country and they use a very short vocabulary. When it comes to the law, they use a very long and complex vocabulary and, therefore, the man on the street is between a rock and a hard place with these things. That is the area that I am asking the question from.
Roger Burlingame: The protection that is afforded to the citizens is knowing that the judge in their own country, who is going to be making the decision as to whether or not they are going to be arrested, is going to be putting the same view on what is presented to them—is putting the domestic standard on the application that is presented to them. If there is a UK prosecutor who is seeking the extradition of a British citizen from the United States, they are going to fill out a document that provides the basic facts of the case, the law and why they believe this person broke the law. The US judge, who is going to issue the arrest warrant, is going to say, "Is there probable cause for the person to be arrested?" That person in the

United States is going to have the same benefit of the probable-cause standard that any other United States citizen has before they are arrested.
If you have faith in the concept of extradition, which is essentially that we have sufficient faith in the criminal justice system of this other country that we are willing to extradite people who are in our country in order to be subject to its processes, then that should give you some comfort that you are getting the same treatment that the country's own citizens are getting.
Baroness Wilcox: Can I just sneak in an extra one? Do the US prosecutors provide requested persons with any assistance to understand the charges levelled against them? What assistance do you actually offer in the States that is better than here in the way that we approach the people that we are trying to move?
Roger Burlingame: I am sorry; I do not think I understand the question.
Baroness Wilcox: You do not understand it. Okay, we will leave it until later.
The Chairman: Do you want to answer quickly and then we must move on?
Isabella Sankey: Yes, absolutely. As I said in part in response to the first question, our impression of the huge public concern about our extradition arrangements relates in part to the somewhat over-emphasised issue about whether there is a difference in evidentiary standards required by the UK, as per the US Government. If you look at the cases over which the public have been most concerned—the cases of Richard O'Dwyer, Babar Ahmad and Talha Ahsan—you see that the concern really stems from cases that are deemed to be disproportionate, as in the case of Richard O'Dwyer, where it is clearly not in the public interest to extradite a young student for a copyright offence: for setting up a website as part of his studies at university. As with both of those, and also with Gary McKinnon's case, the activity took place wholly in the UK. People feel, I think understandably, a great sense of unfairness that, in these cases of concurrent jurisdiction, there are currently not proper processes in place to ensure that we get the first bite of the cherry as to whether we want to bring a prosecution here. There is an effective bar to prosecution in those cases. Again, it comes back to not whether or not the systems are equal, but whether we have the right protections for our citizens. That is what we think the public is so concerned about.
Lord Brown of Eaton-under-Heywood: You are really asking for a reintroduction of the prima facie evidence case across the board.
Isabella Sankey: Yes, we are. We think that this comes back to first principles.
Lord Brown of Eaton-under-Heywood: That would apply to Part 1 as well, would it not?
Isabella Sankey: Yes, to Part 1 and to Part 2.
Lord Brown of Eaton-under-Heywood: That is going back a long way now in the history and it would rewrite the entirety of extradition law, would it not?
Isabella Sankey: Those are the safeguards that have existed for decades and decades in British extradition law, and we think with very good reason. We think they were removed too hastily, and we now have experimented with their removal and seen incredibly unjust results that have caused huge consternation amongst the British public. Yes, sometimes law-makers need to reverse reforms that they have brought forward. It can seem like a very big ask, but we feel that the situation is incredibly unfortunate: our traditions of criminal justice standards in this country are something to be proud of yet, instead of requiring those same standards to be met by other countries, we have given away a lot of the procedural protections that we would require here in our own law. We think this may be for well intentioned reasons, because we want to have good diplomatic relations with other

countries, and we understand that extradition is in the interests of everybody, but we think that there are basic first principles that must be returned to.

The Chairman: Can I just come in there? We have got the message that you think that the thing is fundamentally misconceived in the present state of circumstances but, when we go forward, can we ask you—we have specific questions—bearing in mind the law is as the law is now, to give your gloss on that and not simply to go back to the point I think we have all got? We can entirely understand where you are coming from—some may agree; some may disagree. That is a separate point: that we have to go back and start it again. We have to approach it from the perspective of where we are now and see what the nuances may be, bearing in mind that is your firm position.

Lord Henley: I have a very quick question. Isabella Sankey said very firmly in her opening remarks that the statistics show there is an imbalance between the two countries. I wonder whether you can expand on that to show why the statistics show there is an imbalance, or whether you prefer to put something in writing to us to explain. Obviously we are different sized countries. Statistics can say an awful lot of things.

Isabella Sankey: I can certainly follow up in more detail on the statistics point but, in front of me here, I have statistics. In 2010, 33 people had been extradited from the US to the UK, and only three of those were known to be US nationals under the new arrangements, with the 2003 treaty and Act. In that same period, 62 had been extradited from the UK to the US; 28 were known to be British nationals or had dual citizenship. That shows, in that period, many more British nationals were being extradited to the US than vice versa and, given the different sizes in population, you would expect that to actually be the reverse. The statistics more than show that the current arrangements are operating, for various reasons, we think, in a very imbalanced way.

Q57 Lord Brown of Eaton-under-Heywood: That is one aspect of the statistics. Another is that, we have been told, the United States has never, ever denied us an extradition request, whereas we have denied 10 of theirs.

Isabella Sankey: That may be the case, but that could be for a whole host of justified reasons. Just because certain extraditions have been denied, it demonstrates that, on the facts in that particular case, extradition was not warranted. Statistics are always going to be a bit of a rough measure of things, but those statistics should give cause for concern that things are operating in such a hugely imbalanced way, particularly given the different population sizes. That may be to do with public-interest decisions about prosecution, which could be different in the UK and US, and different rules about that. It could be for all sorts of reasons. It could be that it is something that needs to be factored into the analysis.

The Chairman: Can I just intervene there? You said initially that there was a particular reason for that and now you have said that there are possibly all sorts of reasons. Clearly there is something that it is worth looking into, but I am not sure you have adduced any evidence to us as to what the conclusion we should draw from the statistics ought to be.

Isabella Sankey: One of the possible conclusions is that the US pursues disproportionate extradition requests that are not in the public interest.

The Chairman: That is one interpretation, but I think Mr Burlingame might have given a reason why he may think that possibly is not the right gloss to put on it. Lord Brown, you are in the driving seat with this.

Lord Brown of Eaton-under-Heywood: I would like Mr Burlingame's response to the statistics. Could you explain both sets of figures?

Isabella Sankey: Can I just make one more additional point? Another factor might be the way in which things operate currently for concurrent-jurisdiction cases. We see in nearly all of those cases where there is concurrent jurisdiction the US successfully requests extradition. I am not aware of a single case of concurrent jurisdiction where the UK has successfully extradited someone from the US to the UK. In those cases where the US could prosecute or the UK could prosecute, I am not aware that the UK seeks, or at least successfully seeks, extradition.

Lord Hart of Chilton: Why do you say that is: because of weakness on our part?

Isabella Sankey: It is difficult to know how the prosecutorial decision-making processes work, because these are private discussions and negotiations between prosecutors but, if you look at the cases that come to court and the extradition requests that we get from the US, it is quite clear that, in many concurrent-jurisdiction cases, again for different reasons, our prosecutors decide not to pursue prosecutions and US prosecutors do. That could be a difference in approach, a different public interest test and all sorts of things, but the evidence is the cases that we have seen in this period that the treaty has been in operation. The evidence demonstrates that the US much more aggressively seeks extradition and prosecution in concurrent-jurisdiction cases. They may be better resourced. There are all sorts of considerations that there may be.

We think the way to fix this is by having an effective forum bar on the statute book that would make US prosecutors prove why, in concurrent-jurisdiction cases, prosecution should take place in the US, rather than in the UK. We think the way that the current forum bar that has recently been introduced operates would do nothing in practice to deal with this very disturbing situation that has developed.

The Chairman: Now, Mr Burlingame, you may wish to give us some thoughts arising from that.

Roger Burlingame: My understanding of the way it works is that all the UK authorities would have to do to take jurisdiction over a case in which the US is seeking to extradite a UK citizen is to indict their own citizen. My sense of what drives the prosecution decisions is the prosecutor with the better case is bringing the case. My sense is that it boils down to a prosecutorial resources issue.

The US has a huge, huge amount of law enforcement. One thing that has become apparent to me, being over here and interacting largely with UK white-collar defence attorneys and UK prosecutors, is the very different tracks that there are in the US and UK, in that the ranks of federal prosecutors are very well funded and there is no shortage of funds for people to be pursuing any cases that they want to be pursuing. The US has an expansive view of its jurisdiction and so it is seeking to bring cases that implicate US interests around the world and there are plenty of people to pursue those cases. The people who are pursuing those cases are, on the whole, the brightest and best of the US system. If you are at a Slaughter and May-equivalent firm in New York City and you get an offer to go work at the southern district of New York as a federal prosecutor that is the most exciting day of your life, not the day you got the job at Slaughter and May, and you are dying to go do that job. Those people at the end of doing that job are then going back to the Slaughter and May-equivalent and becoming the tippy-top members of the bar in New York City.

First of all, you have incredibly high-achieving, hard-working, motivated people at the height of their energy levels. The typical career trajectory is you do four or five years out of law school at a big firm, then you go to the US Attorney's office for five to 10 years, and then you go back to a big firm. In DC, New York and Chicago—the big cities—that is the

trajectory. You have these people in their 30s with boundless energy, who are the most Type A aggressive achievers up to that point in their lives, and then they are given this job and the cases that are going to get them the biggest headlines are huge international white-collar or terrorism cases. You have people with virtually unlimited resources working around the clock to pursue these kinds of cases. I do not have an in-depth knowledge of the way the SFO works and the way the Crown Prosecution Service works, but it seems like England has a different approach to funding law enforcement, and that there are different choices being made by people about their career trajectories. It seems to me that a natural function of those two systems at work would be that you would have less aggressive law enforcement and you would have less energy left over for doing, essentially, law enforcement in someone else's country.

Isabella Sankey: If I could just comment on that, as a person in my 30s with boundless energy, and with lots of friends in the same category, I would like to stick up for people who work in public service in the UK. I do not recognise that comparison and I do not think that we can put the difference down to that.

Could I just quickly illustrate, using the case of Babar Ahmad, why I do not think that interpretation stacks up? He and Talha Ahsan may have had the brightest and the best federal prosecutors going after them. Last week, the federal prosecutors were severely criticised by a US judge for the evidence that they brought to secure very long sentences for the two men. She was highly critical of their evidence and their approach, and gave much lower sentences than the federal prosecutors were after, so I do not think it is a question of the quality of the prosecutors or otherwise. On the issue of who has got the best case of the two prosecuting authorities, Babar Ahmad's case clearly shows that the evidence and the witnesses for his alleged activities were all in the UK. In fact, the Metropolitan Police handed over evidence to their US equivalents, so there is obviously a high degree of co-operation between the prosecuting authorities. I do not think any of the cases that I am familiar with demonstrate that, in these cases where forum is an issue, the US necessarily has a stronger case before they co-operate with the UK.

Roger Burlingame: Just to clarify, I am by no means casting aspersions on anyone who is in public service in the UK. I think that there is just a slightly different incentive structure, on my understanding, in the way the law-firm systems work in the respective countries.

Q58 Lord Hussain: Could you tell us what are the processes involved in extraditing an individual from the US to the UK, and how these compare to processes in the UK?

Roger Burlingame: I think they are largely parallel. Is that towards me?

Lord Hussain: Yes.

Roger Burlingame: They are largely parallel processes. They are slightly different in some of the procedures involved. If you are in the UK and seeking to bring someone back from the US, the prosecutor here is going to make a judgment as to whether there is sufficient evidence for a reasonable prospect of conviction and that the prosecution is justified in the public interest. They are going to then provide the documentation required under the treaty to the diplomatic corps, the most salient of which is the information outlining how the individual's conduct has broken the law. That is transferred over to the United States. It is reviewed by first the State Department and then the Office of International Affairs. If they judge that it meets the requirements of the treaty, it goes to one of the local US attorney's offices, and then the federal prosecutor writes out a warrant for the person's arrest, brings that to a judge and the judge makes a probable-cause determination. Are there indeed facts and circumstances sufficient to warrant a man or woman of reasonable prudence to believe

that there is evidence of a crime? If so, the person is arrested and then there is an extradition hearing, which is essentially: is this the person who was identified in the warrant? Was the treaty followed? Within "was the treaty followed?" is there indeed probable cause here?

As I said earlier, there is the hearing but it is not a particularly robust opportunity for the person who is being extradited to change the trajectory of how things are going to go for them, because they are not able to put on a case; there is not a mini-trial that takes place. It would just be an opportunity for them to say, "We believe what was set forth in the papers does not in fact meet the standards. We believe the Treaty was not followed in X, Y or Z way." After the hearing is cleared, there is an opportunity for appeal by habeas corpus, and then the person is certified for extradition and is returned to the UK.

The same process essentially happens in reverse going the other way. The US prosecutor either indicts the person before a Grand Jury or fills out an arrest warrant, which gets a judge to sign on the same probable-cause standard, transmits it to the Office of International Affairs. They make sure all the boxes are ticked in accordance with the treaty. It gets transmitted by diplomatic channels to the UK. A judge here then passes on an arrest warrant, making sure that it has set forth clearly the reasonable-suspicion standard and is in compliance with the treaty. The person is arrested. The main procedural difference between the two systems is that then the person does not have an extradition hearing in which to challenge the judge's determination.

The Chairman: Can I just come in there? In the hearings in the US, are there any equivalent considerations brought into play, such as, for example in this country, the European Convention on Human Rights?

Roger Burlingame: There are indeed, yes.

The Chairman: Can you just specify, please, what they are?

Roger Burlingame: It would be the defences outlined in the treaty, so double jeopardy, not being prosecuted for the same crime twice, and then whether it is a politically motivated prosecution or whether there are humanitarian concerns. They are the same issues that would be addressed by courts here.

Lord Brown of Eaton-under-Heywood: That would be what: after the Grand Jury has issued the indictment?

Roger Burlingame: No, because this would be a person who is coming from the United States to England who has the benefit of the extradition hearing. If you are being indicted that means you are on your way to the United States.

Lord Brown of Eaton-under-Heywood: Does it? I do not know. I wrote the judgment in McKinnon and I just reminded myself of what happened there. As I understand it there, he had been indicted by Grand Juries in two districts, New Jersey and Virginia, and it was on the basis of those indictments that the request came to the UK to extradite him.

Lord Hart of Chilton: The same thing happened with Mr Tappin.

Roger Burlingame: Correct. For people who are coming from the UK to the US, step one in that process is often going to be their indictment in the US. The extradition hearing would take place for a UK citizen who is arrested in the United States and is then on the way back to the UK.

Lord Brown of Eaton-under-Heywood: I see. If you are being transferred the other way, then you are saying there is a human rights consideration stage or the equivalent.

Roger Burlingame: I think it is the home country—the country that is being requested to extradite the person—which is going to be evaluating the human rights concerns before they allow their citizen to be extradited.
Lord Hart of Chilton: Where does that happen? At the moment, the nuts and bolts of this are a bit of a puzzle to me. Is the hearing that you are referring to before a Grand Jury?
Roger Burlingame: No. I am sitting at my desk in New York City and decide that a British citizen has committed securities fraud. I go and indict him along with the other five co-conspirators who are sitting in New York City. I go to the Grand Jury; I present my case as to why this person has committed a crime. They vote out an indictment. I have my indictment, then I fill out my extradition packet and I send it off to Washington. It gets transferred to the UK and the person is arrested in the UK. At that point is their right to have their case reviewed, as to whether or not my prosecution of that person was in some way a humanitarian violation. The British judge would be responsible for that. The Grand Jury is just weighing in on the initial decision, "Did this person commit a crime?" It is step one of the process.
Lord Hart of Chilton: Is that usually a rubber-stamping exercise?
Roger Burlingame: With no disrespect to Grand Jurors all over the world, essentially it is very rare that a Grand Jury stands in the way of an indictment.
Lord Hart of Chilton: There is no advocacy in front of the Grand Jury?
Roger Burlingame: I guess I would want to know what you mean by "advocacy". Why it is typically a rubber stamp is because of what I mentioned before: when I am deciding whether or not I am going to indict this British trader for securities fraud, I am thinking, "Can I convict this guy at trial? What is the evidence that I am going to be able to introduce at trial?" When you go into the Grand Jury, you have a much lower standard than the beyond-a-reasonable-doubt standard at trial; you have just a probable-cause standard. It is very atypical that you would be able to clear this much higher burden and then get tripped up on the lower hurdle of: does it appear reasonable that they committed the crime.
Lord Brown of Eaton-under-Heywood: The accused does not even know of the existence of the Grand Jury proceeding, does he?
Roger Burlingame: Correct; it is secret.
Q59 Lord Henley: The Grand Jury process is unfamiliar to most people in the UK. I wonder if you can just expand a bit. I appreciate you have sent an email, which we have seen, but for the sake of the record it would be quite useful if you just explained to the Committee how the Grand Jury process works.
Roger Burlingame: I would have written my email more formally had I realised it was going to be distributed to the Committee. The Grand Jury is a group of between 16 and 23 jurors––members of the community in which the Grand Jury is sitting—who are called to Grand Jury service. It sits on a weekly basis and it will be comprised of the same Grand Jurors. In the federal system, the shortest Grand Jury would be three months, but it can renew and it will typically renew up to a period. I think it ends at two years, but I am not positive of that. It is like any other jury; it is members of the community. Over time, you can drop off after a three-month period, and so it tends to be people who like Grand Jury service the longer the Grand Jury has gone on. If you have a very stressful job, you might not want to spend two years on the Grand Jury. If you do not particularly like your day job, then having a day away sitting in the Grand Jury hearing about crimes being committed—that is the population of the Grand Jury. The prosecutor comes in and makes a presentation to the Grand Jury. Actually, sorry, there are two functions. The first is an investigatory function.

Lord Henley: The defence does not know about it.
Roger Burlingame: The defence has no right to know that the Grand Jury is taking place. One of the things that you can do is subpoena witnesses who have to come and testify to the Grand Jury. You can use it as a prosecutor as an investigative tool: "I want to find out evidence from this person in the search of whether or not X crime was committed, so I will call them in and they will be forced to answer questions, under penalty of perjury, in the Grand Jury." You would be conducting your investigation through the Grand Jury and then, at the end of that process, you would provide a summary of what your evidence shows to the Grand Jurors, read them the indictment and then, provided 12 of them voted that there was probable cause to believe that the crime charged in the indictment was committed, then there would be a true bill and that person would then be indicted.
The Chairman: Do they have to make any determination first not that the crime has been committed, but on whether or not the person alleged to have committed the crime is the perpetrator?
Roger Burlingame: Yes, that would be part of the indictment: that you have the right guy.
Q60 The Chairman: The second question I have is whether this procedure with the Grand Jury is part of getting the prosecution underway, or whether it is part of the trial of any person who is accused.
Roger Burlingame: No, it is the investigative role of helping the prosecutor adduce evidence as to whether or not a crime should be charged, and then it is the bringing of the charge. It has nothing to do with the proving of the charge and the trial afterwards. The whole thing can be avoided. The accused could waive their right to be indicted by Grand Jury and you could just proceed forward on what is called an information and have an indictment come into being that way. You can also arrest someone without indicting them first, but then you would have 30 days in which you would have to indict them to start the case. You cannot arrest somebody and indefinitely hold them.
The Chairman: Is the Grand Jury a universal characteristic of law in the United States or is it merely in some places and not in others?
Roger Burlingame: It is universal federal practice and I believe it is being used in a little over half of the states.
Lord Rowlands: Does any extradition case have to go before the Grand Jury?
Roger Burlingame: No. I could also be sitting at my desk as the prosecutor and write up an arrest warrant for a judge that lays out the facts and the law as to why this person, I believe, violated the law. I would submit that to the judge; the judge would put the American probable-cause test on to it, as to whether or not there is probable cause to believe this person committed the crime. He or she would then issue an arrest warrant, and then you would use that arrest warrant, which had just passed muster with the judge, not with the Grand Jury, as the arrest warrant that you are going to use in your extradition request.
Lord Rowlands: What determines which course you take then?
Roger Burlingame: Outside the extradition context, it has to do with timing concerns and how locked in you want to be, if there is any chance that, maybe, you do not want to seek the indictment of a certain person. For example, a typical case would be you have someone who you know committed a crime. You are hoping that they, instead of fighting the charge, are going to co-operate and are going to help you get the other person in, say, the drug gang or whatever. You get an arrest warrant, so that the agents can pull them over on the side of the road and say, "Listen, you are under arrest. Do you want to help us or not?" If the person says, "Yes, I want to help you," you can keep it secret; they could then go ahead and

co-operate for years. If you have gotten your arrest warrant through an indictment, then you have the case sitting there and the judge is antsy about this person who is co-operating for years and years. It has to do with a firm beginning time on the beginning of the case and various strategic timing concerns.

Lord Rowlands: What proportion of extradition cases would go to Grand Jury as opposed to the other?

Roger Burlingame: I do not know the answer to that question. I suspect that Amy Jeffress, who is the next witness, will have a better answer to that question.

The Chairman: Can I interject there? We are getting down to an awful lot of technical detail. Would it be too much to ask if perhaps you could either point us to the kind of book that would lay it out for us or find someone to produce a paper that would explain? It is very alien and out of character with the approach we have, so it is obviously important, but I do not want to spend too much time on the nuts and bolts.

Roger Burlingame: Sure. I would be happy to provide the Committee with the names of basic federal criminal practice treatises that will lay this out.

Q61 The Chairman: Not too complicated please. One point that I think is important is that the human rights bars that exist in the English system are pretty emphatic. When you talk about the US system in terms of humanitarian considerations and political motivation, what degree of robustness pertains to them? Are they of equivalent strength, for want of a better way of putting it, to the bars that exist in this country, or are they in fact more loosely and more generally interpreted? Are they equivalent or are they not?

Roger Burlingame: I think that might be another question that is better posed to Amy in that, by dint of her job as the American attaché in London, she is going to have a better sense of the standards here than I do and be able to give you a better comparative answer.

The Chairman: That is an entirely fair response.

Lord Brown of Eaton-under-Heywood: Can I just ask one thing? Whether you base your extradition request to this country on a Grand Jury indictment or a judge's warrant, either way, at least theoretically, the Grand Jury or the judge should have been satisfied as to probable cause.

Roger Burlingame: Correct.

Lord Brown of Eaton-under-Heywood: That is the only point at which anybody is looking at probable cause as opposed to the lesser standard of reasonable suspicion.

Roger Burlingame: There would also be internal controls in the Office of International Affairs before they approve the extradition request. They are going to read very carefully the information that comes along with it to be satisfied that it agrees with the individual US attorney offices and the judge's determination of probable cause.

Lord Brown of Eaton-under-Heywood: You say they apply the probable-cause standard too.

Roger Burlingame: Right, and there is also going to be internally the prosecutor who is sitting at his desk and saying, "I want to arrest this person." There are levels of supervision that they have to clear in order to be able to, so there are many sets of eyes that are looking and making sure that the US standard of probable cause has been cleared.

Q62 The Chairman: As far as the US end of the game is concerned, until you start looking out of the US border, it is all based on probable cause. Is that right?

Roger Burlingame: That is correct.

Lord Hart of Chilton: Can I just ask this? All these alpha males are burning up energy in getting to the point where—

Roger Burlingame: There are lots of alpha females as well.

Lord Hart of Chilton: I am sorry. Their energy is being used and a warrant has been issued. Why is there sometimes such a delay between the warrant being issued and the extradition process being started? In Tappin, for example, there was a three-year delay between the warrant being issued and the extradition process being started.

Roger Burlingame: I cannot speak to that case. A couple of possible explanations spring to mind. One would be if the investigation is covert; once you submit the extradition request, it is going to become overt. If there is continuing investigation going on, you might not want it to be known about that you are looking at a certain person or a certain group of people, because it would give away what is happening in the investigation. It can also just be bureaucratic. I do not think three years would be explained by bureaucratic processes, but there are many requests going through OIA and I am not sure that they are all—well, I will not comment on OIA, because I am not an expert on OIA. I think Amy will probably have more experience with that.

Lord Mackay of Drumadoon: Can the procedures you were talking about of going to a Grand Jury or a judge for a warrant be pursued by a state prosecutor or by a federal prosecutor?

Roger Burlingame: The system is identical from the point at which the arrest warrant has been secured but, up to that point, there are differing procedures in the states and for federal prosecutors. It is still going to be governed by a probable cause standard but, for example, Grand Jury procedure can differ greatly. For example, with the federal Grand Jury procedure, as I said, you are typically going to end up with a true bill. It is a much higher hurdle to clear in New York State, because the rules of evidence are in force and you cannot have people testifying through hearsay. It is a higher hurdle.

Q63 Lord Empey: Good morning. Because of the different systems, because of the different lengths of sentences, there could be a possibility that somebody would be encouraged into plea bargaining. That requires an admission of guilt rather than an assertion of innocence. Therefore, given the fact that people are away from home facing these very lengthy sentences, do you feel that there would be additional pressure on those people to actually enter a plea bargain rather than continue to assert their innocence?

Roger Burlingame: You have a constitutional guarantee of the right to trial. At base, you have the same decision in the United States that you have in the UK, which is whether you are going to challenge the case at trial or you are going to plead guilty and get a slightly better deal than you would get if you challenge the case at trial and lose. That is always an incredibly fraught, hard decision for people who are in that situation. My take on that question is that it boils back down again to the differing approach to the charging decision, as I perceive it. What I understand your question to be asking is whether there is an added pressure to plead guilty in the United States that there is not in the UK. Part of that may boil down to the much higher conviction rate and part of that may boil down to the much tighter sift on the charging decision.

I was incredibly struck recently. I was having a conversation with a prominent white-collar defence attorney in London after the phone-hacking trial ended. I said, “This is just amazing; one conviction. Heads would roll at any prosecutor’s office in the United States if you got one out of eight in the most high-profile trial in the country.” She said, “I thought it was a tremendous success, in that the main target was convicted.” I think that reflected a huge difference in perspective as to what, when you charge someone, you are expecting. I do not think that the 95% conviction rate in federal courts—I am not sure it is actually 95%, but it is somewhere way up there—is because of a more talented group of prosecutors; I think it is

because you are making a much stricter charging decision. If that is true and you are charging a pool of people who are more provably guilty, then it is going to make sense that those people are going to be feeling additional pressure to plead guilty, because it becomes a more futile thing to challenge the case at trial.

Lord Empey: Given the fact that there is a very significant political dimension to the identification of prosecutors and others, through elections in the various states, which is obviously something we do not have, to what extent does that intervene in the decision-making as to whether somebody goes for a case or does not go, and what practical implications does that have for the individual?

Roger Burlingame: I have no personal experience of that. Federal judges are not elected, but I know it is very prevalent in many states. I have read some of the material—the Brennan Center study that was included in one of the questions that I was kindly sent. I found the study to be very troubling, but I do not think I can offer any sort of opinion that goes beyond what you would be able to glean by reading the study.

Lord Empey: Do you have a view on that, Isabella?

Isabella Sankey: We do have a view on that and also your earlier question about pressure to plea bargain. I think there is an increased pressure on those who are extradited from the UK, not only because there is such a difference between possible length of sentence in a way that, for many offences, there is not in the UK, because the US has much higher sentences for many crimes, but also because, as part of a plea bargain, the issue of where you get to serve your sentence often comes into play. For people who are far away from home without support, facing an alien justice system, the idea that you will be able to serve a period of your sentence back in the UK is always going to be much more comforting. There is an increased pressure to plea bargain and that is something that certainly should be taken into account in extradition decisions made by our judges.

Q64 Lord Brown of Eaton-under-Heywood: How would you take that into account? What do you do about that? Do you say, "They should not be given a discount if they plead in order to take the pressure off them. They should be required to contest the case"? How do you deal with it? Do you say, "We won't extradite them; they can have sanctuary here"? How do you deal with that?

Isabella Sankey: It puts our judges in an invidious situation; I agree with that. In the McKinnon case, as you will remember—you dealt with it—you looked at the facts that were presented by his side and you reached a conclusion as to whether or not you thought that the plea bargaining in that case was oppressive. That is the best way of dealing with it and reaching the conclusions on a case-by-case basis. It is always going to be an incredibly difficult situation, because our criminal justice systems are so very different—more different than a lot of people realise—but it is something that needs to be taken into account, because it affects the ability of somebody to access justice when they are extradited and to get a fair trial. There is no way it cannot be taken into account.

The politicisation of the judiciary, at state level in the US, and prosecutors also is something that we should be very conscious of here in the UK. It is completely different from the politically impartial justice that we administer here.

The Chairman: Can I stop you there a moment? It is obviously something we have to take note of. Do you have—and you may not have it here with you—any evidence to suggest that there has been injustice caused by the kind of things we are talking about?

Isabella Sankey: You can look at the practical cases that have now reached a conclusion, one way or another, and what you will find is that so many people who are extradited from

the UK to the US do plea bargain. It is impossible to know whether or not they should have done so, but the evidence is there that, for the vast majority of people—in fact, I cannot think of anybody who is planning to contest, apart from perhaps Paul and Sandra Dunham, who have recently been extradited and are now saying that they are planning to contest the charges—you do not see cases of people not wanting to plea bargain. It is a huge roll of the dice if you do not.

The Chairman: There are two points with that. To go back to what Mr Burlingame said, his proposition to us was that, in order to bring a prosecution, the way in which the American prosecutors look at it is they will not start at all unless there is a much greater degree of evidence to support the likelihood of conviction than is the case in the UK. You may not have any views about that; you may say you do not know enough about the detail; but I, and I am sure the Committee, would be interested to know your gloss on that perspective.

Isabella Sankey: I am not sure that there is evidence available to demonstrate that. In a number of cases, it is clear that the evidence that the US claims that they had was not there. In the case of Lotfi Raissi, when we did have a prima facie safeguard on the statute book, back in 2003, his extradition was rejected because the US did not make a basic case. Taking the prosecution's case at its highest, there was no case to answer. So there is an example. In the Babar Ahmad case that I just mentioned, the US judge in that case was highly critical of the evidence that the US prosecutors brought and said showed that material support to terrorists had been provided. There are a few anecdotal examples I can give you, but it is not my impression at all that a much more stringent test is exercised by US prosecutors before going after prosecutions.

If I could just make one connected point, all of these issues that we are grappling with are incredibly difficult—the plea bargaining, issues to do with the politicisation of judges in the US and the differences in our justice systems. We believe this is all the more reason why there need to be other procedural safeguards in place, which would in a way help you get around some of these more fundamental contradictions between our justice systems. Having an effective forum bar on the statute book, for example, would mean that we were not outsourcing so many prosecutions to the US of people who have allegedly done things here in the UK. It means we would not have to get into these very difficult assessments as to the pressure to plea bargain, the treatment they might receive in the US, in US prisons. One very easy way to deal with a lot of these issues is to make sure we have better procedural safeguards so that the case can be barred for a different reason and somebody can be prosecuted here.

Lord Rowlands: Ms Sankey, you are leaving me with an impression that you would almost extradite no one. What would happen then to the interests of those who are the victims of the crime, who are waiting for justice?

Isabella Sankey: That is absolutely not the case. We believe in extradition wholeheartedly and we think it serves a very important purpose. We just think that too many safeguards have been given away. With so many of the cases where forum is an issue, potential victims are here in the UK just as they are in the US, and more evidence is often here. To us, it just seems to make no sense to have to send so many people to face justice abroad when they could quite easily be brought to justice here, but we do not deny the importance of extradition at all.

Q65 The Chairman: Can I come back here to a point that we almost got to but is quite important. We have heard evidence that, if you resist extradition and you then are subsequently extradited, bail in the US is denied. Is that correct?

Roger Burlingame: Not necessarily.
The Chairman: It is not so.
Roger Burlingame: It is not so.
The Chairman: Is it general practice to deny it?
Roger Burlingame: The bail determination is made by the judge, based on risk of flight or dangerousness to the community. Typically the most important factor for somebody who was being extradited in would be risk of flight. The arguments that are presented in bail hearings to US judges to negate risk of flight are: this person has been living in this community for X number of years; their job is here; their family is here. Judge, where are they going to go? We have put down a bond on their house. They do not have enough money to be able to live on the lam. Not only do they have no incentive to flee because this is where they are, but they do not have the ability to flee. That becomes a much tougher hurdle to clear when you have no ties to the United States and you are brought in.
The Chairman: No money, no home, no nothing.
Roger Burlingame: Right. I do not think it is the act of challenging extradition that would lead to a low percentage of bail granted, but there are instances that I can think of that my firm has handled where, if you can assure the judge that the risk of flight is negated, so that the person will submit to some sort of electronic monitoring to show that they are still within the jurisdiction or be able to put up some sort of a bond that makes the judge satisfied that a particularly close family member would be financially ruined if they were to flee, or something along those lines, you can get bail.
The Chairman: It is a pretty high hurdle if you do not have much in the way of resources, is it not?
Roger Burlingame: That is correct.
The Chairman: Anybody else on this, otherwise I would like to ask Lord Hart. We have touched on forum and you have an interest.
Q66 Lord Hart of Chilton: We have. We need to go back to that. I would like to start by just having you explain in a little more detail how the various prosecutors, UK and US, work out together decisions on concurrent jurisdiction. What do they actually do? Just describe what happens?
Roger Burlingame: The relationship between the two countries is extremely strong, as in all other areas. If there was a case that was starting from an absolutely even starting line and the same amount of exact information was known to both the UK and the US at the beginning, and you were dividing up who was going to prosecute whom, then the idea would be for each country to focus on its own citizens and the ones who are there. Conflicts arise where one set of prosecutors has a greater quantum of evidence against a certain defendant and is more advanced in the investigation. Then you have a meeting at which one side says, "We can prove X, Y and Z. We are here with our investigation. You are not off the blocks. We should be entitled to this."
The Chairman: I take it you have done these kinds of negotiations.
Roger Burlingame: Some of these investigations I have done. There are two federal prosecutors' offices in New York City. When you become more senior at either one of them, you spend your life fighting with the other one about who is going to get which target. Prosecutors are prosecutors the world over, and do not like to invest a lot of time and effort investigating a case to then give away the target, so it becomes a question of who has the better more advanced case typically.

Lord Hart of Chilton: When you look at a case and you see that the defendants are located—let us take an example of UK-US—in the UK. Here are the defendants resident in the UK. The crime has probably been committed in the UK. Why would it be that that would lead to extradition?

Roger Burlingame: I guess it depends. I would need to know what happened and why the prosecutor was thinking about extradition in the first place. If it is a person who was involved in, say, allegedly fixing LIBOR and they were sitting in a bank in London, but two of the people they were conspiring with to fix LIBOR were in New York and one was in Hong Kong, that group of people, you could argue as a prosecutor, should all be tried together, because they were committing the crime together. What is the appropriate jurisdiction in that case? I would think the jurisdiction that can prove the case.

One point that has been glossed over a little bit is that any time the UK wants to stop an extradition to the United States, it can just indict its citizen and then that is it for the extradition. Where there are cases where both sides are equally advanced in their investigation and prepared to prosecute, you are not going to have situations where people are being extradited. It is where one country is more advanced in the investigation and ready to go, whereas the other one is not similarly advanced on the same case.

Lord Hart of Chilton: Does it sometimes come down to the zeal of the prosecutors, going back to your alpha male or female?

Roger Burlingame: I think it is less about the prosecutors, possibly, and more about their resources and how much attention is focused on those sorts of cross-border, multi-jurisdictional, white-collar cases, terrorism cases and currently US tax evasion cases. They are the kinds of cases where the US is reaching across borders. No one is coming to try to extradite people for marital disputes that lead to dust-ups in south London. It is crimes that the US perceives have some logical connection to the United States.

Isabella Sankey: That logical connection could be as small as a computer being used with a US server based in the US for a matter of months.

Lord Brown of Eaton-under-Heywood: You would not suggest McKinnon was more appropriately tried here than the United States considering, although his action was here, it was targeted exclusively at destroying capabilities in the United States.

Isabella Sankey: We believe that, in all cases, there should be a forum bar that could be argued by somebody who has not left the jurisdiction. It will then be up to a UK court to determine whether extradition should be barred on forum grounds.

The Chairman: We have really got to the end of the time we have as we have the next witness coming on line in a minute or two. What I would like to say to both of you is thank you very much indeed. Speaking for myself, I now know a lot of things I did not know before the session began. You have given certainly everybody here a considerable amount of food for thought. If anything crops up later, I hope we might be able to come back to you and seek additional evidence, if that were possible, please.

Roger Burlingame: Of course. Thank you so much for the opportunity.

Isabella Sankey: Thank you, Lord Chairman.

Chief Magistrate's Office – Written evidence (EXL0043)

Response of the extradition judges based at Westminster Magistrates' Court to the House of Lords Consultation on extradition

Introduction

The first instance extradition judges of England and Wales welcome the opportunity to respond to the House of Lords consultation. This response has been prepared in the Chief Magistrate's Office, and all the extradition judges have had the opportunity to comment.

Background

From at least the 19th century, extradition proceedings took place at Bow Street Magistrates' Court. Following the closure of Bow Street, that work is now conducted at Westminster Magistrates' Court.

Before the 2003 Extradition Act, there were in the region of 50 new extradition cases a year. Since the implementation of the 2003 Act, the number of new cases has risen to nearly 2200 cases in 2013. Of those, only 82 were cases from outside the EAW scheme. We have been advised that with the implementation of the Schengen II scheme in a few months' time (implementation has twice been postponed), the volume of work is likely to rise significantly, again.

It is our perception that not only has the volume increased, but so has the complexity of a typical case. A significant number of cases have been heard by the House of Lords and more recently by the Supreme Court. Moreover, the majority of those cases where extradition is ordered are appealed (as of right) to the Divisional Court. As a result there is a considerable body of case law that can be, and is, referred to during the proceedings at first instance.

It follows that the court has had to adapt its arrangements to cater for this increased workload. In 2003 we had the occasional use of one courtroom for extradition proceedings. Now five extradition courts sit every day, with contingency plans for more if there is a "Spike" in the work. As recently as 2008 there were four district judges undertaking extradition work (plus the Senior District Judge (Chief Magistrate) and the Deputy Senior District Judge). Now there are 15 ticketed judges plus the Chief and Deputy. In addition there is a body of expertise among CPS lawyers and defence lawyers that is, in our view, essential for the smooth operation of the extradition process.

All defendants arrested on an extradition warrant make their first appearance in custody. A significant number, maybe a third, either consent to extradition or do not oppose it. Of the remainder, most oppose extradition on human rights grounds, notably Article 8 (right to private and family life) and Article 3 (torture and inhuman or degrading treatment or punishment). Other commonly argued grounds are conviction in absence without right to a retrial; passage of time; that the warrant is invalid as insufficiently particularised; oppression (usually based on mental or physical health). We do not have figures for the numbers who

successfully resist extradition (although no doubt they could be obtained), but there is no doubt that the proportion is rising following the Supreme Court decision in *HH*.

Defendants are sought either for prosecution (where they are accused of an offence) or to serve a sentence having already been convicted of that offence. It is worth stating that the discharge of an extradition warrant is not an acquittal. The person remains liable to further proceedings in this jurisdiction (and that is not rare), or to further extradition proceedings if they travel to another country, or to due process if they travel to the jurisdiction that issued the warrant. Moreover, almost all those sought for extradition are nationals of the country issuing the proceedings. For the most part they appear to be economic migrants, although some have deliberately fled to escape prosecution or sentence. That for most people, successfully resisting extradition means you cannot return to your home country. Only a tiny proportion of those who appear before us are British citizens, and of those most were either living in or visiting the country that now brings proceedings against them.

The European Arrest Warrant is based on a system of mutual trust. It was designed to enable the speedy return of people for prosecution or to serve a sentence in other European countries whose system of justice we trust. The Framework Decision envisages that decisions on extradition, including appeals, will be taken within 60 days. In contested cases we almost never meet that ambition. It is not uncommon for contested cases to take over a year to resolve in this court and the court above. It may be sometimes overlooked that these are very anxious times for a defendant, and that self-harm is not uncommon. On the other hand, it appears that some prisoners at least are content to effectively serve their sentence in this country, and for them delay is an advantage.

Extradition judges meet formally and informally with colleagues from other jurisdictions. Broadly speaking, extradition in Scotland, Northern Ireland, and the Republic of Ireland follow a similar course to ours. However, elsewhere in Europe there is surprise and a sometimes expressed disappointment at our lengthy and complicated proceedings that our colleagues consider may be characterised by lack of the mutual trust required by the EAW process.

Previous enquiries

The first instance extradition judges provided written evidence to the Scott Baker enquiry. The Chief Magistrate, the Deputy Chief Magistrate (Judge Wickham) and the most experienced extradition judge at the time (Judge Evans) gave oral evidence before the enquiry. Although two of the three judges have now retired, the evidence accurately reflects our current views.

We have admiration for the work of Scott Baker LJ and his team, and have no significant disagreement with the extensive report produced.

The current chief magistrate, Judge Riddle, also gave evidence to the House of Commons Select Committee, under the chairmanship of Mr Keith Vaz MP.

There have been recent changes to the Extradition Act. It is too early to assess the effect of these changes. Our preliminary view was that such changes would be unwelcome and unnecessary. We said that they would add to the delay and expense of proceedings, without, as we saw it, any benefit. However, we will of course faithfully follow the will of Parliament. We do however suggest that any future proposed changes, if introduced during a time of austerity for the justice system, be costed, to include the cost of arguing new points, potentially through to the Supreme Court and to take into account the cost to the courts service, the CPS, and legal aid.

Our suggestions

Before we turn to the specific questions asked by the House, perhaps we can be permitted to make the following suggestions of our own.

1. From a practical point of view, our most pressing concern is over legal aid. It is not simply that we doubt those calculations that have suggested that means testing saves money. It is the sheer injustice of seeing someone in custody for long periods of time, without representation, because of inability to provide the necessary paper proof of earnings. We refer to submissions made earlier to Scott Baker LJ.
2. We would welcome the ability to appoint and pay for a report by a CAFCASS officer, or similar, in cases where extradition of a parent may be incompatible with the human rights of a child. Similarly, access to a psychiatrist for reports on a defendant at risk of self-harm, or on the question of fitness to plead, would have significant practical advantages at, in our view, no extra overall costs.
3. Prison conditions are a problem. Recently attacks have been made on prison conditions in Lithuania, Latvia, Poland, Italy, Romania, Moldova, Russia, the Ukraine, Turkey, South Africa, Kenya, Greece, among others. In most of these countries we do not now order extradition because of prison conditions, or do not do so in the absence of assurances which are not usually forthcoming. This means in effect that we have extradition arrangements with many countries to whom in practice we will not order extradition. The question is a complicated one, involving concerns about inhuman or degrading treatment. At the moment each case is dealt with individually, sometimes with unchallenged expert evidence. Sooner or later we will decline to extradite somebody who then commits a serious offence in this country. In our view the position needs to be considered.
4. A more imaginative, and more productive, approach than legislative change is to increase mutual international cooperation by a more extensive use of modern technology. For example, an English witness gave evidence from Westminster over a video link to a court in Milan in the case of Silvio Berlusconi. Witnesses from South Africa gave evidence here by video link in the case of Shrien Dewani. There have been numerous cases where evidence from abroad has been received by way of Skype. In some cases judges from other countries, notably Holland and Italy, have travelled to Westminster to take live evidence from a witness. We see no reason in principle why these procedures should not be followed more commonly in cases of extradition from the United Kingdom. A defendant wanted for extradition could choose whether to return to the requesting state, and participate personally. Alternatively he could agree to some or all of the proceedings taking place by way of

video link or Skype. Thus defendants wanted in another jurisdiction might only be returned once their hearing had taken place and they had been sentenced to a term of imprisonment. Or a case could be fully case managed to trial with the defendant only returning shortly before the date listed for that trial. Lawyers could be instructed in the requesting state to appear before the court there, while taking instructions here (either in person or by Skype).
Although of course there is an expense, it may be that this expense is scarcely more, or even less than, our current protracted litigation.

5. We suggest that this is an appropriate time to investigate independently what has happened to those who have been extradited under the Extradition Act 2003. In many of those cases there have been dire predictions made on their behalf, particularly of human rights abuses if returned. It should not be difficult, we suggest, to identify a number of individuals who have been returned and to examine whether those predictions have been realised. In the case of extradition to the United States it should not be difficult to discover whether, as is sometimes asserted, the case against them was based on insufficient evidence. Such an enquiry could disclose whether the courts have been wrong to order extradition, and it could act as a yardstick for future decisions.

Your questions

General

1. Does the UK's extradition law provide just outcomes?

The concept of "just outcomes" is a rather elusive and subjective notion. The application of the Extradition Act 2003 along with Framework Decision and principles developed by the ECHR are certainly applied in the extradition courts at Westminster in a structured and cogent manner, by trained and ticketed District Judges (MC).

Is the UK's extradition law too complex? If so, what is the impact of this complexity on those whose extradition is sought?

2. Is extradition law fit for purpose in an era of increasingly multi-jurisdictional crime?

The principles governing extradition under the EA 2003 are not in themselves complex, They seek to provide an efficient mechanism for cross-jurisdictional crime control and mutual judicial cooperation. However in an era of increasing multi-jurisdictional crime and a high turnover of cases being brought on appeal, there is a perceived lack of consistency and undue complexity surrounding this area of law now. Defendants seek to gain an advantage from the evolving, and sometimes conflicting case law in this area, which affects the interpretation and application of various statutory provisions. A high volume of extraditees seek to rely on various Article 8 arguments or the passage of time, which although they believe are of extreme importance, do not in fact pass the threshold of outweighing the public interest in effecting extradition. There is a perception by the District Judges that we have almost moved beyond the Framework Decision giving rise to a system entrenched with delays and huge costs, whilst damaging our international relations by not honouring our extradition arrangements.

Greater use could be made of digital equipment such as video links, Skype, Facetime etc (provided the systems were compatible and did not inadvertently protract proceedings due to equipment failure).

3. To what extent is extradition used as a first resort when prosecuting a crime committed in another jurisdiction? Should greater use be made of other remedies?
The number of extradition cases listed for a contested hearing has steadily increased. This is in part due to the number of requests being received and partly because of the number of defendants contesting application under Article 8 or delay grounds. In 2013 there were a total of 2182 extradition cases, 2100 of which were EAW requests and 82 cases of which were Part 2 requests. In Scotland there were 111 EAW requests last year and 1 Part 2 request. Northern Ireland had 57 cases all of which were EAW cases. Between August – December 2014, already over 330 cases have been listed at Westminster Magistrates for a contested hearing.

In many cases (especially in cases originating from Poland) there needs to be a requirement of proportionality and the consideration of other alternatives. The extradition District Judges agree with the recommendation in the Scott Baker Review 2011 (para 11.22) that consideration should be given to other measures such as recognising and enforcing fines imposed by Member States, releasing extraditees on bail under the European Supervision Order in pre-trial cases, serving a summons for attendance, transferring sentences to the United Kingdom where appropriate, and using the European Investigation Order to allow for an investigation to take place before a decision is taken whether to issue an EAW. However it is also important to bear in mind that any of the proposed alternatives (example serving custodial sentences in the UK, enforcing fines and non-custodial sentences) do not create undue displaced pressure on resources. It would be wholly disproportionate to avoid the costs of extradition by displacing the costs of alternative enforcement measures on to a different body within the Criminal Justice System. A clear accountability of the savings of these alternative measures must be provided at the outset.

European Arrest Warrant

4**. On balance, has the European Arrest Warrant (EAW) improved extradition arrangements between EU Member States?**

How should the wording or implementation of the EAW be reformed?

Are standards of justice across the EU similar enough to make the EAW an effective and just process for extradition?

How will post-Lisbon Treaty arrangements change the EAW scheme once the UK opts back in to it?

Overall the District Judges agree with paragrphs 11.1-11.7 of the Scott Baker Review 2011. The EAW has improved the scheme of surrender between Member States of the EU and broadly it operates satisfactorily. However there is an issue regarding the number of arrest warrants issued by certain Member of States without any consideration of whether it justifies the issuing of a warrant or whether less draconian methods of dealing with the

requested person could be used (para 11.1). Poland for example has a disproportionately large number of extradition requests for minor matters which would be deemed as summary only matters in the Magistrates Courts over here. In contrast, the UK tends to issue requests for more serious cases that are likely to be prosecuted and dealt with at a higher level. There are continued concerns surrounding the issue of proportionality along with the lack of prosecutorial discretion, excessive use of pre-trial detention, requests being made before the prosecution case is ready, and the use of Schengen Alerts which allows an EAW to remain live even after a decision to discharge has been made by a Member State. Some judges argue that we have over complicated the arrangements by going beyond the Framework Decision. Consistency and uniformity could be achieved by further guidance or cross-jurisdictional training, including when to issue an EAW. Another concern is the failure of some jurisdictions (notably Poland) to keep a central system of outstanding warrants. It is not uncommon for a defendant to be extradited, return and then face another EAW which predated their earlier extradition. This obviously causes additional distress, work and upset.

It would be arrogant to assume that the standard of justice in the UK is not on a par with other Member States. The justice *systems* however will undoubtedly vary from one Member State to another. This may on occasion make the framework of EAWs difficult to understand and the reasons behind the request for an extradition (ie whether it is for questioning, sentence, investigation or trial?). The lack of clarity surrounding this however can be bridged by cross jurisdictional training and judicial feedback. On the whole the EAW is seen as an effective and just process.

The extradition Judges agree with their Scottish colleagues that it is not possible to predict how the post Lisbon Treaty arrangements will work if the UK opts to return. They also agree with the submissions that although the case load will increase, not to opt in would allow the UK to become a haven for foreign criminals and accused persons to prolong the extradition process in Part 2 cases.

At the time of submission it is not known whether Scotland will leave the United Kingdom. If this does happen then urgent arrangements will need to be made, or the current position confirmed.

Prima Facie Case

5. In circumstances where a prima facie case is not required, do existing statutory bars (the human rights bar, for instance) provide sufficient protection for requested people? Are there territories that ought to be designated as not requiring a prima facie case to be made before extradition? What rationale should govern such designation? What parliamentary oversight of such designation ought there to be?

The District Judges are in agreement with para 11.63-11.68 of the Scott Baker Review 2011. The extradition process provides sufficient safeguards by subjecting the process to various scrutinies to ensure that abusive and oppressive requests are identified and dealt with appropriately. It is a public misconception that the process is not fair. The procedure for

extradition is not a trial – it is simply a gate keeping mechanism. Paragraphs 35 & 36 in the case of *Goodyear & Gomes* [2009] are adopted here:

"Council of Europe countries in our view present no problem. All are subject to Article 6 of the Convention and should readily be assumed capable of protecting an accused against an unjust trial—whether by an abuse of process jurisdiction like ours or in some other way. Insofar as Keene LJ's judgment in Lisowski v Regional Court of Bialystok (Poland) [2006] EWHC 3227 (Admin) suggests the contrary, it should not be followed. Trinidad itself should similarly be assumed to have the necessary safeguards against an unjust trial; the Privy Council is, after all, its final Court of Appeal. …Regarding other category 2 territories or indeed, a country like Rwanda with whom, we are told, ad hoc extradition arrangements have recently been made pursuant to s.94 of the Act. We conclude, however, that even with regard to these countries the presumption should be that justice will be done…If there is such a likelihood of injustice, almost certainly this will be apparent from widely available international reports. The extradition process, it must be remembered, is only available for returning suspects to friendly foreign states with whom this country has entered into multi-lateral or bilateral treaty obligations involving mutually agreed and reciprocal commitments. The arrangements are founded on mutual trust and respect. There is a strong public interest in respecting such treaty obligations. As has repeatedly been stated, international cooperation in this field is ever more important to bring to justice those accused of serious cross-border crimes and to ensure that fugitives cannot find safe havens abroad."

UK/US Extradition

6. Are the UK's extradition arrangements with the US comparable to other territories that do not need to show a prima facie case? If so, should the US nonetheless be required to provide a prima facie case, and why?

Sir Scott Baker's 2011 'Review of the United Kingdom's Extradition Arrangements', among other reviews, concluded that the evidentiary requirements in the UK-US Treaty were broadly the same. However, are there other factors which support the argument that the UK's extradition arrangements with the US are unbalanced?

The extradition Judges agree with the findings in the Scott Baker Review 2011 that the treaty does not operate in an unbalanced manner. The test for the USA is probable cause and the test for the UK is reasonable suspicion. In either case there is a need to show an objective basis for an arrest. The fact that the systems are not the same is not the fault of the treaty. The USA usually have very good information compared to other countries. The particulars are very clearly laid out and are very well written. There is a *perceived* notion that there is an imbalance. In practice there are not significant practical differences. The extradition process is not a trial. It is merely a gate keeping process. As mentioned above, it should not be difficult to find examples of UK citizens being retirned inappropriately to the US, if this has occurred.

Political and Policy Implications of Extradition

7. What effect has the removal of the Home Secretary's role in many aspects of the extradition process had on extradition from the UK?

8. To what extent are decisions of where to prosecute certain crimes and whether to extradite influenced by broader political, diplomatic or security considerations?

The removal of the Home Secretary's role in the extradition process only applies to Part 1 cases. Part 2 cases are still essentially subject to a decision by the Home Secretary. In some situations this involvement can lead to unnecessary delays and costs. We welcome recent restrictions on what the Home Secretary should consider. It is essential that such decisions do not undermine the judicial process as a whole or create inconsistency in the application of the law and judicial doctrines. Part 1 cases are satisfactorily dealt with under the Extradition Act 2003 despite the changing landscape of policies and political initiatives in EU Member States since the process allows for consideration of Article 8 and Article 3 arguments.

Of course it is entirely appropriate that in some cases there will be a need to make decisions based on diplomatic or security considerations, but these should be transparent and ideally part of the judicial decision making process. The extradition process is subject to a right of appeal and therefore safeguards against any injustice an extraditee perceives there to be.

Human Rights Bar and Assurances

9. Is the human rights bar as worded in the Extradition Act 2003, and as implemented by the courts, sufficient to protect requested people's human rights?

The extradition Judges support the argument that the human rights bar, as worded in the EA 2003, is ill worded. The ECHR provides rights subject to exceptions and therefore it would be more appropriate for the courts to consider whether extradition would be incompatible with the accused's Convention rights.

As a result of the wording the human rights barriers are frequently argued by defendants resisting extradition and are increasingly successful, not least on Article 3 and Article 8 grounds.

Some judges argue that the human rights issue should not be looked at by Member States when dealing with category 1 countries and should only be challenged in the requesting state, as it undermines the international agreements and judicial systems that are in place. The courts will often not know about an offender's record, the effect on the victim, etc and therefore it should not be considered as a determining factor. In relation to Part 2 countries, the principles developed by the ECHR also emphasise that a reliance on human rights to prevent extradition should demand a very strong case and only in exceptional cases should extradition be deemed as being disproportionate where extradition has been sought legally. There should be great weight accorded to the legitimate aim of honouring extradition

treaties and only in striking or unusual circumstances should a court say that extradition is disproportionate (*R (Ullah) v Special Adjudicator [2004] UKHL 26*; *R (Bermingham) v Director of the Serious Fraud Office, Government of USA [2006] EWHC 200 Admin*; *Jaso, Lope & Hernandez v Central Criminal Courts no 2, Madrid [2007] EWHC 2983*; *Norris v USA [2010] UKSC 9*).

However since *HH [2012] UKSC 25* the courts have increasingly attached greater weight to factors such as passage of time, age of offender, seriousness of offence, time served and impact on third parties (particularly minor children) thereby detracting from the principles outlined above, albeit at a different stage of the process.

District Judges would welcome research and monitoring that could show objectively whether there have been human rights breaches in cases where extradition has taken place. This would not only involve an additional protection, but also a yardstick by which we could measure future decisions.

10. Is the practice of accepting assurances from requesting states to offset human rights concerns sufficiently robust to ensure that requested people's rights are protected?

What factors should the courts take into account when considering assurances? Do these factors receive adequate consideration at the moment?

To what extent is the implementation of assurances monitored? Who is or should be responsible for such monitoring? What actions should be taken in cases where assurances are not honoured?

The practice of assurances from requesting states is perhaps determinate on whether a case falls under a Part 1 or Part 2 category and whether there are existing extradition agreements in place? On the whole the Judges have found it useful to have assurances from Member States where the issue of prison conditions breaching Article 3 have been raised. Certainly in Part 1 there is a public interest in honouring extradition agreements where Member States satisfy Article 6 jurisprudence. Therefore although the judicial systems may vary, by adopting the ECHR framework and signing up to the EAW Framework, there is strong public interest in honouring those arrangements as it emphasises mutual trust and judicial respect. If assurances are being given at the appropriate level it is only right to accept those assurances without the need to robustly scrutinise or monitor this. As stated above, further research into this area would be welcomed to see exactly how many cases have gone on to involve human right breaches? There have been a number of cases in recent years challenging the prison conditions of various EU states. Currently the position adopted is that Italy breaches Article 3 (*Badre v Italy [2014] EWHC 614 Admin*). Lithuania does not breach Article 3 provided assurances are given (*Laurinavicius v Lithuania [2014] EWHC 2668 Admin* applying *Alksynas v Lithuania [2014] EWHC 437*). Romania does breach Article 3 however if assurances are given for a particular prison then it would not be in breach of Article 3 (*Razvan-Flaviu Florea v The Judicial Authroity Carei Courthouse, Satu Mare County, Romania [2014] EWHC 2528 Admin*. The issue of undertakings was looked at in the case of *Dewani v South Africa [2014] EWHC 770 (Admin)*, where it was held that an undertaking given by the South African officials had indeed been properly given. Latvia & USA do not breach Article 3 (*Balsevics v Latvia [2012] EWHC 813 Admin; Dunham v US [2014] EWHC 334*). Greece is yet

to be decided on appeal (see *Antonia Ilia v Appeal Court in Athens (Greece), Appeal Court in Piraeus (Greece) [2014] EWHC 2372 Admin*), Hungary is outstanding on appeal, Bulgaria may also be subject to an appeal, and Poland (*Krolick and others v Poland [2012] EWHC 2357)* does not breach Article 3. Brazil is said not to breach Article 3 in view of the assurances provided by the prison authorities (*Da Silva v Brazil [2014] EWHC 1018 Admin*). Taiwan however is being considered by an appellant court as the defence state the assurances being given are unreliable and not in good faith. In *Ghana v Gamborah [2014] EWHC 1569* despite assurances being given that the accused would not be executed if found guilty of murder, the court held that there was no clarity as to the likely status of his detention, the sentence he would receive or the circumstances he would be held in prison.

Concerns continue to be raised on the basis of "expert reports" which are more often based on an experts opinion which have been formed though reading Articles, journals or government reports on the prison population, as oppose to first hand knowledge gained through visiting the actual prisons or the particular institution subject to the alleged breach of Article 3. It is argued that Judges have a sufficient skill set to understand and digest for themselves any CPT reports or evidence relating to the number of applications by prisoners of the Requesting State to the European Court, without the need for an "expert" to provide such subjective analytical reports (see *Brazuks, Zibala & Sinicins v Prosecutor General's Office, Republic of Latvia, [2014] EWHC 1021 Admin*).

Other Bars to Extradition

11. What will be the impact of the forum bar brought into force under the Crime and Courts Act 2013?

This bar came into force on the 14.10.13 and the current impact of it is unclear. No cases have been resolved on appeal yet. The academic stance is that it will simply elongate the process because of the various steps that the extradition process must consider. Despite its introduction, it is worth impressing the point that the decision on where to investigate and prosecute a case should be for the criminal authorities to decide not the courts. The District Judges endorse the suggestion that in European matters Eurojust could be an appropriate forum to discuss and determine such issues. Liaison between criminal authority officials for other countries may at first prove difficult, but an equivalent platform could also be set up. It is a misnomer for an extraditee to think that just because they are not extradited on this ground, that they will not be prosecuted here. But there must be clear information from the CPS that they are looking to prosecute the individual in this country. The central issue to be decided is essentially how can the evidence best be secured and where can an effective and efficient trial take place, ensuring convenience to witnesses? It is hoped that practitioners apply this bar sensibly, as oppose to taking up unnecessary court time with elongated submissions on the matter where it is essentially clear that a case will and should be prosecuted in a particular state. The issue should be decided on a parallel to the Mode of Trial process for either way offences whereby the court determines swiftly and efficiently whether an offence is more suitably dealt with in any particular jurisdiction.

12. What will be the impact of the proportionality bar in relation to European Arrest Warrant applications recently brought into force under the Anti-social Behaviour, Crime and Policing Act 2014?

The issue of proportionality is currently dealt with under the Art 8 submissions. Almost every contested case has a proportionality angle. Since the *HH* case greater weight has been attached to factors such as passage of time, age of offender, severity of offence, dependants (especially minors) etc. It is unclear therefore whether this will simply elongate the process or simplify matters. The concerns raised are that it will have a significant impact on the number of contested matters listed that originate from Poland which tend to be old historic matters and often for a minor or trivial offences and short sentence. Whilst it is recognised that such cases would benefit from principles of proportionality, a balance must be struck to ensure that offenders do not use the UK as a safe haven for absconding and that the extradition process does not entertain arguments pertaining to the internal workings and sentencing policies of other countries. The principles as developed by the ECHR prior to the 2012 HH case should not be watered down.

Right to Appeal and Legal Aid

13. To what extent have changes to the availability of legal aid affected extradition practice, and the provision of specialist legal advice to requested persons?

What has been the impact of the removal of the automatic right to appeal extradition?

The application process for Legal Aid has caused considerable amount of concern with the introduction of means testing. It is seen as bureaucratic causing significant amount of delays and injustice (see also *Stopyra [2012] EWHC 1787 Admin*).

The issue isn't with the first hearing, as a duty solicitor will almost always be available and the hearing is usually managed quite well. Most of the duty solicitors at Westminster are experienced in extradition. The problem comes with the second hearing because of the means test. The majority of defendants are either in casual work or between employment and very few have records. Language barriers and personal circumstances will often impact on the ability of defendants satisfying the strict requirements of Legal Services Commission regulations, which are simply too dogmatic and fail to adopt a practical approach.

Those in custody present a particular concern because it is one thing to have legal aid refused or withdrawn, but it is quite a separate matter where someone, who would otherwise be eligible for legal aid, is unable to get representation, through no fault of their own because they have not satisfied the regulations.

Means testing is simply not cost efficient, especially where it results in protracted hearings due to defendants being unrepresented and unable to speak the language or understand the process. Between February–July 2014 more than 11 cases listed for final hearings were ineffective as a result of delays caused by the LAA. The cost of convening a court and ensuring resources are in place for a final hearing cannot be mitigated by any perceived savings to the legal aid bill.

Accordingly, paragraphs 11.85-11.87 of the Baker Review are adopted as part of these submissions.

A further proposal is for a system whereby legal aid is granted from the outset (on the basis of the interest of justice criteria being met) and then proof of means to be provided within 3-4 months. If this is not provided within the requisite time period, the LAA could seek to notify the courts at the end of the hearing and any sanction for non payment could include a prison sentence. Even if a defendant is extradited and the legal aid monies are outstanding, it could still be enforced by issuing a warrant. Should the defendant enter the country again then they would then be picked up for enforcement. Another alternative is for the duty solicitor scheme to cover the 1st and 2nd hearing and limiting the fee so that more cases can be dealt with within 21 days.

A further area for concern is the inappropriate approval of legal aid for expert reports. This issue has now been raised with the LAA who agreed that further training or guidance would be useful for HMCTS/LAA staff when dealing with applications for prior authority. Reliance was placed on the divisional court case of *Brazuks, Zibala & Sinicins v Prosecutor General's Office, Republic of Latvia, [2014] EWHC 1021 (Admin)*, where Mr Justice Collins held that:

> "Approval should not be given to pay … experts who have no direct personal experience of the conditions in a particular country. If they do have such experience and it is relevant, they can of course give evidence of what they have observed."

The LAA have also been asked to look into the regulatory position in relation to local authorities preparing section 7 reports for children affected by extradition following the Supreme Courts decision in *HH v Deputy Prosecutor of the Italian Republic, PH v Deputy Prosecutor of the Italian Republic, F-K (FC) v Polish Judicial Authority [2012] UKSC 25.* This is to ensure a more standard approach can be adopted when dealing with this issue.

Devolution

14. Are the devolution settlements in Scotland and Northern Ireland fit for purpose in this area of law?

How might further devolution or Scottish independence affect extradition law and practice?

The District Judges do not have any comments for the purposes of question 14.

12 September 2014

Chief Magistrate's Office and Ministry of Justice – Oral evidence (QQ 132-153)

Evidence Session No. 9 *Heard in Public* *Questions 132 - 153*

WEDNESDAY 29 OCTOBER 2014

10 am

Witnesses: Senior District Judge Howard Riddle, Deputy Senior District Judge Emma Arbuthnot and District Judge John Zani

Hilda Massey and Hugh Barrett

Members present

Lord Inglewood (Chairman)
Lord Brown of Eaton-under-Heywood
Lord Empey
Baroness Hamwee
Lord Henley
Lord Hussain
Lord Jones
Lord Mackay of Drumadoon
Lord Rowlands CBE
Baroness Wilcox

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Examination of Witnesses

Senior District Judge Howard Riddle, Chief Magistrate, **Deputy Senior District Judge Emma Arbuthnot**, Deputy to the Chief Magistrate, and **District Judge John Zani**, Westminster Magistrates' Court

Q132 The Chairman: I extend a very warm welcome to our first panel of witnesses, who are all dealing with these matters of extradition right at the coalface: Judge Howard Riddle, Judge Emma Arbuthnot and Judge John Zani, who are from the Westminster Magistrates' Court. I begin by reiterating our thanks for the opportunity you gave us before the recess to come and see first-hand the work you were doing. It was very helpful and I think there are

some members who may not have been able to be there then who would quite appreciate an opportunity to come and see you doing what you are doing in Westminster now.

Senior District Judge Riddle: Thank you. As you know, they would be very welcome.

The Chairman: Thank you very much. I will ask each of you to introduce yourselves, and if any or all of you want to make an opening statement, please feel free to do so. We will then move into the questions. As far as the Committee is concerned, nobody needs to feel obliged to answer all of them. We are interested if you disagree with each other and we want to work through the general area that has been brought to our attention. Please also feel free to tell us anything that we have not, as it were, identified as being of interest that you think is important.

Judge Riddle, please open the batting and tell us who you are, and then we will go down the panel.

Senior District Judge Riddle: Yes. I am the Senior District Judge and Chief Magistrate of England and Wales. I have been in post since 2010. That is the title that Parliament gave me; it is not one I chose.

Deputy Senior District Judge Arbuthnot: Emma Arbuthnot, Deputy to the Chief Magistrate. I have been in post as a district judge since 2005 and became the Deputy Senior District Judge two years ago. I was a barrister in practice before that.

District Judge Zani: John Zani, District Judge. I was previously a solicitor in private practice with a fairly extensive extradition practice, and I took up a full-time judicial appointment in January 2001. I am also a link judge, which is, I suppose, the voice of the Chief Magistrate and his Deputy for London and South East England.

The Chairman: Would you like to make an opening statement?

Senior District Judge Riddle: I do not think any of us intended to, thank you, Lord Chairman.

Q133 The Chairman: Right, fine—thank you very much. If I might just open the batting, do you believe that there is a significant problem of people receiving poor legal advice and, if you do, can you give us specifics about what that might be? In particular, are you sure that the duty solicitors' rota ensures that people get sufficiently expert representation in the first instance? Also, bearing in mind this is very much a specialist or niche area in legal practice, is self-certification to join the duty rota the appropriate way of doing it? Do you, in fact, think there is some sort of training accreditation gap in that quarter? Finally, do you think that there is equality of arms between the prosecution and the defendant in this area?

Senior District Judge Riddle: Thank you, Lord Chairman. This is something we have discussed together. We have also discussed it with some of our other colleagues. We are a fairly small group of judges dealing with this work, so we are able to get a broad consensus. Our view is that the extradition lawyers in England and Wales are of a very high calibre indeed, both at the bar and in the solicitors' profession. They have, for a long period of time, been wonderfully ingenious in the loopholes that they are able to find.

There are, if you like, two different situations. There is the duty solicitor situation, which is at the first hearing. We are enormously reliant on our duty solicitors, and our view is that, with one or two possible exceptions, they perform their task extremely well. I am not able to give you, and I do not think either of my colleagues here is able to give you, any example of where we thought that an individual was let down by the duty solicitor. I have had two complaints made to me in the last four years. I investigated one of them, because it came from the High Court, and it was simply a question of the duty solicitor in question having been away on holiday and not picking up a change in law that had happened recently.

It is very difficult to assess the quality of advice, and the reason for that is that the best advice very often may be: "Accept extradition and go back, because winning your case in

England and Wales is not an acquittal. The process could start again if the warrant was defective, for example, and if you are successful in fighting extradition you can never go home to see your parents. You cannot travel in Europe or, indeed, outside England and Wales for fear of being re-arrested on the warrant". A lot of those who might look, as it were, a little tame may well be giving the right advice. On the other hand, there are other lawyers whose clients you notice never consent to extradition.

That is it in terms of quality. Having said all that, I cannot see, myself, why there would be any harm in ticketing. There is an excellent book on the subject. We provide training. We have, through the judges at Westminster, provided training. You tend to find that the people who come are probably the best; it is not compulsory, of course. It would not seem to me very difficult or very expensive for duty solicitors new to the rota to have the ticket, and I think we would, overall, welcome that without wanting to be alarmist about the current quality.

As far as inequality of arms is concerned, again the CPS lawyers—and I do not mean this as a criticism of those who do the crime list—in the extradition court are very able, but one does not get the impression that they are out-muscling, if I can put it that way, the defence lawyers. I would not be troubled, by and large, by an inequality of arms.

Q134 The Chairman: One thing I was interested in was that frequently you think that the right advice to give someone is to say, "I will go home voluntarily". Is there too much of a macho culture and some defence lawyers encourage them to stand and fight here?

Senior District Judge Riddle: I would not want to characterise it in that way and I certainly would not want to criticise those lawyers, because we are not privy to the advice that they give or to the instructions that they get. Certainly something we emphasise in training and one of the factors I have not mentioned to you is the sheer anxiety of waiting for extradition

proceedings to conclude. One of the very distressing things we see as the process goes on and the horrors, if you like, of extradition become perhaps overemphasised in court is that people do get very anxious and we do get, for example, significant incidents of self-harm. Sometimes you wonder—and it is purely a rhetorical question—whether, if they had gone back and served their four months in Poland, they would have been back here long ago and perhaps not put themselves through such an ordeal.

The Chairman: Before going on to Lord Brown, you mentioned ticketing. Could you, for the sake of the record, please just describe that?

Senior District Judge Riddle: Yes. I believe the process has to be authorised by the Law Society, because these are solicitors who are paid by the Law Society through their role on the duty solicitor scheme. All duty solicitors are interviewed; they have to go through a panel process. It would not seem to me very difficult, I think, for the Law Society to accredit a team, and perhaps give some pre-reading. I think you saw or may be seeing or have heard from Ed Grange and Rebecca Niblock; they have written a very good introductory book on the subject. You could expect a little test on whether you know what you are doing, and I do not think it would take very much in each individual case.

Lord Rowlands: On the back of this question, I wonder if I might just raise the question of proportionality and whether with the recent bar you are seeing this affecting the decisions. Are the defence lawyers using the guidance that the Lord Chief Justice has given on proportionality?

Senior District Judge Riddle: In my experience, surprisingly, no. This is Section 21A proportionality. We may be touching on that later when we look at how the common law has evolved a response to proportionality through Article 8, but I have had very few pure arguments under Section 21A. In fact, of course, the new proportionality bar is very

restrictive. It applies only to accusation cases, so you cannot run it on a conviction, and it gives really three criteria that the court can take into account and it expressly says that, for example, delay is not a factor to take into account. I do not know if my colleagues have had different experiences.

District Judge Zani: No.

Deputy Senior District Judge Arbuthnot: Article 8 is still the main proportionality argument that is argued in virtually every case that goes to a full hearing.

Lord Rowlands: They are not turning up with the guidance and saying, "My case qualifies under this and this".

Deputy Senior District Judge Arbuthnot: No, not in my experience.

Senior District Judge Riddle: No, they are not. To go back to the other part of your question, I simply do not know the extent to which the National Crime Agency, using the Lord Chief's guidance, is filtering out cases that do not come before us, and that may well be happening. One thing we really would not welcome is a flurry of very minor cases coming before us if the NCA can filter them out.

Q135 Lord Brown of Eaton-under-Heywood: Can I first echo what the Lord Chairman said about the visit we made to your court in July? I found it enormously valuable and also, if I may say so, I greatly enjoyed it.

Legal aid is what I want to ask you about and on this I draw from your very helpful written submissions. Paragraph 13, page 81 of our written bundle, deals with these particular matters and it is pretty clear what your thinking is, but perhaps we had better have it on the record. We are told that over a two-year period, August 2012 to the end of June 2014, some 95% of legal aid applications eventually came to be approved, and the real question is should it be automatic and what is the cost-benefit of all this and so forth? As you know, the

argument largely against the present means testing system is it leads on occasion to aborted hearings and all the delay and expense that that involves and also, consequentially, to people spending more time in custody. As far as aborted hearings are concerned, your paragraph 13 suggests that between February of this year and July of this year more than 11 cases listed for final hearing were ineffective because of delays caused by legal aid. That is the position, is it?

Senior District Judge Riddle: That is the position. We have noticed an improvement, I am pleased to say, since June. It was running for a while at something like five cases a month adjourned simply because of legal aid difficulties. It is now down to two. I want to emphasise that this is, in my experience, never the fault of the staff who are assessing this. They do an excellent job, and if they have all the material on time, they will turn it around in a couple of days. The difficulty arises with providing further information, sometimes information that is very difficult for a person to provide: wage slips when you are a fruit picker, to pick an obvious example, a partner's wage slips and so on. There has been an improvement, but it remains a real problem.

Our basic concern is fairness. It is uncomfortable for us, as judges, to have an unrepresented person, who probably does not speak English, who may not have been in this country very long, alone in court with us with no one to help them but an interpreter. That is our major concern.

We are probably not in a position to tell you certainly which way the cost equation goes. The 95% you mentioned is, of course, 95% of those who apply. About one-third overall do not apply. Whether that is because they know they will not pass the means test or whether that is because they believe and therefore would continue to believe that they would be best

advised to pay privately for representation for, putting it this way, the top lawyers, I could not really say.

From our point of view, probably the most difficult decision in terms of how we administer these cases that we have had to take recently is that we have built in a delay. We have deliberately built in a delay in hearing these cases, so that when a defendant appears in front of us we can say, "You have had three months to sort out your funding and we are going to go ahead". That means that there are undoubtedly people in custody longer than might have been the case and people waiting for longer than might have been the case, and even then we are, I think, finding occasionally people saying, "I still do not have legal aid". Whether that is their fault for not putting in the documents in time, or whether it is the fault of the system for making it very complicated, I could not really tell you.

Lord Brown of Eaton-under-Heywood: The third who do not apply for legal aid, what proportion of those do self-fund and are represented?

Senior District Judge Riddle: I do not have the statistics.

Lord Brown of Eaton-under-Heywood: No, but in round terms.

Senior District Judge Riddle: In terms of feeling, I would say—

Deputy Senior District Judge Arbuthnot: I think the majority end up with private representation. It is still unusual for them to be representing themselves.

Lord Brown of Eaton-under-Heywood: There is a small body who are unrepresented because they are not legally aided, and a perhaps slightly larger body who are unrepresented because they have not applied in the first place and, for whatever reason, have chosen not to seek it.

District Judge Zani: There are some solicitors who will, I suppose, take a chance and start work from day one in anticipation that sooner or later legal aid will come into effect,

because of course it is retrospective to the date when the application was lodged, which probably will have been on day one. That is really their goodwill or them assessing. There are others who say, "Sadly, until that legal aid certificate lands at my door, I do not have the certainty; I do not feel able to start work".

Lord Brown of Eaton-under-Heywood: Of course, the Baker review did recommend automatic legal aid, did it not?

Senior District Judge Riddle: It did and we certainly supported that.

Lord Brown of Eaton-under-Heywood: You are not able yourselves to do the cost-benefit analysis.

Senior District Judge Riddle: No. There are so many variables that come into that: what you count and what you do not count, the cost of prison, the cost of courts, the cost of lawyers who keep coming back and all they are doing on day one is applying for adjournment. I can imagine it would be a very hard calculation to do. I have to say instinctively I feel that there cannot be a lot in it.

Lord Rowlands: What proportion of cases are on remand?

Senior District Judge Riddle: We think about a third; that is the feel. When I went to the Cour d'Appel in Paris to see how they do things, it was very much the other way around. They had two-thirds in custody. We tend to be more generous, if I can put it that way, with bail. One of the things that is interesting is we tend not to release people on bail without a security, usually in the sum of several thousand pounds, and what is striking is how many people can meet that very quickly.

The Chairman: There is considerable pressure on prison places and remand places, is there not, so that systemically it is not necessarily desirable to pour people into jails?

Senior District Judge Riddle: I am sure you are better placed to obtain the facts than we are, but in my time as a judge the prison population has virtually doubled, going up from 43,000 in 1995 to more like 85,000 now. We are told that there is such pressure on the prisons that people are doubling up. More obviously from our point of view, people are not leaving their cells to come to us, because if they do they will end up not going back to that cell; they will be transferred to a different prison perhaps in a different part of the country. So, we do see some signs of strain. John Zani is also a prison adjudicator, so sees inside the prisons, and we do know and we get reports that tensions are, to some extent, rising, but perhaps that is outside our area of real expertise.

Lord Brown of Eaton-under-Heywood: Of those who are bailed, what proportion of them fail to surrender to bail at the second hearing three months after the adjournment?

Deputy Senior District Judge Arbuthnot: Very few. We have a package of conditions: the pay before you leave custody security; we have a curfew; we have reporting; and we tend to use the full package, and that means, I think, that our failures to surrender at the final hearing are minuscule. Probably 1% and that is a guess, I am afraid, if that, because of the package. I think it is the money—the security we get upfront. Often they are families who do not have great means, and therefore it means a lot to them if they have to provide £1,000, which they often do.

Lord Brown of Eaton-under-Heywood: Those in custody have even greater difficulty in getting their legal aid because of all the problems of being incarcerated, and no interpreter, few records, casual work and all the rest of it.

Senior District Judge Riddle: Yes.

The Chairman: Lord Mackay is coming in next, but we seem to have covered most of the questions. Possibly the point about the e-form will be worth pursuing.

Lord Mackay of Drumadoon: Before I come to the e-form, in answering the previous question you made some reference to the Law Society paying solicitors and I just wanted to clarify how that arises. If a legal aid application is back-dated to the date it was lodged, which could well be the date of the first appearance, how could the Law Society, as a separate body, become liable for solicitors?

Senior District Judge Riddle: I think I have confused you with the facts that I gave and I am sorry about that. The Legal Aid Agency is the agency that is responsible for payment, but unless things have changed recently the Law Society is still the body that gives accreditation for duty solicitors. You cannot just apply to be a duty solicitor.

Lord Mackay of Drumadoon: They accredit the solicitors.

Senior District Judge Riddle: They do the accreditation, yes.

Lord Mackay of Drumadoon: Yes, but then a separate body deals with individual applications and pays them.

Senior District Judge Riddle: Yes. That is right.

District Judge Zani: The Law Society has no funding responsibilities at all.

Senior District Judge Riddle: It was not always the case.

Q136 Lord Mackay of Drumadoon: Right. Evidence has been placed before us that an e-form will be introduced for legal aid applications next month. The question arises as to what extent this will ensure that the right people are granted legal aid, qualifying individuals receive legal aid in a timely fashion and decisions on extradition in EAW cases are made within the 21-day target. I think you have covered some of these points, but is there anything else that any of the three of you would like to add?

Deputy Senior District Judge Arbuthnot: What I might just ask is whether prisoners in custody will be able to fill in the e-form. How will that work in practice? I suppose the solicitors will have the e-form on their iPad.

Lord Mackay of Drumadoon: It is not unknown for there to be electronic communications between a prison building and a court room, so where there is a will there is a way, but that is a matter that immediately comes to mind. It is all very well having this good idea, but you have to look at the practicalities.

Deputy Senior District Judge Arbuthnot: Yes, that is it.

District Judge Zani: I think the difficulty still remains in the supporting documentation or evidence. If, for example, you are not in regular employment and you are not claiming benefits, that rings alarm bells, which requires clarity and confirmation.

Senior District Judge Riddle: A word of praise really for the Legal Aid Agency though. When we saw them before, two or three years ago, and raised these problems with the forms being improperly completed, they did work very hard with the solicitors—as you know, there is a core of solicitors who do this work. They went and saw some of those solicitors and pointed out the failings there. An e-form, it seems to me, if it is the sort of form that we are familiar with that will not let you go to page two until you have properly completed page one, might help. On the other hand, it might have the same problems as other e-forms; we will have to see.

Q137 Baroness Hamwee: Can we have a word about expert evidence? I know the questions have been framed in the context of legal aid; if you can say something as well about privately funded cases it would be helpful. I think we all rather tend to think either it is legal aid or the sky is the limit as to the costs that can be incurred and paid by a privately funded client and that, obviously, is not the case.

First, is legal aid funding sufficient for expert advice, for instance, on prison conditions abroad, and how does this affect an individual's ability to pursue the matter of a breach of the ECHR?

Deputy Senior District Judge Arbuthnot: What happens is the application is made to the legal aid fund and it does take a fair amount of time for that particular application to be dealt with. I assume it is because it must be very expensive to send a witness abroad to look at a prison, so that will engender some delay. What then happens is that the witness has to get to the country concerned and get permission to go into the prison, so the whole process of looking into prison conditions with an expert is quite a lengthy one. I would have thought 12 weeks would not be unusual, maybe even 16 weeks by the time the whole thing is sorted out, so that does take time. However, they do grant it, but sometimes the court has to prod the legal aid fund. I have been asked to write a letter before now to say, "This is really necessary and can it please be dealt with in a timely fashion?" because otherwise it does delay things greatly.

Baroness Hamwee: The prodding was what I was interested in. I think we heard they would not pay for a visit to Peru. Are you aware of the ability of expert witnesses to get evidence? It must be quite difficult to get the detail that you might require in the case of some countries.

Deputy Senior District Judge Arbuthnot: I am always rather amazed that some countries are so welcoming to these British experts who are going to look at their prisons, but it seems to be happening. I am not sure the British prisons would react in the same way, but who knows. No, that seems to work quite well.

Baroness Hamwee: Therefore, you are happy with the quality of the evidence that you are able to get.

Deputy Senior District Judge Arbuthnot: Yes.

District Judge Zani: There are also local experts who provide reports, not necessarily people from this country travelling there but experts in their own country who will prepare us a report, critical or not, on how they see the state of the prisons.

Baroness Hamwee: I was interested in your written evidence that you say you would welcome the ability to appoint and pay for a report. You mention CAFCASS and psychiatric reports. That perhaps takes us back to the self-harm that was mentioned. You say that this would give significant practical advantages at no extra overall costs. Can you flesh that out?

Deputy Senior District Judge Arbuthnot: Particularly from the Article 8 perspective, when you have someone saying they are the sole carer for a child or children and you say to the requested person via counsel, "What is going to happen were the court to make an order that you be extradited?" and they say, "I do not know," it puts the court in a very difficult position. What we have been doing is writing to the relevant local authority and saying, "Could you please look into this, because there is a danger this person may be extradited and you will then have charge of this child?" and the family is then visited by a social worker. The mechanism is not a very smooth one. It is the court writing letters and I am not sure what would happen if a local authority said, "No, I do not want to do that". So far, it has all been going rather smoothly. John, have you had experience of this?

District Judge Zani: I have had an experience that was perhaps a little unfortunate. The first report indicated that the local authority was saying that these children were not habitually resident here and so would have to return to their native country. Then, by the time the hearing came up, I had a supplementary report saying that that report was written entirely in error and, "Yes, we do have responsibility". Now, that can happen, of course, but my experience has been that, generally speaking, local authorities are very aware of their

responsibilities and are very keen to try to provide the court with what is very helpful information in what, for us, sometimes is a very well balanced argument.

Baroness Hamwee: The way you are describing this, it is as if you are asking the questions and putting the points that the solicitor might have been expected to raise and you are filling a gap there.

Senior District Judge Riddle: Yes, to some extent we are. This really comes, as Lord Brown probably knows, from Lady Hale in *HH*, and she said we should be doing it. It was overlooked at the time that we have no power to order those reports and we have no finances to back it up, so we are relying on the goodwill of the local authorities. As my colleagues have said, I think they have got more used to this recently and perhaps are more co-operative than they were at first. At first, they would write back and say, "Well, where is the order?" and we do not have an order, because we do not make an order.

The ordinary criminal courts very often have a duty psychiatrist attached who comes in periodically; in our court it is twice a week. From my point of view, it would be good to be able to say to that psychiatrist, "You will be paid to examine these people, as they have come in, for psychiatric difficulties," but psychiatric difficulties sometimes only become clear after months, and it would be good to have that facility. A self-harm assessment is another thing that we would like.

As far as the CAFCASS officer is concerned, here you might find a difference in approach between us. I would like to be able to deal with a case from beginning to end and then, having made the decision to extradite, if that is the decision, to ask a CAFCASS officer to go in on not a hypothesis but a factual basis: what is going to happen to these children now? I would like that to be ordered by the court rather than by the parties.

Q138 The Chairman: We must not delay too much, but before we move on, Judge Arbuthnot, when talking about expert witnesses, you said that in the majority of cases there did not seem to be a problem in getting the money to do it. Are there any instances you could point us towards—examples of where things have not gone right in that respect?

Deputy Senior District Judge Arbuthnot: In terms of prison conditions?

The Chairman: Yes and otherwise.

Deputy Senior District Judge Arbuthnot: No.

The Chairman: You are being cautious in your response.

Deputy Senior District Judge Arbuthnot: I am just trying to look back. As I said, there is often a lot of delay around expert witnesses, but in my experience I have not had a real problem. Sometimes there are experts instructed who I think should not have been instructed, but that is a different point.

Senior District Judge Riddle: I have one example, which I do not think I need name, but it involved Greece. We waited for a year for the report. The witness arrived having prepared, on the face of it, a very thorough and full report. The first question in cross-examination was, "When did you last visit any of these prisons?" to which the answer was, "I have never been in a cell. I have clients in these prisons who tell me". So, it can be a problem, but I agree with Emma that it is rare.

The Chairman: As you were talking about the timeframe, it occurred to me that in fact the framework directive for category 1 matters says that the whole proceedings should take no more than 60 days. Do you think that is an unrealistic approach and that the reality of all these things is that it is going to take longer in order to secure justice?

Senior District Judge Riddle: I think it is unrealistic in the common law adversarial oral tradition. We are not alone. We might sometimes think we are alone, but Scotland,

Northern Ireland and Ireland deal with these matters in a very similar way to us, probably with very similar delays, although they do not have anything like the volume. However, it is clearly incomprehensible to our European colleagues, who are able to deal with it in the timeframe available, because they have written submissions and they keep their advocates for 20 minutes and not more. They say to us, "Our other colleagues in Europe trust us rather more than you do". This is a recurrent theme. As we do all go to conferences internationally, people ask why the United Kingdom does not have confidence in the legal systems of other countries.

Lord Brown of Eaton-under-Heywood: However, you automatically have a three-month delay between the first hearing with the duty solicitor and the second hearing in order that legal aid can be applied for.

Senior District Judge Riddle: We do now. That is quite recent. We faithfully tried to stick to 21 days until earlier this year when it became absolutely obvious that all we were doing was adjourning for 21 days and then adjourning again.

The Chairman: That is an interesting and helpful point. Let us move on.

Lord Henley: Before I put my questions, could I just say I was very sad to miss the visit to your court in July for unavoidable reasons, but I hope I can take up your offer at some future date to come round. Perhaps we can fix that up on a later occasion.

Senior District Judge Riddle: Certainly.

Q139 Lord Henley: I was going to ask about the right of appeal and whether the removal of that automatic right to appeal has either removed an important safeguard against wrongful extradition or provided a filter to filter out the hopeless cases where an appeal is merely going to be used to seek further delay.

District Judge Zani: It is difficult, because the concept behind a filtering system is something that we would applaud. In our experience, there are people who, to put it bluntly, would prefer to spend their time in a British prison than in their local prison, so they will use whatever avenue of appeal there is, however unmeritorious, not only to slow matters down before us but also through the appeal process. I would anticipate that the filtering system would preclude some of these hopeless appeals getting past first base. Time will tell as to really whether that will be the case or not. I have my reservations for those people who are determined to just try whatever they can to stay here, because of course if they are on remand every day spent in a UK prison is one day fewer that they have to spend serving the sentence abroad. If they have their family here it is easier for visits, it is cheaper and they have built their life here, and they might still hope against hope that the appeal might succeed. So a filtering system is important, but how it will work in practice I am not sure.

Lord Henley: It is too early to tell.

District Judge Zani: I think it is, yes.

Deputy Senior District Judge Arbuthnot: It is not in force yet.

Senior District Judge Riddle: It was supposed to come in at the beginning of this month, but we are told that it is not in yet.

Deputy Senior District Judge Arbuthnot: We could be wrong.

Lord Henley: On legal aid, if it were no longer means tested and if there was confidence that representation at first instance was specialist and good and all that, again would that affect concerns about the leave-to-appeal provisions and do you think that would lessen them?

District Judge Zani: I would be very confident that if our duty solicitors or our solicitors or counsel instructed thought that there was an arguable point they would not abandon the requested person. They would give appropriate advice and they would help settle grounds

whether or not the legal aid was in place. I am very confident that they would act very professionally. It really is when they sit back and say, "I really do not think this can be taken any further," that the person is on his or her own to try to progress matters.

Q140 Lord Empey: Could I echo the words of our Chairman about the visit? I thought it was extremely instructive and it brought the whole work of the Committee to life, I think, for those of us who went. What some of the hapless defendants felt when some of us appeared on the bench like Hanging Judge Jeffreys I do not know, but it was very instructive.

Could I take you back to the written evidence where you say, "A more imaginative and more productive approach than legislative change is needed to increase mutual international co-operation by more extensive use of modern technology". Could you elaborate on this and what such an approach would be?

Senior District Judge Riddle: This really comes from the Scott Baker review. One of the concerns that Lord Justice Scott Baker recognised was the long period of time in pre-trial detention in a foreign country. For example, we extradite; the process in country X then starts and may take 18 months to come to trial. There are one or two celebrated cases where it always seemed obvious to people here that the case would result in an acquittal. In the meantime, you have someone in a foreign country, possibly in custody, waiting while the case is prepared. That can be in Europe; it could be in the United States. Really, I am just drawing it to everybody's attention that we have the technology to liaise with those courts by way of video link or, indeed, by way of Skype. Witnesses give evidence to us, as they did from South Africa, by way of video link. I did mention that Signor Berlusconi was in my court for some six days while witnesses from this country gave evidence. It can be done with countries right across the globe, so we could; we have the technology if one wanted it. That is not a question for us, but we have the technology to say this case in country X can be case

managed right up until the stage where the case is about to begin next week, and it is at that point that we extradite.

The Chairman: Is this a legal problem or, essentially, a technical, administrative problem?

Senior District Judge Riddle: And possibly a means problem. The technology is there. Whether other countries are able to do this, I do not know. You would think that they would and they could.

Lord Empey: To follow up on that, we are talking about trusting other countries' legal systems. Is there a sense that they might feel they are being second-guessed or a judgment is being made about their own systems? Would there be almost political issues involving that as well?

Senior District Judge Riddle: There might be hurt feelings, I suppose, especially if this is something we did with country X but not with country Y. There would be real political problems if we differentiated between British citizens and non-British citizens here, I think.

The Chairman: Some of the evidence we have had suggests that were this country to have decided to opt back in to the full package of justice and home affairs provisions it might have helped the administration of justice in the widest sense. It would be less necessary, for example, to extradite people, and there are other legal mechanisms that may not now be available to this country. Do any of you have any views about that?

Senior District Judge Riddle: No.

The Chairman: What about from the perspective of ensuring justice and the proper workings of the system?

Senior District Judge Riddle: I am afraid your thinking is ahead of ours on that.

Lord Brown of Eaton-under-Heywood: Thinking about the European Supervision Order and the European Investigation Order, do they require opting back in to those specific things or how do those work?

Senior District Judge Riddle: Again, I simply do not know, I am sorry.

Q141 Lord Rowlands: A lot of the evidence shows that there is a special problem with the Polish situation. Have you been able to talk to the Polish authorities? Do you discuss these problems with them and see if there are ways around the problem?

Senior District Judge Riddle: We do discuss it with our Polish colleagues. The Polish judges come here and some of our colleagues have been to Poland and discussed it with them, and it has been discussed at a much higher level than the first instance judges at Westminster. I think the reality is—this is what they are quite happy to say to us—that it works rather well from their point of view, and if some of their citizens end up serving their custodial sentences in our facilities, that is not necessarily something they are concerned about.

District Judge Zani: If I can give you a situation, some time ago there was a delegation of Polish judges who came and sat at the back of the court. I had a case called up and the defendant was represented and his lawyer said that there were certain challenges, one of which was to the format of the European Arrest Warrant prepared by the Polish judge. So, I said, "The case can go over and enquiries can be made," at which point this gentleman stood up at the back and said, "I am the judge who issued the warrant". So, they made progress on the day. They had a little chat between them.

Lord Rowlands: There is quite a serious issue of numbers, is there not? We heard evidence last week that in Scotland 90% are Polish cases.

Senior District Judge Riddle: It is fewer than that here; it is about 700 of our 2,100. I do not mean this as a criticism of our Polish colleagues, because it is not, but they are very

generous in suspending sentences. They will very often suspend sentences that in this country you would expect someone to start serving immediately, and quite often over a period of time. You can and do get a position where when that sentence is breached, either by failing to comply with supervision or by committing another possibly quite minor offence, many years have passed. That is what feels sometimes unfair—that someone is going back for something they did 10 years ago when they were very young and they now have a family, but that is the way their system works.

The Chairman: Is it the case that if you leave Poland a suspended sentence is triggered automatically?

Senior District Judge Riddle: Not quite, but you have to almost invariably keep in touch with your probation officer.

Deputy Senior District Judge Arbuthnot: You have to provide your address as well. If you provide your address to the probation officer and keep in touch, you are not in breach. Often, they do not give a forwarding address.

Lord Rowlands: The case I heard when I was at the court was that of a young Pole who had breached his probation conditions by not apparently speaking to probation on the phone for one month or so. In fact, I would be intrigued to know what happened to him, if you can send me a note to follow up; it was court six.

Senior District Judge Riddle: Court six, Judge Arbuthnot.

Deputy Senior District Judge Arbuthnot: Court six.

Lord Brown of Eaton-under-Heywood: Is it right to say that in those particular cases—and, not untypically, it might not have been a very serious offence in first place—the proportionality defence does not apply because it is a conviction and not an accusation case?

Senior District Judge Riddle: That is absolutely right, of course, and the other thing is in extradition cases we do not know the history of the particular person. It might seem comparatively minor to us and might not justify a custodial sentence until you look at the previous conviction. The same would apply here, of course. We may well impose a short-ish custodial sentence on someone for their 40th offence. We do not get that information.

Lord Jones: Lord Empey mentioned how helpful it was to visit your courts in July and I would like to put on record that I found it extremely helpful. I sat alongside Judge Coleman and I was astounded at how everyone in the court tried very hard to help, in this case, several Polish people who were before the judge. The centrality of the interpreter, it appeared to me, on that day was very strong, but the impression was the court always sought to help the citizen before it.

Senior District Judge Riddle: I am glad you had that impression, thank you. We will pass it on to Judge Coleman.

Q142 Baroness Wilcox: I, like Lord Henley, was unable to make the visit with everyone else and I, too, would be very grateful to have the opportunity to come at some time. Maybe you could take us both. Thank you very much.

I am going to ask question eight. This is about the EAW. What would be the consequences of not opting back in to the EAW? It has been suggested that the UK could revert to its previous extradition arrangements with Part 1 countries. How practical would this be in reality and would there be costs arising from the change?

Senior District Judge Riddle: You will understand that what we say will be fairly limited, but I have mentioned the ingenuity of the English extradition lawyers. Every change to the law is properly tested, and that proper testing goes through not just to the Divisional Court and the High Court but often, on important points, up to the Supreme Court. I think extradition

law has travelled to the Supreme Court, and the House of Lords before it, since 2003, probably more than any other branch of the law, and that has been because there have been changes. If we were to opt back or have treaties with countries in identical terms to those that currently operate with the EAW so that the wording was the same, it might be that there would be fewer challenges. However, and I rejoice in this—I think it is a good thing—I predict that any change will be challenged right the way through. Those challenges, it is not often appreciated, bring the work of the first instance courts potentially to a halt, because lawyers will come in and say, "This exact point is being tested," and put it on hold, so we can get backlogs. I think that is about as far as I ought to take it.

The Chairman: Can I just follow up by asking whether, in approaching your work, as I hope and believe you do, from the perspective of trying to administer justice, you think the changes that we have seen in recent years from the introduction of the EAW through to now have made the operation of the system of extradition more just than it was previously?

Senior District Judge Riddle: It really flows from the previous answer, which is that it takes time for a system to settle down. Common law is remarkably robust and from the concerns that there were some time ago about proportionality—and this is no thanks to the first instance judges, I have to say—eventually a proportionality test was introduced effectively using Article 8. So, where there are injustices and they are seen, solutions can be found. As I say, it is a robust system and one in which I think, if it is unchanged, fewer and fewer miscarriages will occur.

Lord Hussain: Lord Chairman, I do not have a question, but a couple of apologies to make. First of all, for being late due to public transport problems. The second apology is for not being able to attend the visit to the courts in July, along with one or two of my colleagues, but I will be happy if there is another opportunity to visit the courts.

Q143 Lord Rowlands: On question nine, Judge Zani, your experience spans both pre and post the EAW. How do you compare the two?

District Judge Zani: They are so, dare I say, totally different. When I was in practice as a lawyer, I had that sort of mindset. As a practising lawyer under the old system, I have to say I had full confidence in the judges who were administering the law as it then was, and I have taken that with me, I hope, to now sitting in a judicial capacity. There are strengths and weaknesses, obviously, in both cases, but they were so entirely different to prepare and to have. However, if I look at the judges who I used to appear in front of or briefed counsel, both in what was then Bow Street and in the High Court, I was enormously impressed by their interpretation of the law, which I have to say was very fair. As to whether Mr X, who I am extraditing today, would have been extradited 15 years ago in a similar situation, I find it difficult, almost impossible, to give that comparison.

Lord Rowlands: Rather intriguingly, in your written evidence you suggest it is an appropriate time to investigate independently what has happened to those who have been extradited under the Extradition Act. Can you elaborate on what you think the scope and purpose of such an investigation could be?

Senior District Judge Riddle: Yes. This comes from comments and criticisms—I must say not raised in court—one sees raised outside court, particularly with the alleged imbalance between the extradition treaty with the United States and the United Kingdom. You are aware that the verbal test is different, but Lord Justice Scott Baker concluded that in fact the practical test was the same. There are other problems as well. We are often told that people will be sent to other countries with appalling conditions, appalling circumstances and pre-trial detention as well. Enough people have been extradited, shall we say, to the United States over the last 10 years for it to be perfectly possible, it seems to me, to see

whether any of those people were extradited when it turns out there was no evidence or no sufficient evidence against them. I think that, in its own right, is an important matter, because it continues to be raised and continues to be a concern for some people.

It would also be some yardstick for us. If we are extraditing people and it turns out that an injustice has been done, I think we would like to know. Much of what we do is predictive. We are imagining, if you like, what the prison circumstances are going to be in country Y in 10 years' time. The best evidence for prediction is what has happened in the past. I think, obviously, we would know very quickly if we had extradited someone to the United States and they had been executed, and we would not then extradite there again.

Therefore, it is a twofold thing: is the empirical evidence there to show that the treaty is not balanced and is the empirical evidence there to show that people are being treated unfairly when they are extradited?

Lord Rowlands: Would this investigation cover the issue of assurances? We have taken a lot of evidence on assurances and I wonder if you have any views on assurances.

Deputy Senior District Judge Arbuthnot: I certainly would like to know if the assurances are binding the issuing country.

The Chairman: Do you have any idea as to how you set about doing it? Is this a job for the Ministry of Justice?

Deputy Senior District Judge Arbuthnot: The embassy? I am not sure.

The Chairman: The Foreign Office? This is one of the slippery aspects of this, because you are not the only people who have raised this entirely sensible proposition. The difficulty, it seems, is how you set up a system that can get accurate, impartial responses and then knows how to synthesise it properly for the benefit of us here.

District Judge Zani: I suspect that if we are being told Mr or Mrs X will go to prison Y and it later transpires that he or she did not, and you can find that out through them notifying you, their lawyer notifying you or whatever, then that, I suspect, is something that is fairly easy to look out for.

The Chairman: It is a good starting point, but that is a small piece of a big jigsaw. Do you think this is a job for the Government, to put it crudely?

Senior District Judge Riddle: I wonder whether, strange though it may sound, the Home Office might be prepared to do this. Cost is always a factor, is it not? We are spending a large amount of money investigating on an individual basis whether prison conditions are appropriate. In an adversarial system that means that we decide it is in France for prisoner A and then that is challenged again further along the line. If there were Home Office reports, for example, that had looked at prison conditions in France that we could rely on, then it would, to some extent, both shorten and, I suspect, improve the process. If, at the same time, as Judge Arbuthnot suggests, our local consulate services were able to enquire into the fate of those who had been extradited, you would think it might be part of their responsibilities, but I do not really know.

The Chairman: Presumably, this would be a two-way street and we would have to afford the same access to other countries.

Senior District Judge Riddle: For far fewer people.

Lord Rowlands: How much do you depend upon assurances in making your decision?

Senior District Judge Riddle: This is a very big legal topic at the moment. It is being litigated currently and we will be getting, I think, clear advice from the Divisional Court; they consider it in November.

Lord Rowlands: Is there any particular case involved?

Senior District Judge Riddle: I think there are three linked cases.

Deputy Senior District Judge Arbuthnot: It is a particular country, is it not?

Senior District Judge Riddle: It is a particular country. This is something on which we do have different views, but I do not think we are going to express them.

Q144 Lord Brown of Eaton-under-Heywood: Investigating the implementation of assurances is one thing and we have been discussing that. I confess that I am rather more troubled about the suggestion of having an investigation into whether people were correctly convicted on extradition, as I understood you to say, if they go back to the States. Am I being cynical in suggesting that most of them in fact will have pleaded guilty under plea bargaining and they will all say they did that because of the plea bargaining and they were not guilty and there was not the evidence? How on earth is any investigation going to carry that usefully any further?

Senior District Judge Riddle: It was not, Lord Brown, so much that I was looking at the conviction as what is being said at the moment is that, because of the imbalance in the treaty, we are extraditing people to the United States on the flimsiest of evidence—on reasonable suspicion. That is the test here. Whereas it is said—and Lord Justice Scott Baker does not agree with this—that the test for extradition from the United States to here is different and weightier. I agree with you. We cannot look at the safety of convictions or even of pleas, but we can look at—and I think it is reasonably easy to find out—whether there was evidence, perhaps strong evidence, at the American end. So, you could go to the lawyer, if the lawyer would help you, and say, "What evidence did the United States have against this particular individual?" If it was flimsy, we would know. If it was strong, then the whole argument about imbalance becomes an academic one.

Lord Brown of Eaton-under Heywood: I do not want to argue with you, but I thought that in order to get the extradition in the first place they give us, in effect, a summary of the evidence.

Senior District Judge Riddle: The Americans do, but that is not what the debate has suggested. The Americans are very good at providing us with evidence, but you will still hear—or perhaps you do not hear—the argument that the treaty is imbalanced and we are extraditing people on no evidence.

Lord Rowlands: Therefore, this investigation would really confine itself to the US-UK arrangement. You would not broaden it to include the European Arrest Warrant.

Senior District Judge Riddle: If anyone could be persuaded to pay for it, I think the broader it was, the happier we would be.

The Chairman: I think that worldly note is probably a good moment to draw it to a conclusion. We have already overstepped the time you kindly said you would come to talk to us for. It has been very helpful. You have raised a number of points that are going to be useful to us in our thinking, so can I individually and collectively say to you thank you very much indeed for coming?

Senior District Judge Riddle: Thank you very much. We will look forward to welcoming those of you who want to come.

Examination of Witnesses

Hugh Barrett, Director of Legal Aid Commissioning and Strategy, Ministry of Justice and
Hilda Massey, Deputy Director Legal Aid Policy, Ministry of Justice

Q145 The Chairman: You have both come from the legal aid section of the Ministry of Justice. Hugh Barrett, you are Director of Legal Aid Commissioning and Strategy

and, Hilda Massey, you are Deputy Director of Legal Aid Policy. You have kindly sent us brief CVs, so we know about your background in the Department. First of all, could you just tell us who you are for the sake of the record, and then if you want to make an opening statement, either one or both of you, please feel free. In responding to questions, please feel free, either of you, to take whichever seems the most suited.

Hugh Barrett: I am Hugh Barrett. I am Director of the Legal Aid Agency and I have been working in the Legal Aid Agency and its predecessor organisation, the Legal Services Commission, for six years.

Hilda Massey: I am Hilda Massey. I work in Legal Aid Policy as the Deputy Director. I joined the Ministry of Justice from the Department for Work and Pensions in September this year.

The Chairman: Do you want to make any kind of opening statement?

Hugh Barrett: Yes, very briefly. We had the opportunity of hearing Judge Riddle and his colleagues' evidence and I was pleased to hear he was commenting on the work that the Legal Aid Agency has done with him and his colleagues to improve the administration of the legal aid scheme. However, there was one particular issue that I thought it would be helpful to clarify, which is around the evidence requirements for those detained in custody, because there was a discussion about potential delays to granting of legal aid causing increased levels of incarceration. For individuals who are remanded in custody, which I think from his evidence was roughly one-third of cases, even for those who are employed and self-employed, any requirement to provide supporting evidence is waived[48]. In other words, the individual can self-certify that the facts of the matter are as he or she presents them. Therefore, collecting evidence, which obviously is difficult for somebody who is remanded in custody, is not an issue in those one-third of cases.

[48] For individuals remanded into custody who fail the means test but subsequently submit a fresh application for change in financial circumstances and/or hardship, supporting evidence is required.

The Chairman: I am just trying to look at it from your point of view. If they self-certify and have no money—

Hugh Barrett: If they self-certify they have no money—

The Chairman: No—if they self-certify they have money when they have no money.

Hugh Barrett: Ah. Well, then they would not get legal aid and then they would obviously be in the situation where they would be self-represented.

The Chairman: Right. Do you want to say anything?

Hilda Massey: No, thank you.

Q146 The Chairman: Can I start off with the same question that we put to the previous panel of witnesses. Do you see any evidence of significant problems of people receiving poor legal advice, which is a slightly different thing from legal aid? In particular, do you think that the duty solicitors' rota is up to standard and gives decent advice in the context that it is being asked for? Secondly, bearing in mind this is a specialist niche area, do you think that the process of self-accreditation for solicitors joining the duty rota is appropriate? Would you like to see some sort of training scheme introduced? Finally, do you see there is inequality of arms between the prosecution and the defence in this area or are you, in fact, reasonably satisfied it is a fair contest?

Hugh Barrett: If I may, I will lead off on responding to that. I would really very much defer to the view expressed by the members of the judiciary who were in front of you just now, which is that they felt that there was a high calibre of representation both from solicitors and barristers. That is the same evidence that we have, which is obviously, from our perspective, what we would expect to see.

In terms of the accreditation, in some areas of law we do have what was referred to earlier as a ticketing system. In other words, in order to be publicly funded you need to have

passed a scheme that typically, but not always, is administered by the Law Society of England and Wales. For example, in family cases, in mental health and in some other asylum cases, in order to get public funding for those cases you do need to be accredited. To be honest, I am not completely convinced that that is something that we would want to do in this area, simply because of an issue of cost. Putting in place a ticketing system, mandatory training, examination and potentially an appeal for people who fail will be a costly process, and given that at the moment, certainly from the evidence that I have heard and seen, there is not a quality problem, is it worth investing in those sorts of schemes?

The Chairman: Can you give us an example of an area or two where you do this?

Hugh Barrett: In immigration cases, for example, we insist that practitioners go through an accreditation scheme. In that instance, it is administered by the Law Society. That was a result of widespread concern a number of years ago about the poor quality of advice being given to immigration clients, and we have that scheme in place to try to rectify that problem. As I say, what appears to be the case in this instance is that there is not a fundamental problem and therefore, in these financially constrained times, the cost of funding that, which would probably fall in one way or the other to the taxpayer, is something that we would have to weigh in the balance.

Q147 Lord Brown of Eaton-under-Heywood: A simple question: how many defendants are funded by legal aid at present? We have been told it is 95% of those who stand to be extradited—who are sought for extradition. Do we need to know precise numbers?

Hugh Barrett: I can give you the precise figures for the last financial year. Last year, there were 1,106 representation orders. There were 1,161 people who applied for criminal legal aid in the last financial year, and that represents the 95% figure that was quoted earlier.

Lord Brown of Eaton-under-Heywood: I do not think it is within my scope to ask, on a cost-benefit analysis, whether anybody has updated the September 2011 review, but have they?

Hilda Massey: The cost-benefit analysis has not been updated since it was undertaken in 2011.

Lord Brown of Eaton-under-Heywood: You heard the district judges say that they build in an automatic three-month delay between the first and substantive hearings in order to accommodate the whole question of gaining legal aid, and that takes them way beyond their supposed 60-day limit and so forth. Are these not considerations that one should have in mind in deciding whether automatically that people should get representation?

Hilda Massey: Ministers have considered, and considered before the response to the Scott Baker report, whether or not legal aid ought to be paid automatically in these cases. On balance, the evidence in relation specifically to the analysis is quite a difficult piece of analysis to do. The previous witnesses talked about how difficult it is to weigh up what the costs are in these cases. Therefore, the analysis that was done was based on a series of assumptions. One of the key things to think about when looking at that analysis, particularly in our current cash-constrained environment, is whether the cost to the legal aid scheme of taking away the means test in these cases is a real cash cost to the Government. Some of the potential savings that might arise as a result of doing that through, potentially, cases going through quicker are much more difficult to realise in reality.

Lord Brown of Eaton-under-Heywood: Less custody is, no doubt, taken into account.

Hilda Massey: It is taken into account, but if we use that as an example, that is clearly one of the more expensive elements of the potential saving that you might make. However, when you look at the numbers of people who are in prison in this country at the moment, we have

86,000 people in prison, 12,000 of whom are on remand. When you factor in the amount of spaces that you would save if these cases were going through quicker when you are planning your number of prison spaces that you need, those numbers are so small that the cash saving you would generate from their not being in prison is very difficult to quantify. Essentially, it is not big enough to make a difference in terms of your planning for prison places, for example. There are obviously some minor savings, but most of the savings related to that would not be cashable to the Government, whereas the cost of removing the means test would be.

The Chairman: Is it not the case that we have overcrowding in prisons and you would have thought that any mechanism that could permit people who are not going to necessarily be a danger to the rest of society to remain in society at large is something that is in the public interest to pursue?

Hilda Massey: What the Government is trying to do here is balance the need of the taxpayer against making sure that these cases go through as quickly as possible. I think Ministers have made the judgment call that, in this particular instance, if the means test were to be removed, then, potentially, that opens up a question of consistency with the rest of the criminal legal aid system. So, if you make an exception in this instance, then why would you not make an exception in other difficult cases?

The Chairman: That is a slightly different argument from the one that is contained in the cost-benefit analysis. It is rather like saying if somebody has bad prison conditions, everybody should have bad prison conditions. I am not sure it is a very attractive argument.

Hilda Massey: No. I take your point, but the point that Ministers have made is that the cost-benefit analysis is inconclusive in terms of whether or not there are savings to be made when you weigh up both sides of the argument. Certainly it is easier to see what the costs

are to Government than how you might realise those savings, and when you are considering legal aid in the round and the context of the fiscal environment that we are working in currently, Ministers take the view that the cost-benefit analysis is not sufficiently proven to strongly support making an exception in this case.

Lord Rowlands: How many of the 12,000 in remand are extradition cases?

Hilda Massey: I am afraid I do not have that figure off the top of my head.

Lord Rowlands: If we had that figure, we could then work out how much it is costing.

Hilda Massey: We can certainly write to you on that point.

The Chairman: Lord Mackay, we are starting to trespass on your territory here.

Lord Mackay of Drumadoon: Well, I think you have addressed all the questions. Nevertheless I have one or two more. You talked about an assessment being done in 2011. That would result in a written report.

Hilda Massey: There was a written report appended to Scott Baker's report.

Lord Mackay of Drumadoon: Yes. I just want to get the chronology of events. There was a report and that was in the big Scott Baker report—an extra. Has there been any subsequent written report?

Hilda Massey: No.

Lord Mackay of Drumadoon: On a number of occasions both of you have referred to Ministers making a judgment call and Ministers doing that, so the matter has been considered by Ministers, but nothing in public has been made in the form of a further report.

Hilda Massey: No, not in the form of a further report. We provided input into the Home Office response to the Scott Baker report, which confirmed that the Government did not believe that the cost-benefit analysis was such as to change their view.

The Chairman: Are there any plans to review this work?

Hilda Massey: Not at this point in time, no.

The Chairman: It is a high-level report, is it not?

Hilda Massey: It is a high-level report, yes.

Q148 Lord Henley: I think much of what I wanted to ask about was dealt with in your opening remarks, but I want just to make sure I have it right in my head. Those in custody can self-certify and that is that.

Hugh Barrett: Correct.

Lord Henley: They assert that their income is whatever and the Legal Aid Agency, for which you have responsibility, will accept that.

Hugh Barrett: We will accept that self-certification. As the Chairman pointed out, that may not mean that they get legal aid, because they may self-certify that they have an income level above the means threshold.

Lord Henley: However, they themselves have no problem about the documentation that they would need to find. A lot of people who are not in custody are going to have those problems, because if they are fruit pickers or whatever, they might not have it.

Hugh Barrett: Yes. That is absolutely correct.

Lord Henley: Right. Well, I think that is quite clear.

Q149 Lord Rowlands: I think with this question too we have, in some ways, almost heard the answer. Why did you reject the Scott Baker recommendation?

Hilda Massey: I think there are three things, basically, that were taken into account when the decision was made. First, there is the general principle that the Government believes that where people can afford to do so they ought to make a contribution towards the costs. Means testing is the mechanism by which that is introduced, so there is a general principle

there. We are in a fiscally constrained environment and we need to bear down on the costs of legal aid as much as possible, so it is difficult to see, in those circumstances, why an exception would be made in this particular instance. The risk, if an exception is made, is there will be a question of both consistency with the rest of the legal aid system and also a question of whether or not that then opens the door to claims being made that exceptions should be made elsewhere. Not only that; some very difficult decisions have had to be made on where legal aid is provided in the broader legal aid scheme, particularly in terms of things like reducing the scope of civil legal aid.

Lord Rowlands: However, you have just said that 95% of the cases are successful. Is that true of the other sectors?

Hilda Massey: Yes, it is. The overall success rate in criminal legal aid is something in the region of 94%. It was briefly referred to when the previous witnesses gave evidence that there is also an element of what we call "suppressed demand", which is where people have not claimed legal aid because they have realised they will not get it, because of the level of their income. Therefore, if you remove the means test, you are likely not only to open it up to the 5% or 6% of people who fail but also widen the door to those people who have not previously claimed.

Lord Rowlands: In that document of September 2011, I must say the figures are not easy to understand. The potential savings are anything between £250,000 and £750,000. That does not sound like a cost-benefit analysis to me.

Hilda Massey: It gets back to what the previous witnesses were saying. It is very difficult to estimate the costs in this case, so they have had to give a range of potential costs depending on various factors that might come into play, and that is why there is a wide range in terms of where the analysis came out.

Lord Rowlands: On the figures, first of all, the potential costs you have are £450,000 and the savings are somewhere between £250,000 and £750,000.

Hilda Massey: Yes.

Lord Rowlands: You have not been able to refine those figures.

Hilda Massey: Those figures will have changed because, for example, when the potential savings were calculated it was estimated at the time that it would cost £40,000 a year to keep somebody in prison on remand. We know now those figures have substantially reduced and are somewhere now in the region of £28,000.

Lord Rowlands: £28,000 a year per prisoner.

Hilda Massey: Yes. Similarly, the potential increase in costs from the removal of the means test may also have reduced because the average amount spent has reduced, so there are counterbalancing arguments on both sides of that equation. However, fundamentally, it still brings us back to the point that a lot of the potential savings in the system are not realisable.

Lord Rowlands: Yet we heard from the previous witnesses, people who are at the front line, conducting the cases and managing the system, that they believe on balance there would be a saving if the means test was abolished. What weight do you give to such practical experience on the ground?

Hilda Massey: There are undoubtedly savings that would be made. For example, there are cash savings that might be made by not having to pay for an interpreter at an additional hearing. There are identifiable savings, but where the majority of the costs fall are in relation to expenses such as keeping somebody in prison, where it is much more difficult to realise those savings.

Lord Rowlands: Is it easy to calculate? If you have the number of people on remand on extradition cases and you have worked out a percentage of the time and £28,000 or whatever it is, you must be able to come up with a figure.

Hilda Massey: Of those, not all will be on remand or in receipt of legal aid; some of them will have been granted legal aid. It is not always clear why delays take place, so attributing the amount of time that somebody spends on remand, for example, directly to their legal aid application is quite difficult, because there will be a number of different factors involved there. Therefore, we have had to make some very broad estimates in relation to that.

Lord Rowlands: Given the burden of the evidence we have received, though, do you not think it is at least worth revisiting rather than just saying you have not done anything since September 2011?

Hilda Massey: I think Ministers have taken the view that there is not a sufficiently weighted case to remove the means test in these instances and, in fact, some of the work that the Legal Aid Agency has done to drive out greater efficiency in the process is a better way forward than creating precedent by removing the means test. There is a lot of work that the Legal Aid Agency has been doing to make the process more efficient, some of which the previous witnesses referred to, but also there are future changes coming in relation to things like e-forms, which should help drive further efficiencies and be a more effective way of dealing with this issue.

Lord Rowlands: Perhaps, Mr Barrett, you could tell us about that.

Hugh Barrett: As you will recall, when the previous witnesses were talking about the introduction of e-forms they were hoping—indeed, we hope—that that will smooth out the administration of legal aid application processes. That will happen in November, next month. So far, we are about halfway through introducing these e-forms across England and

Wales and what we are seeing is, roughly, a reduction of 50% in the proportion of these forms that, to use a phrase, ping pong back and forth between the Legal Aid Agency and the solicitors firms who are applying for legal aid. We would expect that to happen in these cases as well. As I say, that is coming in November, and so by the beginning of December we should see that still further improving the situation.

Q150 Lord Henley: Continuing on this point, I accept it is very difficult indeed to do a cost-benefit analysis and I accept that the last one you did was in September 2011. It is obviously over-simplistic to think that just by reducing one prisoner you reduce your costs by one times one prisoner. All I want really, I think, is an assurance that, even if there has not been an update of that cost-benefit analysis and even though we know certain things have changed since then—you have just asserted that the average cost of each prisoner has come down from £40,000 to about £28,000—Ministers have actively considered this over the last year or so and keep it under review, and that this is at ministerial as well as at official level.

Hilda Massey: Indeed, yes[49].

Lord Empey: We are dancing on the head of a pin to some extent, because is it not the case that, with the vast increase in the number of prisoners, there is so much capacity to reduce before it would hit any reasonable costs, such as prison officer numbers and all that sort of thing? Really, you would have to reduce the number of prisoners substantially before you make much of a difference on costs. Is it not the case more people in prison drives down the cost? If you have, say, twice the number of people in a prison, it does not mean you have twice the number of prison officers. The only extra cost is really the food.

[49] Ministers last considered the cost benefit analysis in October 2012. Whilst officials recognise that some of the cost assumptions have changed, there are currently no plans to actively update or review this work.

Hilda Massey: Yes, I am sure that is right. I do not have any figures relating to that, I am afraid.

Lord Hussain: As we have heard, the majority of the cases are from Poland. Of the majority of those Polish cases, and the rest of the 5%, how many will need interpretation or translation?

Hilda Massey: I am afraid I do not have those figures.

Hugh Barrett: I do not have the figures for how many of them need interpretation, sorry.

Lord Hussain: Either Polish or non-Polish.

Hugh Barrett: No, sorry, I do not have those figures. I do not think we collect them. Applications for expert witnesses would be something that we would have and obviously the raw number of individuals who apply for and are granted legal aid.

Lord Brown of Eaton-under-Heywood: I absolutely understand the force of your point about general principle, consistency and the effect if you removed the means test and then there is a hidden number who will apply in addition and all the rest of it. However, is extradition not a special case, not least because there is internationally an obligation to meet or to attempt to meet the 60-day target? We have been told now that you have an automatic three-month delay built in in order to accommodate legal aid. Does that not make it a special case?

Hilda Massey: I understand what you are saying, but I would go back to the point that I made previously. Rather than creating a precedent, effectively, by making extradition a special case, we think the right solution is to make the process work more efficiently and more effectively, and we believe we are putting measures in place to help that happen.

Lord Brown of Eaton-under-Heywood: We have been told that until this year the courts used to have to accommodate all the various adjournments, and that is why they have now

changed to this automatic three-month delay. That is a new scenario and, presumably, it would justify a new cost-benefit analysis because you now know more certainly how long people are going to remain in custody?

Hugh Barrett: If I might come in, I think there is force in your argument, but we need to be careful that we do not see, if I can use this phrase, solving the legal aid application problem as meaning that automatically the process will proceed at the speed you indicate. We heard, once again, in earlier evidence about the need for expert witnesses and that they, typically, if they have to go and visit the country in question, take many months.

Lord Brown of Eaton-under-Heywood: Undoubtedly in individual cases, but that is not the great demand.

Hugh Barrett: I am sure that is right, but I am just trying to make the point that we should not see reducing the period for legal aid as automatically going to mean that you are going to meet the overall timescale. That is the point I was trying to make.

The Chairman: Lady Hamwee, you were anxious to talk about expert witnesses.

Q151 Baroness Hamwee: Thank you, yes. First of all, so we understand how an application is dealt with, how do you assess an application and do you put a limit on the amount that can be funded? If you can just give us a quick overview of how you respond.

Hugh Barrett: Yes. Solicitors firms will make an application to us for permission to engage an expert. We will have some rates that are stipulated in regulations that we can pay for the various categories of expert. We will then look at the case that they put and make a judgment as to whether we believe that the rates they are asking for are justifiable, and we turn 90% of those applications around within a two-week period. We heard earlier about a particular individual case, which I think was Peru, which took longer.

Baroness Hamwee: That is a one-off.

Hugh Barrett: Exactly, so there will be cases that do take longer than the two-week period, but essentially that is the process. If the solicitor feels that we have been unreasonable in our judgment to grant or not to grant the permission to use that particular expert at that rate, there is an appeals process where we go to an independent body of solicitors and barristers to make a judgment on that judgment. That, in essence, is the process that we apply.

Baroness Hamwee: As well as the rates—I remember now that I have seen regulations with the rates in—do you stipulate a number of days, because they are day rates, are they not?

Hugh Barrett: Yes, they are indeed. In fact, I think most of them are hourly rates. Normally we would ask for an indication of how many hours or days the work was going to take, so we can make a judgment as to the total amount of money that is going to be applied in that particular instance. There are no regulations that apply to the number of hours or days that are worked, though, so it is a matter of trust between us and the solicitor that they will endeavour to do that in as expedient a time as possible.

Baroness Hamwee: Obviously, there are experts and experts. We heard from a member of the bar that sometimes people cannot afford the most expert experts, but that is a matter for application as to the speciality or whatever.

Hugh Barrett: Yes, I think that is right.

Baroness Hamwee: Are there limits on what can be funded? You heard Judge Riddle and Judge Arbuthnot talk about their wish to be able to commission more evidence.

Hugh Barrett: At the moment, we would consider things on a case-by-case basis, so if there was an application for funding a particular expert, which would be done by the defence, we would consider it. As we heard earlier, at the moment, local authority reports are commissioned but paid for by the local authority.

Baroness Hamwee: Do you have a response that you feel you can share with us to the suggestion that the court itself should be able to commission reports?

Hilda Massey: I think that would be a matter that we would have to take away and consider.

Baroness Hamwee: Okay. I was giving you that out. Are you aware of cases where legal aid funding has been insufficient? For instance, in terms of prison conditions in foreign countries.

Hugh Barrett: I am not personally aware of them, but this can be a bit of an iterative process. One of our objectives in safeguarding public money is to make sure that we get good value for money. Experts are out to make a reasonable return for the time they invest, and sometimes there is a bit of to-ing and fro-ing. Personally, as I say, I am not aware that we have had cases where we have had that problem, but I am sure there is a healthy commercial tension from time to time.

Baroness Hamwee: Yes. Good evidence may mean that the hearing of an application is much shorter, because you get to the point and you get the good evidence. Lord Brown is nodding.

Hugh Barrett: Yes.

Q152 The Chairman: One of the things that has struck me from your evidence is that you have been approaching this very much from the perspective of value for money, saving money, public expenditure. The other side of the coin is of course that the court system is there to ensure justice is done. Do you think there are real conflicts between saving public money and justice in this sector?

Hilda Massey: I understand why you have asked the question. When considering this, you need to consider it in the broad context of legal aid as a whole.

The Chairman: That is the way you are considering it, not me. I am just trying to be clear what you are telling us.

Hilda Massey: I understand what you are saying, but this is an area where some very difficult choices have had to be made in the context of public expenditure. By the nature of why we pay legal aid in the first place, there are some very difficult issues that are being dealt with, where choices have had to be made in terms of reducing public expenditure right across the board, both in criminal and civil legal aid, that have been difficult and that may result in people thinking that exceptions should be made in that particular instance. This is an instance where that argument can be made, but it is not the only instance is what I would say, and I think you do have to consider it in a broader context.

The Chairman: What other areas do you think are analogous to this in your experience of doing your job?

Hilda Massey: Well, first of all, I have to say my personal experience of doing legal aid is fairly limited, only having been in the job for about a month and a half, but I think there are areas. For example, if you look at civil legal aid, we have considerably reduced the scope in recent legislation of where civil legal aid is available.

The Chairman: This is not really civil legal aid, is it?

Hilda Massey: No, I appreciate that. The point I am trying to make is in a very fiscally constrained environment there are difficult choices to be made and, as I said before, in this instance the judgment is that the way to deliver the interests of justice in this case is not to automatically pay legal aid. It is to make sure that the legal aid process is working as effectively as it can do, so we are not creating delays and not conflicting with the interests of justice in that respect.

Q153 The Chairman: If we can go back to what we were hearing earlier from the judges about how they have introduced a three-month delay, because that appears to be a function of dealing with legal aid, you have responded, as the Department, by introducing the e-applications and so on. First of all, why, in practice, did it turn out to take so long to get these matters resolved? Is there any light you can throw on that? Secondly, are you looking with confidence to the future when, shortly, the Westminster Magistrates' Court no longer introduces the three-month legal aid delay period and just gets on with it because everything works smoothly?

Hugh Barrett: The introduction of electronic forms is not a response to this particular area of law. It is to improve efficiency across the hundreds of thousands of cases that we deal with in the other magistrates' courts across England and Wales. As I was saying earlier in my evidence, it is roughly halfway through deployment. We are confident that we will be able to turn around 90% of applications for legal aid within two days[50]. Obviously, there will be a number of cases that will take longer. I think once we have this new system in place for Westminster, we will be sitting down, as we have done over the last several years, with Judge Riddle and his colleagues and talking about how it was working and whether that would enable him to make a different decision about how he schedules cases in his court. As I say, I am struggling to see how, given the very small number of cases that are delayed, that is going to drive a three-month delay for all.

The Chairman: You say the small number of cases that are delayed, but in fact every case appears to be being delayed for three months.

[50] The Legal Aid Agency (LAA) will expect to process 95% of completed legal aid applications in straightforward cases within two working days of date of receipt. If the individual's application is more complex (for example, if the individual is self-employed) or if the individual fails the means test and subsequently applies under the hardship provision, the LAA will expect to process 90% of such completed applications within two working days of onward referral to their specialist team.

Hugh Barrett: Okay, sorry—every application I should say. Sorry; I used the wrong terminology. Every application is delayed. As you say, the response is to delay all cases by three months. I am struggling to see the link between the two.

The Chairman: Right. There are problems at the heart of what we are looking into that are affected by legal aid but may not be caused in whole or in part by legal aid. What I am trying to do is to disaggregate what is going on to see where the problems might be, because our remit is to look at the law of extradition in the round, not specifically as a judge but to look at the political context. I am just trying to see whether there is anything from your evidence that can help us in coming to conclusions about that. You will have understood, both from reading the newspapers and from hearing some of the questioning, that this is clearly something that is of concern to people. I come back to the fact that I am struggling myself to see what changes to the way legal aid is operated could do for the system as a whole or for certain individuals affected by it, and whether, in fact, you can save public money at the same time.

Hugh Barrett: If we talk about the administration of legal aid, as we heard from Judge Riddle, if we can get to a situation where we can flag to him the exceptional cases that are going to take longer to go through the process—that will take, say, three months to get an application processed—we can treat those as exceptions. For the 98% or whatever it is of cases that are going through within a few days, he can process those on a much faster track than he is at the moment. That is the sort of conversation that we ought to be having with him once we have the new system in place.

The Chairman: That is what I was interested in. Your perspective from here is that that is the direction of travel it is all going in.

Hugh Barrett: It is indeed.

The Chairman: That is what I was interested in finding out.

Lord Rowlands: Basically, you are saying that extradition is not a special case.

Hilda Massey: In the context of legal aid, we do not want to make it an exceptional case.

Hugh Barrett: It is a special case, in some ways, already, because of the duty solicitor scheme that is available in the first instance hearing. Therefore, there has been a recognition that in first instance hearings there is a different provision from what there would be in the normal magistrates' court; for example, for other matters that are considered in the other magistrates' courts.

Lord Brown of Eaton-under-Heywood: Is it just means tested? There is not a merits test.

Hugh Barrett: As I understand it, there is a merits test but everybody passes it.

The Chairman: Well, the threat is you are going to be sent abroad.

Hugh Barrett: I am not an expert on this, but my understanding is that that appears to be the thrust of it.

The Chairman: Time is moving on and we have covered, in very general terms, all the topics we told you we were interested in hearing about from you. Is there anything else you would like to say to us about that or more generally where, perhaps, you may think some of the gist of the questioning is not really right, or anything more generally to help us in our inquiry?

Hilda Massey: I do not think so.

Hugh Barrett: I do not think there is anything we would want to add.

The Chairman: Right. Well, I thank you both very much indeed for explaining it to us.

Simon Clayton – Written evidence (EXL0071)

To The Lords,

Sorry a hurry I normally prepare extremely well written and long, erudite and worthy statements for High Courts regularly in cases I manage, with the greatest of care [*despite never having met anyone fore years “worth” it…] , but UK society truly is breaking down and people like me are under such pressure from our desperate clients [who don’t even know how to mean what they say] I no longer have time for such.

Extradition, useful case study for you. In 2003 I was arrested in Portugal and extradited. The charge was child abduction (my own daughter who had in fact lived with me for 2 years prior and as soon as i got out of the stone hotel i got her back immediately half the time AND it became a case that was foundation UK shared care law...in other words the only happy extraditee ever? very...

(true, the press coverage forced the courts to deal with it more carefully than anyone else ever is...indeed our judge said "the local celeb is back...lets sort it out proper this time.." and he did. when they never did before or so rarely do for anyone else - i know i often legally work with them).
I am highly intelligent, v well educated (self) an ex pilot, bookseller and never even a parking ticket for 10 years prior the 2003 matter....and quite humble..or was until this nonsense made a real man of me..

I became minor ish cause celebre ("why has this nice dad been nicked and jailed in Portugal?")

I agreed to extradition the day after arrest ..because there was NO WAY i could get a lawyer..even with 5 grand in savings with me.....[*and some other hidden, not with me…assumed never again with me, but when I was reunited I HAPPILY maintained myself to the last penny during the 6 feet of paperwork that follows sacking the average lousy CAFCASS creep you have to show up in even a well processed case. unlike ANYone else I ever meet these days who keeps their money for their selfish own needs, no, no one in Britain any more sacrifices anything for their kids]. had i had any legal advice (i asked but was denied against of course the Vienna convention if memory serves me well... MANY asks, always denied, prior court...a joke...and that with media around!...and so called embassy support) .. yet despite TV camped outside my gaol, despite loads UK media... it took at least 2 months before the coppers would even come collect me..(and only after a demonstration by fathers4justice in streets of Brecon where the cops were). and that when we really hit media bigtime (the summer of 03 50degrees c in a *Midnight Express* gaol.... people dying around me) ...

only when even more media came to question the Portuguese Minister of Justice in person re my case did something happen..(he signed papers in front of them asking the UK plod to come now please and get me…or else……and inside there were many awaiting international transfer...all with NO legal help, no real ability to plead against their extradition...one phone per 100 inmates impossible even to speak with lawyer) ...and most were there at least 6

mths... and expecting more... most were indeed well educated folk whom had fallen foul of minor drug smuggling laws… the gentlemen smugglers popping back and forth the Moroccan Rif… and naughty bankers skipped with a few mil plundered…

(punished before ANY trial in reality)

The notion that the recent couple would have come straight home is laughable..ok my situation 10 years ago but (i am the last 10 years a VERY successful paralegal/lay legal and have a radical freedom of speech law in my name, primary legislation 06 test case i did myself called clayton v clayton) I doubt it has changed indeed am sure it has gotten worse... the real issue is as in my case local plod put the most ridiculous "evidence" to initial warrant and bail hearings...which later (all subsequent hearings even if I simply couldn't geta sane lawyer or barrister when back in the UK) they casually forgot about, would never have dared to repeat in a real trial.....no apology. …in short they can say ANYthing to the extradition initial hearings and no one will ever smack their wrists...
(the real, unspoken, issue)

I was given a hard time because i spoke up initially against my arrest then an easier ride because yes media got more intense there were some 35 plus evening news segments on me...god forbid the ordinary person no publicity
please help me speak out (i adore public speaking) in fact this last week have been poacher turned gamekeeper working with a well known charity on a case of kids abducted by a mum...that rarely of course gets prosecuted (they say that xborder moving kids is mushrooming beyond all societal awareness...indeed extradition may become far far more a normal part of life for many….if such laws were applied…and that is from female legal workers I have been dealing with this very week)

NB I am also just recently working with a client (as lay legal specialising in family law). I have a case which has actually just gone to the ICACU (Intl child abduction and contact unit).

The matter (I have large files and evidence on) concerns a woman who though English drifts around Europe and has for the last five years. Ditto the father who resettled back in UK two years ago.
On engaging with Liberty recently (the charity which surely must be aware of more potentially extraditable offences than any other) they admit that as with the case I am dealing with there is a huge, in their words "unspoken mushrooming problem few seem to know of" problem of many parents being abroad against child abduction law - i.e. without the consent of their ex (indictable, serious if convicted, certainly extraditable) who are getting away with abductions because clearly there is some policy to ignore many of these crimes. Perhaps because the Pandora's box has enlarged so. Perhaps because police and others are already in reality past breaking point.

What is also interesting is there appears to be a civil channel (to have children taken abroad returned after civil legal action) that one is almost encouraged into (on application) whereby informing the Official Solicitor of an indictable offence (abduction) one is given a choice to report in such a way there will be no prosecution. (Curious as civil courts abroad dealing with these matters are notoriously slow)

Simon Clayton

29 September 2014

The Criminal Bar Association – Written evidence (EXL0055)

Answers to House of Lords Select Committee questions on behalf the Criminal Bar Association:

1. Does the UK's extradition law provide just outcomes?

1. It is somewhat difficult to answer such a broad question. Some observations follow:

2. There are some aspects of extradition law, particularly in the context of EAW cases as well as some Part 2 cases that do not require a prima facie case, where there is a perception that individual rights are not adequately protected (see the stance of Liberty, for example). The amendments to the 2003 Act are, in the large part, concerned with the rights of the individual (such as the proportionality test and forum bar), but it is yet to be seen how they will be applied in practice.

3. The fact that some countries issue EAWs without any prosecutorial discretion is capable of leading to unjust outcomes and an unjust process. Whilst the court is required to conduct a balancing exercise in the context of Article 8 and a proportionality assessment for accusation cases, this does not prevent a requested person from being remanded in custody awaiting a decision for (sometimes a considerable) period of time. Moreover, the extradition court is overwhelmingly likely to decide that absent compelling circumstances it has an obligation to honour extradition arrangements even where the case has all the hallmarks of being a request issued without any qualitative assessment of the facts.

4. Great weight is attached to the fact that countries in the EAW scheme are signatories of the European Convention on Human Rights. Whilst that may often be appropriate, time has shown that the criminal justice systems of European countries operate with some serious problems. Very very long delays are one example - the recent accession of Croatia to the EU and thus the EAW system was met with much positive comment and commitment to the scheme. Yet of the two Croatian EAW requests being processed by the courts both have involved delays of almost a year as the courts have adjourned the cases repeatedly to allow the Croatian Court to provide clarification. In one, extradition was refused and in the other, the same decision is expected imminently. Another example is of prison conditions. These vary considerably across Europe and recent cases involving Lithuania and Romania in particular have shown that the presumption that prison conditions are acceptable was misplaced.

5. Means tested legal aid can also lead to injustice in the proceedings- a requested person may spend on remand in custody awaiting a decision on legal aid before the proceedings can get started.

2. Is extradition law fit for purpose in an era of increasingly multi-jurisdictional crime?

6. Some of the applicable concepts are awkward to deal with and thus potentially lead to some injustice where the offence itself is multijurisdictional. Assessing offence equivalence in relation to fraud offences where information may be limited and the law complex is notoriously difficult and of this is compounded by issues of forum.

7. Many aspects of the system are also hopelessly out of date; communication from a court takes and is accepted to take one month; the request is drafted, translated and sent via the NCA and Interpol to the relevant court. When the response is drafted the reverse is then necessary.

3. To what extent is extradition used as a first resort when prosecuting a crime committed in another jurisdiction? Should greater use be made of other remedies?

8. Yes, extradition is often used as a first resort before looking at alternatives. In particular, little use appears to be made of the provisions for payment of fines (via the Framework Decision on the mutual recognition of financial penalties) though there have been plenty of examples where that would have been appropriate, assuming law in the issuing state could accommodate. These include primarily criminal proceedings in respect of low value frauds or thefts, often where a fine has formed part of the punishment.

9. Potential use of the principles behind the Framework decision on the mutual recognition of probation issues would also represent an alternative to use of an EAW. Numerous cases, particular Polish request, relate to instances where someone has lost contact with probation or come to this country with the permission of probation but not of the court and automatically/in default an EAW is issued. In many cases the only condition placed on the person sought was not to commit further offences and to stay in regular contact.

10. The amendment in s21A to the 2003 Act (consideration of less-coercive measures in proportionality) is apparently designed to try to redress this problem, particularly, when taken in conjunction with s21B (temporary transfer, etc), which allows extradition proceedings to be put on hold whilst the requested person and the court / prosecutor / judicial authority speak to one another.

11. Whilst it hasn't yet been used, it would appear that s21B is aimed at exploring the possibilities of alternative measures. Section 21B does not place any restrictions on the purposes for which temporary transfer or a conversation can be used for. The aim of the section therefore appears to focus on enabling a conversation to take place which could lead to a more efficient resolution of some of the issues which arise during the course of extradition. One can envisage this section being popular with countries such as Poland where the authorities can often be persuaded to withdraw an EAW where certain conditions are met.

European Arrest Warrant

4. On balance, has the European Arrest Warrant (EAW) improved extradition arrangements between EU Member States?
- Are standards of justice across the EU similar enough to make the EAW an effective and just process for extradition?

12. No- this causes one of the most prominent problems. The Framework Decision tries to accommodate the differing justice system across the member countries and there are marked differences between them. Poland is a prime example- they operate a system where there is no prosecutorial discretion in enforcing their proceedings and sentences, which results in such a high number of requests in comparison to other Member States. This is coupled with the sentencing regime where suspended sentences are activated when a person leaves the country, even if other conditions (ie. payment of damages and a period of probation have been complied with). This was the main reason behind the proportionality bar. This causes a tension between two aims of the Framework on one hand respecting Member State's justice systems, where the seriousness or gravity attributed to a certain type of offending can vary greatly, as against the desire to reserve extradition proceedings for the more serious offences.

- **How will post-Lisbon Treaty arrangements change the EAW scheme once the UK opts back in to it**?

13. Two main impacts will be that this will permit cases to go to the European Court of Justice- so more case law and Commission will have the ability to bring enforcement proceedings.

Prima Facie Case
5. In circumstances where a prima facie case is not required, do existing statutory bars (the human rights bar, for instance) provide sufficient protection for requested people?
- Are there territories that ought to be designated as not requiring a prima facie case to be made before extradition? What rationale should govern such designation? What parliamentary oversight of such designation ought there to be?

14. The vast majority of Part 2 extradition request do not require a prima facie case to be presented. All signatories to the European Convention on Extradition 1957, plus a number of members of the Commonwealth and the USA are dealt with on this basis. This process has not stopped abuse by a number of jurisdictions but in particular Russia, Ukraine, Turkey and Azerbaijan. The UK court do however frequently discharge extradition requests to the jurisdictions. For instance there has been only one individual surrendered to each of Russia and Ukraine and both were by consent. Human Rights concerns become more difficult to examine outside the Council of Europe because there are not the same monitoring bodies such as the European Committee for the Prevention of Torture. The UK courts do frequently discharge requests to Part 2 territories on the grounds of abuse of process and human rights breaches so the bars and human rights protections do provide sufficient protection. However, it is difficult to analyse the underlying conduct which is sometimes fabricated without the need for prima facie evidence.

15. There are no territories that are not already designated that should be. If anything a number of states should be required to provide more evidence not less. The designation and signing of extradition treaties is by is nature an immensely political issue. For instance the UK now has an extradition treaty with Libya which co-incidentally coincided closely with the removal of Mr. al Magrahi (the Lockerbie Bomber) whilst in reality because of the political and human rights situation in Libya there is no prospect of the UK surrendering any individual there.

UK/US Extradition

6. Are the UK's extradition arrangements with the US comparable to other territories that do not need to show a prima facie case? If so, should the US nonetheless be required to provide a prima facie case, and why?

- Sir Scott Baker's 2011 'Review of the United Kingdom's Extradition Arrangements', among other reviews, concluded that the evidentiary requirements in the UK-US Treaty were broadly the same. However, are there other factors which support the argument that the UK's extradition arrangements with the US are unbalanced?

16. The UK's extradition arrangements with the US are not unbalanced. The tests are the same; neither party has to provide prima facie evidence. This area has been reviewed and debated at length but there is no evidence to show that the arrangements are better or worse than those with for instance Russia (other than the fact that the UK actually extradites individuals to the US).

17. The factor that always brings this issue into public debate is that US prosecutors are far better resourced and political that those in the UK and far more willing to prosecute a multi-jurisdictional crime that touches the US even when most of the conduct occurs in the UK.

18. Public discourse is skewed away from the horrors of former CIS states and Turkey to the US because the cases are given better publicity and discussion and often involve UK nationals.

Political and Policy Implications of Extradition BK

7. What effect has the removal of the Home Secretary's role in many aspects of the extradition process had on extradition from the UK?

-To what extent is it beneficial to have a political actor in the extradition process, in order to take account of any diplomatic consequences of judicial decisions?

19. The changes only came into effect in July 2014 and only touch a small proportion of cases so it is difficult to tell. It is only those cases that involve asylum claims and the case of Gary McKinnon in which the Home Secretary has had any significant input into under the 2003 Act so it is unlikely that there will be any change.

20. It is imperative that the Home Office retain some input into the Extradition process otherwise the use of assurances by the UK or the monitoring of assurances in foreign jurisdictions is impossible to properly assess.

8. To what extent are decisions of where to prosecute certain crimes and whether to extradite influenced by broader political, diplomatic or security considerations?

21. This can only be answered fully by those making such decisions. However, from experience there are few but growing number of cases that this impacts upon and the influence of Eurojust in that decision making process seems critical within the EU and the cooperation between the SFO and US Department of Justice in US Cases in US cases.

Human Rights Bar and Assurances
9. Is the human rights bar as worded in the Extradition Act 2003, and as implemented by the courts, sufficient to protect requested people's human rights?

22. The Human Rights bar incorporates the ECHR into the Extradition Act and needs no amendment. The implementation by the courts is an ever evolving process and there has rightly been a sea change in the analysis of Article 8 cases which has led to more just outcomes. The use of assurances is the main problem when examining prospective Human rights breaches in EAW cases.

10. Is the practice of accepting assurances from requesting states to offset human rights concerns sufficiently robust to ensure that requested people's rights are protected?
- What factors should the courts take into account when considering assurances?
- Do these factors receive adequate consideration at the moment?
- To what extent is the implementation of assurances monitored? Who is or should be responsible for such monitoring? What actions should be taken in cases where assurances are not honoured?

23. The use of assurances must be of real concern.

24. No European legal instrument expressly provides for reliance on diplomatic assurances as a safeguard to a States' obligations not to return a person to the risk of ill-treatment.

25. The preamble to the E.U. Framework Decision adopting the EAW scheme reaffirms the absolute nature of the prohibitions against the death penalty, torture, and returns to torture or ill-treatment. The decision explicitly provides for the use of assurances **only** with respect to the opportunity of a retrial in cases of judgements or orders handed down in absentia, and for the review of life-sentences. The European Convention on Extradition 1957 provides for the use of assurances, but only with respect to the death penalty. Its Second Additional Protocol provides for the use of assurances in the context of a right to retrial. Article 4 of the Protocol amending the 2003 European Convention on the Suppression of Terrorism, obliges Contracting States to seek assurances **only if** a person concerned risks being exposed to the death penalty.

26. The guidelines elaborated by the Council of Europe's Group of Specialists on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers on July 15, 2002, reaffirm the absolute prohibition against torture in all circumstances and permit states to seek assurances that a person subject to surrender will not be subject

to the death penalty. As above, no express provision is made for states to seek diplomatic assurances that a person subject to surrender will not be at risk for torture.

27. International, UN and European intergovernmental institutions and NGOs have consistently stressed the problems of recourse of assurances as inherently unreliable and often ineffective and that concern is repeated here. Receiving states are already under a duty not to torture or ill-treat detainees having ratified legally binding treaties, thus non binding diplomatic assurances provide no additional protection to returnees whilst simultaneously sanctioning the poor human rights conduct of the state outside the remit of the assuance/s. There may be little proper enforcement mechanism of the assurance for the person concerned or legal recourse if the assurances are breached or independent review (at any time and without notice) and post transfer monitoring.[51]

28. Thus the Courts here rely heavily on the trust between nations.

29. In that context a limited number of cases since case ***Soering***, have considered assurances in context of deportation or extradition.

30. Where considered, the ECHR has invariably referred to the inherent weakness of their use, namely that where there is a need for such assurances, there is an acknowledged risk of ill treatment. As such, even if diplomatic assurances have been given they are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources had reported practices contrary to the principles of the Convention.

31. It is noteworthy that in 2005 a Committee created by the European Council's Steering Committee for Human Rights refused to draft guidelines for the adoption of a common instrument on diplomatic assurances because, inter alia, such an instrument would weaken the absolute nature of the prohibition and could be an inducement to resort to assurances.[52]

32. In ***Othman v UK*** (2012) 55 E.H.R.R. 1 the Court reviewed caselaw arising in relation to the status of assurances. It noted at para 187, that:

> "In a case where assurances have been provided by the receiving state, those assurances constitute a further relevant factor which the Court will consider. However, assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving state depends, in each case, on the circumstances prevailing at the material time."

[51] UN Special Rapporteur on Torture, the UN High Commissioner for Human Rights, the UN High Commissioner for Refugees, the UN Human Rights Committee, the European Council Parliamentary Assembly and Commissioner for Human Rights, and the European Committee for the Prevention of Torture. See, for example, Ismoilov v Russia.

[52] DH-S-TER(2006)005, Steering Committee for Human Rights, Group of Specialists on Human Rights and the Fight Against Terrorism, Meeting Report, Strasbourg, 29-31 March 2006.
http://www.coe.int/t/dghl/standardsetting/cddh/DH_S_TER/2006_005_en.pdf

33. The ECtHR set out a non exhaustive list of factors relevant to assessing the practical application of assurances and determining what weight is to be given to them:

> "189… the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving state's practices they can be relied upon. In doing so, the Court will have regard, inter alia, to the following factors:
> (1) whether the terms of the assurances have been disclosed to the Court ;
> (2) whether the assurances are specific or are general and vague;
> (3) who has given the assurances and whether that person can bind the receiving state http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=16&crumb-action=replace&docguid=I28D3E2A0BA6A11E1BFFEC15C734DCAB3 - targetfn83 ;
> (4) if the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them
> (5) whether the assurances concerns treatment which is legal or illegal in the receiving state ;
> (6) whether they have been given by a Contracting State;
> (7) the length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances;
> (8) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers ;
> (9) whether there is an effective system of protection against torture in the receiving state, including whether it is willing to co-operate with international monitoring mechanisms (including international human-rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible;
> (10) whether the applicant has previously been ill-treated in the receiving state http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=16&crumb-action=replace&docguid=I28D3E2A0BA6A11E1BFFEC15C734DCAB3 - targetfn90; and
> (11) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.

34. It is the experience of this team that the Courts do not review the assurances methodically by reference to those criteria. Perhaps more importantly, no debate is really entertained about the ethical use of such assurances and how they impact on the wider human rights issues in the country concerned. Nor, of course, is there any real mechanism by which those assurances are monitored or results fed back to this court – partly because there is no funding for that to happen.

35. The history behind the recent High Court case of A and Ors v Lithuania showed how clearly the approach of the court which accepted the assurance 'without hesitation' was

inappropriate. The Court felt it inconceivable the Respondent might not implement or renegade on what they purported to be promising. The reality was very different as it became clear that the assurance had not been disseminated within the country, so the relevant staff across the CJS did not know about it, and that its terms were then breached.

36. It is only a practice that can grow and that is to the detriment of the overall criminal justice system.

Other Bars to Extradition

11. What will be the impact of the forum bar brought into force under the Crime and Courts Act 2013?

37. The Forum bar as implemented will lead to considerable additional litigation and is unlikely to lead to any significant change in the number of extraditions.

12. What will be the impact of the proportionality bar in relation to European Arrest Warrant applications recently brought into force under the Anti-social Behaviour, Crime and Policing Act 2014?

38. There is likely to be very little impact of the proportionality bar because it is worded in a way that prevents an overall merits based assessment and so requires a higher threshold than Article 8 of the ECHR meaning that it is unlikely to have any significant impact.

Right to Appeal and Legal Aid

13. To what extent have changes to the availability of legal aid affected extradition practice, and the provision of specialist legal advice to requested persons?

39. Extradition proceedings under the Extradition Act 2003 are unusually complex and high profile. They constitute some of the most difficult and specialised proceedings in the Magistrates' Court. For this reason first instance proceedings are restricted to Westminster Magistrates' Court before a team of highly trained District Judges, Legal Advisors, Prosecution Counsel and specialist Duty Solicitors. Cases concern the full range of criminal offences from shoplifting to murder and terrorism. However, it is the seriousness of the consequences for Defendants and Governments that makes the cases so complex. Nowhere else in the criminal law must a judge consider whether a foreign state will deliberately torture a Defendant or whether the allegations are fabricated for political motives.

40. The small team of District Judges at Westminster Magistrates' Court require a specific extradition training and "ticket" and benefit from direct guidance by the Chief Magistrate, Senior District Judge Riddle, and Deputy Chief Magistrate, Deputy Senior District Judge Arbuthnot. The full proceedings and all evidence must be heard by Westminster Magistrates' Court with statutory appeals to the Administrative court

constituting a form of review not a re-hearing. Jurisprudence has repeatedly emphasised this point[53].

41. Extradition on legal aid is presently remunerated under the non-standard fee scheme, which has seen cuts in recent years, for instance by the removal of travel and waiting time, an estimated 30% cut. Extradition work was specifically excluded from the introduction of fixed fees in the Magistrates Court, because it was accepted that it was a highly specialised area. This is the only area remaining where Queen's Counsel can be instructed under the legal aid scheme in the Magistrates' Court. Leading Counsel are instructed a number of times a year in important and high profile cases. This is also one of the few areas where it is frequently necessary to have representation by litigator and advocate to represent in "grave and difficult cases".

42. In the past year there have been 5 cases before the Supreme Court relating to extradition and it contributes a significant amount to the jurisprudence of the UK and the European Court of Human Rights.

43. The volume of extradition work fluctuates beyond the control of the UK government and judiciary. There are presently over 1600 cases per annum. It is clear that the last year's work is not going to indicative of next year's case load, nor for the next 3 or 5 years. The field is extremely small in comparison to general Magistrates' Court crime.

44. Police station work does not apply to extradition.

45. Economies of scale cannot apply in the same way to extradition and instead threaten to result in cases taking longer and costing more by way of Court time at first instance and on appeal.

46. Where representation orders are granted, the system presently works and is not in need of funding changes beyond the laws already being reformed. These cases simply will not work under a fixed fee scheme.

47. Many cases involve separate counsel and experts. The actual duration of cases can be anything between 1 ½ hours for a short case to 10 days for a long case.

48. In each contested case the Court routinely issues strict directions for a set of detailed signed witness statements, written submissions and an agreed joint paginated bundle. Properly presenting these cases requires careful research which is already beyond the scope of the current Legal Aid Agency guidelines. In addition expert evidence and liaison with international lawyers is necessary for competent representation. There is often a direction made for full supplementary written submissions in order to reduce the Court time spent on a case.

49. An exclusive group of London firms specialise in extradition. These firms have strong reputations and expertise developed over a number of years. The majority of firms work

[53] *Szombathely City Court and Others v Fenyvesi and Fenyvesi* [2009] EWHC 231 (Admin)

collaboratively in order to expedite cases and minimise costs by receiving referrals and requests for assistance from the court as well as other firms. The inability to choose a lawyer is a fundamental flaw in the proposal and will lead to massive injustice as clients are not allowed to choose a specialist in their area, be it extradition, fraud or corporate manslaughter. Similarly, there are only a handful of advocates who conduct the majority of cases and that expertise will be lost in the so-called "economies of scope". Given the specialist rules of law and procedure solicitors and barristers work extremely closely in this area of law.

50. The expertise necessary to conduct extradition proceedings is reflected by the Extradition Lawyer's Association and the decision of the LAA in association with the LCCSA and the Chief Magistrate to create a separate specialist Duty Rota.

51. The CPS prosecutes extradition cases as if they were VHCC cases, instructing independent Counsel in the majority of contested matters with individual paid preparation hours. For similar reasons, the CPS Special Crime and Counter Terrorism Division deal with all extradition cases at Westminster Magistrates' Court. The obvious inequality of arms should these reforms be implemented demonstrates their inappropriate breadth. The Treasury Solicitor and NCA never act without Counsel, in the Magistrates Court or Appeal Courts.

RECENT CASE STUDIES

52. Below are just three examples of the complexity of different extradition cases.

Azerbaijan v AM

Mr AM was requested by the government of Azerbaijan in 2010 to face a charge of fraud allegedly committed in 1999. Mr AM was arrested in February 2010 and at the outset explained that he had been granted asylum on the basis that he was a member of the Azerbaijani Democratic Party, and a vocal opponent of the incumbent government. He had been granted asylum in 2000 and then naturalised as a UK citizen in 2007. He was unable to avail himself of the protection of the Refugee Convention because he was now a UK citizen. The basis on which the SoS had given him asylum originally was political, but the SoS still decided to certify the request.

The Extradition proceedings meant that he had to reveal to the Azerbaijan government that he had asylum in the UK and was a UK citizen. Thereby giving his oppressors details of not only his location but activities. In December 2011 the Defendant was discharged from the extradition on the grounds that the extradition was made because of his political views rather than to prosecute him for an offence, that he would be tortured on return to Azerbaijan and that he would not receive a fair trial. For the defence were Queens Counsel, Junior counsel, experienced solicitor and a human rights expert. The substantive hearing took 5 days and very large degree of preparation.

Czech Republic v JH

On the papers this was a straightforward European Arrest Warrant ("EAW") case

relating to convictions in absentia and accusations for dishonesty offences. However it transpired from instructions that there was an element of duress to the extradition offences and that JH had subsequently been trafficked to the UK and effectively imprisoned here for a long period of time. Europol confirmed some of JH's account. Consequently this case concerned the intersection of international law obligations (anti trafficking conventions such as (Palermo Protocol and European Human Trafficking Convention).
The case also involved expert evidence. This was crucial in showing that the requested person was effectively a victim of systemic abuse in Czech Republic and this country, the likelihood of his treatment on return, but most importantly the state of the Czech Police investigation and Europol coordination of the same investigation. The fact that Europol was involved in this case demonstrates the seriousness of the context. The expert evidence was vital to assess the impact of Human Trafficking and slavery on the requested person. The vulnerability of the requested person also added complexity to the case.
The documentation generated by the case also demonstrated the complexity of the issues: No less than 5 bundles, of 500 pages were necessary in order to properly litigate the issues. The extradition request was found to be at odds with the extradition scheme, in that it should be adjourned in order for JH to be processed through the National Referral Mechanism, otherwise it would abuse the good faith of the CPS and the Court.
The CPS deemed the case so complex that they changed Counsel (and were permitted to do so by the District Judge) mid-way through proceedings. In sum, the case was extremely complicated.

Portugal v P
P was arrested and produced for an initial hearing at Westminster Magistrates' Court the next day. The EAW requesting his return related to 3 accusations of robbery, attempted blackmail and abduction. P initially did not consent to extradition and wanted further advice about the possibility of resisting extradition. After a conference where P was fully advised about the merits of any possible arguments and the procedural consequences, the case was concluded 10 days later via an uncontested extradition hearing which was not appealed. The benefits of timely comprehensive and specialist advice in this case are obvious.

-What has been the impact of the removal of the automatic right to appeal extradition?

53. This provision has not been implemented. It is anticipated that it will complicate rather than simplify proceedings as unrepresented Defendants have to comply with more steps, not fewer.

Devolution
14. Are the devolution settlements in Scotland and Northern Ireland fit for purpose in this area of law?
- How might further devolution or Scottish independence affect extradition law and practice?

54. We are unable to assist with this question.

Ben Keith
Louisa Collins
Amelia Nice

12 September 2014

Crown Prosecution Service – Written evidence (EXL0054)

HOUSE OF LORDS COMMITTEE ON EXTRADITION - WRITTEN EVIDENCE ON BEHALF OF THE CROWN PROSECUTION SERVICE

EXECUTIVE SUMMARY

Q1. The CPS believes that the UK's extradition law provides just outcomes in the vast majority of cases because it embodies a balance between the various competing interests as an essential prerequisite of any decision to extradite or surrender a requested person. The Extradition Act 2003 cannot be characterised as overly-complex.

Q2. On the whole we believe that the existing law is fit for purpose. Rather than focussing on extradition, which often comes at the end of the process, tackling transnational crime requires a greater emphasis on early discussions between prosecutors and investigators in different jurisdictions in cases where jurisdiction to prosecute may potentially be shared.

Q3. The CPS would welcome progress towards making fuller use of mutual recognition measures as alternatives to extradition in appropriate cases.

Q4. On balance, the introduction of the EAW has improved extradition arrangements between members of the European Union and increased cross-border co-operation. We would like to see a binding requirement on other States to operate a proportionality filter when considering issuing an EAW. Refusals to execute EAWs on grounds relating to the conditions of detention happen frequently enough to demonstrate that the courts are alive to the need to balance the requirements of comity and reciprocity with the protection of the human rights of the requested person. One possible consequence of re-joining some of the pre-Lisbon Treaty arrangements is that the UK will face infraction proceedings in the CJEU brought by other Member States.

Q5. Requested persons in cases where a prima facie case is not required are not unreasonably prejudiced by this circumstance because the courts are required to apply all the statutory bars including an examination of the impact of extradition on the human rights of the individual requested.

Q6. UK/US extradition arrangements are not imbalanced or asymmetrical. Many of the criticisms supposedly relating to the 2003 Extradition Treaty are in fact related to perceptions of the US system of criminal justice.

Q7. The principal effect of the removal of the Home Secretary's role from parts of the extradition process has been to increase the speed with which surrenders take place and to reduce complexity, without a perceptible diminution of the protections afforded to requested persons. The CPS is neutral on the need for a political actor in the extradition process

Q8. CPS decisions on handling cases where the jurisdiction to prosecute is shared with prosecuting authorities overseas are taken in accordance with guidelines issued by the DPP and are not influenced by broader political, diplomatic or security considerations.

Q9. In the context of maintaining a necessary balance between the obligations of comity and reciprocity and the rights of victims of crime on the one hand and the interests of requested persons on the other, the CPS believes that the implementation of the human rights bar by the courts is sufficiently robust.

Q10. The principles in the *Abu Qatada* case provide comprehensive guidance on the use of assurances. If the court wanted to monitor post-surrender compliance as a matter of course then the onus ought to be on the court to make or initiate those enquiries.

Q11. Given its recent introduction it is still somewhat early to speculate on the eventual impact of the forum bar.

Q. 12. The success of the proportionality bar will depend almost entirely on how the NCA and the courts apply the respective tests set down for them in the amended legislation.

Q.13. It is not appropriate for CPS to comment on matters which are the preserve of the Ministry of Justice.

Q14. The CPS has no comment on devolution matters.

CPS ROLE IN EXTRADITION

1. The Director of Public Prosecutions is under a statutory duty to have conduct of all extradition matters in England and Wales unless expressly asked not to act by the requesting authority abroad. This duty is delegated to the CPS Extradition Unit which is part of the Special Crime and Counter Terrorism Division based at Rose Court in London. The Extradition Unit deals with all export extradition cases, i.e. all those cases in which a fugitive located in England and Wales is sought by a foreign State or Territory whether a category one or two territory. It does so by *representing* the foreign issuing judicial authority (in EAW or "Part 1" cases) or foreign state (in "Part 2" cases) in furtherance of the UK's international obligations under the relevant extradition treaty or convention.

2. In this capacity the CPS does not act as a prosecutor and, as matter of law, is not a party to the proceedings. In many ways its relationship with the requesting authority or State is akin to a solicitor-client relationship. However, case law in this jurisdiction has established that the CPS is not required to act "unquestioningly" on instructions. There is no general power or discretion to refuse to act, still less to discontinue an extradition case once commenced. Nonetheless, as a public authority the CPS is bound to exercise its extradition functions lawfully (i.e. compatibly with European Convention rights as well as ordinary domestic law). In the event of conflict between instructions from the requesting authority/state and its duty to the court the CPS's primary duty is to the court. This dual role as representative and public authority is not always properly

understood by issuing judicial authorities and requesting States, who sometimes assume either that the CPS has discretion whether to initiate or discontinue extradition proceedings, or that it acts in a quasi-judicial capacity.

3. The Extradition Unit also drafts most import requests to non-EAW territories on behalf of CPS Areas and regionally based Complex Casework Units using information supplied by the local reviewing lawyers. Central Casework Divisions within Headquarters draft their own category two requests. In either case once drafted, the requests are forwarded to the Judicial Co-operation Unit in the Home Office for a formal State-to-State request to be made.

4. As far as outgoing EAW requests are concerned, these are drafted by local prosecutors in CPS Areas, Complex Casework Units and Central Casework Divisions. They are adopted and issued by an appropriate judicial authority which for the purposes of the Extradition Act 2003 ("the 2003 Act") means a Magistrate or a District or Crown Court Judge.

RESPONSES TO QUESTIONS RAISED IN THE CALL FOR EVIDENCE

General

Does the UK's extradition law provide just outcomes?

5. First of all, it is important to appreciate that the extradition process is not concerned with establishing the guilt or innocence of the requested person in the way that the domestic criminal prosecution system is. Rather, its focus is on the obligations of the United Kingdom arising from treaties and other international instruments to surrender persons wanted in foreign jurisdictions for the purposes of criminal prosecution or the execution of judicially imposed punishments. Given that focus, the definition of a "just outcome" must differ from that associated with the adversarial criminal prosecution process in this jurisdiction, although it can be difficult to define precisely what that different definition might contain. For present purposes we suggest that achieving a just outcome in an extradition case involves striking an objectively justifiable balance between the obligations of the United Kingdom to uphold the comity of nations, the rights of victims here and abroad to obtain justice and to have their legitimate complaints and allegations adjudicated by a competent court of law according to the laws of the country involved and the rights of the individual sought, most particularly those rights and freedoms guaranteed under the European Convention and other binding fundamental laws. To this we would add that a just system of extradition should operate without undue delay.

6. Judged against this yardstick we believe that the UK's extradition law provide just outcomes in the vast majority of cases because it embodies that balance as an essential prerequisite of any decision to extradite or surrender a requested person.

Is the UK's extradition law too complex?

7. In our view the Extradition Act 2003 cannot be characterised as overly-complex. On its face it is a relatively straight forward and comprehensive piece of legislation. However, we recognise that a considerable body of case law has emerged over the years both before and since the coming into force of the 2003 Act and that this constitutes a formidable body of jurisprudence that has to be mastered by those involved in the extradition process. It is for this reason that we believe that adequate legal representation, as far as this can be provided within the means of the individual or the State, is an important adjunct to a properly functioning extradition system. That said, the basic issues at the heart of any extradition application, namely does it comply in form and substance with the requirements of the 2003 Act such as to trigger a legitimate obligation on the UK to surrender this person to another country; and can that obligation be fulfilled compatibly with the requested person's human rights, are in essence very straightforward. Our experience is that the courts are assiduous in complying with them even, or one might say, especially, when the requested person does not have the advantage of qualified legal representation for one reason or another.

8. From the perspective of a prosecuting authority which represents governments and judicial authorities seeking extradition any complexity which does exist within extradition law can often work to the *advantage* of those whose extradition is sought. We do not suggest that the case law is weighted *against* those requesting extradition but much of the development in the jurisprudence has evolved in a very fact specific way and this can sometimes make it difficult to predict outcomes in advance and thus to advise requesting authorities how best to present their applications in light of extended interpretations and glosses on statutory language. There are on occasions differing interpretations within the case law which a person wishing to resist extradition can explore to their advantage. In several high profile cases this has led to considerable delay amounting in some cases to many years. However, we believe that it is correct that those who are most directly affected by extradition decisions should have the opportunity to challenge the basis on which those decisions are made, testing the law to its full extent where there is uncertainty.

Is extradition law fit for purpose in an era of increasingly multi-jurisdictional crime?

9. On the whole we believe that the existing law is fit for purpose. Rather than focussing on extradition, which often comes at the end of the process, we believe that tackling transnational crime requires a greater emphasis on early discussions between prosecutors and investigators in different jurisdictions in cases where jurisdiction to prosecute may potentially be shared. Discussions based on the early and frank exchange of information assist prosecutors to arrive at effective, agreed strategies that can make extradition better targeted and thus more effective, helping to provide better outcomes for the victims of trans-border crimes. This is happening already and is likely to become more widespread and routine in the medium term. The Director has issued guidance to CPS prosecutors on handling cases where the jurisdiction to prosecute is shared with prosecuting authorities overseas, as recommended by the Scott Baker

Review. We also recognise the considerable contribution made by Eurojust to increased prosecutorial co-operation.

To what extent is extradition used as a first resort when prosecuting a crime committed in another jurisdiction? Should greater use be made of other remedies?

10. All forms of extradition involve restrictions on the liberty of the requested person and their transfer to another country. Additionally, the processes relating to extradition and the subsequent surrender of the person necessitate the expenditure of considerable resources both on the part of the CPS and by other criminal justice agencies. Therefore, it is important that extradition should only be used in cases where this is clearly appropriate and proportionate to the seriousness of the alleged offending, the likely penalty if the requested person is eventually convicted and the interests of any victim. In recognition of this the CPS issues guidance to its prosecutors to consider proportionality in every case where extradition to this jurisdiction is a possibility.

11. Such restraint is not always displayed in extradition requests from other countries. This causes strains on the system as a whole, something which has been recognised by the UK Government and by the Council of the European Union. A possible solution to issues of proportionality, increasing volumes and unease over lengthy pre-trial detention abroad is to make fuller use of other mutual recognition measures. Such measures might include:

    - Using a European Supervision Order to allow an accused to remain on bail in this country until a point nearer to trial.
    - Making fuller use of prisoner transfer arrangements which allow for sentences to be served abroad rather than using the extradition process to secure the surrender of a requested person who has already been convicted.
    - Allowing more readily the adjournment of extradition proceedings in order to facilitate the compromise of extradition requests where possible and appropriate e.g. avoiding the need to extradite a requested person to serve a suspended sentence activated for non-payment of fines by facilitating his payment of the required sum in the requesting jurisdiction. The introduction of a new section 21B to the 2003 Act which will allow temporary transfer of a requested person (with their consent) before the determination of the formal extradition request may increase the potential for improvements of this kind.

12. The Home Secretary has made it clear in various statements to Parliament that the Government is committed to exploring options such as those outlined above. The CPS would welcome progress in this area and is willing to assist such initiatives as far as was legally possible.

EUROPEAN ARREST WARRANT

On balance, has the EAW improved extradition arrangements between EU Member States?

13. We are firmly of the view that, on balance, the introduction of the EAW has improved extradition arrangements between members of the European Union. It has certainly increased cross-border co-operation. In the latest year for which consolidated figures are available (2012-13) 1057 people were surrendered from England and Wales to other Member States and 123 people were surrendered to us. By contrast, in the last year before the introduction of the EAW (2002-03) the UK received 114 requests from the whole of the rest of the world and made 87 requests to other countries. While there may have been difficult cases which have justifiably caught media attention, by speeding up the justice process across Europe the EAW system has proved an invaluable asset in the fight against multi-jurisdictional crime and has assisted in bringing to justice those who would otherwise have been able to exploit national boundaries to evade their criminal responsibilities. As well as considerably reducing delay in the process, the EAW has removed former barriers to the surrender of nationals which some countries operated and, as one recent case involving multiple offences of historical child abuse by a paedophile priest revealed, now prevents offenders hiding behind differing limitation periods in other countries.

14. We understand that the UK Government position remains that the decision to opt-out of the EAW (among other Justice and Security measures) will be followed quickly by a successful application to opt-back-in so that no gap in present extradition arrangements will exist. If, despite these intentions, any gap did emerge we believe that there would be a profound impact on the CPS and wider CJS. Our experience is that extradition under the former system was much more complicated and time-consuming. An increase in the time taken to extradite will mean higher detention costs where the person is in custody and a greater burden on courts and prosecutors through the extended process or need to provide a District Judge at short notice to sign a domestic warrant before a person can be arrested. Moreover, there will also be an impact on victims and witnesses if there is a long delay before a trial can go ahead in the UK because it has taken much longer for EU Member States to surrender accused persons back to the UK.

15. In addition, some Member States currently require assurances before surrendering their own nationals that the requested persons will be returned to serve their sentences in their own countries and it is entirely possible that those States may refuse extradition requests for their own nationals should we revert back to the old arrangements.

How should the wording or implementation of the EAW be reformed?

16. Much of the criticism of the EAW system arises from a widely held perception that EAWs are being issued and executed in cases involving relatively minor, some would say, trivial offences. As we note above, detention under an EAW has significant impact on the liberty of the individual involved and it requires the expenditure of considerable resources in the executing country. Both of these considerations make an effective

argument for EAWs to be used only when the arrest and surrender of the requested person is proportionate to the offence or offences involved.

17. The apparent lack of proportionality in some requests is a problem that has been recognised by many countries not just the UK and is something that the Council of the EU is committed to addressing. The focus at the pan-European level is on restraint by the *issuing* State (the EU Council is opposed to the introduction of proportionality filters by the *requested* State). At the moment the recommendation that issuing States should operate a proportionality filter is advisory only. We would like to see this becoming a binding requirement on other States which operate the EAW. However, we recognise that this will require action at a pan-European level and is unlikely given that it would probably involve amendment of the EAW Framework Decision.

18. In the interim we shall assist the domestic courts to implement the new section 21A in the Extradition Act 2003. This provides that a lack of proportionality may operate as a bar to extradition to an EAW territory. Before ordering surrender, extradition judges will be required to be satisfied that taking into account the likely sentence, the overall seriousness of the case and the possibility of other, less coercive measures being used instead, the execution of the EAW is proportionate. In addition, the 2003 Act has been further amended to empower the National Crime Agency (NCA) who receive and administer EAW requests to refuse to accept requests which appear bound to be rejected by our courts on proportionality grounds.

19. In this context we have noted that since at least late 2012 in dealing with appeals against extradition in EAW cases the High Court has been taking a more liberal approach to the interpretation of proportionality where it arises in relation to interference with the requested person's rights to private and family life guaranteed under Article 8 of the Convention. It seems to us that it has become much easier to avoid extradition on the basis of Article 8 or because of delay in seeking surrender where the offence might not be thought of as particularly serious. Any suggestion that there is a test of 'exceptionality' has been swept away a long time ago with the courts reiterating when necessary that in regard to Article 8 exceptionality is a prediction, not a legal test. We have also noted an increasing tendency among some judges to view the sentences imposed in other countries through the prism of English sentencing practice, to an extent that would have been frowned on previously. If these two tendencies continue it is likely to mean that the new proportionality bar will have a not inconsiderable impact on EAW-based extradition in future.

20. Another change to the wording of the EAW which we would welcome is the introduction of a requirement that in EAW accusation cases the requesting State confirms that a decision to charge and try the requested person has been taken by the competent authorities in their jurisdiction. This would assist us in meeting the requirements of the recently introduced section 12A of the Extradition Act 2003 which provides that a failure to take either or both of these decisions operates as a bar to extradition in cases where an EAW has been issued in order to secure the return of a person accused (but not convicted) of an extradition offence. In response to a similar requirement in Irish law all outgoing EAWs drafted by the CPS now contain an

appropriate statement to this effect. A similar endorsement on incoming EAWs would, we believe, avoid the need for us to revert to the issuing authority in very many cases where section 12A was in issue.

Are standards of justice across the EU similar enough to make the EAW an effective and just process for extradition?

21. At the heart of the EAW scheme, and central to its functioning, is the principle of mutual trust and recognition between Member States. This was clearly expressed by Baroness Hale in *Re Hilali* [2008] UKHL 3, where at paragraph 32 she said this:

"*The issuing judicial authority will not always know where the person concerned will be found. It cannot tailor the warrant to any particular or idiosyncratic requirements of another Member State. So, while I agree that every issuing State should do its best to comply with the requirements of the Framework Decision, it seems equally important that every requested State should approach the matter on the basis that this has been done: in other words, in a spirit of mutual trust and respect and not in a spirit of suspicion and disrespect. For better or worse, we have committed ourselves to this system and it is up to us to make it work.*"

22. Acceptance of this principle and approach enables the expeditious surrender of requested persons between Member States. We know that criticisms have been expressed by, among others, Lord Justice Thomas, as he then was, in his evidence to the Scott Baker Review of the UK's Extradition Arrangements about what he saw as the variable quality of the judiciary across the European Union.

23. As a matter of principle, domestic courts have always been extremely cautious about embarking on "fact-finding missions" about issues touching on the state of human rights in other jurisdictions. Superimposing "local notions of fairness" undermines the effectiveness of the UK's treaty relations and is not an obligation imposed by the European Court of Human Rights. There is a presumption that Council of Europe members will be able and willing to fulfil their obligations under the European Convention on Human Rights and Fundamental Freedoms to which they are all signatories, in the absence of clear, cogent and compelling evidence to the contrary (see, for example, *Dabas v High Court of Justice in Madrid* [2007] 2 AC 31 and *Krolik v Several Judicial Authorities of Poland* [2012] EWHC 2357 (Admin)). Those whose surrender is sought face the legal burden of proving that the requesting state would not fulfil its obligations under the Convention and the threshold is a relatively high one requiring the establishment of strong grounds for believing that, if surrendered, there is a real risk that the requested person will be subjected to mistreatment amounting to a breach of one or more of their guaranteed rights.

24. Notwithstanding that presumption, the courts are prepared to refuse to surrender requested persons where the necessary legal burden is discharged by cogent evidence. In one recent example (*Badre v Italy* [2014] EWHC 614 (Admin)) the court discharged the requested person because it was not satisfied that detention in Italian prisons was compatible with his rights under Article 3 of the Convention. Jurisprudence from the

European Court of Human Rights indicates that the same approach can and, in appropriate cases, should be applied to apprehended breaches of other guaranteed rights, for example where the fugitive has suffered or risks suffering "a flagrant denial of a fair trial" in the requesting country. However, this is a stringent test of unfairness and it is noteworthy that since the possibility that an issue might exceptionally be raised under Article 6 by an extradition decision was recognised by the Strasbourg Court in *Soering v United Kingdom* (1989) 11 EHRR 439 neither the European Court nor the High Court has ever found that an expulsion would be a violation of Article 6.

25. Whilst refusals to execute EAWs on grounds relating to the standards of justice—including for these purposes the conditions of detention—in the requesting State are rare, it does happen frequently enough to demonstrate that the courts are alive to the need to balance the requirements of comity and reciprocity with the protection of the human rights of the requested person. It is also important to keep in mind that the practical alternatives to reliance on the good faith and integrity of requesting States are limited. In a Europe where people move around much more than they did, there is a need for a system for returning someone who has offended in one country back to that country to face charges or to serve sentences, at least in relation to non-trivial offences. A system in which all of the evidence was tested in our courts before someone was returned is, in our view, impractical. Even if it were desirable as a matter of principle (and we do not believe it is) to transfer the enquiry into guilt and innocence to the courts of the requested State, the domestic court is unlikely to be seized of more than a fraction of the evidence that would be available to the foreign court. The inherent delay would be totally inimical to the principles underlying extradition and detrimental to the interests of the requested person and the victims and witnesses involved. While neither the courts nor the CPS can avoid their responsibilities to act compatibly with the human rights of requested persons, it is also important to appreciate that most of the time we are returning to the country of origin somebody who offended in that country and who, in the absence of their decision to come to this country, would have been dealt with under that legal system. Of those surrendered to other countries in 20012-13 under the EAW scheme 43 (or less than 5%) were British nationals.

How will post-Lisbon Treaty arrangements change the EAW scheme once the UK opts back in?

26. The precise details of our renewed relationship with the European Union on matters of justice and security have yet to be finalised as far as we are aware and so it is premature to speculate on the changes, if any, that that relation will entail. However, as a consequence of re-joining some of the pre-Lisbon Treaty arrangements the UK will have to accept the jurisdiction of the Court of Justice of the European Union (CJEU) in relation to those matters. This raises the possibility that the UK will face infraction proceedings in the CJEU brought by other Member States on the basis that a request for surrender has been refused on grounds that are incompatible with the European law, in particular, the EAW Framework Decision (FD).

27. Infraction is not an inevitable consequence of a discrepancy between the FD and domestic law. For instance, Ireland goes beyond the provisions of the FD in requiring

assurances from requesting States that a decision to charge and to try has been taken and, as far as we are aware, this has not been challenged in the CJEU.

PRIMA FACIE CASE

28. We answer together all four questions under this heading in paragraph 5 of the call for evidence.

29. The decision to designate certain territories as not requiring a prima facie case is a matter of Government policy enacted by Parliament in, for example, in sections 64(5), 65(5) and 84(7) of the 2003 Act. As such, it is not appropriate for the prosecuting authority to comment upon the policy, the rationale for it or the level of parliamentary oversight that is provided for such designations.

30. As a matter of practical application we do not believe that requested persons in cases where a prima facie case is not required are unreasonably prejudiced by this circumstance. The extradition courts in this jurisdiction are bound to apply all the statutory bars including an examination of the impact of extradition on the human rights of the individual requested. There is also a well-established abuse of process jurisdiction which can be used to examine the legitimacy of extradition requests. In our view, these arrangements provide sufficient protection for requested persons.

31. If prima facie evidence were to be required in all extradition cases it would almost certainly lead to more protracted and complex extradition proceedings. Requested persons would routinely be entitled to give and call evidence in proceedings concerning the sufficiency of the evidence against them. A broad requirement for prima facie evidence would also go against the prevailing trend in extradition proceedings of leaving 'trial issues' for the courts of requesting States. The approach of not pre-empting the function of the court of the State seeking extradition by applying a prima facie case requirement before the trial proceedings take place is one adopted in other common law jurisdictions such as Canada, Australia, New Zealand and the United States.

UK/US EXTRADITION

32. The Call for Evidence notes at paragraph 6 that Sir Scott Baker's Review of the UK's Extradition Arrangements, among other reviews, concluded that the evidentiary requirements in the UK-US Treaty were broadly the same. It goes on to ask, however, whether there are other factors which support the argument that the UK's extradition arrangements with the US are unbalanced.

33. The evidence which the CPS gave to the Scott Baker Review both orally and in writing is a matter of public record. In our written submission we said this:

"*There is relatively a high volume of extradition between the UK and the US, and in respect of requests from the US, the following considerations are relevant:*

(a) Any request must comply with the formal requirements of the Act which sets out minimum standards for the content of a request to amount to a valid request;

(b) All requested persons enjoy the full range of protections under Part 2 of the 2003 Act, including full respect accorded to their Convention rights;

(c) Requests from the United States in practice invariably provide extensive details of the criminal conduct alleged (often greater detail than is provided by those States which must give prima facie evidence). The information provided in the affidavits which form part of the requests, without exception, goes far beyond a bald assertion an offence has been committed.

The CPS generally experiences no difficulty in securing the assistance and co-operation of the United States Government. There is a predictable and relatively uncomplicated procedure which does not prove onerous for the United Kingdom. In general, the content of US and UK requests is often similar in terms of information provided and overall length: The US requests consist of a sworn detailed affidavit, usually from a prosecutor. Requests to the US from the United Kingdom contain the sworn depositions usually of a CPS lawyer setting out the relevant law and a hearsay statement summarising the evidence, provided by the investigating police officer. Requests made to the US are executed quickly and almost invariably lead to the surrender of requested persons in a timely manner."

34. This remains our position. We do not accept the proposition that UK/US extradition arrangements are imbalanced or asymmetrical. The Scott Baker Review observed that a number of criticisms supposedly relating to the 2003 Extradition Treaty, in fact related to the US system of criminal justice. We would agree with this observation. The differences between the UK and US criminal justice systems that might give rise to a perception of imbalance include:

- The range of sentences available following conviction in the US which often excite the interest of our local media.
- The wider availability of plea-bargaining in the US, such that fewer cases are resolved by a contested trial.
- A higher incidence of the US seeking extradition for some offences of extra-territorial or concurrent UK/US jurisdiction. However, it must be borne in mind that extradition to the US from the UK could only take place for any such offence if the UK could also assert jurisdiction in the reverse situation – the 'dual criminality' test - so there is no question of US prosecutors asserting a jurisdiction not available to their UK counterparts. In addition there are well-established principles and procedures to assist UK and US prosecutors in deciding where offences of concurrent jurisdiction will be tried. Neither do we believe that the US has exercised so-called 'exorbitant' jurisdiction in any extradition case, in the sense that it has asserted technical jurisdiction over conduct which is connected only tenuously to US criminal justice interests.

35. We agree with the conclusion of the Scott Baker Review that should a combination of these or any other factors operate in an individual case to give rise to injustice or oppression then the 2003 Act allows for proper protections against extradition.

POLITICAL AND POLICY IMPLICATIONS OF EXTRADITION

What effect has the removal of the Home Secretary's role in many aspects of the extradition process had on extradition from the UK?

36. The principal effect of the change to extradition arrangements with other EU Member States from a State-to-State basis to one based on the mutual recognition of judicial orders has been to increase the speed with which surrenders take place and to reduce the complexity previously associated with extradition through "the diplomatic channel". A limited monitoring exercise of cases in 2012 revealed that on outgoing extradition the average length of the case was 63 days from first hearing to final order, including appeals. That is significantly different to the position before the introduction of the EAW, and it is a huge benefit from a prosecutorial point of view. There are other benefits too which we outline briefly in paragraph 13 above. Taken together these advantages have led us to conclude that, on balance, the introduction of the EAW has improved extradition arrangements with other EU States.

37. However, this assessment is not to be taken as an argument against there being any role for the Home Secretary in extradition arrangements. It may be more appropriate for extradition arrangements between our closest neighbours within the European Union to operate without any involvement by the Executive than it is where arrangements are based on international treaties having their origins in diplomatic relations between Sovereign States. The CPS is essentially neutral on that point but notes the observation in the Scott Baker Review Report (at paragraph 9.23) that even in relation to extradition under Part 2 of the 2003 Act there are some matters with which the Secretary of State is better placed to deal with than the courts and vice versa. Certainly, the change introduced by the Court and Crimes Act 2013 which ensures that human rights issues arising at the end of the extradition process are decided by the courts rather than the Secretary of State has had the advantage of reducing delays without, as far as we can perceive on the small number of cases involved, diminishing the protections afforded to requested persons.

To what extent are decisions of where to prosecute certain crimes and whether to extradite influenced by broader political, diplomatic or security considerations?

38. The Select Committee will be aware that section 208 of the 2003 Act gives the Secretary of State power to direct that a Part 1 warrant should not be proceeded with and to discharge a requested person in a Part 2 case in the interests of national security. This is a matter established by primary legislation on which the CPS cannot comment, save to observe that we are unaware of any case in which this power has been exercised.

39. Internally, the Director has issued guidance to CPS prosecutors on handling cases where the jurisdiction to prosecute is shared with prosecuting authorities overseas. These guidelines are to be followed wherever we are aware that an investigation in this country is running parallel to an investigation in one or more other countries, where questions will arise as to whether one jurisdiction should be in the lead and where any subsequent trial or trials should be held.

40. The guidelines set out a body of principles (modelled, to a large extent on similar principles emanating from Eurojust) to be applied in deciding where a case with concurrent jurisdiction should be prosecuted. The principles are set out in Appendix 1 to this submission. All are legally relevant factors and none require any consideration to be given to political, diplomatic or security considerations. Decisions on where to prosecute must conform to these broad principles and as with all public statements of policy the Director's guidelines can and have been used as a basis on which to challenge prosecutorial decisions in the courts.

41. For completeness it might be noted that considerations of national security may have some tangential relevance where the court has to decide whether extradition is barred by reason of forum. Sections 19B(4) and 83A(4) provided in identical terms that in deciding whether the extradition would not be in the interests of justice, the judge must have regard to the desirability of not requiring the disclosure of material which is subject to restrictions on disclosure in the requesting territory concerned. We cannot point to any example in case law where this has been of application.

HUMAN RIGHTS BAR AND ASSURANCES

Is the human rights bar as worded in the Extradition Act 2003, and as implemented by the courts, sufficient to protect requested people's human rights?

42. Please see our general conclusion in paragraph 25 above. In the context of maintaining a necessary balance between the obligations of comity and reciprocity and the rights of victims of crime on the one hand and the interests of requested persons on the other, we believe that the implementation of the human rights bar by the courts is sufficiently robust.

Is the practice of accepting assurances from requesting states to offset human rights concerns sufficiently robust to ensure that requested people's rights are protected?

43. The practice of accepting assurances as to the treatment of a requested person if extradited has recently been approved both by the Strasbourg Court (*Othman (Abu Qatada) v UK* [2012] 55 EHRR 1) and by the High Court here (*Ravi Shankaran v The Government of India* [2014] EWHC 957 (Admin). Indeed, in the *Shankaran* case Sir Brian Leveson P accepted the submission made by counsel for the requesting State that undertakings and assurances were "not merely normal but indispensable in the operation of English extradition law". Unsurprisingly, we would respectfully agree with this appraisal.

44. In a case where assurances have been provided by the receiving State, those assurances constitute a relevant factor which the court will consider in determining whether a requested person faces a real risk of ill treatment in the country to which he or she is to be removed. However, assurances are not in themselves sufficient to ensure adequate protection against the risk of ill treatment. It is recognised that there is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. As cases such as *Badre v Italy*, *Republic of South Africa v Dewani* [2012] EWHC 842 (Admin) and a number of cases involving prison conditions in Lithuania reveal, the courts in this country are assiduous in examining the practical effect of the undertaking as well as its content.

45. In its judgment in *Abu Qatada* the European Court of Human Rights laid down a set of principles that should be followed in relation to the giving and accepting of assurances. It seems to us that this provides comprehensive guidance on the factors that courts should take into account when considering the quality of assurances and whether in the light of the requesting State's practices they can be relied on. Not every factor will be relevant to each case or carry the same weight.

46. Prominent among these factors is the requesting State's record in abiding by similar assurances, which implies that the court should have access to an objective evaluation of a State's past performance. However, whilst the CPS would have a duty to bring to the attention of the court and defence any material of which it was aware suggesting that an assurance will be not be kept, including previous breaches by the requesting State, if the court wanted to monitor compliance as a matter of course then our view is that the onus ought to be on the court to make or initiate those enquiries. In an adversarial system, the emphasis tends to be on the parties putting information before the court but in relation to monitoring of assurances the court may need to be more proactive.

OTHER BARS TO EXTRADITION

What will be the impact of the forum bar brought into force under the Crime and courts Act 2013?

47. The revised and expanded version of the forum bar came into force on 14 October 2013 and it is still somewhat early to speculate on its eventual impact. So far, the issue of forum has been raised only in a handful of extradition hearings before Westminster Magistrates' Court and none of the challenges to extradition on this basis have been successful at first instance. The first appeal to the High Court in the case of *Dibden v Tribunal de Grande Instance de Lille, France* (CO/899/2014) was decided on 18th July 2014. The approved judgment is awaited but in broad terms the Divisional Court endorsed the approach of the District Judge in giving great weight to the prosecutor's belief that the UK was not the appropriate jurisdiction in which to prosecute. The court took the view that section 19B of the 2003 Act was not intended to invite a review of a domestic prosecutor's belief on grounds short of irrationality.

48. It may be worth noting in this context that in their evidence to the Scott Baker Review the extradition judges at Westminster Magistrates' Court could not think of any case already decided under the 2003 Act in which it would have been in the interests of justice for it to have been tried in the United Kingdom rather than in the requesting territory.

What will be the impact of the proportionality bar in relation to European Arrest Warrants applications recently brought into force under the Anti-Social Behaviour, Crime and Policing Act 2014?

49. This is an even more recent innovation to extradition practice. It came into force on 21 July 2014 and so far has only been raised in a handful of first-instance cases. We make a tentative suggestion at paragraph 24 above that the proportionality bar could have a not inconsiderable impact on EAW-based extradition if the High Court continues to apply the more liberal approach to proportionality evidenced by recent decisions in relation to Article 8 challenges. However, until the changes are bedded in, it is impossible to say with any precision how effective they will be in removing comparatively trivial cases from the extradition system.

50. There is even a risk that the introduction of the new measures will increase the amount of time and the resources required to deal with extradition requests from EAW territories if the extradition judges routinely require to be provided with additional information from the requesting authorities e.g. on likely sentences or on viable alternative measures, in order to come to come to a decision on proportionality. The success of the initiative will depend almost entirely on how the NCA and the courts apply the respective tests set down for them in the amended legislation.

RIGHT TO APPEAL AND LEGAL AID

To what extent have changes to the availability of legal aid affected extradition practice, and the provision of specialist legal advice to requested persons?

51. The availability of legal aid does not directly affect the CPS, except where delay in determining a requested person's eligibility for assistance prolongs the overall length of a case by producing the need for additional adjournments. We share the common view that the extradition process should be as short and as efficient as possible and anything which has the potential to introduce or unnecessarily prolong delay is to be deprecated. We are aware of the strong views on the subject expressed by the President of the Queen's Bench Division in the case of *Stopyra v District Court of Lubin, Poland* [2012] EWHC 1787 (Admin) but do not feel that it would be appropriate to comment on matters which are clearly the preserve of the Ministry of Justice.

What has been the impact of the removal of the automatic right to appeal extradition (sic)

52. This amendment is not yet in force.

DEVOLUTION

53. The CPS has no comment on this topic.

APPENDIX 1
Principles to be applied in deciding where a case with concurrent jurisdiction should be prosecuted

1. So long as appropriate charges can properly be brought which reflect the seriousness and extent of the offending supported by admissible evidence, a prosecution should ordinarily be brought in the jurisdiction where most of the criminality or most of the loss or harm occurred.

2. Where potentially relevant material may be held in another jurisdiction, the prospects of the material being identified and provided to prosecutors in England and Wales for review in accordance with disclosure obligations in this jurisdiction will be an important consideration in deciding whether appropriate charges can properly be brought in England and Wales.

3. Provided it is practicable to do so and consistent with principles 1) and 2) above, where crime is committed in more than one jurisdiction, all relevant prosecutions should take place in one jurisdiction.

4. Other factors relevant to any determination by CPS prosecutors as to where a prosecution should take place include:

    i. the location of the witnesses, their ability to give evidence in another jurisdiction and where appropriate, their right to be protected;
    ii. the location of the accused and his or her connections with the United Kingdom;
    iii. the location of any co-defendants and/or other suspects; and
    iv. the availability or otherwise of extradition or transfer proceedings and the prospect of such proceedings succeeding.

5. Where all other factors are finely balanced, any delay introduced by proceeding in one jurisdiction rather than another and the cost and resources of prosecuting in one jurisdiction rather than another may be relevant.

6. Although the relative sentencing powers and/or powers to recover the proceeds of crime should not be a primary factor in determining where a case should be prosecuted, CPS prosecutors should always ensure that there are available potential sentences and powers of recovery to reflect the seriousness and extent of the offending supported by the evidence.

12 September 2014

Crown Prosecution Service, Edward Grange and Rebecca Niblock – Oral evidence (QQ 76-105)

Evidence Session No. 6 *Heard in Public* *Questions 76 - 105*

WEDNESDAY 15 OCTOBER 2014

10 am

Witnesses: Sue Patten and Nick Vamos

Rebecca Niblock and Edward Grange

Members present

Lord Inglewood (Chairman)
Lord Brown of Eaton-under-Heywood
Lord Empey
Baroness Hamwee
Lord Hart of Chilton
Lord Henley
Lord Hussain
Baroness Jay of Paddington
Lord Jones
Lord Mackay of Drumadoon
Lord Rowlands CBE
Baroness Wilcox

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Examination of Witnesses

Sue Patten, Head of Specialist Fraud Division, Crown Prosecution Service, and **Nick Vamos**, Head of Extradition, Crown Prosecution Service

Q76 The Chairman: I welcome witnesses from the CPS back again: Nick Vamos, head of extradition at the Crown Prosecution Service, who gave us an informal briefing before the summer break, and also Sue Patten, who is head of the specialist fraud division of the CPS.

We have had CVs from you. Is there anything you would like to say either individually or separately as a brief opening statement before we go into formal questioning, please?

Sue Patten: We just wanted to say a few words to explain that we are here first as lawyers representing the countries that request extradition from this jurisdiction, and secondly as the domestic prosecutor who may be taking decisions about concurrent jurisdiction during investigation, and therefore whose opinion, or belief or certificate is under consideration at the extradition stage, if extradition is sought. CPS takes all prosecution decisions independently of government and independently of investigators. We have a Code for Crown Prosecutors that guides decisions to prosecute and not to prosecute. You will be aware of the separate guidelines issued by the DPP, which set out the objective criteria we apply when looking at questions of concurrent jurisdiction; these cases are extremely fact-specific.

The Chairman: Thank you. Nick Vamos, do you want to add anything?

Nick Vamos: No, thank you.

Q77 The Chairman: Perhaps just to get the ball rolling, could you tell us roughly if you can what proportion of cases you investigate involve criminal conduct in more than one jurisdiction?

Sue Patten: I do not think there are any statistics that would give you authoritative or complete data on that question, but we have made some inquiries with colleagues: first, for example, at the UK desk at Eurojust, with colleagues who specialise in organised crime, counterterrorism and so forth. According to Eurojust, since 2004, they have logged 54 joint investigation teams, which is a formal process in EU cases. That is 54 between the UK and other EU Member States. About 25% of those were between three or more Member States, and about 75% were purely bilateral between the UK and one other jurisdiction. The most

common criminality that Eurojust cites is probably relating to people trafficking, drug trafficking, immigration, money laundering, boiler room fraud, murder, robbery, cybercrime including images of child abuse, and corruption. They also tell us that since 2011 Eurojust has hosted between 50 and 60 multijurisdictional meetings between investigators and prosecutors in the UK and other EU Member States; although this obviously does not mean there are concurrent investigations in all of those cases. My colleagues specialising in organised crime who prosecute cases investigated by what used to be SOCA and is now the National Crime Agency estimate that about 70% of their case load involves conduct in multiple jurisdictions. I can also tell you that both the organised crime division and my division—the specialist fraud division—each send between 200 and 300 letters of request every year to other countries. These are obviously evidence-gathering tools, but it just gives you an indication of the extent of the international dimension that can arise in serious casework.

The Chairman: Can we just clarify? When you gave us the figures about the number of cases, is that cases that have ended up in some prosecution? Or was that cases just investigated, some of which would have got no further?

Sue Patten: Probably both. This was just really to give you an estimate of what we can give you.

The Chairman: I know, but I just want to be clear what it was you were saying. This is all the work you have done: the 54 cases.

Sue Patten: That is Eurojust joint investigation teams. That is a formal process where there is almost like a contract between two or more EU Member States where there is a joint investigation. That is one element.

The Chairman: Can I just take it further in terms of trying to assess the scale of what is going on? Is there a lot of contact that is informal, rather than formal?

Sue Patten: You could say the letters of request are a formal way of evidence gathering that can be preceded by police-to-police or mutual administrative assistance, Interpol et cetera where there are inquiries as to what can be established in another country by way of evidence.

The Chairman: Forgive me; I am just trying to get an assessment. It is a bit like the tip of the iceberg in the form of statistics. I am trying to assess how much of the iceberg is underwater, in the most general sense.

Sue Patten: Some of it certainly is, but obviously if there is a serious investigation at some point you will need to send letters of request, otherwise you will not be able to use the evidence in this jurisdiction if we bring proceedings. Equally, the UK receives a lot of letters of request, but I am afraid I cannot give you figures on that.

Lord Brown of Eaton-under-Heywood: Is that all Part 1 cases, EU cases? Are Part 2 cases another matter entirely?

Sue Patten: Eurojust figures relate to EU Member States. For my colleagues in the organised crime division, it could be anywhere in the world, and letters of request could be anywhere in the world. Although, in the case of my own division, I would say the majority are EU.

Q78 Lord Empey: Good morning. Your guidance on shared jurisdiction states that a prosecution should only really be brought where most of the criminality or most of the loss or harm occurred. What happens when the two factors in this formulation—criminality and harm or loss—occur in different jurisdictions? You did mention cybercrime; obviously internet-related crime could mean damage in multiple jurisdictions. Could you tell the Committee how you would sort that out?

Sue Patten: We thought we might try to address that by telling you about some cases where the forum bar has already been argued. Some of those give you an understanding of the fact that, as you have just said, the conduct and the harm may be in different places or in many places. Obviously there are other factors as well in the DPP's guidelines, and also in the forum bar legislation, which we can also look at.

The first case that you may be interested in the facts of is a Polish extradition case. This was a drug trafficking case, so much of the planning, the intended distribution of the drugs and intended victims were in the UK. I am taking this from the judgment; I was not personally involved in the case. However, the drugs were being transited through other Member States, and most of the intended harm was aimed at the UK. The court took into account the fact that there were no actual victims in the sense that the conspiracy had been disrupted because it had been thwarted, so to speak. The CPS's view was that England was not the right venue, because other co-accused had been arrested and were already awaiting trial in Poland, and the court decided that view was reasonable. Most of the witnesses and the evidence were in Poland; other defendants were in Poland, and the court took it into account that mounting a trial in the UK would involve delay, cost and time taken up in argument, and extradition of others from Poland, if that was possible. The court looked at the fact they could see an economy of effort to try the case in Poland in terms of cost, time and consistency of outcomes between defendants. You can see multiple factors were taken into account in that case by the court itself.

Lord Empey: That sounds eminently sensible, but there are a number of people worried particularly about cyber-based crime, whether it is child abuse or something like that, where it must be exceptionally difficult to assess where that would be available in a host of

jurisdictions. Would you focus on where you felt the perpetrators originated? It is almost impossible to measure.

Sue Patten: It may sound like I am not really answering your question, but it probably depends on the facts of the case. One of the other cases I was going to mention was possibly along the lines you might have been thinking about. It was a child pornography case, and the defendant whose extradition was sought from this jurisdiction was the administrator of an e-mail group and was distributing images of children being abused. However, the offences had come to light in the United States, because the person who was making those images was there. That person was identified, so the investigation started in the United States. The person in the UK had been in the UK all along and he was doing the distribution from the UK. The court did not really know where the abused victims were. It was thought some of the children may well have been in the US, because that is where the main perpetrator was. They looked at the loss or harm that could flow from the abuse, and that could come from distribution but equally it comes from the abuse that has to be suffered in the first place before you can distribute those.

The Chairman: Can I just make an important point? Obviously you abide by the guidelines that arise from various court decisions, but when you are deciding whether or not to prosecute you presumably are applying the same criteria that you have described here. What we are anxious to know is, right at the beginning of the process, how you and your colleagues elsewhere decide where you are going to bring the proceedings?

Sue Patten: Assuming there are parallel investigations, that is one thing. Obviously there are cases where prosecutions are brought in multiple jurisdictions. The DarkMarket case that we were looking at yesterday is an example of that, where there was a website that was facilitating fraud and it was a global matter. Somebody from the FBI apparently infiltrated

this website, but the NCA investigated that and we prosecuted it here. Probably some people were prosecuted in the US, some in other countries, so it is a lot of factors that make a difference. Obviously if there is an investigation here we would look at all of the factors of where it is most likely to be prosecuted—the feasibility of bringing trials and so forth—and we look at all of the factors that are relevant as the evidence emerges. It can be a different matter if there has never been an investigation in the UK at all and the issue only arises at the point of extradition.

Nick Vamos: It can arise earlier; occasionally prosecutors from another jurisdiction will come and say they have a prosecution and ask whether we are interested in having a parallel investigation or prosecution. Of course, if there is no investigation at that point within the UK, the CPS can only prosecute if somebody domestically has investigated it. If there has been no domestic investigation, there is not really anything the CPS can do in that situation.

The Chairman: What you are telling us is that basically you have to treat every one of these on its individual facts.

Sue Patten: You can only do that, and they are very fact-specific. That has also been said in one of these forum bar cases when it got to appeal: that they do not see there is a hierarchy of factors and actually these cases are all very fact-specific. It might depend on the stage at which the issue arises, where the evidence is and who has it, et cetera.

The Chairman: Do you have a culture of trying to go for as many as you can, or of taking a more measured stance about it?

Sue Patten: Any prosecutor wherever they are in the world, if they are advising on an investigation—and that is a good investigation with a good case attached to it—would want to prosecute it. Sometimes you might have to consider whether, if the prosecution can be brought somewhere, the jurisdiction is better to be somewhere else. That might depend on

the relative seriousness of the offending in different places, and all kinds of factors, including how far advanced each investigation is, and how quickly a trial could be brought. It genuinely is fact-specific.

Nick Vamos: There are similar cases that can have different outcomes. In the case that Sue was referring to, extradition was requested to the US. There, it was detected in the US, most of the evidence was in the US, co-defendants were in the US, but there is somebody who happens to be here who is a prime player in that conspiracy to manufacture and distribute these images. Nevertheless, the preponderance of the factors that determine current jurisdiction point towards the US. There was another case a few years ago where, in a reverse situation, there was not an extradition because the person was here in the UK, so we did not need to extradite anybody from the US. However, in that case the CPS prosecuted and the US was providing support, assistance, evidence, witnesses, but we led the prosecution. It really depends on the facts of the specific case: where it was detected, and all the other factors.

Q79 Lord Brown of Eaton-under-Heywood: Your appendix 1 of your written statement sets out the principles. The one in this question is just the first of them, but there is a host of considerations.

Sue Patten: Yes.

Lord Brown of Eaton-under-Heywood: Do they not more or less duplicate the same considerations when you get to the forum bar?

Sue Patten: The question, though, that the court is looking at is different from the question we would be looking at during an investigation, because what we are looking at is the feasibility: who should lead? Where would we be looking to prosecute, assuming the evidence is gathered during the investigation? What the court is looking at in the forum bar

is whether, because of those factors or a combination of those factors, the court should intervene and stop an extradition. Although they are in fact looking at the same factors, they are looking at them for a different purpose and in a different way.

Lord Brown of Eaton-under-Heywood: They are looking at them after you have taken the initial decision, by definition, that you are going to prosecute here. The court is then second-guessing the correctness of that. Is that it?

Sue Patten: It is looking at the same factor, but it is asked to take an independent decision. In the forum bar cases so far, the district judges have said that they would give quite a lot of weight to the view the prosecutor has taken, so unless the prosecutor has taken an irrational approach in some way, they would give considerable weight to the view of the prosecutor.

The Chairman: In a sense, do you feel it is a failure on your part if the court says, "Actually, no, the forum bar comes into play"?

Nick Vamos: Thankfully that has not happened. Well, "thankfully" is not the right word. It has not happened. Obviously, as you said, it is a different test, but if the court did look at the opinion of a prosecutor that the UK was not the correct jurisdiction and said, "Nevertheless, extradition should be barred by reason of forum," we would have to look carefully at the decision-making we had made earlier in that process to see if we had got that right.

Q80 Lord Rowlands: If there is a disagreement between you and another jurisdiction as to the way it should be pursued, how is it resolved? What is the process of resolving a disagreement?

Sue Patten: You can only use the communication lines that are available. You can have a discussion; it can be a robust discussion. Obviously, there are certain circumstances in

which, if you are able to start the prosecution, you could do, but what you try to do is reach an agreement.

Lord Rowlands: You have not had any case where you have not eventually reached an agreement.

Nick Vamos: An example of a kind is Abu Hamza, whose extradition was sought by the Americans for offences back in 2004. The CPS decided about six months after that extradition request came in that, actually, we wanted to prosecute him, not for the offences the Americans wished to prosecute him for but for domestic offences, which we knew full well would delay for a number of years the American extradition request. In fact, it delayed it for up to seven or eight years in the end.

However, the CPS felt it was in the public interest and there was sufficient evidence to prosecute Abu Hamza here, even though that directly prejudiced and delayed the Americans' interest in prosecuting him for separate offences. We make those decisions where, on the facts, it is justified. If there was a case with direct concurrent jurisdiction where there could not be an agreement as to who would prosecute, there is always another option. If the person is here and the CPS or another domestic prosecutor charges, that halts an extradition. It effectively brings the extradition to an end, but I cannot think of examples where that has happened.

Abu Hamza is an example of a slightly different situation, but, nevertheless, the CPS has been perfectly prepared to prejudice US interests to bring a domestic prosecution.

Q81 Baroness Hamwee: This is still about getting the flavour of it. We will come on to political considerations, but your principles refer to cost and resources. Does that mean that there is sometimes competition to pass over a costly case or is it competition to actually plough ahead and show we can do it?

Sue Patten: I think I am right in saying that that paragraph talks about "if all other considerations are finely balanced".

Baroness Hamwee: Yes, it does.

Sue Patten: Obviously we are talking about different situations here, but in a situation where there is no criminal investigation in this jurisdiction, the decision whether to start one and devote resources to it is the police's decision, essentially, but where questions like cost come in it is rather similar to the couple of cases we have cited, where another jurisdiction is trial-ready, in effect, and able to bring the proceedings.

If we were asked to do that here, we would be going to all the effort of, in effect, duplicating the case being put together in the other jurisdiction and then dealing with all the legal argument here and, possibly, the delay in bringing the case before the courts when another jurisdiction is ready to do that.

The Chairman: We have been in and around forum bar as well as decisions to prosecute, Lord Henley.

Lord Henley: My Lord Chairman, because we have got on to the forum bar, I was just wondering whether it is, at this moment, worth asking the panel to expand a bit on the forum bar. There are criticisms that it has no teeth and that it has been illusory. Is that a fair criticism? Would you like to comment on the fact that it simply provides another avenue for litigation and so on?

Nick Vamos: Yes, I would like to comment on that. The simple answer is that it is far too early to say whether the forum bar is illusory or has no teeth. We have had a handful of cases and only one has gone to appeal. If you look at the legislation, it gives the court the power to bar an extradition based on the specified matters, and it is really up to the court to

decide what weight to attach to each of those specified maters in any given case and whether more should attach to some and not others.

Thus far, they have said there is no hierarchy, but that is, like I said, in a very limited number of cases. I honestly do not agree. It will ultimately be up to the court to interpret the bar in a way that gives it the effect that they think it should have. Parliament has given them the opportunity to bar extradition. Whether or not it adds to litigation, any new legislation gives the potential for further argument. It sometimes takes longer to reach a just outcome.

Forum cases have not extended litigation in those cases much beyond what it otherwise would have been. Some of the issues would have been litigated anyway, because under Article 8 there was a forum jurisdiction that many people did argue. In fact, those cases where forum was argued under Article 8 probably took longer, because the jurisdiction was more complicated and the factual basis upon which the court was being asked to consider those cases was far more complicated. Forum bar now actually makes it simpler to bring those arguments.

Lord Henley: It is a question of waiting to see what the courts do.

Nick Vamos: Absolutely.

Q82 Lord Mackay of Drumadoon: I have a further question. The effect of DPP's certification not to prosecute in the United Kingdom with the current forum bar has been criticised in a number of written submissions. How do you anticipate using the certifications?

Nick Vamos: In our internal guidance on this—which has been disclosed in some of the forum bar cases, and we are very happy to send a copy to the Committee — we have made it clear that we would only issue a certificate once we had applied a Full Code Test. We would need to receive a full file of evidence, just like in any other case. We would advise the

police on further evidence they might need to obtain and, once we were satisfied we had a full file, we would reach a decision. Only once we were capable of making that decision, and if the decision was not to prosecute, would we consider issuing a certificate.

It seems to us that the point of a certificate is if, having considered all of the available evidence in this country, the UK is not a forum for that offending—and we have made that decision based on full consideration of all the facts available to us—then the forum bar does not apply anymore, because this is not a realistic forum for that case to proceed. Therefore, you heighten the risk of somebody evading justice altogether if the forum bar then becomes almost a theoretical exercise. Somebody's extradition is barred but there cannot be a prosecution in this jurisdiction because we have considered all the evidence and said that we would not prosecute it.

Sue Patten: Can I add a couple of points to that? First, the certificate in our guidance is issued only after consultation with the Director of Public Prosecutions. There are internal processes that need to be followed. The other thing people have said is it is wrong that, in effect, by issuing a certificate in some way the prosecutor vetoes the court from looking at whether it is feasible for a prosecution to be brought in this jurisdiction, but, in fact, the prosecutor's decision can be looked at on appeal. It is not normal for the magistrates' court to be the forum in which a judicial review of a decision not to prosecute is considered, but the legislation allows it to be looked at under the normal principles and so forth at the appeal stage. Extradition proceedings do not provide any sort of procedure for dealing with that sort of issue and although, obviously, the district judges in Westminster are extremely experienced and august in their own right, they are in the magistrates' court, and that is not normally the forum where such a matter would be considered.

The Chairman: Arising out of that, just to be clear, if a decision not to prosecute is taken, does it automatically follow that certification ensues? From what you have told us it does not, does it?

Nick Vamos: No, it would not. It is an option available to the CPS to issue a certificate. It is a necessary but not sufficient condition.

Lord Brown of Eaton-under-Heywood: I find it rather difficult to see how it all actually works. You take the initial decision in a concurrent jurisdiction case and, by definition, you decide not to prosecute here. The extraditee then says, "Well, I do not like that. I want a forum bar," and applies to the court for a forum bar. At what point does the question of certification arise? If you issue a certificate then, as you rightly say, it is decisive in the district judges' court and it can only be challenged then on appeal under Section 19E. In relation to the application for a forum bar and district judge's decision whether to give effect to the forum bar, when do you actually decide whether to issue the certificate?

Nick Vamos: Once the extradition request arrives, we would have to look very carefully at the nature of the offending alleged, because the certificate has to relate to the same conduct as alleged in the extradition request—and it may not. We may have made a decision not to prosecute somebody for a certain type of conduct and the extradition request may come in and allege a different type of conduct: different victims, different activity or a different time period. First, you have to be very sure that what we have decided not to prosecute for is the same conduct as alleged in the extradition offence. If, at that stage, it appeared that it was the same conduct, then the process that Sue outlined would be gone through. We have not had to do this yet, so this is theoretical, but we have set out a process of assurance and governance within the CPS to make sure that it has to go up to the Director to decide to issue the certificate.

Sue Patten: I may be wrong about this, but presumably that would happen if the requested person had to raise the forum bar in the first instance, because that is when the operation of this legislation would then arise. We do not issue a certificate because we have taken the decision not to prosecute for an offence.

Lord Brown of Eaton-under-Heywood: No; you wait until there is a challenge.

Nick Vamos: That is correct.

Sue Patten: There may or may never be an extradition request. Only if there is and the issue is crystallised in a forum bar argument would we then need to consider how we, on the domestic side of the fence, would assist the court in that regard and whether it is a belief case or a certificate case.

Lord Brown of Eaton-under-Heywood: If you were going to issue a certificate, you would need to make the decision before the district judge resolves the forum bar issue.

Nick Vamos: Yes. We can ask for time to do that; that is within the legislation.

Lord Brown of Eaton-under-Heywood: I see—or at least I think I see.

Q83 Baroness Wilcox: Good morning. I am going to ask you two linked questions, if I may. Discussions between prosecuting authorities inevitably take place in private. This has given rise to suspicions that inappropriate politically motivated or unjust decisions on where to prosecute have taken place. What, if anything, should be done to improve this situation and bring decisions on forum out into the light? In two recent and well publicised cases, that of Ashya King's parents and that of the chief suspect in the murder of Alice Gross, apparently very different approaches were taken to the use of the EAW. Why might this have been the case?

Sue Patten: Perhaps we can take the second question first. Do you want to take that, Nick?

Nick Vamos: Yes, thank you. The difference in outcome in Ashya King's parents' case and the Latvian suspect in the murder of Alice Gross flows directly from the purpose and the reason for which an EAW can be issued. The CPS's position, and in fact the law, is that you have to charge somebody before you can ask the court to issue an EAW. In the case of Ashya King's parents, the Hampshire Constabulary asked the CPS to consider a charging decision based on the evidence that they had at the time. That charging decision was made on what is called the Threshold Test, which is only exceptionally used in extradition cases, and it is where we do not have all the evidence, but for exceptional reasons—for example, where there is a flight risk or there is another reason to act quickly—we will charge on the assumption, not a guess but having thought about it, that we will have the necessary evidence in a short space of time. Hampshire police asked us; we charged on the Threshold Test; and at that point you can ask for an EAW, because there is a charge.

In Alice Gross's case, first of all the Metropolitan Police never asked the CPS to consider a charge—presumably because they never felt they had enough evidence to ask us to make that decision. As a matter of practice, we could not have asked for an EAW, because we were never asked to make a charging decision. My understanding is there was never sufficient evidence to have charged that Latvian suspect even under the Threshold Test. That explains the different outcomes.

Sue Patten: In relation to where there are considerations of concurrent jurisdiction with another country, where this results in an extradition request and an application for the extradition of an individual who has been the subject of such a decision, we provide the defence with a copy of our decision on concurrent jurisdiction and it becomes part of the facts before the court when forum bar is raised. In that sense, if the CPS were to have

applied improper or irrelevant considerations, obviously the court would be in a position to see that at the time a forum bar is raised.

Lord Brown of Eaton-under-Heywood: You issue a reasoned decision letter, do you?

Sue Patten: It is not a decision letter, but it is a record of the decision that we have taken and the factors that we have taken into account.

Lord Brown of Eaton-under-Heywood: We have not seen one. We would be helped if you could send us the sort of thing you would dish out.

The Chairman: This is made available to the defence?

Nick Vamos: Yes, it is served. It is specified factor (b) or (d); I always get them out of order.

Baroness Wilcox: It is (c).

Nick Vamos: It is (c). Thank you. Under the specified factors, one of them is the belief of a prosecutor that the UK is not the appropriate jurisdiction. Where we have not made a Full Code Test decision—so there is no option to issue a certificate—but nevertheless we have decided under our concurrent jurisdiction guidelines that this is not a case we would prosecute, we will put forward the basis for that decision on a form, which we call a record of a concurrent jurisdiction decision, and disclose that to the defence and the court.

Sue Patten: We found it quite hard to see at what point you could make such a decision public before that, because, obviously, frequently it is during an investigation. You may not know who the suspects are or, if you do, you may be disclosing to them that they are suspects etc. I do not need to spell that out. Obviously, it would not encourage other countries to talk to us during investigations if they knew we could not keep the discussions confidential.

Nick Vamos: Can I add one more thing about the Ashya King case that I should have made clear? One of the key points about the Threshold Test is that it has to be kept under

constant review, because you have charged somebody without having all the evidence. Obviously, what happened in that case is that very quickly further evidence emerged, after the parents were apprehended, which changed the evidential picture—and on that basis the case was then discharged.

The Chairman: It is a slightly silly way of putting the question, but if you are going to apply the Threshold Test, how high is the threshold?

Nick Vamos: It is set out in the *Code for Crown Prosecutors*.

The Chairman: In practice, however, are you looking to apply it or are you reluctant to apply it?

Nick Vamos: In the extradition context, we only apply it very exceptionally, because, by definition, applying the Threshold Test means that you do not have all the evidence.

The Chairman: In a sense, you start with a presumption that this is not going to be the way you proceed.

Nick Vamos: No, not in an extradition case, because, when you extradite somebody, the presumption is that when they arrive back in the country you start straightaway with the criminal prosecution. Therefore, there is another governance mechanism within the CPS for issuing extradition requests based on the Threshold Test. It has to be approved at very high level and it is considered exceptional.

The Chairman: Does it happen frequently on the EAW?

Nick Vamos: No.

The Chairman: That is what I thought.

Q84 Lord Hart of Chilton: The evidence we have had so far seems to indicate that there is really no difference in the tests applied in America and here. Although there has been a lot of froth around it, in substance it seems from the evidence we have been given that there is

really no difference. However, where there does seem to be a difference, on some of the evidence, is that those who are in command of the situation in America are alpha males and females bursting with testosterone, who have emerged out of leading law firms to go into the prosecution service and then, with badges of honour, go back again to earn their fortunes. Is that a cultural difference that you notice in terms of discussions as to which forum should win? If there is arm-wrestling over who should get the case, I am interested in knowing whether that is something you recognise in terms of dealing with your American colleagues.

Sue Patten: I admit that I am not bursting with testosterone, but that does not mean to say that, if a CPS prosecutor, the Crown Office and Procurator Fiscal Service or the DPP Northern Ireland had a good case that they thought it was in the public interest to bring in this jurisdiction, they would not have a robust conversation with a US counterpart. Really, that is all I can say on that subject. We are all there to try to bring people to justice. That is what we are there to do, and we all have the same view. Whether somebody shouts louder than somebody else or what have you is not really the issue.

Lord Hart of Chilton: You do not recognise this.

Sue Patten: I saw the evidence that the gentleman you are quoting gave you, and I also saw the response of Isabella Sankey from Liberty, who rather resented the picture that was being painted there.

Lord Hart of Chilton: Nobody could describe her as not being an alpha female. However, do they have more resources than you?

Sue Patten: They are a much larger country than we are, but I do not know how many resources they have. I am sure they have limited resources, in the same way all public services do not have infinite resources to do what they need to do. Sometimes there are

circumstances where it has come to public attention that there is a difference of approach. Although this has changed since the Bribery Act, there was a time when the US policy of pursuing international bribery and their ability to pursue corporate offending was different from the UK law on that subject. That is different now and the Director of the Serious Fraud Office has made very clear his position on the matter. You will find that, if there ever was a difference, it has been addressed.

Lord Hart of Chilton: I am sorry, Mr Vamos; I will come back to you in a minute. Do you ever get the feeling that if only you had more resource you could do a better job? Has there been a time when you have thought, "We just cannot do this, because we have not got enough resource to deal with it"?

Sue Patten: No, the investigative resource is the key resource here. It is the resource to investigate the offending, particularly in multiple jurisdictions. I do not know if you are going to hear evidence from the National Crime Agency or the Metropolitan Police or others who investigate in this area, but that is a critical area of resources. I am resourced to prosecute serious fraud cases; that is what my division is there to do and that is what I do.

Lord Hart of Chilton: Mr Vamos, you wanted to come in.

Nick Vamos: I wanted to draw out one distinction between US and UK prosecutors that I think is important here. A US prosecutor—certainly a US federal prosecutor—has the ability to conduct an investigation himself or herself through a grand jury. They can set up a grand jury and they can ask that grand jury to issue subpoenas to obtain evidence. In that sense, the US prosecutor can drive the investigation. It is very different from the UK prosecutor. We are referred cases by the police, who conduct the investigation, and we can advise or suggest. We do not direct it; we do not drive it. It is not our investigation.

The other point I wanted to make is that I was based in Washington for three and a half years. I did a similar job to the one that Amy Jeffress did over here, so I was the CPS liaison in Washington. I do not recognise that universal alpha male/alpha female characterisation that was given to this Committee. Certainly it was true of some people, but I do not think there is any less commitment to prosecuting on this side of the Atlantic.

Lord Brown of Eaton-under-Heywood: I have a very short question. Ms Patten, you mentioned bribery and the change in the law, but I do not understand how that works, because you have to have dual criminality anyway in order to exercise the jurisdiction—

Sue Patten: Yes, maybe it was not a great point, but it may have appeared in the public domain at one time that the Americans were bringing more corporate bribery cases, certainly, than the UK. That might be what some people were referring to. Maybe it is not the best point, but, obviously, the law brought in by Parliament in 2010 does change the law of corporate criminal liability so far as bribery is concerned.

The Chairman: I have two thoughts arising from this. The first thing is that one of the concerns we have heard expressed to us is that the US is being rather imperialist, if I can put it that way, jurisdictionally in terms of going out and grabbing people wherever it can. Is there any sense that the US prosecution system is actually looking to extend right to the limits its jurisdictional capabilities and claim things? Secondly, when you have been dealing with them, there is this idea that there is a great tussle between two stags as to where the proceedings might be held. Is that a reality or is what happens in practice that the obvious way to proceed becomes apparent to the parties?

Nick Vamos: Can I approach that question from a slightly different angle? There are many examples—and we can give you some and we have explained some—where the US are very happy to support a UK prosecution, even though they would theoretically have jurisdiction.

There is the DarkMarket case that Sue referred to and the indecent images of children case that I referred to; there are the Anonymous hacking cases from a few years ago where some of the targets were in the US. Certainly, evidence and witnesses were in the US, but they were prosecuted here with great support from the Americans. Certainly, it did not seem like there was any desire by the Americans to just override UK prosecution and extradite those people and prosecute them themselves.

It is also instructive to look at mutual legal assistance, which sometimes gets forgotten in this debate. The UK sends three times as many mutual legal assistance requests to the US as vice versa. That indicates there is a lot of evidence in the US that is relevant to prosecutions taking place here. Over half those requests are normally for e-mail and communications data. I have heard this argument that just because one e-mail passes through a US server that gives the US technical jurisdiction over something, which they will then choose to assert. That is not borne out by the facts. There is lots of evidence on US servers that we request from them that they happily give us, and we prosecute those cases without any indication from them that they want to take those cases over.

Q85 Baroness Jay of Paddington: Good morning. I wonder if we could turn to another new test, a new bar. It is the issue of proportionality. Now, you may feel this has been in operation for such a short time that you do not really have the ability to assess it very much at this stage, but the Committee is interested in two areas, one of which is the question why this at the moment only applies in Part 1 cases and whether there is a case to be made to extend it to Section 2 - Part 2 - cases. For example, it has been suggested that a judge in the case might make the assessment on that. The other one relates to the always controversial question of the operation of the ECHR and whether proportionality has added anything to the Article 8 provisions. I wonder if I could ask you to deal with the first part.

Nick Vamos: Yes. If I could deal with whether it has added anything first, that is quite simple. Under the proportionality bar, the requested person does not have to have any right to private or family life in the UK under Article 8 for their extradition to be barred by reason of proportionality. The Lord Chief Justice has issued guidelines on the types of cases that are so trivial in and of themselves that, without any right to private or family life here in the UK, and without consideration of any further facts, that is disproportionate.

Baroness Jay of Paddington: In fact, the evidence that we have been given that there is a relevance of the ECHR in these cases is not the case.

Nick Vamos: No, in some cases where the offence is so trivial the proportionality bar gives the court the power to say, "We do not need to hear any more. We do not need to consider Article 8; it is just so trivial that we stop here". There will be a great many cases, the vast majority, where Article 8 considerations and proportionality considerations will overlap, because the same factors are relevant to both.

Baroness Jay of Paddington: You do not feel, however, that one is necessarily adding to the other, as it were. It is not getting out of balance in so far as you can judge it.

Nick Vamos: I was going to say it is too early to say, because we have had very few cases on proportionality and no appeals as yet. The other important thing about the proportionality bar is that without that the NCA would not be able to operate their proportionality filter, which, in our view, is much more important. If somebody is discharged at court on the basis of proportionality, they have already been arrested; they have been detained in custody; they have been taken to court. Cost resource has been used. That person's human rights have already been interfered with, one might say. It is much better if those cases can be filtered out by the NCA, and the way their filter works is that they have to be clear that this

case would be discharged at court, so you need to have a statutory proportionality bar to allow the NCA to operate their filter.

Baroness Jay of Paddington: What I asked as the first question, but which you have chosen to take as the second one, which is perfectly all right, was the question about Part 1 and Part 2 operation of this.

Nick Vamos: We cannot think of a single case—and it may be the next witnesses can—under Part 2 that we think was disproportionate in the way that Part 1 cases are that led the Government to legislate as it did. We think that would be a solution to a problem that does not exist. Part 1 is about mutual recognition and, obviously, one of the consequences of mutual recognition has been a flood of allegedly disproportionate or trivial extradition requests—or not a flood, but a large number. That just does not seem to happen in Part 2 cases.

Q86 Lord Rowlands: Is not the problem of proportionality really a Polish problem? Essentially, if you could solve that problem, the whole issue of proportionality would sort itself out.

Nick Vamos: Statistically, that is true. That does mean that there are not disproportionate requests, potentially, from other countries. However, the NCA released some statistics just last week on their website where they break down all the requests by country. Poland still makes up two-thirds of all those people arrested on European Arrest Warrants in England and Wales.

Lord Rowlands: Did you say two-thirds?

Nick Vamos: Yes, two-thirds—or maybe just under.

Lord Rowlands: May I just ask one other question? I am under the impression a large number of warrants are issued but never executed. What is the proportion of European Arrest Warrants that are issued and then not executed?

Nick Vamos: Again, the NCA statistics show that they receive—I would urge the Committee to check, because I do not want to mislead you accidentally—around 7,000 or so requests a year, but they have a discretion at the moment whether to certify those requests, and it is only once they are certified that somebody is arrestable. The last year for those statistics, which was 2013-14, about 1,700 people were ultimately arrested, but, of course, they may not be in the country.

Lord Rowlands: It is only 1,700 out of 7,000.

Nick Vamos: Those are 7,000 requests that the NCA receives, but EAWs are issued across the European area. They are not geographically targeted as such, so the NCA then has to sift through them to decide which ones should be certified.

Lord Brown of Eaton-under-Heywood: Chairman, I am terribly sorry. I will try to ask it very quickly, but I just had a question on the designated authority's approach to proportionality. As you say, if they expedite it, then you get rid of all the hassle of extradition and so on. This is under the new Section 2(7A). Are there yet any statistics as to that?

Nick Vamos: We understand—and you may wish to ask the NCA directly—they have used that filter to knock out about 14 cases since it has been in effect.

Lord Brown of Eaton-under-Heywood: The other aspect I want to look at is this: when they are looking exclusively at proportionality, do you happen to know if they look at the Article 8 aspects of that in deciding whether it is disproportionate?

Nick Vamos: They almost certainly could not, because there is simply not enough information on the warrant. It does not tell you anything about that person's private and

family life in the UK; it tells you what they are accused of in the requesting country and some other information about them. It would not tell you whether they had a family here, whether they had children here or how long they had been residing here. They just simply could not do that in practice.

Q87 Lord Hussain: Good morning. A number of submissions referenced cases where prosecutions were not pursued in the UK and the individual was subsequently extradited. If the CPS has judged there to be insufficient evidence or it not to be in the public interest to prosecute in the UK, how can it be proportionate for extradition to a different jurisdiction to be sought?

Nick Vamos: The answer in most cases, in practice, is that there is a difference in availability of evidence in each jurisdiction. We may not have evidence here to prosecute; that evidence may be in other country. Where we have said there is insufficient evidence under our Full Code Test, that does not necessarily mean that there is not the evidence elsewhere in the country that is requesting extradition. The offence for which we could prosecute may be far less serious than the one that is revealed by the totality of the evidence that is not available to us. We may not be able to fulfil disclosure obligations in relation to that prosecution if, for example, there is an informant or a co-operating witness or undercover officers were engaged in that other country. We simply would find it very difficult to have access to that information to make sure that a fair trial was being held here, but the same considerations for access to that information would not apply in the country that is requesting extradition. It would be very much fact-specific.

Lord Hussain: Could I just ask one further question? If the courts discharge the request for extradition in a case that could arguably have been prosecuted in the UK, what steps are taken to ensure that justice is done?

Nick Vamos: The Director of Public Prosecutions could always invite the appropriate Chief Constable to consider an investigation, but she certainly could not direct or commence one herself. It is just not something the CPS has the power to do. It would be a case-by-case assessment. Again, it would depend on the availability of evidence, witnesses and all kinds of very case-specific factors. Ultimately, however, it would be for the police or another enforcement agency to make their independent decision as to whether that offence should be investigated in this jurisdiction.

Q88 The Chairman: Thank you. We are getting near to the end of our time. I will ask you if there is anything you want to say to us that you think is relevant to what we are doing that we have not touched on, but I might just raise one point about something you said in your written evidence, which is that you think that the court, perhaps, ought to be proactive in monitoring assurances on which extradition has occurred. We are just really interested to know how you envisage this could be done.

Nick Vamos: I am really grateful for the opportunity to clarify what we said in that written evidence, because, in hindsight, it may not have been as clear or as detailed as we intended. Assurances are a vital part of extradition practice. The courts have said so on a number of occasions. The European Court in the case of Abu Qatada—that was not an extradition but a deportation case, of course—set out a list of factors that they said a court should look at when considering the quality and reliability of an assurance. One of those factors is the track record of the requesting country or the country to which the deportation is being made in abiding by previous assurances. That is a factor that is always open to the court to ask about. In the normal course of extradition proceedings, if the requesting country is a friendly state with whom we have friendly, diplomatic relations, which is pretty much most of them who request extradition, there is a presumption that that country will abide by its

assurances, so the CPS and the requesting state itself would not spontaneously choose to research and provide information about their track record in abiding by previous assurances unless it was a live issue in the case. The first point is that we say the onus is on the court to identify if that is a live issue in those particular proceedings under the Othman criteria and, in that case, of course we would work together with the requesting state to produce evidence to suggest they do have a good track record.

If we are talking about a monitoring process outside the specific proceedings, that is much more complicated. I cannot see a role for the CPS outside specific extradition proceedings in monitoring compliance with assurances in other states. It is difficult to see what order a court could make within the extradition proceedings after they have concluded to require information about what had happened in relation to assurance that had been given to that court. If the judiciary felt that there should be a more general monitoring system so they can have up-to-date information about assurances, then that is something the judiciary would probably want to take up with the FCO.

The third point to make is that if assurances are breached, there is no clawback. You cannot bring the person back again with fresh extradition proceedings. There have been cases where the assurance has contained such provisions. Mr Dewani is a good example: the assurance itself contained a provision that if he was not fit to stand trial within a particular period, he would be returned to the UK. Otherwise, with this sort of ex post facto monitoring, it is very hard to know what you could do about that.

The Chairman: That is why we are interested in the question.

Nick Vamos: It would be very difficult for the CPS to play a role in that proceeding, outside a specific case where the court said they wanted more information.

The Chairman: That is helpful. Thank you. Is there anything else you would like to draw to our attention? We would be delighted to hear it, if there is.

Nick Vamos: No, thank you.

The Chairman: Thank you both very much indeed. That was very helpful.

Examination of Witnesses

Rebecca Niblock, Associate, Kingsley Napley LLP, and **Edward Grange**, Associate, Hodge Jones & Allen LLP

Q89 The Chairman: Can I extend a formal welcome to Edward Grange and Rebecca Niblock, respectively Associates of Hodge Jones & Allen and Kingsley Napley? We are very grateful to you for coming. You have circulated CVs, which we have seen, and you are the co-authors of *Extradition law: a practitioner's guide*. You will have obviously seen the way the proceedings went with the previous witnesses and heard their responses to similar questions to the ones that we are going to ask you, but first of all would each or both of you like to make any kind of brief introductory statement?

Rebecca Niblock: We do have an opening statement. First of all, we would like to thank you for inviting us to give evidence. We are here as defence practitioners. We represent requested persons. We see the problems that extradition presents and, in particular, the impact it has on our clients and our clients' families. Having said that, however, we do understand the importance of extradition. We know that people who are accused of offences must be tried and they must be appropriately sentenced, if convicted. However, that does come into conflict, in the context of extradition, with the requirement that those people are not sent back to face an unfair trial or to face conditions of detention that might be inhuman or degrading.

Our view is that it is absolutely fundamental to the rule of law that the rights of a requested person should develop alongside the rights of the requesting state and those that, of course, represent the rights of the victim. The Framework Decision of 2002 introduced the concept of mutual recognition of criminal decisions—and that was, of course, an enhancement of the powers of the state against the individual. It was not until the Stockholm Programme of 2009 that we saw a movement towards an attempt to bring forward the rights of the individual at the same time. The Commission has done a great job in proposing Directives for, for example, the right to interpretation and translation and the right to access to a lawyer.

It is with dismay, as we said in our written evidence, that we note that the UK has opted out of, in particular, the last three of those, which are the guarantee to the right to legal aid, the presumption of innocence, and procedural safeguards for children. This, to us, signals a lack of interest in the parallel development of the rights of the individual and we see the failure to engage in the development of these procedural safeguards as a real missed opportunity on the part of the UK Government to contribute at an early and formative stage.

Edward Grange: I certainly adopt those views expressed by Ms Niblock.

Q90 The Chairman: Perhaps I will start with a general question, which is the same one I put to the previous witnesses. In terms of your experience—and, obviously, you are not seeing this in the same way the CPS is—how many of the cases seem to involve criminal conduct in multiple jurisdictions?

Rebecca Niblock: Our answer is anecdotal. We see a very large number of enquiries coming into Kingsley Napley involving multiple jurisdictions, although not necessarily criminal conduct in multiple jurisdictions. Other examples might be that a person is a national of a second country or some element of business involves a second or a third country. There are

also cases involving Interpol red notices. Sanctions cases often involve many jurisdictions. There are also mutual legal assistance requests that the Committee has already heard about. Our perception is certainly that there are a number of cases involving cross-jurisdictional elements and that these are on the rise.

The Chairman: Again, in your personal experience, in terms of anecdote, do you feel there are many cases in which really serious questions arise about in which jurisdiction something might be dealt with, or is it in fact something that comes out in the wash?

Rebecca Niblock: There is a significant minority of cases in which that is an issue, yes.

Edward Grange: In anticipation of this answer, I looked at my own caseload. I have 34 extradition contested cases either at the Magistrates' Court, Court of First Instance, or at the High Court. Of those 34, four of those cases involved multi-jurisdictional issues, one of which was referred to by Mr Vamos in his evidence: a US extradition request for a British national. Two involved European Arrest Warrant cases where the alleged conduct had taken place in other Member States but not any part of it in the United Kingdom, so the countries that had issued the European Arrest Warrant had already determined through Eurojust, I believe, which Member State was to take priority. Then the final one of the four is another US request for extradition in relation to a Ghanaian national where the relevant activity could be said to have been carried out in Ghana, albeit that the intended effect, according to the extradition request, was in the United States. Four of 34 current cases that I have involve multi-jurisdictional issues.

Lord Henley: Mr Grange referred to his 34 cases. I just want to know who is paying for those 34 cases.

Edward Grange: Out of the 34 cases, the majority are funded by the state—that is, they qualify for legal aid, so they have qualified through the means test. In all cases that originate

in the magistrates' court, the requested persons are entitled at that very first hearing to representation by the duty solicitor, so that is a free service that is provided. After that hearing, if the matter progresses to a contested hearing, they will either have to apply for legal aid, in which case they have to satisfy the means requirement—for example, if their income is greater than £22,500 they will not qualify for legal aid and they will have to fund their case privately—or will have to represent themselves in court, which frequently does happen still in contested extradition cases.

Q91 Lord Empey: I just wanted to ask something following up on that. You use the criteria of the particular jurisdiction where the criminality or most of the loss or harm will occur, but, where we have multiple ones, and quite frequently with the internet and cyberspace and so on, it must be extremely difficult to allocate, because it is very hard to tell, particularly in that example, where most of the harm may come. Indeed, quite a lot of the cases that are coming up are global, not confined to the EU or any of our partners. How do you see that aspect of things developing? Whether it is fraud or abuse, it does appear that there is a whole range of issues that are now entirely focused on this sort of medium. How do you see that developing?

Edward Grange: As defence practitioners, we do not play any role. As has been identified in some of the questions, a lot of decisions on concurrent jurisdictions take place in private, without any submissions being advanced either by the suspect or by the suspect's representatives. The only way we can interpret that is by looking at the forum bar that has been enacted—and it has now been on the statute books for one year and one day as we speak—and the guidance that has been provided in the only case to have been determined by the High Court. When they look at the factors to be applied and when they look at the location of the criminality compared with the location of the loss or harm, what weight is to

be attached to those factors in determining what the correct forum is for the prosecution to be brought?

The case that I am referring to is a case called *Dibden*, where it was stated that, obviously, the place where the majority of the loss or harm occurred is plainly an important consideration, but they then go on to say in that case, which involved a conspiracy to import Class A drugs into the United Kingdom through France, originating from Holland, "Although I accept that most of the harm occurred in the United Kingdom, I do not accept that this is necessarily the most important consideration."

Obviously, within the forum bar there are primary considerations the court must take into account. I do not think any one has been identified as being the primary consideration where the most weight should be attached.

Lord Empey: What you are really saying is this is obviously a case-by-case issue. "Arbitrary" is really not the right word; it is very hard to determine rules. However, where you have more crime committed through the internet, it is very often global. It must be extremely difficult to assess. If, for instance, you have improper images and things like that, it must be almost impossible to determine.

Edward Grange: It is. The courts are struggling to grapple with it, looking to guidance perhaps from the High Court in the cases that are likely to be determined by the end of this year. I am aware of at least four cases that are awaiting determination on appeal at the High Court. The lower court is certainly looking for guidance from them as to how they are to apply each of the factors and the weight to be applied to each.

Q92 Baroness Wilcox: I will just ask you a quick question if I can. If we can go back to all these cases that you are taking through the courts, those who got legal aid are okay. They are away and going. In terms of those who did not get legal aid, and who cannot find the

money for a lawyer and are representing themselves, how are they faring? This is a very complicated area for them to be standing there on their own.

Edward Grange: It is—and courts do appreciate that. The view of the courts, certainly expressed in the Baker Review, is that they would prefer if everybody was represented. Extradition law is a difficult and complex area. As to how they are faring, I am aware of a few who have managed to succeed with the assistance of the court and the requesting state assisting them to some extent with the evidence that can be adduced on their behalf.

Some slip through the net and their extradition has been ordered. Previously there was an automatic right to appeal to the High Court. Any issues that had not been raised could have been raised on appeal, subject to certain criteria being met. That was a safety net for them. Of course now the situation has changed, albeit it has not quite yet come into force. The automatic right to appeal a decision of the district judge to order somebody's extradition is no longer there. That safety net is gone.

Baroness Wilcox: I did some work in this area quite some years ago about people representing themselves in court. We discovered that it was useful to have a clerk just for them in the court to help them through. In those days we also eventually did a video. I wonder if there is a DVD of what the process will be, so that they have something they can look at and study themselves—so that they do not go in quite so naked.

Edward Grange: That would assist, certainly if it could be made available in each of the languages the requested persons speak. Of course, the majority will require the services of an interpreter, and an interpreter is provided for them to help them to understand the proceedings. The Committee may well be aware of certain problems with interpreters and the availability of certain languages, but, certainly, a video would assist.

Q93 Baroness Jay of Paddington: Can I just ask a bit more about the Dibden case that you raised? We were given a very helpful note about that in which it seemed to be that one of the major objections to this person not being extradited was the simple fact that the French authorities had already advanced the case and the practical administration of dealing with it all under one legal jurisdiction was obviously a practical advantage for those who wished the court proceedings all to take place in France. The note we had said that this kind of administrative issue was going to, in practical terms, pose a significant barrier to the whole issue of forum. Would you agree with that?

Edward Grange: Certainly, in relation to location of co-accused, if a trial procedure is well under way in a requesting state, there are two or three co-accused awaiting trial and perhaps their trial cannot proceed until all co-defendants are brought to the state in order for the trial to be heard, that certainly would be a factor that would weigh heavily against extradition being barred by reason of forum.

Baroness Jay of Paddington: The question about the co-defendants was not necessarily the one that was the most evident—at least in the note we were given. It was the question about the proceedings actually developing and it being somewhat administratively inconvenient, not to say resource-heavy, to try to establish another proceeding in the UK.

Edward Grange: That goes to the issue of costs and the associated costs of bringing proceedings in this jurisdiction if they are already under way in another jurisdiction.

Rebecca Niblock: That leads on to one of your further questions about what can be done about the fact that discussions between prosecuting authorities take place in private, which is that it is expected and understandable, where investigations are at an early stage, that they would take place in private. Ideally we would like to be involved at that early stage, but we understand why we cannot be. The problem for us is that once those decisions have

been made, it appears that they are set in stone. It is difficult for us to find out the reasons for the decision in order to analyse them and test them and, in appropriate circumstances, invite a review of that decision.

The Chairman: We heard from I think Mr Vamos that a statement is produced. Is that too late?

Rebecca Niblock: It points to a fundamental problem with the forum bar, which is that so much weight is placed on the prosecutor, whether that is by way of the prosecutor's certificate or by way of the prosecutor's belief, under subsection (c). In the case of *Dibden*, the court said that was enough for them to receive the record and they did not need to go any further into the reasons why the prosecutor believed that the UK was not the appropriate jurisdiction.

The Chairman: That is fine. Probably the right thing is if we can move on to Lord Henley, talking about—

Q94 Lord Henley: I am not sure I really need to ask anything more about the forum bar, and you heard what the CPS had to say. I do not know whether you want to expand on anything you have just said now, either of you, because you have both been touching on it, as to whether it has no teeth.

Edward Grange: On the forum bar, the Baker Review panel recommended that a forum bar is not introduced into the legislation and, of course, it now has been, and it has been in force, as I say, for just over a year now, so it seems a little strange for me to say it is a little too early to tell as to whether it has no teeth or it was illusory in that effect. However, it certainly has not opened the floodgates. We are not seeing a huge amount of cases where forum is being raised.

We do have concerns as to how the forum bar has been enacted, because of course one of the criteria in the forum bar is that extradition can be barred by reason of forum if it is not in the interests of justice. Of course, it is for a judge to determine whether it is in the interests of justice or not, but it then seems to curtail the discretion that the judge has by only allowing him to refer to specified matters that are in the Act. Of course, one of the problems could be—and again it may be too early to tell—that if there is a scenario that was not in contemplation of the draftsmen when they drafted the forum bar, the judge would be precluded from considering it. Whereas if it was just left for forum to be considered in the interests of justice to be barred, I think that would allow greater scope perhaps for the arguments to develop and the interests of the requested person to be fully protected.

Q95 Lord Brown of Eaton-under-Heywood: The point you have just made I think is made by Liberty in their particular submission to the court: that the list of factors under the section 19B(3) is constrained, limited. We did not explore this with the other witnesses, but are there any differences between those considerations and the principles to be applied—appendix 1 to the CPS's written argument—as to what considerations are in play when you are deciding which of two concurrent jurisdictions should assume it?

Edward Grange: We have not had sight of the CPS's response or the appendix.

Lord Brown of Eaton-under-Heywood: "Principles to be applied … In deciding where a case with concurrent jurisdiction should be prosecuted". You do not have that.

Edward Grange: Sorry, is their appendix the DPP's guidelines?

The Chairman: It is an appendix to our evidence.

Edward Grange: To your evidence?

Lord Brown of Eaton-under-Heywood: I am surprised it is not a published document. Is it not?

The Chairman: It has to be approved by the Committee before it is published.

Lord Brown of Eaton-under-Heywood: Oh.

The Chairman: I am slightly surprised. If they are using it as guidelines and it is being put in front of the court, you would have thought—

Edward Grange: Sorry, is it their actual guidelines as to concurrent jurisdiction that they refer to as their exhibit?

The Chairman: Yes.

Edward Grange: It is a public document, so I am sure we can refer to it.

Lord Brown of Eaton-under-Heywood: It seems to set out all the things that might be logically relevant to where you would prosecute, and I am just wondering if there is any apparent difference between those and those set out in the statute. What is missing from the statute? Liberty suggests the ability of the requested person to mount a defence from the requesting state, but would that not come into play under the statutory guidelines?

Rebecca Niblock: Perhaps one of the issues that is not covered there is the requested person's health: for example, in the case of McKinnon, whether, if a prosecution had taken place in this country, it would have been easier for him to have the family and health support there.

Edward Grange: At the moment, in the forum bar it just simply refers to the defendant's or requested person's connections within the United Kingdom. For example, in relation to the McKinnon case, the judges were asked, as part of the Baker Review, if they could think of any case that they had dealt with or had come through their courts where, if the forum bar had been on the statute books, they would have barred extradition. They said, "We could not think of a case." It would be interesting to know now it is on the statute books whether it would have changed their minds. If it would not change their minds and the forum bar

now still would not have prevented the extradition of Gary McKinnon or Richard O'Dwyer—if it does not apply to those cases—whose cases will it apply to? I think that is the difficulty with the forum bar as it is enacted.

Rebecca Niblock: One of the great things about an interest of justice test generally is that it allows for the multitude of different things that can arise in criminal cases. To limit it to specified matters seems to circumscribe it.

Q96 The Chairman: Two things seem, to me, to arise from this. The first is that the forum bar is just one of a series of mechanisms to stop the extradition process in the interests of justice more widely. Am I right that health is a ground on which the court would be able to intervene, so that probably the McKinnon-type subject would be saved by that provision even if it was not under this provision?

Rebecca Niblock: Well, yes, and the reason, in the end, that it was decided that he would not be extradited was because of Article 3. However, the unjust or oppressive test, which is the health test, is whether it is unjust or oppressive by reason of their mental or physical health, and that is a very difficult test to satisfy, but it might be one of the considerations that you would like to consider as part of the forum bar.

The Chairman: The other thing I wondered about the forum bar and your comments about it is the argument that we have heard is that the forum bar poses a potential further way of delaying the whole process on every occasion. Do you think that if the forum bar had been drawn as widely as Liberty suggests it should, there would in fact have been a kind of tsunami of hopeless cases using this simply to slow the whole thing down? We know that one of the things that requested people would rather is, if they know they are going to go at the end, to spend time serving sentences here than in other countries. Would that have had a great impact or do you think that is just a bad argument?

Rebecca Niblock: Is that in relation to the forum bar as it is currently enacted?

The Chairman: Yes, as opposed to the alternative model.

Rebecca Niblock: We agree with the evidence of the CPS that the forum bar now will not significantly add to the time spent on cases.

The Chairman: Were it to be expanded, as Liberty suggests it should be, would it have that effect, do you think?

Edward Grange: To have to include a prima facie search of evidence, do you mean?

The Chairman: Yes. Would it clog up the courts?

Edward Grange: Yes. A prima facie determination of a case, as the Committee are aware, only applies to certain undesignated category 2 territories. Certainly in those cases the court will have to take more time to consider the evidence that is presented by the requesting state in order to determine whether or not there is a prima facie case and, of course, the defence are able to present evidence in order to try to rebut the prima facie case that may be made out. Therefore, if a prima facie case were to be considered to be brought in applying across the board, then in my view, yes, it would.

Lord Brown of Eaton-under-Heywood: A prima facie case is one thing, but that is not quite the same thing as widening the scope of consideration under a forum bar. However, there does seem to be a sort of overlap between the forum bar and proportionality, as there is between proportionality and Article 8. It is quite difficult to disentangle them. At the end of the day, the courts just say, "Is it a bit rich to send this guy abroad?"

Q97 Lord Hart of Chilton: Again, this is a question that was, I thought, more relevant to Mr Vamos and Ms Patten, but I do not know whether you heard the answers on this cultural difference identified, based on the evidence that we have been given, between a messianic approach from the American prosecutors, who are determined to win at all costs, so it was

portrayed, as against a rather meek and mild approach from the British, in true traditional form. The evidence that they gave was that this was an illusion. They were not arm-wrestled into submission when they had their discussions. They were up to the task and argued their case and it was all a rather sensible outcome when they did that. I just wondered whether you had any comments to make about that. There is an additional point that there seemed to be more resource available in America, which encouraged people to hoover on, as it were, as distinct from a lack of resource here. There again, they denied that and said that they had adequate resources to fulfil their tasks.

Rebecca Niblock: Our view is obviously a view from the outside, but we do think it is probably a bit of both. It is probably a different interpretation of jurisdiction alongside a better resourced prosecution and a more zealous approach by the US prosecutors, and we think all of those factors have an impact.

On the question of resource, our view, in particular in relation to domestic criminal cases is that the CPS is under-resourced and it does face a huge amount of pressure. These multi-jurisdictional cases are very expensive for the taxpayer and so it is just logical that resource would be a consideration.

Edward Grange: In relation to the bullish nature of US prosecutors, there was perhaps an apt and quite timely quote in *The Economist* last week, where it referred to the US dominating the criminal justice system, not just within the United States but also globally. The Attorney General to the United States in 1940, a gentleman called Robert Jackson, was quoted as saying, "The prosecutor has more control over life, liberty and reputation than any other person in America." That quote came in the 1940s, over 70 years ago, and it is their view that the power given to the prosecutors in the United States has extended and, of course, one of the reasons why they have been empowered is plea bargaining. That is a

system that is not really known to our jurisdiction whereby I think the quote is 95% of cases in the United States end up being plea bargained with the person pleading guilty or entering into a plea agreement to lesser charges. That does not necessarily mean that 95% of those who have entered into those agreements are guilty of those offences. However, faced with mandatory minimum sentences if you go to trial and take the risk of being convicted—where the prosecutor has made it very clear that if you are convicted you will face the maximum sentences that are applicable on statute—if you enter into a plea agreement, a lesser sentence can be passed and there may well then be the possibility of repatriation in an extradition context. Of course when somebody has been taken away from their family in this jurisdiction, that is going to be at the forefront of their mind when perhaps deciding what to do at trial.

Lord Hart of Chilton: Do you have personal experience of this?

Edward Grange: Of prosecutors being bullish? As cases are dealt with by the CPS on behalf of the requesting state, we do not have any contact at all with the prosecution, whether it be the Department of Justice or state attorneys, so any communication that comes from them will be in written format. There is no requirement for them to give live evidence in extradition proceedings. Therefore, to answer your question, I do not have personal experience of dealing directly with US prosecutors; they would be dealing with the representatives from the CPS who act on their behalf.

Q98 Baroness Jay of Paddington: I think this is a moment when it might be useful for the Committee if you could give your comments on the point that Lord Brown made a few minutes ago about the overlap between proportionality, the human rights issues, ECHR issues and forum. I wanted specifically to ask you about proportionality, but I think that is a very pertinent point that it would be very helpful to have your comments on, because it

must be difficult, as practitioners, as defenders, to distinguish between those different aspects of a case.

On the specific proportionality question, you probably again heard the CPS saying that they felt that it was not a useful point to make that there was a difference between Part 1 and Part 2 cases, because in Part 2 cases it would probably, in practice, never arise. Indeed, Lord Rowlands made the legitimate point about the volume of Polish cases that came under Part 1, which could be discharged in a way if you addressed proportionality. So, in a way, I am asking for a very general comment, but also on that specific point, if you could.

Rebecca Niblock: On that specific point, we disagree with the evidence of the CPS. It is right that, as Mr Vamos said, we cannot think between us of any Part 2 cases that have involved trivial offences, and we understand that that is the rationale for not extending it to Part 2. However, we do think that it would make sense for it to be extended to Part 2 for a couple of reasons. Firstly, generally, the bars mirror each other in Part 1 and Part 2, but more importantly there is nothing to prevent Part 2 countries making trivial requests. There is a requirement that the offence must carry a sentence of 12 months at least, but there are minor offences that do carry that sentence. Looking at the Lord Chief Justice's guidance, for example, which Mr Vamos referred to—I do not know if the Committee has seen that guidance, but I would be happy to provide it—there are a couple of offences in there that should be considered as disproportionate, in his view, and would carry a 12-month sentence at least in this country. They are low-value fraud and possession of a small amount of a controlled drug.

We think that the proportionality bar is unlikely to have a significant effect, first, because it only applies to accusation cases, but, secondly, because of the criterion of seriousness that the court has to consider, it is not clear whether the courts will do that in a relativist or

absolutist way. However, looking at the guidance that I referred to, it seems that it will be an absolutist way and there are six offences listed, which are: minor theft, minor fraud, minor driving offences, minor public order offences, minor criminal damage and possession of a controlled drug. The guidance says that in relation to those cases extradition will be generally disproportionate, except where there are exceptional circumstances. The exceptional circumstances set out are, with respect, not all that exceptional and include a vulnerable victim and significant premeditation. However, it also includes the example of where there are multiple counts, where extradition is sought for another offence or where there is previous offending history. You can imagine a circumstance in which somebody is wanted for possession of a small amount of cannabis in Greece, they have received a warning for possession of cannabis in this country and their extradition would still be proportionate because of those exceptional circumstances.

Edward Grange: As Rebecca mentioned, there is the fact that the proportionality bar only applies to Part 1 and also the fact that it only applies to those accused of offences—it specifically refers to, in the title of it, persons not convicted. Well, of course, just because somebody is convicted does not mean that they are unlawfully at large. For example, you could have somebody who has been convicted in their absence and who has not deliberately absented themselves from the trial process; they literally knew nothing about it—no summonses or anything at all. As they have used the word "conviction" as opposed to "unlawfully at large" in the statute, it would prevent that type of person from relying on the proportionality bar, which cannot be right.

Q99 Baroness Jay of Paddington: On the broader point about the ECHR and Article 8 and the overlap with proportionality, it has been suggested by some witnesses in written evidence that this will lead to a vast number of extra cases being included under that

heading, but also that really there is such a degree of overlap, as Lord Brown was suggesting, that very little is added to the cases by adding proportionality.

Edward Grange: I think it was mentioned in the evidence by Mr Vamos that one thing that the proportionality bar does bring in is the amendment to Section 2 of the Extradition Act, which deals with the National Crime Agency's ability to certify European Arrest Warrants. They now have the ability to not certify a warrant where it is clear to them that it would be disproportionate in the eyes of a judge exercising his discretion under the proportionality bar. Therefore, in effect, if exercised correctly, it would prevent warrants being certified and people being arrested, detained and processed through the courts—if exercised correctly and diligently. I think Mr Vamos referred to 14, so far, having been filtered out. However, the National Crime Agency is already supposed to provide a similar type of service under Section 2, because it can only certify a valid Part 1 warrant. A valid Part 1 warrant is one that meets the requirements of Section 2 of the Extradition Act. So, for example, a warrant must contain the place where the conduct took place, the time the conduct took place, and the maximum sentence applicable. We still see warrants coming through the courts that have been certified by the National Crime Agency and its predecessor, the Serious Organised Crime Agency, where the location of the offence is missing from the warrant, so it should not have been certified in the first place and it is then discharged at the first hearing by the judge. However, by then, the person has been arrested and potentially detained overnight; there is the cost of transport to court, the interpreter's costs and the court costs for something that should have been filtered out in an earlier process. Therefore, I hope that the proportionality bar, in bringing in this filtering process on certification, will be effective and active.

In terms of how it interacts with Article 8, it did appear that there was a conflation of proportionality and Article 8, because already in the Article 8 context a proportionality exercise is carried out—albeit that other factors are taken into account, not just the ones contained within the proportionality bar. However, as of only last week, in a case heard at Westminster Magistrates' Court, the judge was of the opinion that following Parliament's decision to include the proportionality bar into the Act, there was no longer any room for the argument that extradition would be disproportionate under Article 8 solely because of the nature of the offence, that High Court cases that had included a proportionality bar by the back door should no longer be followed, and that the courts should now proceed under Article 8 by ordering extradition unless there were exceptionally compelling circumstances. It is going back to the old regime before proportionality was considered in an Article 8 context, taking into account various factors, one of them being the nature and seriousness of the offence committed.

Lord Brown of Eaton-under-Heywood: Could you send us that case?

Edward Grange: It was comments made in court. It is not a judgment yet. Judgment has been reserved on that. I cannot recall who it was by, but certainly the judgment, when it is handed down, if it goes that far, can be provided to the Committee.

Baroness Jay of Paddington: It would be very useful, because if that becomes the case law that is then followed—

The Chairman: I have a feeling that a lot of what we are going to think about when we conclude our work is going to hinge on relatively recent judgments, so we have to follow those sorts of things up.

Q100 Lord Rowlands: I wonder if I could slightly broaden that question. Reading your evidence and listening to you again this morning and reading the evidence in 4(1) that the

European Arrest Warrant is not an improvement—you have stated that to be so—do you support the Government's decision to opt back into the framework decision as it stands?[54]

Rebecca Niblock: Yes, we do think that the Government should opt back into the framework decision, but also, at the same time, it should ensure that the rights of the individual are protected. There has to be a parallel development of those things.

Lord Rowlands: You believe that we should stay in the system?

Rebecca Niblock: Yes.

Lord Rowlands: Is that irrespective of the fact that there is not a great probability that there is going to be any fundamental change to the warrant and to the decision at a European level?

Rebecca Niblock: We think that the only way that we will be able to make any changes is if we are part of the decision. One of the problems, for example, with Norway is that it is subject to the rules but does not have any influence over what happens, and we may well end up in that position. There are very good reasons why we should have good extradition arrangements with our neighbours. We do not want to become a haven for everyone to come and escape justice in the UK, but there needs to be, at the same time, sufficient protection for individuals.

Lord Rowlands: You do recommend certain changes. How are they going to be promoted?

Rebecca Niblock: By going a different way from the way that the Government are going at the moment in terms of the directives. It seems to us very much that the Government are only looking at opting into those measures that detract from the rights of the individual rather than the parallel development of the procedural safeguards.

Lord Brown of Eaton-under-Heywood: Back to the Stockholm Programme.

[54] See written Submission from Edward Grange and Rebecca Niblock: [hyperlink]

Rebecca Niblock: Back to the Stockholm Programme, yes.

The Chairman: I wanted to make a similar point about this, because I understood from your opening remarks that the European Arrest Warrant is obviously only part of a wider process and you were criticising the suggestion that you can opt back into the European Arrest Warrant and one or two other things on a kind of cherry-picking basis. If you leave the other things, the coherence of the system as a whole is put out of kilter.

Rebecca Niblock: Exactly, yes.

Q101 Lord Brown of Eaton-under-Heywood: This is question nine under the heading of "Political angle". Rather than read out the question, it relates to your paragraph 8.1 and, I confess, when I read it I did not understand it. Can I just read it again? "Our view is that decisions about where to prosecute are very frequently influenced by broader political, diplomatic or security considerations. We are aware of recent cases in which directly contradictory decisions were made by the CPS as to potential immunity, which can only be explained by the relative political import of the cases". What is this idea of "potential immunity"? What is that paragraph directed at?

Rebecca Niblock: I can elaborate. It was very useful that we were told not to refer to specific cases, but on the political point—by "political" we do not mean party-political, of course, but political with a small "p"—to some extent, we think it is expected and inevitable and, in some cases, it will be perfectly proper. We can see that there is a spectrum. In domestic cases, you have heard Mr Vamos talking about the public interest test. If we look at the Code for Crown Prosecutors, in particular the public interest test and the range of factors that will be considered, they are, for example, seriousness of offence and culpability of suspect, but also three of the factors are: impact on the community, where the prosecution is a proportionate response and where the sources of information need protection. Those

are proper considerations, but you can see that when you start looking, for example, at the impact on the community, you start off down a road that could lead to a point where the public interest becomes the public will or the public mood. The example of McKinnon is a very pertinent one; there was a very strong public feeling that he should not be extradited. There were striking similarities, as we said in our submission, with the case of Talha Ahsan just a few weeks earlier, whose extradition was ordered. We know and we agree that it was the right thing to do to take away the Secretary of State's decision in that case, but it was a legal decision that she was supposed to be making. Another example is that there is, at the moment, a very strong political will to prosecute bankers, and you can see that as well in the media. That requires huge, massive resources, and the decision on the allocation of those resources must be taken at a political level.

Lord Brown of Eaton-under-Heywood: The reference to potential immunity is if they decide not to extradite or prosecute they go free; is that the point?

Rebecca Niblock: Yes.

Lord Brown of Eaton-under-Heywood: I see. I feel rather defensive about McKinnon because, as I am sure you appreciate, his health was not an issue when the matter came before this House in an appellate capacity. The whole question of Asperger's and all the rest of it, on which the Secretary of State eventually acted, which would now go before a court at a later stage in the proceedings, was simply not before us.

Rebecca Niblock: Yes.

The Chairman: Is your concern about these things really not inherent in any system of any kind where there is a degree of discretion on whether or not to prosecute?

Rebecca Niblock: Yes.

The Chairman: What one has to make sure is that the people who are responsible for that are impervious to that sort of populist or political pressure.

Rebecca Niblock: Yes.

Q102 Lord Rowlands: You defend your defendants. Do you have any thoughts about the rights and interests of victims?

Rebecca Niblock: Yes, and that is why we think that we should remain within the EAW scheme.

Edward Grange: There is also the fact that victims are represented, in essence, throughout the extradition process by, of course, the judicial authority and the CPS, who act as their agents. They are putting forward to the court, as arguments as to why somebody should be extradited, certainly in a proportionality context, the harm caused and the rights of victims.

Lord Rowlands: Before the European Arrest Warrant and before 2003, though, the delays on some of these cases were enormous. You would not want to go back to where that situation could arise again, would you?

Edward Grange: I do not think we advocate a system whereby there are delays, because delays not only interfere with justice and the rights of victims but also the rights of those who are subject to the extradition proceedings. For example, with some of our clients we see great stress placed upon not only them but their family members as well, who are also innocent parties to the whole extradition process, and delays in the system benefit nobody.

Q103 Baroness Hamwee: Can I ask a linked question about assurances? You said in your evidence that it is extremely difficult to displace the presumption of compliance, and you were particularly talking about Article 3, particularly where the requested person is publicly funded. Would you like to expand on that?

Rebecca Niblock: Yes. In order to displace those assumptions, one will have to obtain expert evidence, and obtaining expert evidence at the rate of £90 an hour from a lawyer or another expert in another jurisdiction is very difficult.

Baroness Hamwee: Who do you think should monitor assurances or monitor compliance with assurances when they have been given?

Edward Grange: That is a very good question, because of course once, for example, a client is extradited, funding stops at that moment. We are reliant upon clients reporting back to us—and they may be incarcerated and it may be very difficult for them to do so—on the effectiveness of the assurances that are being provided. We are seeing more and more assurances being provided in order to get around the difficulties, certainly in relation to prison conditions, not only in category 2 territories but also within Member States. We have had decisions from the High Court in relation to Italy, where their detention facilities are being held to violate Article 3, but it is not only Italy. There have been decisions at the lower court that were not appealed by the judicial authority in relation to Greece, Hungary and Romania. All of those countries, at the moment, have difficulties and problems with their prison systems that would mean that anybody detained in them was at real risk of an Article 3 violation. In order to circumvent that, if we can put it that way, assurances are being provided and we need an effective monitoring system to ensure that the assurances that are being given can be carried out.

Baroness Hamwee: It is very difficult to see how an assurance given about an individual not being subject to particular conditions in a prison could possibly be complied with if that is the way the prisons operate. I have seen a reference somewhere to one prison being fingered, as it were, but I do not quite see how the assurances can apply generally.

Edward Grange: I think that was the difficulty in the case that we refer to in our written submission, the Lithuanian case, whereby the evidence pointed to the fact that one prison in Vilnius fell far short of the requirements in Article 3. However, the Lithuanians gave an assurance regarding requested persons if extradited from the United Kingdom—and it was specific to the United Kingdom, so if you were extradited from another state all bets were off as to where you would go—and then, on being returned, the person who gave the assurance did not effectively oversee where the prisoners were being sent. It was a different body that was responsible for that and the old system operated, whereby there were those who were then sent to the prison where the assurance specifically said they should not be sent.

Baroness Hamwee: If the prisoner is a British national, does the embassy, the consulate, have a role in this locally? I might be taking you beyond your experience.

Edward Grange: Slightly, but I do have experience of where British nationals have been extradited; they do have access to the British embassy. There is very little that can be done if there is an assurance of the breach as to how it can be remedied once the person has left the jurisdiction of the court.

The Chairman: We are going to look into this in a bit more detail later.

Baroness Hamwee: Sorry.

Q104 The Chairman: No, no, it is entirely relevant and proper, because of the very issues that you have thrown up in your responses.

We are just about at the end of the hearing. There are one or two questions, if I might, of a rather random nature, and reply as you would like. The first thing is that you talked about the requirement for assurances, which might have been helpful in a particular case, but then there was no funding for the defence to get any expertise; you talked about £90 an hour.

Are there any concrete instances you can think of where that has happened? That is my first point.

The second point I would like to ask you about is in terms of thinking about proportionality. Proportionality is focused on the nature of the offence that has occurred. Is there any argument for saying that the destination to which the person might be sent could have a bearing on it?

Finally—and this is something that we will come back to in a different hearing—you say that you think it is important that a requested person should have a lawyer in the requesting state, because you may thereby be able to completely obviate the entire proceedings. Can you just elaborate a bit on that? I think that is important.

Rebecca Niblock: The first question about funding—

The Chairman: Funding and experts: is it a hypothetical question or is it a real-world question?

Rebecca Niblock: It is definitely a real-world problem. I cannot think of any specific cases where we have not been able to instruct an expert at all, but I can think of numerous cases where we have not been able to instruct the expert that we would have instructed had we been privately funded.

The Chairman: I suppose, following on from that—and this is a question you can only answer in the most general terms—do you think the outcome has been affected by that?

Rebecca Niblock: Yes. A lot of the time a case will turn on expert evidence.

Edward Grange: In relation to that specific question, it is not my own case but I am aware of a case that is currently going through the courts involving an extradition request from Peru, where the defence, who are all legally aided, applied for funding in order to instruct an expert to consider the prison conditions within Peru. It is a country that has not successfully

requested extradition before, so of course the issue was live and there was objective material to suggest that prison conditions fell short. I believe in that case the defence found it difficult to persuade the Legal Aid Agency to grant funding in order for somebody to physically go and look at the prison conditions, because they were of the view that there was objective material available that was not up to date and did not relate to the specific prison, and therefore that it would not be in the public interest to issue the funding. That resulted in delays in the proceedings and adjournment requests until funding was granted to allow an expert to go and visit the facilities where the requested persons would be held if extradited.

The Chairman: The next one was the question about proportionality relating to the possible destination of the requested person.

Edward Grange: If it is taken as a strict interpretation of the proportionality bar and whether it could be taken into account, then obviously it could not, because the proportionality bar considers only three issues: the seriousness of the offence, the likely sentence and whether there are any less draconian measures that could be adopted. Generally, of course, where somebody is expected to be extradited to should be taken into account, because other considerations come into play as to human rights records and whether extradition is likely to be secured by that jurisdiction.

The Chairman: Therefore, you think it is covered?

Edward Grange: I think so, yes

Lord Rowlands: Do you think that with these changes there will be fewer Poles?

Edward Grange: Fewer requests for extradition?

Lord Rowlands: Yes.

Edward Grange: There are certainly requests for extradition from Poland for offences that would fall within the Lord Chief Justice's guidelines as clearly being disproportionate to extradite on, but there are also a lot of requests from Poland for offences of robbery or other serious offences where obviously the proportionality bar would not apply. The problem with the Polish requests is that the majority we see coming through are conviction cases whereby they have been given a suspended sentence and that sentence has later been activated, for no other reason than that they have left the jurisdiction to resettle in the United Kingdom. Then, several years later, the sentence has been activated unbeknown to the person it relates to and then their extradition is sought. That then leads to the next point about the need for a lawyer in the requesting state to perhaps stop the extradition request, so to speak, before it progresses and costs escalate in order to compromise the warrant.

Rebecca Niblock: We advise all our clients to get a lawyer in the requesting state as soon as possible. The most effective way of stopping an extradition is stopping it in the requesting state and it is so effective and it saves cost.

The Chairman: This is the point: the UK Government, I understand, have set their face against extending legal aid into funding this aspect of what we are talking about. Would it be your view that this is likely, if it were to be introduced, to save public money in the round?

Rebecca Niblock: Yes. The directive on legal aid suggests that it should be the issuing Member State that should provide legal aid for requested persons. That is why it is such a terrible tragedy that we have opted out of that.

The Chairman: It would follow, would it not, therefore, that presumably the Polish Government would be the principal bill picker-upper of this?

Rebecca Niblock: Exactly.

Edward Grange: The examples that we could give are of two different scenarios. There is an accusation warrant where somebody is accused. If the requested person had a lawyer, they could get in touch with the court or the prosecutor directly. We cannot do that, but they can and we have seen scenarios whereby they have made communication with the court and said, "Look, we are living a life in the United Kingdom. We are willing to come back, but we do not necessarily want to come back in handcuffs and in custody. If we were to put a bail security with the court and the court set a date for us to return to Poland,"—giving the example—"then we are willing to come of our own volition back to Poland." Sometimes the Polish courts will say, "Fine. We will then withdraw the domestic warrant. We will withdraw the European Arrest Warrant. Please come to court on this date," and the requested person will do that. That stops the extradition request.

In the conviction scenario, as I said, one of the reasons why a suspended sentence may have been activated is because they have not kept in touch with the court or their probation officer. If they had a lawyer to suddenly say to the probation officer, "Look, we have not been in touch with you, but here is evidence of the blameless life they are living in the United Kingdom: they are paying their taxes; they have a young family there," very often the courts will then re-suspend the sentence once they have possession of the up-to-date facts, and that very often leads to a request being withdrawn.

One example I can give is that of a client who could not afford, in the extradition proceedings, to pay for a lawyer in Poland. He was working, so he had to save in order to fund a lawyer in Poland, and the reason his sentence had been activated was because he had failed to pay damages—a very limited amount of no more than £1,000. He had gone through the extradition process. His Article 8 rights had been considered and rejected by the magistrates at Westminster Magistrates' Court and on appeal, and on the day that he was to

be extradited, which was two weeks ago to the day, the Polish courts, having received the damages money and confirmation from the victim that they had received that, decided to re-suspend the sentence and withdraw the domestic warrant. Luckily, in that case, communication was made to the National Crime Agency to say, "Do not put him on the plane this afternoon," and he was not extradited. However, had that process started at the beginning as opposed to six months later, we would not have had the need to go through the whole procedure.

The Chairman: Therefore, it is your view that you could save a lot of money and trouble and energy and unhappiness and potential disturbance to people by the European system working more effectively within itself across the entire area of jurisdiction of the European common security area or whatever it is now called. Is that right?

Rebecca Niblock: Yes, that is right, and that also goes back to the evidence of one of your other witnesses. I am afraid I cannot remember who it was who talked about the European supervision order and Eurobail and so on being very good alternatives. Instead, we are now in the position where the EAW is the first resort rather than the last resort.

Q105 Lord Hussain: If an accused or an important witness resides in a territory where the UK Government do not have any agreement for them to be extradited, what do you do with those? How do you bring them to the court?

Rebecca Niblock: There will often be ad hoc arrangements made between the states.

Lord Hussain: Even if the territory is not recognised?

Edward Grange: Yes. For example, at the moment there is a case going through the courts involving an extradition request from Rwanda. They had made a previous request for extradition. There was no extradition treaty, at the time, with Rwanda, so ad hoc arrangements were set up specific to that case for those requested persons. Therefore, just

because there is not a treaty it does not mean that extradition cannot be secured if special arrangements are entered into between the two Governments of the countries.

The Chairman: Thank you very much. Unless there is anything else you think it is important that we hear from you, I will say we are very grateful. Thank you both.

Crown Prosecution Service – Supplementary written evidence (EXL0075)

CPS INTERNAL PROCESS FOR DEALING WITH FORUM BAR CASES

1. This process is to assist extradition and domestic prosecutors who have cause to apply the Guidelines on the Handling of Cases where the Jurisdiction to Prosecute is shared with Prosecuting Authorities Overseas ("the Guidelines") or where he/she is dealing with a case where there appears to be a forum issue.

2. The extradition and domestic units within CPS will share information unless it is inappropriate or unlawful to do so in accordance with general principles.

3. The Extradition Unit will inform requesting states or judicial authorities generally or on a case by case basis that this information will be shared in cases where forum may be an issue.

4. Decisions on forum will be taken by a domestic prosecutor as the Extradition Unit acts for the foreign state making the extradition request.

5. The Extradition Unit will provide advice on how forum might apply in extradition if requested by a domestic prosecutor.

6. Where a domestic prosecutor is involved in a case where the guidelines are engaged, the case must be registered on CMS and flagged as a concurrent jurisdiction case so that it is easily traceable. The prosecutor will also make a record of the decision using the template provided (see Annex B). This record should include a note of the extent to which the prosecutor has been able to consider the specified matters set out in the forum bar and any relevant information regarding each. Where public interest or other considerations determine that information cannot be shared publically it should be recorded elsewhere.

7. Four separate scenarios may be envisaged.

No domestic prosecutor is or has been engaged

8. Where it is obvious from the extradition request that forum will be in issue the Extradition Unit lawyer will check CMS to see if a domestic case has been registered and also contact directly the relevant Central Casework Division and Complex Casework Units to find out if a domestic prosecutor is or has been engaged in the case.

9. If it appears that no prosecutor is or has been seized of the case but it appears to be a case where one might expect contact under the guidelines, the Deputy Head of Division (Extradition) will notify the Head of Special Crime and Counter Terrorism Division to decide if any further action is required.

10. If forum is raised and there has been no domestic involvement, the Extradition Unit lawyer will inform the judge. The Extradition Unit lawyer will assist the court with the specified matters as far as is possible. If further information is requested by the court, a domestic prosecutor may need to confirm that the CPS is not engaged domestically and that they have no evidence to consider.

A decision to charge in this jurisdiction

11. Where a domestic prosecutor has decided that it is appropriate to charge the requested person with corresponding offences, Section 8A or 76A of the Act applies and the extradition proceedings must be adjourned.

A decision that England and Wales is not the most appropriate jurisdiction

12. Where a prosecutor has engaged the guidelines without making a formal Code Test decision and it has been decided that a prosecution should be conducted elsewhere he/she will inform the Extradition Unit and provide the template containing a record of that decision. If forum is raised in the subsequent

extradition, the Extradition Unit lawyer will inform the court of the domestic prosecutor's decision and will assist on the specified matters using the template and any relevant material from the extradition papers.

13. In the event that the extradition court needs further information, the Extradition Unit lawyer will consider whether it is necessary to seek an adjournment so that the prosecutor who made the relevant decision may be made a party to the proceedings.

A decision to issue a prosecutor's certificate

14. A prosecutor can issue a certificate where he/she has made a decision whether or not to prosecute on the basis of the Full Code Test or where it is appropriate to do so because of concerns about the disclosure of sensitive material. A prosecutor considering the issuance of a certificate must consider in doing so, his/her ability to protect that material during any appeal proceedings under s19E.

15. If it appears to the prosecutor with conduct of the domestic prosecution that it may be appropriate to issue a certificate, he/she will draft a briefing note outlining why a certificate is appropriate together with a draft certificate using the template attached (see Annex C). This should be sent in the first instance, via the CCP, to the Head of Special Crime and Counter Terrorism Division (SCCTD) (or in her absence the Head of Specialist Fraud Division (SFD)). The prosecutor's certificate will be considered, authorised and given under the signature of the Head of SCCTD, the Head of SFD or the Principal Legal Advisor in consultation with the Director of Public Prosecutions.

16. If authorisation is given, the prosecutor will provide the signed certificate to the Extradition Unit lawyer to enable him/her to provide a copy to the court and to serve it on other parties as appropriate.

17. Any appeal against a 'relevant certification decision' should be conducted by the domestic unit which is dealing or has been dealing with the case.

Role of the Extradition Unit lawyer in the forum hearing

18. Where the fugitive provides sufficient information for the court to determine that the forum bar is engaged, the court may require the Extradition Unit lawyer to provide further information to assist in deciding whether a substantial measure of the relevant activity occurred within the United Kingdom and/or information about any of the specified matters listed at ss (3). If the Extradition Unit lawyer is unable to assist from the information contained in the extradition request or the template provided by a domestic prosecutor (if engaged), further enquiries should be made of the requesting state or the relevant prosecutor.

19. Where appeal proceedings are being conducted by a prosecutor following the issuing of a prosecutor's certificate, the Extradition Unit lawyer should assist by providing the records of any extradition hearing and any relevant advice about law and procedure.

European Arrest Warrant Statistics 2009-2014[i]

The NCA is the Central Authority for the EAW and collates the official statistics for all export (Part 1) and import (Part 3) cases[55].

Export EAW cases

The NCA is responsible for certifying requests under section 2 of the Extradition Act 2003. Once an EAW is certified the requested person can be arrested in this jurisdiction. The CPS has conduct of extradition proceedings from the point that a requested person is produced at court following an arrest and up until his/her extradition is ordered or discharged. NCA have responsibility for arranging the surrender of those whose extradition is ordered.

Part 1 EAWs - Fiscal Year	2009-10	2010-11	2011-12	2012-13	2013-14	Total
Requests	3,870	5,770	5,641	6,263	7,881	**29,425**
Arrests	1,057	1,295	1,394	1,438	1,660	**6,844**
Surrenders	772	1,100	1,076	1,057	1,067	**5,072**

[55] The latest figures were published on 10 October 2014 and can be found at http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics

- Poland accounts for about 60% of EAW proceedings per year (909 out of 1,660 in 2013-14). The next highest figures are for Romania and Lithuania, at about 8% each (119 and 137 respectively).

- Fewer than 5% of EAW arrests and surrenders are of UK nationals.

- Whilst the number of arrests has been increasing each year, the number of surrenders has remained steady for the last 3 years, indicating that the courts are discharging more defendants each year. The NCA figures support the anecdotal evidence that since 2012 the courts have been more willing to discharge warrants for older and less serious offences under Article 8 ECHR - the right to a private and family life[56].

- CPS does not record routinely the reason why someone is discharged. However, a review of appeals between January-September 2014 shows that in the 130 cases in which the requested person argued that extradition was not compatible with Article 8, 26 were successful. This is a success rate of 20%, which contrasts with the 6% success rate on extradition appeals generally referred to the in Scott Baker Review. This doesn't mean necessarily that courts are applying a less strict test, but could be that the test is being met more frequently where offences are older and less serious.

Import EAW cases

The CPS issues most of the EAWs in the UK, alongside Scottish and Northern Irish prosecutors, SFO and other government departments. NCA figures are for the UK as a whole, but CPS accounts for about 90%.

Part 3 EAWs - Fiscal Year	2009-10	2010-11	2011-12	2012-13	2013-14	**Total**
Requests	238	241	252	244	230	**1,205**
Arrests	142	150	148	133	170	**743**
Surrenders	110	130	144	123	140	**647**

- EAWs are issued to all participating countries rather than targetted at a particular jurisdiction. The highest number of arrests on UK EAWs take place in Spain (26%), Republic of Ireland (19%) and the Netherlands (15%).

- Requests are issued for a very wide range of offences, the most common being drug trafficking (18%), fraud (14%) child sex offences (11%), murder (8%) rape (7%) and GBH (6%). This is consistent with the CPS applying a proportionality test before issuing an EAW.

- Over half (55%) of all requests are for British citizens.

16 October 2014

[56] See, for example paragraph 20 of *Matuszewski v Regional Court in Radom Poland* [2014] EWHC 357 (Admin)

Crown Prosecution Service – Further supplementary written evidence (EXL0092)

Views of the Crown Prosecution Service on the possible introduction of Closed Material Procedure in Extradition Proceedings

1. We note that the House of Lords Select Committee on Extradition Law is currently investigating the law and practice relating to extradition in the United Kingdom. As part of that investigation it is considering the implications of the decision of the Supreme Court in *VB and Others v Westminster Magistrates' Court and Others* [2014] UKSC 59 ("VB") and a possible change in the law to allow the use in extradition hearings of the so-called Closed Material Procedure" ("CMP") currently provided for only in proceedings before the Special Immigration Appeals Commission.

2. As a preliminary to that consideration the Committee is also interested in exploring whether some statutory change to the role of the CPS in extradition proceedings would enable the appropriate judge to make an absolute and irreversible ex parte order and thus obviate the need for CMP and the appointment of a special advocate. The Committee has sought the views of the CPS on these two linked proposals.

3. For the purposes of our response we summarise the latter enquiry as follows:

   Should the role of the CPS in extradition proceedings be amended by statute to provide for a "Chinese Wall" between the CPS and the requesting state to allow a requested person to use sensitive material in the proceedings without risk of disclosure to the requesting state? Would such a separation be workable in practice?

4. The CPS role in extradition proceedings is set out in the broad terms of section 3(2) of the Prosecution of Offences Act 1985 as follows:

   (ea) to have the conduct of any extradition proceedings;

   (eb) to give, to such extent as he considers appropriate, and to such persons as he considers appropriate, advice on any matters relating to extradition proceedings or proposed extradition proceedings;

5. This statutory definition presently says nothing about the nature of the relationship between the CPS and the requesting state. Case law, culminating in *R (Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72, [2008] QB 836, suggests that in extradition proceedings under the 2003 Act the CPS acts on behalf of the requesting state or authority and it is generally accepted in the cases that the relationship is akin to that of "a lawyer acting on behalf of a foreign client" (see *VB and Others v The Government of Rwanda* [2014] EWHC 889 (Admin) *per* Mitting J. at paragraph 20.

6. To that extent the CPS is in a similar position to a private firm of lawyers which might also be instructed to act on behalf of a foreign state in extradition proceedings (see

section 2A of the Prosecution of Offences Act 1985). On this basis it seems to us that it would be difficult to legislate in isolation for a change that allowed the CPS to withhold material which had been disclosed to it from those on whose behalf it acted in a (quasi-) lawyer-client relationship. This runs contrary to the normal duty of disclosure to the client of information of which a lawyer is aware which is material to their client's matter. To be coherent and effective any statutory derogation from that duty would also have to extend to *any* lawyer who might potentially be instructed on behalf of a foreign state. Therefore, the necessary legislative change would not be confined to the relevant section of the Prosecution of Offences Act and would almost certainly require consultation with, and the agreement of, the wider legal profession.

7. Further, any attempt to define more precisely in statute one particular aspect of the role of the CPS in extradition may create a need to deal with other aspects of the role as well, for example, the extent to which our disclosure obligations and duty of candour and good faith had been altered by this statutory exception.

8. Conflicts of interest between the duties of confidentiality and disclosure can be dealt with in practical ways particularly in large organisations and the idea of erecting "Chinese walls" within the CPS is not unknown (see e.g. *The Queen (on the application of Ahsan) v the Director of Public Prosecutions* [2008] EWHC 666 (Admin) [42]). However, in our view, such arrangements would be cumbersome to establish and to maintain and we are not persuaded that they would necessarily rule out the risk of what Helen Malcolm Q.C. in her evidence to the Committee called "inadvertent disclosure". Nor is it apparent that the prospect of disclosing sensitive information to a lawyer employed by the CPS, albeit in a different part of the Service, would adequately address the concerns that a requested person might have about that information being transmitted to the foreign state.

9. Moreover, the type of conditional disclosure which is in prospect and for which statutory authority exists within the immigration system may be signally inappropriate in the extradition context. The reasons why this may be so were set out cogently in the speech of Lord Mance in VB at paragraph 37. Distinguishing *W (Algeria) v Secretary of State for the Home Department* [2012] UKSC 8, Lord Mance noted that the foreign state to which deportation was contemplated was not a party to the immigration proceedings. Nor did the Secretary of State against whom the non-disclosure order was made represent in any fashion the foreign state. There was, simply, no client relationship against which the necessity of a non-disclosure order had to be balanced. In contrast, extradition proceedings took place on an *inter partes* basis between the requested person and the foreign state with the CPS merely representing the legal interests of that state. Given this significant difference, the sort of order available to an immigration judge may not be readily transportable to the extradition process.

10. For this combination of reasons we would answer negatively the question which we posed in the introduction. We do not believe that the role of the CPS in extradition proceedings should be amended to provide for a "Chinese Wall" between the CPS and the requesting state nor do we see that such a change would produce a workable system that would address the particular the tension between preserving the general principle of open justice and safeguarding individuals from potential abuse if extradited.

11. We do not think we can assist the Committee with the wider question of whether some sort of CMP within the extradition process is necessitated by the interests of justice and, in particular, fairness to requested persons. It is not possible to quantify how often a situation similar to that in VB will arise but experience suggests that such cases will be exceptional. We recognise, of course, that the denial of a fair hearing to any individual

raises fundamental principles of the rule of law and is not to be countenanced lightly. Against this must be set the undoubted public interest in the maintenance a responsive and effective extradition system which enables the United Kingdom to comply with its international obligations to assist prosecuting crime.

12. Any recourse to CMP will inevitably introduce further delay and complexity into a system that is often criticised for being too cumbersome already. Therefore, in our view, if such a procedure is to be adopted by a change in the legislation, it is preferable, on balance, for it to be integrated, as far as possible, into the extradition process itself and to be restricted on the face of the statutory provision to exceptional cases only. Making CMP available to the extradition judge will remove the incentive to commence satellite immigration proceedings with the extra delays inherent in that process and remove the unfairness that results from that avenue being unavailable to British citizens. We should make it clear, however, that we remain essentially neutral on the question of whether any such extension of CMP is necessary.

15 February 2015

Crown Solicitor's Office – Written evidence (EXL0034)

HOUSE OF LORDS

SELECT COMMITTEE ON EXTRADITION LAW

1. Introduction

1.1 This document reflects the views of the Crown Solicitor's Office in Northern Ireland ("CSO") consisting first of some general observations and then specifically on the questions and areas which the Select Committee on Extradition Law have highlighted.

1.2 This is based on our experience of working the extradition arrangements in Northern Ireland.

2. Background

2.1 Extradition has not been devolved to the Northern Ireland Executive thus the policy, legislation and practice is UK wide and the Secretary of State involved in Northern Ireland cases is the Home Secretary. It had, until approximately 7 years ago, been the Secretary of State for Northern Ireland.

2.2 CSO acts on behalf of foreign judicial authorities in proceedings under Part 1 of the Extradition Act 2003 ("the 2003 Act") and for foreign states under Part 2. This is provided for by Section 192 of the 2003 Act.

2.3 It has only been since the commencement of the 2003 Act - that is since 1 January 2004 - that the CSO has acted for foreign states (ie other than the Republic of Ireland under the Backing of Warrants legislation) seeking fugitives in Northern Ireland as prior to that any fugitives found in Northern Ireland were arrested and taken to Bow Street Magistrates' Court and dealt with there.

2.4 The main bulk of cases before January 2004 involved the extradition of fugitives between Northern Ireland and the Republic of Ireland under the Backing of Warrants (Republic of Ireland) Act 1965.

2.5 As with the other parts of the UK, the Northern Ireland authorities have witnessed a substantial increase in the number of extradition cases.

3. Operation of the EAW Scheme

3.1 The 2003 Act represents the acceptance of the extradition scheme in the Framework Decision (13 June 2002) of the Council of the European Union, and affords protection to requested persons within the jurisdiction of the United Kingdom.

3.2 The Framework Decision makes provision for the "European Arrest Warrant" ("the EAW"). This is described in the sixth recital as "the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the "cornerstone" of judicial co-operation".

3.3 The eighth recital focuses on the judicial authority of the requested Member State in these terms:

> "Decisions on the execution of the European Arrest Warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender."

Thus the judicial process is a central element of the scheme established for the surrender of persons by one Member State to another.

3.4 The Framework Decision has to be considered in conjunction with the 2003 Act, which is the domestic measure of transposition and which comprehensively reformed the law relating to extradition. The adoption of the Framework Decision, is widely acknowledged as creating "fast track" extradition (more correctly surrender) arrangements amongst the EU Member States.

3.5 The themes of simplified procedures and expedition recur throughout the 2003 Act: for example, sections 4-6. There is an array of provisions arranged under the general heading "Bars to Extradition" and these include matters such as the rule against double jeopardy, so-called "extraneous considerations" and the passage of time. The judge must decide whether the extradition of the requested person is precluded by any of the specified prohibitions. Further, by virtue of Section 21, the court is obliged to consider whether the extradition of the requested person would be compatible with the Convention rights given effect by the Human Rights Act 1998.

3.6 In Northern Ireland, before the 2003 Act which commenced on 1 January 2004, we had most experience of the backing of warrants system which operated between the Republic of Ireland and the UK. Leaving aside the difficult years involving terrorist offences and the political offence defence which troubled both jurisdictions, the backing of warrants system did work very well for other non-terrorist, non-political cases. In essence, the warrants issued in either jurisdiction were recognised in the other jurisdiction and were endorsed on the back to facilitate execution of the warrant in the respective jurisdiction. In Northern Ireland we received the warrants from the Republic of Ireland and made application before a Justice of the Peace to have them backed for execution without anything else being required. In the Republic of Ireland, they initially started from this position of warrant acceptance but, over the years, for various reasons, they added to the requirements and eventually we had to send our warrants together with statements of fact and law which were sent to the Irish Attorney General's Office together with a certificate stating that if the person were returned they would be prosecuted for the offences

set out in the warrants. These were incremental add ons to the backing of warrants system.

3.7 Thus, in a simplified way, the EAW idea had, through the backing of warrants, been operative and effective.

3.8 Within the EAW scheme the warrant recognition concept was widened in that the EAW became the warrant recognised throughout Member States and because it is in a format and contains common information it is accepted and acted upon and in our view the scheme is in theory (and practice) effective and represents a large measure of cross-border co-operation amongst the signatories.

CSO Response to the Select Committee's Questions

4. Does the UK's extradition law provide just outcomes?

If by just is meant that fugitives, whether convicted or accused, are returned to the requesting states to either serve out sentences or to be tried for alleged offences then yes, in our experience it does. However, like all legal regimes there can be exceptions to this in terms of delays, especially with pre-trial detention, and in terms of the often long drawn out extradition processes.

It is not our experience that justice is not generally served by the process.

4.1 Is the UK's extradition law too complex? If so, what is the impact of this complexity on those whose extradition is sought?

Extradition Law generally is complex. It tends to be the product of negotiated compromised agreement between Sovereign States each with their own laws, procedures and criminal justice systems. The agreed product is usually a Framework Decision, Convention or Treaty. We are not sure that it can be otherwise. Certainly the EAW system has at its core the idea of mutual recognition of judicial decisions taken by judicial authorities in Member States but, built around this, in each Member State they tend to have their own additional requirements. Some Member States are quite purist and require only what the Framework Decision sets out; others, sometimes for national Constitutional reasons, require more than this.

The impact of complexity is quite hard to identify. From our experience we would not conclude that the complexity has been to the detriment of fugitives. To the contrary, the complexity has tended to offer layer upon layer of safeguards, bars, and interplay with human rights none of which, we consider, has lessened the safeguards or rights of a fugitive.

5. Is extradition law fit for purpose in an era of increasingly multi-jurisdictional crime?

It is complex and involved but it is difficult to envisage a system of less complexity which would readily serve and follow the remedies and retribution required following multi-jurisdictional crime without huge agreement amongst States.

6. To what extent is extradition used as a first resort when prosecuting a crime committed in another jurisdiction? Should greater use be made of other remedies?

Extradition is not, we consider, always looked at as a first resort. Its cost, complexity and possible length of proceedings can make it unattractive but, very often, there are no other options.

As regards other remedies - it is difficult to envisage what these might be. This would require a case by case analysis to identify what, if any, other remedies might be possible.

<u>European Arrest Warrant</u>

7. On balance, has the European Arrest Warrant (EAW) improved extradition arrangements between EU Member States?

On balance yes.

7.1 How should the wording or implementation of the EAW be reformed?

There should perhaps be within the Framework Decision some sort of proportionality test which would limit the types of offences where a European Arrest Warrant can be used. Some Member States issue EAWs for all offences no matter how trivial.

7.2 Are standards of justice across the EU similar enough to make the EAW an effective and just process for extradition?

We have now had experience of a reasonable number of Member States justice systems at least to the extent of receiving or sending EAWs, exploring aspects of their criminal justice systems such as trial rights, conviction in absentia, prison regimes and conditions and sometimes hospital and medical facilities but even that can be superficial. In effect Member States have to rely on the comity of nations concept and the fact of membership of the EU, given the rigorous basis used for achieving and retaining that membership.

7.3 How will post-Lisbon Treaty arrangements change the EAW scheme once the UK opts back in to it?

We are not sufficiently aware of any changes to comment.

<u>Prima Facie Case</u>

8. In circumstances where a prima facie case is not required, do existing statutory bars (the human rights bar, for instance) provide sufficient protection for requested people?

It would be difficult to answer a fulsome "yes" to this. In some countries (for example, the USA) where there is a Constitution which provides a guarantee of a fair trial it is easier to be satisfied about sufficient protection but in other countries, however, it may not. So far as Member States operating the Framework Decision are concerned reliance, through the scheme of the Framework Decision has to be placed on the Issuing Judicial Authorities to the extent that s/he is satisfied that it is appropriate (in terms of information and evidence) to issue an EAW.

8.1 Are there territories that ought to be designated as not requiring a prima facie case to be made before extradition? What rationale should govern such designation? What parliamentary oversight of such designation ought there to be?

We are not sufficiently aware of the regimes and procedures in different territories to comment. This would require input from the Foreign and Commonwealth Office and/or Home Office.

<u>UK/US Extradition</u>

9. Are the UK's extradition arrangements with the US comparable to other territories that do not need to show a prima facie case? If so, should the US nonetheless be required to provide a prima facie case, and why?

In Northern Ireland we have had very few extraditions to the US from Northern Ireland hence it is difficult for us to comment authoritatively on the content of such requests. However, we have had reasonable experience of a number of requests sent from Northern Ireland to the US and the extensive work that was required to set out a probable cause case to meet their requirements. It would appear that there is an imbalance in terms of effort and content and it is perhaps difficult to understand why that should be. It would appear more equitable, and preferable, that the UK and the US mirror the requirements sought by each. However, we fully recognise the government to government issues which have to be considered here and would not seek to put our views any stronger than above.

9.1 Sir Scott Baker's 2011 'Review of the United Kingdom's Extradition Arrangements', among other reviews, concluded that the evidentiary requirements in the UK-US Treaty were broadly the same. However, are there other factors which support the argument that the UK's extradition arrangements with the US are unbalanced?

See as in answer to 9. above.

<u>Political and Policy Implications of Extradition</u>

10. What effect has the removal of the Home Secretary's role in many aspects of the extradition process had on extradition from the UK?

It has tended to de-politicise decisions and shorten procedures; this seems entirely appropriate in the EAW context where Member States have themselves agreed that mutual recognition of judicial decisions is the centre piece and that in effect means that no political input is required.

10.1 To what extent is it beneficial to have a political actor in the extradition process, in order to take account of any diplomatic consequences of judicial decisions?

To have a political actor, as is described, seems more appropriate where the extradition arrangements are Treaty based having been negotiated government to government and thus with more scope (and perhaps necessity) for diplomatic, political type considerations which are not normally the domain of the courts.

11. To what extent are decisions of where to prosecute certain crimes and whether to extradite influenced by broader political, diplomatic or security considerations?

We have no experience or knowledge of any of the listed factors influencing where to prosecute and whether to extradite.

<u>Human Rights Bar and Assurances</u>

12. Is the human rights bar as worded in the Extradition Act 2003, and as implemented by the courts, sufficient to protect requested people's human rights?

In our experience we consider that it is.

13. Is the practice of accepting assurances from requesting states to offset human rights concerns sufficiently robust to ensure that requested people's rights are protected?

In our experience, generally yes.

13.1 What factors should the courts take into account when considering assurances? Do these factors receive adequate consideration at the moment?

Factors should (and do in our experience) include consideration of the source of the assurance, its likely reliability and its purported efficacy to address the particular concerns at issue.

13.2 To what extent is the implementation of assurances monitored? Who is or should be responsible for such monitoring? What actions should be taken in cases where assurances are not honoured?

In our experience we are not aware of any formal monitoring but where the requesting State is one in which the United Kingdom has for many years reposed the confidence not only of general good relations, but also of perhaps successive bilateral treaties consistently adhered to the honouring of any such assurances could reasonably be accepted/expected subject to strong evidence which might displace that good faith. However, those who have been the subject of extradition may (and some do) report back from the country to which they have been extradited and that tends to show if the assurance is (or has been) adhered to. The major sanction for not honouring an assurance must be the refusal to extradite other fugitives. In other words, ceasing extradition to that State where similar issues pertain or apply in other cases.

Other Bars to Extradition

14. What will be the impact of the forum bar brought into force under the Crime and Courts Act 2013?

We would not expect the forum bar to be engaged in many cases. But where it is engaged it will serve to focus prosecutorial gaze on the presence of evidence in this jurisdiction and the convenience (or otherwise) of proceeding here in the UK.

15. What will be the impact of the proportionality bar in relation to European Arrest Warrant applications recently brought into force under the Anti-social Behaviour, Crime and Policing Act 2014?

We consider that it is too early to say. But it has the potential, we consider, to address the possible unfairness in cases where, especially in EAW cases, the offence is at the very lowest end of criminality.

Right to Appeal and Legal Aid

16. To what extent have changes to the availability of legal aid affected extradition practice, and the provision of specialist legal advice to requested persons?

We are not aware that there has been any particular effect.

16.1 What has been the impact of the removal of the automatic right to appeal extradition?

It should serve to filter out the hopeless cases where an appeal is merely used to delay further the carrying out of the extradition.

Devolution

17. Are the devolution settlements in Scotland and Northern Ireland fit for purpose in this area of law?

In Northern Ireland we consider that they are.

17.1 How might further devolution or Scottish independence affect extradition law and practice?

We are not best placed to comment on this.

11 September 2014

Clair Dobbin, Jeremy Johnson QC, Raza Husain QC and Helen Malcolm QC – Oral evidence (QQ 230-237)

Evidence Session No. 14 *Heard in Public* *Questions 230 - 237*

WEDNESDAY 17 DECEMBER 2014

10.10 am

Witnesses: Jeremy Johnson QC, Raza Husain QC, Clair Dobbin

and Helen Malcolm QC

Members present

Lord Inglewood (Chairman)
Lord Brown of Eaton-under-Heywood
Lord Empey
Baroness Hamwee
Lord Henley
Baroness Jay of Paddington
Lord Jones
Lord Mackay of Drumadoon
Lord Rowlands

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Examination of Witnesses

Clair Dobbin, Barrister, 3 Raymond Buildings, **Raza Husain QC**, Barrister, Matrix Chambers, **Jeremy Johnson QC**, Barrister, 5 Essex Court, and **Helen Malcolm QC**, Barrister, 3 Raymond Buildings

Q230 The Chairman: I extend a very warm welcome to our four barrister witnesses today, who are, in the order on my piece of paper that is otherwise of no significance, Clair Dobbin, Raza Husain, Jeremy Johnson and Helen Malcolm. Thank you for coming along and talking to us. As I think I explained outside, we will deal with this as a panel, so anybody who wants to say anything in response to any question, please do so. I will very much leave you to decide between you how you answer the questions which the Committee will put. Please feel free

to range widely in your responses. If at any time there is something you think bears on what is being said that is not quite being covered, please feel free to tell us. If you would, please first introduce yourselves, in order, for the purposes of the record. We are being recorded. If anybody has any opening statement of any kind that they would like to make, please feel free to do so, otherwise we will just move straight into the questions. Perhaps we can start on the left hand side as we look, with Jeremy Johnson. Tell us who you are.

Jeremy Johnson QC: Good morning. My name is Jeremy Johnson. I am a barrister in independent practice at 5 Essex Court, specialising in public law and human rights. As part of that, I am on the panel of special advocates and occasionally act as a special advocate.

Raza Husain QC: Good morning. My name is Raza Husain. I am a barrister practising from Matrix Chambers. My expertise is in refugee and immigration law, as well as public and human rights law. I act for the UNHCR.

Clair Dobbin: Good morning, my name is Clair Dobbin. I am a barrister at 3 Raymond Buildings. I am a member of the Attorney-General's panel of counsel. I have a specialisation in public law and extradition law in particular.

Helen Malcolm QC: I am Helen Malcolm QC and am at the same chambers, 3 Raymond Buildings. I also have a specialisation in extradition law and am a special advocate for the purposes of SIAC. I am also a special independent counsel, doing a similar type of work domestically where there is sensitive material.

Q231 The Chairman: Thank you. Would anyone like to make an opening statement? I will open the batting by asking you to what extent you feel there is an issue, when someone is facing extradition and seeking asylum in this country, that material relating to the application for asylum is being used in the extradition hearing. Who would like to start?

Helen Malcolm QC: I am going to duck everything about immigration law, about which I know almost nothing I am afraid, and stick to extradition.

Raza Husain QC: Can I have a go? I have been involved in two cases over the last six months where there has been an issue, and material relevant to the extraneous considerations bar or the human rights bar could not be employed fully owing to fear of reprisals against the witness. In a Russian case, the Secretary of State granted refugee status in the face of an extradition request. Indeed, the request supported the refugee claim, because the claim was that the prosecution and the request were politically motivated. That claim was accepted by the Secretary of State. The other case is pending. In it, efforts are being made to see whether the very high-level witnesses—former prosecutors and former high-ranking members of the Government—who are prepared to give evidence in confidential and closed asylum proceedings would be prepared to do so in open extradition proceedings.

Lord Brown of Eaton-under-Heywood: Which country?

Raza Husain QC: The Czech Republic.

The Chairman: From what you have said, it sounds as if the evidence relating to the asylum case seems to press the buttons of the bars in the process.

Raza Husain QC: Yes. There is obviously a substantial overlap between the extraneous considerations bar and the definition of a refugee under Article 1 of the refugee convention. The bar arises when the request is in fact made for the purpose of prosecuting, inter alia, on account of political opinion or when the individual's position would otherwise be prejudiced for particular reasons that find a mirror in the refugee convention. It is the reasons that find a mirror, although the standard under the refugee convention is different; it is persecution, as the Committee will well know. Obviously, the human rights bar will block extradition, and will block removal pursuant to immigration powers as well, so there is an overlap but also a very important difference. One of the questions concerns the VB decision, which touches on asylum confidentiality, which is a big and very important difference between the two

processes. At some point, if the Committee would find it useful, I would want to say something about that, because the majority appear to have misunderstood some features of asylum confidentiality.

The Chairman: Please do. One general thing is that you flatter us by saying that we have full knowledge and understanding. Please assume that we are sensible, intelligent and well informed, but at the same time keep it as simple as you can. Please explain everything. It is not going to do us any good if we are under any misapprehension about what is being said.

Raza Husain QC: Yes, of course Lord Chairman.

Clair Dobbin: Lord Chairman, can I support what Mr Husain said? There are a number of cases in which it has been publicly reported that during extradition proceedings or close in time to them, an individual has applied for asylum. I can give you one example of a case in which, during the currency of the extradition proceedings, an individual asked for them to be adjourned in order to pursue an appeal in front of SIAC for the very reason that he wanted to be able to rely on anonymous witnesses and he could not do so in the extradition process. I hope you will understand that I have to be careful and can only refer to those cases that have been reported publicly. However, you will probably be aware that Akhmed Zakayev was granted asylum in his case, and I understand that that was after the British courts had rejected a Russian extradition request. In the case of Boris Berezovsky, it has been publicly reported that he was subject to an extradition request and then granted asylum in 2003. There is the publicly reported case of Trushin, a Yukos executive who was granted asylum in August 2005. Then in October 2005, a request was made from Russia for his extradition, which was refused. It was expressly said in the report of that case, although I think it is common sense, that the background of the criminal investigation was central to

his being granted asylum. Those cases give you some idea of the close interrelationship in some very sensitive cases between extradition and asylum.

The final example that I can give you is an easier one to talk about, the case of *Khelifa v Algeria*, which was the first ever extradition request that Algeria made to the United Kingdom. It was pursuant to a memorandum of understanding between the United Kingdom and Algeria, so was a specially negotiated extradition request. In that case, it was publicly reported that Khelifa wished to rely on anonymous evidence. He therefore made an application for asylum during the extradition process, and then made an appeal to SIAC so that the anonymous witnesses could be heard. That will give the Committee some idea of the problems this causes, because it took about three years for the proceedings before SIAC to be finally concluded. Ultimately, the appeal was rejected and the extradition proceedings resumed, having been subject to a very considerable period of delay.

The Chairman: Does this happen a lot? Is this a relatively rare phenomenon or is it frequent?

Clair Dobbin: It is certainly not a widespread problem, but I think that there are a minority of cases in which individuals may have elected to pursue immigration applications on the basis that they wanted to rely on evidence that they could not adduce in extradition proceedings.

The Chairman: Is that the sequence normally—extradition looms, then you go for asylum because you think you can draw into the whole thing evidence that you otherwise might not be able to?

Clair Dobbin: There may be individuals who come to the United Kingdom knowing that they are the subject of a criminal investigation that they believe to be politically inspired and who make an application for asylum quickly. There are others who make it during the currency of the extradition proceedings. I do not think there is any set rule or pattern.

Lord Rowlands: Can I check that I have understood you? Are you suggesting that if these proceedings were available in extradition cases, such a case could have carried on as an extradition case?

Clair Dobbin: Yes.

Lord Rowlands: Is that the simple point of this? Do you therefore support the principle of using this procedure for extradition purposes?

Clair Dobbin: I think, as a matter of principle, that there are probably two points. First, if the ability to have a closed procedure is available in immigration, it is difficult as a matter of principle to see why it should not be available in extradition, given that there are common issues to both extradition and asylum.

Lord Brown of Eaton-under-Heywood: The Supreme Court's answer to that one of course is that there is a very important third party involved in extradition, the requesting state, which is the other party to the proceedings. That is not a dimension that exists in ordinary deportation or removal cases.

Clair Dobbin: I suppose the issue is whether that is a principled objection to the idea of having the procedure or a practical objection. Looking at it from simply a humanitarian protection point of view—

Lord Brown of Eaton-under-Heywood: Yes, that was Lord Toulson's view.

Clair Dobbin: —it can be quite difficult. I entirely agree that particular difficulties attach to the extradition context that none the less make this a really vexed issue. The Supreme Court might have gone further in some of its analysis about the difficulties that may be caused, but looking at this entirely as a point of principle I think it is difficult to say that there are differences between extradition and asylum.

Q232 Lord Brown of Eaton-under-Heywood: I would just ask something that relates to one of your earlier answers. To what extent does the *W (Algeria)* case bear on this? Is that a case that now needs to be relied on in this context?

Clair Dobbin: Do you mean in terms of making the same sort of—

Lord Brown of Eaton-under-Heywood: Disclosing something to a Government, under an irrevocable undertaking not further to disclose it to the state to which it is proposed to deport people, in order to take instructions and gain evidence as to how reliable and trustworthy the evidence is.

Clair Dobbin: To take this in stages, I was just going to mention the second point of principle that arises—for one moment having the luxury of not looking at the practical implications. The second point, which was alluded to in the VB decision of the Supreme Court, is that it is obviously not open to someone who has already been granted British citizenship to make an application for asylum. That is the second issue of principle that arises: as things stand, this unequal protection exists.

The Chairman: Can I just stop you there? When you use the word "unequal" protection, is that about the distinction between British citizens and non-British citizens?

Clair Dobbin: Yes, precisely. Some of the Rwandan defendants could have gone down the route of making an application for asylum and relying on evidence that they did not have to produce in the extradition proceedings—not a course that was open to those who had British citizenship. As regards where one goes after that, for all the reasons that Lord Brown alluded to, it is a really difficult issue.

The Chairman: That is why we asked you to come along.

Baroness Jay of Paddington: Let us take what one might describe as a simple extradition case, say with a British citizen, or someone who has residency or whatever it may be, whose extradition the requesting state is asking for. There are concerns about sensitive material,

which may well be political rather than legal. In your experience, what are the proportion of cases in which proceedings in court are inhibited by the fact that there is potentially sensitive information that cannot be used?

Clair Dobbin: It is very difficult to say. I should make it clear that there is often a great deal of sensitivity around the fact that individuals have even applied for asylum. It may not even be clear in the extradition process that that has happened. The defence may be put in the position of asking for a long adjournment to prepare their extradition case, which they can justifiably ask for, but also because they wish to make an asylum application as well. It is very difficult. All I can say is that there have been a significant number of cases where that has been an issue.

Baroness Jay of Paddington: A significant number. Both you and Mr Husain have given interesting individual examples of cases where this has been relevant but, as you said at the beginning, we are talking about a legal or human rights principle, and one that might potentially be altered by statute. One has to have a sense of how really significant it is in terms of the proceedings that you have all dealt with.

Clair Dobbin: I would find it difficult to put a number on it. The best that I could do would be—

Lord Brown of Eaton-under-Heywood: A ballpark figure? A dozen a year?

Clair Dobbin: I am not sure.

Raza Husain QC: Perhaps around that. It is a minority, but not a de minimis minority. There is a concern. There is a problem.

Baroness Jay of Paddington: I think we all understand that it is a problem. It is whether it is a huge problem or something that is an aggravation in a certain number of cases.

Clair Dobbin: It is not a significant number in that sense, in terms of the overall number of extraditions.

The Chairman: It is just significant for the particular individuals involved.

Clair Dobbin: Absolutely.

Raza Husain QC: May I say something just by way of further elaboration of Ms Dobbin's evidence? The fundamental reason why the closed material procedure in VB was rejected was because there was no statutory warrant for it. That is the fundamental difference between the W case, which Lord Brown referred to—

Lord Brown of Eaton-under-Heywood: Well, there were two fundamental differences: that was one but the other was that a third party was involved.

Raza Husain QC: Indeed, but it could be said that there is a sufficient analogy between the W case and the extradition case because both concern coercive removal, consequent upon wrongdoing. It could also be said that the fact that the state is a party makes that case a fortiori—there is an even stronger reason why there should be some protection. One can see why that would not carry the day at common law because the common law protects very strongly the principles of open and transparent justice and fairness. There are very limited exceptions to those principles at common law; they concern child welfare and certain intellectual property proceedings. Lord Brown will remember the Al Rawi case.

That leaves the question of statutory provision at large, and as far as that is concerned it is interesting to note that in VB the majority did find it appropriate to rule that you could have anonymous evidence by analogy with the statute. Often, that anonymised witness evidence will not give the witness sufficient protection, because the importance of their evidence may rely on or concern who they are. But the considerations that animated allowing in

anonymous evidence carry over to controlled closed procedures, with safeguards of the sort which Lord Brown articulated in the W case.

Lord Brown of Eaton-under-Heywood: It is a matter of opinion that there is an overlap in the constitution of the court in those two cases. In VB, nobody from W sat.

Raza Husain QC: Indeed.

Helen Malcolm QC: Lord Chairman, may I make one more point? A lot of these cases proceed upon the basis that the difficulty is of evidence getting back to the requesting state: that is to say, evidence about their internal procedures, their judicial independence or the general fair trial breaches that are a matter of concern. But there are cases in extradition proceedings where a much more individual and domestic concern has caused the parties to want to call anonymous witnesses. An example might be somebody who comes from a small village and wants to say, "I know that my family, which is the only Catholic family in the village, is permanently the butt of false allegations", but I could not call that evidence in an open fashion in this court because information about it will get back. That has nothing to do with the state apparatus but is none the less an extremely important consideration for that defendant.

Then there are cross-over cases. There was a Bulgarian case that achieved a certain notoriety, where it was being said that one particular person was in a position to do great harm, both physical and other harm, to witnesses and to the defendant. It so happened that that person was also a senior member of the criminal justice system, so that just made the matters even worse. Bulgaria, after all, is a member of the European Community and is now an EAW state. Indeed, it was an EAW state by the time of the second application for the return of that particular defendant. The point I am making is that these concerns do not only arise as in the case of Rwanda, where you are making broad allegations about the system of

justice altogether; they can sometimes be enormously particular and domestic, without affecting the state.

The Chairman: Does the suggestion follow from that, given that the requesting state is a party, that even if the understanding of these points gets into the purview of the requesting state, effectively that will lead to damage in the requesting state, albeit that it is not directly a political matter?

Helen Malcolm QC: Yes, either inadvertently or because they simply do not know whether the information is true. They may go back and ask questions of the local mayor—"Is it true about this or that?"—and everyone thinks, "Oh, why are you asking that?", so the damage is done in either case.

Lord Rowlands: But if you do not do that, how do you check the veracity of the evidence?

Helen Malcolm QC: That is always the problem with all closed material procedures. It is a problem within SIAC and in any difficulty. Going back to what someone was saying about points of principle, what we have ended up with in SIAC is, in my view, not a perfect system but the best available option. It is for that reason that I would personally be in favour of extending that into the extradition arena.

The Chairman: Lord Mackay, would you like to come in now? We may have covered quite a lot of this.

Q233 Lord Mackay of Drumadoon: We have covered quite a lot of this, but I think you have been given notice of the questions that you were going to be asked, and I wanted to ask you about question 2. If any one of you wishes to respond, we would be very grateful. To what extent is there an issue of material relating to political persecution or sensitive material being used in an extradition hearing to support a bar to extradition?

The second part of my question is: do problems arise from how the material can be used or from whether the necessary material can be found? We are looking for anything else that

you would wish to say, first, about an issue of material relating to political persecution on the one hand or sensitive material on the other being used in an extradition hearing to support a bar to that extradition. Secondly, on the problems relating to how such material can be used, is that more or less prevalent than the issue of whether the necessary material can be found, about which something has already been said? We are not inviting you to repeat yourselves, but sometimes when you hear a question being asked a second time—

Raza Husain QC: I think problems arise for both reasons. If I can be very quick, it is often difficult to obtain the necessary material because, ex hypothesi, it will often be sensitive so witnesses may be reluctant to come forward and give any kind of statement at all, under whatever conditions. Secondly, if they are prepared to come forward they may often be prepared to do so only under conditions of confidentiality. In the Russian case that I mentioned, the claimant himself was not prepared to give full particulars of his defence to extradition because of fear of reprisals towards his family.

Lord Mackay of Drumadoon: Would I be right in understanding that you are not the only members of your profession who are concerned about these issues and identify with things that may require to be altered?

Raza Husain QC: Certainly. I took the liberty of speaking to a number of practitioners, such as Mr Keith, who I think came to give evidence on a previous occasion, and solicitors such as Mrs Peirce. It is a concern that is shared.

The Chairman: How often do these things crop up in your professional life? Is it the kind of thing that comes in the papers once a week, once a month or just occasionally at an odd time of year? Can you give us a sense of the scale of the thing?

Clair Dobbin: I can say that I have dealt with a handful of cases during my 15 years doing extradition law. I think that other colleagues may have had more experience. I say that

because I most often act for the Secretary of State or prosecute in extradition cases. For that reason, I may come across it less than other colleagues do.

Helen Malcolm QC: I would also say that it is relatively rare, but then nowadays I only get the sensitive cases. I no longer get the ones that I was referring to earlier: for instance, where a particular family may have a particular problem. It is none the less immensely important, from their point of view, but that would probably not involve a Silk and therefore would not come my way. Certainly, the Rwandan case is the starkest example that I have ever dealt with.

Raza Husain QC: I have to say that I have come across it reasonably often in the recent past in the context of eastern Europe and Russia, where there is a practice in some cases—I think the Yukos cases were discussed in October—of politically inspired prosecutions.

The Chairman: As a more general comment, are we talking here about what we might describe as eastern European countries that are using the EAW, or is it essentially outside and in category 2?

Raza Husain QC: It is essentially category 2 but not limited to that. As I said, I have had a couple of cases in the last six months and I am instructed in another two where this may or may not be an issue.

Helen Malcolm QC: One of the things that may underscore this is something that is not really gone into in the questions. There are of course different categories of countries and they are to an extent ranked in relation to the confidence that we repose in their judicial systems. I say "to an extent" carefully, because this is, presumably, largely a Foreign Office decision; there may be all sorts of other reasons. Rwanda is a case where we not only require prima facie evidence but with whom we do not have any official multilateral arrangements. One solution to all this might be to say that we should simply not be in

international treaty relations with countries in which we do not repose enormous confidence. In response to that, I would have to say that it is not necessarily the solution. There are all sorts of difficulties with it. First, it is very difficult to tell at the beginning of the process when you are negotiating a memorandum of understanding to what extent this particular case will cause issues to arise. Secondly, we of course have international treaty obligations under things like the UN convention against corruption, which require us to do everything in our power to assist other countries. It is an issue on which we have different sorts of extradition relations but it is not the full answer. The simple answer might be to say, "We simply won't entertain any extradition requests", but that does not seem to me to solve any of the problems.

The Chairman: It certainly creates other ones.

Helen Malcolm QC: Yes, not least the fact, of course, that extradition is reciprocal.

The Chairman: Exactly.

Helen Malcolm QC: That is another issue. One is always having half an eye on whether we are going to get somebody back who we very much want for trial.

Baroness Jay of Paddington: I have asked my question. It was covered by the previous discussion, I think.

Q234 Lord Empey: I was going to ask you a question about the VB case, which we have obviously covered to a very large extent. But as Lord Mackay hinted, and maybe just to put it on the record, first of all, what will the likely consequences be, and, secondly to what extent do you agree with the Supreme Court's view that to allow closed proceedings in extradition hearings would not be in the interests of open justice? Obviously the case has been discussed around the table quite a bit, but maybe we could just put it formally on the record.

Helen Malcolm QC: I probably have the most immediate information as to the likely consequences, because this has been said in open court and we have gone back to the

magistrates' court and are in the process of hearing further evidence. Indeed, we were due to be hearing further evidence today in it. The answer as to the consequences is that there are witnesses who will give evidence anonymously and there are others who will not give evidence at all. In relation to the latter, the best we are going to get is information from the investigators in Rwanda as to general problems and why some people might not wish to come forward, some of which has already been given and, indeed, is referred to in the judgment.

In relation to whether that decision could have come to a different conclusion, I am not sure that I really ought to comment.

Lord Empey: We are waiting on every word.

Helen Malcolm QC: I am not sure that I can go very much further on that, but that is the consequence of what is actually happening. Some evidence will be put anonymously, but of course if it is a prima facie case and the witness wants to say something along the lines of, "Well, I was there. I could see from my kitchen window and I know perfectly well that X was not involved", for obvious reasons anonymising them does help and they are not going to give that evidence.

The Chairman: We have heard Clair Dobbin on this, but do the other two have any thoughts on this particular point?

Jeremy Johnson QC: Just on the second part of your question whether the use of closed material processes is compatible with open justice, undoubtedly the majority are correct that any closed material process by definition involves a departure from public justice principles. Not only that, but more troubling in some ways is that it involves a significant departure from ordinary norms of natural justice, insofar as a party to the proceedings is not given access to material that is being relied on in the proceedings. That is a fundamental and

inherent feature of closed material processes. The issue is whether that is a price worth paying to cure the difficulty that is demonstrated by that case.

Lord Empey: Where does the balance lie in your opinion?

Jeremy Johnson QC: I am not an extradition lawyer so I do not purport to comment on the overall correctness of the decision, but my personal view is that Lord Toulson identified some pretty powerful factors in favour of departing from ordinary rules of open and natural justice. However, a closed material process involves a very significant departure from those principles. There are often intermediate stages—less draconian measures—that could be adopted to cure the problem in a less draconian way, such as the anonymisation of witnesses or non-disclosure orders imposed on the existing parties to the proceedings. I can certainly see that in principle one could use closed material processes, but I think it is necessary to explore other options.

Lord Empey: It is fair to say that you could anonymise a witness, but that person could still be identifiable to a third-party regime, for instance.

Jeremy Johnson QC: Yes. Inevitably a facts-specific assessment would have to be made, and in some cases anonymisation may be sufficient but in other cases it may be necessary to redact some of the evidence or to have non-disclosure orders or to gist or summarise the evidence in a way that enables the parties to engage in the process while not giving rise to the risks that are feared by full disclosure.

Lord Empey: Would that be a general view on the panel?

Raza Husain QC: I would certainly agree with everything that Mr Johnson said.

Clair Dobbin: I think there are real difficulties that are particular to extradition that mean that real thought would have to be given to a closed material procedure. At the heart of extradition, of course, is the fact that one is dealing with criminal allegations, as in the

Rwanda case. The sorts of allegations that are usually made as regards Part 2 countries are the most grave. There may be a considerable motivating factor in extradition proceedings for individuals to fabricate evidence. It is my experience as someone who acts for requesting states in extradition that there is a particular need to interrogate and test the kind of evidence that is relied upon. So I think there are real issues about closing a requesting state out from being able to test the evidence in the way that it would be tested in conventional proceedings.

Lord Empey: That is the big dilemma, is it not?

Clair Dobbin: Yes.

Lord Brown of Eaton-under-Heywood: Does it follow that you would agree with the majority in VB and Rwanda?

Clair Dobbin: I still accept that there is a need for some sort of accommodation to be found. I certainly agree that it could not be done without legislation.

Lord Brown of Eaton-under-Heywood: No, but would you legislate? As I read the majority judgment—Lord Mance, I think, in paragraph 29—you would not buy it anyway, would you?

Clair Dobbin: I do not know.

Lord Brown of Eaton-under-Heywood: As I read that paragraph, he thought that it really was not a very good idea. It is on page 13 of our printed copy of the judgment. He said, "It is inevitably only speculation that any material which the appellants might adduce in a closed material procedure would be relevant, truthful or persuasive, and the very nature of a closed material procedure would mean that this could not be tested", et cetera, et cetera. "The appellants are inviting the Court to create a further exception to the principle of open inter partes justice, without it being possible to say that this would be necessary or fair".

Baroness Jay of Paddington: I think the difficulty, perhaps for us rather than for you, and practising the law is that we have had enormous legislative struggles, as you will be only too aware, about using closed material proceedings in internal terrorist cases, for example, and changing the law on that has caused huge political and jurisprudential debate, particularly in the House of Lords. What I find difficult is understanding how one could in a sense incorporate a principle that enabled you to do that in extradition in the same way.

Clair Dobbin: I think the fundamental difficulty is that you are shutting out a party to the litigation—

Baroness Jay of Paddington: Exactly.

Clair Dobbin: —in extradition, and that is the thing that has to be put.

Lord Rowlands: Earlier on I got the impression that you two were in favour of having these procedures for extradition. Now you seem to be making a very good case against them.

Clair Dobbin: I understand why there might need to be such a procedure, but equally I understand the very real difficulties that there would be for it. I entirely agree that the issue is how one reconciles those two things.

Lord Rowlands: Are you going to tell us which way you are going to balance this up and which way you are going to fall?

Clair Dobbin: I think there is a difficulty with the status quo as it stands and with the fact that there is this possibility for some defendants in extradition cases to pursue an asylum application and to have protection in that way. I am not sure whether or not that is necessarily good and in the interests of our extradition procedures in general, because of the delay that it causes to the extradition process. There is that issue of unequal protection, where British citizens do not have that route.

Helen Malcolm QC: I would come off the fence a bit more than that and say, in my view, that we do need some sort of procedure.

The Chairman: That means some sort of closed procedure.

Helen Malcolm QC: Yes, some sort of closed procedure.

Baroness Jay of Paddington: Would that be achieved by legislation?

Helen Malcolm QC: Certainly, yes. I think that is clear as a result of the Supreme Court's judgment. We have already gone down this route, certainly in the SIAC proceedings. There, you are balancing national interests against an individual's right to stay in the country and we have fallen on to the side of protecting the national interest perhaps more than the individual's right to put his case. Having been on the receiving end, as an advocate I know that it is quite difficult to do one's job as fully as you would like as a special advocate in the SIAC proceedings. May I raise one small point? There is a suggestion that a special advocate only deals with disclosure, but they do not of course. You deal, in the first place, with questions of disclosure—you try to persuade the Home Secretary to disclose more or to gist or something—but if you fail you remain engaged in the process and then go on to deal with the substantive evidence that is provided, to the limited extent that you are able. You cannot take instructions and you obviously cannot guess or put things that might be completely off the wall for very obvious reasons; you are really limited to testing and probing the evidence and probing inconsistencies between different witnesses. There are difficulties with it but, with good reason it seems to me, we have decided that there should be that statutory process.

In the case of extradition, you are balancing the prosecution of crime—sometimes very serious crime—against an individual's right to a fair trial, which is an equally important balance. I do not see why we should not come down on the side of giving that individual the

possibility of putting as much before the court as he can in the absence of the party that wants him back for a trial. That does not mean to say that the court is going to accept it, but I do not see the difficulty. It seems to me to be an equally important balance, and to shut it out altogether from calling that evidence is very troubling.

That leads on to one other thing, which I think Mr Johnson mentioned, which is the possibility of non-disclosure. I have real difficulties with the idea that you can call the evidence in front of counsel for the requesting state and order that lawyer not to disclose to his own client what has been said. I am not sure that this is a three-party issue, it is very significantly just a two-party question in an extradition. In the old days, prior to the CPS coming into being, you used to have individual sets of solicitors who would be instructed to act for France, Russia, Germany or whoever. Perhaps the CPS is better qualified to talk about this, but the process now is simply that the CPS are the lawyers for the requesting state. I do not see any way in which they can be privy to information without disclosing it on to their client. There are real problems because of inadvertent disclosure. In the case of SIAC, once you are privy to the information you never speak to your client again, except in tiny circumstances relating to purely administrative issues with the leave of the court and usually having written out the question in advance and having shown it to the Secretary of State. In essence, you do not take any further instructions. In an extradition process, you may be privy to information and then have another two or three years' worth of daily or weekly communication with the investigator from the requesting state—who, in the case of Rwanda, is sitting in court every day. He is actually there. The dangers of inadvertent disclosure, quite apart from the matter of principle, would concern me there.

The other matter that matters is that if you constitute the CPS lawyer or counsel as some form of lawyer who is not simply appearing on behalf of a client, you bring back into play all

the issues that are current about European Arrest Warrants and what discretion there is within the CPS to stop a case for reasons of de minimis or forum, or all the other matters that this Committee will be aware of and other Committees next door will be even more aware of that have caused problems for the EAW. The whole point is that the CPS is just the solicitor for the requesting state, so I have problems with non-disclosure orders.

Q235 Lord Brown of Eaton-under-Heywood: So how do you do it? Assuming that you legislate, you cannot legislate to put in place the position we arrived at with *W v Algeria* whereby, if you make a disclosure to Government, the Government are under an irrevocable undertaking not to disclose the information to the state to which they are proposing to return somebody. You cannot do that, so how would you legislate? Would you simply say that there would be a closed proceeding and nobody at all to oppose whatever evidence is then adduced on behalf of the proposed extradite, or would you have a special advocate?

Helen Malcolm QC: The latter.

Lord Brown of Eaton-under-Heywood: You would have a special advocate?

Helen Malcolm QC: Yes. My proposal is that instead of constituting the CPS lawyer as the special advocate on behalf of the requesting state, you have, exactly as in SIAC, a separate special advocate who comes in for that purpose and then plays no further part in the extradition proceedings.

The Chairman: Who places the special advocate? The court?

Helen Malcolm QC: That would depend on exactly how the statutory procedure sets it out. What happens at the moment is that the Treasury Solicitor has a special advocates' department and they are instructed—

Raza Husain QC: I think it is the Solicitor-General who appoints special advocates in SIAC cases.

Lord Henley: Would the other three members of the panel like to comment on Helen Malcolm's views? Would you go down the line of legislation?

Raza Husain QC: I think there is a need for legislation. The precise contours of that are difficult, and I can certainly see the force in Ms Malcolm's observations. As to why I think there is a need for legislation, I want to just address Lord Brown's point that Lord Mance, in paragraph 29, thought there was no problem. To my mind, with great respect, that is compellingly answered by Lord Toulson in paragraphs—

Lord Brown of Eaton-under-Heywood: I am not saying there is not an argument, but that was the view of the majority.

Raza Husain QC: Lord Mance thought that you could not assume the truth of the evidence. Of course you cannot, but equally you cannot assume that it is untrue. The point is that it is potentially important and the question is whether it should be admitted. As regards the need to interrogate the evidence, of course that also arises in the SIAC context, where the Secretary of State is very significantly inhibited from interrogating evidence because she cannot contact the home state. There are other circumstances where the home state would have an interest in securing the return of the individual. It is not the same interest as an extradition of course, but when you have a memorandum of understanding in the national security context, it is in the interests of the home state to have its good faith, efficacy and propriety upheld by a foreign court. That is very much the case in Algeria, which was very keen—

Lord Brown of Eaton-under-Heywood: You are talking about the W situation, which was not an extradition case but a deportation.

Raza Husain QC: Indeed.

Lord Brown of Eaton-under-Heywood: In that case, there was a disclosure to the Government and the Government were going to be in a position—true, without consulting Algeria—to deal as best they could with whatever material there was.

Raza Husain QC: I was trying to draw analogies, very unclearly, between the two processes. I would say that the special advocate solution articulated by Ms Malcolm gives you a further analogy there. It is the special advocate who is able to test the material.

Lord Brown of Eaton-under-Heywood: Right. The special advocate comes in, in place of Government in the W scenario.

Raza Husain QC: It is very, very far from perfect.

Lord Brown of Eaton-under-Heywood: But you come down on her side of the fence?

Raza Husain QC: Indeed.

Baroness Jay of Paddington: That is a majority on the panel.

Lord Brown of Eaton-under-Heywood: Well, what about the other two?

The Chairman: Ms Dobbin, I was not so sure that you had a chance to say—

Baroness Jay of Paddington: Sorry, I thought that Ms Dobbin had answered.

The Chairman: Mr Johnson, you have been very patient.

Jeremy Johnson QC: Yes. Ms Malcolm has given some pretty compelling objections to the CPS lawyer effectively fulfilling a dual function and having to compartmentalise information. As I say, I recognise the force in those objections. I think that every solution is imperfect and I will come to some of the difficulties with the closed material process in a moment. I am not utterly convinced, though, that one should rule that out as an option—i.e., a CPS lawyer, by statute, fulfilling a slightly different purpose and being under a non-disclosure obligation. It would be less cumbersome and costly, would involve less delay and would be less of a departure from rules of open and natural justice than a closed material process. That said, there are some pretty powerful objections.

Some of the problems with the closed material process that have not been fully drawn out yet are, first, that experience shows that it involves significant delay and extra cost because

of the extra dynamic that a closed material procedure brings. There is an extra team of lawyers, separate hearings and an iterative process between the special advocate and the Secretary of State. SIAC proceedings generally take a very long time compared to more conventional immigration appeals. So there is the delay and the cost factor. Another feature, though, is that in a SIAC appeal the Secretary of State remains in control at all times of the closed material. The Secretary of State seeks permission not to disclose it; that will generally be opposed by the special advocate and there is a hearing. If the court is persuaded that the material is sensitive and cannot be disclosed, the hearing takes place in the ordinary way, with the special advocate representing the interests of the appellant, and there is no question of disclosure. If, on the other hand, the court takes the view that the Secretary of State's objections to disclosure are not sufficient to justify non-disclosure, the court will refuse to allow the Secretary of State to rely on the information in those proceedings.

The Secretary of State then has an election to make. She can elect either not to rely on the information any more—that is why she remains in control of the material—or to disclose. The point is that at all times the Secretary of State remains in control of the security of the information. She can also change the underlying immigration decision to bring proceedings to an end. By contrast, in extradition proceedings - in the sort of procedure that is being contemplated - the person who is seeking to rely on the closed material will not have the same level of control. They cannot disengage from the process in the same way as the Secretary of State can and they would not know in advance what view the court is going to take about disclosure. So the risk is that a person would be disinclined to give the evidence, in witness statement form or whatever it is, because they would not remain in control of it and could not guarantee that it would not be disclosed, for example, to the requesting state.

That would depend on a court decision and they would not be able to elect in the same way that the Secretary of State can. That is an additional problem which would have to be grappled with.

The Chairman: Now the way in which I provisionally thought we were going to conduct the business has gone slightly awry, which is probably my fault, but Lady Hamwee had something that she wanted to say.

Baroness Hamwee: Yes, it is one thing that arises from what Mr Johnson has been saying. Are you suggesting that a distinction from the other uses of special advocates, which we have been referring to, is that the CPS's relationship to the requesting state is the same as that of a solicitor to a client?

Jeremy Johnson QC: Yes.

Baroness Hamwee: I actually wanted to ask a rather practical question. There is no ethical judgment in my question, but it comes from the experience of the briefings that we had on the terrorism legislation. Are there enough members of the Bar who are prepared to act as special advocates? Is there any difficulty there, because there were certainly a lot of protests at the time of the terrorism legislation? I remember Dinah Rose being very clear about her own colleagues' views.

Jeremy Johnson QC: It does raise ethical questions, and different members of the Bar take different views about it. Some members of the Bar will refuse to contemplate acting as a special advocate. Some have acted and then resigned from their posts. Others continue to act; I fall within the latter category. I do not understand there to be any difficulty with recruitment. There is a large panel appointed, as Mr Husain said, by the Solicitor-General and, as I understand it, that is sufficient to fulfil the need and there is a competitive recruitment process.

The Chairman: As by definition none of us knows what goes on in the special advocacy procedures, just from the perspective of those who have done it, did anything turn out to be very different from what you could have supposed, had you been a reasonably well informed layman looking at the system from the outside?

Jeremy Johnson QC: From my point of view, until you do it you do not realise how reliant an advocate is on their instructions. Before one gets engaged in a closed material or special advocate process, there might be a temptation to think that it will be wonderfully liberating to be involved in a case where you can do what you like; you do not have instructions and can just attack the case that is mounted against you. In fact, it is terribly disorientating and terribly frustrating. People apply epithets such as Kafkaesque to it because without instructions, you have no framework within which to operate. That is the practical difficulty.

Helen Malcolm QC: I would like to add to that. After all, as I said at the beginning, we use this process in domestic proceedings as well where there is very sensitive material. The Attorney-General will appoint what I think are known as special independent counsel. I have done that as well. What is most disconcerting is the feeling that you may be missing something and if only the defendant had access to it he could say "Ah, Margaret. Of course the name Margaret means something to me", and the following is relevant and her evidence will never be reliable, for the following 16 immensely cogent reasons. The fact is that you are normally swung in at about 24 hours' notice. It is often not in London. You are dealing with advocates who you have never met before. You get two or three feet of papers and a huge amount of instructions, which by definition are immensely general because it is before you have seen the information. So the defence are trying to cover every possible base, you have a 24 hour-period where you panic and then you do your best in court. That is a very

slangy way of describing it, but that tends to be what happens on the ground—entirely in my own case, I should say. There is a constant fear that you are missing a really good point.

Lord Rowlands: But would you not change the system and abolish the role of the special advocate?

Helen Malcolm QC: I certainly would not. It is certainly much better than nothing, which is the alternative.

Lord Brown of Eaton-under-Heywood: It is the least bad option.

Helen Malcolm QC: Yes.

Lord Brown of Eaton-under-Heywood: Roughly, how many times has W been used in SIAC?

Raza Husain QC: As I understand it, very rarely. The order was made in the W case itself, but other than that I am not aware of cases where an order has been made. The fears that may have been articulated—that this will encourage people to fabricate evidence—have not borne fruit. There is a principled answer as well to that kind of fear that this will encourage fabricated testimony, which was given by Lord Toulson in the VB case when he said that the same objection could have been made to the Criminal Evidence Act 1898.

Helen Malcolm QC: You also have to trust the courts to have a level of expertise in dealing with evidence that is fabricated. It is not that easy to fabricate extensive evidence that really stands up consistently, even to cross-examination without instructions. The courts are very capable of seeing the wood for the trees, it seems to me.

The Chairman: Does that go right through the whole court system?

Helen Malcolm QC: Of course, yes, because the magistrates who are hearing this kind of application are the most experienced and the most senior magistrates, at Westminster.

The Chairman: Yes, absolutely.

Helen Malcolm QC: They have masses of experience.

Lord Brown of Eaton-under-Heywood: Somebody suggested—I cannot remember which one of you—that it was only going to be used to ensure, so to speak, a fair trial on extradition. I thought it was intended rather to secure people against a return to barbarism of one sort of another: imprisonment, ill treatment or that sort of thing.

Helen Malcolm QC: That might have been my wording, but that is not what I meant. I merely meant that you were doing a similar balancing act: national interests against deportation on the one side or criminal trial against the individual's rights. I should have put it more broadly, not just as fair trial rights.

Raza Husain QC: I think, Lord Brown, that in the W case you said that the irrevocable non-disclosure order was essential to safeguard the rights of the appellant not to be retuned to Article 3 ill treatment.

Lord Brown of Eaton-under-Heywood: That is right.

Raza Husain QC: You said that that was the least worst option, despite the diplomatic issues that arose. I think there is a parallel.

Lord Brown of Eaton-under-Heywood: Does the fact that it has not been needed very often, if indeed at all, except for that case not make one wonder how far it is actually necessary in the extradition context?

Baroness Jay of Paddington: That goes back to my question about proportion.

Helen Malcolm QC: For the individuals in any one case, it is absolutely vital.

Baroness Jay of Paddington: We understand that.

The Chairman: If you were to take this general view and have some sort of—let us be a bit more generic—independent counsel involved, are there any aspects of the existing arrangements where this sort of thing happens that you should either definitely do or

definitely not do, if you were to have some rather nebulous system introduced into the extradition system? Are there any dos or don'ts that you feel strongly about?

Helen Malcolm QC: I can see that I might be making my case weaker by saying this, but from my experience it is hugely helpful to have two special advocates engaged in any one case. I realise that there is a cost implication to that and, of course, ultimately it would be up to whichever department funds it and whether they are prepared to do that, but these cases not only have the practical difficulties that I have already raised about just getting through the material and not missing points but can raise really difficult ethical questions. Just having one person in the loop to whom you can talk makes a huge difference. I have only done one case where I was given a junior—in fact, she was a Silk at the time and has gone on to be a judge, so it is quite wrong really to describe her as a junior—but it made the most enormous difference, and I think we were much more effective as a pair than I ever would have been on my own. But that is the only practical issue that I would raise.

Jeremy Johnson QC: Yes, I agree with that. The special advocate system has evolved over a number of years. From time to time, special advocates as a body have asked for adjustments to the rules; some have been accommodated and others have not. I think the system now is about as good as you can get, consistent with the need to preserve the confidentiality of the material that is being protected, so I would not invite any radical changes to the existing system, whether in SIAC or the current Civil Procedure Rules. I think they provide quite a good template, if that is what is going to be used.

The Chairman: We have dodged around in the way that we have approached this hearing. Lord Brown, is there anything else you want to raise? We have covered a lot of the stuff that you were going to talk about.

Lord Brown of Eaton-under-Heywood: Lord Chairman, one way or another I have asked everything I wanted.

The Chairman: Lord Henley, are you happy? So really we move on to the final question, which is Lady Hamwee's, although we have already covered quite a lot of that.

Baroness Hamwee: This may be self-fulfilling, I do not know. Essentially, is there anything else that you would like to say?

Raza Husain QC: May I say something about Lord Brown's point about numbers and Baroness Jay's point as well? The fact that the W order has been rarely used may indicate that the safeguards that the Supreme Court put in place are very effective and may be taken as an indication that this is a very proper development in the law, which has not been open to abuse. So the fact that it seems to be a rare case where that kind of order is made could be said to be a good thing. If the Committee was interested—it may not be—I also wanted to say something about what VB said about asylum confidentiality.

The Chairman: Please tell us what you would like to tell us.

Raza Husain QC: It may be that confidentiality considerations in asylum are not of interest to the Committee. If they are not, I will not say anything about them.

The Chairman: It is not directly germane to what we are looking into, but it may have tangential relevance, so if you would like to briefly tell us.

Raza Husain QC: The first point to make, as the Supreme Court acknowledged, is that it received very limited argument on the point. The arguments apparently appeared "late" and had "incomplete content"—those are Lord Hughes's words at paragraph 56. He said that "further full consideration will be essential". The majority appear to have suggested that an indication in extradition proceedings that asylum might be claimed was sufficient to waive asylum confidentiality and that even then a subsequent asylum claim may be seen as an

abuse of or a "collateral attack" on the extradition proceedings. With very great respect I would say that that is unsound, essentially for the reasons which Lord Toulson gave. First, the questions of refugee status and extradition are related but are distinct. Indeed, they are not just distinct but refugee status has primacy, and domestic law—the Act—and international law—Soering—recognise that. So extradition yields to human rights and refugee status protection concerns. As Lord Toulson said in his dissent, at paragraph 90, the UK has a responsibility to consider a refugee claim properly, and that will not be discharged if a claim is considered on necessarily incomplete evidence in the extradition proceedings. Confidentiality is not simply an incidental windfall that the asylum claim gets, it is absolutely basic to the system. That is demonstrated by the EU material which the court cited, which enshrines confidentiality. The majority, with respect, misunderstood the reason why confidentiality is given. They said that it was given to protect the claimant or his family, and said that it had nothing to do with procuring evidence. But those two concerns—protection of the individual and their family, and obtaining evidence—are obviously not mutually exclusive. The international material supports that: the EU material says that you have to have an interview that ensures confidentiality and the UNHCR says that. The Secretary of State's own asylum form assures claimants of confidentiality. At the risk of turning this session into a debate on moral philosophy, the EU requirements are deontological not teleological—the telos is irrelevant. You have to comply with this very strong requirement of confidentiality as a matter of directly effectively EU law. That is not overridden by an implied waiver because you have raised the possibility that you may claim asylum in extradition proceedings. There are some very serious concerns about what is said in the majority judgment. I am sorry if I have unnecessarily troubled the Committee.

The Chairman: I shall read the transcript with care. I have to concede that I was not 100% with you all the way.

Raza Husain QC: I am sorry, my Lord

Q236 The Chairman: No, it is my fault, not yours. I shall look at it with care, because I can see the gist of the concerns you articulate. We have gone on longer than originally planned, but I have just a couple of points. First, have there been any instances that you know of where a requesting state would want to admit sensitive material? It has been suggested to me, for example, that there might be some threat to the potential extradited party or something—there might be stuff that they did not know about that the requesting state might want to admit. Has that ever cropped up?

Helen Malcolm QC: It has never cropped up in my experience.

The Chairman: I assume that we have just approached this debate solely from the perspective that the defence are the people who have the sensitive material. I just wondered whether there are any instances of it the other way around.

Helen Malcolm QC: The first base of course is that the requesting state by definition either has a full trial in contemplation or has already had a full and open trial and passed sentence, otherwise they would not be making the request. It would arise only if they wanted to put evidence in answer to some extraneous consideration of evidence, perhaps in answer to human rights or political issues.

The Chairman: I just wondered whether that issue had cropped up with any of you, that is all.

Helen Malcolm QC: I have not had experience of that.

Lord Brown of Eaton-under-Heywood: I suppose that theoretically they might want the person extradited for trial on some terrorist offence and were proposing at trial, in part at least, to adduce closed material themselves. This postulates that they have to make a sufficient prima facie case to justify the extradition, but it is a pretty theoretical prospect.

Helen Malcolm QC: There are so few states now from which we require prima facie evidence—

Lord Brown of Eaton-under-Heywood: Well I know, but—

Helen Malcolm QC: —and with the ones who would be most likely to try terrorists, we do not. Maybe that is the practical answer as to why I have not come across it.

Clair Dobbin: I have acted for requesting states in a number of terrorist cases and it has not arisen.

Raza Husain QC: In VB, the majority discussed the case of Tollman, which apparently is such a case, at paragraphs 24 to 26.

Clair Dobbin: But it did not actually happen.

Raza Husain QC: It did not happen. I defer to Ms Dobbin.

Clair Dobbin: I think that they were referring to the possibility that a requesting state might be able to rely on evidence in secret to rebut a prima facie case of abuse of process, but I do not understand that eventuality to have arisen.

The Chairman: Fine, thank you. Mr Johnson, do you have any thoughts on that?

Jeremy Johnson QC: No, I cannot add to that, save to say that in deportation proceedings in SIAC the Secretary of State will sometimes seek to rely on closed evidence about the conditions in the country to which they are being returned, so one could see the theoretical possibility of that in extradition, too.

Q237 The Chairman: Thank you all very much. Perhaps my Christmas present to you, since we seem to all agree that there is a problem and some sort of legislation is probably required at some time to deal with it—and every suggested and proposed solution is imperfect and has flaws—is to ask: what do you suggest we ought to recommend about this?

Helen Malcolm QC: So, our Christmas present is to draft the legislation.

The Chairman: Is there any kind of fundamental principle? A couple of you seem to think that some kind of closed hearing procedure might be an important bolt-on to what we have already.

Lord Rowlands: With the use of a special advocate in extradition cases.

The Chairman: Yes. Is that the gist of why you think that?

Helen Malcolm QC: My solution would be the use of closed material procedure with a special advocate appointed just for that purpose and not the CPS member, although I should say that I do not speak for the CPS here. It may be of immense use to you to get their view on whether it would be possible for them to have a special statutory role in extradition proceedings, but that would be my solution.

The Chairman: Is that the gist of what sort of approach you would all recommend to us in thinking about this, based on your experience, a lot of which has been in secret?

Raza Husain QC: I think that, as in Lord Brown's phrase in the W case, it is the least worst option.

Clair Dobbin: I think as well that it would be helpful for you to hear from the CPS. The suggestion that there should be a closed procedure very much hinges on the CPS's relationship with the requesting state and the extent to which there would be an incursion into that relationship if a non-disclosure order was made. In many respects, a non-disclosure order would allow the CPS to play a fuller role in any hearing in which evidence is being tested. Ultimately that consideration may trump the consideration about the changing nature of the relationship between the CPS and the requesting state.

Jeremy Johnson QC: I am with Ms Dobbin. I would accept that a closed material procedure could be used as a last resort, but before going down that route, with all the difficulties that it involves, I would want to look rigorously at the possibility of a non-disclosure order and

the CPS having a slightly different role. You would obviously need to hear from them in relation to that.

The Chairman: Thank you all very much indeed. We are extremely grateful to you and I wish you a happy Christmas.

Anand Doobay and Rt Hon. Sir Scott Baker – Oral evidence (QQ 1 – 13)

Transcript to be found under Rt Hon. Sir Scott Baker

Anand Doobay – Written evidence (EXL0079)

It is particularly difficult in extradition cases which involve allegations of improper conduct on the part of the requesting territory to locate evidence and to provide this to the court considering the extradition case. Often there is no direct evidence available to the defence as the authorities are astute enough not to reveal direct evidence. I think it is for this reason that a very relaxed approach has been adopted towards the type of evidence that the court is prepared to consider (as discussed in the judgement). Even if there is direct evidence then witnesses are often too fearful of what may happen to them or their families to give evidence knowing that this will be provided to the requesting territory. The risk to the witness's family will continue even if the witness has been able to leave the requesting territory. Therefore, it is, in my view, essential that there is some mechanism to allow this evidence to be presented to the court for it to be assessed to see whether extradition should be refused because there has been an abuse of process or the extraneous considerations bar is made out or extradition would violate the requested person's human rights. I think that many of the arguments which support the introduction of a statutory power for a closed material procedure (which would now be required given the Supreme Court's decision that there is no common law power) are eloquently set out in the dissenting judgement of Lord Toulson. I am not sure that the situation, if a statutory power was introduced, would be much different than that before SIAC where the person who the Home Office is seeking to deport can only challenge the restricted material through their special advocate. They suffer the same challenges that a requesting territory would face. I appreciate that the Supreme Court's indication that anonymous witness evidence may be used could be seen to ameliorate these difficulties. However, as appears to be the case in *VB*, it is often impossible to anonymise the evidence such that the witness cannot be identified- if this is done then it may remove all of the features which indicate the credibility of the evidence and may leave the evidence as appearing to be generalised assertions rather than specific first hand evidence.

14 November 2014

Philippa Drew – Written evidence (EXL0032)

Evidence to the House of Lords Select Committee on Extradition Law

I urge the Committee to recommend that the law be changed as follows:

- British residents should not be extradited without a *prima facie* case against them being tested in a UK court
- If their alleged activity took place wholly or substantially in the UK, a judge should be able to bar their extradition – whether or not the CPS decides to prosecute in the UK
- The automatic right of appeal against an extradition order should be reinstated
- Extradition is part legal and part political – the Home Secretary should once more be obliged to block extraditions that would breach human rights
- Legal aid in extradition cases should not be means tested

Philippa Drew CB

10 September 2014

David Dugdale– Written evidence (EXL0022)

Submission to Extradition Law Committee

The extradition process operating in the UK is producing too many examples of injustice and is often driven by political considerations rather than those of law. In the case of the USA it is particularly unbalanced with the US showing greater regard for the human rights of its citizens than we do for ours.

In this area of law we need to reinstate the basic principles of fairness and respect for human rights that have been eroded away by recent legislation

1. No extradition to any country should be allowed without sufficient prima facie evidence being presented to a UK court

2. Those subject to extradition should have the right of appeal.

3. The home secretary should again have the right and the duty to halt extraditions that could result in violations of human rights.

David Dugdale

22 August 2014

Paul Dunham – Written evidence (EXL0047)

The ongoing Extradition Case of Paul and Sandra Dunham

Introduction

My wife Sandra and I are a British married couple 58 years of age who have never been in any kind of trouble before, always worked hard and be proud to be British. Who now find ourselves embroiled in a living nightmare we have been dragged to hell and back and yet still have not had either a British or US court listen to what we have to tell more than 3 years later. Our case continues and it may well be at least another year or more before we are given a chance to prove our innocents.

We both urge you to read our story trying to place your selves in our shoes, maybe one day it could be you or a friend or family member facing the same ordeal.

On the 18th of November 2012 at 8.15am, my wife Sandra Dunham was at home alone I had left the house early that morning to attend a business meeting. Sandra was upstairs taking a shower she heard a knock at the door and tried to dress quickly to answer the door, by the time she got down stairs the callers had gone but had posted a business card though the front door.

The Business card told her that officers from Scotland Yard had called to speak to her and would she urgently call them, can you imagine the shock this caused her?

Sandra immediately called the number fearing something bad had happened to me, the officers asked her if they could return to the house as they were still at the end of our road she said yes.

On arrival at the house 3 Scotland Yard officers showed her an arrest warrant for both Sandra and I, Sandra explained I was not in and what an earth was it all about. This was the first we knew of any criminal complaint against us (you should note we are in our late 50's and have never had so much as a parking ticket issued against) until that day.

The officers explained to my wife that they could see we were good people and that they were surprised to be issuing an extradition request to a law abiding couple like my wife and I. they tried to reassure her not worry and agreed not to arrest her if she agreed to ask me to call them when I got home.

Upon my return home I was told of what had happened, my wife told me that the officers were somewhat shocked because the extradition request referred to the company in the USA who had made a complaint against us as a supplier of products to US military! My wife had shown them via the internet the company's web site and far from being a manufacture of military equipment what they saw was a company that made soldering irons for the electronics industry.

I called the officers who were no longer in the area and in fact had returned to their offices in London, they again told me not worry and to them it seemed that something strange was going on they specifically referred to their surprise about what they had seen on the company's web site (i.e. not military equipment) and the fact that the extradition request had been made many months earlier and they could not understand why the arrest warrant had been delayed so long. They told, me to them it would appear that the Home Office had doubts about it.

The officers said that they were still required to arrest us and that we should seek legal help and advice, as it was by now late Thursday afternoon they request that we turn ourselves in at xxxx police station the follow Tuesday at 9.00am they told us we would be formally arrested at that time and taken to court.

The next day we connected solicitors Kaim and Todner in London for advice they told us they would meet us at Westminster Magistrates court on the Tuesday morning, they went on to advise they could not offer too much advice at that stage as neither they nor us had seen details of what we're being charged with.

AT THIS POINT I WOULD REQUEST THAT THE READERS OF THIS CASE FILE TRY TO PUT THEMSELVES IN THE SAME POSITION AS MY WIFE AND I FOUND OURSELVES IN. HAVING BOTH WORKED ALL OUR LIFE SINCE LEAVING SCHOOL AND NEVER BEEN IN ANY KIND OF TROUBLE BEFORE…

The next few days were simply torcher we just did not know what to do or which way to turn. Finally it was Tuesday morning and we travelled from our home in Northampton to London to report to the police station as requested.

Upon arrival at the police station we were meet by two of the same officers who had called at our home, without saying much they took us both into the police station and down to the charge room. Once in the charge room were handed each a large bundle of paper (in excess of 100 pages), before we could even read them the charge officer started to charge each of us. We could not believe what was happening nobody had even asked for our side of the story or even explained the charges. After being charged photographed and finger printed etc, the charging office said we would have to wait in separate prison cell's until they were ready to take us to court.

Luckily the officers who had come to our house over heard this and stepped in telling the charge officer that we were clearly good people and it would be wrong to hold us in the cells, they agreed they would sit with us in the charge room until the court was ready for us. During the next couple of hours we talked to the Scotland Yard officers while we waited they told us they could not believe what was happening to us and that something must be wrong.

At 11.00am the same officers drove us to Westminster court, during the drive one officer called ahead to the court to tell them they were not going to bring us in via the court cells as we were good people and it would be very wrong after some discussion the court agreed.

On arrival at the court we were meet by our solicitor who hurriedly tried to read the paperwork we had been given so that he at least had a basic understanding of the charges. He told us we would go before the judge, who would ask us if we were willing to be extradited or did we want to contest the request. The solicitor then warned us if we agreed to the request there was no going back, however if we chose to fight the request via the British legal system then the US courts would view that badly and if eventually extradite getting any kind of bail would be very difficult. Our heads were spinning to say the least, we asked the solicitor when would we get a chance to answer the charges he told us we would not be given that opportunity until we were in front of a US court we just could not understand or believe what was happening to us.

SO MUCH FOR INNOCENT UNTIL PROVEN GUILTY…

Within about half an hour we were called into court, there we were locked behind large glass screens, the judge entre the court and asked us to confirm our names. After this he ask the prosecution to read the charges against us, to our complete amazement the prosecution Barrister was a high level British prosecutor being paid for by the British tax payer.

The prosecutor told the court that a grand jury in the USA back in November 2011 (more than a year earlier) had had granted an extradition request against us for fraud and money laundering charges in excess of $1,000,000.00 and that the prison sentence if found guilty would run into up to 300 years in prison!!.

The judge then asked my wife and I we would be willing to be extradited? We said NO, our solicitor at that point asked the judge to grant us bail and the prosecutor said he would not be happy to see bail granted. The judge agreed to give us bail on the following conditions that we would have to report to the local police station 3 times each week, surrender our passports and post 30,000 pounds bail bond. He went on to say until these conditions could be met we would be held in prison. By good fortune we had friends at the court who were able to post the bail for us and we were released on bail later that afternoon.

ONCE AGAIN WE REQUEST THE READERS OF THIS CASE TRY TO PUT THEMSELVES IN OUR SHOES.

Loyal hardworking British citizens who had never been in any kind of trouble before… frankly we expected much more from the British Government in terms of at least hearing our side of the story before treating us this way.

The following week we meet with our solicitors to review the charges and also apply for legal aid to help support the cost of opposing the extradition request. Our solicitor was very experienced with extradition matters and warned us that however unfair it may seem most likely we would be extradited, because the British courts would not consider any defence we may have against the charges.

Although that was what the solicitor told us my wife and I, we still thought that as British citizens our legal system and Government would surely do more to protect us from such an ordeal until they were sure of the facts. Unfortunately as our story will continue to tell that was far from what happened.

The legal process that followed

The first step was to ensure we had funding to support the cost of our opposition, my had wife and I had both lost our jobs as a result of being made bankrupt earlier that year the bankruptcy being resulted from a civil claim the same company had bought against us in the USA (more details of this are given in the back ground information in the next section of this report).

Our legal aid request was heard by the court, who agreed to provide legal aid to cover the solicitor's fee's however they would not agree that we needed the help of a Barrister. Another important example of the unfair treatment the accused persons face, why was the British Government using tax payers money to provide the US justice system with a highly qualified and no doubt highly paid Barrister to prosecute us if the case did not justify us having at least the same level of legal support?

As our solicitor started working on our defence it quickly became clear to him and us that this was a complicated case and extra legal expertise would be required. What followed next

was just pure good fortune, our solicitor spoke to a Barrister (Ben Watson) who normally works for the government as a prosecutor in these types of cases. He asked Ben to look at our case, once Ben had reviewed the facts, he agreed that our case had more than just strong merit so much so he agreed to represent us with no fees paid to him.

A hearing date was agreed at Westminster Court, and we submitted our defence which under the current extradition rules with the USA required no examination of our evidence. HOW CAN THAT BE? Partially when you take into consideration that the US justice system also does not give any opportunity for any defence to be offered against them issuing there request.

Although the court were not required or allowed to consider our defence, when included a very large quantity of evidence and witness statements which clearly showed doubt about the validity of the claims made against us. We included a note to the judge advising him he was not required to read that section of our defence.

At the hearing the judge started by commenting on what a good job our defence had done in presenting our evidence and also confirmed although not required to he had carefully read everything we submitted. The Barristers for both side then present their arguments to the judge and the prosecution ended by reminding the judge that he could not take the evidence we had provide against the charges into consideration.

The judge noted that the evidence was “compelling” and in view of that would need to take time before ruling on the matter.

6 weeks later we were required to return to court to hear the judge’s ruling, the judge repeated his comments about the “compelling evidence” but then went onto say that under the current extradition law he could not take that into his consideration and therefore had no choice but to recommend to the Home Office that the extradition request was up held.

In background to the legal process our MP Andrea Leadsom had been trying to meet with the PM and Home Secretary as she also had grave concerns about our case despite multiple letters neither would agree to meet with her, I am sure Andrea would be happy to provide the readers of this report with more details.

In addition to this Andrea also wrote to the US embassy in London expressing her concerns of what she had learnt about the extradition process, in particular the lack of any review of the defence, the difficulty we would have in getting bail in the USA. Also the alarming conviction statistics of criminal white collar crime (currently 97% of cases plea bargain) that result from the unrealistic sentences in our case in excess of 300 years which leads to innocent people accepting a plea-bargain rather than risk would could be life time sentences. The US wrote back to Andrea telling her all of her concerns were unfounded, which as events unfold you will see was untrue.

At the time of our hearing we still had an automatic right to appeal (sadly that right has now been removed from the legal process). We appealed our case in the High Court arguing that there was clear evidence of a vendetta against us and also concerns that whilst held in prison in the USA pending trial that an independent expert appointed by the high court had concluded would be inadequate. The expert also told the High Court that we would not be given bail and that we would be held in what’s known as a Supermax prison which was designed and in fact used to hold terrorists and dangerous prisoners. Interestingly neither the prosecution nor US justice system challenged these claims.

Once again the High Court were clearly unsure how to rule as they also said they would need more to consider the case. 5 weeks later they ruled in favour of our extradition sighting the limited grounds that exist to prevent extradition request to the USA. The court went on to say and I quote:

"**Conclusion**

56 In some cases there is compelling evidence of an acute or chronic psychiatric illness which

cannot or will not be treated if the Requested Person is extradited. This is not such a case.

57 In summary, and without seeking to minimise Mr Dunham's mental condition, the medical

evidence shows that he is suffering from an Adjustment Disorder due to a high degree of stress

associated with uncertainty and apprehension arising out of the legal proceedings and the

prospect of extradition. This has been in existence since the start of the civil legal proceedings.

The stated intention to commit suicide is not linked to his mental condition, but appears to be a

rational choice that the Dunhams have said they will make if they are ordered to be extradited.

Although Mr Watson was not prepared to concede this, his client's mental condition does not

approach the threshold test set out in s.91 of the 2003 Act: a mental conditions such that it would

be unjust or oppressive to order extradition. In any event there is no reliance on Mr Dunham's

Article 3 rights.

58 It is clear that, if extradited, neither of the Appellants will be granted bail. They would be

remanded to one of four detention facilities. If it were at CDF there would be the advantages that

the Appellants would be in close touch, which would not be possible if they were in separate

facilities.

59 The CDF regime is plainly harsh; and the treatment of Mr Dunham's mental condition might be

unsatisfactorily perfunctory, although it is unlikely that his life would be at risk. On the other hand

it is not clear that he would be detained at CDF, and the evidence about the other facilities is very

limited.

60 So far as Mrs Dunham is concerned, her mental condition is not so serious as her husband's,

and there is no real evidence that her detention before trial would not be adequately addressed.

61 The Appellants would be separated from their family, home and friends (and from each); but

this is implicit from the nature of extradition; and the question will always be whether it amounts

to an undue or exceptionally severe interference with private or family.

62 As Lord Mance said in Norris (No.2) at [107]

Interference with private and family life is a sad, but justified, consequence of many

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extradition cases. Exceptionally serious aspects or consequences of such interference

may however outweigh the force of the public interest in extradition on a particular case

63 Having weighed the considerations on which the Appellants to rely (and bearing in mind the

matters which they pray in aid by way of background), I am not persuaded that the public interest

in extradition is outweighed by an interference with the Appellants' Article 8 rights which is

exceptionally severe.

64 I would dismiss the Appeal.

Lord Justice Beatson:

SO IN SUMMARY THE HIGH COURT ALTHOUGH REQOGNISING THE IMPACT ON MY WIFE AND I ENCLUDING THE FACT WE WOULD BE HELD IN AN UNSUITABLE PRISON. STILL RULED THAT INNOCENT BRITISH CITIZENS SHOULD STILL BE SENT THOUSANDS OF MILES FROM THEIR HOME AND FAMILY SUPPORT STRUCTURE TO BE HELD IN HIGH SECURITY PRISON PENDING TRAIL FOR A CRIME THAT THEY HAVE YET TO BE GIVEN THE OPPORTUNITY TO EVEN TELL THEIR SIDE OF THE STORY…

Can this truly be fair justices ?????

With little or no hope we made a last minute desperate appeal to the European Court of Human Rights, the main problem being there are little or no grounds to appeal extradition to a non-member county. Even though in point of fact as the US legal process acts outside the European court’s jurisdiction there should in fact be great considerations and grounds for them to act.

At this point were advised that there was nothing else we could do to prevent our extradition, which would take place within 28 days. We had all through this nightmare been receiving counselling to help us deal with the pressure and situation we found ourselves in,

the short and long term impact to our lives we found to be beyond anything we could imagine.

A year or so earlier during this process Sandra and I had begun to realise how if extradited we would lose everything we had worked for all our lives, even if as we fully expect we are eventually found to be innocent of all charges. We ask that you just stop and think about the impact, how could we continue to pay our mortgage on our home?, what would happen to all our possessions when the mortgage company repossessed our home as a result of not being paid?, what would happen to our car?, we had by this time both just started working again so we lost our jobs once again, how could we stay in touch with our families, what would be the impact on them and our five grandchildren. We also had two beloved dogs Buster and Oscar who were an extremely important part of lives what would happen to them?, the list and impact just ran on and on.

Once coming to terms with this we made what we considered a rational decision that we would rather end our lives than face losing everything in fact we spoke publically about this both in court and to the various media following our case.

AGAIN PLEASE TRY AND PUT YOUR SELVES IN OUR SHOES, YOU HAVE WORKED HARD ALL YOUR LIFE NOW YOU ARE ABOUT TO LOSE EVERYTHING. STILL NOT EVEN HAVE BEEN ASKED YOUR SIDE OF THE STORY, YOU NOW FACE BEING TAKEN TO THE USA ON A COMMERCIAL FLIGHT IN CHAINS. THE BRITISH COURTS HAVE CONFIRMED YOU WILL NOT GET BAIL AND THAT YOU WILL BE HELD IN A CARELY UNSUITABLE PRISON MOSTLY LIKELY FOR A YEAR OR MORE BEFORE YOU GET YOUR CHANCE TO EXPLAIN YOUR DEFENCE!!.

If that situation is not bad enough you fully expect to be found not guilty, you would then be returned to the UK with NOTHING, no home, no possessions, no job, little or no money, no dogs, and most importantly NO RIGHT TO COMPENSATION for your lose. In our case we would be 59 years and having to try and start all over again, it would just not be attainable to imagine.

THE EXTRADITION THAT FOLLOWED

By now 23 days had passed in was a Monday lunchtime and my mobile phone ran unexpectedly up until then neither we or our solicitor had been contacted to confirm when the extradition would take place. The man on the other end of the phone introduced himself as one of the two Scotland Yard officers who had come to arrest us at the beginning of this nightmare, he said he was so sorry to be making the call and very socked that things had gone this far. The officer went on to tell me that my wife and I were required to report to a London police station at 9.00am on the Thursday of that same week just three days' notice, how could we be expected to put everything in place in such a short time?. My wife was not present at the time of the call she was at work I had no choice but to go to her place of work and tell her the heart breaking news.

Over the next two days we spent time with family and friends, there was also a lot of media interest in our case in fact the phone did not stop ring with even complete strangers calling to express their concern about what was happening.

Once again our MP Andrea Leadsom urgently contacted the home office to seek a meeting with the home secretary after a number of angry calls the home office agreed for our MP to meet with the home secretary on the Wednesday morning. This was the glimmer of light and hope we had been praying for (you will recall that it was an eleventh hour reprieve that

was given to Gary McKinnon). As the hours Wednesday morning ticked by we anxiously awaited news from Andrea but nothing came, we called her office who told that Andrea was still waiting as soon as they had news they would call us. Morning turned into afternoon and then evening still no news from Andrea, as her office was now closed we sent her an email after a short wait Andrea responded to our email.

Her email said that she had been trying all day to speak to the Home Secretary and that the meeting kept being pushed back, and that she had just been advised that the Home Secretary had refused to even meet her saying the decision was not her responsibility!!! (IF ITS NOT THE HOME SECERATARY THEN WHO IS RESPONESABLE???).

It was now 10.30pm and we were due to travel down to the London police station at 6.30am the next morning, at this point my wife and I looked at one another said good bye to our dogs. And calmly walk upstairs to bed not a word was spoken we knew what we had agreed to do, each of us without speaking took a large quantity of various medication we had around the house we climbed into bed and fully expected our lives to end that night.

At around 3.00pm I woke up I was still alive although very groggy, I looked at my wife she was not moving and did not seem to be breathing. I climb out of bed and looked for more pills to take I found my blood and heart pills I took all of them and returned to bed I must have fallen asleep.

The next thing to happen as I recall was a loud bang as the police broke down our front door, then I was being shaken by a policeman, I could also hear another policeman trying to revive my wife. We were both rushed by ambulance to Northampton hospital it was around 8.30am Thursday morning, I could hear the doctors working on my wife in the next cubical I kept asking if she was OK the doctors treating me said not to worry. Apparently unknown to us the media had turned up early that morning to try and interview us as we left for London, when we did not leave someone became concerned and called the police.

Soon after, our friends and family started to arrive they were all so upset and shocked, by 10.00am officers from Scotland Yard had arrived at the hospital they claimed to be very concerned and only wanted what was best for us. However they started to question us, we were both still very confused we asked the doctors to ask them to leave us alone which the doctors did however the officers kept coming back into the cubicles and asking us questions. After a few hours we were moved to separate private wards next to one another, and the Scotland Yard Officers and two other local policeman sat outside our rooms. We were on all kind of drips/medication and could still not even walk the police stayed outside our rooms all night and into the next day.

The next morning around 9.00am I was still on drips but feeling a little better I overheard the officer asking the doctor to discharge us so that he could arrest us and take us to London. The doctor said he would not do that yet and told us not worry, during the morning the Scotland Yard officers continued to press for our release finally a nurse told us they had agreed to have us evaluated by a mental health team and we should not worry as we were clearly not ready to leave hospital.

Early that afternoon four doctors arrived to evaluate us, they spoke to each of us from about 30 minutes telling us not to worry their main focus was would we try and take our lives again. We both told them we did not think so and in fact regretted our actions as it had caused so much pain for our family and friends, we stressed however we were still feeling

very weak and confused they assured us not worry and they would help us get the rest we needed.

We could overhear them speaking to the officers, who were clearly not happy with what they were being told, I heard the officer say “if they did that then he would just” and I could not hear the rest. Then within 10 minutes two officers came into each of our rooms and formally arrested us, the nurse in the room was clearly shocked. We were told there was no time to spare and we had to leave straight away and would be taken to the London Westminster court, at this time we were only dressed in hospital gowns so we asked if we could at least stop at our home to get dressed as they would be passing it on the way to London to which they agreed.

We were rushed out of the back door at the hospital as the officers told us they did not want the media to see us the media were at the entrance to the hospital. Once outside the hospital we were shocked to see four more Scotland Yard Officers waiting for us making a total of six officers. My wife was put into one car with three officers and I in the other car, it was frightening and shocking we were both still very confused. Again please keep in mind we are a British couple in our late 50’s with no criminal records, we felt like we were being treat ikeI terrorists or murders. Having stop at our home to dress we were then driven to London.

The drive to London was terrifying it was like a police chase you might see in a movie, the cars travelled on the M1 motorway at speeds in excess of 100 miles an hour, we asked why they were driving so fast they told us they had to get us to Westminster court before 5pm. I told them that the journey from Northampton on a Friday afternoon to Westminster would normally take 2 hours and as it was already 4.00pm they could not make it to which they said wait and see. Having reached the end of the motorway we then had to cross north London to get to Westminster court, we were in unmarked police cars. So at this point for the first time they turned on their blue lights and proceeded to drive at dangerously high speeds through the London traffic often even on the wrong side of the road this action clearly put everyone’s lives in danger.

As we approached the court there was a large number of press and TV people outside the court these people rushed at our cars taking pictures and shouting questions the police tried to push us onto the floor and then drove away from the court at high speed. Once out of sight of the media they stopped the cars and called for advice on a different entrance to the court. We then again drove at high speed to a back entrance at the court, however there were also media there and there was a bit of a scuffle between them and the police officers.

Our heads were spinning what an earth was happening to us, after all we were still recovering from the events of the previous day. Yes we were being extradited but it was for a no violent crime for which we still had not even been questioned (remember our legal system should be based on INNOCENT UNTIL PROVEN GUILTY) we were clearly not resisting the police or causing any kind of treat to them or the public.

Once inside the court we were held in separate cells and only given 5 minutes to speak with our lawyers before being taken into the court room handcuffed and locked behind a glass panel. The prosecution asked that we be held in prison until extradition could be arranged, our lawyer told the court they had hurriedly that afternoon applied to the Home Office that we be granted a few days to rest and recover from our ordeal and in return we not exercise any other legal rights to avoid or delay our extradition further.

ALL WE WANTED WAS TO BE ALLOWED A FEW DAYS TO REGAIN OUR STRENGHT AND ASSURE OUR FRIENDS AND FAMILY WE WOULD NOT ATTEMPT TO TAKE OUR LIVES AGAIN AND METALLY PERPARE FOR WHAT LAY AHEAD.

The judge asked if the Home Office had approved this and our lawyer advised they had not responded either way but that we were hopeful they would agree to this reasonable request. The judge said without that approval he was ordering that we be detained in prison to await extradition. By this time it was 7.30pm we then spent a further hour in the court cells before my wife was taken to Holloway prison and I was taken to Wandsworth prison.

Over course of the weekend the prison kindly allowed us a telephone call to one another for a few minutes which we were very grateful for. Nobody seemed to be able to tell us what was going to happen next, early on the Tuesday morning we were told we were being extradited that day, then a little later that morning they said the extradition had been delayed they did not know why. Then after lunch they again said we were going to be extradited again that day, we were driven to the police station at Heathrow airport.

I arrived before my wife the officer at the police station was very understanding, he said that my wife would be arriving soon and that once checked in he would let us speak to one another he went on to tell me that we would be spending the night at the police station and extradited the next morning. I asked if I could telephone my father to advise him and also advise him where we were being flown to, the police man said I could call but he would not be able to advise me of the destination or flight number. As they had been requested to get us out of the UK without any further publicity.

During that evening I was allowed to sit for a while with my wife then were put into separate cells and a police man station outside to watch over us all night. The following morning we were taken via a back entrance into the airport and driven straight to the boarding steps to the plane. Standing at the entrance of the plane was again the two Scotland Yard Officers, they told us we could not take anything with us NO money, NO Jewellery, NO clothing other than what we were wearing not even a paper list of contact address and telephone numbers. I was most concerned about my medication for my heart problem the officers said they would ask the US Marshalls if they would allow that but that they may not.

After a short wait four US Marshalls arrived three men and a lady, they checked we had hand everything back to the British officers and reluctantly agreed to allow me to bring my medication. The US Marshalls told us we were to be taken the CDF supermax prison in Baltimore but it would be for just one night as it was such a bad place and unsuitable for us. At this point we were chained up and taken onto the aircraft we each had a US Marshall sat either side of us, the Marshall explained that they did not want the other passengers to see we were chained up so we would have to keep a blanket over our hands, arms and legs throughout the flight. It was a very undignified way to be treated and the other passengers stared at us throughout the flight no doubt thinking we were dangerous prisoners.

During the 10 hour flight we were unlocked once so that we could get a drink but still had one hand chained to the arm rest, I asked to use the toilet so they unchained me from the seat and followed me to the toilet I still had my hands chained and had to keep the blank in place. I was then allowed to use the toilet but had to leave the toilet door open while the US Marshall looked in.

To our surprise we landed in Atlanta USA the Marshall said they had taken us there to avoid any media that maybe trying to follow us. From Atlanta were flown to Baltimore again in chains and in full view of the other public at the airport, when we arrived in Baltimore it was 10.00pm. We were taken to prison cells at the airport where we had to wait a further hour while the Marshalls made sure there was no media waiting for us.

We reached the CDF prison at midnight, during the journey between the airport and prison the Marshall's kept apologising that we were going to CDF and telling us how bad it was and they promised it would be just one night and early the next morning we would be taken to court and then transferred some ware more suitable.

AGAIN PLEASE TRY AND PUT YOUR SELF IN OUR SHOES YOU ARE BEING TOLD BY US MARSHALL JUST HOW BAD THIS PRISON IS GOING TO BE.

On arrival at the prison I did not see my wife although they confirmed she was there and being processed. I was taken into a small room with a shower cubical and told to strip naked so I could be searched, which included looking into my private body parts. Then I was required to take a shower with some kind of bug killer liquid, then given a very poorly fitting prison boiler type suit bright red it was size XXXL which was at least three sizes to big. I had put all my personal cloth into a bag and was told I had fourteen days to arrange for my cloths to be shipped to a USA postal address otherwise they would be destroyed.

Then followed a basic medical examination before being given a two inch thick mattress and taken to a cell by this time it was 3.00am Friday morning we had been on the go for 23 hours and only had one drink during this time. There was another prisoner asleep in the cell who the prison guard woke up and told him to move to the top bunk, the guard the left and locked the cell door the other prisoner was very unhappy about being woken and told to move to the top bunk he proceeded to shout at me about it. By around 4.00am he had calmed down and I feel a sleep. My wife's experience was very much the same as mine, we were both left feeling we had no dignity left.

After just getting two hours sleep we were woken at 6.00am and taken back to the arrivals area to be once again strip searched and re chain up handcuffs and leg chains. We were crammed into a prison van with other prisoners and driven one hour to the Green Belt court. Once at the court my wife was taken to a small room and asked once again to strip so that she could be searched again, then taken to a prison cell. I was told to line up with six other male prisoners against a wall and told to strip so we could be searched yet again (that's three different strip searches within 8 hours of arriving at the prison) then taken to a cell with the other prisoners and told to wait.

Soon after my wife and I were taken into interview rooms, a court officer explain she was going to try and make a case for to get bail she said we could answer her questions so she could get started or we could wait to see lawyers, we chose to answer her questions and was then taken back tour cells.

About an hour later each of us were taken into separate interview rooms again where a court appointed lawyer was waiting to speak to us. They told each of us the same thing they were there to defend us and try and get bail although they felt bail was very unlikely. My wife and I were somewhat surprised by the lawyers that had been appointed to us as they seemed very well qualified and very committed to helping us.

Early in that same afternoon, we were both handcuffed and taken to the court room by 4 US Marshalls just before entering the court room they removed our handcuffs. My wife was dressed in a bright yellow jump suite, and I in a bright red jump suit neither of which came close to fitting several sizes to big also I had not been allowed to shave we both look rough and haggard not the way we would have chosen to be attending court.

The judge read out the charges and said we should continue to be held at the CDF Supermax prison this was not what the US Marshalls had promised us. Our lawyers said we wished to apply for bail and the Judge set a hearing date for the following Tuesday.

Before being rehancuffed and chained we were both once again required to fully strip so that we could be search a very degrading process which was difficult to understand since we had not left the court at any point since the morning strip searches we had already had to endure. After completing the search and being chained each of us were taken back to the prison.

Once we arrived at the prison to our complete amazement we were once again strip searched and then taken to our prison cells. WE HOPE AS READERS OF THIS REPORT YOU ARE ABLE IN SOME SMALL WAY PUT YOUR SELVES INTO OUR SHOES TO IMAGINE THE DISCUSSED, HUMILIATION AND FEAR WE HAD TO ENJURE.

It was by now around 6.00pm Friday evening and we had only had couple of hours sleep over the past 48 hours, the next few days passed very slowly. We could not call home as international calls were not allowed for prisoners, I write to the prison warden to if I could at least write to my wife and he promptly and kindly agreed to allow this although pointed out it was not an automatic right.

On the Sunday afternoon, 4 days after we had arrived in the USA I was told I had a visitor and was taken to the visitor area. There were 2 men from the British Embassy who told me they had come because my Grandson had been making so many calls to them wanting to know what was happening to my wife and I. They said they knew all about our case and that the newspapers in the UK had printed quite a few stories about it that weekend. I told them we had expected to see them much sooner that in fact our MP Andrea Leadsom had been promised they would be there to meet us on arrival into the USA, they made no comment.

I asked what they planned to do to help us they told me there was not much they could offer, they knew all about the CDF prison and knew just how bad it was. They said all they could do was pass on any messages to our family and proceeded to give me 3 leaflets which were not very helpful. I told them we had no money in our prison account to be able to purchase basic needs like soap and a razor and some underwear that fitted, they again said they knew about the problem and that money could not be sent from outside the USA but offered no help or solution to this. The very least I would have expected was for them to offer to help in allowing my family transfer some funds. Since that one and only visit we have heard nothing more from them, my wife has sent them 3 emails since that visit and has not had even a reply from them. To be frank they are have been a complete was of time to us, we wonder how much of our taxes are used to pay for them to be based in the USA and for what purpose??

At the end of the 15 minute with them, I was once again taken into a small room and strip searched then taken back to my cell. On Tuesday morning I was woken at 5.30am and told

to get ready for court, this envolded the same process described above strip searches and chaining and then again on arrival at the court.

Late morning again still in the same ill-fitting prison jump suits, we had now been wearing since our arrival 6 day's earlier and still not have been allowed to shave we appeared before the judge. The prosecution told the judge that we were clearly a flight risk as it had taken almost two years to bring us here, our lawyers told the judge that we had done nothing more than follow the legal process available to us under British law. The prosecution also went on to tell the judge that during that two years we had conducted a media frenzy and accused the USA of having nothing more than kangaroo courts, which was completely untrue yes we had gained a lot of media and public support but had never said anything to undermine the USA legal system.

Within less than 5 minutes it was all over the judge said she thought it was clear that we were a high flight risk due resisting extradition and had no intensions of allowing bail. Our lawyer were shocked by how narrow mined she was on the whole matter, they lodged an appeal, which was set three weeks later. We were taken back to CDF prison once again enduring the chaining and strip searches.

I was keen to find a way of passing the time rather than just sitting and waiting so took a job in the prison library which allowed me out of my cell each day for a few hours. My wife also requested to be allowed to work but was told the prison did not allow women to work as there were only 19 female prisoners and supervision was to difficult to ensure there safety with so many male prisoners held within the prison.

Over the next three weeks I have to say the prison offers were friendly within the harsh rules they had to follow and most days I was given my medication although this was never easy having to chase it most days. The food was indescribably poor served on plastic trays (no plates and only a plastic teaspoon to eat it with) and eaten in your cell which also house an open plan toilet without even so much as a modesty screen or curtain. The bed was a concrete slab onto which you placed a two inch thick foam mattress very basic and uncomfortable.

WE ASK YOU IS THE WAY YOU WOULD EXPECT STILL INNOCENT BRITISH CITIZENS TO BE TREATED?

Finally the day came and we were taken back to court, unfortunately the same degrading process and same ill-fitting cloths, still not been able to shave. At court we were very pleased to see that our MP Andrea Leadsom had been able to send one of her staff to attend the court Andrea had also written a powerful letter to the court highlighting her concern regarding bail and also referring to the promises that had been made to her by the US Embassy in London.

The judge was very fair and listened carefully to both our lawyers and the prosecution, he agreed we had done nothing wrong in following the legal process and was inclined to approve bail but no without a significant bond. He set bail at $300,000.00 for me and $200,000.00 for Sandra my wife this bond was to be paid as a secure deposit with the court before we would be released. This is a very large sum of money that the average persons like my wife and I would have no hope of raising had it not been for the help of our good friends Mike and Annie who live in North Carolina USA.

Mike and Annie secured their home to provide our bail, so after a days we were released into their custody.

Our situation to date

We are now on bail under house arrest at our friend house in North Carolina, we are require to wear electronic tags on our ankles and have limited movement around the house some areas of the house are out of bounds as is most of the garden. We are only allowed to go to church for a couple for a couple of hours on a Sunday morning, other than that unless it's a doctor's visit we cannot leave the house. (Important to note this house arrest would not count as time severed if we were found guilty, which we do not expect to happen).

Its now 33 months since the Grand Jury issued the extradition request, and we have been under house arrest in the USA for 3 months. We fail to understand that having been accused of over $1,000,000.00 of charges, that the prosecution are still unable to produce evidence of only $55,000.00 of the claims made against us. A trial date has been set for the 2nd of December 2014 and we have filed a motion of complaint to the court by the lack of information/evidence the prosecution have provided a date of the 18th October has been set to hear our motion. Which if granted will leave very little time to prepare for the trail on 2nd December.

Our lawyer is currently in the UK trying to interview British witnesses since for the most part the alleged crime took place in the UK Company. However they have no legal rights in the UK so are coming up against a brick wall with witnesses not wanting to speak to them for fear of being drawn into a matter that they wish to avoid.

HOW CAN THIS BE FAIR?

Picture being separated from your family and flown across the world in handcuffs. Imagine being imprisoned in a foreign land, forced to navigate an alien legal landscape. All without ever being quizzed by British police, or having the evidence against you examined by a British judge.

That's what happened to us a British couple, myself suffering with a heart condition were most of the alleged crime had taken place in the UK. And yet we have been shipped off to solitary confinement in the US without a basic case ever being made in a British court (although thankfully now under house arrest in the USA thanks only to very dear friends not the British government).

My wife and I have lost our jobs and almost everything we have worked for, the US Government are demanding a sentence in excess of 300 years in prison.

Having already spent three long years now on both sides of the Atlantic, we still have yet to see full details of the case against us.

Our ordeal, by no means unique, is a damning indictment of our scandalous extradition laws.

Over recent years there's been much promise of reform from politicians of all parties, but in fact the few basic protections which did exist have been diluted even further under this Government.

Extradition is an important part of fighting cross-border crime. But it's also a traumatic punishment in itself and effective safeguards are imperative. A fundamental overhaul is long-overdue

Changes over the past few years have subverted time-honoured protections in the UK's extradition system making the extradition of British residents far too easy.

The Extradition Act (2003) short-circuited due process by eroding traditional British justice safeguards. Such "fast-track" extradition is justice denied.

No-one should be extradited to stand trial in a foreign country without evidence being presented in a British court to prove there is a basic (*prima facie*) case against them. And a properly effective "forum bar", allowing our judges to prevent extradition where an alleged offence takes place partly or wholly within the UK, and it would be in the interests of justice to do so, should be introduced.

Despite much rhetoric from politicians of all parties on the need for reform, so far we've seen very little positive change. Worse still, some of the few safeguards which remained in 2003 have recently been stripped away.

My wife Sandra and I hope by telling you our story so far, can help you all better understand why urgent change is required. Although currently held in the USA we would be more than willing to answer any questions you may have or help in way we can.

Yours sincerely

Paul and Sandra Dunham

Background History about PACE, the Siegel's and Dunham's

William Siegel set up PACE Inc in or around 1960 The PACE company designed and manufacture soldering equipment (soldering irons)used within the electronics industry.

In 1976 I was employed by a division of Phillips Electronics, this was the first time I met William Siegel during the day we spent together we got on very well and William talked about the UK based company who sold his products. Shortly after that meeting I was approached by the UK Company (Electrautom Ltd) who offered me a job as a technical applications engineer, to support and develop the sales of PACE products into the UK and other parts of the world.

In 1987 I was asked by PACE Inc to set up a new UK based company called PACECENTER, the VP of sales at PACE Inc and William Siegel approached myself and another person also employed by the UK distributor (Electrautom) to ask if we would consider leaving our employer and setting up a new company on behalf of PACE in the UK. We agreed to this and a new UK company was formed by PACE it was called PACENTER my colleague and I were each given shares in this company as agreed, my wife was also asked by PACE if she would like to work for the company.

After about six months we were called to a meeting in the USA and told by the COO and Mr William Siegel that Mr Siegel had reflected on the decision to give us shares in the company

and had decided that he what them back, he no longer what to have business partners he told us he had been down that road before and did not like it. After discuss we agreed to give back the shares without payment in return for continuing to be employed by the company, we were not very happy about that and in fact my colleague made himself quite unpopular by his views. A few months later I was told that the company felt my colleague was not a good fit and he was let go.

I was very concerned by this but assured by PACE that I had a secure future; I later learnt that Mr William Siegel had a long history of falling out with partners and senior managers within his company. On one occasion about a year later I had the opportunity to discuss this with him and he told me that they had all tried to rip him off and that he was the victim and they were all just bad people. In almost every meeting Mr William Siegel and his son Eric would constantly refer to all the bad people who had worked at PACE in the past and how everything was there fault even though the company was being very successful.

As time went on I got on well with both William and Eric Siegel interestingly Williams two other children Mark and Nancy also worked in the company but like Eric there business skills were poor over time William asked both Mark and Nancy to leave the company due to performance issues. Mark and Nancy both seemed to think it was Eric's fault and there was bitterness between them.

Between 1990 and 1998 I saw Eric convince his father that almost all of the senior managers at PACE USA were bad people and only out for what they could get, although not in charge of the company Eric systematically either fired or pushed each of them out of the company. These included two CCO's two CFO's and the VP of Sales plus other more junior roles. Amazingly during this period the company had enjoyed strong growth, Eric's goal was clearly to gain control of the company and these people did not respect him and often made that clear to William Siegel.

In around 1998 after many very profitable years of trading Mr W Siegel was considering retirement he placed his son Eric Siegel in charge of the business. Between then and around 2000 the business lost direction and suffered large losses, Eric had tried to build his own team of managers around himself but had now started to blame them for the poor performance.

In or around 2000 William Siegel called me very much out of the blue to express his concerns about the situation and his son ability to run the business, he asked if I would take on the role for 6 months of trying to help teach his son the ropes which required me to work from the USA office. The initial role was to spend 6 months helping training Eric to run a company. 6 months then ran into several years. During this time I attended senior management meetings and some board meetings it was very clear that Eric did not have their support as they had big concerns about his skills. Also often Mr William Siegel would use the excuse that he could not remember things he had agreed to.

In or around 2004 William Siegel decided he could no longer allow his son Eric Siegel to continue running the company, he ask me if I would take on the role as President and asked his son to leave. (Mr Eric Siegel told me he would get even one day and I should take care if I supported his father in decision)Mr W Siegel wanted me to help him sell the company as he no longer had the desire to run it and it was also causing him so many family problems, the company had various independent valuations carried out these were all much lower than he would accept (due to poor prior year trading results).

At that point William Siegel instructed the company to purchase back all the company shares from his children at an inflated price which did not reflect the recent independent valuations. In fact he had to personally loan the company the funds to do this which he did at an inflated interest rate. As PACE was an S corporation it meant that the shareholder was personally responsible to pay personal taxes on the profits made by the company not the company its self (i.e. there was no corporation tax). This transaction worked well for William Siegel as it helped to create losses in the company which he could offset against personal taxes he had paid in prior years when the company had made big profits.

After this he had several meetings with his Board of Directors (BOD) trying to decide what to do as he no longer wished to run the company himself. Mr William Siegel asked me if I would take on the role as President and had asked his son to leave.

In light of this William Siegel asked me if I would be willing to enter into an agreement to purchase 20% of the company shares with a loan note he would give me and that he would gradually sell the remaining 80% of share to me. Although I had a very good relationship with William Siegel I knew how people had been treated in the past I also knew what had happened the last time he offered me shares to work at PACE back in 1987 and how he would often chose to forget things he had agreed to. With this in mind I told him I would be happy to do this as I knew the company had a good future but only on the understanding that we had a formal agreement which clearly mapped out the long term future ownership and that his family could not come back into the business at any time.

In 2005 a shareholder agreement was signed and completed, the shareholder agreement clearly stated how the remaining shares would be valued and sold. As a condition of this agreement I was required to spend most of my time based in the USA. It was agreed with Mr William Siegel and fully understood that the company PACE would cover all my family relocation cost without limits, at the time Mr Siegel was willing to offer me whatever it took to agree to the deal.

By this time I had purchased a new house in Maryland close to Washington DC where the company offices were located prior to that since around 2001 I had been in various rented accommodation which had been paid for by the company.

Business started to improve but was still facing very high labour cost due to its location near to Washington DC. It was agreed by the BOD and practically pushed by William Siegel that we need to relocate to a less expensive area various options were considered including China and South America it was agreed to stay in the USA and relocate to North Carolina as considerable labour cost saving could be made. This meant that although we had just purchased a home in Washington area we now had to sell up and relocate to North Carolina, again it was agreed with Mr William Siegel the company should cover all the costs, in point of fact the sales tax alone on the purchase of a home in Maryland then the agents fees to sell that home to relocated to North Carolina and the purchase of a new home in North Carolina amount to over $200,000.

Three other staff was also asked to relocate to North Carolina of which two accepted and each were offered a lump sum relocation package (only took the package), although they were both single people who did not have homes to sell to relocate.

In mid 2007 William Siegel became seriously ill and required life threatening surgery, we were told his chances of survival were low. William Siegel advised the BOD that he wished to

sell his remaining shares back to the company ASAP the company agreed they would do this under the terms clearly outlined in the shareholder agreement.

During his time in hospital and given his chances of survival Mr William Siegel and Mr Eric Siegel settled their differences.

Mr William Siegel did recover and in or around September 2007 meet with the BOD to finalise the sale of his shares, during this meeting he advised that he no longer agreed with the terms of the shareholder agreement and wanted a much more favourable deal. The BOD told him this was not possible or realistic and that if he wanted to sell it would have to be in line with the terms of the shareholder agreement.

The very next day Mr William Siegel returned to the company with his son Eric and advised he was giving control of his shares to his son and that once again he wanted to sell the company but not under terms contained in the shareholder agreement. He requested that I accept this and that in no way would his son interfere with my role as President or the running of the business. I was not happy about this but could not do much about it at that moment in time. I decided to try and make it work as I still had the original shareholder agreement in place and hoped over time that William Siegel would honour the agreement we had entered into some years earlier.

Within 2 months of the September 2007 meeting at a complete surprise to my wife and I, William Siegel sent a fax over a weekend to my office outlining his intentions to move the company forward. Essentially he was giving his son control of his shares in the company and once again wanting to redraft the shareholder agreement. He claimed over the past few years he had lost interest in the company and could not remember or did not fully understand the business issues. He told me I was required to sign a copy of his outline agreeing to this and return to him that same day.

I tried to speak to William Siegel about his fax but he would not take my call instead his son Eric called me saying unless it was signed I would be asked to leave the company that day. I discussed this with my son who acted as company secretary and legal adviser to PACE Europe about this he agreed it was an unfair request and said he would speak to Eric Siegel about it. Eric agreed if signed it as an act of goodwill he would agree that for a period of time whilst a new agreement was worked out it would not affect the terms of my employment in the company nor would he in way interfere in the running of the company.

I was between a rock and a hard place if I did not sign I would be let go or whatever that day and then have no control or input in the running of the company for which I had given so much too and also owned 20% leaving it in the control of a person I had doubts about their ability to run the company and also about which the BOD felt the same way. I therefore very reluctantly signed the fax document.

Over the following 12-18 months I tried to resolve this problem but no longer had the support of the long establish BOD as they had been dismissed by the Siegel's. During this period every decision I had made or tried to make was undermined by the Siegel's. William Siegel would whenever an issue came up which in the past he had agreed to and now no longer wished to happen say he was an old man and could not remember (you should note he would often even in earlier years pull this stunt at BOD meetings). They also cut both mine and my wife's salary by 20% no other employee at that time had their pay cut, I

believe this was done to cause us financial hard ship and prevent us from having funds to fight for our rights.

I requested a meeting with William Siegel to discuss this present at the meeting was Eric Siegel and Mr J Sabot (the Siegel family accountant), I made it very clear at the meeting I felt we had been treated unfairly and ask for them to explain why our salaries had been cut no explanation was given other then William Siegel said it was Eric's decision. Interestingly Eric had been trying to get his father to agree to reemploy him in the company and both I and the financial controller had told William that the company could not justify or afford the cost, a few months after our pay was cut Eric was reemployed by his father into the company.

During this same meeting I told William that I thought he was being very unfair in wanting to change the terms of the shareholder agreement and that if the new terms had been offered in the beginning I would not have been willing to accept as the personal sacrifices we had to make in moving to the USA would have far out wade the benefits we gained. William told me he was an old man and no longer understood what was right or wrong in the business he also had just rekindled his relationship with his son and that he and his wife wanted to sell the company for the best price and then allow Eric to better plan and deal with their future estate planning issues.

In this meeting they briefly outlined their future plans for disposing of some of the company assets and also moving funds (cash) back to William Siegel to early repay long term loans William Siegel have given the company (mostly the funds had been used to buy back the share from his children in 2004). They also at length told me that based on advice from Eric he (William) felt that the company and BOD had not been considering his best interests instead focusing on what was best in the long term for the company.

I told him I did not agree and that maybe it would best instead of a new shareholder agreement that I agree to sell back my shares in the company in return I would expect the company to continue to allow me to run it and that I would get some form of bonus once a sale was agreed and hopefully continued employment with the new owners. In principal this was agreed at the meeting, on the way back from the meeting I travelled with Mr J Sabot. I told him that it was not the outcome I had wanted but maybe it was for the best, at least each of us (William and I)would come away from the deal with something and part as friends.

I could tell from his body language and the comments he made that he had doubts, he told me he did not think it was a done deal as he knew what it was going to be like having Eric broker this arrangement and try and deal with the sale of the company particularly in view of the bad feeling Eric felt towards me. He told me that although Eric had undertaken training during the past few years as a financial planner he had difficulty in understanding Eric's long term goals. He told me he did not think it was going to end well (for the record Mr Sabot had a great respect for me and the way I treated William Siegel and managed the company).

It should also be noted that every year PACE had a large independent audit firm audit both the USA and UK companies and at no time were any issues ever raised about my expenses or any other payments made to us the auditors also often commented in their management letters about how well I was managing the business. Additionally all payments made to us

were via the company accountants I never issued or approved any cheques or payments to myself or wife.

With so much pressure my wife and I both started to become unwell we did under much pressure give in and agree to sell our shares back and also sign new contracts of employment although the company never transferred the payment for the share buyback to us. (That debit to us from the company was later awarded to them as part payment against the Civil Judgment by the North Carolina court). I think in part apart from getting his personal revenge against us Eric Siegel brought these claims to avoid paying us for sale back of our share to the company.

His actions also showed in him once again in poor light with the employees at PACE and all started to express big concerns about the possibilities of Sandra and I leaving the company and them having to deal directly with Eric. The employees were very concerned about changes in operations he was making; he told them he was only interested to generating cash so that he could put the funds to better use outside the company. He cut all product development as he said that the cost was too long term he cut almost all the Sales and Marketing budgets again saying there was not point as he was selling the company.

He also told me in April 2009 that I needed to make all employees take a pay cut (10% I think) this was practically hard as employees had already seen a pay freeze the prior year. I first made this announcement to the Europe office at Eric's request, they were very unhappy with me saying that I needed to find a way to stop it. I delayed to cut in the USA which Eric was very unhappy about because of the bad morel it was causing; my name was mud over this although I had little or no control over it I was being made the fall guy.(I think this action was planned once again by Eric to try and discredit me because within two weeks of me leaving the company he agreed to reinstate the original pay structures in an attempt to win favour with the employees).

In May 2009 the pressure became too great I was also becoming more and more concerned about the Siegel plans to move funds out of the company at a time when cash was very tight all of the financial projections I was being given by the company accountant showed that the company was about to run out of cash due to the down turn and recession that had hit at that time. I again spoke to Eric about this and told him that I felt moving cash out when the company forecast showed that it was not going to be able to meet payments to other creditors was not legal he did not seem to care.

His plans were all centred on moving cash and assets out of the company and back to the family, as he felt he could invest it better in other ways.

In May 2009 we sent the company our resignations and also stated our intention to take legal advice on the events of the past few years. A few days later the company in turn sent us letters saying they were terminating our employment for cause, although at no time did they request we return to answer any claims against us.

At this time May 2009 both my wife and I had health concerns resulting we believe from the pressure of this dispute, my wife had been signed off by the doctor as unfit to work and was prescribed antidepressants I was also feeling very unwell.

We also had no means of income or savings to live on (as a result of actions taken against us by the company earlier pay cuts). So we returned to UK (May 2099) for support from our family, also keep in mind as result of no longer being employed by PACE we had no medical

insurance and I knew my wife needed to continue her treatment. I was also very aware my own health was in need of treatment which I could not pay for.

Upon returning to the UK a few days later I had a suspected stroke a TIA for which I am still undergoing treatment at Northampton hospital. The hospital has implanted a heart monitor into my chest to help understand why I continued to have blackouts.

At the time we returned to the UK there were no legal claims against us we wanted time to recover our health and take advice on our rights WE DID NOT LEAVE THE USA TO AVOID PROSECUTION.

I think it is VERY IMPORTANT at this point to provide you some details of the continual attempts that Eric Siegel and PACE have made over the past 4 years to bring unreasonable hardship on us and also to discredit us, as a result of this our life has become almost unbearable.

1) Upon our resignation from PACE the company sort to discredit us with all its employees within days of us leaving and even made them sign a document threatening them with dismissal if they made any contact with us. Sandra and I had worked at the company for more than 30 years and had many personal friends at the company.

2) PACE also contacted suppliers and customers in a “witch hunt” to discredit us and also make finding new employment difficult if not impossible.

3) Eric Siegel made regular contact with our son and made many damaging comments to him about us, he also tried to imply that our son may have also been involved in some dishonest practises against the company (our son has his own law firm and acted as company secretary for PACE Europe). In an attempt to damage our relationship with our son further he also contacted various other law firms and companies in the area telling them about his claims against us.

4) In late 2010 we purchased a distressed recruitment company from the administrator in an attempt to find new employment. In the summer of 2011 Eric Siegel then met with an employee of the recruitment company (Sonia Coleman see fax you have on file) and encouraged her to send copies of his claim against us to the recruitment companies clients and bankers with the intent of damaging both us and the company. As a result of these actions the company lost favour with key clients and funders and the business quickly lost ground and had to close.

5) Eric Siegel sent copies of his claims to some of our friends and contacts we cannot be sure of how many, but I have given you a copy of one such letter that he sent to Zul Keswani in the letter he describes us as untrustworthy and advise him not to give us any financial help. Again we feel his actions were to prevent being able to fund a defence or counterclaim against him.

12 September 2014

Jelena Dzankic – Written evidence (EXL0029)

Florence, 8 September 2014

Dr. Jelena Dzankic

SUBMITTED IN PERSONAL CAPACITY

Question 4: European Arrest Warrant

On balance, has the European Arrest Warrant (EAW) improved extradition arrangements between EU Member States?

1. Overall, despite some of its contentious aspects, the European Arrest Warrant (EAW Framework Decision 2002/584/JHA) has improved the extradition arrangements between the Member States of the EU, along the applicable areas. [57] The EAW has been adopted in the aftermath of 9/11 with the aim of making the extradition process more efficient within the EU, and removing some obstacles (such as the 'nationality exception', i.e. the right of the surrendering state not to extradite its nationals) that previously resulted in lengthy procedures. It entered into force on 1 January 2004, and applies to the arrest or surrender of a requested person to another Member State for: 1) conducting criminal prosecution; 2) executing a custodial sentence; and 3) executing a detention order. The EAW can only be used in cases 1) when a detention order or a final imprisonment sentence has been imposed for at least four months; and 2) when the offence is punishable by imprisonment or detention for a maximum period of at least one year.

2. The efficiency of the EAW has been largely due to the fact that it has abolished the political dimension of the traditional approach to extradition, and transformed it into a judicial process thus involving less costs. In other words, historically, extradition has been regulated through bilateral agreements, concluded between states. In that, they had a political and a diplomatic dimension. This means that conclusions of such agreements have been lengthy procedures themselves. In addition to this, the very extradition procedures that preceded the EAW were long as they involved invoking diplomatic procedures. Extradition times have been shortened by the EAW, which requires the executing national judicial authority to recognise *ipso facto* the request for extradition that has been made by the judicial authority of another Member State of the EU.

3. The procedure in itself is relatively straightforward. The executing judicial authority receives the EAW directly from the issuing authority, while cooperation is ensured through the Schengen Information System (SIS) and the Interpol. The executing authority then may arrest the individual, conduct hearings, and keep him or her in custody. In either case, the executing authority must comply with the EAW within 60 days from the time of the arrest. If the arrested person consents to his or her surrender, the executing authority must make a

[57] For a full list of the areas covered by the EAW, see EAW Framework Decision 2002/584/JHA.

decision on the EAW within 10 days from the time when the person concerned has consented to extradition. Dual criminality is not required, further simplifying the process. On the grounds for refusal of execution see point 6 (below).

4. The efficiency of the EAW is also mirrored in the fact that in most of the traditional extradition agreements states would keep the nationality exception. The traditional rationales for keeping the nationality exception include 1) that the arrested person should be prosecuted by his natural judges; 2) that the state has the duty to protect its citizens; 3) lack of confidence in other states' judicial systems; 4) the disadvantages of being tried in a foreign language/system, etc. Hence by abolishing the nationality exception, the EAW has effectively allowed for recognition of judicial decisions among Member States, based on the principles of 'mutual trust' and 'sincere cooperation' as stipulated in the EU Treaties. This recognition, in turn, has expedited the extradition procedures. Hence even if the EAW requires a degree of sovereignty transfer, it offers a more efficient way of combatting international crime compared to bilateral agreements.

How should the wording or implementation of the EAW be reformed?

5. Since its adoption, the EAW has faced criticism mostly related to fundamental rights. In this context, the wording and the implementation should ensure that the procedure is balanced against the potential for the infringement of the individual rights of arrested persons. In addition to this, two further safeguards need to be discussed in the context of the EAW: 1) its excessive use for minor offences; and 2) safeguards for mutual cooperation in judicial matters among Member States. The first issue could potentially be resolved by rewording Article 2 of EAW to prevent its use for petty crimes and introducing proportionality as an obligation. The second issue has 2 aspects – one political and one related to implementation. First, the EAW effectively abolishes dual criminality, which has been raised as a concern in the UK (the fact that the country has to extradite a person for offences that are not considered crimes in the UK). Equally, the UK has the right to request surrender from another country, where the offence committed is not a crime. This recognition is based on the principles of mutual trust and sincere cooperation. Second, given that the EU's Member States, regardless of how different their political, legal and judiciary systems are, are all democracies, it is reasonable to expect a fair trial. Detention conditions, however, vary, but all Member States implementing the EAW should be required to comply with the guarantees of respectable detention in line with the human rights instruments available in Europe.

Are standards of justice across the EU similar enough to make the EAW an effective and just process for extradition?

6. Standards of justice across the EU have been commonly cited as a concern in relation to the EAW. As noted in point 5 (above), in order to be an EU Member State, every country needs to achieve a certain degree of institutional and economic soundness. In other word, the question is not whether the standards of justice are 'similar enough', but whether they guarantee to a sufficient degree that the individual will face a fair trial in another Member State. Given that the EU Member States are democracies, the answer to the second question is 'yes'. This issue is dealt with in the Stockholm programme. In addition to this, the

EAW already contains some safeguards in the form of refusal of surrender in cases of *ne bis in idem* (individual already tried for the same offence), amnesty in the executing Member State, in cases of trials *in absentio* (unless safeguards existed), or the age of the requested individual.

How will post-Lisbon Treaty arrangements change the EAW scheme once the UK opts back in to it?

7. Under the Lisbon Treaty, criminal justice will be regulated through legislative instruments including regulations, directives and opinions, which implies a transfer of the right to initiate to the Commission (now it is shared with the Member States). The EAW will therefore become a directive, and subject to implementation by the Commission and the Court of Justice. Prior to the lapse of the transitory period, under transitional provisions (protocol 36), framework decisions, including the EAW, remain in force until repealed, annulled or amended. Up until six months before the end of the transitional period (5 years), the UK has the right to notify the Council that it will not respect the powers of the Commission and the Court, and subsequently measures adopted under the third pillar will cease to apply to it. Notification of return is required but it is uncertain if the UK will be allowed to participate again.

8 September 2014

Sally Eberhardt, Baher Azmy, Pardiss Kebriaei, Arun Kundnani, William P. Quigley, Laura Rovner, Saskia Sassen, Jeanne Theoharis – Written evidence (EXL0049)

Submission to be found under Baher Azmy

Clifford Entwistle – Written evidence (EXL0017)

My son Neil Entwistle was extradited to the USA in 2006.

1) Even after Neil was extradited our home land line was hacked into by the American authorities, even though my wife and I were not under any suspicion. We complained to our government about this and we received a reply from the Rt. Hon. Theresa May the Home Secretary on the matter.
2) In the extradition papers submitted by the US authorities to have Neil extradited, it states that they had a 'match' of Neil's DNA on the butt of the gun involved in the crime. This reference to a 'match' was used by them in the media at least twenty times according to Neil's trial lawyer. The same lawyer proved that the only way you could gain a reliable match of someone's DNA was for an oral swab to be taken from that person. This had not been done in Neil's case at the time. They made reference to supposed activity by Neil on a computer that they never checked for fingerprints or DNA as proved in trial.
3) Neil was shackled throughout the flight to the US and was questioned on the flight without access to any legal aid. He told me that when he disembarked from the plane he was trussed up that tight he had to stoop to walk. He was led out in a sea of media who were broadcasting these images live to the potential jury and for days after. What chance of a fair trial?

3 September 2014

Simon Erskine – Written evidence (EXL0013)

Submission to Extradition Law Committee

1. British residents should not be extradited without a basic (*prima facie*) case against them being tested in a UK court
2. If their alleged activity took place wholly or substantially in the UK, a judge should be able to bar their extradition – whether or not the CPS decides to prosecute in the UK
3. The automatic right of appeal against an extradition order should be reinstated
4. Extradition is part legal and part political – the Home Secretary should once more be obliged to block extraditions that would breach human rights
5. Legal aid in extradition cases should not be means tested

25 August 2014

Eurojust – Written evidence (EXL0061)

From:	Eurojust
Date:	19 September 2014
Subject:	Eurojust's written evidence further to a Call for Evidence concerning Extradition

1. *By an e-mail to the general mailbox of Eurojust dated 24 July 2014, the House of Lords' Select Committee on Extradition Law invited EUROJUST to respond to a Call for Evidence.*

2. *The Call for Evidence indicates, inter alia, that the remit of the House of Lords' Select Committee on Extradition Law is 'to consider and report on the law and practice relating to extradition, in particular the Extradition Act 2003.'*

3. *EUROJUST seizes the opportunity to offer written evidence. On the basis of its casework and expertise, EUROJUST's submission relates to question 4 alone, and concerns the EAW scheme as a whole, not the Extradition Act 2003.*

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4. On balance, has the European Arrest Warrant (EAW) improved extradition arrangements between EU Member States?

4.1 Based on Eurojust's casework and expertise, Eurojust considers that the EAW is a successful instrument that has brought added value in the fight against cross-border crime by facilitating the rapid surrender of requested persons. On balance, the EAW has certainly improved surrender arrangements between Member States. Despite a positive assessment overall, issues identified in relation to the EAW scheme would be better tackled by way of soft law measures rather than by legislative changes, and all means available at European and national level should be explored in this regard.

4.2 This view was shared by the practitioners attending the strategic seminar, *The European Arrest Warrant: Which way forward?*, organised by Eurojust in cooperation with the Hellenic Presidency of the EU, that took place on 10 June 2014. This view was also shared generally by the members of the Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the Member States of the European Union at their 7th meeting, convened on 11 June 2014 by the Prosecutor General of Greece, with the support of Eurojust.

4.3 Between 2007 and 2013, Eurojust dealt with 1 730 EAW cases. Eurojust plays a key role in facilitating the execution of EAWs and the exchange of information; clarifying legal requirements; advising on drafting EAWs; advising on the priority to be given to competing EAWs; reporting on breaches of time limits in the execution of EAWs and the reasons for these breaches; coordinating the execution of EAWs and contributing to the prevention of *ne bis in idem* issues and conflicts of jurisdiction; and, generally, speeding up the execution of EAWs.

4.4 On the basis of its casework, Eurojust also identifies issues, difficulties and best practice in the operation of the EAW, and has developed guidelines and collated EAW-related case law with a view to assisting practitioners.

4.5 Without prejudice to an exhaustive analysis of Eurojust's EAW casework throughout the years, the following issues, among others, have been identified[58]: a) slow communication between competent authorities; b) differences between legal systems, namely in relation to the conditions to be met under domestic law before an EAW can be issued; c) poor quality of translations of the EAW; d) delays as a result of insufficient or inadequate information in the EAW; e) proportionality issues in the executing Member States linked with mandatory prosecution in the issuing Member States; f) delays by the executing authority in providing information under Article 26(2) Framework Decision on the EAW; g) requests for additional information in situations in which the need for such information was not obvious; h) differences in legal systems concerning the return of nationals; i) differences in legal systems concerning the application of the speciality rule; j) different approaches to sentences *in absentia* and the right to a retrial; k) failure to notify withdrawal of an EAW; l) cases in which no reason has been given for non-execution of an EAW, even after the person has been released; m) use of different channels to transmit the EAW without information that the EAW is being sent via a particular channel; and n) costs incurred with surrenders.

a) How should the wording or implementation of the EAW be reformed?

4.6 From a Eurojust perspective, issues identified in relation to the EAW scheme would be better tackled by way of soft law measures rather than by legislative changes. All means available at European and national level should be explored in this regard. An example of such soft law measures is the existing *Handbook on How to Issue an EAW*, which is considered a useful instrument by practitioners that could, however, be improved, by making it more 'practitioner friendly' and by including in the handbook other relevant documents such as Eurojust's Guidelines for Deciding on Competing EAWs[59].

b) Are standards of justice across the EU similar enough to make the EAW an effective and just process for extradition?

4.7 From a Eurojust perspective, practical experience shows that in only a few cases has the execution of an EAW been refused on the basis of allegations of breach of fundamental rights, meaning that the arguments to support such allegations must be seriously grounded. With regard to, *e.g.*, the matter of proportionality, practical experience also shows that the question of disproportionate EAWs is limited to a relatively small number of cases and that there is a clear decrease of such use. Close cooperation between practitioners, with the support, where necessary, of Eurojust, and EU legislative developments, such as those linked to the implementation of the roadmap

[58] For more information about Eurojust's casework, *see* 'Report on Eurojust's casework in the field of the EAW', Council document 10269/14 of 26 May 2014. This report includes detailed statistics as well as practical and legal issues identified by Eurojust in the application of the EAW.
[59] Eurojust Annual Report 2004, pp 82-86.

for strengthening procedural rights of suspected or accused persons in criminal proceedings[60], are believed to lead to further progress.

c) How will post-Lisbon Treaty arrangements change the EAW scheme once the UK opts back in to it?

4.8 Eurojust would like to recall the oral evidence given by Ms Michèle Coninsx, President of Eurojust, to the House of Lords Select Committee on the European Union on 30 January 2013 in Brussels.

19 September 2014

[60] Resolution of 30 November 2009 on a *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, OJ C 295, 4 December 2009.

Eurojust and the European Commission – Oral evidence (QQ 211 -229)

Evidence Session No. 13 Heard in Public. Questions 211 - 229

WEDNESDAY 10 DECEMBER 2014

10.15 am

Witnesses:

Michèle Coninsx

Olivier Tell

Members present

Lord Inglewood (Chairman)
Lord Brown of Eaton-under-Heywood
Lord Empey
Baroness Hamwee
Lord Henley
Lord Hussain
Baroness Jay of Paddington
Lord Jones
Lord Mackay of Drumadoon
Lord Rowlands
Baroness Wilcox

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Examination of Witness (via video conference)

Michèle Coninsx, President of Eurojust.

Q211 The Chairman: Good morning, Madame.

Michèle Coninsx: Good morning, Lord Chairman.

The Chairman: Good. Thank you so much for coming and giving evidence to us. Just so I am not being discourteous, your surname is pronounced Coninsx?

Michèle Coninsx: My surname is Coninsx.

The Chairman: Coninsx, yes. That is to get it on the record at our end, and I wanted to get the pronunciation correct. As I said, it is very good of you to come and talk to us. I know that you have indicated that there were three questions that were outside the proper scope of your responsibilities. We have thought about it and we have tried to contact your office to see if we could perhaps reconfigure them slightly, which would enable you to say something, if you wanted to, to us about that. When we get to those questions— 3, 4 and 7—one of the Members will be asking you a question along the lines of what we originally put. Please, if you are in any way unhappy, just say you had rather not respond. But if you were able to respond it, would be helpful to us. Before we start, I ask you first of all whether you could just say who you are and your position for the purposes of the transcript.

Michèle Coninsx: Thank you, Lord Chairman. I am very happy with this invitation to give evidence today to the Committee. My name is ***Michèle Coninsx, I am the national member for Belgium, and I am the President of Eurojust.***

The Chairman: ***Thank you very much. Is there any introductory statement that you would like to make, or shall we move straight into the questioning?***

Michèle Coninsx: I would just say that the matter of the European Arrest Warrant has been an issue at the heart of the activity of Eurojust since the outset of Eurojust, Eurojust being a European judicial co-operation unit body. A few months ago, on 10 and 11 June, we gathered in a strategic meeting all the experts of the 28 Member States, representatives of the institutions and academics to make a round-up of 10 years of experience of the European Arrest Warrant. We also gathered the highest level of the judiciary of the 28 European Union states in a consultative forum meeting of directors of public prosecutions

and prosecutor-generals. What I will share with you is based on these exchanges with more than 100 experts. In your own assessment—

The Chairman: Sorry, something very odd is happening with the link. We seem to be hearing an additional piece of evidence from somewhere else in Belgium. I do not know whether you can hear me, but I think that we are going to have to stop the call and start it all over again, but we will not start your evidence all over again, which I hope will be in order.

The Chairman: Can you hear me again?

Michèle Coninsx: I can hear you.

The Chairman: Yes. I apologise. I do not know what went wrong, but something went quite badly wrong. Shall we continue where we broke off? No point in repeating everything.

Michèle Coninsx: Fine by me.

The Chairman: One small point occurred to me while we were off air. You referred to the seminar that you held earlier in the year, which you had alluded to in your evidence. Is there going to be a publicly available report of that at some point, or was it a domestic one?

Michèle Coninsx: No, a report has been sent to the Council, which is supposed to be put on the website of the Council and on the website of Eurojust, so it is a public report.

The Chairman: Right, so in other words it is a publicly available document and we can get it and have a look at it.

Michèle Coninsx: Absolutely.

The Chairman: Good. Thank you. We will look forward to having a look at that. If I might, I will start by asking you this:it has been suggested by some of the witnesses from whom we have heard that the principle of mutual recognition, which is the basis on which EAW has been formulated, is perhaps fundamentally flawed because of a, and I quote, “gulf of

difference between the standards of justice across the European Union". Do you agree with this? Do you think there is any truth in it?

Michèle Coninsx: It is absolutely true that the European area of security, freedom and justice is an area where we are confronted with 30 different legal systems and 24 different languages. This is part of the judicial reality. We also have seen that after 10 years of practical experience at Eurojust dealing with European Arrest Warrants, although the issue might not always have been tackled without flaws and in a perfect way, overall it is a true success story. We see that it helps to fight effectively and efficiently organised cross-border crime. The breaches of human rights and the disproportionate execution of European Arrest Warrants, at least from what we see in our practical experience at Eurojust, are really limited.

The mutual recognition instrument is based on trust, but of course it cannot be based on blind trust. However, in relation to safeguards of human fundamental rights, a legal basis is foreseen in the framework decision on European Arrest Warrants through, for instance, Article 1(3) and Article 12 of the recital, which deals with the respect of fundamental rights through an effective protection by a competent national court. Overall, we say that it is a success story. There might be differences, but our experience does not lead to this statement so, as Eurojust representative, I am not able to confirm this statement. The European Arrest Warrant is a success story with some imperfections, but imperfections related to the breaches of fundamental rights and the improper, disproportionate, unbalanced execution of European Arrest Warrants are really limited.

The Chairman: Thank you ever so much for that helpful start to our proceedings.

Q212 Lord Mackay of Drumadoon: One of the matters that we have heard evidence about over the last few months is that the European Arrest Warrant is being used incorrectly in

this respect: rather than it being used as an instrument of last resort, authorities are using the European Arrest Warrant as a first option in the proceedings they seek to take. In your experience, is such an occurrence of first-option use of the European Arrest Warrant founded in fact? If so, what do you consider to be the causes of it being used at this early stage?

Michèle Coninsx: Thank you very much for this question. From Eurojust casework throughout the years, differences between legal systems—namely in relation to the conditions to be met under the domestic law before an EAW can be issued—are just one among other issues that Eurojust has identified. We have identified at least 14 issues, in fact. However, from a Eurojust perspective this does not mean that the European Arrest Warrant is being used incorrectly or in an unbalanced way.

Moreover, the specific issue of the differences between legal systems in respect of the conditions to be met under domestic law before an EAW can be issued is by no means illustrative of Eurojust's overall experience. To say that the European Arrest Warrant is being used incorrectly is an assessment that may be made on a case-by-case basis by the executing judicial authority. The assessment, for example, of whether other mutual recognition instruments are more suitable is one to be made on a case-by-case basis by the issuing judicial authorities.

The starting point is and should be the prominent role of the issuing judicial authority. Consultation procedures between issuing and executing authorities can be useful. I would like to underline in this perspective that Eurojust is playing a crucial role in supporting the national authorities in their choice and is providing them with information, for example, in relation to the national law of other Member States. If we see that there are problems, they are very often related to the lack of communication between the two concerned authorities,

with authorities not communicating well or having to struggle with the language issues. But the fact that there are differences in law does not seem to be relevant in this perspective.

The Chairman: Thank you very much.

Q213 Lord Rowlands: Some 60% of all warrants that are received in the United Kingdom come from Poland. Could you tell me what discussions you have had with the Polish authorities on the way they use the European Arrest Warrant?

Michèle Coninsx: You must know that in 2009 there was afourth round of mutual evaluation, and all the Member States were assessed by a group of experts on their way of executing EAWs. That report is a goldmine of information. It is not Eurojust's role to assess to what extent one Member State is issuing EAWs correctly and proportionately in a balanced way and to what extent those EAWs could be executed in the executing state. That is a matter where Eurojust has neither the competence nor the role to have any statement.

Lord Rowlands: You have an advisory role. Could you not advise the Polish authorities, for example, on the way they are handling the warrant?

Michèle Coninsx: If we are requested to play a role in the execution of a European Arrest Warrant, this is the kind of support we will deliver. We will ensure a translation and a communication between the two concerned states. However, it is up to the concerned judicial authorities—the concerned competent authorities—of the Member States to get things right. If they need us to facilitate the communication, we are most willing to do so. If they ask us for advice, we might give it, but the final decisions, assessments and acts are made by the two concerned authorities. We cannot replace them, we can only support them. It is their call; it is their responsibility.

The Chairman: Thank you.

Q214 Lord Henley: I was just wondering whether there are any examples from Eurojust's casework where problems have arisen in relation to the United Kingdom's execution of European Arrest Warrants.

Michèle Coninsx: I would refer to my previous answer. In fact, there is a report that reflects very well how the members in the European Union deal with the European Arrest Warrant cases. That assessment, in relation to how the UK is dealing with the European Arrest Warrant, should be asked by you to different Member States. It is not the role or competence of Eurojust to deal with that matter. It would be utterly unprofessional for us to give any statement on this.

Q215 Baroness Hamwee: Good morning. You may well give the same response to this, but we wondered in particular about any casework regarding delays in the way the UK operates the European Arrest Warrant.

Michèle Coninsx: Indeed, delays in criminal proceedings, delays in the execution of mutual legal assistance requests and delays in the execution of mutual recognition instruments are the sole responsibility of the Member State and it is up to the Member State to deal with those delays. It is not up to Eurojust to have an assessment or a statement in relation to that.

Baroness Hamwee: Thank you.

Q216 Baroness Wilcox: Good morning, Madam President. Would it help the workings of the EAW system if some of the proposed flanking measures, such as the European supervision order and the roadmap on procedural rights measures, were implemented by all Member States***?***

Michèle Coninsx: Thank you for this question. There is interaction between the framework decision on the European Arrest Warrant and other mutual legal systems and mutual recognition instruments. The choice by practitioners of the adequate instrument is not always an easy one to make, and this appears to be due to a number of factors, including

lack of implementation of the instruments, lack of knowledge, and lack of tools and guidance for practitioners. While Eurojust is aware of concerns about the low level of implementation in Member States of certain legal instruments, such as the framework decision on the transfer of prisoners, the framework decision on probation and an alternative sanction, the framework decision on the European supervision order, and that may have an impact on the use of the framework decision on the European Arrest Warrant. Not all mutual recognition instruments are true alternatives. The framework decision on the transfer of prisoners, for instance, can be an alternative—for example, there could be resocialisation arguments in a case where it concerns the execution of a sentence, but not in all the other cases. The framework decision on the European supervision order can be an alternative, too, but its scope is not suitable for serious offences. The framework decision on probation and alternative sanctions is not a real alternative either. Practitioners on top have very little experience with this instrument. If you look at the directive on the European investigation order, it is not a real alternative either, because the European Arrest Warrant and the European investigation order concern two different stages in criminal proceedings. One is related to the prosecution and investigation and the other is related to the stage of the interrogation. That is one point.

With particular regard to the roadmap for strengthening procedural rights, we have three directives: one on the right to interpretation and translation, one on the right of access to a lawyer and one in relation to a right to the information. All three directives can contain provisions specifically dealing with the European Arrest Warrant proceedings, and this significantly improves the situation of the requested person in a surrender procedure. For example, the provision of dual representation ensures that the person has access to a lawyer in the executing state and that he is informed of his right to appoint a lawyer in the

issuing state. It has been underlined that the right to dual representation is not self-sufficient and that it should be coupled with flanking measures concerning legal aid and ensuring efficient co-ordination between the lawyers of the concerned countries across the European Union.

In this regard, I would like to underline that the proposal for a directive on legal aid, which was launched by the Commission in 2013, ensures that suspects have access to legal aid at the early stage of the criminal proceedings—that means provisional legal aid in the period leading up to the final decision on whether the person is entitled to legal aid. It also guarantees legal aid for people arrested under the European Arrest Warrant.

From a Eurojust perspective, the key tool for successful application of the framework decision on the European Arrest Warrant and other mutual recognition instruments is trust—mutual recognition based on mutual trust at different levels, trust between the Member States. That raises a question of the need for the training of magistrates, lawyers, doctors, solicitors and legal practitioners. The need for trust between the Member States raises a question on the follow-up of the implementation. Last but not least, there is the trust of the citizens in the area of freedom, justice and security, which raises the question of procedural safeguards and victims' advice.

When you are dealing with European Arrest Warrants, these are very often related to cases of organised crime and terrorism cases—complex cross-border cases. There we see that, in particular because of the different legal systems, different languages, as I said, and the different legal cultures, that Eurojust can play a huge role and will continue to play a real role in having this trust enhanced between all the parties that I have just mentioned. This is the reaction we wanted to share with you.

The Chairman: One point that occurs to me is that there are a huge number of proposals you have described. Are there any that you would ascribe priority from a systemic perspective?

Michèle Coninsx: I think it is really important that the procedural rights of the accused persons are being fully respected and safeguarded. I think that all the directives I have been mentioning—right to access to a lawyer, right to information, right to translation and interpretation—are extremely valuable and essential. This should be underlined, indeed.

Q217 Lord Empey: Good morning. I would like to refer back to your written evidence of 19 September. You stated there that the issues identified in relation to the EAW scheme would be better tackled by way of soft law measures rather than by legislative changes. For all 14 issues that you highlighted, what is the likelihood that they can be dealt with in such a way by all EAW states?

Michèle Coninsx: As noted by Eurojust, based on Eurojust casework and expertise, the European Arrest Warrant is a successful instrument that has brought added value in that fight against cross-border crime. On balance it has certainly improved surrender arrangements between Member States. When I give presentations, I always refer back to the successful surrender of Mr Osman right after the 21 July bomb attacks in London. It took us only a few weeks to get Mr Osman, who fled from London via France to Italy and was hiding, to the United Kingdom and to get him tried and successfully convicted for 40 years for these atrocities. For exactly the same scenario, the attacks against the tube in France in the 1995 terrorist attack, it took us more than 10 years to get a terrorist, an accused person, from the United Kingdom to France. In terrorist cases, which can be considered as very serious crime cases, we have seen the absolute success of this—the speedy, efficient, effective surrender of the accused or suspected or requested persons.

But of course despite this positive assessment of the European Arrest Warrant overall, its functioning can still be improved by ways of soft law measures rather than by having intrinsic legal legislative change. This can include, for instance, as I have just referred to, more training for judicial authorities, prosecutors and defence lawyers in criminal justice matters, and in EU languages—as it is very often a linguistic issue—as well as proper guidelines on the different instruments, such as the handbook on how to issue European Arrest Warrants.

The Court of Justice of the European Union case law is of great importance for practitioners. Very often it is a yardstick and an example to be followed by practitioners. It helps them to get better acquainted with the scope and meaning of the framework decision on the European Arrest Warrant. Then there is also the development of a multilingual EU database of national case law covering different aspects and difficult aspects related to the European Arrest Warrant, such as the grounds for non-recognition, legal remedies, proportionality and fundamental rights. That could allow traditional authorities from all the Member States to learn how their counterparts in other Member States address certain issues and it could spread the good practices, the best practices.

From a Eurojust perspective, the Member States can only benefit from these measures as they reinforce mutual understanding. Mutual understanding will lead to mutual trust and mutual trust will lead to mutual recognition done and executed in a legally binding and correct way. As I said, for some measures that require tackling at national level, such as delays in criminal proceedings, these must be addressed by the Member States directly.

Lord Empey: Thank you for that. Could I just return to proportionality for a moment? Do you think that EAW legislation should be amended at European level to incorporate explicitly the concept of proportionality?

Michèle Coninsx: After having met with the highest level of the judiciary in June, and after having met with academics and experts, the final conclusion is that proportionality and other issues related to the EAW showing that it is not yet perfect should be tackled not by legislative changes but only by soft law measures. It can be the translator, the messenger of that important message that is shared by a lot of experts.

The Chairman: Arising out of that, it seems to me that the crucial aspect of soft law is whether or not it is going to be implemented in the various Member States. On the basis of your past experience of where soft law ideas have been promoted, are you confident that the Member States are going to do this as you would like?

Michèle Coninsx: It would be a wonderful world if the Member States would follow up on the outcome of our report, but we can only signal that this is the way forward. We can only advertise that this is the best way forward for having effective, speedy and correct execution of European Arrest Warrants and we will continue to repeat that message. Repetition is the best way of advertising good practices. Are we sure about the successful outcome? No one can be sure, but at least we have to try to use and choose that way forward.

The Chairman: It is possibly a case of, as we say in English, the best being the enemy of the good.

Michèle Coninsx: That is nicely phrased. I could not say it better.

Lord Rowlands: You will be familiar with the phrase "soft law measures", but I am not quite sure what they mean. Are you saying that it is arrangements and procedures rather than laws and legislation, or is a soft law measure a piece of legislation?

Michèle Coninsx: Soft law is all the examples that I have been mentioning. Very often there is a lack of training of the judiciary—that means all legal practitioners, be it lawyers,

solicitors, magistrates, prosecutors and judges—on how European Arrest Warrants have to be issued. What about legal remedies? What about the information that should be shared? That training will lead to a better application. That is one point—training on criminal procedural law—but there is also the matter of languages. I started my statement by saying that we have 24 different languages. You cannot underestimate the need for linguistic training, so that would be one way forward. So no legislative changes, but measures that will little by little, gradually, surely but slowly, of course, lead to better execution of European Arrest Warrants. There is no need, after 10 years of experience, to go into hard legislative changes. A handbook on good practices and how to issue European Arrest Warrants might be helpful, as would be a multilingual European database with information on proportionality, as you have been referring to, and important issues such as fundamental rights and remedies. These are all certainly a way forward—a smooth way forward, a soft way forward.

Q218 The Chairman: Thank you very much indeed. We have now come to the conclusion of the points that we indicated we wanted to discuss with you, but before we finally conclude and say thank you, is there anything else you would like to say to us that we have not covered that you think is important for our deliberations, please?

Michèle Coninsx: I think that the oral evidence is confirming the written evidence. What we share with you is based on our practical experience dealing with especially Article 16 and Article 17 of the framework decision of the European Arrest Warrant, conflicting or competing European Arrest Warrants, the breach of the time limits of the European Arrest Warrants and helping, supporting the Member States in a fast and correct execution of their European Arrest Warrants, especially in those cases where security is at stake—I have given you the example in relation to counterterrorism. These are matters where we have to react in a speedy and legally correct way. I have given you an example of a successful execution of

a European Arrest Warrant and those could serve as examples for future other mutual recognition instruments. There are successes, there are some flaws, there are some imperfections, but they can be dealt with through what we call soft law measures. There is no need for immediate legislative action, because we see that the European Arrest Warrant is a success story.

In 2013, when I gave evidence to a Committee of the House of Lords in January in relation to the opt-out, I referred back to statistics. We have seen that the European Arrest Warrant is being used by the UK as a requesting country and as a requested country and I must say that the UK is making a lot of use of this mutual recognition instrument, so we see it in our practical experience that even in the UK it is considered as a success story. Of course, we need to have a critical analysis. That is something that you should do every day: "Is what I am doing sufficient? Is what I am doing correct? Is what I am doing making a difference? Is it effective?" That is what we do throughout our daily casework and in strategic meetings, such as the meeting that we had in June with the highest level of the judiciary.

The Chairman: Thank you very, very much indeed. We are all very grateful to you for the time you have given us and for the evidence and things you have told us, so thank you very much.

Michèle Coninsx: Thank you very much indeed.

Examination of Witness (via video conference)

Olivier Tell, Head of Unit, Procedural Criminal Law, Directorate-General for Justice, European Commission.

Q219 The Chairman: Monsieur Tell, it is very good of you to give us some evidence. Could you formally, please, introduce yourself, and if you want to make any kind of opening statement before we move into the questions proper, that might be the moment to do it.

Olivier Tell: Thank you, my Lord Chairman. Indeed, my name is Olivier Tell. I am French. I have been Head of Unit, Criminal Procedural Law, in the European Commission since 2010. I am today assisted by two colleagues, Anna Hodgson on my right, and Sami Kiriakos on my left, who are responsible for the European Arrest Warrant in the unit. I am ready to reply to your questions, but I do not have any general statement to make at the beginning.

The Chairman: Thank you very much for that and for introducing your colleagues, who are both, needless to say, very welcome. It is then just for me to open the questioning, if I may, by asking the first question, which is that some of the witnesses we have been speaking to have suggested that the principle of mutual recognition on which the European Arrest Warrant relies is fundamentally flawed because, in their words, there is "a gulf of difference between the standards of justice across the European Union". Would you agree about this, and have you any gloss you might like to put on it?

Olivier Tell: My Lord Chairman, thank you for your question. I respectfully would not agree with this statement, because the mutual recognition principle is a long-standing principle that applies in various policy areas in the EU. Indeed, in criminal matters the European Arrest Warrant was the first instrument that put this principle in practice. Since the Lisbon treaty, the principle of mutual recognition is now part of primary law, EU law, and binding on all Member States. Basically, if I remember correctly, mutual recognition in the field of

criminal law is a British idea. The very idea of mutual recognition implies precisely preserving the differences in Member States' judicial systems. It is about improving cross-border co-operation without harmonising legal systems. It implies that decisions made in other legal systems are recognised with minimum formalities and without questioning the process through which the decision was taken. Harmonising legal systems only for the sake of cross-border co-operation would be disproportionate, politically challenging and not legally possible under the current treaties, as it would offend the principle of subsidiarity, so mutual recognition seems to be the best alternative.

Importantly, nonetheless, mutual recognition requires certain consistency in the laws of justice between Member States. In general, Member States have high standards of justice in the EU, including the UK, with a common commitment to fundamental rights, for example, related to the application of the jurisprudence of the European Court of Human Rights. On a fundamental level, the system is well founded. However, justice standards can and should be improved further, hence, for example, the procedural rights road map. A series of measures have been adapted to ensure that all Member States have minimum standards for those who are suspected and accused of a criminal offence. With that I have tried to reply to this question, my Lord Chairman.

The Chairman: Thank you for that answer.

Q220 Lord Mackay of Drumadoon: Over the last few months, we have heard evidence from a number of witnesses that certain countries in the European Union are using the European Arrest Warrant incorrectly in this respect: rather than delaying the use of the warrant to an instrument of last resort, they are using the European Arrest Warrant as a first option. All Members of this Committee would be very interested to learn whether you have come across this, and if so, whether you are in a position to give us any guidance as to why it is a fact that some countries are using it as the instrument of first option.

Olivier Tell: Thank you very much for your question. In general, the Commission is of the view that the European Arrest Warrant system operates correctly and successfully. We used to say that the European Arrest Warrant is a success story. I think we have to be aware that the European Arrest Warrant, compared to the history of criminal procedural law in the EU, and if you refer to national criminal procedural law, is a relatively new instrument. It has only been in place for the last 11 years, and during the past 11 years we have seen that the practical operation of mutual recognition in the European Arrest Warrant system is very successful overall and has succeeded in helping to deliver swift and fair justice for victims. There have been many situations where the European Arrest Warrant was very useful for bringing criminals to trial in all the Member States.

Having said that, certain problems arise, and of course we have come across them. The primary cause of these problems seems to be the lack of knowledge and experience of practitioners in the Member States and sometimes the inconsistent implementation by certain Member States of the EU legislation. Another reason is that authorities are not aware of less intrusive alternative measures provided in EU law, or they are not yet available in the Member States due to lack of implementation in some Member States, so there is much ongoing work to address this issue. During the last four years in the Commission we have worked very closely with the Member States to improve the concrete functioning of the European Arrest Warrant and to ensure that these problems will be reduced in the future. I might come in with more detail later on the application to give you some concrete examples if you wish.

Lord Mackay of Drumadoon: That would be helpful, thank you.

Q221 Lord Henley: The Committee over the last few months has heard some criticism of how other EU states use the European Arrest Warrant system. I was just wondering what criticism is levelled at the United Kingdom's use of the European Arrest Warrant.

Olivier Tell: This year we have organised two expert meetings with the Member States on the concrete operation of the European Arrest Warrant. This is part of our work to improve the system, so we know what the Member States think about the ways in which the European Arrest Warrant is working in the other Member States.

As regards the UK, there are indeed some issues with the UK related in particular to keeping up with the time limits. This is set out in the latest Commission report of 2011 on the European Arrest Warrant. It is a well known fact that there are some delays in the UK in dealing with certain European Arrest Warrants. The European Arrest Warrant framework decision requests that European Arrest Warrants shall be dealt with and executed as a matter of urgency. In any case, the framework decision sets out strict time limits, and only in exceptional cases and where there is no consent by the person concerned to be surrendered, the surrender may last as long as 90 days. Every Member State has a duty to ensure that their systems are able to respect these time limits, but of course we are aware that the European Arrest Warrant is an entirely judicial procedure. I was a judge myself in a previous life. You cannot give instructions to the judiciary, but of course it is the responsibility of the states to ensure that we keep respecting the time limits, especially because, generally, where the person is awaiting his or her surrender, very often they are in pre-trial detention and bail is not always given, so these matters should be dealt with expeditiously.

One of the most important improvements of the European Arrest Warrant compared with the previous extradition system is precisely that previously the average time limit to extradite someone between the Member States was an average length of one year, which is

a very long period of time. Now we have 16 days when the person consents to his or her surrender, and 54 days on average when the person does not consent to surrender, which is certainly an improvement from the point of view of the right of defence. Of course, in certain situations, as I said, it should be exceptional. When there are remedies that are used by the person, it is possible to go beyond the three months, but this should remain exceptional.

The Chairman: I ought to know the answer to this, but is the UK worse than many other countries in terms of the time taken?

Olivier Tell: We do not have exact data on the time taken, but I can tell you that during the latest expert meeting we had in April this year even the UK representative mentioned that they have certain problems with regard to this issue. They explained that it was linked to the systematic use of remedies or review appeals by the person whose surrender is sought.

Q222 Lord Brown of Eaton-under-Heywood: Mr Tell, could you indicate whether there are any other principal features of the way the United Kingdom operates the European Arrest Warrant scheme that trouble the Commission?

Olivier Tell: For us and for the other Member States, as far as I know, and this is according to the expert meeting that we had with them, this is the main issue.

Lord Brown of Eaton-under-Heywood: Delays?

Olivier Tell: Yes, but as I said I do not have exact data on that.

Lord Brown of Eaton-under-Heywood: There are no other particular matters that concern the Commission at all as to the UK's use of the warrant?

Olivier Tell: For the moment this is the principal one, because, as I said, there are also all the technical issues, which are explained in detail in the annexes of the latest Commission report in 2011. I do not want to enter into the detail, but I feel that certain provisions have not been implemented. If I remember correctly, for example, in the framework decision you

have a provision according to which you can refuse to surrender your own nationals if they are requested for the execution of a prison sentence, provided that you execute that sentence in the UK. I am not quite sure on that point that this provision was fully implemented.

The Chairman: Arising out of that exchange, where do you feel the UK stands compared with other Member States, because obviously in some Member States there are problems of one kind and in other Member States they may be different? How is our operation of the EAW in general terms comparing with other Member States, please?

Olivier Tell: There are issues in every Member State, as you said, my Lord Chairman, which are different. As far as the UK is concerned, we mentioned several times in our report the issue of delay. We do not have the data from the UK from 2005. Every year we collect the numbers of European Arrest Warrants issued and executed and so on, which is important. We have improved the statistics with a revised questionnaire prepared by the Commission. For example, in the future we will be able to know for which office a European Arrest Warrant has been issued, which is also very important.

If I look at the statistics furnished by Member States and compare the years 2005 to provisionally 2013, the latest figure that we have for the UK is from 2011. We do not have the figures for 2012 and 2013, so it would be important to get the data first of all. That would be my main concern.

The Chairman: I agree with you about that and might see what can be done.

Q223 Lord Hussain: Would it help the working of the EAW system if some of the proposed flanking measures, such as the European supervision order and the road map on procedural rights measures were implemented by all Member States?

Olivier Tell: Again, very briefly, to finish on the previous question, we do not rank Member States by the way they operate the European Arrest Warrant systems. Their institutions are

very different, but in general we think, as I said previously, that the European Arrest Warrant system is operating well in the Member States, including in the UK.

As regards flanking measures, you pointed out a very important question. Indeed, there are notably five EU legal instruments: a mutual recognition complementing the European Arrest Warrant, namely concerning the transfer of prisoners; probation and alternative sanctions; the European supervision orders for people who are awaiting trial; the financial penalties framework decision; and the European directive creating the European Investigation Order, which enter into application only in 2017.

I just want to mention that the framework decision, for example, on the transfer of prison sentences has only been implemented by 19 Member States including the UK, but we in the Commission are pushing the Member States very hard so that all of them implement it. Normally, you should not issue a European Arrest Warrant if you know the address of the person or for the execution of a prison sentence. You should use the framework decision on the transfer of a custodial sentence so that the sentence is executed in the habitual residence of that person in order to ensure social rehabilitation and to avoid imprisonment. If you do not know where the person is, you can issue a European Arrest Warrant but once the person is arrested we encourage Member States to replace the European Arrest Warrant by issuing a certificate for the execution of the custodial sentence in the place of the habitual residence of the person. We think that in the future this will be a promising tool that could reduce very substantially the number of European Arrest Warrants issued for the purpose of enforcement of prison sentences.

As regards prosecution, there is a very important instrument that unfortunately has been implemented by only 12 Member States, which is the European supervision order, which instead of transferring the person back to the issuing state ensures that this person remains

in his own state or in the state of his habitual residence and is supervised according to certain measures, such as an obligation to present or report to the police et cetera while awaiting his or her trial. We hope that this measure will be implemented by all the Member States. As you know, after 1 December this year, Member States are under a stronger obligation to implement these expert pillar measures and we will scrutinise this very closely in the future.

The latest flanking measure, which is very important, is the European Investigation Order, which notably will help to avoid issuing a European Arrest Warrant when the sole purpose of the European Arrest Warrant is investigation, for example for hearing a person during an investigation. In the future, we should us the EIO and not the European Arrest Warrant. Today, I want to mention that the mutual legal assistance agreement between the Member States allows this to be done, but unfortunately it is not used enough by some Member States, which tend sometimes to issue the European Arrest Warrant in situations where they could use alternative and less intrusive but yet effective measures.

I do not know if you want me to mention procedural rights now, because we also have a huge agenda on procedural rights in the EU, which directly affects the functioning of the European Arrest Warrant. I do not know whether this was included in your question.

Lord Hussain: Yes please.

Olivier Tell: Okay. On the other side, the rights side, the Commission has done a lot to strengthen the procedural rights of persons subject to European Arrest Warrants, including a comprehensive Commission road map on procedural rights. Three directives have been adopted: a directive on the right to interpretation and translation; a directive on the right to information, which creates a letter of rights for a person subject to the European Arrest Warrant, which should be given to all these persons and that lists their rights in a language

they can understand; and a directive on the right of access to a lawyer, which is also important because it provides assistance by a lawyer for persons both in the executing Member States and the issuing Member States.

The two first directives, interpretation and right to information, have a deadline for implementation in the past, and now they have to be applied by the Member States. They directly amend the European Arrest Warrant, meaning that all the rights that they provide mutatis mutandis are applicable to these persons. The access to a lawyer will be applicable in 2016, and I need to insist on that. This is a very important text for the European Arrest Warrant precisely because of the mandatory assistance of a lawyer in both issuing and executing state.

The Commission proposed in November last year three new directives on procedural rights: one on the presumption of innocence, one on legal aid and one on the rights of children. The one that is the most important for European Arrest Warrant functioning is the one on the provision of legal aid, which is also applicable to European Arrest Warrant proceedings. It ensures that all persons subject to a European Arrest Warrant, be it in the issuing or in the executing Member States, are granted legal aid during the proceedings. The negotiations on these three directives are ongoing. I do not think that the UK opted into the legal aid directive or the access to a lawyer directive, which we adopted, although that is still possible in the future, as you know.

Clearly, to conclude on that question, in the framework decision itself there are certain rights for individuals to counterbalance the competence of the state. If you look at Article 1(3) for example, which does not mandate the execution of the European Arrest Warrant when the rights of the person are clearly at stake and there have been some certain decisions related to pre-trial detention and the like, but of course it should be in exceptional

circumstances. Moreover, the road map on prosecuting rights will improve the situation of persons subject to the European Arrest Warrant. Of course it is not in the decision itself, it is around the decision, but it does not mean that it does not improve the situation. Thank you very much.

The Chairman: Thank you very much. I think you were going to ask a question. Would you like to ask it at this juncture?

Q224 Baroness Wilcox: I would. Thank you very much indeed.
Good morning. It has been suggested that the rights of the individual have not kept pace with the rights of the state, and I wonder to what extent the Commission's work on this procedural road map has addressed this alleged disparity.

Olivier Tell: Thank you. I think I largely replied to your question just one minute ago. The rights of individuals were never neglected in the European Arrest Warrant system. The European Convention on Human Rights, fundamental rights and EU law and provision of the decision itself provides rights for the individual. but of course the European Arrest Warrant was adopted, as you know, in the aftermath of 9/11 in 2002. Clearly, since then there has been a need to improve the system as regards the enforcement of fundamental rights. This is what we did with the road map and, as I said, even if these directives are apart from the European Arrest Warrant, they amend it to some extent where they provide that you have the right to interpretation and the right to be assisted by a lawyer.

If you look at the framework decisions that they have now, the right to be assisted by a lawyer is very limited. It is only in the executing Member States and it is according to national law. If you do not have a provision in national law according to which you should be assisted by a lawyer, this is not applicable. Now in the directive it is mandatory for the

Member States to ensure the right of access to a lawyer for all persons subject to a European Arrest Warrant.

Baroness Wilcox: Thank you for that answer, but can I press you a little further? What I am asking you about is that it has been suggested to us that the rights of the individual are not keeping pace with the rights of the state. I know that you have described to me what should happen, but I am asking you whether you have had any evidence of this. Surely you must be watching to see that there is a fair balance here.

Olivier Tell: Yes, indeed. I do not think the rights of individuals have not kept pace with the rights of the state. We are in the field of criminal law. There should be a balance. It is the essence of criminal procedural law to keep a balance between the need of the state to prosecute crimes and, of course, the need to respect different rights. I think this balance is there, and we trust the judiciary and we trust the courts to do this. There have been many decisions given by the European Court of Justice under the European Arrest Warrant that have tended precisely to keep this balance between those two different aspects., such as in the recent decision in Jeremy F v France on the European Arrest Warrant, which is precisely about the rights and the remedies.

There are of course some issues that are not in the framework decisions that relate to national law, for example as regards the remedies and the differences between the Member States. There are more remedies in some Member States than in other Member States, but at the moment this is not addressed. Maybe in the future this could be addressed by EU legislation.

Baroness Wilcox: Thank you very much.

Q225 Lord Empey: Good morning, Mr Tell, or should I say good afternoon with you? Earlier in the inquiry, we took oral evidence from Jacqueline Minor on 16 July. She indicated at that

stage that the outgoing Commission did not think it was appropriate to re-open consideration of amendments to the framework directive. Have you any evidence that you can give us to the attitude of the new Commission, if indeed it has been able to consider these matters?

Olivier Tell: As I said previously, the European Arrest Warrant is a rather young instrument for many practitioners, which is also one reason why there are certain difficulties in its application. Practitioners, who we have met very often over the last three years during meetings in the European judicial network, in Eurojust conferences and so on, and Eurojust agree that it is not necessary at the moment to re-open the instruments and we should continue working with such measures to improve its practical functioning. The majority of the Member States do not want to re-open it either, and the Commission—as was certainly confirmed by the voice of my Commissioner, Věra Jourová, during a hearing in the Parliament—still considers that revising the framework decision would be unwise at this stage.

The issues can be addressed and are already being addressed by this flanking legislation and through training by improving the practical application and improvements achieved without re-opening the core legislation. This is the Commission's position at the moment.

Lord Empey: That is a very clear answer, thank you very much.

The Chairman: If I may, Mr Tell, arising out of that there has been criticism levelled at this country because of the introduction of the proportionality rules in our domestic legislation. At the same time, it is clear that there is a need for some sort of proportionality principles within the workings of the European Arrest Warrant system, and if the Commission is not prepared to propose the introduction of such things at European level, surely Member States—this one not being alone—have no other choice perhaps but to do things domestically, even if some of the other Member States might be unhappy about that.

Olivier Tell: My Lord Chairman, this is a delicate issue indeed, because it depends whether you address the proportionality in the issuing Member States or the proportionality in the executing Member States.

As regards the proportionality in the issuing Member States, even if it is not written in black and white in the framework decision, as soon as the framework decision does not oblige the Member States themselves to issue a European Arrest Warrant, everybody agrees, and it is clearly stated in the Council handbook of 2010 that was adopted by all the Member States, that there should be an assessment in the issuing Member States of the proportionality of issuing those. You should not issue European Arrest Warrants for petty crimes, and this has been the position of the Commission for a long time. This is a serious instrument that involves costs, and even if in the European Arrest Warrant the threshold is only one year of imprisonment that is incurred—this is about prosecution, but the problem happens—you have to make an assessment of the interests of justice.

Most of the Member States' national transposition legislation obliges prosecutors and judges to assess whether it is in the interests of justice to issue a European Arrest Warrant, and there has recently been new legislation in Poland, for example, to ensure that this test is met. We have worked very hard with the Member States, and we have noticed a very important reduction in the numbers of European Arrest Warrants issued by certain Member States that have tended to issue many European Arrest Warrants in the past. There is a real decrease. As regards the executing Member States, there is no possibility in the framework decision to make it a ground for refusal. I understand the dilemma that you raise, but since 1 December the European Court of Justice has had full jurisdiction to assess conformity in the interpretation of the European Arrest Warrant and the conformity of national legislation vis-

à-vis the framework decision. Probably in the future we will have to say something about that.

The Chairman: Yes. If I might just speak for myself, it seems to me that it is a good thing for individual countries to give their courts a discretion about whether or not to act if there is a serious concern about the interests of justice, and I am reassured to think that it seems that the Commission shares that view. Is that right?

Olivier Tell: We share that view for the proportionality assessment in the issuing Member States when you have to issue a European Arrest Warrant, but not at the stage of the executing Member States, because in the executing Member States you have a certain number of reasons for refusing to execute a European Arrest Warrant. We encourage dialogue between the Member States, but there is no possibility normally to refuse to execute a European Arrest Warrant for reasons of proportionality in the framework decision. This is what the text says at the moment.

The Chairman: I understand the argument, but if there is no discretion in the issuing Member State, the onus has been put on the state that is having to deal with its execution, I would have thought.

Olivier Tell: This is why we have worked very hard to ensure at the beginning that these kinds of problems should not arise in the issuing Member States. I can tell you frankly what we said in the last expert meeting between the Member States. We said, "If you, the executing authority, think that this is not proportionate, you should enter into contact with the issuing judge, the issuing prosecutor, and start a discussion on that and see". Very often this is what happens and very often it leads to the withdrawal of certain European Arrest Warrants or the adoption of alternative measures.

The Chairman: I understand what you say and it is marvellous when it works. Perhaps we will just alter the sequence of the questions slightly. I know that Lord Rowlands is interested in these points.

Q226 Lord Rowlands: I might ask the question, because everyone knows already that the United Kingdom Government have enacted a proportionality bar, a requirement for a decision to charge to be made and a further bar to address specific concerns about the European Arrest Warrant as it affects the United Kingdom. May I ask whether the Commission is content that the legal remit that we have introduced is consistent with European legislation?

Olivier Tell: The UK has opted back into the European Arrest Warrant and into two important measures, Eurojust and so forth, and we are very pleased that it has. This means that the national legislation needs to accord with the framework decision. The Commission will scrutinise the existing legislation, and we will see whether it is fully compliant or not with the European Arrest Warrant framework decision. I cannot tell you more than that at the moment.

Lord Rowlands: Out of interest, did the United Kingdom government Ministers, for example, have any discussions prior to enacting the law? Did they discuss their thoughts about changing the law with the Commission?

Olivier Tell: We are in permanent contact with the UK experts in the Ministry of Justice. As I said, we organised a meeting on 1 April. They were there. We had informal contacts and they mentioned their wish to change their legislation, certainly at expert level.

Lord Rowlands: And at that level, the Commission did not feel that it offended European legislation?

Olivier Tell: As I told you, we will scrutinise this legislation. We are not fully aware of the content of this legislation. It needs to be assessed and to be scrutinised in light of the text

and in light of public consideration before I can make any official statement on its conformity or non-conformity to the framework decision.

Lord Rowlands: What timescale is this consideration going to have? When are you likely to at least have an opinion on the matter?

Olivier Tell: I am afraid that I cannot tell you now. On 1 December we started the process of scrutinising all the implementation by the Member States of the expert pillar acquis measures, including the European Arrest Warrant but not only the European Arrest Warrant. This process has started and will be ongoing over the next few months, so I cannot tell you exactly when this will be done. As I said, I can tell you that this process has started but not only for the European Arrest Warrant; it has also started for all the framework decisions adopted prior to Lisbon, because the 1 December cut-off date has passed and now we have to do some things. The Commission published a list of all these measures in May. We entered into negotiations in the Council for opting back in, which lasted many months and resulted in a very good result, and on 1 December all the Acts were published in the official journal, with the listing of measures to which the UK will opt back into. Now, we will turn this into a more general exercise with all the Member States to ensure first the proper transposition and then conformity of the legislation in the future.

You have to be aware that we are talking here about conformity or non-conformity, but there are many framework decisions that have not been transposed by Member States. The European Arrest Warrant is the only framework decision that has been transposed by all the Member States. We are very busy at the moment ensuring the proper transposition by all the Member States of all these instruments, including those that are as important as the European Arrest Warrant, such as the instrument on the transfer of prisoners. This is our first priority.

Regarding the correct implementation of the framework decision European Arrest Warrant, we work closely with the Member States. We favour dialogue with the Member States. There was a meeting with the Member States on 20 November where certain important issues were addressed. There will be another meeting in the first semester of 2015 with the Member States in which the UK will participate, and we will address these issues.

The Chairman: Mr Tell, presumably we cannot opt back into something if we are not in conformity with it. Is that not correct?

Olivier Tell: I am not sure I am the right person to reply to this legal question, because it is rather a more legal question.

The Chairman: That is fair enough.

Olivier Tell: I am not working in the legal service of the Commission, but my first feeling is that this is not the issue; all the Member States have transposed the European Arrest Warrant, but the transposition is patchy. In all the Member States there are different levels of transposition. We have already published three reports on that and if you look at all the annexes of the report 2005, 2007 and 2011 you see that they relate to this patchy transposition, but this does not prevent the European Arrest Warrant from operating satisfactorily at the moment. The UK has opted back in. We will monitor compliance in the future, not only for the UK but for all the Member States. I do not think this is an impediment to opting back in. This is my personal view. As regards extradition, the UK is no different from the other Member States.

Q227 Lord Jones: My Lord Chairman, Mr Tell, good morning. What appetite do the Commission and the Council have for enacting the recommendations contained in the report on revising the European Arrest Warrant for which Baroness Ludford was the rapporteur? What is the state of opinion? Have you any plans for moving forward?

Olivier Tell: Thank you. To answer your question, I do not know if Baroness Ludford is there among you, but I know her very well. We worked together on different files because she was rapporteur on the access to a lawyer directive, for example, so please send her my best appreciation.

Lord Jones: Baroness Ludford is sitting here listening to proceedings.

Olivier Tell: Thank you. After the resolution of Parliament on the recommendations contained in the report on revising the European Arrest Warrant for which Baroness Ludford was the rapporteur, the Commission has officially replied to that report and praising it. It was a very moderate and balanced report, especially on the question of proportionality, which was addressed only in the issuing state. We felt that, all in all, the recommendations of the report were very good and very interesting. Nonetheless, as regards the issue of reopening the European Arrest Warrant, as I said previously, the Commission said that for the time being, instead of revising the European Arrest Warrant, we would prefer to improve its practical functioning by training, by flanking measures, by best practices et cetera. We will not, at the moment, give legislative follow-up to that report, but we are trying to enforce these measures through means other than EU legislation.

Lord Jones: Thank you, Mr Tell.

The Chairman: Lady Jay, I think you just want to clarify something.

Q228 Baroness Jay of Paddington: We were interested, Mr Tell, when you spoke earlier about the lack of any need to reform the legislative framework for the EAW. We have obviously had a very large number of proposals from Eurojust of things they would like to see changed or action on, and I wondered if you thought there were any things, particularly around the proportionality question, that would be susceptible to proper European legal change and that would avoid some of the confusions that you have described about the different applications in different Member States.

Olivier Tell: Thank you for your question. As regards the proportionality between Member States we have certain recommendations, which are soft law in the handbook. We have devoted almost a full meeting with the Member States to the issue of proportionality in the issuing Member State in April this year. We will continue doing that. The Commission now, after Lisbon, is taking over the handbook. We will revise the handbook on the practical application of the European Arrest Warrant, and of course particular emphasis will be put on the issue of proportionality. This has given results. As I told you, Poland has changed its legislation. This is a result of the bilateral talks that we had with Polish authorities, and, I know, of the bilateral talks between Member States, including the UK, and the European authorities. This is the way we want to continue. We want to work with the Member States to improve the operation, showing best practices and making legal information more accessible—for example, in the e-Justice portal—but we will not, in the short term, revise it.

As regards Eurojust's concerns—I have the list in front of me—most if not all of them have already been addressed with the Member States during these expert meetings. Insufficient information or abuse of or access to information asked by certain Member States from other Member States is an issue that we cannot address with legislation. A certain number of issues on Eurojust's list could be addressed in the legislation, but imagine if we tried to enact new legislation. It would take one to two years for the Commission to adopt it. It might take two years for the Member States to negotiate and adopt it, should they agree and should they adopt it. If they then put three years of deadlines for implementation in the directive, it would be five to seven years before the legislation was available for the practitioners. We would clearly prefer to work with the Member States to improve the situation for practitioners on the ground.

I can also tell you that most Member States apply a proportionality test in practice before issuing a European Arrest Warrant. We know that because we have these discussions with the Member States, and sometimes certain Member States even go so far as to issue a European Arrest Warrant only for very serious crime, which is not in conformity with the framework decision. There is, of course, a range of practices, but this issue of proportionality is being addressed at the moment.

Baroness Jay of Paddington: Thank you. I understand your concerns about the length of time to legislate, but you are confident that you can do the soft-power approach in a shorter time, are you?

Olivier Tell: Yes, we are confident. It has already produced real results. We have noticed a significant decrease in European Arrest Warrants issued in certain Member States. I do not want to name them; you can imagine which Member States I am talking about. This will continue. This is a result of all the underground work we are doing with the Member States.

As I said previously, you have two reasons for issuing a European Arrest Warrant: prosecution and enforcement of a prison sentence. As regards the enforcement of a prison sentence, the framework decision on the transfer of prison sentences will be adopted by all the Member States. Our position in the Commission is that only in exceptional circumstances should European Arrest Warrants be executed for the enforcement of prison sentences. Again, that is why it is so important to get the data and that is why we are insisting that the Member States provide them, because if we want to monitor the application of the European Arrest Warrant correctly we need the statistics from the Member States, especially as we now have a new questionnaire and the data that are required from the Member States are much more comprehensive than previously.

Lord Rowlands: Very briefly, the figures show that a very large proportion of the warrants received by the United Kingdom are breaches of probation orders.

Olivier Tell: Yes, indeed. This is a situation that we have discussed with the Member State concerned. This is also why it would have been important for the UK to opt back into the framework decision on probation, because instead of using the European Arrest Warrant you would have been able to use the framework decision on probation and supervise the obligation of the persons in the UK. Of course, this has certain costs—although these people are habitual residents in the UK—such as reimbursement of the victim, obligation to pay alimony for children and so on, failure of which might be a crime in other Member States. Indeed, this is the situation with regard to one particular Member State, as far as I have heard. Again, as we have said in the Commission, a solution to that would be the application of the framework decision on mutual recognition of probation measures. It would mean that the issuing Member State would not issue a European Arrest Warrant only because a person has fled and is in the UK, and even if the European Arrest Warrant is issued, once the person is arrested this measure would immediately switch to a simple execution of the probation measure in the UK.

Of course, I am aware that this has a cost for the executing state, which has to supervise the probation measure, but this is a principle of mutual recognition: all Member States that are party to the framework decision will have to supervise the probation measures issued by the other Member States. On that measure, we have organised three expert meetings of the Member States. We are at the moment assessing the difficulties of implementation of this framework decision on probation and we hope that in the future it could certainly work better.

There is also an issue about difference in legislation. In certain Member States, probation measures are very often given by courts as an alternative to prison sentences. I am aware that this is not necessarily the case in all Member States, including in the UK, even though you have the community service order. You do not have exactly the same system as France, Poland or Germany as regards probation. We also want to work with the Member States so that they get used to the differences between the national legal systems.

Q229 Lord Brown of Eaton-under-Heywood: Mr Tell, we have already discussed certain aspects of the United Kingdom's recent opt back into the European Arrest Warrant, but I just want to ask you about the relationship of that with our non-participation in certain measures adopted with regard to the rights of individuals in criminal proceedings. That is to say the Stockholm Programme, the road map in 2009, and a year ago of course the December 2013 proposed package by the Commission: the presumption of innocence, the procedural safeguards for child suspects and a directive on access to provisional legal aid. Are those matters of concern to the Commission? Which matters particularly concern the Commission? What are the implications of our non-participation now that we have opted back in?

Olivier Tell: Thank you for your question. This is indeed an important question. Of course, the Commission would have preferred the UK to opt into those measures and the UK has still the possibility to do so. It is not for ever. I see a possibility to opt in, for example in the access to a lawyer directive, with which you are probably already compliant. It is 20 years since the right of access to a lawyer was granted in the UK. It is not an innovation for the UK. What is especially important, also, in these directives, as I have mentioned previously, is that they give new rights to a person subject to a European Arrest Warrant as regards assistance by a lawyer. That, for us, is very important. Indeed, it will be appreciated also by the other Member States that all EU instruments on procedural rights would be applied in the UK.

That would be a positive step for the application of mutual recognition instruments, including the European Arrest Warrant.

Lord Brown of Eaton-under-Heywood: Do any of these measures that we have not chosen to opt back into yet concern you particularly?

Olivier Tell: No. It is difficult for me to rank them in matter of priority. They are all important. Clearly, technically speaking, from a strictly legal point of view on the European Arrest Warrant's functioning, as I mentioned, the access to a lawyer directive is important because it provides access to a lawyer for those persons, and the legal aid directive also. The rights that are directly linked to the European Arrest Warrant, which is the subject of the hearing today, are access to a lawyer and legal aid, but they are all important for the Commission. The children's rights are important and of course the presumption of innocence has a very important symbolic and practical importance for the Commission, not only vis-à-vis the situation in the UK, which is not at stake, I think, but also because we want a minimum standard across all the EU Member States. This is also important for UK citizens when they travel abroad, or for UK legal practitioners when they are intervening in cross-border cases; they could rely on those measures.

Lord Brown of Eaton-under-Heywood: Thank you very much.

The Chairman: Thank you very much, Mr Tell. It is very good. We have come to, I think, the conclusion of the points that we indicated we wished to raise with you. Unless anybody else has a point they would like to put to you, could I just ask you whether you feel you would like to tell us that we have not specifically come forward with?

Olivier Tell: My Lord Chairman, thank you very much. No, I was very pleased to speak with you and to answer as far as I could. I did my best to answer your questions. Thank you very

much. I remain at your disposal, as does my team, should you have further questions or further requests.

The Chairman: That is very generous. Thank you very much. You have given us a lot of material. Some of it was, if I can put it this way, rather dense, so I think there is every likelihood we may want to follow up some of the points you have raised with a letter or something. If we could do that, that would be very good. Thank you and your team for the help you have given us.

Olivier Tell: Thank you very much. Goodbye.

The European Commission and Eurojust – Oral evidence (QQ 211 -229)

Submission to be found under Eurojust

Michael Evans, Graham Mitchell, Julia O'Dwyer and Jodie Blackstock – Oral evidence (QQ 172-190)

Transcript to be found under Jodie Blackstock

Faculty of Advocates – Written evidence (EXL0063)

RESPONSE by
FACULTY of ADVOCATES

to the

HOUSE of LORDS SELECT
COMMITTEE on
EXTRADITION LAW

General

1. In the view of the Faculty, it is generally the case that the UK's present extradition law provides just outcomes in outward extradition cases brought before the courts in Scotland.

   We are of the opinion that the present law is not too complex. As stated, it generally results in just outcomes of cases, and, in particular, the "step-by-step" procedure set out in both Parts 1 and 2 of the Extradition Act 2003 ("the Act") facilitates explanation of the court process to potential extraditees and provides a useful framework for practitioners in the more factually complex cases.

2. We are not aware of the present extradition law being unfit for purpose when applied to the increasing volume of multi-jurisdictional crime. The nature of such crime involves of necessity the recognition of the interests of various parties. We are of the view that the present law recognises and balances those interests in a satisfactory manner.

3. We are aware of neither the policy nor the practice of the Crown Office in Scotland in possible inward extradition cases, nor that of prosecuting authorities in foreign jurisdictions where convicted or accused parties are traced in Scotland.

   We are also unaware of any statistical evidence as to how frequently procedures other than extradition are used in such circumstances.

European Arrest Warrant

4. We are of the opinion that the introduction of the European Arrest Warrant ("EAW") has, on balance, improved extradition arrangements between EU Member States. It has done so by providing a standardised procedure among them, and that in turn has generally expedited the determination of individual extradition cases.

   We have no specific recommendations to make as to the alteration of the wording or implementation of the EAW.

We do not have either the necessary experience or information to express a view as to whether "standards of justice" across the EU are sufficiently similar to ensure that the EAW is an effective and just process. It is a fundamental principle of UK extradition law, pre-dating but continued by the Act, that the focus of the courts is on the implementation of our domestic law, and not on the law or procedure of the foreign requesting state. We would refer the Select Committee to the Opinion of the Appellate Committee of the House in the cases of Gomes and another v. Trinidad and Tobago[61] where it is stated that all Council of Europe countries "are subject to Article 6 of the Convention and should readily be assumed capable of protecting an accused against an unjust trial". In the main, we agree, subject to what we say below.

We have no view as to how post-Lisbon treaty arrangements will change the EAW scheme.

Prima Facie case

5. We are of the opinion that the existing statutory bars, including the human rights bar, do provide sufficient protection for requested people.

We are not aware of any particular territories which ought to be designated as not requiring a prima facie case to be made before extradition. We have no views as to what rationale should govern the making of such a designation, nor what parliamentary oversight should be exercised in that connection. These are political decisions and, there being few cases before the Scottish courts involving the requirement for prima facie evidence, we have insufficient experience on the basis of which to form a view.

UK/US Extradition

6. Again, by reason of there being few cases before the Scottish courts involving the US and other territories that do not need to show a prima facie case, we are not able to reach a view as to whether the UK's extradition arrangements with the US are comparable with those with such other territories.

Nor does our experience allow us to identify factors other than that of prima facie evidence which support the argument that the UK's extradition arrangements with the US are unbalanced.

Political and Policy Implications of Extradition

7. We are unable to answer this question. It involves a comparative analysis of pre- and post-Act cases in both political and legal terms, in which exercise we are not qualified.

[61] ([2009] UKHL 21 at para. 35)

In Part 2 extradition cases before the Scottish courts, the role of the Home Secretary is performed by the Scottish Ministers[62]. The Act confers no discretion on the Ministers; their role in outward extradition cases is limited to reaching decisions on certain legal issues specified in the Act, and having done so, then discharging or extraditing the requested person in accordance with those decisions[63]. It is therefore not the case – so far as Scotland is concerned - that the Act presently provides for a political actor in the extradition process who may take account of any diplomatic consequences of judicial decisions. We do not favour the introduction of a general discretion on the part of a political actor to extradite or not to do so; we remain of the view, as expressed in para. 6 of our Response to the 2011 Review, that such a step would add a further stage to proceedings which would lengthen and complicate them in an undesirable fashion.

8. We are not aware of any influence on decisions as to where to prosecute certain crimes, and whether to extradite, by any political, diplomatic or security considerations. There is no overt political input in Part 1 cases in Scotland. As stated above, the only overt input by a political actor in Part 2 cases is not discretionary; it is limited to the Scottish Ministers considering certain legal issues, and then, in accordance with the decisions reached, ordering that the requested person be either discharged or extradited.

Human Rights Bar and Assurances

9. We consider the human rights bar, as worded in the Extradition Act 2003, is sufficient to protect requested people's human rights. However, we have concerns about its implementation. In particular, we have concerns over the presumption that *all* signatories to the European Convention on Human Rights will act in accordance with their obligations thereunder. The jurisprudence of the European Court of Human Rights amply demonstrates that this has not always been the case. We consider that the domestic Courts should be more circumspect. We accept that membership of the Council of Europe is a relevant (and perhaps) weighty factor in determining whether extradition would be compatible with the Convention rights. However, we are uncertain as to the extent to which it may justifiably found a presumption. We recognise that there are practical and diplomatic difficulties in statutorily designating particular European States as "compliant". However, we consider that the Courts should be more prepared to engage with the country background information in determining whether a State can be expected to comply with its Convention obligations.

10. The practice of accepting assurances is, of course, governed by case-law. In *Othman (Abu Qatada) v United Kingdom* (2012) 55 EHRR 1, the European Court of Human Rights suggested that the following considerations should be taken

[62] The Act, section 141(1)
[63] The Act, section 93

into account when considering assurances: (i) whether the terms of the assurances have been disclosed to the Court; (ii) whether the assurances are specific or are general and vague; (iii) who has given the assurances and whether that person can bind the receiving State; (iv) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them; (v) whether the assurances concerns treatment which is legal or illegal in the receiving State; (vi) whether they have been given by a Contracting State; (vii) the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances; (viii) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers; (ix) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible; (x) whether the applicant has previously been ill-treated in the receiving State; and (xi) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.

The Court has made it clear in subsequent judgments that the Court expects Member States to conduct a robust assessment of the reliability of assurances (see, for example, *Asimov v Russia*, Application No.67474/11; *Sidikovy v Russia,* Application No.73455/11; *Nizomkhon Dzhurayev v Russia*, Application No.31890/11; *Ermakov v Russia*, Application No.43165/10; *Kasymakhunov v Russia,* no.29604/12).

The domestic Courts are therefore bound to apply the said principles robustly in order to comply with the law. There have been relatively few reported domestic decisions since the Court issued these guidelines. We are not aware of any in Scotland. However, we consider that robust adherence to these guidelines, is likely to ensure requested people's rights are protected. Our only concern is that there should be no assumptions made in respect of any these matters, nor should too great an evidential burden by placed on the requested person.

We have limited information on the arrangements for monitoring. We understand that monitoring is generally carried out by Non-Governmental Organisations in the receiving State. As the law currently stands, monitoring will only be deemed effective where the monitoring body (i) has sufficient resources or expertise; (ii) is provided with appropriate access; and, (iii) is independent of the receiving state (see, *Othman*, paragraph 204). The difficulty we perceive with this is in ensuring that these minimum safeguards are met, and maintained. We consider that the system would command greater confidence if the United Kingdom were to independently monitor compliance with these minimum requirements, on the part of bodies to whom it is proposed to entrust

monitoring functions, in much the same way as it currently monitors country conditions.

We assume that if assurances are not honoured, this may have an effect on diplomatic relations. That appears to be the assumption on which the Strasbourg jurisprudence proceeds. However, we are not in a position to comment on what the effect on diplomatic relations ought to be. What we can say is that, where assurances are not honoured, the Court should be very circumspect in accepting them in subsequent cases. We suggest that the degree of circumspection should depend inter alia on the particular human right violated; the nature and extent of the violation; the circumstances attending the violation; the safeguards that existed in the receiving State to prevent such a violation and why they failed; the steps taken by the Member State to remedy the situation; and, the previous human rights record of the State. Clearly, however, the more serious and/or widespread the violation, the greater the reluctance should be of the Court to accept them. However, we would not support the proposition that *any* violation should inevitably lead the Court to give no weight to such assurances at all.

Other Bars to Extradition

11. The forum bar provisions in the Crime and Courts Act 2013 have not been brought into force in Scotland, and it is thought that they will not be introduced in the future.

12. The proportionality bar introduced in terms of the Anti-social Behaviour, Crime and Policing Act 2014 has not been in effect for long enough for us to form any judgement on its impact. However, we welcome its introduction.

Right to Appeal and Legal Aid

13. We are of the view that the major reduction in the availability of legal aid at both Sheriff Court and Appeal level in Scotland has had a major effect on the provision of specialist legal advice and representation to requested persons.

We do not have any statistical evidence on the point. However, we are aware that the reduction in the number of cases where Legal Aid is made available for representation by Counsel at first instance has resulted in cases being prepared and presented in the Sheriff Court by agents who are both unskilled and inexperienced in the field. We are also aware of Legal Aid being refused in appeal cases where experienced Counsel are satisfied that there is a readily stateable argument to be made - on occasion an argument which was not raised at first instance.

Devolution

14. We are of the opinion that the existing devolution settlement in Scotland is fit for purpose in this area of law.

We would be reduced to mere surmising if we were to comment on how further Scottish devolution or independence would affect extradition law and practice.

23 September 2014

Duncan Ferguson – Written evidence (EXL0026)

Extradition – submission to House of Lords

I believe the law needs changing:

I don't believe it is in the interests of justice that people can be extradited to stand trial in a foreign country without evidence being presented in a British court to prove there is a basic (*prima facie*) case against them. The case of Andrew Symeou is a case in point where he was cleared by a Greek court yet had already spent 10months in a Greek prison.

There needs to be an automatic right of appeal to allow people to present the most recent evidence to the High Court – this would provide further protection against miscarriages of justice.

I also believe that the Home Secretary should have her right to bar extradition where she considers removal would breach human rights should be reinstated. Without that Gary McKinnon would have been extradited.

6 September 2014

Rowena Foote – Written evidence (EXL0038)

Members of the House of Lords Select Committee on Extradition Law,

I am writing as an individual member of the public to urge you to recommend that the current extradition law be changed in line with these principles:

1. British residents should not be extradited without a basic (*prima facie*) case against thembeing tested in a UK court.

2. If the alleged activity/ies for which a person is facing extradition took place wholly or substantially in the UK, a judge should be able to bar her/his extradition (whether or not the CPS decides to prosecute in the UK).

3. The automatic right of appeal against an extradition order should be reinstated.

4. The Home Secretary should once more be obliged to block extraditions that would breach human rights.

5. Because the cost of fighting an extradition order is high for people at most income levels, legal aid for extradition cases should not be means tested.

Yours sincerely,

(Mrs) Rowena Foote

12 September 2014

Foreign and Commonwealth Office – Written evidence (EXL0082)

Response to Select Committee for Extradition Law – Monitoring Extraditions from the UK

This note to the Select Committee on Extradition law details the monitoring of extraditions from the UK to other countries by Foreign and Commonwealth Office officials, sometimes in concert with those from other government departments.

The Committee's interest in the Council of Europe Convention governing Extradition will be the subject of a Home Office response, as they are policy lead on the Convention.

Monitoring Extraditions of British Nationals

We have a general consular commitment to safeguard the welfare of British Nationals in prisons overseas. All British prisoners abroad are subject to this protection. The form which our monitoring of prisoner welfare takes varies.

In those countries where prison standards are broadly comparable to, or exceed, those in the UK, we do not generally visit regularly, unless the circumstances of the individual merit this. This approach applies, for example, in Western Europe, North America, and Australia.

But in places where prison conditions can be poor[64], or when prisoners are assessed by our staff as vulnerable[65], consular officers visit regularly. Those visits are an opportunity to identify and address any welfare problems, including failures to honour assurances given. Where we are concerned about the welfare of a British National, there are several steps we can take.

Through our partnership with the UK based NGO, Prisoners Abroad, British Nationals receive financial and other support whilst in detention. Any British National can receive such support, with some services restricted to specific countries where prison conditions are typically below accepted minimum standards. Prisoners Abroad are also able to make payments for certain medical services, to ensure that British Nationals can access these.

If the conditions in which a British National is detained give rise to concerns that they could amount to Torture, or Cruel, Inhumane and Degrading Treatment, we will always lobby the authorities for improvements, if given the authority to do so by the individual who is incarcerated.

[64] The FCO has a system of assessing those facilities where British Nationals are in detention. This is done through a vulnerability assessment of the prison in question. They explore a range of risk factors and are quality controlled by consular regional managers, and by Consular Directorate in London. The assessment template is attached as Annex A.

[65] As with facilities, there is a specific vulnerability assessment tool focused on individual circumstances. The circumstances that determine vulnerability include: age; health (physical and mental); sexuality; gender; and ethnicity. Some of these factors induce a person being designated vulnerable due to the context / country in which they are imprisoned. The assessment template is attached as Annex B.

The nature, frequency and level of lobbying we undertake is determined by the severity of our concerns and the risks to the individual. Where a British National raises an allegation of mistreatment or torture, we will always raise this with the authorities in question, if given permission by the individual to do so.

It is important to stress, however, that consular officers do not have the resources or the information sources required to monitor deportation conditions constantly and would not necessarily learn straight away of any prisoner movement in breach of assurances given.

Assurances and human rights compliance

Most assurances we seek relate to non-British nationals being dealt with by foreign jurisdictions. And the majority of these refer to situations where we receive requests for Mutual Legal Assistance from foreign governments, rather than instances where non-British Nationals are extradited from the UK.

The highest profile application of assurances is the Deportation with Assurances (DWA) programme which has enabled us to deport 12 individuals who pose a threat to our national security to countries where there is a risk that they might be arbitrarily detained, tortured/mistreated or executed or subject to unfair trials in the receiving State. A monitoring system in these cases has been established.[66]

In general, assurances have proved to be a useful tool in mitigating risk. Posts help us to make that assessment by reporting regularly on the human rights situation and law enforcement system in their countries.

Ross Allen, Head Consular Assistance Department

Rob Fenn, Head Human Rights and Democracy Department

November 2014

[66] In each country, HMG will establish a mechanism to independently verify that assurances are upheld. Relevant case law (*BB (2006)*), establishes that a variety of approaches are legally acceptable, including but not limited to the appointment of a monitoring body.

Potential monitoring bodies are identified based on information gained from a number of publically available sources and in consultation with the host government, human rights experts and international institutions. HMG will fund capacity building activity, where appropriate, to ensure that the body has and maintains the skill, knowledge and expertise to perform the role effectively.

We have functioning DWA agreements with Algeria, Ethiopia, Jordan, Lebanon, and Morocco. The monitoring mechanism in each of those countries either takes the form of an agreement with a local organisation or the role is performed by an FCO overseas post. Both the Special Immigration Appeals Commission and the European Court of Human Rights have found this approach acceptable.

Annex A: FCO template for assessing prisons

Assessing vulnerability: Checklist to assess prisons
To assess how vulnerable a customer in prison may be, you need to consider both their personal circumstances (who they are) and the prison services (where they are). **This checklist will help you assess prison services**.

Your team should assess prison services for your country annually (or whenever there is a significant change). You should normally use this information to assess vulnerability before using the individual checklist. This is because if you have already decided your customer is vulnerable because of the prison they are in, you may choose not to assess how vulnerable they are personally. But you may also decide you want to consider the results of both, so you can make a better decision about the help you want to give them.

Is a detainee in this prison at risk of or experiencing the following things?	Yes	No	Notes
Torture or mistreatment			
An unfair trial			
Corruption of prison guards			
Violence from others			
Limited access to nutritionally sufficient food and/or clean drinking water			
Limited access to proper sanitary and/or sleeping facilities			
Limited access to proper medical care and/or protection from serious disease			
High overcrowding			
Inadequate heating/cooling or access to appropriate clothing			
Forced labour			
Restricted ability to contact consular staff in general correspondence and/or emergencies.			
A failure of prison authorities to inform consular staff about any changes that would change our assessment			

Have you answered yes to any of these questions? If you have the person you are helping may need more. See relevant Guidance chapters for more advice.

Have you answered no to all of these questions? If your customer isn't vulnerable because of who they are either, they may not need all the support you can offer. You should see relevant Guidance for more advice.

Whatever you decide, you must get your line manager's approval, and record your assessment and the decisions you made on Compass. And if the circumstances of a case change and you believe your customer's vulnerability has changed as a result, you should assess them again.

Annex B: FCO template for assessing prisoner vulnerability

Assessing vulnerability: people in prison
To assess how vulnerable a customer in prison may be, you need to consider both their personal circumstances (who they are) and the prison they are in (where they are). **This checklist will help you assess your customer's personal vulnerability**.

You can use this checklist at any time, but you should normally use it after considering their context because if you have already decided your customer is vulnerable because of the prison they are in, you may choose not to assess how vulnerable they are personally. But you may also decide you want to, so you can make a better decision about the help you want to give them.

How vulnerable is the person?

	Yes	No	Notes
Are they 18 or under?			
If they are older, does this make them especially vulnerable?			
Do they have a disability? You can think about the definition: 'a physical or mental impairment that has a 'substantial' and 'long-term' negative effect on your ability to do daily activities'.			
Do they seem to have learning difficulties?			
Do they seem to have mental health difficulties?			
Do they express suicidal thoughts, ideas, plans or actions?			
Do they have a serious illness?			
Do they use alcohol or drugs to a level that makes them vulnerable?			
If they are destitute, either long-term or temporarily, does that make them especially vulnerable?			
If they are inexperienced as a prisoner, does this make them especially vulnerable?			
If they do not speak a certain language (including English), does this make them especially vulnerable?			

Are they bereaved?			
If she is pregnant, does this make her especially vulnerable?			
Are they illiterate or with other difficulties understanding written information?			
Does their sexuality, ethnicity, religion or gender make them especially vulnerable because they are in a country with different attitudes to the UK?			

Questions specific to detainees			
Are they on hunger strike or threatening to be?			
Does the nature of their offence make them more vulnerable, e.g. sex or terrorism offences?			
Do they have no or inadequate legal assistance?			
Have they been a victim of mistreatment and torture and does this make them more vulnerable to further violence?			
Are they facing (or potentially facing) the death penalty?			
Are they unable to protect themselves against significant physical or emotional harm for any other reason that we don't mention here?			

Have you answered yes to any of these questions or the questions on the prison checklist? If you have the person you are helping may need more. See the Detainees chapter for more advice.

Have you answered no to all of these questions or the questions on the prison checklist? Your customer may not need all the support you can offer. You should see the Detainees chapter for more advice.

Whatever you decide, you must get your line manager's approval, and record your assessment and the decisions you made on Compass. And if the circumstances of a case change and you believe your customer's vulnerability has changed as a result, you should assess them again.

1 December 2014

The Freedom Association – Written evidence (EXL0059)

Summary

1. This submission is written and submitted by The Freedom Association. The Freedom Association is a non-partisan organisation with principles that include individual freedom and the rule of law. As such, the organisation takes an interest in how the UK government and court system deals with the subject of extradition.

2. This submission seeks to examine the Extradition Act of 2003 and provides evidence to assess whether the Act has enabled those living in the United Kingdom to be protected from false threat and accusation. This is not an exhaustive review and will focus on the implications of the European Arrest Warrant. Nonetheless, lessons can be learnt from the UK's current arrangements with other nations and allow for an improvement of our procedure. The review will therefore also include some examples of other extradition treaties, such as that of the UK - US Treaty, that were included in the Extradition Act of 2003.

1. Does the extradition law provide just outcomes?

3. Extradition law - especially concerning the European Arrest Warrant (EAW) - does not provide just outcomes in all cases as those accused are not protected in the same judicial checks that UK judges can provide for those accused domestically. It leads to UK judges being unable to provide sufficient protection for British citizens, and others living in Britain, from false accusation from another state and / or party in another country. The result is the unjust transfer of individuals, such as Andrew Symeou, to face false accusations in other countries.

4. Given the low threshold exercised under current EU law for extradition (or transfer), and the asymmetry of justice systems within the European Union, the 2003 Extradition Act exposes those living in the UK to conditions that do not meet the standards of UK justice. This asymmetry is not recognised within the EAW and therefore is not taken into consideration when judges assess a transfer request.

5. The result of the low threshold for evidence exhibited in the EAW results in police forces, including within the UK, using the mechanism improperly and leads to cases such as that of Ashya King whereby Hampshire Police Force, in the words of the Hon. Jacob Rees Mogg MP, "create an injustice" (Hansard, 3 September 2014, column 238) by issuing a warrant when one was not needed. The ability to do so may improve expediency for the police force, however, the cost can prove devastating to those involved.

6. The extradition process varies dependent on the category territory. The extradition process needs to be more rigorous in the case of category 1 territories that requires minimal proof to satisfy extradition requirements. The lack of this, and the catch all nature of the warrant, has allowed cases such as that of Julien Assange to be produced where claims have

been made concerning whether or not the issuing of the warrant was made due to political reasons[67].

7. Conversely, category 3 territories have significant barriers that could place the lives of citizens within the UK at risk. There is also a need to consider other factors that influence extradition, such as the UK's membership to the ECHR.

8. In the case of the European Arrest Warrant, expediency is often placed before justice. In does not give enough checks in order for the UK courts to be satisfied that the extradition or transfer would comply with the principles of the UK legal system.

2. Is extradition law fit for purpose in an era of increasingly multi-jurisdictional crime?

There is clear evidence that with the growth of cross-border criminal activity, law enforcement agencies are often required to work closely with international partners. With the formation of the National Crime Agency, the UK now has a centralised body with which to co-ordinate international operations. However extradition, which by its very nature involves cross-border operations and cooperation has not been transferred to the National Crime Agency and instead is still the responsibility of the Metropolitan Police Service's Extradition and International Assistance Unit[68].

All reforms to extradition should be undertaken with consideration to the growing role of the National Crime Agency, to ensure a centralised and consistent approach to extradition is undertaken. Also, with the international scope of the National Crime Agency, it may be the case that the need for extradition is lessened because there will be more abilities to prosecute criminal behaviour within the states in which it is working. Unlike the Security Services, the National Crime Agency's role in other states is well known and welcomed - as a route to combatting multi-jurisdictional crime. Therefore as the National Crime Agency's role and presence overseas grows, there should be less of a requirement for extradition to be the first tool used.

With the UK's use of universal jurisdiction, there are some occasions where extradition of an individual to another state should not be required, especially when the judicial processes in that individual's receiving nation do not the standards expected by the UK. However, universal jurisdiction only applies to a small number of serious crimes[69] - consideration should therefore be given to widening the scope of universal jurisdiction in areas where the Crown Prosecution Service believes the public purse would be best served by conducting a prosecution in the UK rather than relying upon extradition proceedings.

As indicated earlier, the Extradition Act should not been seen in isolation. As the 2003 Act does not cover all countries whilst other acts and mechanisms such as the RIP Act seeks to do so,

[67] Despite the EAW and other EU frameworks prohibiting the practice.
[68] Metropolitan Police Service Specialist, Organised & Economic Crime command structure: http://content.met.police.uk/Site/scospececoncrime
[69] UK's use of universal jurisdiction: https://www.gov.uk/government/news/universal-jurisdiction

9. Crimes, even amongst jurisdictions within the European Union that use the EAW, should be seen as

The introduction of a forum bar in the US-UK Treaty could provide benefits in terms of transparency, however, the substance of this reform is yet to be proven.

2 European Arrest Warrant

10. The European Arrest Warrant has improved the expediency of arrest but has increased the number of extraditions within the EU. Between pan-EU legislation being enacted and the end of 2009, 54,689 arrest warrants were issued and 11,630 were executed.[70] Figures obtained from the Daily Telegraph show that more than 6,200 arrest warrants were issued in 2012-13 - equivalent to 17 a day.[71] In the UK, Department of Justice figures show that there have been at least 7,000 surrenders by the UK to other Member States and evidence compiled by Lee Rotherham indicates that the UK is a "net extraditer" under the current terms of the EAW.[72]

11. However, under the proportionality of the scheme,[73] the warrant is not meant to be issues for so-called "minor offences". Nevertheless, a report issued by the campaign group *Justice* stated that "the EAW has been used, in vast numbers, for the return of people who have committed minor offences."[74] and admitted that, despite guidance, the numbers of EAW requests "remain very high". It continued:

"[I[n many requests from Poland and other Eastern European countries, it has been reported (both by lawyers in the project and in other reports and the media) that the person is only required to return to serve a few days in prison or at the resolution of the case, to pay a fine, which demonstrates that it may be being resorted to in circumstances which have not been contemplated by the Advocaten vor der Wereld 35 decision of the European Court of Justice or the obligations under Article 49 CFR that severity of penalties must not be disproportionate to the criminal offence."[75]

12. This means that proportionality tests have been too low and that the process does not have enough checks and balances that can be applied within respective Member States to stop, or at least halt, the transfer of individuals to another state for minor offences.

13. The impact of the proportionality bar in relation to European Arrest Warrant applications recently brought into force under the Anti-social Behaviour, Crime and Policing Act 2014 will have an effect on procedure: it means practitioners will require more

[70] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf
[71] http://www.telegraph.co.uk/news/worldnews/europe/10790394/17-arrest-warrants-a-day-on-EU-orders.html
[72] Rotherham, L (2012): The EU in a Nutshell: Everything you wanted to know about the European Union but didn't know who to ask. (Harriman House Publishing, London)
[73] Which tried to ensure that minor offences were not executed through the installment of minimum prison sentences.
[74] http://www.justice.org.uk/data/files/resources/328/JUSTICE-European-Arrest-Warrants.pdf
[75] Ibid.

information from foreign courts and authorities. This could mean that extradition takes longer but that the procedure is more transparent and the eventual transfer of the Requested Person(s) less likely to be for minor infractions.

14. A solution to any extra costs involved could be a change in the way the European Arrest Warrant is effectively billed. The estimated cost of each EAW case is estimated at £20,170 (25,000 euro)[76] and there is currently no provision in the EAW for costs to be passed onto the country demanding extradition. If the EAW were changed to put the onus on the requesting country to provide all the relevant and accurate information before, with subsequent costs for requests for further information passed onto the relevant authorities in that nation, any costs resulting from incomplete and / or inaccurate requests would be cost neutral to the UK taxpayer.

15. The proportionality bar is only applied to a certain type of case and, although those cases are numerous, it will not affect every EAW request. A far more concerning issue is the difference in the standards of justice across the EU.

16. Post Lisbon Treaty Member States have agreed that any new proposal or amendment to an existing law means that it falls under the ECJ's full jurisdiction with regards to Asylum, immigration, borders and civil justice, policing and criminal justice. However, as highlighted in the Michael Turner and Jason McGoldrick extradition case to Hungary, the standards found in the Hungarian criminal justice system do not match those exhibited in the UK.

17. The case of Turner and McGoldrick took three years from their original arrest and extradition in 2009 to their conviction for fraud in 2012. They were placed in a high security prison for four months and was released in February 2010 with no charges or trial. Michael Turner told *Fair Trials International* that he found it very bewildering that he was denied something so basic as a phone call home and the case.[77]

18. There are a number of other cases of injustice through the use of the EAW which have been highlighted by *Fair Trials International*, some of which raise issues that still need to be addressed.[78]

19. However, judicial systems across the EU do not just have different stands in the way they respond to crime, they seemingly have alternative ways on how they view the judicial procedure.

20. As suggested by Dominique Strauss-Kahn (DSK):

"In our [the French judicial] system you are presumed innocent until proven guilty. The reality is you are seen guilty from the moment the judicial system is interested in you"

21. Recently the Mayor of London, Boris Johnson, suggested that for certain crimes the accused should be seen as "guilty until proven innocent". Senior (unnamed) lawyers were

[76] EU Parliament 2011
[77] http://www.fairtrials.org/cases/michael-turner/
[78] http://www.fairtrials.org/documents/EAW_-_Cases_of_Injustice1.pdf

reported to have subsequently told the Daily Telegraph that Mr Johnson's proposals for "rebuttable presumption" would mark a "profound change" to British law.[79] Along with the comment by DSK The implication is that with the EAW, as currently constructed, the UK can be obliged to extradite individuals to countries that have different judicial constructs.

22. Nonetheless, there needs to be a method of extradition where both those that have committed crimes can be extradited to / from the UK. In the co-authored paper by Iain Murray and Rory Broomfield the example of both the US and Australia were mentioned.[80] The Australian example and its use of the Extradition Act of 1988 may hold some lessons for the UK in its ability to protect individuals using mechanisms such as prima facie evidence.

Prima Facie Case

23. Under the EAW prima facie evidence is not required because EU nations are deemed "democratic states and trusted extradition partners".[81] It seems incongruous that, given this definition, UK Courts may be prevented from transferring an individual on the basis that their human rights would not be respected. If there rights are to be in danger then they cannot be classified as "trusted extradition partners". If Human Rights legislation is being used to block individuals from being transferred it indicates a failing in the threshold of the EAW arrangement, not that their human rights are necessarily in jeopardy.

24. Nonetheless, in Sir Scott Baker's Review of the Extradition process[82] he states that "there is no good reason to re-introduce the *prima facie* case requirement for category 1 territories. No evidence was presented to us to suggest that European Arrest Warrants are being issued in cases where there is insufficient evidence." However, cases such as that of Andrew Symeou demonstrate that the standards of justice are not replicated in many of these partner states and that, in terms of judicial standards, the system has certain shortcomings and that there needs to be further checks to ensure the evidence meets the basic standards of British justice.

25. Further, as previously indicated, because of the low threshold for evidence to execute the warrant, there can be issues of granting extradition when the prerequisite information has not been provided. As indicated previously, amendments to the system could ensure that requests for further information can be passed onto the state requesting the information but the information should be made available so that UK judges can make an appropriate judgment.

26. The reintroduction of a *prima facie* assessment provides for a check against issue of having a low threshold of evidence. Further, as a government working report stated in 1974 when it reviewed the UK's extradition arrangements:

"The requirement of prima facie evidence remains the only real safeguard against the trumped up case, and we venture to think that it must serve to deter some applications for

[79] http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/11054372/Britons-who-go-to-Syria-are-guilty-until-proved-innocent-says-Boris-Johnson.html
[80] Cutting the Gordian knot: A road map for British exit from the European Union (Institute of Economic Affairs, London)
[81] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf
[82] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf

extradition where a warrant of arrest has been issued in a foreign State on largely unsupported suspicion of guilt." The report further pointed out that the requirement of a prima facie case was also the only effective guarantee that judges have enough information to establish dual criminality and that the suspect is not wanted for political reasons. Without the prima facie case safeguard,the other safeguards would also effectively go by the board.[83]

27. This safeguard becomes even more important when there are exemptions to the dual criminality test. In Sir Scott Baker's Review, he states: "it is clear that the United Kingdom could not require European Union Member States to meet the prima facie case requirement without withdrawing from the European Arrest Warrant Framework Decision". The EAW is though flawed in not appreciating the differences in legal systems and the burden of proof required across the Union. It has, as a result, become a tickbox exercise[84] and requires a further check.

28. Given that there is evidence that a prima facie case could assist in preventing the improper extradition of individuals to category 1 territories, it should be implemented. There are a variety of ways that this can be done including instituting the test during the hearing itself or instituting the practice of having a *prima facie* hearing separately, conducted by an impartial body before a EAW request is heard in a British court.[85] The latter suggestion would save costs in preventing inappropriate or incomplete requests from using court time while the former will save on setting up such a process. Instituting both would give a further check that could lessen the chances of an individual being extradited without the evidence meeting the basic standards of British justice.

12 September 2014

[83] CIted in: http://www.gerardbattenmep.com/wp-content/uploads/2012/02/EAW-Scott-Baker-response-28th-Nov-11.pdf
[84] EAW Compendium Wizard; allowing automatic and standardised creation of a European Arrest Warrant for Member States:
http://www.ejn-crimjust.europa.eu/ejn/EJN_EAWWizard.aspx
[85] As recommended by Nick de Bois MP in his evidence to the Baker Review:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117194/public-consultation-10.pdf

Maddy Fry – Written evidence (EXL0058)

Evidence for an overhaul of the current rendition laws

- British residents should not be extradited without a basic prima facie case being presented against them in a UK court. The Extradition Act of 2003 means that British residents can be extradited without a British court ever having the chance to assess whether there is adequate evidence against them.

  A judge should also have the right to bar an extradition if he/she feels the crime committed was done so at least partially In the UK and therefore that there should be a bar on extradition. Ass it stands, the current extradition bar forum bar is arguably not effective enough. Despite the possibility that the extraditions of Gary McKinnon, Richard O'Dwyer and Baba Ahead could have been prevented did an effective forum bar was in place, the current bar can be vetoed by the Director of Public Prosecutions.

Unjust extraditions are also far more likely under the current legislation, due to the automatic right of appeal having been scrapped - it therefore needs to be reintroduced with great urgency.

The Home Secretary's decision to remove the obligation to bar extradition to countries with questionable human rights records also means that the right of individuals to be protected from torture and ill-treatment can be violated. In the past this was an obligation that saved Gary McKinnon from this fate.

12 September 2014

Paul Garlick QC, Ben Keith and Daniel Sternberg - Oral evidence (QQ 106 - 119)

Evidence Session No. 7 *Heard in Public* *Questions 106 – 119*

WEDNESDAY 22 OCTOBER 2014

10.30 am

Witnesses: Daniel Sternberg, Ben Keith and Paul Garlick QC

Members present

Lord Inglewood (Chairman)
Lord Brown of Eaton-Under-Heywood
Lord Empey
Baroness Hamwee
Lord Hussain
Baroness Jay of Paddington
Lord Jones
Lord Mackay of Drumadoon
Lord Rowlands
Baroness Wilcox

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Examination of Witnesses

Daniel Sternberg, Barrister, 9-12 Bell Yard, **Ben Keith**, Barrister, 5 St Andrew's Hill, and **Paul Garlick QC**, Barrister, Furnival Chambers

Q106 The Chairman: I extend a warm welcome to our three legal witnesses, all members of the Bar, who are, from left to right as I am looking, Ben Keith, Paul Garlick and Daniel Sternberg. Thank you for coming and apologies for keeping you waiting a tiny bit. As practitioners, clearly we are interested to hear what your perspective will be on the points we are talking about. Before we start your evidence could you tell us who you are for record? Secondly, if anybody has a brief opening statement they want to make before we go into the questioning proper, we would be very pleased to hear from you.

Ben Keith: My name is Ben Keith. I am a barrister and I practise from chambers at 5 St Andrew's Hill. My practice is almost exclusively in extradition, both for the prosecution and defence.

Paul Garlick: My name is Paul Garlick. I am also a barrister, at Furnival Chambers. I have practised in extradition for about 20 years now, beginning with the Soering case, and have seen all three regimes of extradition under the various Acts. I hope I can assist on the historical development as well.

Daniel Sternberg: I am Daniel Sternberg. I am also a barrister, at 9-12 Bell Yard. I specialise in extradition cases, both prosecuting and defending.

Q107 The Chairman: Thank you. I will open with a very general question. Each of you can answer, but if you do not have anything extra to say, do not feel you need to come in. To what extent do you think a swift and efficient extradition process allows for the examination of human rights concerns? Is there a tension between them that is fundamentally flawed?

Ben Keith: In general, the way that our courts operate in human rights works quite effectively. The swift process by which the European framework decision works—which is meant to be 21 days—is not something that operates in this country; we almost never comply with that 21-day time limit where it is a contested hearing. However, if you are able to show an arguable case, most judges will allow you to argue your human rights bars unless there is absolutely no merit whatever.

Daniel Sternberg: I would certainly agree with that. Our court process privileges the argument of human rights over the speedy time limits in which we are supposed to comply with the framework on the EAW, but that is not necessarily a bad thing. There are perhaps a more complex set of issues in relation to the EU Charter of Fundamental Rights and

Freedoms, but for the most part those issues do not arise in extradition cases. People tend to argue primarily under the European Convention on Human Rights.

Paul Garlick: I have little to add except to say that the questions of swift extradition and efficient extradition are not necessarily the same. To ask the question of to what extent swift and efficient extradition allows for the examination of human rights depends on the human rights bar that is being argued. Most of my cases have been involving Article 3 rather than Article 8, and I certainly defer to my two colleagues on the Article 8 cases. I imagine, though, in Article 8 cases there will inevitably be some delays that are caused by obtaining the evidence, particularly, for dealing with a family situation. You have to get reports from social services, and that is notoriously difficult. They will often want to argue public interest immunity and the like, so getting the evidence for those cases may take a little time.

As I say, my experience has been more with Article 3 cases. My view on this is that, at the court at Westminster, the judges who are involved in extradition have a very keen judgment about which arguments are real arguments and which arguments are specious arguments. They are very good at weeding those out at an early stage and certainly, on the first or second hearing, pressing defence counsel as to what the issues are and whether there is an arguable point. Where they are satisfied that there is an arguable point they will allow sufficient time for proper evidence to be obtained. Where they think the matter is completely specious they are less likely to allow unreasonable delays. In real cases where there are real arguments, particularly as to Article 3—which of course are the most grave human rights violations—my experience is that the judges at Westminster are acutely aware of the difficulties and will extend quite a lot of time in proper cases to obtain the evidence.

That is not inconsistent with efficient extradition. In fact it is quite the opposite. It is consistent with a proper application of the law but it does make extradition less swift. Of

course in Article 3 cases in particular, where the risks of torture or degrading treatment are involved, swift extradition is not something that can be brought into the equation fairly.

The Chairman: I understand that. So the general conclusion, from the remarks the three of you are making, is that in the real world that we live in our system is working pretty well?

Paul Garlick: Yes.

Daniel Sternberg: Yes, most of the time.

Paul Garlick: I think that is largely due to the fact that we have a specialist panel of judges who are extremely well trained now and have a great deal of experience.

The Chairman: Lord Brown, do you want to come in?

Q108 Lord Brown of Eaton-under-Heywood: Yes, it follows on quite neatly from that, and was something that I was going to ask the three of you. I rather get the impression that, therefore, none of you think that the human rights protection under the Act is "theoretical and illusionary"; you accept that it is real and substantial. So far as Article 3 is concerned, the UK has refused extradition to a number of countries of late on Article 3 grounds. I would imagine they are almost all prison grounds, are they—the circumstances of incarceration if you extradite? Are those mostly what the Article 3 grounds are?

Ben Keith: I did a little research to remind myself that most of the cases, yes, involve general prison conditions. There are specific instances of torture cases, in particular Turkey. I know that Paul, having worked in Turkey, has a lot more expertise on that. Turkey, Ukraine, Russia and Moldova have serious issues with torture and of mistreatment of prisoners by police services, security services and prison guards, rather than just generalised conditions. The arguments in relation to a lot of the EU states are to do with general conditions rather than specific instances of torture.

Lord Brown of Eaton-under-Heywood: Was it mostly the torture cases, Mr Garlick, that you were referring to when you said how the District Judges at Westminster are able to distil speedily which are the serious cases and which are not?

Paul Garlick: If you go before a judge at Westminster and tell the judge—certainly as counsel, and counsel who is well known to the court as an extradition practitioner—that you have an Article 3 argument they will always allow you to raise that because of the consequences. The Article 3 cases that I have been involved in have mainly involved torture, particularly in Turkey. In all those cases, we have always been given adequate opportunity to obtain the evidence and the court has listened extremely carefully. In fact, it has discharged most prisoners in those cases. The evidence has taken a great deal of time to obtain. It has not just been general evidence of international consensus—to go to one of the other problems—but is usually direct evidence, if one can obtain it. In those sorts of cases the courts are usually compelled by that evidence. Certainly, so far as the torture cases I have been involved with, I think that the protection that the Westminster court has given has been far from illusory; it has been very real. I have never had to appeal a case on an Article 3 torture.

Q109 Lord Brown of Eaton-under-Heywood: We have been shown cases where the principle has been evolved that something approaching a sort of international consensus has to be established before you can sustain an Article 3 argument. Is that in relation to prison conditions or more generally in relation to torture? Is there international consensus on torture?

Paul Garlick: I do not want to pre-empt what Mr Keith or Mr Sternberg are going to say, but there are two ways of approaching an extradition case. One is by referring to material that is in the public domain, such as international material from the courts and the international

consensus. To do that you have to have a great deal of material to make a compelling argument. The other is by direct evidence.

In cases where there is direct evidence of either torture or degrading treatment or punishment, there is no question of an international consensus; the court looks at the actual evidence in the case. Certainly, in the Turkish cases I have been involved with, we have been fortunate to be in a position where other prisoners, from the same prison at the same time, have been able to give extremely cogent evidence of torture. In those cases, there is no question of international consensus arising. The court looks at the particular case on a fact basis and says, "We are satisfied in this case that this defendant, if returned, is at real risk of torture", and they apply that very effectively.

Lord Brown of Eaton-under-Heywood: Is there an international consensus that you do not send people back to Turkey?

Daniel Sternberg: There is not at the moment.

Paul Garlick: No, there is not.

Lord Brown of Eaton-under-Heywood: Roughly, what proportion of those who challenge extradition to Turkey on these grounds would succeed in their challenge?

Paul Garlick: If it is a Kurdish case, there is a much higher likelihood that they will succeed. In the two cases I have been involved in, there has been cogent evidence of torture, both by prison staff and by the police before they arrive in the prison, and in those cases the incidence of success is very high.

The Chairman: One small technical point: presumably, when we are talking about imprisonment in this context, that covers police custody before any sentence has been conferred?

Paul Garlick: In the cases I have been involved with, the torture has been both in the investigation stage and in the prison. Particularly in those cases involving Turkey where there have been riots in the prison by the Kurdish inmates, the violence in the prison, which has been extremely well documented and videoed, has been extensive. Certainly in Turkey, and from my experience also in cases such as Azerbaijan, there is a real endemic problem of torture during investigation and interrogation. I spent four months working in Azerbaijan for the Organization for Security and Co-operation in Europe monitoring a series of trials, and the evidence that was given during the trials by some of the witnesses—some of whom were prosecution witnesses—was about how they had been tortured in the investigative stage of the proceedings, as prosecution witnesses, and wanted to resile from their evidence. It was quite shocking and very credible.

Ben Keith: To say that it is prisoners in police stations assumes that they have the same system as we do. In a lot of post-Soviet states and Turkey, going to the remand prison, or even to the main prison, does not necessarily mean that you will not be taken back to the police station in the early stages for further questioning, interrogation or torture, even while you are technically remanded in that prison. Throughout eastern Europe, in particular, that is a common practice. So, while you are in the remand prison, you can be taken back to a police station for further questioning while the investigatory stage of the case takes place. The worse the human rights record, the more likely that that country is to produce torture; Azerbaijan and Moldova are particularly horrific examples.

Daniel Sternberg: Coming back to the international consensus test for a moment, I wish to emphasise that that test applies in relation to EU Member States and other countries operating the European Arrest Warrant. It does not apply to each and every extradition partner that we have, albeit I have seen some extension of it to countries that are members

of the Council of Europe or aspirant EU Member States, such as Albania and to a lesser extent—given what has just been said—Turkey. I should also say that I have been involved in Turkish extradition cases where there is not specific evidence of torture and the court has ultimately decided extradition should go ahead.

Q110 Lord Brown of Eaton-under-Heywood: There are a lot of supplementary questions that one could ask here. Are there problems with legal aid? Are there occasions when in fact it would be valuable to have an expert to examine the situation in the foreign country but, on legal aid, you cannot have that expert?

Daniel Sternberg: I will give way to Mr Keith in just a minute. The real problem with legal aid is getting it in the first place. That is where the real delay is. I have cases—both prosecuting and defending—where cases are fixed and then taken out many times because the defendant does not have legal aid.

Lord Brown of Eaton-under-Heywood: I think we are alive to that, but this is in terms of getting authority for an expert to look abroad, once you have it.

Daniel Sternberg: Getting authority for an expert in itself is something that happens fairly frequently, but the problem is finding an expert who is willing to work for legal aid rates. I think Mr Keith probably has much more experience of this and I will defer to him.

Ben Keith: I have not done an Article 3 case where I have not been able to find an expert who is prepared to give evidence on our behalf. It is sometimes the quality of expert that is difficult to find for those rates. Some of the very best experts will work for legal aid rates, because they have been doing it for so long and they are genuinely interested in the topic. It is when you are trying to deal with a new jurisdiction that it can take an awful lot of research. Once you have legal aid, and you have enough time, you will be able to find a suitable academic to assist you.

It also goes back to Paul's point on the difference between direct evidence and expert evidence. I do not think the international consensus test is applied terribly well. The test that is applied very well is the real risk test, the Chahal test, and that is applied very well across the board by the magistrates' court and the High Court. The international consensus test is really used in some respects to beat the defence down when you are trying to say, "All prisons in a particular jurisdiction are non-compliant with Article 3", and that is understandable. I know Professor Morgan is going to give evidence to you later. He has inspected a number of prisons over the years in these cases and has found some of them to be compliant and some of them to be non-compliant. There is a difference with the international consensus, which is very difficult to show because you have to have some evidence from the European Court of Human Rights, which involves a five-year turnaround to get a body of case law that shows that consensus, or from the European Committee for the Prevention of Torture reports, which need to show serious systematic breaches probably not over one report but a number of reports in a row. Once you have that, then you probably have the start of an international consensus.

The easiest way to do it is to look at specific areas or specific prisons where people might be held and to try to show that. Obviously you then come up with the problem that, when you show there is an Article 3 breach, you have to be sure that a jurisdiction is able to keep its promises as to where they are going to keep somebody.

Lord Brown of Eaton-under-Heywood: Mr Garlick, what you were going to say?

Paul Garlick: Lord Brown, I was merely going to add that it is also jurisdiction-specific in the European cases where you have a whole mechanism, like the European Committee on the Prevention of Torture. At least there is a body of expertise available. I did a case last year involving Ghana, where it was much more difficult. One of the difficulties is that there are so

many practitioners practising extradition that there is—I am going to phrase my words carefully—a variable level of expertise being used. In a serious case, you will need someone who has experience at the Bar of conducting the cases but also has contacts and knows where to go to get the expertise.

For example, Mr Keith and I have both been in cases where Professor Bowring has been our expert and is well known. In Ghana, it was very much more difficult. I had to do a great deal of research through Ghanaian contacts to find someone who was properly qualified to opine on the conditions in Ghana. Fortunately, he had been a member of the prison inspectorate in Ghana and was prepared to come to the United Kingdom to give evidence. In that case, he was not being paid legal aid rates; it was a privately funded case. I am very doubtful that the legal aid fund would have funded the cost of his flight. His evidence was accepted entirely before the judges at Westminster.

Q111 Lord Brown of Eaton-under-Heywood: Overall, I get the sense that you, representing the Bar, are reasonably satisfied with the way the courts give effect to and protect Article 3 rights.

Paul Garlick: Yes, we are.

Lord Brown of Eaton-under-Heywood: Thank you.

The Chairman: Are there any particular cases where it has perhaps gone wrong that you think ought to be drawn to our attention?

Paul Garlick: It is very difficult to separate your personal opinion from a professional judgment, but I will try to do that. In the Ghanaian case I was involved in, one of the difficulties we faced was that we had a wealth of evidence from the professor from Accra in relation to prisons generally and one particular prison where the prisoner would usually have been housed on remand pending his trial, probably for a period of two to three years.

The conditions in that prison can properly be described as absolutely appalling—some of the worst prison conditions I have ever seen in 20 years at the extradition Bar.

On the day of the hearing, the Ghanaians—through not even a diplomatic note but just a fax to the Crown Prosecution Service—informed the court that they would assure the court that if returned, the prisoner would not be housed in that prison but another prison. That caused us to have to completely rejig the case. We were granted an adjournment of course, and the professor then had to go and visit the new prison and prepare another report. The conditions in that prison were still in my judgment—this was a personal judgment—woefully inadequate and plainly a breach of Article 3. That defendant was returned to Ghana after an unsuccessful appeal to the High Court. He has been in that prison waiting for a trial for nearly two years now.

Lord Rowlands: What was the nature of his offence?

Paul Garlick: It was a serious offence. It was attempted murder. It was an accusation case, though, and of course in accusation cases there would be a trial when he was returned. In that particular case—I will not go into details of the prison conditions—there were 10 people in his cell, where they have one square metre and a lavatory that was just one yard from one of the beds. They were in bunk beds. Perhaps worst of all was an infestation of mosquitoes, where even the prison officers said to our witness, "I wish we had mosquito nets". It was really deplorable.

The Chairman: These were the improved conditions.

Paul Garlick: They were the improved conditions; the mark 2 conditions.

Daniel Sternberg: I am not sure I agree entirely with Mr Garlick on that. I only say that because I was involved in a separate Ghanaian case where there was evidence from Ghana—I should say at a much earlier stage than the day of the full hearing—about what

the Ghanaians considered to be a modern high-security prison they had constructed. It had facilities that were maybe not the same as one would find in a prison in this jurisdiction but were certainly comparable, and ultimately that issue was not the one on which the case failed. There is some difference between us in terms of personal and professional experiences, and among practitioners experiences and views will vary.

Lord Mackay of Drumadoon: I have one small question, which is just a one liner. You refer to the extradition Bar. Do I understand from what you are saying that most members of the extradition Bar appear on different sides of the cases?

Paul Garlick: Yes, I think so, Lord Mackay. The Crown Prosecution Service, certainly at the junior Bar, have a system where they rotate and they send out briefs to all recognised practitioners, particularly those who have been on secondment to the Crown Prosecution Service. A lot of the members of the Bar here in London now from various chambers go on a 12-month secondment to the Crown Prosecution Service to deal with extradition cases. It is absolutely excellent training for them and then, when they return to the Bar, they are regularly briefed by the Crown Prosecution Service and by the defence. There is a well established extradition Bar in London.

Q112 Lord Mackay of Drumadoon: Can we move on to Article 8? The factors relevant to determining Article 8 claims have been set out by Lady Hale in HH, with which I anticipate you will be familiar. Some witnesses have argued that they present too high a hurdle. Others argue that, since HH, an increasing number of extraditions are being discharged on Article 8 grounds. Which view is the more accurate?

Ben Keith: There has been what I would describe as a sea change in Article 8 cases since the summer of 2012. Since then there have been numerous discharges by the High Court, which has now filtered down to the magistrates' court. I did a case this year where one of the

district judges said to me, “If this case had been before me two years ago I would have ordered your extradition. However, having looked at what is happening in the High Court, I do not think it is proportionate and so I am going to order your discharge”. My experience is that Article 8 is now winnable and a good use of proportionality whereas, prior to HH, you had to be basically on death’s door or have a terminally ill relative, and there were very few discharges. Now there is a proper proportionality exercise undertaken both by Westminster and the High Court.

Daniel Sternberg: I would add that the other area in which there has been growth since the decision in HH is the concept of private life as being a factor that can defeat extradition. Before HH I was not aware of any cases in which private life had successfully been the basis to resist extradition. I would not say it is being used as a backdoor proportionality test, but it is certainly being used by persons who may have committed very minor offences, such as shoplifting or minor road traffic offences. Although they may not have children in this jurisdiction, the fact that they have established themselves here is a basis on which extradition is being refused.

The Chairman: Paul Garlick is the one who has seen this the longest. Is regime that is being operated becoming slightly more liberal—using the word in a non-political sense—than was the case previously?

Paul Garlick: Lord Inglewood, I think we have seen a moving of the sands both ways. I first started practising extradition back in the 1970s. In those days, under the old extradition Acts, there were not the human rights safeguards—it was long before the Human Rights Act—but there were other safeguards. Oppression was much more widely interpreted under the old Act, so one could argue that it would be oppressive to send a fugitive back under the old legislation. Delay was much more widely construed. It was much easier to

prevent extradition and then there was a tightening of that through case law. Then we had the new Extradition Act, the 2003 Act, which was the sea change. The grounds upon which you could resist extradition narrowed dramatically but of course one had the human rights bar, which has now become the most important field in extradition. In the case law, I think there was a hardening: "We do not want to have the human rights bars resulting in no extraditions taking place". So there was a hardening, first of all, in the magistrates' court and also in the High Court. Then I think we have seen a softening of that approach, led by tremendously important judgments like HH in the House of Lords, which is now feeding back down. In my judgment we have it about right at the moment.

The Chairman: If you bring the various factors involved in thinking about this from a perspective of justice as an abstract concept, you think it is about where it ought to be?

Paul Garlick: I think it is, perhaps with one small exception, which is that under the old law, one could successfully resist extradition on the basis that it would be oppressive to extradite or that the application for extradition was not made in good faith. That was a very useful save-all protection and in some cases, which we were involved in, the courts were persuaded that the application was not made in good faith. I certainly recall back in the 1990s being involved in a number of Indian cases for the prosecution. During the course of a lengthy extradition hearing, where we had to take evidence in India, it did become abundantly clear that the application—which on paper looked faultless—was being made in bad faith by the Mumbai police. Fortunately, although I was for the prosecution, the High Court refused extradition.

Lord Rowlands: Given your immense experience, do you think Parliament should have been more prescriptive in legislating rather than allowing case law to basically define the law?

Paul Garlick: That is a difficult question because it depends how one limits by legislation the avenues for appeal, although case law will always be important. If there are blanket restrictions then of course case law will never arise. As we have it at the moment, we have the very good gateway of the Human Rights Act, human rights violations or any Convention rights, and case law can very effectively interpret how those gateways are going to be used. So I think Parliament has got it right and the way the High Court—and of course the Supreme Court now—is interpreting it is about the right balance.

There are one or two cases that I am still concerned with where you might not be able to wheedle out cases that are being brought in bad faith, particularly some of the Russian cases that I was involved with arising from Yukos oil case. I can well remember that it was difficult but we were successful in resisting those extraditions.

Lord Rowlands: You cannot actually argue bad faith here then?

Daniel Sternberg: All I was going to say is bad faith does remain arguable in the context of abuse of process, which is an area that is judge-made law, and the High Court has established there is an abuse of process jurisdiction under the 2003 Extradition Act. It is invoked regularly and it does succeed sometimes.

Q113 Baroness Hamwee: Mr Sternberg, in your written evidence on human rights—I think you may have been talking specifically about Article 8—you used the terms, "fluid, evolving and dynamic". In your view, has the situation now plateaued or is there a continuing evolution—or are we too close to 2012 to know?

Daniel Sternberg: It is like watching a lake into which a very large rock has been thrown. Ripples are still reaching the edges but the surface of the water is starting to settle. Perhaps underneath there is a little more furious paddling.

Paul Garlick: I wish I could have put that so eloquently.

The Chairman: Before we move on—we want to talk a bit about assurances—we have not heard much evidence from anybody about Articles 5 and 6 of the ECHR. In reality, do they seem to play much of a part in your professional life?

Ben Keith: I do not think I have ever run an Article 5 case that is not tacked on to the end of an Article 6 case or an abuse of process. I do not think Article 5 extradition is something we examine very well or is argued very well, because it is very difficult to show what pre-trial detention should or should not be in another jurisdiction. Particularly with different court systems—I will come on to Article 6 in a moment—it means that an investigatory stage after charge can take a considerable amount of time, say a year or 18 months, during which stage somebody is technically charged and technically on bail or is in custody. It is difficult to compare that to our own system. It is also very difficult for there to have been a flagrant breach of Article 5, because it is a legal test and there are usually remedies, particularly in Europe; there is a legal remedy for Article 5 in a particular jurisdiction. Poland does not have a terribly good record on Article 5. People spend a lot of time in pre-trial detention awaiting trial, but the European Court of Human Rights knows that and deals with that when people apply to them for issues under Article 5.

In relation to Article 6 it is almost the same, in that we are common-law lawyers and we have a particular view of how our system works. We are the only ones in Europe who work on that sort of basis. In Article 6 there is a much greater margin of appreciation from the convention than anywhere else, because it is difficult to say, "Our jury trials are fair, your judge-led trials are fair, your prosecutor-led trials are fair and your magistrate-led trials are fair, but they all follow completely different systems". Within Europe it is very difficult to say that that is going to be unfair as a system because they have signed up to the conventions. It is possible on occasion to show that specific people in political cases will not receive a fair

trial, but that is direct evidence rather than systemic breach. In non-European countries, although it is not easier to argue Article 6—it is always very hard to argue—it is easier to show in some respects. Again, with the political cases in Russia, Ukraine, Azerbaijan, Moldova, Turkey and the United Arab Emirates, it is almost impossible to fathom how their trial system works for a common lawyer. There is monitoring of those by various international organisations who try to work out whether somebody is getting a fair trial or not, but it is very difficult to compare. To show a flagrant breach, in my experience it really only goes to those cases that have specific facts or specific political influences where the Government are behind a political prosecution, such as those cases involving associates of Yulia Tymoshenko in Ukraine or those persons who might be opposed to Vladimir Putin from Russia. You cannot say the whole of the Russian system or the whole of the Ukrainian system is broken, because that is too difficult to show, but you can show that those specific people are unlikely to get a fair trial because of the influence of the Government or of the FSB or whichever security service in whichever jurisdiction service it is.

Q114 Baroness Jay of Paddington: Mr Garlick, even before your very vivid example, we were concerned with the problem of getting assurances from different jurisdictions. Even though you seem pretty confident about the way the system is operating in our courts, do you feel—individually and collectively—equally confident about the methods of seeking assurances about people's treatment, how that is handled and what the processes of verification are? I think we received slightly contrasting written evidence from Mr Keith and Mr Sternberg, for example, about the operation of what I am going to call the "Abu Qatada rules"—the 11 provisions that might be looked at—and I would be grateful for your reflections on that and, as I say, more general points about assurances.

Paul Garlick: Assurances have always been given by requesting states. Formerly, they were given by way of a diplomatic note of assurance, and the courts regarded them highly.

Baroness Jay of Paddington: Sorry, just to interject immediately, does that mean that every case has an element of assurances? One of the things we were trying to establish was in how many cases this was an important or relevant factor.

Paul Garlick: I think a small number.

Baroness Jay of Paddington: A small number.

The Chairman: For clarification, in this context, we have sometimes had references to assurances and sometimes to undertakings—are they the same or are they in fact legally different?

Paul Garlick: They are the same. An undertaking is the perhaps more contemporary description of it. Assurances were given by way of a diplomatic note.

The Chairman: Yes, fine.

Baroness Jay of Paddington: Are we talking about a small number of cases?

Paul Garlick: A small number of cases. They usually go to questions of the admission of evidence that may have been obtained by torture—that is more of a contemporary problem—but are primarily about conditions on return. The first case I was involved in with an assurance was, of course, the Soering case, where eventually the American Government did give an undertaking that Soering would not be liable to the death penalty if he was convicted of murder. That took litigation all the way to Strasbourg before they would give that assurance. I can well recall appearing for the American Government in what then was the House of Lords on an application to appeal to the House of Lords, and there was no assurance. Of course that was before we signed the protocol, so a person could be returned to a foreign jurisdiction where they would be liable to the death sentence.

Within the domestic jurisdiction, at that time there was no abhorrence about this; there was no feeling that that would be completely wrong to send someone back to a jurisdiction where the death sentence might be applied. Of course, that has changed; there has been a complete sea change. The problem very evident in Soering was that you get an assurance but, first of all, who you are getting the assurance from and, secondly, are you able to monitor it?

Baroness Jay of Paddington: Exactly, and the verification process is the one that I think is of most interest.

Paul Garlick: I quite agree. There was a problem with Soering because, of course, the question of the death penalty was not a matter for the federal Government but for the state Government. It is very difficult to get an assurance from a state prosecutor—particularly a prosecutor who might be facing re-election by quite a right-wing community—that something will or will not happen to a particular person when returned. In Soering's case the assurance that was given was stuck to by the American Government.

In other jurisdictions, there are problems. One of the problems in a case—I know that Mr Summers will be giving evidence in a later session today—called Gomes and Goodyer, where I appeared for Mr Gomes, again involved prison conditions, in Trinidad and Tobago; on the island of Trinidad in fact. There were assurances before return that both Mr Gomes and Mr Goodyer—they were separate cases but they were joined in the House of Lords—would only be returned to a certain prison. Mr Goodyer was returned to Trinidad before Mr Gomes, because the litigation for my client, Mr Gomes, was continuing. When Goodyer was returned to Trinidad, the message had not got through to the local prison services, and Goodyer was incarcerated in the wrong prison. As soon as that was found out in this country, it was corrected, because they knew that if it was not corrected there would be no

further extraditions to Trinidad and Mr Gomes would not go. But there was a problem there. There was a lack of communication. It had not filtered through to the prison authorities. The assurances were not disobeyed, they just did not have any knowledge of them.

In other jurisdictions, there are concerns where someone may be facing a very long period of imprisonment on their return—for example, an allegation in Mr Ridge's case of attempted murder, or in, I know, Mr Sternberg's case where the allegation was actually murder where, if there is a conviction, there are going to be very lengthy periods of detention, possibly whole life sentences. It is very difficult to rest assured that an undertaking will continue for the whole of a life sentence. There could be a change of Government. There could be a change of political attitudes to someone in a foreign jurisdiction and of course, once they are back, there is no means of obtaining their return to this jurisdiction. Those are the worrying cases in some jurisdictions. I am not just pointing the finger at Ghana, as there are other jurisdictions, such as Russia, for example.

Q115 Baroness Jay of Paddington: That is very helpful. I am also interested in the point of whether or not our courts are giving sufficient weight to these apparently established 11 principles.

Paul Garlick: I have not been involved in a sufficient number of cases since the 11 principles to be able to answer that. Historically, the courts have always regarded an assurance by a requesting state as sufficient unless there is a real reason to doubt them, like a rebuttable presumption.

Baroness Jay of Paddington: Mr Sternberg, you look as though you not sure about that.

Daniel Sternberg: I think I would disagree actually. I would say that assurances, where there is real doubt about compliance with human rights, are necessary but not sufficient. The

giving of an assurance in itself is something that will give confidence to the magistrate or to the High Court, but that is not enough. You have to show that the assurance will be implemented and will be carried out. I know Mr Keith has talked about a number of countries, including Ukraine and Azerbaijan. If a country gives an assurance that says, "This person will have a fair trial and will be held in conditions that do not violate their Article 3 rights" but all the evidence that is available internationally goes the other way, then it can clearly be shown that that assurance is one that will be either very difficult or impossible to honour. I think the courts take a realistic approach to assurances. If they are being promised the moon, they will be sceptical about it.

Baroness Jay of Paddington: Mr Keith, what is your view?

Ben Keith: It depends on who is giving the assurance. The Othman criteria are all well and good, and if it is an EU state then, in general, it will be believed. The thing we have not been able to look at, particularly in prison condition cases, is whether you can monitor that and see whether it is a realistic assurance. Nobody is going to allege that Italy or other jurisdictions might give an assurance in bad faith. It is just that, in reality, they might not be able to detain somebody in compliant conditions, even if they want to.

Baroness Jay of Paddington: May I interrupt you? Our attention was drawn to examples where there was general concern—for example, about Italian prison conditions—but where there was a specific reference, rather like in the Trinidad case, to a particular prison when the extradition was granted. How on earth would the District Judges at Westminster be able to identify the conditions in a specific Italian prison?

Daniel Sternberg: I can answer that because I was doing an Italian extradition case yesterday. On that occasion I was in fact defending. The Italians had said that the defendant would be in one of four named prisons. The Italian Ministry of Justice places on its website

statistics of the occupancy of each prison, so I was able to show the court that each prison to which it was being proposed this person should be returned was in fact overcrowded now. But that is specific to Italy.

Ben Keith: I have had Ukrainian cases where the extradition request says, "This request is not politically motivated", and the fact that you have to put that in your extradition request usually starts to ring alarm bells. They have been discharged on those bases because, in spite of the assurance given by Ukraine that they would be kept in compliant conditions or given a fair trial, when looking at the background to the case and the political involvement of the defendants and the prosecution witnesses, it was clear that it was politically motivated. There was no prospect of a fair trial and, tagged on to that, prison conditions were horrendous and no assurance that was given could be relied upon. It is the same with Russia. They might say, "We will not torture somebody", but we know from looking at Sergei Magnitsky, who was killed by the FSB, and at Mikhail Khodorkovsky, who was recently released from Russia and is now living in the United States, that if you stand up to the regime in Russia—or if you are linked to those who stand up to the regime in Russia, which is more important—you will be punished. So if there is a high-profile person who is against a particular jurisdiction and you happen to have worked for them, there is a high probability that, if you get involved, extradition will be requested. That is not because you have committed a crime but because you could have pressure put on you and be tortured in order to give evidence against them to discredit them. Mr Garlick may be able to correct me, but I think that is a lot of what Yukos was about.

Paul Garlick: It was. Interestingly, there are three categories of territories that might give us your answers. In the EU categories, there is quite a good framework for monitoring. Certainly, we would always be given access to prison conditions within EU Member States.

The larger body of the Council of Europe is more worrying. Certainly, I know from personal experience that in countries like Azerbaijan—where I spent four months sitting in courts and seeing prison conditions—it is so difficult to monitor what is going on, even if you are actually in the country. As a member of the OSCE, at the Baku office in Azerbaijan, it would probably take you weeks to get access to a prison, despite actually being there and having the political momentum of the OSCE behind you. It is almost impossible properly to monitor prison conditions or, indeed, trial conditions in countries like Azerbaijan. Some of the trial procedures in Azerbaijan have improved since my first report, which was in 2007. Some certainly have not, and it is very variable between court and court.

It is very difficult to even get in to a court in Azerbaijan. During one political trial that I was monitoring in Baku, the hearings would be cancelled. You would have to wait outside court for many hours, not knowing whether there was going to be a hearing that day. Hearings would not be posted publicly on the court doors. Often, you would have to wait for days—literally days—before you would be admitted to a hearing. Then there was the difficulty of having the right papers to be admitted to a hearing. Where you have a situation like that, where it is so difficult to monitor either the trial process or the prison conditions which someone might have to endure after a conviction, it is very difficult to test an assurance, to be absolutely sure you can rely upon it. Although they are members of the Council of Europe, there is a machinery and often courts will say, "Well, of course, they are all members of the Council of Europe. There are standards", in reality, it is almost impossible to properly monitor the conditions in countries like that.

Baroness Jay of Paddington: Then you go beyond, to your third category, Ghana, and so on?

Paul Garlick: Yes, where you do not even have the Council of Europe mechanism.

Lord Brown of Eaton-under-Heywood: I rather think I wrote the judgment on Gomes. Is that not a case where Lord Ramsbotham went out and saw the prison?

Paul Garlick: Yes, it was indeed. He kindly went out and did that, and came back and opined that the conditions in that one particular prison were Article 3 compliant.

Lord Brown of Eaton-under-Heywood: They got him in to the wrong one by mistake.

Paul Garlick: They got in to the wrong one, yes.

Q116 Lord Empey: I suppose Mr Garlick touched on this issue. You go to a third country, where presumably there are language issues and you run into all sorts of things. In the absence of a support group, which some people who are being extradited do have, is the Foreign and Commonwealth Office, through our embassy network, helpful in these matters? Are they under any obligation? Should they be under an obligation? What other reach would the courts have in order to follow up, other than sending out a specific individual with that specific task?

Paul Garlick: Lord Empey, that is a very important question, because the consular role of our embassies abroad would only extend to UK citizens. The majority of people who are going to be extradited back may not be UK citizens, so the Foreign and Commonwealth Office and our local consular services would not be available to them. I will be corrected by my colleague, but I do not think there is any procedure whereby the Foreign and Commonwealth Office will undertake to monitor assurances that are given by requesting states. They are overwhelmed with their consular activities as it is. So I do not think there is any machinery in place for a non-UK citizen, who is returned to a common jurisdiction, whereby our Foreign and Commonwealth Office could monitor that properly.

Lord Empey: Does that therefore mean that, at the very least, there are going to be two tiers of monitoring: for those who do have support groups that can verify the situation or at

least raise the alarm on behalf of an extradited person, and those who are on their own, perhaps without legal aid and without a support group when they go out there. Is it a case of out of sight, out of mind?

Paul Garlick: I think in many cases it is case of out of sight, out of mind. It is a very lonely existence for a prisoner in a foreign jurisdiction who is suffering and cannot get the message out.

Lord Rowlands: In most cases, being non-nationals they would not be British nationals?

Paul Garlick: If they are British nationals, and if they can get a message to the local consular office, then I am sure that the local consul will give such assistance as they can.

Lord Empey: What is your collective experience? Would you have any suggestion to the Committee as to how this process could be strengthened to the point that the court could, if requested, have a mechanism to underpin the decision that it took to justify what it has done or to prove that there is a question of doubt? That would obviously have an impact on future cases but it could also have a diplomatic implication, if the United Kingdom Government were able to say to a foreign Government, "Look, we extradited X in good faith. We are now satisfied that that has not been implemented accordingly. Can you kindly correct it?"?

Paul Garlick: I think that the resources of the Foreign and Commonwealth Office will be tested, but there are two possibilities. One could either have an ad hoc scheme where, in particular cases, where a particular assurance has been given by a requesting state, as part of that assurance within that mechanism there should be clear assurances that the Foreign and Commonwealth Office, or the local consular offices, will be given access on a continuing basis. Then of course that is a continuing assurance that can be monitored, and if the Foreign and Commonwealth Office are refused entry to a prison, they can report back to

London and steps can be taken diplomatically. To the prisoner within the prison, it is still a very remote remedy. That is the ad hoc method.

The alternatives that we have are part of either a legislative or a practical mandate. We could have a mandate on the Foreign and Commonwealth Office to monitor, as a matter of fact, the position within a prison of anyone who is extradited, whether or not they are United Kingdom citizens. I think that is maybe asking a lot of the Foreign and Commonwealth Office, and I am not sure what jurisdiction in the requesting state they would actually use to get access to a non-UK citizen within a prison.

The Chairman: Is there a Strasbourg court ruling that indicates that we have a legal responsibility towards those our legal system extradites, even if they are not UK citizens?

Paul Garlick: The obligation would extend to not extraditing them.

The Chairman: If you extradite and they subsequently find their human rights are breached in the destination, as far as you know, do we or do we not have any ongoing legal responsibility towards them? It was something that I thought— theoretically, let me put it that way—that we did?

Paul Garlick: There are two aspects. First, in non-EU cases and non-Council of Europe cases, if the prisoner is extradited outside the territory of the contracting state to the European Convention, they do not have the protection of the European Convention, so it would be difficult to place an obligation on us to enforce it.

The Chairman: I agree it would be difficult, yes.

Paul Garlick: However, we certainly have a positive obligation, under Article 3, not to extradite someone where we know that they may be tortured or suffer degrading treatment. Arguably, that positive obligation may continue if someone is extradited to a non-Council of Europe state.

Daniel Sternberg: I was going to say that, legally, the only examples I can think of where that has been done, which is not an extradition example, is where habeas corpus has been sought in the case of a detainee who was held in Afghanistan. A writ was issued eventually. But I think the High Court in this jurisdiction would be very reluctant to extend habeas corpus to every prison in every country with whom we have extradition relations.

Ben Keith: We simply do not have the locus to do anything, apart from to write. The problem with the process of international law is that it is very much done on goodwill, and so the Home Secretary, the Foreign Secretary or the Prime Minister can write to representatives of the other country and say, "Stop mistreating the extraditee" but, unless we are prepared to sanction or to take military action, therein is the end of our jurisdiction.

Q117 Lord Rowlands: You have given us some very good examples of Turkey and Azerbaijan. In recent years, how many people have we extradited to these two countries?

Ben Keith: One case of extradition to Azerbaijan was reported. There were two gentlemen—one was called Ramil but I cannot remember the other gentleman's name. They were extradited.

Lord Rowlands: Out of how many?

Ben Keith: Three or four. The rest have been discharged. From the statistics from the Scott Baker report and in my recent experience, we have only extradited a handful of people to Turkey, overall.

The Chairman: Discharged them?

Ben Keith: We only extradited a handful of people. Most people that Turkey requested have been discharged.

Daniel Sternberg: This is purely anecdotal, but my experience with Turkey is actually the other way. I have personally been involved in three or four Turkish cases, all of whom—save for one that is ongoing—have been extradited eventually.

Paul Garlick: Interesting. Did they involve Kurds?

Daniel Sternberg: Some of them did, yes.

Paul Garlick: One of the other matters of concern—I am sorry to dwell on Azerbaijan, but it is certainly my best area of expertise—is that with extradition to Azerbaijan now, they do not even have to establish a prima facie case. I am certainly able to say that, if a request was made, I would certainly want a prima facie case from states like Azerbaijan because the trial process when you get back is pretty horrendous.

Lord Rowlands: We cannot do it apparently, can we? There is no means by which we can do that.

Paul Garlick: No.

Q118 The Chairman: Is there any means by which we can achieve the same, through the various other provisions that do bite in those circumstances, for example if you have such systemic evidence that the trial is not going to be fair?

Paul Garlick: That might amount to a complete nullification of the very essence of a right to a fair trial under the Othman test. In a sense we all know what the difficulty is with torture: it does not take place on the streets, but always takes place at night, normally in a basement, and it is very difficult to see. It is very difficult to deal with that.

Leaving aside torture, in these other jurisdictions the actual judicial process is so closed—although they do have people who can come in—that it is very difficult to follow and very disjointed. Getting the evidence together to show a judge at Westminster to say, "This man cannot possibly get a fair trial in Azerbaijan" is extremely difficult.

Ben Keith: It is almost impossible to get information out of Azerbaijan, because all NGOs are monitored. It is quite a dangerous place for anybody to operate who is trying to promote human rights. I am always slightly conflicted about the prima facie case argument, because I am not sure it necessarily provides a much greater protection than the European convention because, in fact, all the political cases I have done have involved the 1957 convention, so countries have not had to prove a prima facie case. Even if they did, Russia would just make up the evidence anyway. It is a shorter document for them to make up than lots of different witness statements. The United Arab Emirates do not have their systems right for producing witness statements. I know the Indian prima facie cases, because they take witness statements in a very different way—the police officers take it down in logbooks rather than in witness statements—what you get is almost incomprehensible to us; a sort of narrative of what has happened in the case through the Indian evidence and it is quite difficult to analyse. For my part I am not sure, acting for either side, that the necessary prima facie case adds any particularly greater protection than the 1957 convention. It is more about which country we are dealing with and how much we trust them, as to whether we believe what they are saying.

Paul Garlick: I agree with Mr Keith and I was not arguing that the prima facie case would solve the remedy. What is concerning is that someone could be returned to a jurisdiction like Azerbaijan where we do not have adequate monitoring facilities. They could be returned in a situation where there was not even a prima facie case. That is what really concerns me.

Lord Brown of Eaton-under-Heywood: Has an extradition ever been refused specifically on Article 6 grounds?

Ben Keith: Yes. The High Court refused it in the Rwandan genocide case, which I know is now restarting again.

Lord Brown of Eaton-under-Heywood: Was that just on Article 6 grounds?

Ben Keith: Yes, that was Article 6, because the International Criminal Tribunal for Rwanda said that they would remand in the domestic court, which at that stage was not compliant with Article 6. I had an Article 6 discharge last year in the magistrates' court in relation to Ukraine, as well as an Article 6 in relation to Azerbaijan. They do not often get to the High Court because if you manage to find enough evidence to show that a system or a particular person is not going to get a fair trial, it is very difficult to come back from that, as with the Russian cases and I think the Ukraine cases. With Turkish cases it happened only where you went to the special military court, which was non-Article 6 compliant, rather than the domestic court. There is a handful of cases, but they are in non-EU states. There was one case that I did years ago for the CPS, a particular Hungarian case that was in breach of Article 6. Again, that was on very specific facts for that particular locality and those particular defendants, based on the fact that they would not receive a fair trial on the evidence before that court, rather than on a systemic breach.

Lord Empey: Chairman, can I just ask one supplementary?

The Chairman: Yes. We must wrap up quickly.

Q119 Lord Empey: Is there any merit in exploring the extraterritorial jurisdiction act type of principle, whereby someone could ultimately be tried here?

Daniel Sternberg: We traditionally take a very limited approach to extraterritoriality, usually only applying it to British citizens and for very limited categories of offences. Off the top of my head, the only one I can think of is murder.

Lord Empey: We have an extraterritorial jurisdiction Act with Ireland, which we used to use. Is there any traction in that?

Daniel Sternberg: As a Committee, I know you have heard a lot of evidence in relation to the forum bar. If there is simply no connection to the UK, the difficulty would be in having to import all of the evidence, prosecution witnesses and documentary evidence and in trying a case in a British court at cost to the British taxpayer. That would seem very odd to a lot of people who would say, "Why are we trying someone for something that has no connection to the UK at all?".

The Chairman: It may be poor chairmanship, but I fear we have already substantially overrun the time, so I think we ought to draw this bit of the session to a conclusion. Before thanking you, is there anything any of you would like to say that we have not touched on that you think matters to us?

Paul Garlick: No, I would just like to thank the Committee. I think it is an absolutely laudable attempt to look at extradition in the broadest terms, and it is very important.

Ben Keith: I echo my learned friend's thanks. One thing that I think this Committee might want to look at, which has not yet really been tackled, is the interaction between asylum proceedings and extradition proceedings, because that does not work. It only occurs in a very few cases because it is almost exclusively non-EU cases, but there is still no proper procedure or proper analysis of the proper interaction when somebody who has asylum from a jurisdiction has a current extradition case.

Paul Garlick: I am so pleased that Mr Keith raised that because there is a real and practical difficulty, which exposes some people to a great deal of danger. For example, I was involved in a Turkish case just this year where, in order to make good the case of torture, we had to call witnesses who were in the process of obtaining asylum and, of course, there are all the difficulties involved with that. The Turkish requesting state was obviously the respondent in the asylum case and the Home Office is dealing with both aspects: the extradition and the

asylum. They have very good Chinese walls to make sure that information that is disclosed during the course of an extradition hearing will not be sent back to the requesting state, because others might be tortured back in the requesting state. But when it comes to court and the evidence is given, witnesses come along and they are exposing their family, if not themselves, to a real risk of similar treatment in Turkey.

Lord Brown of Eaton-under-Heywood: Is the Supreme Court about to hear a case about this? Do you know about that?

Paul Garlick: I do not, Lord Brown, I am sorry.

Lord Brown of Eaton-under-Heywood: I may be hallucinating but I rather think I have been told they were.

Paul Garlick: I am sure you are right.

Ben Keith: You might be thinking about VB v Rwanda, which is the second round in the genocide case. I think that deals with, I think, anonymous witnesses. The asylum tribunal is generally considered as the expert tribunal and it is closed proceedings, so you can call all that evidence that might put other people in danger. Whereas the extradition proceedings you obviously have the requesting state there and they are party to it, so it becomes very difficult to put forward a case that might place your client, his family—who might still be in the requesting state—or any of your witnesses in danger because of the evidence they might give. There are various case law mechanisms that sometimes work and sometimes do not, and it is always a massive struggle to work out how the extradition and immigration proceedings interact.

The Chairman: That is a good point, most interesting and well made, so if I can thank each of you very much indeed.

Robert Goundry – Written evidence (EXL0008)

EVIDENCE FROM ROBERT GOUNDRY (AN INDIVIDUAL) TO THE HOUSE OF LORDS SELECT COMMITTEE ON EXTRADITION LAW, SUBMITTED ON 21 AUGUST 2014

1. It is naturally just that British residents should not be extradited without a basic (*prima facie*) case against them being tested in a UK court, since the standards of criminality, evidence and proof in overseas jurisdictions may not accord with those seen as fair by British people and British courts. The present arrangements prevent justice being done to British standards and introduce double standards without transparency or safeguards.
2. If the alleged activity justifying extradition is said to have taken place wholly or substantially in the United Kingdom (UK), a judge should be able to bar extradition, whether or not the Crown Prosecution Service decides to prosecute in the UK. This should apply across the board.
3. The right of appeal against an extradition order should be restated so that a British court of appeal can try the validity of the process where this is brought into question.
4. Extradition is often part legal and part political – the Home Secretary should once more be obliged to block extraditions that would breach human rights, as a basic human duty.
5. Legal aid in extradition cases should not be means tested.

21 August 2014

Edward Grange and Rebecca Niblock – Written evidence (EXL0035)

This response has been prepared by Edward Grange and Rebecca Niblock, co-authors of Extradition Law: A Practitioner's Guide (published by LAG, May 2013), both solicitors working in the field of extradition.

Rebecca Niblock is a solicitor at Kingsley Napley LLP. She has significant experience in extradition having regularly appeared at court for those arrested in extradition proceedings.

Rebecca has advised in a wide range of high-profile cases from, for example, one involving an apparently straightforward EAW which was heard by the Supreme Court in February 2012 to more complicated requests from outside the European Union. Rebecca comments regularly in the media on extradition related matters and gives training in extradition law for solicitors. She has a PhD in Art History from the University of Bristol.

Edward Grange is an Associate Solicitor at Hodge Jones & Allen LLP. Edward has extensive experience in defending individuals in extradition proceedings at the Westminster Magistrates' Court and preparing appeals to both the High Court and the Supreme Court. Edward is the Vice-Chair of the Extradition Lawyers' Association and in 2012 he was shortlisted for Criminal Legal Aid Lawyer of the Year. Edward is a member of the Legal Experts Advisory Panel (LEAP) that was established by Fair Trials International.

General

1. *Does the UK's extradition law provide just outcomes?*

1.1. Generally the system has provided just outcomes (although with some notable exceptions). This is in part due to the fact that if an order for extradition is made, the requested person has, at present, an unfettered right of appeal to the High Court. Therefore, any potential injustice can be reviewed by the High Court. However, from 6 October 2014 the unfettered right of appeal will be removed and requested persons will require leave to appeal to be granted by a Judge of the High Court. Although the test for the grant of leave is whether there is an 'arguable case' there is a danger that some cases could slip through the net. The authors of this submission are however pleased to note that a 'right to renew' was included in the enacted amendment.

- *Is the UK's extradition law too complex? If so, what is the impact of this complexity on those whose extradition is sought?*

1.2. It is not too complex for those that are familiar with the law and practice. The difficulty is that not all of those that undertake extradition work are trained in this area of law. The majority of first appearances at Westminster Magistrates' Court are dealt with by the duty solicitor. There is a specialist extradition duty solicitor rota in operation at the court but the only criterion for joining is that you 'opt in' and state that you are able to carry out the work. There is no formal training in extradition

when applying to become a duty solicitor and the Criminal Law Accreditation Scheme (CLAS) does not contain any assessment of extradition law.

2. *Is extradition law fit for purpose in an era of increasingly multi-jurisdictional crime?*

2.1. See above response to question 1.

3. *To what extent is extradition used as a first resort when prosecuting a crime committed in another jurisdiction? Should greater use be made of other remedies?*

3.1. The use of other tools such as the European Investigation Order is rare. We are aware that certain jurisdictions (such as Greece and Spain) send summonses to defendants through the Mutual Legal Assistance channel rather than pursuing a case in a person's absence and then issuing an EAW. However, there are still instances where EAWs have been issued following a conviction in a person's absence where no effort has been made to notify the person of the proceedings, despite knowledge of that person's whereabouts (see *Cousins v France [2014] EWHC 2324 (Admin)).* This deprives the person of the opportunity to attend the proceedings voluntarily and results in extradition in custody to the requesting state where the person may then remain in detention until the proceedings are re-opened.

3.2. It is the authors' view that greater use of other remedies should be made

European Arrest Warrant

4. *On balance, has the European Arrest Warrant (EAW) improved extradition arrangements between EU Member States?*

4.1. It is certainly the case that the EAW has considerably shortened the duration of extradition proceedings. It is also the case that the number of persons being extradited has greatly increased. Seen in the context of difficult and protracted proceedings under the old arrangements, it may be thought that this does amount to an improvement. Nevertheless, our view is that the speed and facility that the EAW brought in does not necessarily amount to an improvement. In our role representing requested persons, we are very well aware of the fact that extradition will almost always involve the state exercising very significant interference in an individual's private life. Whilst this can be justified by the circumstances, we have seen a number of cases in which it is not, and in our view this comes about as a result of the EAW system.

- *How should the wording or implementation of the EAW be reformed?*

4.2. The most effective tool for defence lawyers in representing requested persons is a lawyer in the requesting state. Where we have a client who is able to fund a lawyer in the requesting state, we are often able to come to a negotiated position with the issuing judicial authority which obviates the need for extradition and saves not only

the very considerable economic cost involved in extraditing a person, but also the social cost involved in removing a person, often the sole breadwinner, from their family and employment to face proceedings in the requesting state. In many cases, however, our clients are unable to access a lawyer in the requesting state because they are either in custody or simply do not have the financial resources.

4.3. The Directive on *provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European Arrest Warrant proceedings*[86] *contains a highly practical requirement to ensure that requested persons can exercise their right to appoint a lawyer in the executing Member State. We note with disappointment that the government decided not to opt in to this Directive, stating that "the UK's current system for the provision of criminal legal aid is one of which the country can be proud and does not need to be changed". The number of those that the UK extradites is, we understand, far higher than those it seeks for extradition, and therefore it would be likely that, had the UK opted in to this Directive, a considerable cost saving would be made (given that it is for the requesting state to ensure the provision of legal aid for the requested person).*

4.4. The introduction of a proportionality bar by the Anti-Social Behaviour, Crime and Policing Act is a welcome development, however see comments on question 12 below. In relation to the implementation of the EAW, we are of the view that the legislation does not currently prevent disproportionate extradition but should be reformed in order to do so. For example, in one of our recent cases, a man convicted of drunk cycling in Poland received a sentence of 12 months' imprisonment. This is not an imprisonable offence in the UK. Under the new law, this man would still be extradited, given that the proportionality bar applies only to accusation cases. We are of the view that it should not be possible to extradite someone for an offence that is not punishable by imprisonment in this country whether the EAW is in an accusation or a conviction case.

4.5. It is also of very great concern to us when advising those who have been discharged by the court that they remain liable to arrest on the same EAW should they travel to other Member States. Given that the EAW system is founded upon the principle of mutual trust and recognition, it follows that the same principle should be applied to decisions that courts make regarding extradition. The EAW system should be reformed so that, where an EAW is discharged in one Member State on human rights grounds, it should be withdrawn or barred in other Member States.

- *Are standards of justice across the EU similar enough to make the EAW an effective and just process for extradition?*

4.6. No. From our practice we are aware that there is a gulf of difference between the standards of justice across the EU. We note that the development of EU policy on policing and criminal justice appears to have arisen in order to facilitate the

[86] EU 2013. COM (2013) 824 final

exchange of information and persons between Member States, ie, to strengthen the armoury of the state against suspected offenders. We acknowledge that this is necessary in an era in which crime is increasingly multi-jurisdictional. Nevertheless, it is necessary for the preservation of the rule of law for suspect's rights to be developed alongside, and in an equivalent manner, to those of the state. The procedural safeguards introduced by the Stockholm Programme went some way to providing some counterbalance, however it is notable that the UK sets an uncomfortable example in opting out of many of the Directives that the Stockholm Programme has brought about.

4.7. Procedural safeguards are only the first step towards the standardisation of justice across Member States. We are of the view that standards relating to evidence vary widely and, in many cases, fall far short of those that are necessary. To take one example, a client of ours was convicted in Italy of a murder which, we were quickly able to show, he could not possibly have committed. He was convicted on the basis of evidence of witness A who told witness B that our client had telephoned witness A and confessed. Unfortunately there was no legal mechanism that we could rely upon in order to secure our client's discharge.

4.8. We also note the uneven adherence across the EU to the European Convention on Human Rights in relation to fundamental rights, in particular the right to a fair trial and the prohibition on torture or inhuman and degrading treatment. We have seen the courts develop away from the approach taken in earlier years of the operation of the EAW scheme, in which defendants faced a seemingly insurmountable hurdle in displacing the presumption of adherence to the ECHR, to one which is slightly more favourable to them (see response to question 9 below).

- *How will post-Lisbon Treaty arrangements change the EAW scheme once the UK opts back in to it?*

4.9. When the UK becomes subject to the jurisdiction of the CJEU, it will be possible for infringement actions to be brought by the Commission or other Member States for failing to comply with the Framework Decision. As things currently stand, we do not think that the Commission would have an interest in initiating such actions. It will also be possible for courts to refer questions to the CJEU. Our view is that this will assist in achieving the harmonisation of our law with that of other Member States.

Prima Facie Case

5. *In circumstances where a prima facie case is not required, do existing statutory bars (the human rights bar, for instance) provide sufficient protection for requested people?*

- *Are there territories that ought to be designated as not requiring a prima facie case to be made before extradition? What rationale should govern such designation? What parliamentary oversight of such designation ought there to be?*

5.1. One of the main differences between extradition requests from Part 1 and Part 2 of the Act is the requirement for the requesting state to establish a prima facie case. The following countries are *not* required to provide evidence in support of their extradition requests:

> Albania, Andorra, Armenia, Australia, Azerbaijan, Bosnia and Herzegovina, Canada, Georgia, Iceland, Israel, Liechtenstein, Macedonia FYR, Moldova, Montenegro, New Zealand, Norway, Russian Federation, Serbia, South Africa, Switzerland, Turkey, Ukraine and the United States of America.

5.2. The human rights bar contained within s.87 of the Act states that extradition must not be ordered if it would be incompatible with the requested person's extradition. The prima facie bar to extradition looks to whether there is a case to answer by asking whether the prosecution evidence taken at its highest, is such that no jury properly directed could convict upon it.

5.3. Whilst it is the case that, even in politically motivated requests for extradition (mainly from the Russian Federation) requested persons have been able to successfully resist their extradition using s.87 and without having to consider whether there is a prima facie case, it is the opinion of the authors that there should be a mechanism to review designation. In particular, we would urge parliament to look at countries which can be seen to have consistently flouted decisions of the European Court of Human Rights, or where there is clear evidence of politically motivated prosecutions supported by reports by human rights bodies or by Country Guidance decisions of the Asylum and Immigration Tribunal.

UK/US Extradition

6. Are the UK's extradition arrangements with the US comparable to other territories that do not need to show a prima facie case? If so, should the US nonetheless be required to provide a prima facie case, and why?

6.1. Yes, arrangements are comparable. Whilst we are of the view that a requirement to show a prima facie case is desirable and would lead to a greater protection for suspects in all Part 2 cases, we are not of the view that the US is a special case. In fact, we have more concern at the designation of other Part 2 countries, in particular Albania, Azerbaijan, Georgia, the Russian Federation, Turkey and Ukraine. In our view, there should be a mechanism providing for the de-designation of countries, particularly where those countries can be seen to have consistently flouted decisions of the European Court of Human Rights.

- Sir Scott Baker's 2011 'Review of the United Kingdom's Extradition Arrangements', among other reviews, concluded that the evidentiary requirements in the UK-US Treaty were broadly the same. However, are there other factors which support the argument that the UK's extradition arrangements with the US are unbalanced?

6.2. That review also pointed out that the way in which the US is said to exercise exorbitant jurisdiction, such that, should an offence use any communications system in the US, it will have jurisdiction to prosecute. We are of the view that the exorbitant jurisdiction which goes alongside an enthusiasm to prosecute beyond its borders is of real concern. See below regarding the forum bar.

Political and Policy Implications of Extradition

7. What effect has the removal of the Home Secretary's role in many aspects of the extradition process had on extradition from the UK?

- *To what extent is it beneficial to have a political actor in the extradition process, in order to take account of any diplomatic consequences of judicial decisions?*

7.1. Recent changes to the Extradition Act 2003 removed the so-called "McKinnon jurisdiction" from the Home Secretary. Whilst we are of the view that it was right that Gary McKinnon was not extradited, we believe that this is a decision that should have been taken by the court. There were striking similarities between the cases of Talha Ahsan and Gary McKinnon, but the decision made in respect of Ahsan just a matter of weeks before was to extradite him. We do not think it is beneficial to the rule of law to have a political actor taking decisions in respect of extradition proceedings.

8. To what extent are decisions of where to prosecute certain crimes and whether to extradite influenced by broader political, diplomatic or security considerations?

8.1. Our view is that decisions about where to prosecute are very frequently influenced by broader political, diplomatic or security considerations. We are aware of recent cases in which directly contradictory decisions were made by the CPS as to potential immunity, which can only be explained by the relative political import of the cases.

Human Rights bar and Assurances

9. Is the human rights bar as worded in the Extradition Act 2003, and as implemented by the courts, sufficient to protect requested people's human rights?

9.1. In the authors' opinion the wording of the human rights bar in s21 and s87 of the Act is sufficient to protect requested persons' human rights as it allows a Judge to discharge an extradition request if an extradition order would not be compatible with the requested persons human rights. Recently, the courts have been more willing to discharge extradition requests on human rights grounds under Article 8 ECHR. With regard to Article 3, the courts will proceed on the basis that the requesting state (in Part 1 cases) will abide by their Convention obligations unless there is clear and compelling evidence to rebut this assumption. Recently extradition requests have been refused on Article 3 ECHR grounds for requests from Italy, Romania, Latvia, Hungary and Greece. In our view, however, there are still some people who are extradited to countries where they face a real risk of torture

or inhuman or degrading treatment: this is because it is extremely difficult to displace the presumption of compliance, particularly where the requested person is publicly funded. Moreover, the courts are now moving to a practice of inviting assurances from these countries to forestall what would otherwise be a finding of a violation of Article 3.

10. Is the practice of accepting assurances from requesting states to offset human rights concerns sufficiently robust to ensure that requested people's rights are protected?

10.1. Assurances are given in order to secure a person's extradition. The most common assurance is that relating to detention conditions. It is clear from decisions such as *Badre v Italy [2014] EWHC 614 (Admin)* that general assurances will not suffice despite being provided by a contracting state to the Convention and of long standing friendly status with the UK. This illustrates that the courts are willing to examine the assurances provided and not just accept them at face value.

10.2. We are of the view that it is not simply the specificity or otherwise of assurances that should be assessed. With more specific assurances the requested person should still be able to challenge the validity of the assurances to ensure that they are practicable and capable of being given and of being adhered to. This is all the more important where there is not an effective monitoring group in the requesting state.

10.3. In the case of *Aleksynas & others v Lithuania [2014] EWHC 437 (Admin)* it was noted that Lithuania had breached the assurances previously given to the English courts not to hold detainees in Luskikes prison that had been found to violate Article 3 ECHR. However, the High Court held that the breach was not in bad faith and had been rectified and therefore future assurances given were held to be sufficient to negate the Article 3 risk.

- *What factors should the courts take into account when considering assurances? Do these factors receive adequate consideration at the moment?*

10.4. At present, the criteria set out in the case of *Othman v United Kingdom [2012] 55 EHRR 1 [paragraphs 189 i-xi]* is considered when the validity of assurances is called into question. The concern amongst defence practitioners is that undertakings are being offered (whether on advice from the CPS or given of their own volition) and little thought is given to the practicalities of such undertakings. If that is the case then they are meaningless assurances. In order to properly test assurances the court will need to consider hearing evidence of the practical effects of the terms of the assurance and in particular how they will be monitored to ensure compliance.

- *To what extent is the implementation of assurances monitored? Who is or should be responsible for such monitoring? What actions should be taken in cases where assurances are not honoured?*

10.5. There does not appear to be an effective monitoring of assurances system in place. Defence practitioners are reliant upon those who have been extradited to notify them of any breaches of the assurances and this may not always be possible.

Other Bars to Extradition

11. What will be the impact of the forum bar brought into force under the Crime and Courts Act 2013?

11.1. Since the Forum Bar was brought into force there have been about half a dozen cases where this bar has been raised. The cases have yet to be determined by the High Court and therefore it is too soon to say whether the bar will be an effective tool in resisting extradition. It certainly has not opened the floodgates.

12. What will be the impact of the proportionality bar in relation to European Arrest Warrant applications recently brought into force under the Anti-social Behaviour, Crime and Policing Act 2014?

12.1. Although the authors welcome the introduction of the new proportionality bar (s12A) we are concerned that its impact will not be as far reaching as hoped for. The new proportionality bar appears to echo what is already considered as part of the proportionality exercise in Article 8 ECHR cases. Furthermore, the authors do not see the rationale behind the bar only applying to accusation cases given the practice of many European states to proceed to trial and conviction in someone's absence (see above). Furthermore, it is inappropriate and illogical to limit the bar to Part 1 cases, particularly given that requested persons are likely to be sent further away from the UK if extradition is granted in Part 2 cases.

Right to Appeal and Legal Aid

13. To what extent have changes to the availability of legal aid affected extradition practice, and the provision of specialist legal advice to requested persons?

13.1. Legal aid is available to requested persons in the Magistrates' Court if they meet the means requirements set down by the Legal Aid Agency. There are practical difficulties in requested persons obtaining legal aid if they are self-employed or work cash in hand (as many migrant workers tend to).

13.2. It is the author's opinion that legal aid should be granted irrespective of means. This would curtail delays in the system and save court time through avoiding wasted hearings and (if the requested person is in custody) prolonged periods of time in custody at the State's expense. The High Court's comments in the case of *Stopyra v District Court of Lublin, Poland* [2012] EWHC 1787 have not, sadly, led to any change.

- *What has been the impact of the removal of the automatic right to appeal extradition?*

13.3. This provision will not come into force until 6 October 2014 so it too soon to say what impact this will have. During the Criminal Procedure Rules consultation

process, the authors of this response made submissions that the right to renew the appeal (if permission is refused) should be included in the wording of the amendments to safeguard against possible instances of injustice. The authors were pleased to note that this was included in the published version.

Devolution

We have no comments to make on devolution.

Rebecca Niblock and Edward Grange

12 September 2014

Edward Grange, Rebecca Niblock and Crown Prosecution Service – Oral evidence (QQ 76-105)

Transcript to be found under Crown Prosecution Service

Hilary Griffin – Written evidence EXL0021)

Dear Sir/Madam

I urge you to amend our existing extradition laws on the following grounds:

- Our current fast track extradition laws represent an erosion of British justice.
- In essence, no-one should be extradited to stand trial in a foreign country without evidence being tested in a British court.
- There should be a basic case against British residents.
- The Home Secretary should be obliged to block extraditions that would breach human rights.
- Means tested legal aid should be available to defendants.

Yours faithfully

Hilary Griffin

5 September 2014

Rachel Hasted – Written evidence (EXL0004)

In recent years, changes to the basis on which people living in Britain may be extradited – especially to the United States of America – have resulted in a series of decisions that reflect very badly on British justice and undermine public trust in it.

A free and democratic country cannot give precedence to the legal systems of other countries in this way. The poor Human Rights records of the United States (Guantanamo Bay detention without trial) and its draconian enforcement of laws we do not have in Britain should not be accepted. They stain justice in Britain. No democracy should deny residents the right to a proper legal appeal procedure when their liberty and life is at risk. How can Britain challenge human rights abuses elsewhere, if we do not uphold them in the most difficult cases at home?

I support the proposals of the NCCL (Liberty) for the re-instatement of a truly just extradition procedure for Britain, as follows:

- British residents should not be extradited without a basic (*prima facie*) case against them being tested in a UK court

- If their alleged activity took place wholly or substantially in the UK, a judge should be able to bar their extradition – whether or not the CPS decides to prosecute in the UK

- The automatic right of appeal against an extradition order should be reinstated

- Extradition is part legal and part political – the Home Secretary should once more be obliged to block extraditions that would breach human rights

- Legal aid in extradition cases should not be means tested

21 August 2014

Home Office – Post Legislative Assessment of the Extradition Act 2003 (EXL0001)

Post Legislative Assessment of the Extradition Act 2003 – submission by the Home Office (EXL0001)

Introduction

1. **Extradition** is the formal procedure for requesting the surrender of a person from one territory to another for the following purposes:

   - to be prosecuted;
   - to be sentenced for an offence for which the person has already been convicted;
   - to serve a sentence that has already been imposed.

2. An incoming extradition request is made by another territory to the UK, for the extradition of a person from the UK.

3. An outgoing extradition request is made by the UK to another territory, for the extradition of a person to the UK.

4. The relevant primary legislation is the Extradition Act 2003 ("the 2003 Act")[87]. This memorandum has been prepared by the Home Office for submission in order to assist the reader in understanding the provisions and operation of the 2003 Act.

5. The 2003 Act is divided into five Parts. These are dealt with further in this memorandum. Briefly, Parts 1 and 2 set out the framework for processing incoming extradition requests from other states. Part 3 makes provision regarding outgoing extradition requests. Part 4 makes provision regarding powers of arrest, search and seizure. Finally, Part 5 contains miscellaneous provisions.

6. Extradition is *"reserved"* vis-à-vis Scotland and "*excepted"* vis-à-vis Northern Ireland. That said, Scottish Ministers do exercise some of the functions which, in the rest of the UK, are exercised by the Secretary of State.

7. (Extradition statistics are provided in the Annex to this paper).

Objectives of the 2003 Act

8. In March 2000, the then Home Secretary, announced that a review of UK extradition legislation was to be carried out. In March 2001, a review of the law

[87] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117676/extradition-act-2003.pdf

on extradition was published by the Home Office. This review formed part of the background to the enactment of the 2003 Act.

9. The 2003 Act received Royal Assent on 20 November 2003, most of its provisions coming into force on 1 January 2004. The 2003 Act reformed the law on extradition and repealed the previous legislation, the Extradition Act 1989. The 2003 Act provides a comprehensive statutory framework for the extradition of wanted persons between the UK and other territories.

10. The objectives of the 2003 Act were to provide a quick and effective framework for extradition, subject to appropriate safeguards. The main features of the 2003 Act are:

- a system where each of the UK's extradition partners is designated by order of the Secretary of State as either a Part 1 or a Part 2 territory (as opposed to the system in the 1989 Act, which divided them into foreign states and Commonwealth countries);

- the adoption of the EU Framework Decision[88] on the European Arrest Warrant (EAW), creating a fast-track extradition arrangement with other Member States of the EU and Gibraltar in which the Home Secretary has no involvement (incoming extradition request from these territories being dealt with under Part 1 and outgoing requests under Part 3);

- the retention of the former arrangements for extradition with non-EU territories, with modifications to reduce duplication and complexity in the proceedings (incoming extradition request from these territories being dealt with under Part 2);

- retaining the position whereby State Parties to the European Convention on Extradition 1957 (ECE) do not have to provide *prima facie* evidence, and extending this to the US, Canada, Australia and New Zealand;

- in Part 2, providing that the judge, rather than the Home Secretary, considers most of the statutory bars to extradition including double jeopardy; extraneous considerations; passage of time; the person's physical or mental condition; or whether the person's extradition would be incompatible with the Convention rights within the meaning of the Human Rights Act (HRA) 1998;

- giving the Home Secretary only limited issues to decide (the death penalty, speciality[89], earlier extradition to the UK or transfer to the UK by the International Criminal Court (ICC));

[88] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117680/european-arrest-warrant.pdf
[89] A customary rule of extradition law which is intended to ensure that a person is not dealt with in the state requesting his extradition for any offence other than that for which he is extradited.

- a simplified single avenue of appeal for all Part 2 cases, so that appeals against the decisions of the judge (to send the case to the Home Secretary) and the Home Secretary (to order extradition) are heard together.

Subsequent Amendments

11. To date, there have been four main Acts which have amended the 2003 Act. These are outlined below.

Police & Justice Act 2006

12. The Police and Justice Act 2006 received Royal Assent on 8 November 2006. Sections 42 and 43 and Schedule 13 made a number of amendments to extradition legislation (principally the 2003 Act), including:

- changes to the definitions of 'unlawfully at large';
- the introduction of provisions to deal with cases where the requested person had previously been transferred to the UK from the International Criminal Court;
- the introduction of a forum bar (in Part 1 and 2 cases). This was not to be commenced within 12 months of the passage of the Act and only thereafter if both Houses of Parliament had passed a resolution to that effect. The provisions remained uncommenced and were superseded by the forum provisions in the Crime and Courts Act 2013 (see below);

Policing & Crime Act 2009

13. The Policing and Crime Act 2009 received Royal Assent on 12 November 2009. Part 6 made a number of amendments to the 2003 Act, including:

- ensuring that the UK was in a position to execute EAW alerts transmitted via the second generation Schengen Information System (SISII)[90]. These provisions also enabled an EU Member State which had made a request for provisional arrest, to apply for an extra 48 hours in which to formally issue an EAW;
- allowing for the use of like link in extradition proceedings;

[90] SISII is an EU-wide IT system at the centre of Schengen cooperation. It is a large-scale database used for law enforcement, immigration and border controls in the EU. It was conceived as a tool to deal with any insecurity brought about by the lifting of EU internal borders (not including the UK) under the Schengen regime. SISII allows competent national authorities to issue and consult on various alerts. The SISII system combines data from all Member States so that they can receive alerts in real time.

- amending and clarifying a number of provisions in the 2003 Act on temporary surrender in relation to incoming and outgoing extradition requests.

Crime & Courts Act 2013

14. The Crime and Courts Act 2013 received Royal Assent on 25 April 2013. Section 50 and Schedule 20 made three changes to the 2003 Act:

- the introduction of a new forum bar (for Part 1 and Part 2 cases). The judge must bar extradition on forum grounds when he or she decides that (i) a substantial measure of the relevant activity was performed in the UK and, (ii) taking into account certain specified matters relating to the interests of justice (and only those matters), extradition should not take place;

- removing the Secretary of State's obligation to consider human rights issues in Part 2 cases. Late human rights representations must now be raised with the High Court by way of an appeal under section 108 of the 2003 Act; and

- amending the provisions on appeals in Scottish cases.

Anti-social Behaviour Crime & Policing Act 2014

15. The Anti-social Behaviour, Crime & Policing Act 2014 received Royal Assent on 13 March 2014. Part 12 makes various amendments to the 2003 Act and other legislation relating to extradition. These are set out in detail below in the section on Provisions to Improve the General Process of Extradition. They include:

- introducing a proportionality bar in Part 1 cases where the person is wanted for the purposes of prosecution;

- allowing for the requested person in Part 1 cases to speak with the authorities in the issuing State, either by way of videoconferencing or temporary transfer;

- making the right of appeal subject to the leave of the High Court;

- making provision for transit through the UK of a person who is being extradited from one territory to another territory (where neither of those territories is the UK);

- amending the provisions covering people who have been granted asylum to ensure a consistent approach.

Previous reviews

16. As of July 2014, these provisions, have not yet been commenced.Previous Reviews

17. The 2003 Act has not been subject to formal post-legislative scrutiny in the past. It has, however, been the subject of a number of reviews (both independent and parliamentary) since coming into force. These are outlined below.

The Baker review

18. On 20 May 2010 the coalition government gave a commitment to review the UK's extradition processes[91]. As a consequence, the Home Secretary announced, on 8 September 2010, that a review would look in detail at the following five key areas of extradition arrangements:

    - the breadth of the Home Secretary's discretion in an extradition case;
    - the operation of EAW, including the way in which its optional safeguards have been transposed into UK law;
    - whether the forum bar to extradition should be commenced;
    - whether the UK – US Extradition Treaty was unbalanced;
    - whether requesting states should be required to provide prima facie evidence.

19. Sir Scott Baker QC led the review. He was joined by two independent lawyers with expertise in extradition matters; David Perry QC and Anand Doobay, who has particular experience in defending individuals subject to extradition requests.

20. The panel reported back to the government on 30 September 2011[92].

21. The key findings from the Baker review were:

    - the breadth of the Home Secretary's statutory discretion should remain unchanged and the courts should consider human rights issues that arise at the end of statutory proceedings;

[91] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf (section 6 - Crime & Policing, page 14 refers)
[92] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf

- the EAW operates broadly satisfactorily; apart from the problem of proportionality the scheme worked reasonably well;

- the forum bar contained in the Police & Justice Act 2006 should not be implemented;

- the UK – US Extradition Treaty is balanced;

- the prima facie evidential test should not be reintroduced where it had been removed.

22. On 16 October 2012 the Home Secretary announced the government's response to the Baker review. The Home Secretary's oral ministerial statement to the House of Commons and the government's response to Sir Scott Baker's recommendations are available in Command Paper 8458[93]. In summary:

- the government agreed to seek to legislate afresh for a forum bar which would better balance the safeguards for defendants;

- the government also took the view that it should not renegotiate the US-UK Extradition Treaty or introduce the concept of probable cause (the standard by which a US police officer has the grounds to obtain an arrest warrant), into UK law;

- The government accepted the recommendation to review periodically designations for category 2 territories, taking into account adverse extradition decisions in either the UK or in the European Court of Human Rights (ECtHR).

The Joint Committee on Human Rights (JCHR) review

23. In December 2010 the JCHR announced an inquiry into the human rights implications of UK extradition policy.

24. The JCHR inquiry focussed on whether the UK's bilateral extradition treaties, along with the EAW system and the European Investigation Order (EIO), complied with the UK's human rights obligations. The inquiry sought to address a number of issues, including:

- whether current extradition arrangements provided adequate protection against any unjustifiable infringement under the HRA 1998, and what safeguards should have been included to better protect human rights;

[93] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228566/8458.pdf

- whether bilateral extradition treaties overtook human rights, and whether safeguards were required to better protect human rights;

- the implementation in the UK of the EAW.

25. The JCHR inquiry ran in parallel with the Baker review, but had no formal connection to it.

26. On 22 June 2011, the JCHR published its report[94]. Its key findings were:

- the government should take the lead in seeking to ensure that there is equal protection of rights, in practice as well as in law, across the EU;
- the government should work with the European Commission (EC) and other Member States to implement a proportionality principle in the EAW Framework Decision;

- the government should transpose (into domestic legislation) Article 4(6) of the Framework Decision, which allows the requested State to decline an EAW issued for the purposes of serving a sentence where the requested State undertakes that the sentence will be served in that state.

27. On 16 October 2012 the Home Secretary announced the government's response to the JCHR inquiry. The Home Secretary's oral ministerial statement to the House and the government's response to the JCHR inquiry recommendations are available in Command Paper 8464[95]. In summary:

- the government undertook to take the opportunity of the 2014 Justice and Home Affairs (JHA) opt-out decision to work with the EC, and with other Member States, to reform the EAW so that it provides the protections that citizens demand;

- the government was also concerned in particular about the disproportionate use of the EAW for trivial offences and acknowledged the issues around the lengthy pre-trial detention of some British citizens overseas;

- in relation to cases where asylum claims are raised during extradition proceedings, it was the government's intention to put this on a statutory footing once a suitable legislative vehicle arises.

The Home Affairs Select Committee (HASC) re view on extradition arrangements between the UK–US A

[94] http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/156/156.pdf
[95] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236002/8464.pd

28. One of the first commitments made by the coalition government was to review the operation of the 2003 Act and the UK - USA Extradition Treaty. This commitment was made in the context of widespread political concern about the operation of the UK's extradition arrangements with the USA.

29. On 30 March 2012, the HASC published its report into the extradition arrangements between the UK and USA[96].

30. The key findings from the HASC review were:

- the government should seek to re-negotiate the US-UK Extradition Treaty (particularly with regards to the "probable cause" and "reasonable suspicion" tests);

- the government should introduce a forum bar as soon as possible.

31. On 16 October 2012 the Home Secretary announced the government's response to the HASC review. The Home Secretary's oral ministerial statement to the House and the government's response to the HASC review recommendations are available in Command Paper 8465[97]. In summary:

- the government agreed to seek to legislate afresh for a forum bar which would better balance the safeguards for defendants;

- the government also took the view that it should not renegotiate the US-UK Extradition Treaty or introduce the concept of probable cause (the standard by which a US police officer has the grounds to obtain an arrest warrant), into UK law.

Legislative Implementation

32. All provisions in the 2003 Act were implemented (or commenced) by way of a UK Statutory Instrument issued via Parliament (further details are provided in the Annex to this paper). These included updates and amendments to provisions, such as the list of extraditable offences. They also included the designation of territories under category 1 or 2, as appropriate, or the designation of relevant authorities with responsibility in the UK, such as when the Serious Organised Crime Agency (SOCA) was replaced by the National Crime Agency (NCA). They also covered the commencement of police powers.

33. A selection of these are given below;

- Commencement order made on 18 December 2003 enabled Part 2 of the 2003 Act to apply to all territories with which the UK has extradition relations that

[96] http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/644/644.pdf
[97] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236001/8465.pdf

are not designated as category 1 territories. Article 3 designated some of those category 2 territories as territories that are not required to provide prima facie evidence to support a request for extradition.

- Another commencement order made on 18 December 2003, implemented the Codes of Practice in connection with the exercise of the powers conferred by Part 4 of the 2003 Act by police officers and customs officers. The Codes of Practice[98]12 provided guidance on the operation of police powers in extradition cases in England, Wales and Northern Ireland and those of customs officers throughout the UK.

- A statutory instrument implemented on 26 July 2007 designated Gibraltar as a category 1 territory given it had then passed its own law implementing the EAW Framework Decision.

- Another statutory instrument implemented on 27 June 2013 designated Croatia as a category 1 territory following its accession to the EU on 1st July 2013.

Operational Provisions

34. This chapter sets out the operation of the provisions of the 2003 Act. It takes account of amendments made to the 2003 Act by the Police and Justice Act 2006; the Policing and Crime Act 2009; and the Crime and Courts Act 2013.

35. The amendments introduced in the Anti-Social Behaviour Crime & Policing Act 2014, had not yet commenced, at the time of writing this paper.

36. This is not a step-by-step guide to the extradition process and should be read in conjunction with the procedures set out in the 2003 Act.

Part 1

37. Part 1 of the 2003 Act was enacted to transpose much of European Council Framework Decision of 13 June 2002 on the EAW and the surrender procedures between Member States (2002/584/JHA).

38. Part 1 deals with cases where the UK receives an EAW from a State which has been designated for the purposes of the Part under section 1 ('category 1 territories'). All other Member States of the EU, plus Gibraltar, are currently designated under section 1[99].

[98] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117675/extradition-codes-of- practice.pdf
[99] The Extradition Act 2003 (Designation of Part 1 Territories) Order 2003

39. Section 2 applies where the designated authority receives a Part 1 warrant (i.e. an EAW) in respect of a person. The NCA is the designated authority except in Scotland where it is the Crown Office and Procurator Fiscal Service[100].

40. The NCA checks whether the EAW contains the necessary statement and information (set out in section 2). If it does, the NCA may issue a certificate provided it believes that the authority which issued the EAW has the function of issuing warrants. If a certificate is issued, the warrant may be executed by a constable or customs officers in any part of the UK (section 3).

41. Section 4 applies where a person is arrested under section 3. It says, inter alia, that the person must be brought as soon as practicable before the appropriate judge (which is defined in section 67).

42. Sections 5 and 6 deal with provisional arrest (an emergency procedure, used in particularly urgent cases).

43. Sections 7 and 8 deal with the initial hearing. At the initial hearing the judge must decide whether the person brought before him/her is the person in respect of whom the warrant was issued. The judge must also, amongst other things, fix a date for the extradition hearing to begin (which must normally be within 21 days of arrest) and remand the person in custody or on bail.

44. Sections 9 to 25 deal with the extradition hearing. At the extradition hearing (which may be merged with the initial hearing in straightforward cases) the judge must decide a number of issues, including:

- whether the offence is an 'extradition offence', as defined in sections 64 to 66 (further details are provided in the Annex to this paper).
- whether there are any bars to the extradition;
- whether extradition is compatible with the person's rights under the European Convention on Human Rights (ECHR).

45. The judge must discharge the person if s/he decides that there is no 'extradition offence', that extradition is barred or that extradition would not be compatible with the person's human rights.

46. The bars (dealt with in sections 11 to 19F) are:

- the rule against double jeopardy;

[100] The Extradition Act 2003 (Part 1 Designated Authorities) Order 2003

- extraneous considerations;
- the passage of time;
- the person's age;
- speciality;
- forum (introduced in the Crime and Courts Act 2013);
- the person's earlier extradition to the UK from another category 1 territory;
- the person's earlier extradition to the UK from a non-category 1 territory.
- the person's earlier transfer to the UK by the International Criminal Court (as introduced in the Police and Justice Act 2006).

47. If there are no statutory grounds to refuse the request, an order must be made for the person's surrender.

48. Sections 22 to 25 make provision regarding various matters which may arise before the end of the extradition hearing.

49. Sections 26 to 34 deal with appeals. The 2003 Act gives the wanted person (in cases where the judge orders extradition) and the requesting State (in cases where the judge order's the person's discharge) a right of appeal against the decision of the judge. Appeals are to the High Court in the first instance and timeframes are set out in the 2003 Act. There is an onward right of appeal to the Supreme Court, with leave.

50. Sections 35 and 36 set out the time limit for surrendering a person (in cases where extradition is to take place). In short, a person must be extradited before the end of the required period, which is 10 days starting with:

- the first day after the permitted period for giving notice of appeal, in cases where the person does not appeal; or
- the day the decision of the relevant court on the appeal becomes final (or the day the proceedings are discontinued), in cases where the person appeals

51. The remainder of Part 1 deals with a number of miscellaneous issues, including competing EAWs, withdrawal of the EAW and post-extradition matters.

Part 2

52. Part 2 of the 2003 Act, deals with incoming extradition requests from territories which have been designated under section 69 ('category 2 territories'). These are territories outside the EU with which the UK has extradition relations. At present there are almost 100 territories designated as category 2 territories (further details are provided in the Annex to this paper).

53. Upon receipt of a valid extradition request from a category 2 territory the Secretary of State must (subject to certain limited exceptions) issue a certificate. The provisions governing when an extradition request is valid and certification are set out in section 70.

54. In cases where a certificate is issued, the request and certificate are sent to the appropriate judge.

55. On receipt of the papers, the judge must decide whether or not to issue an arrest warrant for the wanted person. Section 71 deals with this, and sets out that the judge may issue a warrant if s/he has reasonable grounds for believing that the offence is an 'extraditable offence' (defined in sections 137 and 138) and that there is certain specified evidence or where a territory is designated by order under Part 2 specified information[101].

56. Section 72 applies if a person is arrested under a section 71 arrest warrant. It states, inter alia, that the person must be brought as soon as practicable before the appropriate judge who must either remand the person in custody or on bail.

57. Sections 73 and 74 deal with provisional arrest requests, the issue of provisional arrest warrants and the arrest of persons further to such warrants.

58. Sections 75 to 92 cover the extradition hearing, which must normally begin within two months of the person first being brought before the judge.

59. At the extradition hearing the judge must decide a number of issues:

- whether the documentation sent to him/her by the Secretary of State complies with the 2003 Act;
- whether the individual arrested is the person named on the warrant;
- whether the offence detailed in the request is an 'extradition offence' (again, as defined in sections 137 and 138);

[101] The Extradition Act 2003 (Designation of Part 2 Territories) Order 2003

- whether copies of the documentation sent by the Secretary of State to the judge have been served on the person;

- whether any of the bars to extradition apply.

60. The bars are set out in section 79, and explained fully in the succeeding sections. They include :

- the rule against double jeopardy: extradition is barred if it appears that the person would be entitled to be discharged under any rule of law relating to previous acquittal or conviction if s/he were charged with the offence in the relevant part of the UK;

- extraneous considerations: extradition is barred if it appears that (a) the request for the person's extradition (though purporting to be made on account of the extradition offence) is in fact made for the purpose of prosecuting or punishing him/her on account of his/her race, religion, nationality, gender, sexual orientation or political opinions, or (b) if extradited s/he might be prejudiced at his/her trial or punished, detained or restricted in his/her personal liberty by reason of his/her race, religion, nationality, gender, sexual orientation or political opinions;

- the passage of time: extradition is barred if it would be unjust or oppressive by reason of passage of time;

- Forum. Part 1 of Schedule 20 to the Crime and Courts Act 2013 amends the 2003 Act to provide for a new forum bar to extradition. Forum concerns the place where a person ought to be prosecuted for an offence he or she is alleged to have committed. Extradition can be barred by reason of forum if the judge decides that: firstly, a substantial measure of the relevant activity was performed in the UK; and secondly, having regard to a list of specified matters, it would not be in the interests of justice for the extradition to take place.

61. If any of the bars apply, the person must be discharged. Otherwise, the judge must proceed under section 84 (in cases where the person is wanted for the purposes of prosecution) or section 85 (in cases where the person has been convicted).

62. In all cases, the judge must also decide whether the person's extradition would be compatible with his/her human rights. Section 87 deals with this. The judge must order the person's discharge if extradition would not be compatible with the person's ECHR rights.

63. If the judge decides that extradition is not prohibited, s/he must send the case to the Secretary of State for a decision on whether to order extradition.

64. Sections 93 to 102 cover the Secretary of State's consideration of cases. The Secretary of State must decide whether she is prohibited from ordering the person's extradition under any of sections 94, 95, 96 or 96A[102]. These deal with, respectively:

- the death penalty. The Secretary of State must not order a person's extradition if s/he could be will be or has been sentenced to death. But this does not apply if the Secretary of State receives a written assurance from the requesting State, which she considers adequate, that the death penalty will not be imposed or will not be carried out, if imposed;

- speciality arrangements. The Secretary of State must not order extradition if there are no speciality arrangements with the

  requesting territory. Speciality arrangements ensure that an extradited person may only be dealt with for offences committed before his/her extradition if (i) they are listed in the extradition request or disclosed by facts specified in that request, (ii) the Secretary of State consents to this, (iii) the person agrees to this, or (v) the person has been given the opportunity to leave the requesting territory, but chooses not to do so;

- earlier extradition to the UK from another territory. In these cases, it may be necessary to first obtain the consent of that territory to the onward extradition of the person;

- earlier transfer to the UK by the International Criminal Court, in order for the person to serve a sentence. In these cases, it may be necessary to first obtain the consent of the court to the extradition of the person.

65. If the Secretary of State decides that extradition is prohibited on any of these grounds, then she must order the person's discharge. Otherwise, she must order extradition.

66. Section 50 of, and Part 2 of Schedule 20 to, the Crown and Courts Act 2013 amended sections 70, 108 and 117 of the 2003 Act to the effect that (i) the Secretary of State may not consider at any time after the issue of certificate under section 70 whether extradition would be compatible with a person's Convention rights, and (ii) if a person wishes to raise such issues after the end of the normal statutory process, s/he must do so by way of an out-of-time appeal to the courts.

67. Sections 103 to 116 govern appeals. If extradition is ordered, the person has the right of appeal to the High Court against the decisions of the judge (section 103) and the Secretary of State (section 108). If the person is discharged by the judge

[102] Paragraph 3 of Schedule 13 to the Police and Justice Act 2006

or the Secretary of State, the requesting territory has the right of appeal to the High Court (sections 105 and 110).

68. An appeal lies to the Supreme Court from a decision of the High Court under section 103, 105, 108 or 110.

69. Sections 117 and 118 set out the time scales for surrendering a person.

70. The remainder of Part 2 of the 2003 Act covers areas such as the withdrawal of the extradition request, competing extradition requests, consent to extradition and post-extradition matters.

Part 3

71. Part 3 of the 2003 Act deals with extradition to the UK (i.e. cases where the UK makes the request of another territory).

72. Sections 142 to 149 deal with extradition from category 1 territories (i.e. EAW cases)[103].

73. Section 142 as amended by the Police and Justice Act 2006 sets out the conditions for the issue, by the appropriate judge, of a Part 3 warrant (i.e. an EAW). In short, in cases where the person is wanted for the purposes of prosecution, there must be reasonable grounds for believing that the person has committed an 'extradition offence' and that a domestic warrant has been issued. In cases where the person has already been convicted, there must be reasonable grounds for believing that the person is unlawfully at large following conviction for an 'extradition offence' and that either a domestic warrant has been issued or the person could be arrested without a warrant. 'Extradition offence' is defined in section 148 and 'appropriate judge' in section 149.

74. The remainder of Part 3 makes provision for cases of extradition to the UK from category 2 territories (section 150) and generally (sections 151A to 155A)[104]. Requests to category 2 territories are made under the Royal Prerogative.

Part 4

75. Part 4 of the 2003 Act deals with police powers, making provision regarding, among other things, search and seizure warrants, production orders, powers of

[103] Section 143, 144 deleted by the Policing and Crime Act 2009
[104] Sections 151A, 153 A-D and 155A inserted by the Policing and Crime Act 2009 (Section 151 was deleted by the same Act)

search and seizure without warrant and the treatment of persons following arrest under the Act.

76. Most of this Part does not extend to Scotland reflecting the difference in policing powers across the UK.

77. Section 173 requires the Secretary of State to issue Codes of Practice in connection with the exercise of powers conferred by Part 4 of the 2003 Act, the retention, use and return of anything seized or produced under the Part and the like.

78. A Code of Practice issued under this section is admissible in evidence in an extradition case and must be taken into account by a judge or court in determining any question to which it appears to the judge or court to be relevant.

Part 5

79. Finally, Part 5 of the 2003 Act covers a number of miscellaneous and general matters, including extradition to and from the British Overseas Territories, the conduct of extradition proceedings and special extradition arrangements.

80. Section 194 allows the Secretary of State to certify that arrangements have been made between the UK and another territory for the extradition of a person to that territory and that territory is not a category 1 or category 2 territory. If a certificate is issued, the 2003 Act applies in respect of the person's extradition as if the territory were a category 2 territory (with modifications). This allows for extradition in cases where the UK does not have formal extradition arrangements with the territory in question.

Changes to the 2003 Act since 2004

81. The 2003 Act has been amended on four occasions since 2004. The main changes are set out below

Police and Justice Ac t 2006

82. Section 42 of the Police and Justice Act 2006 introduced Schedule 13 which made amendments to the 2003 Act. The references to paragraphs below relate to that schedule.

Requests for extradition of persons unlawfully at large.

83. Paragraphs 1 and 2 amended the wording in the 2003 Act relating to extradition requests for persons who were unlawfully at large in relation to the offence for which they had been requested. They amended various sections of the 2003 Act to refer instead to a person who "has been convicted." The convicted person can only be sought if wanted for the purpose of sentencing or to carry out a sentence of imprisonment

Restriction on extradition following transfer from ICC.

84. Paragraph 3 amended Parts 1 and 2 of the 2003 Act so that in cases where a requested person had previously been transferred to the UK by the ICC, extradition was barred without the consent of the Presidency of the ICC.

Restriction on extradition in cases where trial in United Kingdom more appropriate.

85. Paragraphs 4 and 5 introduced a ground for refusal of extradition where an accused person was requested for conduct, a significant part of which occurred in the UK, and it would not have been in the interests of justice for that person to be tried in the requesting territory. These provisions were never commenced

Remand of persons serving sentence in United Kingdom.

86. Section 131 of the Magistrates' Courts Act 1980 made provision for a person who was serving a domestic sentence, and who was simultaneously on remand awaiting trial for another domestic offence, to be remanded every 28 days in respect of the unconvicted offence.

87. Section 131 also applied to persons serving a domestic sentence who was simultaneously the subject of an extradition request. Paragraph 7, via amendments to sections 23 and 89 of the 2003 Act, amended the references to 28 days in section 131 of the Magistrates' Courts Act 1980 to have effect as if they were a reference to 6 months.

Remands in connection with appeal proceedings.

88. Paragraph 8 made explicit provision for remands in appeal proceedings. The paragraph amended various provisions in Part 1 and Part 2 of the 2003 Act which provided for appeal routes to the High Court and Supreme Court.

Time for extradition.

89. Paragraph 9 extended the deadline by which the subject of an executed Part 1 warrant must be removed if the person decided not to appeal. Upon a decision of a judge to order extradition the person had seven days in which to lodge an appeal.

Extradition of person serving sentence in United Kingdom.

90. Paragraphs 10 to 14 made provision for a person who is on licence in the UK following conviction for an offence to be extradited while on licence. While the 2003 Act made provision for a serving prisoner to be temporarily surrendered to

the requesting jurisdiction, it did not make equivalent provision for someone who had completed the custodial part of the sentence and was out on licence.

91. The amendments also cover arrangements for both the surrender of the person to the requesting jurisdiction and for his return to the UK to complete his license period after his trial in the other state.

92. The amendments do not apply where someone has been given a suspended sentence or conditional discharge.

"The appropriate judge "

93. Paragraphs 15 and 16 provide that a case may be heard by a different judge at different times.

Extradition to category 2 territories: requests and certificates.

94. Paragraph 17 amend section 70(1) and (2) of the 2003 Act to provide Ministers with a discretion whether to certify an extradition request for a person who:

- has been recorded by the Secretary of State as a refugee within the meaning of the Refugee Convention, or

- who has been granted leave to enter or remain in the United Kingdom on the ground that it would be a breach of Article 2 or 3 of the Human Rights Convention to remove him to the territory to which extradition is requested.

95. The paragraph also amends section 70(1) to provide for a Part 2 request to be certified whether or not the person is in the UK on the day of certification.

96. In addition, it removes the reference at section 70(9) to the Order in Council which designated the requesting state. This is because the orders designating states for extradition purposes are made by Order of the Secretary of State not by Order in Council. It also removes the requirement at section 70(9) for the relevant order to *accompany* each certified request when it is sent to the court. The amendment made by *sub-paragraph (4)* requires Ministers instead to *identify* the relevant order when sending the request to the court.

Time for representations and consideration of case under Part 2.

97. Paragraph 18 reduces the time permitted for the requested person to make representations to 4 weeks. (This has the consequence of equalising the time for the making of representations with the time within which the Secretary of State is required to consider them). It also provides that if the person has consented to his extradition Ministers are not required to wait until the end of the permitted period (i.e. 4 weeks) to order extradition.

Applications for discharge or for extension of time limit.

98. Paragraph 19 amends section 99 of the 2003 Act to provide for applications in England and Wales to be made to the Magistrates' Court instead of the High Court in the following cases: where the person is applying for discharge (because Ministers have not ordered extradition within the permitted period), and where Ministers are applying for an extension of time in which to consider the case (because it raises issues that are too complex to be dealt with in the permitted period).

Scotland: references to Secretary of State.

99. Paragraph 20 corrects a flaw in the 2003 Act which attributed to Scottish Ministers a function that should properly be attributed to the Secretary of State. Section 141 is thereby amended, with the effect that, in Scottish cases, references to section 70(2)(b) (as amended) and section 93(4)(c) are references to the Secretary of State and not to Scottish Ministers.

Issue of Part 3 warrant: persons unlawfully at large who may be arrested without domestic warrant.

100. Paragraph 21 amends section 142 of the 2003 Act to provide for additional grounds upon which a Part 3 warrant (a UK European Arrest Warrant for transmission to another Category 1 territory) may be issued, where the wanted person is unlawfully at large.

Issue of Part 3 warrant: domestic warrant issued at common law by judge in Northern Ireland.

101. Paragraph 22 amends section 142(8) of the 2003 Act by adding common law warrants issued by a crown court judge in Northern Ireland to the list of domestic warrants.

Dealing with person for pre-extradition offences following extradition to UK.

102. Paragraph 23 amends section 146(3)(c) of the 2003 Act to provide the basis upon which the UK authorities can issue a request for pre-extradition offences to be dealt with following a wanted person's return to the UK. The amendment makes provision for such a request to be issued by a judge, analogous to the issue of the original Part 3 warrant.

Extradition requests to territories not applying European framework decision to old cases.

103. Paragraph 24 makes provision for the issue of extradition requests (as opposed to Part 3 warrants) to certain category 1 territories for certain old offences. A small number of territories have availed themselves of the provisions of Article 32 of the Framework Decision on the EAW, which states that where a person is wanted for offences committed before 7 August 2002 an extradition request rather than a EAW may be issued for their extradition.

Extradition of serving prisoners

104. Paragraph 25 clarifies that a serving prisoner may be removed from custody in the UK if he is extradited to another country.

Authentication of receivable documents

105. Paragraph 26 amends to section 202(4) of the 2003 Act to restore the receivability of documents in court which have been authenticated by an officer, in addition to documents authenticated by a judicial authority of the requesting state.

Powers of High Court in relation to bail decisions by magistrates' courts

106. Paragraph 27 gives a requested person refused bail by a magistrates' court an avenue of appeal.

107. Paragraph 28 changes the venue for appeals in bail proceedings from the crown court, which has no other involvement in extradition proceedings, to the High Court, which hears all other appeals in extradition proceedings.

108. Paragraphs 29 and 30 provide a prosecution right of appeal against the grant of bail in extradition proceedings in Northern Ireland where bail has been granted either by a Magistrates' Court or by a County Court Judge

Credit against sentence for periods of remand in custody of persons extradited to UK

109. Paragraphs 31 to 33 amend section 243 of the Criminal Justice Act 2003, section 101 of the Powers of Criminal Courts (Sentencing) Act 2000 and section 47 of the Criminal Justice Act 1991 to provide that time served abroad while awaiting extradition to the UK can be considered for deduction from the person's eventual UK sentence, subject to judicial discretion in line with domestic sentencing legislation. Without the amendments, credit could not be given in cases where the person is convicted before he is extradited, but is not sentenced until after he is extradited. There were also no provisions to give credit to juveniles sentenced to a detention and training order. The amendments apply regardless of when the person is convicted or sentenced in the UK, and regardless of the person's age

Amendments consequential on amendments in Part 1

110. Paragraph 34 provides for an amendment to the Bail Act 1976 which is consequential on the amendments in relation to the provisions amending "unlawfully at large".

111. Paragraph 35 amends Schedule 9 to the Constitutional Reform Act 2005 in respect of amendments to have effect on the Extradition Act 2003, substituting "Supreme Court" for "House of Lords".

Section 43 - Designation of the United States of America

112. Section 43(1) makes provision for an amendment to be made to the 2003 Act (Designation of Part 2 Territories) Order 2003, which would restore the requirement for the US to provide *prima facie* evidence with its extradition requests to the UK.

113. Section 43(2) provides that an order bringing such an amendment into force may not be made within 12 months of the day on which the Police and Justice Act 2006 was passed (i.e. 8 November 2006), nor may such an order be made if the instruments of ratification of the 2003 Extradition Treaty between the United States and the United Kingdom have been exchanged.

114. In addition, the effect of *subsection (3)* is that the Secretary of State is not obliged to make a commencement order bringing section 43(1) into force unless both Houses of Parliament have passed a resolution requiring him to do so. In that case he would be under a duty to make such an order within a month of the resolutions being passed (*subsection (4)*).

Policing and Crime Act 2009

Section 67: Article 26 alerts

115. These provisions are designed to ensure that the UK is in a position to deal with alerts transmitted via the second generation SISII which request the arrest of a person for extradition purposes.

Section 68 – Article 95 Alerts

116. Section 68 allows that *all* Article 95 (Schengen) alerts issued at the request of an authority of a category 1 territory fall to be regarded as arrest warrants issued by that authority. This will ensure that information contained in an Article 95 alert (together with any information transmitted with it) will fall to be considered by the designated authority in determining whether it amounts to a Part 1 warrant which may be certified under section 2 of the 2003 Act. This will allow the UK to meet its obligation to validate existing Article 95 alerts prior to the UK beginning to send and receive data via SISII.

Deferral of extradition- Section 69: Extradition to category 1 territory and Section 70 Extradition to category 2 territory

117. Section 69 inserts section 8A into the 2003 Act and section 70 inserts section 76A into the 2003 Act. These provisions require the appropriate judge to adjourn extradition proceedings on the basis of a domestic prosecution where the judge is informed of this fact after a person has been brought before him or her, but *before* the extradition hearing has begun. Section 8A covers proceedings under Part 1 of the 2003 Act and section 76A covers proceedings under Part 2 of the 2003
Act.

118. Sections 23 and 89 of the 2003 Act provide that where the appropriate judge is informed that the person in question is serving a sentence of imprisonment or another form of detention in the UK the judge may adjourn the extradition hearing until that sentence has been served. These powers only apply, however, once the extradition hearing has begun. Section 23 covers proceedings under Part 1 of the 2003 Act and section 89 covers proceedings under Part 2 of the 2003 Act.

119. Section 69 inserts section 8B into the 2003 Act and section 70 inserts section 76B into the 2003 Act. These provisions allow the appropriate judge to adjourn extradition proceedings on the basis of a domestic sentence after a person has been brought before him or her, *before* the extradition hearing has begun. Section 8B covers proceedings under Part 1 of the 2003 Act and section 76B covers proceedings under Part 2 of the 2003 Act.

Section 71: Person charged with offence or serving sentence of imprisonment

120. This section amends various provisions of the 2003 Act so as to make it clear that where consideration of an extradition request is deferred in order to allow domestic proceedings to be concluded or a UK prison sentence to be served, consideration of the extradition request should recommence once the person is released from detention pursuant to any sentence imposed.

Section 72: Return from category 1 territory

121. Section 72 inserts a new section 59 into the 2003 Act. This section applies to cases where a person is serving a sentence of imprisonment in the UK, is then extradited to a category 1 territory under a EAW and then returns to the UK. The section sets out what happens when this person returns to the UK to serve the remainder of the UK sentence or otherwise returns to the UK. Subsection (2) provides that time spent outside the UK as a result of the extradition is not deducted from the UK sentence when the person returns. Subsections (3) and (4), however, make it clear that time spent in custody abroad should be deducted from a UK sentence where the person was held in custody in connection with the extradition offence or any other offence in respect of which they could be dealt with as a result of the extradition request and that person was not convicted of the offence in question.

122. Subsection (5) provides that if the person extradited to a category 1 territory then returns to the UK and is not entitled to be released from detention pursuant to their UK sentence, then they are liable to be detained and should be treated as unlawfully at large if at large. Subsection (6) deals with cases where a person returning to the UK is entitled to be released from detention on licence. Subsection (6)(a) states that if a licence was in force at the time of extradition then the licence will be suspended during their absence from the UK but will have effect on return. Subsection (7) also provides that if no licence was imposed when the person was extradited, then the person in question may be detained in any

place in which they could have been detained prior to extradition. Subsection (8) then provides that a constable or immigration officer may take this person into custody for the purpose of conveying them to the place of detention referred to in subsection (7). Subsection (9) provides that where a person has been taken into custody and detained under these powers they must be released on license within five days of being taken into custody under this section. Subsection (10) provides that in calculating the period of five days, no account should be taken of weekends and public holidays. Subsection (11) defines when a person is to be regarded as entitled to be released from detention. Subsection (12) makes it clear that the powers set out in subsection (8) are exercisable throughout the UK.

Section 73: Return from category 2 country

123. Section 73 inserts a new section 132 into the 2003 Act. This section applies to cases where a person serving a sentence of imprisonment in the UK, is then extradited to a territory designated by order under Part 2 of the 2003 Act (a category 2 territory) and subsequently returns to the UK. The section sets out what happens when this person returns to the UK to serve the remainder of the UK sentence or otherwise returns to the UK.

Section 74 Return to extraditing territory

124. Section 74 repeals sections 143 and 144 of the 2003 Act and inserts new sections 153A, 153B and 153C. These provisions provide a regime within which the UK will be able to provide undertakings as to a person's treatment in the UK and eventual return to a requested territory. Unlike sections 143 and 144, the new provisions will facilitate the provisions of

Section 75 Cases in which sentence treated as served

125. Section 75 amends two provisions of the 2003 Act to ensure consistency with sentencing legislation and to ensure section 152 of the 2003 Act applies where someone is extradited to the UK from a territory which is neither a category 1 or a category 2 territory.

Section 76 Dealing with person for other offences

126. Section 76 replaces section 151 of the 2003 Act with a new section 151A. This section deals with situations where the UK would want to deal with an offence committed by a person previously extradited to the UK for the purposes of prosecution for a different offence.

Section 77 Provisional arrest

127. Section 77 amends section 6 of the 2003 Act so as to exclude weekends and certain specified holidays from the calculation of the 48 hour period during which a person provisionally arrested under section 5 of the 2003 Act must be brought before, and relevant documents provided to, the appropriate judge. Section 77 also provides a mechanism by which the time limit for providing the relevant documents to the appropriate judge may be extended by up to 48 hours.

Section 78 Use of live link in extradition proceedings

128. This section amends the 2003 Act to make it possible for a judge to give a live link direction in hearings before the judge other than the extradition hearing itself and other than any extradition proceedings which post date surrender. This section applies to all extradition related hearings in Parts 1 and 2 of the 2003 Act apart from the substantive extradition hearing and any hearings post dating surrender

Crime and Courts Act 2013

129. Section 50 of the Crime and Courts Act gives effect Schedule 20. Part 1 of Schedule 20 amends the 2003 Act to provide for a new forum bar to extradition. Forum concerns the place where a person ought to be prosecuted for an offence he or she is alleged to have committed.

130. The amendments to the 2003 Act would require the judge at an extradition hearing to consider the issue of forum when deciding whether an individual should be extradited to face prosecution. Paragraphs 3 and 6 of Schedule 20 insert new sections 19B and 83A into the 2003 Act, which provide that extradition can be barred by reason of forum if the judge decides that: firstly, a substantial measure of the relevant activity was performed in the UK; and secondly, having regard to a list of specified matters, it would not be in the interests of justice for the extradition to take place. Subsection (3) of new sections 19B and 83A outlines the specified matters relating to the interests of justice: (i) where most of the harm or loss occurred; (ii) the interests of any victims; (iii) any belief of a UK prosecutor that the UK is not the most appropriate place to prosecute the person; (iv) whether evidence needed to prosecute the person is or could be made available in the UK; (v) any delay that may result in proceeding in one country rather than another; (vi) the desirability and practicality of all prosecutions relating to the offence taking place in one place; and (vii) the person's connections with the UK.

131. Paragraphs 3 and 6 also insert new sections 19C, 19D and 19E, and 83B, 83C and 83D into the 2003 Act, which provide that
extradition cannot be barred on forum grounds if a designated prosecutor issues a certificate that he or she has: firstly, considered the offences for which the person could be prosecuted in the UK; secondly, decided that there are one or more such offences which correspond to the extradition offence; and, thirdly, decided that either the person should not be prosecuted in the UK for a corresponding offence because the prosecutor believes that there is insufficient admissible evidence or it would not be in the public interest, or believes that the person should not be prosecuted in the UK because of concerns about disclosure of sensitive material. A designated prosecutor may apply for an adjournment in the proceedings in order to consider whether to give a certificate. The certificate can be challenged, but only as part of an appeal to the High Court under the 2003 Act. The High Court must apply the procedures and principles of judicial review when reviewing a certificate. If the High Court quashes a certificate, it must then consider the issue of forum. The forum provisions do not apply in Scotland.

132. Part 2 of Schedule 20 amend the 2003 Act to provide that in Part 2 cases, that is those involving extradition to non-EU Member States with which the UK has extradition relations, human rights issues, including those raised after the end of the normal statutory process, must not be considered by the Secretary of State, but may be raised with the courts right up until the time of surrender. At present, human rights matters in Part 2 cases are considered by the judge at an extradition hearing and any subsequent appeal hearing(s). However, once the appeal process is complete, but before the person's surrender has taken place, the person may raise human rights issues with the Secretary of State, but only new representations that have not already been considered by the courts.

133. Paragraphs 10 to 13 of the new Schedule amend the process by ensuring that the Secretary of State is not to consider human rights issues raised after the end of the statutory appeal process or indeed at any time during the Part 2 process. Instead, in cases where the person wishes to raise late human rights issues he or she will be able to give notice of appeal out of time. The High Court will consider the appeal if it is satisfied that: (i) the appeal is necessary to avoid real injustice; and (ii) the circumstances are exceptional and make it appropriate to consider the appeal. This provision does not apply in Scotland

134. Part 3 of Schedule 20 addresses concerns raised by the UK Supreme Court about certain aspects of the operation of the 2003 Act when an appeal of a devolution issue is made to the UK Supreme Court under the Scotland Act 1998. Part 3 of the Schedule principally provides that where the authority or territory seeking a person's extradition intends to appeal to the UK Supreme Court against the determination of a devolution issue, the court must remand the person whose extradition is sought in custody or on bail.

The Anti-social Behaviour Crime and Policing Act 2014

135. Part 12 of the Anti-social Behaviour Crime & Policing Act 2014 ('the 2014 Act') makes a number of changes to the 2003 Act – in particular, on the EAW (set out below), but at the time of writing, these provisions have yet to be commenced. The main provisions are set out below:

Appeals

136. Section 160 of the 2014 Act amends sections 26, 28, 103, 105,108 and 110 of the 2003 Act, which deal with appeal rights in Part 1 and Part 2 cases. Presently, there is an automatic right of appeal without leave for both the requested person and the requesting territory against extradition decisions (as set out above). Section 160 changes the position so that the leave of the High Court is required for all appeals. This change was intended to reduce the numbers of unmeritorious appeals.

137. Section 160 of the 2014 Act also amends sections 26, 103 and 108 to the effect that the High Court must not refuse to hear an appeal by a requested person solely because it was submitted out of time, so long as the requested person did everything reasonably possible to ensure that notice was given as soon as possible.

Speciality waiver protection

138. Section 163 of the 2014 Act repeals sections 45(3) and 128(5) of the 2003 Act. The effect is that when a person consents to his/her extradition s/he will no longer lose the benefit of any speciality protection s/he would otherwise enjoy. At present, a person who consents to extradition loses the benefit of any speciality s/he would otherwise enjoy. This change will enable those who wish to be extradited to be surrendered quickly without risking being tried for any other alleged offences committed before their extradition.

Asylum

139. Section 162 of the 2014 Act amends sections 39 and 121 of the 2003 Act, to ensure that a person who has made an asylum claim (either before or after the initiation of extradition proceedings) must not be extradited before that claim has been finally determined. At present, the 2003 Act only prohibits extradition while there is an outstanding asylum claim, if that claim was made after the start of extradition proceedings.

140. Section 162 also amends section 93 of the 2003 Act (which deals with the Secretary of State's consideration of Part 2 cases), to give the Secretary of State the power to discharge the person if the person has been granted:

- refugee status; or

- leave on the ground that it would be a breach of Article 2 or 3 of the ECHR to remove him or her to the requesting territory.

141. This mirrors the powers which the Secretary of State has under section 70 of the 2003 Act, which applies at the initial stage of proceedings (that is, when the Secretary of State receives a request and must decide whether to issue a certificate). This amendment will provide the Secretary of State with the power to discharge people who are granted status or leave after the certificate has been issued.

Non-UK extradition: transit through the UK

142. New sections 189A to 189E were also inserted into the 2003 Act. The new sections makes provision for the issue of certificates to facilitate the transit through the UK of a person who is being extradited from one territory to another territory (where neither of those territories is the UK). Where the destination territory is a Part 1 territory, it will be for the NCA to issue a certificate. In any other case, it will be for the Secretary of State to issue a certificate.

143. A certificate will authorise a constable or other authorised officer to escort the person from one form of transportation to another, to take the person into custody to facilitate the transit and/or to search the person (and any item in his or her possession) for (and seize) any item which the person may use to cause physical injury (or, in a case where he or she has been taken into custody, to escape from custody).

144. The new sections also deal with cases where a person is being extradited from one territory to another (where neither of those territories is the UK) and he or she makes an unscheduled arrival in the UK. It allows a constable to take the person into custody, for a maximum period of 72 hours, to facilitate the transit of the person through the UK.

145. The new section places a duty on the Secretary of State to issue a code of practice governing the exercise of the powers in the new sections. The Secretary of State is required to publish the code in draft form, consider any representations made on the draft and, if considered appropriate, amend the code accordingly. Failure by a police constable or other authorised officer to adhere to any code issued will not of itself make the officer liable under either criminal or civil proceedings. A code of practice made under this section can be admitted in court as evidence.

146. It also defines an "authorised officer" as a constable or a person who is of a description specified by the Secretary of State by order.

Proceedings on deferred warrant or request

147. The 2003 Act was also amended to ensure that in cases where there are competing extradition requests and one case has been deferred pending the outcome of the other, a judge can only resume proceedings in the deferred cases, or order, that extradition is no longer deferred, in cases where the competing request has been disposed of in the requested person's favour.

Extradition to a territory that is party to an international convention

148. Another new section introduced to the 2003 Act enabled the Secretary of State to designate international conventions and specify conduct in relation to those conventions. Previously the 2003 Act allowed the Secretary of State to designate territories which are parties to conventions. However, as territories frequently sign up to conventions, the section proved difficult to keep updated.

149. Under the new section, the Secretary of State will only need to designate conventions to which the UK is a party and specify conduct to which the relevant convention applies. In the event that a party to one of those conventions then made an extradition request for a person, it would be open to the Secretary of State to certify that:

- the requesting State was a party to a convention designated under the new section; and

- the conduct in the request was conduct specified in the designation order for the relevant convention.

150. The effect would be that the 2003 Act would apply to the person's extradition as if the requesting territory were a territory designated under Part 2 of the 2003 Act. Examples of Conventions that could be designated include the UN Conventions on terrorism, the UN Convention against Corruption and the UN Convention on Transnational Organised Crime.

Provisions to improve the domestic operation of the EAW

151. The government made a number of changes to the 2003 Act using the Anti-social Behaviour Crime and Policing Act 2014 in order to improve the operation of the EAW scheme. These are set out below;

Proportionality

152. A new subsection under section 2 of the 2003 Act has been introduced in order to provide for the designated authority to operate an administrative proportionality filter in cases where the Part 1 warrant has been issued for the purpose of prosecuting the person for an offence.

153. The aim is to enable the NCA to filter out the most disproportionate cases from reaching court. It provides that the designated authority may not issue a certificate under section 2 of the 2003 Act where it is clear that a judge proceeding under (new) section 21A would be required to order the person's discharge on proportionality grounds.

154. New section 21A into the 2003 Act will be introduced, which will require the courts, in cases where an EAW has been issued in prosecution cases, to consider whether extradition would be:

- disproportionate; and

- incompatible with the Convention rights (within the meaning of the HRA 1998).

This new section deals with Part 1 cases where the person is wanted for the purpose of prosecution for an offence. The judge will have to take into account (so far as the judge thinks appropriate):

- the seriousness of the conduct;

- the likely penalty; and

- the possibility of the relevant foreign authorities taking less coercive measures than extradition.

155. The judge will not be able to take into account any other matters. If the judge decides that extradition would be disproportionate, the judge will have to discharge the person.

Absence of a prosecution decision

156. The changes also provide for a new bar to extradition in Part 1cases on the grounds of "absence of prosecution decision" (section 12A).

157. This is intended to ensure that a case is sufficiently advanced in the issuing State (that is, there is a clear intention to bring the person to trial) before extradition can occur, so that people do not spend potentially long periods in pre-trial detention following their extradition, whilst the issuing State continues to investigate the offence.

158. This new section will ensure that, in cases where the person is wanted to stand trial, extradition can only go ahead where the issuing State has made a decision to charge the person and a decision to try the person (or is ready to make those decisions).

159. Where it appears to the judge, that there are reasonable grounds for believing that a decision to charge and a decision to try have not both been taken in the issuing State (and that the person's absence from that State is not the only reason for that), extradition will be barred unless the issuing State can prove that those decisions have been made (or that the person's absence from that State is the only reason for the failure to take the decision(s)).

160. The courts have interpreted the provisions of the 2003 Act in a "cosmopolitan" way[105]19, mindful of the differences in criminal procedure in other Member States, and it is anticipated that the courts will apply the same approach to the interpretation of section 12A and, in particular, the concepts "decision to charge" and "decision to try".

Request for Temporary Transfer

161. A new section 21B has been inserted into the 2003 Act which will apply where the EAW has been issued for the purposes of prosecuting the person for an offence.

162. It will allow, with both the requested person's and the issuing State's consent, the person's temporary transfer to the issuing State or for the person to speak with the authorities in that State while he or she remains in the UK (for example, by video link).

[105] *Asztaslos v Szekszard City Court Hungary* [2010] EWHC 237 (Admin)

163. Either party will be able to make a request to this effect. The judge must, if the judge thinks it necessary, (to allow the other party to consider whether to consent to a request) adjourn proceedings for up to seven days. If that party gives consent, the judge must adjourn proceedings for as long as seems necessary to allow the temporary transfer or conversation to take place.

164. A person will not be able to make a request for temporary transfer if he or she has already consented to a request by the issuing State for temporary transfer (and likewise as regards speaking with the authorities of the issuing State whilst remaining in the UK).

165. Similarly, a person will only be able to make one request for temporary transfer (and one request to speak with the authorities of the issuing State whilst remaining in the UK).

166. The effect of this provision will, in some cases, be likely to be the withdrawal of the EAW; for example, in cases where, having spoken with the person, the issuing State decides that he or she is not the person they are seeking or that he or she did not in fact commit the offence in question.

167. In other cases, where extradition goes ahead, the person may spend less time in pre-trial detention, as some of the questions which need to be asked and the processes which need to happen ahead of the trial could take place during or as a result of the temporary transfer or conversation.

Scotland

168. Although, extradition is a reserved matter in Scotland many of the roles of the Secretary of State fall to Scottish Ministers.

Role of Scottish Ministers

169. Scottish Ministers must issue a certificate where they receive a valid extradition request in respect of a person who is believed to be in Scotland, they unless they decide that a competing request is to take priority, when they may order proceedings in respect of one request to be deferred until the other has been disposed of. The Ministers send the case to the sheriff at Edinburgh. A warrant for the requested persons arrest is sought by the Lord Advocate and if granted issued by him to the Police Scotland Fugitives Unit for execution. On arrest the requested person will appear at Edinburgh Sheriff Court. If the sheriff decides extradition does not breach the requested person's convention rights, the sheriff sends the case to the Scottish Ministers for their decision on extradition. The Scottish Ministers must issue their decision within two months of receipt of the case.

170. Where the sheriff sends a case to the Scottish Ministers for their decision, they must decide whether they are prohibited from extraditing the person for any of the following reasons

- The person could be, will be or has been sentenced to death for the offence concerned;

- There are no speciality arrangements with the category 2 territory. This means that the person may not be dealt with in the territory in respect of an offence committed before his extradition unless;

  (a) it is the offence in respect of which he was extradited;
  (b) an extradition offence disclosed by the same facts as that offence;
  (c) an offence in respect of which the Scottish Ministers have consented to the person being dealt with; or
  (d) an offence in respect of which the person has waived his right not to be dealt with.

  Speciality arrangements also exist where a person is given an opportunity to leave the territory before he is dealt with in respect of an offence committed before his extradition. Speciality arrangements made with a category 2 territory, which is also a Commonwealth country or British overseas territory, may be made either generally or for particular cases;

- The person was extradited to the UK from another territory, that territory's consent is required to the person's extradition from the UK to the category 2 territory and no such consent has been given

171. Where any of these reasons are found, the Scottish Ministers must order the person's discharge. Where these prohibitions do not apply, the Scottish Ministers must order extradition unless:

- the extradition request is withdrawn;
- they make an order for further proceedings to be deferred and the person is discharged; or
- they order the person's discharge for reasons of national security.

172. Where a person is charged with an offence in the UK, the Scottish Ministers must not make a decision with regard to his extradition until the charge is disposed of or withdrawn, or proceedings in respect of the charge are discontinued, or the diet is deserted *pro loco et tempore*. Where a case is before the Scottish Ministers and the person is serving a sentence in the United Kingdom, the Scottish Ministers may defer making a decision in respect of extradition until the sentence has been served. Where the Scottish Ministers do not make a decision within two months of

the appropriate day and the person in question applies to the High Court to be discharged, he must be discharged.

173. Where the Scottish Ministers order a person's extradition, they must inform him of the order, inform him in ordinary language of his right of appeal to the High Court and inform any person acting on behalf of the category 2 territory of the order. Where the Scottish Ministers have received an assurance that the death penalty will not be imposed or exercised, they must also give the person a copy of that assurance. In Scotland an order for extradition or discharge under these provisions must be made by a member of the Scottish government or a junior Scottish Minister or a senior official who is a member of the staff of the Scottish Administration

174. An appeal may be brought against the decision of the Scottish Ministers to order extradition irrespective of any appeal against the decision of the sheriff.

ANNEXES

Annex A – Extraditable offences under the EAW framework decision
Annex B – Statistical information
Annex C – Territory information
Annex D – Statutory instruments

Annex A

Extraditable offences under the EAW scheme as defined in the EU Framework Decision

In cases where a person is wanted for prosecution the offence must usually be one that could lead to a maximum prison sentence of at least 12 months in the requesting state. For certain offences that are listed in the framework decision and which could lead to a maximum prison sentence of at least 3 years in the requesting state, there is no requirement that a parallel offence exists in UK law. Otherwise the conduct complained of in the EAW must also be an offence in the UK. Where the person is wanted to serve a sentence, whether or not the offence is deemed an extradition offence depends on various factors including the length of sentence imposed in the other state.

1 Participation in a criminal organisation.
2 Terrorism.
3 Trafficking in human beings.
4 Sexual exploitation of children and child pornography.
5 Illicit trafficking in narcotic drugs and psychotropic substances.
6 Illicit trafficking in weapons, munitions and explosives.
7 Corruption.
8 Fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests.
9 Laundering of the proceeds of crime.
10 Counterfeiting currency, including of the euro.
11 Computer-related crime.
12 Environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties.
13 Facilitation of unauthorised entry and residence.
14 Murder, grievous bodily injury.
15 Illicit trade in human organs and tissue.
16 Kidnapping, illegal restraint and hostage-taking.
17 Racism and xenophobia.
18 Organised or armed robbery.
19 Illicit trafficking in cultural goods, including antiques and works of art.
20 Swindling.
21 Racketeering and extortion.
22 Counterfeiting and piracy of products.
23 Forgery of administrative documents and trafficking therein.
24 Forgery of means of payment.
25 Illicit trafficking in hormonal substances and other growth promoters.
26 Illicit trafficking in nuclear or radioactive materials.
27 Trafficking in stolen vehicles.
28 Rape.

29 Arson.
30 Crimes within the jurisdiction of the International Criminal Court.
31 Unlawful seizure of aircraft/ships.
32 Sabotage.

Annex B

Statistical information

EAW cases INCOMING

Year	*Number of EAWs received by the UK*	*Number of persons arrested pursuant to EAWs*	*Number of surrenders*
2009-10	3870	1057	772
2010-11	5770	1295	1100
2011-12	5641	1394	1076
2012-13	6263	1438	1057
2013-14	7881	1660	1067

EAW cases OUTGOING

Year	***Number of EAWs issued by the UK***	***Number of persons arrested pursuant to EAWs***	***Number of surrenders***
2009-10	238	142	110
2010-11	241	150	130
2011-12	252	148	144
2012-13	244	133	123
2013-14	230	170	140

Part 2 incoming

Year	*Number of requests received by the UK*	*Number of surrenders*
2009-10	80	40
2010-11	102	27
2011-12	70	28
2012-13	84	31

Part 2 outgoing

Year	*Number of requests made by the UK*	*Number of Surrenders*
2009-10	34	24
2010-11	37	24
2011-12	51	19
2012-13	39	28

Annex C

Territory information

Designation	**Country**
Category 1	Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Gibraltar, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

Category 2 Countries in **bold** are not required to provide prima facie evidence in support of their request for extradition. In 1991, when the ECE came into force in the UK, the prima facie requirement was dispensed with in respect of all signatories to the ECE. This position was carried through into the designations of States under the 2003 Act. For the US, Australia, Canada and New Zealand – the prima facie requirement was removed on the basis that they were democratic states and trusted extradition partners.	**Albania**, Algeria, **Andorra**, Antigua and Barbuda, Argentina, **Armenia**, **Australia**, **Azerbaijan**, The Bahamas, Bangladesh, Barbados, Belize, Bolivia, **Bosnia and Herzegovina**, Botswana, Brazil, Brunei, **Canada**, Chile, Colombia, Cook Islands, **Croatia**, Cuba, Dominica, Ecuador, El Salvador, Fiji, The Gambia, **Georgia**, Ghana, Grenada, Guatemala, Guyana, Hong Kong Special Administrative Region, Haiti, **Iceland**, India, Iraq, **Israel**, Jamaica, Kenya, Kiribati, Lesotho, Liberia, Libya, **Liechtenstein**, **Macedonia (FYR)**, Malawi, Malaysia, Maldives, Mauritius, Mexico, **Moldova**, Monaco, **Montenegro**, Nauru, **New Zealand**, Nicaragua, Nigeria, **Norway**, Panama, Papua New Guinea, Paraguay, Peru, **Republic of Korea**, **Russian Federation**, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, San Marino, **Serbia**, Seychelles, Sierra Leone, Singapore, Solomon Islands, **South Africa**, Sri Lanka, Swaziland, **Switzerland**, Tanzania, Thailand, Tonga, Trinidad and Tobago, Turkey, Tuvalu, Uganda, **Ukraine**, United Arab Emirates, **United States of America**, Uruguay, Vanuatu, Western Samoa, Zambia and

Annex D

Statutory instruments

The Extradition Act 2003 (Designation of Prosecutors) (England and Wales and Northern Ireland) Order 2013
2013 No. 2388

The Extradition Appeals (England and Wales and Northern Ireland) Order 2013
2013 No. 2384

The Extradition Act 2003 (Amendment to Designations) Order 2013
2013 No. 1583

The Extradition Act 2003 (Amendment to Designations) Order 2010
2010 No. 861

The Extradition Act 2003 (Specification of Category 1 Territories) Order 2009
2009 No. 2768

The Extradition Act 2003 (Amendment to Designations) Order 2008
2008 No. 1589

The Extradition Act 2003 (Amendment to Designations) Order 2007
2007 No. 2238

The Extradition Act 2003 (Amendment to Designations) Order 2006
2006 No. 3451

The Extradition Act 2003 (Amendment to Designations) (No.2) Order 2005
2005 No. 2036

The Extradition Act 2003 (Part 3 Designation) (Amendment) Order 2005
2005 No. 1127

The Extradition Act 2003 (Amendment to Designations) Order 2005
2005 No. 365

The Extradition Act 2003 (Parties to International Conventions) Order 2005
2005 No. 46

The Extradition Act 2003 (Amendment to Designations) Order 2004
2004 No. 1898

The Extradition Act 2003 (Repeals) Order 2004
2004 No. 1897

Act of Adjournal (Criminal Procedure Rules Amendment No. 3) (Extradition etc.) 2004
2004 No. 346

The Extradition Act 2003 (Police Powers: Codes of Practice) Order 2003
2003 No. 3336

The Extradition Act 2003 (Part 3 Designation) Order 2003
2003 No. 3335

The Extradition Act 2003 (Designation of Part 2 Territories) Order 2003

2003 No. 3334

The Extradition Act 2003 (Designation of Part 1 Territories) Order 2003
2003 No. 3333

The Extradition Act 2003 (Commencement and Savings) (Amendment No. 2) Order 2003
2003 No. 3312 (C. 131)

The Extradition Act 2003 (Commencement and Savings) (Amendment) Order 2003
2003 No. 3258 (C. 128)

The Extradition Act 2003 (Multiple Offences) Order 2003
2003 No. 3150

The Extradition Act 2003 (Part 1 Designated Authorities) Order 2003
2003 No. 3109

The Extradition Act 2003 (Police Powers) (Northern Ireland) Order 2003
2003 No. 3107

The Extradition Act 2003 (Police Powers) Order 2003
2003 No. 3106

The Extradition Act 2003 (Commencement and Savings) Order 2003
2003 No. 3103 (C. 122)

Home Office – Written evidence (EXL0060)

ANNEX C - Responses to questions raised during the Witness Session of the Minister for Immigration and Security, before the House of Lords Select Committee on the Extradition Act 2003, 16 July 2014

AND

ANNEX D - Home Office Responses to Committee's Call for Evidence

Home Office Written Evidence to the House of Lords Extradition Select Committee: Post-Legislative Assessment of the Extradition Act 2003 – September 2014

Section 1

Responses to questions raised during Minister for Immigration and Security's Witness Session before the House of Lords Select Committee on the Extradition Act 2003 – 16 July 2014

Question by Lord Hussain on new treaties (Page 22 of transcript)

"There are obviously countries with which we do not have any treaties for extradition. Are you drawing up any new list of countries or are you drawing any new extradition treaties with countries such as Japan, for example?"

The Government has recently concluded a treaty with the Philippines which will shortly be designated for the purposes of Part 2 of the Extradition Act 2003 ("the 2003 Act"). We are not currently negotiating any new extradition treaties, including with Japan. At this stage, we see no business need to seek any new treaties.

The lack of any general extradition arrangement with a territory (i.e. one with which the UK has no treaty and which is not a party to any relevant international convention or scheme covering extradition) does not preclude the UK from making an extradition request to another territory, or executing a request from another territory.

Question by the Chairman on ad-hoc treaties (Page 23 of transcript)

[James Brokenshire]…"perhaps it might be helpful to the Committee if we were able to write to the Committee and perhaps set out some of those [ad hoc requests] processes in order to inform your consideration?"

[Chairman] "It would be helpful to know exactly how it works in the real world."

The UK receives several extradition requests each year from territories with which it has no general extradition arrangements (i.e. no treaty and the territory is not a party to any relevant international convention or scheme covering extradition). Some of these requests involve very serious offences. In such cases, section 194 of the 2003 Act gives the Secretary of State the power to enter into "special extradition arrangements" (or ad hoc arrangements) to enable an extradition request to proceed against a particular person.

When the UK receives an extradition request from a territory with which it has no general extradition relations, it is treated as a request to consider whether to enter into special extradition arrangements. It is then for the Secretary of State to consider the facts of the case and whether, in the light of all available information and all relevant factors, the UK should seek to enter into special arrangements. These factors include the seriousness of the offence(s), and whether the bars to extradition in the 2003 Act, including human rights, may be engaged.

Once a decision to proceed has been made, the Government will seek to agree a Memorandum of Understanding with the territory making the request. This is in effect a "mini-treaty" in respect of the particular person whose extradition is sought. Once the Memorandum has been signed by both parties a certificate will be signed by the Secretary of State to certify that special extradition arrangements under section 194 of the 2003 Act have been made between the UK and the relevant territory. Once this has been done, the provisions of Part 2 of the 2003 Act apply in the same way as they would if the request had been received from an extradition partner with which the UK has general extradition arrangements (with modifications).

In 2013 the Secretary of State agreed to proceed with renewed requests for five men accused of genocide in Rwanda. In 2013 Ministers also agreed to proceed with requests from Taiwan and Bermuda. All these cases are currently before the courts.

Question by the Chairman on US extraditions (Page 24 of transcript)

"How many requested people has the UK extradited to the US since the signing of the US/UK treaty?"

Between 26 April 2007 (when the treaty came into force) and 31 July 2014, 72 people were extradited from the UK to the US.

Question by the Chairman on US extraditions (Page 24 of transcript)

"How many requested people has the UK extradited from the US since the US ratified the treaty?"

Between 26 April 2007 and 31 July 2014, 38 people were extradited to the UK from the US.

Question by the Chairman on US extraditions (Page 24 of transcript)

"How many requests from the US have been refused on human rights" grounds?"

Between 26 April 2007 and 31 July 2014, two extradition requests from the US were refused on human rights grounds.

Question by the Chairman on US extraditions (Page 25 of transcript)

"How many requested people has the UK extradited to the US after human rights assurances were made?"

This information is not routinely collected. However, following a manual search of our records seven cases have been identified where the UK extradited a person to the US following the receipt of assurances on human rights matters, such as the death penalty.

Question by Lord Brown of Eaton-under-Heywood on US extraditions (Page 25 of transcript)

[James Brokenshire] … "I do point to the fact that extradition has been refused by our courts on 14 occasions, whereas on no occasion has the US refused a request from the UK."

[Lord Brown] "When you come to write to us, can you give us in each of the 14 cases an indication of the grounds that we refused them on?"

Of the 14 extradition requests from the US that were refused by the UK:

- three were refused because the offence was not an extraditable offence;
- three were refused following legal rulings that the statutory time limits in the 2003 Act had not been met;
- two were refused on human rights grounds;
- two were refused because of the passage of time;
- two were refused on health grounds (one of those being on mental health grounds);
- one case was refused on the grounds of the rule against double jeopardy; and
- one case was refused on the grounds that no reasonable cause had been shown for the delay in the case.

Question by the Chairman on US extraditions (Page 25 of transcript)

"Could you also tell us: 14 out of how many?"

Between 26 April 2007 and 31 July 2014, 106 extradition requests were made by the US to the UK.

Question by Baroness Jay of Paddington on US extraditions (Page 25 of transcript)

"Do UK authorities routinely ask US prosecutors that requested persons who are UK citizens – or who have strong links with this country – serve in the UK any custodial sentences that US courts impose?"

We do not routinely ask for extradited prisoners to be returned to the UK to serve prison sentences. However, post-sentencing it is possible for prisoners to be returned to the UK to serve their sentence under the provisions of the Council of Europe Convention on the Transfer of Sentenced Persons, to which both countries are signatories[106]. Transfer requires the consent of the individual concerned.

Question by Lord Mackay of Drumadoon on US extraditions (Page 26 of transcript)

"Can I also ask that, when you reply to the various questions you have been asked, you make it clear how many of the requests for extradition originated with prosecutors at State level and how many originated with prosecutors at federal level?"

The Government does not hold such information. It was not possible from a manual search of Home Office records to identify which cases were made at federal level or which were State level.

Question by the Chairman seeking any further comments by the Minister (Page 28 of transcript)

[Chairman] "Is there anything else you would like to say?"

[James Brokenshire] … "I have been a very keen supporter of something called Operation Captura, which is a scheme conducted with Crimestoppers and with the Spanish authorities to see that individuals are brought back to justice from Spain to the UK. It has been very successful. Perhaps I may drop the Committee a line on that particular scheme we are operating, because it does give a sense of the power of extradition to see that the rights of victims are properly respected."

[Chairman] "That is a point I hope we will not lose sight of at any point in the proceedings. Thank you very much indeed."

Since 2006, Crimestoppers and the Serious and Organised Crime Agency/National Crime Agency (NCA) have run a joint initiative with the Spanish police called Operation Captura[107] which is aimed at "educating the public about different crime types" and "appealing for information". Operation Captura works by publicising the names and faces of wanted criminals who are believed to be in Spain so members of the public, both in Spain and in the UK, who identify

[106] US ratified the Convention on 1 July 1985, and the UK ratified it on 1 August 1985.
[107] https://crimestoppers-uk.org/get-involved/our-campaigns/international-campaigns/operation-captura/

wanted individuals can anonymously provide information as to their whereabouts. The subjects are then brought back to the UK under an EAW to face justice.

The Government strongly welcomes the work of the initiative and believes that it clearly demonstrates the role and value of the EAW in targeting fugitives from British justice who are believed to be resident in Spain. Government Ministers have taken an active interest in Operation Captura and have met with their Spanish counterparts on a number of occasions to underline their support for it.

The success of Operation Captura means that Spain is no longer an appealing destination for British criminals seeking to escape justice. Since Operation Captura was launched, 61 of 76 wanted criminals have been arrested and brought back to face justice. The NCA believe this to be clear proof of the effective cooperation that exists between UK and Spanish law enforcement agencies.

Notable successes include the return of:

- Ian WHITE – a tobacco smuggler who masterminded a £6million VAT scam. He was tried, convicted and sentenced to six years imprisonment in his absence in the UK on 11 March 2004. He was arrested as a result of information provided through Operation Captura and was returned to the UK on 20 September 2007 to serve his sentence in the UK.

- John DOWDALL – was wanted in the UK for importing large quantities of cannabis from Spain in 2003. He was tried, convicted and sentenced to five years imprisonment in his absence on 17 May 2005. After being arrested in Spain, he was returned to the UK in September 2007 to serve his sentence.

- Anthony SIMMONDS – was wanted for importing large quantities of cannabis from Spain and failure to declare VAT duty of £4million. Arrested in Spain in December 2006, he was returned to the UK in early 2007. After appearing in court, a sentence of three years imprisonment was handed down.

- Markcus JAMAL – was wanted for conspiracy for murder of Nageeb El Hakem in 2005. He was arrested in Spain following information provided through the Crimestoppers website and returned to the UK in January 2007 where he was convicted and sentenced to 22 years imprisonment.

- James TOMKINS – wanted for the murder of Rocky Dawson in 2006. He was arrested in Spain in 2010 and returned to the UK. He was sentenced to life imprisonment in 2011.

Section 2

Responses to the House of Lords Select Committee on the Extradition Act 2003 – Call for Evidence

General

1. Does the UK's extradition law provide just outcomes?

The Government believes that the UK's extradition law now operate transparently, and in a way which sensibly balances the interests of justice and the interests of victims against the rights of the individual whose extradition is being sought.
In acknowledgement of concerns about the operation of the European Arrest Warrant (EAW), the Government has made several changes to the Extradition Act 2003 (the 2003 Act) in order to better protect UK citizens, and strike a better balance between necessary law enforcement action and civil liberties. Those legislative changes were introduced to Part 1 of the 2003 Act, which implements the EAW, through the Anti-Social Behaviour Crime and Policing (ASBCP) Act 2014. These include:

- requiring the judge to consider whether the alleged conduct and likely sentence a person will receive if extradited and convicted is sufficiently serious to make the person's extradition proportionate. This is supported by an administrative proportionality check, undertaken by the National Crime Agency (NCA) which identifies the most trivial requests when they are first received and refuses to certify them (section 157 of the ASBCP Act 2014);

- addressing concerns relating to pre-trial detention, so that where a case is not far enough advanced and there are no reasonable grounds for believing that a decision to charge and/or try the person has been made in the requesting State, the judge must discharge the case. The exceptions to this are where the issuing State can prove that the decisions to charge and try have actually been made, or that the person's presence is required in the issuing State for the decisions to be made (section 156 of the ASBCP Act 2014);

- allowing for an individual to be temporarily transferred to an issuing State to be questioned ahead of the extradition hearing in the UK, if the person consents. The changes also allow the person to speak with the authorities in the issuing State (e.g. by videoconference) pending the extradition hearing, if the person consents (section 159 of the ASBCP Act 2014);

- making the 2003 Act much clearer as regards the existing requirement for dual criminality, in particular, setting out that in cases where all or part of the conduct occurred in the UK and the conduct is not criminalised here, the EAW must be refused for that conduct (section 164 of the ASBCP Act 2014); and

- lifting the requirement that individuals lose their right to speciality protection when they consent to extradition (section 163 of the ASBCP Act 2014).

For non-EAW cases, in addition to the pre-existing safeguards that existed in the 2003 Act the Government has introduced the 'forum bar'. The Government believes that the forum bar,

introduced in the Crime and Courts Act 2013, is a positive development in that it ensures that the possibility of a prosecution in this country is always properly considered before a decision to extradite is taken. It is important that the public have confidence in the way in which the UK's extradition arrangements work and the issue of forum is critical to that.

a. Is the UK's extradition law too complex? If so, what is the impact of this complexity on those whose extradition is sought?

The Government does not consider that the UK's extradition law is too complex. Extradition proceedings are criminal proceeding of a particular type in that they do not involve the determination of any criminal charge. At the same time, there is a need to ensure proper protections for those whose extradition is sought. The Government has sought to provide, through the law, a clear and fair system within which extradition requests can be considered as quickly as possible. Concluding cases quickly and fairly is the best way to reduce any negative impact on an individual.

2. Is extradition law fit for purpose in an era of increasingly multi-jurisdictional crime?

The Crime and Courts Act 2013 introduced a forum bar to ensure that the possibility of a domestic prosecution is properly explored as part of the extradition proceedings. A key part of this process is that the judge must consider whether a substantial measure of the alleged criminal activity was performed in the United Kingdom. The Government considers that the forum bar was important change to domestic legislation to ensure that extradition arrangements operate fairly. The Government considers that this change will have increasing significance in an era of multi-jurisdictional crime.

3. To what extent is extradition used as a first resort when prosecuting a crime committed in another jurisdiction? Should greater use be made of other remedies?

The Government has sought to address concerns that extradition can be resorted to too readily as part of the reforms to the EAW. The changes introduced provide for a new bar to extradition in incoming EAW cases on the grounds of "absence of prosecution decision" (section 12A of the 2003 Act). This is intended to ensure that a case is sufficiently advanced in the issuing State (that is, there is a clear intention to bring the person to trial) before extradition can occur, so that people do not spend potentially long periods of time in pre-trial detention following their extradition whilst the issuing State continues to investigate the offence. This change ensures that, in cases where the person is wanted to stand trial, extradition can only go ahead where the issuing State has made a decision to charge the person and a decision to try the person (or is ready to make those decisions). Where it appears to the judge that there are reasonable grounds for believing that either or both a decision to charge and a decision to try have not been taken in the issuing State (and that the person's absence from that State is not the only reason for that), extradition will be barred.

Other changes have been made to ensure that extradition does not take place where it is disproportionate. In assessing that, the judge must consider (as far as the judge thinks it is

appropriate to do so) the possibility of foreign authorities taking measures that are less coercive than extradition.

In addition, there are now provisions to allow the temporary transfer of an individual to the State issuing an EAW (e.g. to be questioned ahead of the extradition hearing in the UK). There is also a provision which enables video-conferencing, pending the extradition hearing.

The Government also believes that where alternatives to extradition do exist, these should be used. For example, if it is possible to use Mutual Legal Assistance to obtain a statement from a suspect (not an accused person) then that may be a suitable alternative, although this would need to be considered by the issuing authority on a case by case basis.

Within this context it is worth noting the recent adoption of the European Investigation Order (EIO), which will streamline the way in which most EU Member States request and provide evidence to assist in criminal investigations or proceedings. The EIO (Directive 2014/41/EU[108]) entered into force on 22 May 2014 must be implemented within three years of that date. It replaces previous arrangements for the way in which Mutual Legal Assistance is processed and it explicitly states that an EIO is to be issued for the purpose of having one or several specific investigative measure(s) carried out in the Member State executing the EIO ('the executing State') with a view to gathering evidence. This includes the obtaining of evidence that is already in the possession of the executing authority. It will contain specific time limits for obtaining evidence and this is likely to see the EIO become a helpful tool in ensuring that extradition is not sought at too early a stage in proceedings.

European Arrest Warrant

4. On balance, has the European Arrest Warrant (EAW) improved extradition arrangements between EU Member States?

The Government is clear that the EAW provides the most effective tool in tackling cross border crime and provides distinct advantages over the 1957 European Convention on Extradition (ECE), which is the scheme under which extradition between EU Member States would operate if we ceased to use the EAW.

Firstly, the process of extradition under the EAW is quicker than under the ECE. In terms of surrender from the UK to another EU Member State, it takes approximately three months to surrender someone using an EAW. However, it takes approximately ten months using the ECE, but can take much longer. There are obvious advantages to having foreign criminals, and alleged foreign criminals, leave the UK more quickly. The most recent estimate suggests EAWs cost on average £13,000 each to process, whereas the figure for extraditions under the ECE is

[108] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0041&from=EN
Directive of the European Parliament and Council of 3 April 2014 regarding the European Investigation Order in criminal matters

£62,000 (these figures are set out in Command Paper 8897, which includes an Impact Assessment on the EAW and Schengen Information System II at pages 45-46[109]).

Furthermore, the ECE allows territories to refuse to extradite their own nationals. However, under the EAW, EU Member States cannot bar surrender on the basis of the nationality of the person concerned. In non-EAW cases the following EU Member States retain an absolute bar on extraditing their own nationals: Austria, Belgium, Denmark, the Czech Republic, France, Germany, Greece, Latvia, Luxembourg, Slovakia, Slovenia and Spain. Furthermore, outside of the EAW Finland and Sweden have an absolute bar to extraditing their own nationals to countries other than Norway and Iceland, including other signatories to the ECE.
It is because of this nationality bar that ,without the EAW, it is highly unlikely that David Heiss would have been returned to the UK to face justice. In 2008 Mr Heiss stabbed Matthew Pyke 86 times at his flat in Nottingham. He had become infatuated with Mr Pyke's girlfriend, Joanna Witton, whom he met through a gaming website. Mr Heiss, a German national, was arrested by German authorities in September 2008 under an EAW and was subsequently surrendered to the UK. He was found guilty in 2009 and sentenced to life imprisonment, with a requirement to serve a minimum of 18 years.
A further advantage of the EAW is that under the ECE, if there is a long delay between the offence occurring and the extradition request being made, extradition can be refused due to the length of time that has passed as a result of any State's statute of limitations legislation. However, under the EAW it is only possible for a territory to refuse surrender for this reason if the acts fall within its jurisdiction under its criminal law. For example, the surrender earlier this year of Francis Paul Cullen to the UK for sexual offences against children, after hiding in Spain for 22 years, would not have happened without the UK operating the EAW.
The view of the Government has been shared by those who have reviewed extradition arrangements between EU Member States. For example, Sir Scott Baker, in his 2011 Review of the UK's extradition arrangements concluded that "the European Arrest Warrant has improved the scheme of surrender between Member States of the European Union and that broadly speaking it operates satisfactorily".

The House of Lords has recently considered this question during its July 2014 opt in-debate where it was acknowledged by Viscount Bridgeman that "It is the view of Sub-Committee F [Home affairs health and education sub-committee of the EU Select Committee] that both these measures (Europol and The EAW) are in the national interest and are vital to our national security. We also argue that the measures would provide the benefits of legal clarity, making a stronger and more consistent application of measures throughout the EU".

The view is further supported by law enforcement agencies in the UK. The Association of Chief Police Officers, in their evidence to the House of Lords European Union Committee in January 2013[110], called the EAW "vital" and said that "relying on less effective extradition arrangements could have the effect of turning the UK into a 'safe haven' for Europe's criminals".

a. How should the wording or implementation of the EAW be reformed?

[109] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/326698/41670_Cm_8897_Accessible.pdf "Decision pursuant to Article 10(5) of Protocol 36 to The Treaty on the Functioning of the European Union." Home Office July 2014.
[110] http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/Protocol36OptOut/VolofevidenceP36asat110113.pdf

Following the changes introduced to the operation of the EAW, through the ASBCP 2014 Act, the Government is satisfied that the UK's implementation of the EAW now operates effectively.

Baroness Ludford's January 2014 report to the European Parliament[111] concluded that the EAW was "in need of reform to ensure that individual rights are not overridden…. [and]….. needed to be used not only effectively but also proportionately and with guarantees that safeguards are respected and human rights are not abused in the process." The Report proposed proportionality considerations in the executing and issuing State as a key recommendation for reform of the EAW. The Government supported this recommendation in the report. The Government understands that members of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) are likely to have regard to the recommendations that were presented in the recent report of Baroness Ludford (a former MEP), including in relation to proportionality.

b. How will post-Lisbon Treaty arrangements change the EAW scheme once the UK opts back in to it?

There are a number of measures which the Government intends to seek to rejoin as part of the 2014 opt-out that will have an impact on the operation of the EAW.
Measures such as the European Supervision Order (ESO - Council Framework Decision 2009/829/JHA) could be used to allow those who have been accused of crimes abroad to be bailed back to the UK whilst they await trial, rather than spend long periods of time in detention abroad. For example, this may have allowed Andrew Symeou to be returned to the UK whilst he awaited trial in Greece.
The Government wants the Prisoner Transfer Framework Decision (PTFD - Council Framework Decision 2008/909/JHA) to be used to its fullest extent so that British citizens extradited and convicted can be returned to serve their sentence here. The PTFD allows EU Member States to transfer prisoners, in some circumstances, without the consent of the prisoner, and restricts the grounds on which receiving Member States may refuse to accept transfers. Where the extradition of UK citizens is ought in conviction cases it is possible for the EAW to be withdrawn and for a request to be issued, under the PTFD, for the UK to take on the sentence. Currently, only 18 Member States have implemented the PTFD. However, given the onset of Commission enforcement powers on 1 December we expect all other Member States (Poland excepted) to have implemented the PTFD and that this should allow it to be used more frequently as an alternative to an EAW.
The Second Generation Schengen Information System (SISII - Council Decision 2007/533/JHA) is the EU database for exchanging alerts between Member States in relation to people and objects for law enforcement purposes. It has become the primary mechanism for transmitting data about people wanted on EAWs in most EU Member States. SIS II will become the principal way in which the UK transmits and receives EAWs and will give the UK the advantage of receiving EAW alerts in real time. An assessment of the costs and benefits of the UK's implementation of SIS II was made by the Government in 2014 and published in a Command Paper 8897 (question 4 of this written response refers). The Impact Assessment showed that:

[111] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2014-0039+0+DOC+PDF+V0//EN

- access to SISII data would likely lead to an increase in successful extraditions and potentially significant crime prevention benefits;

- advanced passenger information checks carried out by Border Force would provide police forces with an opportunity to intercept individuals before they attempt to cross the UK border;

- SISII could also provide long term efficiency savings to the police and the National Crime Agency as information would be more readily available than under the current arrangements reducing the likely time it takes to locate criminals who have absconded from the UK, especially if their precise location is unknown.

Prima Facie Evidence

5. In circumstances where a prima facie case is not required, do existing statutory bars (the human rights bar, for instance) provide sufficient protection for requested people?

We believe the full range of statutory bars that are in place, including the new bars to extradition introduced by the Crime and Courts Act 2013 and the ASBCP Act 2014, provide adequate protections for those subject to extradition proceedings.

a. Are there territories that ought to be designated as not requiring a prima facie case to be made before extradition? What rationale should govern such designation? What parliamentary oversight of such designation ought there to be?

Currently, under the 2003 Act, prima facie evidence is not required from EU Member States (and Gibraltar, who operate the EAW and fall under Part 1of the Act) and other countries who have ratified the ECE (who fall under Part 2). In addition, Australia, Canada, New Zealand and the USA (which are also dealt with under Part 2) do not need to provide prima facie evidence.

The Baker Review made clear that the UK could not require EU Member States to provide prima facie evidence without first withdrawing from the EAW scheme. The Review concluded, that "the prima facie case requirement should not be re-introduced in relation to category 1 territories.… No evidence was presented to us to suggest that EAWs are being issued in cases where there is insufficient evidence". The Review also concluded that in both Part 1 and Part 2 cases judges are able to subject cases to sufficient scrutiny to ensure that any abusive request is identified and dealt with appropriately.

The Baker Review did, however, recommend that the Government periodically review Part 2 designations; a recommendation the Government has accepted[112].

In terms of Parliamentary oversight of any new designation that a territory not be required to provide prima facie evidence , no new designation may be made unless a draft of the relevant order has been laid before Parliament and approved by a resolution of each House. In the

[112] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228566/8458.pdf

Government's opinion, the affirmative resolution procedure in Parliament the correct method of Parliamentary oversight as it allows for active scrutiny and requires a positive vote on the proposed legislation.

Currently, the Home Office is in the process of preparing legislation for the designation of San Marino and Monaco as territories that would not be required to give prima facie evidence given that they ratified the ECE in 2009.

UK/US Extradition

6. **Sir Scott Baker's 2011 'Review of the United Kingdom's Extradition Arrangements', among other reviews, concluded that the evidentiary requirements in the UK-US Treaty were broadly the same. However, are there other factors which support the argument that the UK's extradition arrangements with the US are unbalanced?**

The Government has no reason to believe the treaty is unbalanced. Indeed, we believe that it operates fairly.

The argument about whether or not the US/UK treaty is unbalanced has tended to focus on the greater numbers of people requested by the US compared to that requested by the UK. However, we do not consider that relying purely on the number of requests made by either party to a bilateral treaty is an adequate way of considering whether or not a treaty is balanced or fair. Indeed, it is not unusual for the number of incoming and outgoing requests made under a bilateral treaty to be very different. For example, the UK has bilateral treaties with Brazil and Thailand.
Between 2007 and July 31 2014 the incoming and outgoing request figures for these territories are as follows:

Incoming Requests	2007-2014
Brazil	15
Thailand	2

Outgoing Requests	2007-2014
Brazil	6
Thailand	19

Consequently, the Government does not consider that simply reviewing the number of incoming and outgoing requests as concerns the US/UK treaty is the correct methodology for determining whether or not it is balanced.

It is also worth noting that 14 requests from the US have been refused by the UK between 1 January 2004 and 31 July 2014. During that same time period, the US did not refuse a single UK extradition request. Each extradition request, in both territories, is considered on its own merits.

Given the figures, set out above, the Government considers that comparing numbers of requests is not a valid way to assess whether the provisions of the treaty are balanced.

The Baker Review considered fully the UK-US extradition treaty and reached the conclusion that it does not operate in an unbalanced manner. The Review concluded: "Nor is there any basis to conclude that extradition from the United Kingdom to the US operates unfairly or oppressively. For these reasons we have concluded that there is no basis for seeking to renegotiate the 2003 Treaty".

Political and Policy Implications of Extradition

7. What effect has the removal of the Home Secretary's role in many aspects of the extradition process had on extradition from the UK?

The role of the Secretary of State in extradition cases has changed significantly in recent years. Under the Extradition Act 1989, the Secretary of State played a major part at both the beginning and end of the extradition process. At the beginning of the process, the Secretary of State made the decision to submit the extradition request to the magistrate by issuing an authority to proceed, or an order to proceed. At the end of the process the Secretary of State made the decision whether to order surrender. The Secretary of State had a wide general discretion to consider whether or not to order extradition at the end of the process.

The involvement of the Secretary of State meant that there was a large measure of duplication in the decision-making process and an opportunity for challenges to the Secretary of State's decision by way of applications for judicial review.

The 2003 Act reduced the Secretary of State's involvement to consideration of a narrow range of issues, including whether to certify the request as properly made, and consideration of the death penalty, specialty, earlier extradition from another territory, and earlier transfer from the International Criminal Court. Under the 2003 Act human rights matters are considered by the courts. The Secretary of State has no involvement in the EAW process.

However, under the Human Rights Act 1998 and the 2003 Act, the Secretary of State still had to consider human rights issues that arose after the extradition procedures had been completed. This led to Part 2 cases being drawn out while people made repeated applications for the case to be reconsidered by the Secretary of State.

The Baker Review recommended that the Secretary of State's involvement should be limited further by removing human rights matters from his or her consideration, as these were thought to be more appropriately the concern of the judiciary. The Review pointed out that allowing people to raise late human rights representations with the Secretary of State was a source of delay, sometimes for months and even years. The Review described the situation as unacceptable, recommending that the courts should decide all human rights issues in order to speed up the process and ensure the process remains transparent. It also concluded that "the Secretary of State's involvement as regards the death penalty, specialty and the other grounds in section 93 which do not involve the exercise of discretion, are matters with which she is best able to deal." The Government accepted this recommendation.

The removal of consideration of human rights matters by the Secretary of State was brought about by the Crime and Courts Act 2013. Those subject to extradition under Part 2 of the 2003 Act must now raise any late human rights representations with the courts.

There are a number of advantages in ensuring that human rights issues arising at the end of the extradition process are decided by the courts rather than the Secretary of State. Firstly, the courts are able to facilitate management of the case without undue delay. The courts have emphasised the importance of finality in litigation and the particular importance of that principle in extradition cases. Second, the process is a transparently non-political one. This is important for the person whose extradition is sought and will remove any perception that a decision may have been influenced by political considerations. The courts are also better placed to take into account any relevant case law.

a. To what extent is it beneficial to have a political actor in the extradition process, in order to take account of any diplomatic consequences of judicial decisions?

The 2003 Act was intended to limit the executive's role in extradition to the greatest possible extent and thus remove any perception that decisions are taken for political reasons or influenced by political considerations. The EAW scheme in particular is a form of judicial surrender and requires judicial authorities in EU Member States to mutually recognise each other's decisions.

However, the Government considers that is also legitimate for the Secretary of State to play some role in the extradition process, and this remains the case in Part 2 cases (even after the change made by the Crime and Courts Act 2013, set out above). In Part 2 cases, the Secretary of State receives the extradition request, decides whether to issue a certificate in respect of the request and, after the extradition hearing, decides whether to make an extradition order. When deciding whether to make an extradition order the Secretary of State must consider the death penalty, speciality protection and earlier extradition from a third country or transfer to the UK from the International Criminal Court. The Baker Review concluded that such matters "are matters with which she is best able to deal."

The Government acknowledges that judicial decisions can have diplomatic consequences in extradition cases, but that this can also be said for judicial decisions in domestic criminal and civil cases. At this stage, the Government sees no need to increase or alter the Secretary of State's role.

8. To what extent are decisions of where to prosecute certain crimes and whether to extradite influenced by broader political, diplomatic or security considerations?

Decisions on whether or not to prosecute individuals in the UK are purely a matter for the prosecuting authorities. There is no political or diplomatic involvement in this decision-making process.

In Part 1 cases, decisions whether or not to extradite a person are for the courts and there is no Ministerial involvement in the case.

In Part 2 cases, the Secretary of State (or Scottish Ministers in requests to Scotland) has only a limited role to play in the process. When deciding whether to order extradition, the Secretary of State must consider the death penalty, speciality protection and earlier extradition from a third country or transfer to the UK from the International Criminal Court.

Section 208 of the 2003 Act enables the Secretary of State to prevent a person's extradition where it would be against the interests of national security. It applies where the Secretary of State believes that the person was acting for the purpose of assisting in the exercise of a statutory power when carrying out the alleged conduct. It also allows that the person is not liable under the criminal law for the alleged conduct as a result of an authorisation given by the Secretary of State. Subsection 4 provides a further condition that must be met if a person's extradition for an offence would be against the interests of national security.

If these factors apply, the Secretary of State can issue a certificate to this effect. Having issued such a certificate, they can direct that the relevant Part 1 warrant or extradition request (Part 2) not to proceed. The Secretary of State may also order the person's discharge.

Human Rights bars and Assurances

9. Is the human rights bar as worded in the Extradition Act 2003, and as implemented by the courts, sufficient to protect requested people's human rights?

The Government believes the bars in sections 21 (in Part 1 of the 2003 Act) and 87 (in Part 2 of the 2003 Act) provide robust and effective protections for the human rights of those whose extradition is requested. These sections set out that if the judge decides extradition would not be compatible with an individual's human rights, the judge must discharge extradition.

The Baker Review also concluded that the human rights bar provides appropriate protection against prospective human rights violations in the requesting territory. The Review was satisfied that these sections, alongside the other safeguards contained in the 2003 Act, provided a fair and transparent mechanism for contesting requests. Furthermore, Baker did not consider that the safeguards "operated so as to cause or permit manifest injustice or oppression". The human rights bar has operated no differently under the 2003 Act as it does under the Extradition Act 1989. Although the Government has removed the ability of the Secretary of State to look at late human rights representations, the Government has amended the legislation to provide those subject to extradition proceedings with the ability to raise late human rights matters with the courts.

10. Is the practice of accepting assurances from requesting states to offset human rights concerns sufficiently robust to ensure that requested people's rights are protected?

As set out above, the courts have the final say on human rights and must bar extradition if they are of the view that it would be incompatible with human rights. It is the role of prosecuting

authorities, the Secretary of State and Scottish Ministers, as appropriate, to seek assurances where they see fit; but, ultimately, it is a matter for the judge to consider whether the assurances which have been provided are sufficiently robust.

In order to help the judge reach their decision, the Government and Crown Prosecution Service (CPS) have, in the past, obtained assurances from requesting States on a number of issues including use of the death penalty, prison conditions, and non-refoulement (sending a refugee from a territory back to the place where he/she had been persecuted). For example, assurances obtained from the US on the use of the death penalty have been accepted by the courts in a number of cases, with extradition going ahead. However, assurances are not always found to be sufficient- a recent request from Ghana was refused following death penalty assurances (decision is currently subject to appeal). Assurances have also been obtained from requesting territories on prison conditions. These are generally accepted by the courts.

It is in the interests of the requesting territory to abide by any assurances given as any failure to do so would impact adversely on subsequent requests.

a. What factors should the courts take into account when considering assurances? Do these factors receive adequate consideration at the moment? To what extent is the implementation of assurances monitored? Who is or should be responsible for such monitoring? What actions should be taken in cases where assurances are not honoured?

The factors to be taken into account when considering assurances is a matter for the courts.

The Government believes it is important that it is important that assurances given are respected, and does its best to monitor compliance. Proposals are currently being developed to improve the monitoring of assurances.

Other Bars to Extradition

11. What will be the impact of the forum bar brought into force under the Crime and Courts Act 2013?

The Government believes the forum bar is having a positive impact. It has improved the overall transparency of the UK's extradition arrangements and ensures that the possibility of a prosecution in the UK is always properly considered before a decision to extradite is taken.

12. What will be the impact of the proportionality bar in relation to European Arrest Warrant applications recently brought into force under the Anti-social Behaviour, Crime and Policing Act 2014?

The introduction of the proportionality bar is already having a positive impact.
The legislative changes are designed to ensure that the most obviously disproportionate cases are filtered out at the very beginning of the process, by the NCA, before the person is arrested and court proceedings commence.

For cases which reach court, the judge must order the person's discharge where the judge decides that extradition would be disproportionate, bearing in mind ,so far as the judge thinks is appropriate:

- the seriousness of the conduct;
- the likely penalty; and
- the possibility of the relevant foreign authorities taking less coercive measures than extradition.

This will ensure that British citizens will not be surrendered for trivial offences. This change is designed to ensure that British citizens benefit from the protections they can reasonably expect whilst allowing our police and prosecutors to benefit from the EAW to the maximum extent possible.

The changes introduced by the ASBCP Act 2014 in relation to proportionality have already ensured that people who are wanted for minor offences have not been pursued. Since these changes came into force on 21 July 2014, and up until 5 September 2014, the NCA has found 14 cases to be disproportionate, refusing to certify these. Given the estimated cost set out in Command Paper 8897 (see question 4) of £13,000 for processing an EAW, this indicates that savings in excess of £180,000 are likely to have been made to the public purse.

Right to Appeal and Legal Aid

13. To what extent have changes to the availability of legal aid affected extradition practice, and the provision of specialist legal advice to requested persons?

With the exception of the introduction of an upper income financial eligibility threshold for defendants appearing before the Crown Court[113] and the changes to criminal legal aid for prison law[114], the Government's legal aid reform programme has had no impact on the scope and eligibility criteria governing access to criminal legal aid representation. Therefore, access to legal aid by a requested person facing extradition proceedings at the magistrates' court, as well as potentially the High Court, remains unchanged.

The last substantive change to the eligibility criteria for criminal legal aid at the magistrates' court dates back to October 2006 with the introduction of the current means testing regime. Means testing was subsequently extended to the Crown Court between January and June 2010. All criminal proceedings before the High Court, Court of Appeal and the Supreme Court remain non means tested. During the period covering the start of August 2012[115] and the end of July 2014 nearly 2,000 requested persons applied for criminal legal aid for representation at Westminster Magistrates Court. In approximately 95% of these cases, the requested person qualified on means and was granted publicly funded representation.

[113] Since 27 January 2014, any defendant whose disposable annual income is £37,500 or more is no longer eligible for criminal legal aid representation at the Crown Court.
[114] See The Criminal Legal Aid (General)(Amendment) Regulations 2013/No.2790
[115] Whilst data was collected prior to August 2012, this was collated on a different basis and so does not allow a 'like for like' comparison.

During the same period, in 98.7% of all cases, a completed criminal legal aid application form for extradition proceedings at the magistrates' court was processed within the target time of two working days. It is noted that in some cases, delays can arise if the application submitted by the solicitor on behalf of their client is not complete. When this happens the application is returned to the solicitor so that missing information and evidence can be provided. In some cases, it may take several weeks for the solicitor to comply with such a request. Therefore, this can impact on the timely progression of an extradition hearing.

It is recognised that where a defendant has been remanded into custody by the court, this may present practical difficulties in allowing the defendant to secure supporting evidence from their home address. It might be anticipated that this would be a particular challenge in extradition cases given the proportion of requested persons who will have been remanded into custody by the court. However, it is noted that in all court remanded cases (though not police custody cases), the Legal Aid Agency (LAA) does not require the defendant to provide evidence of their financial means.

The LAA has worked closely with solicitors representing clients at extradition proceedings to improve both awareness of, and compliance with, the requirements of the criminal legal aid application process. The planned introduction of e-form applications in November 2014 is expected to reduce the number of applications that may be rejected as incomplete by prompting the solicitor for missing information and evidence. This will mean that the application cannot be submitted until all the relevant fields have been completed and a mandate is signed.

An electronic date stamp can be obtained with minimal information to ensure that where eligible, legal aid is backdated appropriately. This is anticipated to reduce the risk of any potential delays to the court. Whilst it is not expected that the use of e-forms will become mandatory until summer 2015, in those areas where the e-form has already been piloted on a voluntary basis, uptake by solicitors has ranged from 30% to 70%.

In some extradition cases, the requested person may rely heavily on services delivered by the court duty solicitor scheme. In order to ensure that the scheme provides sufficient capacity, in July 2013 the LAA doubled the number of duty solicitors allocated to extradition proceedings at City of Westminster Magistrates' Court.

Currently, solicitors, barristers and Fellows of the Chartered Institute of Legal Executives wishing to undertake duty solicitor work, including at the City of Westminster Magistrates' Court, are required to have successfully completed the relevant training module set by The Law Society – 'The Criminal Litigation Accreditation Scheme' (CLAS). It is appropriate that any wider concerns about the quality of services provided by solicitors be addressed to the relevant regulatory body. The Law Society is the approved regulator for solicitors and has oversight of the CLAS, and the Solicitors' Regulation Authority is its independent regulatory arm.

a. What has been the impact of the removal of the automatic right to appeal extradition?

Section 160 of the ASBCP Act 2014, which provides a right of appeal for both the requesting territory and requested person, subject to leave of the High Court, will be commenced shortly.

It is expected to make a positive difference for those with meritorious appeals against extradition decisions. As the Baker Review found, the court system is currently burdened with unmeritorious appeals. This has resulted in many genuine appeals being delayed and statutory time limits extended. The change in the Anti-social Behaviour, Crime and Policing Act 2014 will ensure that the appeal process is not used simply as a means of delaying the extradition process and that unmeritorious appeals are filtered out of the system, allowing challenges with merit to be heard and resolved quickly.

Section 160 also sets out that the High Court is not to refuse to entertain a late application for leave to appeal simply because it is given late if the person did everything reasonably possible to ensure notice was given as soon as possible.

From a legal aid perspective, the Government does not believe that the removal of the automatic right to appeal an extradition decision will have any negative effect on the availability of services to the requested person.

Devolution

14. Are the devolution settlements in Scotland and Northern Ireland fit for purpose in this area of law?

The Government believes that the law operates effectively in every jurisdiction in the UK.

a. How might further devolution or Scottish independence affect extradition law and practice?

Both the Government and Scottish Government have said that there can be no 'pre-negotiations' on independence in advance of the referendum. Given this, the question of how potential future extradition issues for Scotland would be affected by further devolution or Scottish independence cannot be addressed at this time.

Home Office – Supplementary written evidence (EXL0088)

Lord Inglewood
Chairman, House of Lords Select Committee on Extradition House of Lords
SW1A OPW



13 January 2015

Thank you for the opportunity to appear before your Committee on 4 December to give evidence on UK extradition law and practice. During my session I promised that I would write to you to provide further information on some of the points that were raised by Committee members.

European Arrest Warrant (EAW) reform - changes to practice

In my evidence I clarified that there had been little appetite amongst other Member States to amend the EAW framework decision itself in order to improve the EAW's operation. However, as you know, this did not prevent us from legislating last year to improve the practical operation of the EAW, and ensure that better protections are now offered to UK citizens and those subject to extradition from the UK. As I said, we believe there are further changes to the practical operation of the EAW that could be made by all Member States. The Committee requested that I set out details of those changes.

Firstly, we believe that more information about previous convictions should be included, as matter of routine, on EAW forms. This would allow the police properly to risk assess a situation when acting on EAWs. For example, the EAW may be issued for a seemingly mid-level drugs offence. However, where that individual has convictions for a serious assault or firearms offence, the police have told us that having such information at the outset would change their approach to the arrest and would hugely assist in any risk assessments undertaken before the arrest is attempted . That is a relatively small change to practice in many States that we believe would help increase public safety and that of our police officers .

Secondly, where possible, we would like fingerprints to be sent alongside an EAW. Clearly this will not be possible in every case but where it is such an approach would enable the police to confirm the identities of people they arrest. The more fingerprint data that is provided with EAWs, the easier it will be to avoid cases of mistaken identity. This can only be beneficial.

Thirdly, as I said to the Committee, practice should be changed so that EAWs no longer continue to be pursued automatically in a third country if they have already been refused in another country. Once the UK is operating the Second Generation of the Schengen Information System (SIS II), this will allow refused EAWs to be 'flagged' on the system, notifying other Member States that a case has been refused. This will also act as a trigger for further communication with the issuing authority, which we expect will include a discussion about withdrawing the EAW. This should help to reduce the risk of a person being arrested on more than one occasion under the same EAW.

I am confident that no changes to the Framework Decision are necessary to make these changes, which I believe would improve the operation of the EAW in the UK and other Member States.

Post- extradition monitoring of assurances to non-British citizens extradited from the UK

I welcome the Committee's interest in ensuring that there are sufficient mechanisms in place for monitoring assurances given by other States during UK extradition proceedings. This is a difficult issue and, as I indicated to the Committee, this is something that the Home Office and the Foreign and Commonwealth Office are considering jointly.

A series of discussions involving officials from both departments have taken place, but further consideration of this matter is still needed before I can set out a final position. As I said, we had previously explored whether consular staff might do more to routinely assist in monitoring cases involving British citizens. Discussions are now also focusing more closely on how best to monitor cases involving people who are not British citizens, and who would not therefore normally be subject to assistance from FCO consular services. I noted Baroness Jay's proposal that the UK courts should be responsible for monitoring assurances and this is something that we will give due consideration to. Our consideration of this matter will focus on whether we should follow up on every assurance given or whether it would be better to take an informed risk based approach, who should be responsible for following up on any assurance given, and what any reporting structure should be.

As the Committee will appreciate these are far from being straightforward issues, and I cannot give an exact timeframe for when we will have a final position. However, once the position is finalised, or I have more detail to provide, I will be happy to write again to the Committee.

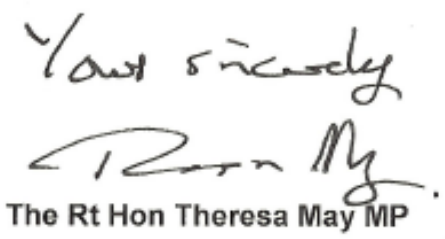
Forum Bar

In my evidence session I referred to the introduction of the forum bar as an example of where legislative reforms to UK extradition arrangements have been effective in ensuring that the courts consider fully the facts of a case before ordering extradition, thereby increasing confidence in extradition proceedings and making them more transparent. Whilst I did not undertake to write further on this point I thought that the judgment in the case of Domminich Shaw - an extradition request from the US – may be of interest to your Committee's deliberations on this matter. This case saw our

courts consider the issue of forum in detail, with the level of analysis and reasoning showing how the forum bar has helped to increase transparency in the system. I attach the judgment, which I hope is of use.

The Committee also asked detailed questions about Legal Aid and I understand that my colleagues in the Ministry of Justice will be writing separately about this matter.

I hope that you find these further details helpful and I look forward to reading your final report.



The Rt Hon Theresa May MP

13 January 2015

IN THE WESTMINSTER MAGISTRATES' COURT

The Government of the United States of America v
Domminich Francys Patryck Shaw

1. The government seeks the extradition of Mr Shaw who is wanted to stand trial on 26 counts of a 29 count indictment in the US District Court for the Southern District of Indiana on charges relating to child pornography said to have been committed between October 2009 and September 2010.

2. Mr Shaw was the administrator of an email group consisting of several dozen members and was engaged in distributing child pornography to persons within the group.

3. Ms Adina Ezekiel represents the government. She has provided (1) a 14-page opening note dated 11th July 2013 [tab 1], (2) 6-pages of submission on 'grossly disproportionate sentence' dated 23rd July 2013 and (3) 8-pages of submissions on the forum bar dated 30th January 2014, Mr Ben Brandon represents Mr Shaw and he has provided (1) a 12-page skeleton argument dated 21[51] July 2013 (prepared by Mr Grange), (2) a 6-page addendum skeleton argument dated 6th September 2013 (prepared by Mr Grange) (tab 5), (3) an 8-page 3rd skeleton argument dated 22"d October 2013 (tab 6), and (4) a 4-page 4th skeleton argument on forum and 'prosecutor's belief' dated 7th April 2014.

4. Ms Ezekiel's opening note contains a good summary of the case against Mr Shaw and there is no need to repeat here anything further about the facts.

5. All the relevant matters in section 78 (2) of the Extradition Act 2003 (the Act) are satisfied as are those in section 78 (4). It is accepted all the offences which Mr Shaw faces are extradition offences. There are two challenges to his extradition:

   (1) If Mr Shaw falls to be sentenced in America, whether following a trial or on a plea, it is submitted his likely sentence will be *so grossly disproportionate* so as to be a violation of his rights under article 3 ECHR and/or
   (2) Mr Shaw's extradition is barred by reason of forum because extradition would not be in the interests of justice see section 83A of the Act.

GROSSLY DISPROPORTIONATE SENTENCE

6. The Indictment alleges:

   Count 1: Conspiracy to distribute and receive child pornography
   Count 2: Conspiracy to commit sexual exploitation of children
   Count 3-22: Distribution of child pornography
   Counts 25 -28: Sexual exploitation of children.

7. I refer to Gross U's judgment in **Inzunza and others v USA [2011] EWHC 920 (Admin)** [tab 14] at paragraph 7: Article 3 prohibits in absolute terms and irrespective of the victim's alleged conduct, "torture or ... inhuman or degrading treatment or punishment" -so enshrining one of the fundamental values of the democratic societies making up the Council of Europe. It follows thatjf_a sentence constitutes "inhuman and degrading treatment or punishment," then article 3 will be engaged. For ill-treatment to fall within the scope of article 3, it has to attain a minimum level of severity, to be assessed in all the circumstances of the individual case. The suffering and humiliation involved has to go beyond the inevitable element of suffering or humiliation inherent in a given form of legitimate punishment.

8. A refusal to extradite Mr Shaw to the United States of America on the ground of a likelihood of a disproportionate sentence would only be justified if the court concluded the potential sentence was one which "shocked the conscience" or was likely, on the facts of the case to be "clearly disproportionate." Any lesser test would fail to give proper effect to the public interest in effective extradition arrangements and could only serve to bring the law in this area into disrepute. [paragraph 17 **Inzunza]**

9. Mr Shaw relies on the evidence of James **B.** Craven III [tabs 4 & 7], an American lawyer experienced in dealing with cases such as this. He has provided two affidavits which give surprisingly different inconsistent pieces of information. In the first affidavit (19.08.13) he calculated that Mr Shaw faces a potential sentence of between 15 - 600 years' imprisonment and in the second (19.06.14) between
   · 190 - 480 years'. The government asserts the range is 15 – 570 years. This court is not interested in potential sentences; but rather a sensible prediction of the likely sentence. Mr Craven suggests Mr Shaw "would receive a life sentence, literally or in practical effect." I take that to mean either an actual life sentence (which in this case could only be a discretionary life sentence) or a sentence of such length that he would remain in prison to the end of his life e.g. "100 years

or some equally symbolic sentence." Mary E Warlow, Director of the US Department of Justice, by letter dated 13th September 2013 [tab4], states that Mr Craven's calculations are inaccurate; nevertheless, agrees Mr Shaw is facing life imprisonment under the guidelines.

10. This court is very much alive to the point discussed at paragraph 24 of **Inzunza** where the rival positions were opposite of those to be anticipated at a sentencing hearing. Mr Shaw focussing on what might be termed a cumulative worst case scenario; by contrast, the evidence relied upon by the US emphasising the advisory nature of the Federal Sentencing Guidelines and matters of mitigation upon which Mr Shaw might rely.

11. Mr Shaw is said to have been the administrator of the email group and he is number one on the Indictment. Those factors do not necessarily mean that his criminal culpability is the same or higher than Mr Bostic (who received a 60 year sentence following pleas of guilty to various counts on this indictment) although Ms Warlow accepts Mr Shaw will likely be regarded as the ringleader and in that sense more culpable on the trafficking case than Mr Bostic. At the same time Mr Bostic can be viewed as the worse actor in the conspiracy, as his produced child pornography material was trafficked into the conspiracy, while Mr Shaw was not distributing the material he himself produced. How the judge would balance factors such as these in determining what sentence to issue in relation to his co- defendants is very hard to predict.

12. In my judgment it does not follow that were Mr Shaw to plead guilty he would receive a sentence of 60 years or greater. He might very easily receive a substantial sentence yet one markedly less than 60 years. Mr Shaw is said to have sent out 92 of the 199 emails see count 1 [7-71] whereas Mr Bostic only sent out 15. Mr Shaw may have been the collator of the material and responsible for sending out the material to the members of the email group. He is described as the administrator, but that activity serious though it is, is less serious and in a different league to that played by Mr Bostic.

13. If Mr Shaw chooses fully to cooperate with the US Department of Justice there are provisions which enable departures from the calculated guideline sentence.Richard Szulborski and Shawn Kuykendall both took advantage of such provisions and received reduced sentences of 15 and 25 years' respectively. Javahn Algere received both a section 5K1.1 departure and a section 3553(e) departure and received a sentence of 12 years, which is below the 15 year minimum.

14. All this illustrates how complicated the sentencing process is and how very difficult it is to predict the likely sentence as so much is dependent upon what Mr Shaw chooses to do when he arrives in America.

15. The impact of a discretionary life sentence when considering "inhuman or degrading treatment or punishment" is discussed at paragraphs 8 – 19 in **Inzunza** and where; as here, we are dealing with very grave offending the test is whether such a potential sentence "shocked the conscience" or "is clearly disproportionate." In this court's view it would neither shock the conscience nor would it be clearly disproportionate if the American court determined a discretionary life sentence were necessary.

16. Mr Shaw is currently 33 years old. Even if he were to receive say, a 60 year determinate sentence, he could expect to serve 85% of that time, given remission for good behaviour, so he would actually serve 51 years. He would then be 84 years old on release. However, when a prisoner reaches 70 years of age having served at least 30 years in prison, (so this provision would apply to him), if he is regarded as "no longer a danger to the safety of any other person or the community" he can be released. Since Mr Shaw would inevitably be deported to England on release I suggest he would likely qualify under this provision. Mr Craven does not help as to whether foreign nationals who are to be deported are more likely to benefit from this provision. In such an eventuality he would serve 37 years in prison if sentenced to 60 years'. Indeed the same outcome would be achieved on any sentence in the 50 - 100 year' range. Any such sentence of imprisonment does not 'shock the conscience' or seem 'clearly disproportionate' when one has regard to the facts of the case.

17. I agree with Mr Brandon there is a striking and exceptional disparity between the likely sentence Mr Shaw would receive, if convicted in England & Wales, and the likely sentence in the Federal Courts of Indiana. Any such disparity is not an indication of gross disproportion.

18. There is no doubt if Mr Shaw were to be sentenced here in England & Wales he would receive a substantially lesser term of imprisonment that he would likely receive in America. Given the seriousness of Mr Shaw's offending I suggest the general public would consider the likely sentence of imprisonment in this country woefully inadequate.

19. Again reference to paragraph 18 **Inzunza** "As a practical matter it is difficult for an English judge to avoid having regard to sentences in this jurisdiction by way of a frame of reference, I am unable to accept that sentencing practice in this jurisdiction is entitled to any greater weight than that ... [It is not for this court] to impose English sentencing policy on other states, while failing to give effect to the proper interest in effective extradition arrangements."

FORUM

20. The forum bar has been available from 14th October 2013. Extradition is barred if it would not be in the interests of justice to extradite him. The concept of 'the interests of justice' is well known to the court, but the statutory provisions in section 83A do not permit the court to apply any generalised notion of the interests of justice, but rather require the court to have regard to the specified matters relating to the interests of justice set out in subsection (3) and stipulate in subsection (2) (b) that only those matters can be taken into account.

21. I set out the provisions:

(1) *The extradition of a person ("D2) to a category 2 territory is barred by reason of forum if the extradition would not be in the interests of justice.*

(2)) For the purposes of this section, the extradition would not be in the interests of justice if the judge –

(a) decides that a substantial measure of D's relevant activity was performed in the United Kingdom; It was. Mr Shaw, although at all material times in England, was distributing pornographic material over the internet via email to persons within the email group. There is neither a breakdown of how many of those persons were physically in the US nor details of which other countries were involved *and*

(b) decides, having regard to the specified matters relating to the interests of justice (and only those matters), that the extradition should not take place.

(3) These are the specified matters relating to the interests of justice – (a) The place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur; This

is not a completely straightforward issue. The location of the abused children is either not known or has not been revealed in the request information. We know from the 7th June 2012 DoJ press release that "more than two dozen children in Indiana and across the globe have been rescued from their tormentors." It is not only the harm to the victims that is relevant. It is also the harm associated with the distribution of the material which perpetuates and encourages the trade in it. Mr Shaw was distributing it from England. An unspecified number of persons within his email group (but certainly some) were resident in the US. There is insufficient information to say categorically where 'most of the harm' occurred. One suspects it is likely to be in the US. One suspects it is unlikely to be in England.

(b) *The interests of any victims of the extradition offence;* Again it is not specified who the victims are or whether it is known where they live. Given their age it would never be in the contemplation of any person involved in any trial for any of the victims to be witnesses. In that sense they have no interests in the trial venue. If the victims were able to express a view it would be a wish for their tormentors to be tried in the state that would deal with them, if convicted, most severely.

(c) *) Any belief of a prosecutor that the United Kingdom, or a particular part of the United Kingdom, is not the most appropriate jurisdiction in which to prosecute D in respect of the conduct constituting the extradition offence;* Prior to the forum bar provisions coming into force the views of the CPS were sought and by an undated letter (some time after 16th April 2013) sent by Mr Hadik to Mr Shaw's solicitors [tab 12] it is recorded "The CPS after conducting a careful review determined that it would forgo prosecution of Mr Shaw in connection with his possession of indecent images of children, in favour of Mr Shaw's prosecution by the US authorities." Subsequently, after the forum bar came into force, the matter has been revisited by the CPS. Ms Ezekiel has informed the court that the matter has been carefully considered at the highest level within the CPS and with the assistance of leading counsel

advising, an unnamed Senior Crown Prosecutor 'believes England & Wales is not the most appropriate jurisdiction in which to prosecute Mr Shaw in respect of the conduct constituting the extradition offence.' See further below my paragraphs 22 -35.

(d) *Were D to be prosecuted in a part of the United Kingdom for an offence that corresponds to the extradition offence, whether evidence necessary to prove the offence is or could be made available in the United Kingdom;* The evidence specifically relating to Mr Shaw originated from the seizure and interrogation of Mr Bostic's computer in Indiana and the obtaining of evidence from Google in the US. Subsequently, once Mr Shaw was identified as a suspect, his computer was seized here in England and it has been interrogated. Such evidence derived from such interrogation has probably been sent over to the US, but it could be recovered. However, other evidence, relating to the investigation which has been on-going since 7th November 2010, is not currently available in the United Kingdom, but it probably could be made available. In order to

demonstrate exactly how wide the email group was, the extent of their collective activities, the impact of those activities, requires consideration of very much more evidence than was obtained in England. The American case is on-going and as and when defendants are identified they face prosecution. I do not know to what extent the US authorities would be willing to release evidence to enable a trial here but if they had to, which would be the case if Mr Shaw's extradition did not take place, no doubt they would. In particular, the English authorities do not know whether any of the material distributed by Mr Shaw to any particular email recipient in say the US went no further or whether it was forwarded on to others thereby increasing the number of recipients and extending the harm which would be directly referable to Mr Shaw's activities.

(e) *) Any delay that might result from proceedings in one jurisdiction rather than another;* If a prosecution were to be launched in the United Kingdom there would be some delay as it would be necessary first to contact the US and

for the US to agree to the handing over of the evidence. Secondly, once the evidence was received, the CPS would need to review the case fully before deciding whether to proceed.

All of that sounds possible but there would be inevitable delay particularly bearing in mind the advanced stage of the proceedings in the US. Thirdly, it would necessarily involve a duplication of work and increased costs to be incurred by the prosecuting authorities.

(j) The desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard (in particular) to –

(i)) Thejurisdictions in which witnesses, co-defendants and other suspects are located,

and (ii) The practicability of the evidence of such persons being given in the United Kingdom or in jurisdictions outside the United Kingdom; see my fuller response in paragraphs 36 - 39 below.

(g) D's connections with the United Kingdom. All of his connections are with the UK.

(4) In deciding whether the extradition would not be in the interests of justice, the judge must have regard to the desirability of not requiring the disclosure of material which is subject to restrictions on disclosure in the category 2 *territory concerned.* I do not understand this subsection to have any significance in this case.

(5) If, on an application by a prosecutor, it appears to the judge that the prosecutor has considered the offences for which D could be prosecuted in the United Kingdom, or part of the United Kingdom, in respect of the conduct constituting the extradition offence, the judge must make that prosecutor a party to the proceedings on the question of whether D's extradition is barred by reason of forum. This subsection has no relevance as there has been no application by a prosecutor.

(6) In this section "D's relevant activity" means activity which is material to the commission of the extradition offence and which is alleged to have been performed by D. Noted

PROSECUTOR's BELIEF

22. The issue of a 'prosecutor's belief is an issue and one that requires the court to decide how that belief should be communicated to the court. Mr Brandon submits there needs to be evidence. He submits the prosecutor should be identified and that prosecutor should provide a statement in which the basis for the belief should be spelt out and, if necessary, that prosecutor should be made available for cross- examination at the extradition hearing so that his evidence can be tested.

23. Ms Ezekiel submits she, having made appropriate enquiries, can relay the information to the court.

24. The CPS extradition unit represent foreign states in extradition proceedings. The solicitor or counsel instructed adopts the role of a private lawyer as if instructed directly by that state. Here, Ms Ezekiel is representing the government of the United States of America and its interests not the interests of the English domestic CPS in relation to domestic prosecutions.

25. This distinction is important. It can be illustrated by the following example. Quite often where the requested person has been charged with a domestic criminal offence and the extradition case is being held up pending its resolution the extradition court suggests having that domestic charge transferred to the Westminster Magistrates' Court. Where, for example, extradition is going to be uncontested, but the requested person's outstanding 'drunk and disorderly' charge is due for hearing some weeks away in some distant court, this court will often arrange to have that charge listed immediately in the extradition court and then have it put it to the requested person. Typically the extradition lawyer for the requesting state will play no part in such a prosecution. A domestic CPS prosecutor will come in from another court room, the requested person agrees to plead guilty, the domestic CPS lawyer gives the facts and antecedents, the requested person is sentenced, and the domestic CPS lawyer is thanked and returns to the court room from which he had been temporarily released. The court then proceeds with the uncontested extradition. Lawyers instructed by the CPS in the extradition case refuse to assist the court in such prosecutions because they recognise the 'Chinese wall' aspect of their role which prohibits their representing other parties in different proceedings.

26. Nevertheless, the extradition lawyer for the requesting state is perfectly able to take and receive information from the

domestic arm of the CPS and impart such information to the court e.g. to provide the court with a list of the requested person's previous convictions in bail applications. This imparting of information does not, in any way, compromise the position of the lawyer representing the requesting state. The situation requiring the need for another lawyer only arises when the lawyer is being asked to represent another party in different proceedings.

27. These are new statutory provisions and so the court has no experience of what court procedure should be adopted. Section 83A introduces a new bar to extradition and so there is no logical reason for not adopting the same procedure, as near as maybe, as the court applies when considering the other bars referred to section 79. The basic approach in relation to bars is that the burden rests on the requested person to establish the particular bar is made out. So it for Mr Shaw, who raises the bar under section 83A, to satisfy this court that his extradition would not be in the interests of justice.

28. I am not satisfied that Parliament intended that the only way for the prosecutor's belief to be conveyed to the court was by the provision of a statement from a Crown Prosecutor who might thereafter be required to give evidence and be cross-examined. Such an approach would likely take up a disproportionate amount of court time which would be unlikely to be justified in terms of cost and assistance to the court. The issues the court is required to consider when making its assessment of the interests of justice are as set out in section 83A (3) (a) to (g) and I have provided the court's observations on each of those identified topics.

29. As to the prosecutor's belief - there has clearly been consideration by the extradition arm of the CPS (apparently aided by the views of leading counsel) as to how the information of the 'prosecutor's belief should be conveyed to the court. Certainly one way would be to adopt the

suggestion that a witness statement could be provided. However, in my view, that is not the only way. Ms Ezekiel, no doubt on instructions has taken a stand, and she has provided the information.

30. Mr Brandon says that is impermissible. In my judgment this court is entitled to receive this information in the way it was presented and there is no requirement for strict rules of evidence to govern the receipt of such material. It is not as if

there is a requirement that something has to be proved. The information relates to one of several topics the court is required to consider when making its assessment on the interests of justice issue.

31. Depending on the information given it is for the court to make its assessment of the weight to be attached to any piece of it. It might well be the court would give greater weight to 'evidence' rather than just 'information.' Each side is in a position to make submissions and the court can then makes its assessment.

32. Ms Ezekiel told me that the prosecutor's belief was based on the following:

(1) The District Court in the Southern District of Indiana is already dealing with the criminal proceedings in relation to Mr Shaw and other defendants, some of whom have already pleaded guilty and have been sentenced. The proceedings are at an advanced stage as indeed are these extradition proceedings.
(2) As of now the evidence for use in Mr Shaw's prosecution is currently in a trial ready state in the US and that evidence is not currently available to the CPS.
(3) A decision was made in 2011 under the then prevailing protocol, the AG's 2007 guidelines, that Mr Shaw should be prosecuted in the US and nothing other than the newly introduced section 83A has changed.
(4) Any prosecution of Mr Shaw in the UK would not adequately reflect the criminality alleged against him.

33. The fact that the new section 83A provisions have now superseded the AG's guidelines does not provide any argument in favour of allowing that old

decision to prevail or to have any bearing on what the new decision should to be. I agree with Mr Brandon Parliament has introduced the new bar and it is the new provisions that need to be considered.

34. Offences that give rise to cross border concurrent criminal jurisdictions are a not infrequent occurrence in the criminal courts. For example Eurojust, in a European case, is a body specifically set up to assist in coordinating cross border criminal investigations and helping to determine in which state any trial or trials should be conducted. It is in the interests of justice for such cases to be prosecuted in one state rather than in a number. That way costs are minimised and it avoids duplication of time consuming and expensive work by police and prosecuting authorities. Here, the United States discovered the offence and obtained the evidence and it has taken upon itself the role of prosecuting, if it can, all involved.

35. At the hearing I asked for the up-dated position of the number of those prosecuted, their countries of origin, the country in which they had been tried if not in the US,the number who had pleaded guilty and the sentences imposed. I have not been provided with any such information. Those who have been prosecuted in their home countries, rather than be extradited to the US, might be persons from states that do not permit the extradition of their own citizens. I thought such information might have been useful in gauging how much of the case was centred in the US rather than perhaps evenly distributed around the world.

THE DESIRABILITY AND PRACTICABILITY of all prosecutions relating to the extradition offence taking place in one jurisdiction...

36. For the reasons already touched upon above there are good reasons (i) for economy of effort, (ii) cost, (iii) time and (iv) perhaps consistency of outcomes for all prosecutions relating to any particular offence which gives rise to the possibility of prosecutions in many states for one state take on that burden.

37. The offence here was discovered in the US. The criminal investigation has been on-going since 2010. It involves a number of US citizens. The evidence was obtained in the US. The prosecution of defendants have either been completed or are up and running.

38. The practical implications of conducting a prosecution of Mr Shaw in England are unlikely to cause any insurmountable problems. The balance of convenience lies with allowing the US to continue its prosecution.

39. The reality is that the only argument in favour of Mr Shaw's prosecution taking place in the UK is that were that to happen then Mr Shaw, if convicted, could expect to spend a much shorter time in prison.

40. Pursuant to section 87 (3) of the Act I propose sending the case to the Secretary of State for her decision on whether to order the extradition of Mr Shaw to the United States of America.



Nicholas Evans
District Judge
Westminster Magistrates' Court
6th May 2014.

Raza Husain QC, Jeremy Johnson QC, Clair Dobbin and Helen Malcolm QC – Oral evidence (QQ 230-237)

Transcript to be found under Clair Dobbin

Human Rights Implementation Centre, University of Bristol – Written evidence (EXL0031)

Written evidence to the Extradition Law Committee

1. This written evidence is submitted by Professors Rachel Murray,[116] Malcolm Evans[117] and Rod Morgan[118] of the Human Rights Implementation Centre at the University of Bristol Law School. It draws upon our expertise in the area of the Optional Protocol to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and the European Convention on the Prevention of Torture to which the UK is a party and in particular our expertise in the area of monitoring places of detention. Our written evidence focuses exclusively on question 10, namely:

   Human Rights Bar and Assurances
   Is the practice of accepting assurances from requesting states to offset human rights concerns sufficiently robust to ensure that requested people's rights are protected?
   - What factors should the courts take into account when considering assurances? Do these factors receive adequate consideration at the moment?
   - To what extent is the implementation of assurances monitored? Who is or should be responsible for such monitoring? What actions should be taken in cases where assurances are not honoured?

2. In the face of defence objections that requests for extradition may involve risk of torture or inhuman or degrading treatment or punishment, it is increasingly the practice of requesting states (both European and non-European) to undertake to accommodate the extradited individual** in a particular institution or conditions to which Article 3 objections will arguably not apply. Such undertakings may be with regard to detention prior to conviction or sentence, or penal custody following conviction and sentence. The key issue that we would like to focus upon is who, if anyone, is or should be monitoring such undertakings and are extradition undertakings known to whoever is monitoring places of custody?
3. OPCAT is an international treaty which requires States Parties to, among other things, establish a national preventive mechanism (NPM). This should be an independent body (or bodies)[119] which have the 'required capabilities and professional knowledge' to prevent torture including visiting places where individuals may be deprived of their liberty. These NPMs should be adequately resourced and should have as a minimum the following powers:[120]

[116] Director, Human Rights Implementation Centre, University of Bristol Law School.
[117] OBE, Chair of the UN Subcommittee on Prevention of Torture (SPT).
[118] Rod Morgan regularly provides expert court reports in extradition proceedings where the purpose is to report on the legal validity, operational feasibility and likely compliance with specific assurances regarding the custody of extraditees and the increasingly widespread use of the tactic where Article 3 objections to extradition have previously been sustained.
[119] Articles 17 and 18 OPCAT.
[120] Article 19 OPCAT.

> (a) To regularly examine the treatment of the persons deprived of their liberty in places of detention as defined in Article 4, with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment;
> (b) To make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations;
> (c) To submit proposals and observations concerning existing or draft legislation.

In addition, States are required to grant to the NPM:

> (a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in Article 4, as well as the number of places and their location;
> (b) Access to all information referring to the treatment of those persons as well as their conditions of detention;
> (c) Access to all places of detention and their installations and facilities;
> (d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;
> (e) The liberty to choose the places they want to visit and the persons they want to interview;
> (f) The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.[121]

4. Even for those states which have yet to ratify OPCAT or designate their NPM, this list provides an authoritative benchmark against which bodies undertaking monitoring at the domestic level can be assessed.
5. There are now 53 NPMs which have been designated and there are 73 State Parties to OPCAT.[122] These NPMs are well placed to be able to monitor the places of detention in which individuals who are extradited are then detained. If independent and credible, these institutions provide an authoritative source of information on the conditions of places of detention and can act as an appropriate monitor of specific facilities.
6. We are aware of cases where individuals are extradited to a state but there are limited or no possibilities to monitor what happens to that individual once they have left the UK. We understand that it is often difficult for the lawyers, family, friends and others, even if they are in the state to which the individual is extradited, to then verify if the assurances are in fact being honoured. There are examples of UK courts

[121] Article 20.
[122] http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIndex.aspx. For a list of designated NPMs see http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx.

requesting experts to visit certain facilities and report on the conditions of detention.[123]

7. We would argue that the use of individual experts, with due regard being taken of their expertise and credentials, does not provide a sustainable and comprehensive solution to such situations. Instead we would recommend that these NPMs or in states where none is designated, an independent national statutory or constitutional body which satisfies the requirements of OPCAT, monitor such assurances and places of detention. These institutions, in line with OPCAT requirements, will be independent, have the necessary expertise, be able to undertake regular and unannounced access to these places of detention, are more likely to have visited the particular detention facility under consideration, and therefore more likely to have the ability therefore to identify certain individuals and monitor their situations or at the very least to give an authoritative statement on the conditions of detention of a particular institution or facility. These institutions, having a broader preventive mandate, are also required to be familiar with systemic problems within a state and relevant applicable regimes. These factors are just as important as knowledge of the physical conditions of detention in particular institutions. Moreover, such mechanisms, being internationally designated as NPMs form a part of a broader international system of scrutiny which adds further levels of transparency to, and support for, the work of such bodies.
8. Furthermore, we would recommend that assurances only be sought or accepted from those States which are a party to the OPCAT and have established an NPM in accordance with OPCAT criteria, (or in the absence of ratification, that there is a body in place which satisfies OPCAT criteria), and that arrangements have been made with the NPM to ensure that they are able to exercise, in practice, their requisite degree of scrutiny over time and the ability to report to the sending State on their observations.
9. A list of NPMs globally can be found on the UN SPT website.[124]

10 September 2014

[123] E.g. *Gomes and Goodyer v Government of Trinidad and Tobago*, [2009] UKHL 21, at para 4.
[124] Ibid. See also http://www.bristol.ac.uk/law/research/centres-themes/hric/npmdirectory/.

Iranian and Kurdish Woman's Rights Organisation (IKWRO) – Written evidence (EXL0083)

Select Committee on Extradition
Houses of Parliament
London
SW1A 0AA

Thursday, December 04, 2014

By email

Dear Sir/ Madam,

We are writing to the Select Committee on Extradition Law in response to your call for evidence. We seek to explain that extradition can not only have a significant impact for victims and/or their families, but it can also be of crucial importance for whole communities and for movements for positive social change, such as the campaign to end "honour" based violence.

We, the Iranian and Kurdish Women's Rights Organisation (IKWRO), are a registered charity providing support, advice, advocacy, referral, training and counselling services to women and girls from the UK's Middle Eastern, North African and Afghan communities. We also provide support, advice and training to front-line professionals, deliver presentations in schools and colleges to students and parents, work with communities and campaign for greater awareness and better laws, policies and implementation around "honour" based violence, forced marriage, FGM and domestic violence. Last year we responded to telephone calls from over 2500 clients and professionals and our advisors assisted over 780 clients face-to-face.

In 2006 Banaz Mahmod, a 20 year old British Kurdish woman, was raped, tortured and murdered in an "honour" killing by members of her family and community in London. Following an extensive police investigation, her body was found a few months later, buried in a suitcase in a back garden in Birmingham. Two of the rapists and murderers fled to the Kurdish Regional Government (KRG) region of Iraq. There were many reports that they boasted openly about their crimes and their apparent ability to escape justice.

IKWRO led the *Justice for Banaz* campaign in collaboration with women's groups based in Iraq. One of our key demands was that these men be extradited to the UK, to face justice for their crimes. We succeeded in this aim and both men are currently serving life sentences. http://www.bbc.co.uk/news/uk-england-london-11729165

"Honour" based violence is a serious, organised crime which is practiced mainly within Middle Eastern, North African, South East Asian, Eastern European and Traveller communities in the UK and often crosses international borders. It is perpetrated by an influential minority within these communities. In order to end "honour" based violence, it is essential that the perpetrators are seen to be brought to justice and that it is clear that there is no safe haven for them anywhere in the world. Where justice is seen to be done, it helps to give the silent majority, the strength to stand together and reject "honour" based violence.

As leading campaigners both in the UK and the global movement to end "honour" based violence, we know that the extraditions in the Banaz Mahmod case have had an enormous positive impact, both here and internationally. Had the extradition not happened, the movement would have been undermined.

An issue which we feel would greatly benefit from scrutiny from the Select Committee on Extradition is the law and practice around extradition in international child abduction cases. Should the Committee agree to investigate this area, we can provide evidence of the devastating impact that this crime has upon many of our clients.

Yours sincerely,

Sara Browne

Campaign Officer, IKWRO

8 December 2014

Islamic Human Rights Commission – Written evidence (EXL0062)

IHRC'S BRIEFING
TO THE HOUSE OF LORDS
SELECT COMMITTEE ON EXTRADITION LAW
ON THE EXTRADITION ACT 2003
SEPTEMBER 2014

About IHRC
Islamic Human Rights Commission (IHRC) is an independent, not-for-profit, campaign, research and advocacy organisation based in London, UK. IHRC has consultative status with the United Nations Economic and Social Council.

1. Introduction

1.1 With the Extradition Act 2003 the government of the United Kingdom passed into law a new streamlined framework for extradition procedures as outlined by the European Union. It made provisions for the extradition of nationals from other EU countries (Category 1) and those with whom the UK has bilateral extradition treaties with (Category 2).

1.2 Amendments have been introduced to the Extradition Act 2003 in the Crime and Courts Act 2013 and the Anti-Social, Crime and Policing Act 2014. A review was conducted by Sir Scott Baker in 2011, and separately in a report produced by the Joint Committee on Human Rights in the same year.

1.3 Islamic Human Rights Commission (IHRC) welcomes the creation of the House of Lords Select Committee on Extradition Law, and hopes consideration will be given to serious violations of human rights under the cover of this legislation. IHRC campaigned in particular against the extradition of Babar Ahmad and Talha Ahsan. Our case study and analysis is included below:

> 'October 5 [2013] marked the first anniversary of the extradition of the British Muslim duo Talha Ahsan and Babar Ahmad to the United States to face charges relating to their alleged support of "terrorists" in Afghanistan and Chechnya.
>
> The pair are accused of running the Azzam.com website, which carried news and reports from the battlefields of Bosnia, Chechnya and later Afghanistan, as a fundraising and recruiting

vehicle for extremists. Both men have pleaded not guilty in the US to the charges against them.

The disturbing circumstances surrounding their arrest, detention and extradition are well-known: Both men were indicted on the basis that one of the servers used by the offending website was located in Connecticut, allowing US prosecutors to claim that an offence had been committed on US soil. Ahmad was violently beaten by police during his arrest and in 2009 won £60,000 in compensation after London's Metropolitan Police admitted subjecting him to a "serious, gratuitous, and prolonged attack". Indeed Ahmad, who was held in detention for eight years in the UK, holds the dubious distinction of having been held without trial longer than any other British citizen in modern history.

Less well known perhaps are the political double standards and machinations that compound the men's ongoing ordeal. Barely two weeks after their extradition the Home Secretary Teresa May blocked the extradition of Gary McKinnon under the same legislation on the grounds that the computer hacker, who wormed his way into the US military's computer systems, suffers from Asperger Syndrome, a condition which was likely to place him at high risk of suicide.

In 2009 Talha Ahsan was independently diagnosed to also have Asperger Syndrome as well as depressive illness and consequently judged to be a high suicide risk. He is currently incarcerated in Connecticut "Supermax Prison" in solitary confinement in the same type of isolative detention described by Juan Méndez, the UN Special Rapporteur on Torture, as cruel and inhuman and a violation of the UN's Universal Declaration of Human Rights.

Gary McKinnon contested his extradition request on administrative bail while Ahmad and Ahsan challenged theirs from behind bars in high security prisons.

The parallels between the pair are glaringly obvious – their fates strikingly different.

Consider also the gravity of their respective indictments. Ahsan and Ahmad allegedly helped recruit and rally Muslims to take up arms against occupying forces using a website that was – only partially – hosted on a US server. McKinnon, on the other hand, is described by US prosecutors as having perpetrated the "biggest military computer hack of all time".

The compassion extended to non-Muslim victims of the scrofulous, one-sided Extradition Act was again in evidence last week when the British government agreed with its US counterpart to allow British a British businessman to fly back and serve out the remainder of his 33-month sentence in the UK.

Christopher Tappin had admitted knowingly aiding and abetting others in an illegal attempt to export zinc/silver oxide reserve batteries, a special component of the Hawk air defence missile, from the US to Iran via the Netherlands.

If as is expected, Ahsan and Ahmad are convicted in the US, is it even imaginable that they will be afforded the opportunity to serve part of their sentences in their native UK?

Many other Muslims have been whisked off to the US under the Extradition Act. On the same plane as Ahsan and Ahmad were three other co-religionists - Abu Hamza al-Masri, Adel Abdel Bari and Khaled al-Fawwaz who had himself spent 14 years in a British jail without trial awaiting extradition. Abu Hamza had already served a seven-year jail sentence in the UK before he was detained and subsequently extradited. Abdel Bari had been in detention since 1999 awaiting extradition for alleged involvement in the 1998 US embassy bombings in East Africa.

Cases such as these – the above list is by no means exhaustive - appear to point to the use of the Extradition Act as a tool to remove “undesirable” UK-based Muslim activists to the US where the lax legal framework makes prosecution more likely. Indeed, when it was drafted shortly after the 2001 attacks against the US, observers – myself included - warned that it had been deliberately drafted to allow the easy and speedy removal of “problem Muslims”. For example, one of the particularities of the Extradition Act is that the burden of proof required for those indicted to be sent to the US is substantially lower than would be expected in other jurisdictions. Authorities are only required to show “reasonable suspicion” and not to produce any prima facie evidence that an offence has been committed. Another particularity is that the Act is retrospective in that it can apply to alleged offences carried out years before it came into force.

As a product of the US-led “War on Terror” the Extradition Act was always a weapon, intended to add to a raft of laws brought in to curb threats to western hegemony. Since its purpose is to demonise, blackball or silence those who dare to challenge western foreign policy, in essence to delegitimise their right to dissent and express their beliefs, should we be at all surprised

when its victims - Ahsan and Ahmad included - are afforded differential treatment?'[125]

2. UK/US Extradition: reconsider the imbalance of threshold requirements & introduction of prima facie evidence

2.1 IHRC has campaigned extensively on what is clearly an imbalance in the UK's extradition arrangements with the US,[126] disagreeing with Sir Scott Baker's 2011 Review, which concluded that the evidentiary requirements for both states were broadly the same. While the UK is required to present evidence for 'probable cause', the US is not required to present a 'prima facie' case. Instead, the US is only required to show 'reasonable suspicion'.

2.2 As the UK Director of Public Prosecutions himself explained, the use of 'reasonable suspicion' as a threshold test is potentially a grave infringement on the liberty of an individual'. [127] It is a low threshold in UK law and is not equivalent to 'probable cause'. Reasonable suspicion is relatively easy to establish as it does not always require specific information or intelligence. Therefore, it is possible for generalisations to be made based on the behaviour of the person.

2.3 'Probable cause' in US law is a higher threshold as it requires some form of evidence. It is a term that features in the Fourth Amendment and can be the standard by which a grand jury establishes a crime has been committed.

2.4 The reason for the lower threshold for extradition from the UK to the US is because the US constitution does not permit an evidential standard lower than 'probable cause'.[128]

2.5 A prime facie case presented by the US with an extradition request would provide an equivalent threshold, as it requires evidence, as per the requirements in the UK's own unwritten constitution.

2.6 Data collected on the number of individuals extradited from the UK to the US and vice versa reveals the reality of this imbalance. Between 2004 and 2011, 62 people were extradited from the UK to the US, of which 28 were UK citizens or dual-citizens. Only 33 people were extradited from the US to the UK during the same period, and of these, only 3 were US citizens or dual-citizens.[129]

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[125] http://ihrc.org.uk/news/comment/10767-extradition-a-year-on-the-hypocrisy-that-doesnt-end
[126] http://ihrc.org.uk/activities/press-releases/11115-press-release-uk-usa-terrorism-sentences-expose-british-injustice
[127] Joint Committee on Human Rights, Twentieth Report, Appendix 3(3): http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/108/10816.htm
[128] Home Office Minister Baroness Scotland in the debate in the House of Lords on the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003
[129] Liberty freedom of information request, pp.28-29 https://www.liberty-human-rights.org.uk/sites/default/files/liberty-submission-to-jchr-extradition-inquiry-january-2011.pdf

2.7 Further, the US is a country of particular concern as it has on several occasions argued that its jurisdiction extends to individuals' online presence. They have been able to assert this on the basis that many web pages are hosted by servers in the US. This is despite the fact that their creation and maintenance occurs in other countries. Richard O'Dwyer, a UK national, was accused of criminal activity online.[130] That his crime was alleged to have taken place on websites hosted by servers in the US allowed the White House to exert its right to prosecute him within the US. This was despite the fact that he had not travelled to the US. This was also despite the fact that the offence he was accused of was not a crime in the UK. The internet is a complex and far-reaching entity, and poses many new challenges to legislators. It is therefore necessary to be cautious when one state is in a position to claim jurisdiction over it due to a technicality. The provision in the Extradition Act that allows such a low threshold for extradition to the US puts all internet users in the UK at risk of extradition because a legal activity they are performing in the UK may well be illegal in the US.

3. Political and Policy Implications of Extradition: limit the Secretary of State's power

3.1 IHRC welcomed the removal of the Home Secretary's role in certain aspects of the extradition process. This is because many decisions appeared to be political, and therefore compromised the role of justice in the proceedings. Many media outlets reported the Home Secretary declaring that it was 'great to say goodbye' to Talha Ahsan and Babar Ahmed on their extradition to the US in 2012. The implication was that the Home Secretary was keen to have these individuals removed from the UK as soon as possible and that the judicial procedure was an unnecessary obstacle. The phrase also implies their guilt. This is despite these men being innocent in the eyes of the law at that point in time (having not yet been tried in a court of law). The Home Secretary's political position in this matter was at odds with the legal procedure. The legal process should not be politicised in this way as it compromises the principle of separation of powers.

3.2 The Home Secretary's previous power to block an extradition was exercised in the case of Gary McKinnon.[131] While IHRC welcomed this, it presented clear disparities in the law. The reasons presented for blocking it were in relation to his health. Mr McKinnon has Aspergers' Syndrome, and his health and wellbeing would be in jeopardy should he be subjected to solitary confinement in the US. As a result, the Home Secretary conceded that allowing his extradition would be in breach of his human rights. However, despite the very same concerns being raised about Talha Ahsan (who also suffers from this condition), no such compassion was exercised in the preservation of his rights. The implication is that Mr Ahsan's race and religion were deciding factors in the decision to send him to the US. This calls into question the fairness and integrity of the UK government and its political actors.

130 http://www.theguardian.com/uk/2012/dec/06/richard-o-dwyer-avoids-us-extradition
131 http://www.bbc.co.uk/news/uk-19957138

3.3 It is clear that extradition law is influenced by political motives, and the courts should be acutely aware of this in order to prevent justice from being compromised. Political points should not be won at the expense of the rights of an individual.

4. Forum Bar to Extradition: preferable to prosecute an individual in the UK

4.1 IHRC welcomes the forum bar, which will be brought into force under the Crime and Courts Act 2013. It ensures the process is less disruptive to the individuals in question. Furthermore, it ensures that the country where the most harm and loss is alleged to have occurred is the site of the prosecution. This will ensure a faster judicial process, unlike that of Babar Ahmad, who was detained in the UK for 10 years awaiting extradition to the US. It will also ensure that the financial burden on the individual is not as great, and that legal counsel appointed in this country is equipped to deal with the matters in question, rather than attempting to understand a foreign system.[132]

5. Human Rights Bar and Assurances: not rigorous enough

5.1 The working of the human rights bar in the Extradition Act 2003 is not sufficient to protect the rights of individuals. The rights under the European Convention on Human Rights that are most often invoked in extradition cases include Articles 5 (right to liberty and security), 6 (right to a fair trial), 8 (right to respect for private and family life), and 14 (prohibition of discrimination). These are also qualified rights, which allow for them to be weighed up against what is in the public interest. It has been suggested in a High Court case that honouring an extradition treaty is of such importance that only a 'wholly exceptional case' would warrant extradition disproportionate to its legitimate aim.[133] From this it is clear that issues of diplomacy have had an impact on considerations of human rights issues in extradition cases, and this ground is a largely unsuccessful bar to extradition. The assumption is that bilateral extradition treaties the UK has with other countries are evidence for those states having the same human rights concerns as the UK. However, this is not necessarily the case, and the legislation should be drafted so as to provide for more rigorous analysis of these countries' human rights records. With regard to Babar Ahmad and Talha Ahsan, they were extradited in the knowledge that they would be jailed in a 'Supermax' prison in the US and kept in solitary confinement for 23 hours a day. This has been described as a system of torture by the UN Special Rapporteur on Torture, and therefore in breach of Article 3 of the European Convention on Human Rights. This is an absolute right, and certainly should not have been dispensed of in favour of diplomatic relations with the US. Diplomacy and international relations should not obstruct the provision of justice or the protection of an individual's human rights.

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[132] Legal advice obtained by Liberty and given by Edward Fitzgerald QC (Doughty Street Chambers) and Julian B Knowles (Matrix Chambers), Liberty's Submission to the Joint Committee on Human Rights, 2011, Appendix 1, https://www.liberty-human-rights.org.uk/sites/default/files/liberty-submission-to-jchr-extradition-inquiry-january-2011.pdf

[133] R (Bermingham) v Director of the Serious Fraud Office; Government of United States of America [2006] EWHC 200 (Admin), [2007] QB 727, per Laws LJ at para 118

5.2 IHRC is also gravely concerned over the way in which human rights abuses have occurred within the UK when individuals have been awaiting extradition. Returning to the example of Babar Ahmad and Talha Ahsan (both British nationals), they were imprisoned in the UK for 10 and 8 years respectively while awaiting extradition. Adel Abdel Bary, an Egyptian citizen, was held in the UK for 13 years awaiting extradition to the US. In all three instances the men were imprisoned without trial. This evidently infringed on their Article 5, 6 and 8 rights. This calls into question the robustness of the judicial system.

5.3 The examples given above are very serious and extreme, but human rights breaches in the arrest and initial detention of individuals occurs frequently under UK extradition law. The possible detention of an individual for 45 days or longer is in violation of the right to liberty and security. This is possible simply on the basis of an accusation by a Category 2 country.

5.4 Attention should not only be paid to human rights in one section of the Extradition Act 2003, but at every stage of the process and in every part of the legislation.

Summary of key recommendations

- Rectify the imbalance of threshold requirements between the United Kingdom and United States in their extradition agreement, and introduce a requirement for prima facie evidence for Category 2 states.

- The court's consideration of political commitments should not supersede the individual's access to qualified rights within the European Convention of Human Rights.

- Limit the Secretary of State's power due to concerns over the politicisation of the extradition process.

- Provisions to hear evidence in the UK are always preferable. The forum bar is welcome and provisions should be strengthened to ensure this is at the discretion of the courts and not subject to external political considerations.

- Human rights considerations should not simply be restricted to one stage of the extradition process. Consideration should be given to the detrimental effect of extended periods of pre-extradition detention.

19 September 2014

Amy Jeffress – Oral evidence (QQ 67-75)

Evidence Session No. 5 *Heard in Public* *Questions 67 - 75*

WEDNESDAY 23 JULY 2014

11.30 am

Witnesses: Amy Jeffress

Members present

Lord Inglewood (Chairman)
Lord Brown of Eaton-under-Heywood
Lord Empey
Lord Hart of Chilton
Lord Henley
Lord Hussain
Lord Mackay of Drumadoon
Lord Rowlands
Baroness Wilcox

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Examination of Witness

Amy Jeffress, Former Department of Justice Attaché to the US Embassy in London and currently Partner at Arnold & Porter, Washington DC

Q67 The Chairman: First of all, it is very good of you to get up so early in the morning for us. We much appreciate that. It is kind of you to come and give evidence. I am Richard Inglewood; I am the Chairman of the Committee. The rest of them you will see on your monitor around the table. We have had a CV; we know you worked in London. I am sure you can help us and thank you very much for doing that. We do not have any special interests to declare, I understand, at this end. Could you just briefly tell us who you are for the sake of the record here? Then what I would like to do is move into the questioning proper. Please tell us what you think matters, even if it is not quite in answer to the question, because we

want to know what you think. I think I am right in saying you have to get off to a train about quarter past. Is that right, in about three quarters of an hour?

Amy Jeffress: That is right, thank you.

The Chairman: If we go on too long, just flag it up and let us know.

Amy Jeffress: I appreciate that.

The Chairman: If you could just tell us who you are, then we can go into the questioning proper, if we may.

Amy Jeffress: Good morning. I am Amy Jeffress and I am currently a partner at Arnold & Porter, a law firm in Washington DC. I used to be the Department of Justice Attaché to the US Embassy in London, but I would like to point out at the outset that I no longer work for the US Government, so I am here in my personal capacity and my remarks cannot be attributed to the US Government.

The Chairman: Thank you very much. If I might start, you can obviously tell us your perception of what the US Government thinks about the extradition arrangements we have with you. In particular, are there any criticisms that you think that they have about the way we handle extradition requests? As a follow on to that, there is clear concern in the UK about certain aspects of the UK-US extradition processes. Do you think any of those are well founded?

Amy Jeffress: First, there is a concern about delay in the extradition process in the United Kingdom. Some cases have taken years to go through the courts, both in the United Kingdom, and then in the European Court of Human Rights, when they have been appealed there. That is the chief criticism that US persons would have of the arrangements with the United Kingdom. I do understand that the US-UK treaty remains controversial in the United Kingdom and I think that is unfortunate because, I believe, if you examine the facts,

you would conclude, as Sir Scott Baker's panel did several years ago, that the treaty is fair, is balanced and operates in the best interests of both of our countries. I understand that there is a lot of criticism of the treaty and I think that is largely because of the media reports about specific cases. Those reports are not always balanced or fair. I understand that; it is not a great story to say that someone was extradited to the United States to face a fair trial. It is much more interesting to point out the flaws in the system. I think that that is partly responsible.

The Chairman: Is there any concern in the same way in the United States about what happens here?

Amy Jeffress: Interestingly, extraditions do not receive a lot of attention in the United States.

Q68 Lord Brown of Eaton-under-Heywood: Ms Jeffress, we more or less understand the situation now as between our two countries, but I am just wondering how matters stand between the United States and other countries, particularly European Arrest Warrant countries, with regards to extradition. Are the arrangements similar? That is to say, do you only have to show reasonable suspicion in order to get people back from Holland, France, Germany and wherever else?

Amy Jeffress: My expertise is mostly on the US-UK treaty, but my understanding is that most of our modern treaties operate in a very similar manner. The standard for most of those treaties is the probable-cause or reasonable-basis standard. I would note that there still remains some disagreement about whether those standards are unequal. Sir Scott Baker's panel examined the cases and found that, in fact, they operate the same in practice. No one has been able to identify, to my knowledge, a case that would come out differently in the extradition context, under one standard versus the other. That is just a point that I wanted

to make about the standards. You may be referring to the requirement for a prima facie case, which used to be the case with the United Kingdom before the treaty was updated.

Lord Brown of Eaton-under-Heywood: Before 1 January 10 years ago.

Amy Jeffress: That was the standard in the old US-UK treaty and some other countries that adopted that old standard still have that standard, but most of our treaties with our partners have been modernised. A small number of countries still have the prima facie requirement. I would note that the prima facie requirement was a great burden on prosecutors in the United States, but also on the authorities in the United Kingdom, because volumes of evidence had to be shipped over, examined and handled in the context of extradition. That contributed a great deal to the delay, which I noted was a problem previously. I would also like to note that the United States never had that requirement from the United Kingdom.

Lord Brown of Eaton-under-Heywood: As a matter of practice, when the prima facie evidence requirement is there, is it significantly more difficult—it may be more time-consuming, but is it significantly more difficult—to get somebody extradited?

Amy Jeffress: The principal difference is in the time that it takes. I do not think that it has a significant impact on whether the extradition is ultimately successful or not.

Q69 Lord Brown of Eaton-under-Heywood: Can I just ask you one other thing? Are there any other aspects of your treaty arrangements with other countries that are notably different from our own? I think we were told at one stage, for example, that the Dutch will not extradite their own nationals unless any sentence of imprisonment is then to be served in the home country. Is that right?

Amy Jeffress: I do not know the answer to that. I do not know whether that, if true, is in the treaty itself or is a matter of government policy. I would say that most of our treaties with our partner countries are very similar and I cannot think of provisions that are distinct,

which the US-UK treaty does not have. There are some countries that, as a matter of policy, will not extradite their own nationals, but both the US Government and the UK Government do not think that that is a policy that is a sound one, in the modern age, with cross-border crime.

Lord Brown of Eaton-under-Heywood: Finally, you are aware that there is still a certain unease in this country about the balance in the relationship between us, in terms of extradition. Is that true of your relations with any other country for extradition purposes?

Amy Jeffress: That is a very good question and I am not aware of controversy over our extradition arrangements in any other country that reaches the level that it does in the United Kingdom. I appreciate that you have mentioned imbalance, because I wanted to address that in two other respects. As I mentioned, the standards are often criticised for being imbalanced but, in fact, they are the same. Just to address two other points along those lines, people often criticise the numbers and there is a view that many more people are extradited from the United Kingdom to the United States than vice versa. It is in fact the case that roughly two or three times as many people are extradited from the United Kingdom to the United States than vice versa but, as Sir Scott Baker's panel found, the population of the United States is five times that of the United Kingdom so, when you place those numbers in that context, there really is no imbalance. I believe that is the case.

Finally, there is another point that people often make about the protections in our systems. Some people say that there are greater protections from extradition in the United States than there are in the United Kingdom. Again, the protections in my view are really very similar. To the extent that there is a disparity, I believe that there are in fact greater protections in the United Kingdom. That is borne out by the fact that the United States has

never denied an extradition request from the United Kingdom, under the current treaty, whereas the United Kingdom has denied multiple requests.

The Chairman: Before we go on to Lord Rowlands, I would just like to ask you if you would clarify something. You used the words "partner countries" once or twice, talking about the kinds of relationships that exist in extradition. By "partner countries", do you mean countries of a similar status to European Union countries and Australia? What exactly do you mean by that phrase?

Amy Jeffress: We have extradition treaties with a wide range of countries. You had specifically asked, I thought, about Europe, although maybe I am mis-remembering.

The Chairman: I was talking about Europe. I just wanted to be sure that that is what you were talking about.

Amy Jeffress: That is right, but I would say the same about most of the countries with which we have extradition treaties.

The Chairman: Does that include, for example, certain South American countries, certain countries that have a slightly bad reputation, the eastern half of Asia? I am just trying to get a measure of it, that is all.

Amy Jeffress: We have extradition treaties with some countries and not with others. Given that I am not an expert on the whole world's extradition arrangements, I would prefer not to offer something that would not be accurate.

The Chairman: That is an entirely fair reply.

Lord Rowlands: Before I ask about the diplomatic aspects, I wonder if I could go back to the controversy on the treaty. At this end, part of the controversy was the secretive nature of the negotiating process. From your experience, was that any different from any other type of extradition negotiations?

Amy Jeffress: That is an interesting question. I was not involved in the negotiation of the US-UK treaty, but I have read a lot about it and it seemed to me that, in fact, there was a great deal of debate in Parliament on this side and in the US Senate on our side. Both congresses—our Congress and your Parliament—had to ratify the treaty, but that is a different question than what you asked about the negotiation. Negotiations between Governments typically are confidential, because we want to encourage frank and candid communication between our Governments. I think that that is actually the normal course. I would not infer anything from that, other than that it helps to be able to talk frankly to one another in the negotiation process. I do not think that there is any reason to think that any secrets were kept from Parliament or from Congress when the treaties were ratified.

Q70 Lord Rowlands: May we turn to the question about what impact extradition might have on diplomatic relations? Does it matter whether the decision to extradite was made by the courts or by the Secretary of State, in our case? What is your experience?

Amy Jeffress: I will just say that the United States and the United Kingdom have such a strong diplomatic relationship on such a broad front that the issue of extradition is nothing more than a small thorn in that relationship, when there is conflict over it.

Lord Rowlands: Would you say Gary McKinnon was a small thorn?

Amy Jeffress: The United States Government was disappointed in the way that that case turned out, but has it affected our overall diplomatic relationship? I would say in a very small way, yes.

Lord Rowlands: A small way. Has it in any way changed the approach in which the extradition requests are being made? Has the US Government changed its approach at all?

Amy Jeffress: No, there is no desire to retaliate in any way that I am aware of.

Q71 Lord Hart of Chilton: Good morning. It has been said that there is a greater zeal to interpret legal jurisdiction on your part—greater effort, greater energy and greater resources put into it. Do you think that is right?

Amy Jeffress: The United States does exercise extraterritorial jurisdiction, and I would note that the United Kingdom has that authority with respect to certain offences as well. It comes under criticism, but most people who criticise our exercise of extraterritorial jurisdiction are really criticising the case; they criticise the jurisdiction, because they do not like the case itself for whatever reason. For example, most people do not criticise it in the terrorism context. But I will say that the exercise of jurisdiction is something that has to be addressed on a case-by-case basis.

Lord Hart of Chilton: Thank you. Can you help us a little by explaining how prosecutors from the UK and the US actually work together to reach decisions on cases of concurrent jurisdiction? Should that process be a little more transparent?

Amy Jeffress: Yes, I can. That was one of the responsibilities that I had when I was the attaché at the embassy, to assist our prosecutors in carrying out those discussions. The way that it works is that, when a prosecutor in either country has a case that the prosecutor believes affects the interests of the other, the prosecutor initiates a conversation through the respective appropriate offices. The prosecutors may discuss it by phone or meet in person, if possible, or even over video sometimes. They talk about where the case should most appropriately be prosecuted, and there are certain factors that are considered.

Sir Scott Baker's panel recommended greater transparency with respect to making public the factors that are considered and I agree with that recommendation. I would note that the Director of Public Prosecutions in fact followed up with it, and has now published the factors that the UK prosecutors are directed to consider. In specific cases, there are sometimes

good reasons for the confidentiality of those discussions. Sometimes the investigation is not public, and it protects both law enforcement interests and, in many cases, the interests of the person under investigation or who is ultimately charged not to have those discussions in a public setting or transparent in a public way.

Lord Hart of Chilton: Were those negotiations that you were involved in always calm and peaceful or was there any excitability and tension?

Amy Jeffress: There was sometimes disagreement, to be honest. I am aware of some cases that were difficult to address, but I will say that the United States and the United Kingdom have a very strong relationship and our prosecutors have a very good working relationship. In my time, we always worked through those cases in a way that I think was ultimately satisfactory to everyone.

Lord Hart of Chilton: Where you substantially disagreed with one another, how did you ultimately come to a conclusion?

Amy Jeffress: By looking at the factors and trying to be objective. Prosecutors in both countries, when they have a good case, want to prosecute it, and so we had to analyse the factors. Ultimately, unless the individual is located in a third country, the individual involved is located either in one country or the other, and that country often will have greater authority over where that person is prosecuted, just by virtue of where the person is located.

The Chairman: Just to follow up something arising out of one of your comments to Lord Hart, you talked about the UK prosecution guidelines being transparent. Are you satisfied, as an individual, with what is happening on your side of the Atlantic?

Amy Jeffress: There has not been a real call for transparency in the process here because, as I mentioned earlier, extradition does not get a lot of attention in the US and is not as much

of a political issue. But it is no secret what the factors are, because the factors that US prosecutors consider are largely the same as what your Government has published, so I do not think that there is any mystery about it, on our side.

The Chairman: The point is that, as you know, and we discussed this, there is disquiet—shall I put it that way?—on this side of the Atlantic about some of the decisions that are taken in the US, and that might be mitigated a bit if the process that the prosecutors go through was a trifle more transparent. That is where I was coming from. The other point that I and the Committee would be interested to know about is that, given we are about to introduce new rules about the forum bar, and that obviously will have an impact on extradition, do you think that will have any impact in turn on decisions by US prosecutors to try to obtain extradition from this country? Will it be a kind of chilling measure? You may not know.

Amy Jeffress: When I was in the embassy, the forum bar was being debated and we were concerned about the impact that it might have on our arrangements, but my understanding is that prosecutors will do their best to do what is right and what is in both Governments' best interests, regardless of how the law is implemented. With respect to the forum provision, it seems that it is a bit too early to tell how it is affecting our arrangements, because there have not been that many cases as yet.

The Chairman: We simply cannot form a view, you would say, about what impact it might have on the US approach to extradition from this country.

Amy Jeffress: I think that is right.

Q72 Baroness Wilcox: Good morning, Amy. Thank you for getting up so early. Paul and Sandra Dunham fought extradition to the United States on the basis that plea-bargaining demands an admission of guilt, rather than assertion of innocence. To what extent should

the likelihood that a person requested by the United States will be encouraged to plea-bargain be taken into account during an extradition hearing in the United Kingdom?

Amy Jeffress: I do not think that that should be taken into account at all. The United Kingdom has plea-bargaining as well, and Lord Brown on your Committee has looked into this. I think there are differences in the way our systems operate, but they are often overstated. When a person is extradited to the United States, every individual extradited has an absolute right to a trial. If that person is not guilty, they should exercise that right to trial. If the person is guilty, then it is often in that person's best interests to plead guilty, so that they receive the benefit of the plea-bargaining process.

Baroness Wilcox: I was just wondering if the circumstances of extradited people, who are often away from home in pre-trial detention, facing possibly lengthy sentences, exacerbate the concerns that they may have. I just wonder how much help is given, how much consideration is given, to people who have been taken from one country to another, obviously feeling completely alienated where they are, and whether they feel that, in truth, they need some help. Do they get any help? In other words, if you are going from one jurisdiction to another, do you have anybody who stands alongside those people to explain quite what the system is and how different it actually is for them?

Amy Jeffress: Everyone is entitled to a lawyer. For people who cannot afford a lawyer, the US courts will appoint a lawyer to represent them. That is true in every case. That lawyer's responsibility is exactly as you described: to explain what the process is and what the options are, and to advise on what the best course of action is. That is the same whether the person charged is in the United States or whether the person is extradited from another country.

Baroness Wilcox: Can I just ask a small question? I should know the answer to it, but I do not. Is it done in other languages? How many languages do you work through in your courts? If you have somebody coming from one country to another who does not speak English as you do, do you have a great range of help in areas like that?

Amy Jeffress: We do not have British interpreters, as far as I am aware.

Baroness Wilcox: We try to cope. We are all right.

Amy Jeffress: For people who do not speak English, there is an interpreter provided at any court proceeding. That is something that the judge has to ensure is provided. The judge has to personally address the defendant and make sure that either that person speaks English and can understand the proceedings or has an interpreter.

The Chairman: Before we go on to Lord Mackay, I would be interested to know from you, please, if you have a US citizen who has been extradited to another country, what kind of support, if any, is provided by the US embassies and the US system more generally to assist them, if any at all?

Amy Jeffress: In that respect, I do not think that the United States does anything different than other countries do. When someone is extradited, the embassy in the country where the person is sent is notified, so that that embassy can provide the usual consular services and visit the person, if the person is in custody. Those services are provided by the British Embassy here in the US and they are provided by the US Embassy in the United Kingdom. I believe that that is standard across the globe.

The Chairman: For example, if a US citizen is put in jail for some time in another country, do the US embassies regularly monitor what is happening and their circumstances?

Amy Jeffress: At the very least, they pay a visit to ensure that the person is being treated fairly and humanely. They should follow up and monitor the case, although sometimes that does not happen, depending on the volume. That should happen in most cases, yes.

The Chairman: The theoretical policy, even if it may not always work, is that they keep regular contact with the US citizens who are in jail. You may not know the answer.

Amy Jeffress: I am not sure exactly what the consular requirements are, but there is at least a visit and then any follow-up that is needed, certainly.

Q73 Lord Mackay of Drumadoon: Can I turn to the subject of prison conditions and ask you how United Kingdom courts should deal with criticism of prison conditions in the United States while at the same time respecting that country's penal system and recognising that conditions in state and federal prisons, throughout the country, will inevitably vary?

Amy Jeffress: The European Court of Human Rights has addressed this question, because it came up in a case several years ago, and the European Court concluded that the conditions in US prisons are, in fact, superior in many ways to those in many European prisons. That is an important point. The broader point, though, that I would like to make about this is that there is criticism about prison conditions in the United States. I think they are actually broadly similar to those in the United Kingdom, from what I know, although you are correct also that there is some variation between the federal and state prison systems, and particular criticism of certain states.

Generally, the United States prisons are humane; they are well run and well operated. The extradition treaty that we have is premised on mutual trust and respect. We could all talk about ways in which our justice systems are different. There are aspects of the US justice system that come under criticism in the United Kingdom; there are aspects that come under criticism in the United States. In the same way, there are aspects of the justice system here

in the United Kingdom that come under criticism. I would note that, while we have great respect for the judicial system here, it falls short of ours in some ways. There is often no recognition of that, but courts in the United Kingdom routinely admit evidence that would violate our fourth amendment, and hearsay evidence that would violate our sixth amendment. Defendants in the United Kingdom do not have the protections of the United States' fifth amendment. That is not to say that your justice system in the United Kingdom is not fair; we believe that it is. The mutual respect for one another's justice systems is really the foundation that underlies the extradition treaty, and I think that is important to remember.

Lord Mackay of Drumadoon: A further issue that may be related to the point you have just been making is the current mechanisms that are available for British citizens who have been extradited to stand trial in the United States and are subsequently sentenced and imprisoned there. Could you assist us by just explaining, in terms that would be of practical assistance to us, the procedure for such prisoners seeking to transfer their sentence, so that it would return them back to the United Kingdom and they could serve their sentence there?

Amy Jeffress: Yes, there is a process under which that can be accomplished. In fact, in many recent cases that has happened. Normally the person has to serve at least a portion of their sentence in the United States, so that the arrangements can be made. There is a process that has to be conducted in the United States, where the prison authorities have to approve. The judge sometimes has to approve; the prosecutor sometimes has to approve. If the parties agree and can recommend that, then it often does happen that a person can be transferred to the United Kingdom to serve the remainder of a sentence.

Lord Mackay of Drumadoon: Does that involve the case concerned and the sentence imposed being re-examined, once the sentence is under way and the parties and the court

deciding whether or not an order should be granted allowing the return to the United Kingdom in the instant case?

Amy Jeffress: The sentence is imposed in the United States, and then where that sentence is carried out is what we are talking about. I think that, when someone is transferred back to their country of origin, that country has the authority to determine what should be done with what is left of the sentence.

Q74 Lord Empey: I wonder if I might ask Amy one further question. There is a bit of concern and certainly a lack of knowledge in this country about the fact that a number of your prosecutors and indeed judges are elected political officials in states. Do you feel that that can lead to circumstances in which a person who is being extradited is not subject to the same standards and would you accept that, because that system is quite different from our system, it can lead to a great deal of misgiving about the process?

Amy Jeffress: I do not think that it should. I would note at the outset though that most extradition requests, come from the US federal system, not the states, although many requests do come from the states as well. The federal system does not have elected judges. Judges in the federal system are appointed by the President and confirmed by the Senate. Even in those states that have elected judges, those judges take an oath to administer justice and, with very rare exceptions, they do so fairly and impartially, as they are sworn to do. I do not think that that should be something that is taken into consideration. Again, that goes back to my point that the systems may differ, but there should be mutual respect for one another's systems.

The Chairman: Advertisements that we have seen for candidates for judicial office, shall I say, run counter to the traditions associated to that office in our country, as you will appreciate. Have you any thoughts for us about that?

Amy Jeffress: I am not personally in favour of judicial elections. It is not something that I am expert on either, I might add. Whatever is said during campaigns, and I can understand the misgivings about some of that, I am not aware of many examples where it actually has affected how a judge performs once elected and once serving. Most judges try very hard to do a good job and do so.

Lord Brown of Eaton-under-Heywood: Can you just help with this? Can you think of any case, in your experience, in which the rule that we have here about not allowing intercept evidence has affected a decision as to where a particular alleged crime should be tried?

Amy Jeffress: That is a very good question. That can be considered as one of the factors, because one of the factors that prosecutors consider when deciding which country is the best country in which to bring the prosecution is where the evidence is located and where the evidence is best. That is a factor that can be considered. I do not recall it being decisive in any particular case, but I cannot say that it is not relevant. It does seem to be relevant.

Q75 The Chairman: Time is moving on. Does anybody else have a question they would like to ask Ms Jeffress? Could I then say thank you? If there is anything you would like to say to us above and beyond what you have already done, which you feel is important for us and for our understanding particularly of the US side, which we have agreed is in many ways rather different, despite superficial similarities, from the way we do things, please feel free.

Amy Jeffress: Thank you. Even given the differences, I actually think our justice systems are closer than most. Our justice system is much closer to yours than yours is to most other countries with which the United Kingdom has extradition treaties. Our system came from yours and, although there have been some changes in 200 years, really they are more similar than most people recognise. With that said, where there are differences, I think that we need to respect one another's systems and recognise that, regardless of those differences,

the justice system in the United States is fair and, likewise, the justice in the United Kingdom, while it might not measure up in certain ways to what United States authorities are used to, is also fair and we have mutual respect for one another's systems.

I thank you for inviting me. I really appreciate the work that the Committee is doing. It is clear that you are looking at the facts and I think that, when you look at the facts in a really fair and careful way, you will conclude, as Sir Scott Baker's very thorough review did several years ago, that the US-UK treaty is fair, balanced and operates in the interests of both of our countries.

The Chairman: Thank you very much indeed. We are all very grateful to you for having had to get up so early in the morning. Thank you very much.

Amy Jeffress: Thank you. It is a pleasure.

Jeremy Johnson QC, Clair Dobbin, Raza Husain QC and Helen Malcolm QC – Oral evidence (QQ 230-237)

Submission to be found under Clair Dobbin

JUSTICE – Written evidence (EXL0073)

Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.

2. JUSTICE has been concerned with the process of extradition for many years, in the past ten focusing on the adoption and implementation of the European Arrest Warrant through briefings, reports and training, raising concerns about its operation in practice.[134] We have given evidence to many enquiries over the years[135], raising the practical difficulties with the European Arrest Warrant (EAW) process[136]. Our response will focus on the EU and human rights implications of extradition.

Operation of the EAW System

3. This inquiry demonstrates the continuing dissatisfaction felt with extradition law and procedure in the UK. There will always be some difficulties with this process given the differences between nations in their approach to criminal justice, the justifications they provide for prosecution and the sentencing regimes that they undertake. In the EU this continues to be a particular problem because the underlying premise of the mutual recognition system, namely that our countries are sufficiently similar to negate the need for scrutiny of extradition requests, was shown to be premature in the earliest days of the European Arrest Warrant system.[137] No Member State seeks to harmonise its criminal justice system, even if recent efforts have been taken to provide minimum standards for people accused and victims of crime. Yet there is still very little understanding of how the judicial systems across

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[134] See for example, Alegre and Leaf, *European Arrest Warrant: A solution ahead of its time?* (JUSTICE, 2003); and Blackstock, *European Arrest Warrants: ensuring an effective defence* (JUSTICE, 2012), available here http://www.justice.org.uk/data/files/resources/328/JUSTICE-European-Arrest-Warrants.pdf

[135] In particular the Scott Baker Review for the Home Office, available at: http://www.justice.org.uk/data/files/resources/163/Home_Office_Extradition_Review_-JUSTICE_response_jan11.pdf

[136] Council framework decision, of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA), O J L190/1 (18.7.2001)

[137] G. Vernimmen-Van Tiggelen and L. Surano, Institute for European Studies, Université Libre de Bruxelles ECLAN – European Criminal Law Academic Network, Analysis of the Future of Mutual Recognition in Criminal Matters in the European Union, EC DG JLS (20th November 2008)

the 28 Member States operate, and little trust that the procedures they apply are fair, if different, to our own.

4. Nevertheless, the EAW system has been successful, in allowing criminals evading justice and crossing open borders to be apprehended in other Member States, at speed and in vast numbers. No system is perfect and the concerns expressed by organisations such as JUSTICE about the flaws in the Framework Decision have been well founded. Steps have been taken recently by the UK Government to reduce some of the problems with the EAW system. We expressed our support, but also concerns, for these measures in briefings to Parliament during the passage of the Crime and Courts Bill and the Anti-social Behaviour, Crime and Policing Bill. The changes have yet to be considered by the courts and may well be subject to scrutiny. In summary, our concerns are as follows:
   - Prosecution certificates and an exhaustive list of what is in the interests of justice must not fetter the judge's discretion to impose a forum bar to extradition – the judge has a different decision to make than whether a case should be prosecuted in this country. The certification process is so widely drawn that it will render the forum bar unworkable;
   - The Human Rights Act (HRA) must continue to apply to the Secretary of State in extradition proceedings, who is a public authority for the purposes of the HRA and may receive relevant information subsequent to an appeal that would affect the interests of the requested person for which they are unaware;
   - Proportionality checks should apply to requests for a person to serve a sentence as well as to try them;
   - Extradition should be barred where the requesting state has not made a decision to charge *and try* the person, and should not be conditional upon the person's absence from that state;
   - Temporary transfers must be subject to procedural safeguards;
   - The time limit for all extradition appeals should be 14 days. Discretion to extend should be available in exceptional circumstances where the interests of justice so require;
   - A leave requirement should not be imposed upon requested persons. If introduced, this should extend to requesting state appeals, and be subject to review. Legal aid must remain available and be granted expeditiously;
   - Further amendments are necessary to make the procedure fair. At a minimum these are: a bar to extradition where the person can serve their sentence in the UK, a bar to extradition where there is shown to be mistaken identity; non means- tested legal aid.[138]

5. Our disappointment with the amendments thus far introduced by the UK Government are that they will make little difference in practice, or in some respects

[138] The detailed reasons for these concerns are set out in the briefings at: http://www.justice.org.uk/data/files/resources/327/JUSTICE-briefing-on-Crime-and-Courts-Bill-HC-Report-Stage.pdf and http://www.justice.org.uk/data/files/resources/350/JUSTICE-Briefing-ASB-Crime-and-Policing-Bill-HL2R-PDF.pdf

will make the situation worse (for example, through the leave requirement and seven day time limits on appeals), for the reasons we set out in our briefings. In our view, there are many practical measures that could be undertaken to mitigate the unfair effects of the EAW system. These are already legislated for by the EU, through hard or soft law measures, or through the jurisprudence of the Court of Justice of the European Union, but are not fully operational across the Member States. Despite ten years of operation, the Member States have been slow to ensure that the requested person is treated fairly by the European Arrest Warrant process, which operates in a vacuum, despite the ease of communications now available to prosecutors and judges between Member States; the availability of measures to pay fines imposed in another Member State[139], to transfer prisoners[140], to hear evidence by way of television link[141], and to allow for a requested person to await trial in the state of residence rather than languishing in the issuing state prison.[142] Too little effort has been taken to make these measures function, which would ease the pressure upon local police forces to arrest requested persons and the courts in the UK hearing thousands of European Arrest Warrant applications and hundreds of appeals.

6. Given the unique position that the UK holds in its decision to opt out of criminal justice cooperation in the EU, pursuant to Protocol 36 of the Lisbon Treaty, but to opt back in to 35 mutual recognition measures, including the EAW, in our view the UK should be taking further efforts at EU level to ensure EU wide improvements in the operation of the system. For example, a proportionality test in the UK will not prevent Polish and Latvian judges issuing requests in the hundreds for what we determine to be minor offences. As drafted, the forthcoming introduction of the proportionality test in the UK courts will not even affect the numerous requests for surrender based upon breach of conditional suspension of sentences – not for committing further crime but for failing to report to local police as a result of coming to the UK in search of employment. Yet a remote reporting option, or the ability to report to a UK police force would prevent vast expenditure and the disproportionate interference with a person's family life and ability to work.

[139] FD 2005/214/JAI of 24 February 2005 on the application of the principle of MR to financial penalties, *OJ* L 76, 22 March 2005, p. 1

[140] FD 2008/909/JHA of 27 November 2008 on the application of the principle of MR to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty, *OJ* L 327, 5 Dec. 2008, p. 27

[141] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197, 12 Jul. 2000 p 1.

[142] FD 2009/829/JHA of 23 October 2009 on the application, between MSs of the European Union, of the principle of MR to decisions on supervision measures as an alternative to provisional detention (here after the ESO FD), *OJ* L 294, 11 Dec. 2009, p. 20

7. Much of the work has been done for the UK by the EU Parliament, which last year requested a European Added Value Report on the EAW.[143] That led to an EU Parliamentary Resolution with recommendations to the Commission on the review of the EAW.[144] In our view, the UK should lead efforts to introduce a transversal measure that would amend the EAW framework decision, and the subsequent measures adopted that are also lacking, to improve operations across the EAW. Such a measure has already been successful in amending the EAW Framework Decision and subsequent measures in relation to trials in absentia.[145] This did not re-open the EAW for review on any ground, but focused on an important aspect with which all Member States could agree.

8. Furthermore, the UK need not persuade the European Commission to introduce such a measure because in the area of criminal justice cooperation the Council has the power to introduce a Member State initiative, so long as it has the support of seven other Member States.[146] Belgium took this approach in introducing both the Directive on the right to interpretation and translation[147] and the Directive on the European Investigation Order.[148] An evidence base has been demonstrated in the Report, and draft legislation of the European Parliament. Five proposals for reform are made in the EU Parliament Resolution for all EU mutual recognition instruments:

    - Validation procedure – by defined judicial authority
    - Proportionality check upon issue (allowing for the executing state to raise concerns)
    - Consultation procedure between the competent authorities in the issuing and executing Member States
    - Fundamental rights refusal ground

[143] European Added Value Assessment, Annex 1, Weyembergh, 'Critical Assessment of the Existing European Arrest Warrant Framework Decision', EAVA 6/2013, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/510979/IPOL-JOIN_ET(2013)510979(ANN01)_EN.pdf

[144] European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), P7_TA(2014)0174, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2014-0174%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN

[145] FD 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial , OJ L 81, 27 Marc 2009, p 24

[146] Pursuant to Article 76(b), Treaty on the Functioning of the European Union

[147] Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings OJ (26.10.2010) L 280/1

[148] Directive 2014/41/EU regarding the European Investigation Order in criminal matters OJ (1.5.2014) L 130/1

- Provision on effective legal remedies

9. We agree with these proposals, which are not only evidence based, but largely replicate measures agreed in the adoption of the European Investigation Order in May of this year. The UK is in a prime position, having recommitted to the EAW system, to lead momentum to introduce these vital, but limited reforms.

10. In our view there is little point in continuing to attempt domestic reform unless other European Member States are doing the same.

Human rights

11. Appeals in the UK courts continue to raise human rights concerns in the hundreds.[149] Whether this will be possible following the leave requirements and time limits imposed under the ASB, Policing and Crime Act is uncertain. It is clear from looking at the cases brought over the past few years that often evidence to support a human rights ground is not available at first instance, whether because the person is unrepresented or it has not been possible to produce in time. A limitation on appeals may therefore prevent many people raising valid human rights claims in the future. The judicial approach to human rights claims is consistent – a high threshold, both evidential and substantial is imposed for requested persons to succeed. This is because in most cases the courts are being asked to predict the impact of extradition on the right not to be subjected to inhuman or degrading treatment, the right to liberty, to a fair trial, or to private and family life, if returned (Articles 3, 5, 6 and 8 ECHR respectively). The threshold can be harsh. For example, it is hard to see how a person who would be denied medical treatment for HIV and Hepatitis C in Latvian prisons, but would receive this under World Health Organisation, EU and British guidance, the absence of which would lead to a worsening condition, AIDs related illness and even death, would not face a violation of Article 3 ECHR. This scenario has not been considered severe enough.[150] The case followed the decision of the Divisional Court[151] that in the absence of any systemic breach or a breach identified by the Committee for the Prevention of Torture which has not or will not be rectified, it is very difficult to believe that an individual will, save exceptionally, be able to establish that there is a real risk of breach.[152] Medical grounds will rarely establish a case because 'Generally speaking, an alien cannot be permitted to remain in the UK to access medical treatment which may be better than that available in the country of his nationality.'[153] In March this year, however, the Divisional Court considered the

[149] A search of Westlaw for the year 2014 demonstrates 167 cases in the Administrative Court alone.

[150] *Balodis-Klocko v Prosecutor General of the Republic of Latvia* [2014] EWHC 2661 (Admin), (unrep) (30 June 2014) per Mr Justice Ouseley.

[151] *Brazuks v Prosecutor General's Office, Republic of Latvia and others*, [2014] EWHC 1021 (Admin), (unrep) (9 April 2014) per Mr Justice Collins and Lord Justice Moses.

[152] At [11]

[153] At [40]

pilot judgment against Italy at the European Court of Human Rights due to overcrowding throughout its prisons, and subsequent call from the President to resolve the problem, as amounting to grounds to refuse the return of a requested person to Italy under Article 3 ECHR.[154]

12. The warrant in *Klocko* was however refused under Article 8 ECHR[155] where more refusals have been made out. For example, Mr Justice Ousely recently reviewed a warrant and found the sentence would breach Article 8 ECHR for being disproportionate:[156]

> 7. …[F]or these tiny amounts of drugs in the circumstances which I have described, where the offences are ones of simple possession, I find it impossible to say that a minimum five-year sentence, without any more in relation to suspension of that sentence, is proportionate. To my mind, it is beyond startling.

And indicated the relevance of communication between the Member States:

> 8 I express the hope that, if Latvia continues to seek extradition for those who have or are alleged to have committed these very minor drugs offences, they will flesh out the reasons why it is proportionate to extradite an individual either by reference to personal or offending circumstances or explain what the circumstances are which make a five-year minimum mandatory sentence a proportionate response to what they perceive as a drug problem in their country.

13. Balanced against any complaint is the obligation to give effect to the UK's international obligations, which cannot be dismissed lightly. Although there have consistently, and recently, been successful human rights challenges in the UK courts, these are usually limited to the facts of the case and rarely set any form of precedent. The UK Supreme Court has provided guidance in a number of extradition cases upon the approach to human rights arguments, but these principles must always be applied to a set of facts by the first instance judge.[157]

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[154] *Badre v Court of Florence*, Italy [2014] EWHC 614 (Admin) (11 March 2014)

[155] Due to the short period of time left to serve, his health, his wife and child with cystic fibrosis who was having behavioural difficulties. The circumstances were described as 'unusual'.

[156] *Miglans v Prosecutor General of the Republic of Latvia* [2014] EWHC 2659 (Admin) (unrep), per Mr Justice Ouseley.

[157] Last year the UK Supreme Court decided that systemic corruption in a judicial system could affect an individual's right to a fair trial without the requested person being able to demonstrate the direct impact in their own case. The matter was remitted to the High Court of Justiciary, which received evidence and concluded there was no risk of breach in the index case, *Kapri v HM Advocate* [2013] UKSC 48 [2013] 1 W.L.R. 2324 and [2014] HCJAC 33; 2014 S.L.T.

14. With so many cases coming before the Westminster Magistrates Court, it may be that district judges can become case hardened - to the same concerns about prison conditions and impact upon children if surrendered some five years after the offence was committed. With only binary options of surrender or evasion of justice, the courts are placed in a difficult position. As indicated above, in our view much more use of alternative measures should be made available to the courts, to mitigate the effects of a request from another Member State. Many of these are simple and would require little effort, but rather a change in approach and deference to the EAW system. For example, use of a video link to appear before an investigating magistrate in the issuing state for proceedings to be commenced or discontinued; bail in the UK pending trial in the issuing state; assistance with payment of a fine; confirmation of the requested person's whereabouts and transfer of the obligation to report to the police or probation service; service of the prison sentence in the UK. The majority of Article 3, 5 and 8 ECHR arguments would fall away if these were standard measures utilised in each case.[158]

Assurances

15. In almost all cases of surrender or extradition there will be some form of assurance given by the issuing state to answer a concern raised by the requested person. Often these will be presumed to operate successfully through pragmatic reasons – if the assurance is not complied with it may hamper future surrender requests. The ECtHR set out in *Othman (Abu Qatada) v UK* (2012) 55 EHRR 1 how the question of assurances should be approached, with which we agree:

> 189. More usually, the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving State's practices they can be relied upon. In doing so, the Court will have regard, inter alia, to the following factors:
> (i) whether the terms of the assurances have been disclosed to the Court….;
> (ii) whether the assurances are specific or are general and vague…;
> (iii) who has given the assurances and whether that person can bind the receiving State…;
> (iv) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them…;
> (v) whether the assurances concerns treatment which is legal or illegal in the receiving State…;
> (vi) whether they have been given by a Contracting State…;
> (vii) the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances…;
> (viii) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers…;

[158] Following the UK Supreme Court case of *HH v Deputy Prosecutor of Italian Republic, Genoa* [2013] 1 AC 388 courts now regularly enquire as to the arrangements that can be made for the care of children of requested persons in the issuing state as well as the UK. This demonstrates that a more flexible approach can be taken.

(ix) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible…;
(x) whether the applicant has previously been ill-treated in the receiving State…; and
(xi) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State…."

(case citations omitted)

16. However, we are not aware of any mechanism in place to monitor the application of these assurances. Often, it will only be if there is a dual representation team, with lawyers in the UK and issuing state that a breach can be made known. A contact point at the executing court that the requested person may inform of any breach might support adherence to the assurance by the issuing state, since scrutiny by the parties could then be placed on any alleged breach. However, in either circumstance, there may be no remedy for the requested person as they will now be subject to the law of the issuing state. Nevertheless, the UK and other states could monitor adherence to assurances and this may have an impact upon future cases.

1 October 2014

Kaim Todner Solicitors Ltd – Written evidence (EXL0057)

Extradition is undoubtedly an important tool in the fight against international crime but at the same time is also, rightly recognised as amounting to a breach of a person's Article 8 ECHR right to a private and family life.

The legitimate aim of extradition law in the UK is to uphold and honour the UK Government's obligations pursuant to European-wide agreements and International treaties between the UK and countries outside of Europe, whilst scrutinising the legality of the extradition request and considering carefully the balancing act of deciding whether or not the undoubted breach to a person's human rights would be disproportionate to the legitimate aim of extradition.

The legitimate aim of extradition law is to achieve justice for victims of crime and to ensure that the ease at which a human being can travel the world does not allow impunity. It is submitted that it is not a legitimate aim of extradition to be in itself part of a punishment in advance, a plea bargaining tool, a threat, or punitive post-conviction. Extradition's legitimate aim is achieving international justice.

In this sense, it is submitted that there are fundamental flaws to the UK's Extradition system both legally and procedurally and furthermore it is submitted that there are remedies, perfectly viable remedies, that the UK Government and Court system could implement in order to reduce the impact of extradition in relation to human rights' breaches, make the system fairer, and the outcome less draconian. It is submitted that these remedies are not only conceivable, but they are implementable and that other Countries have proven that these safeguards are accepted by other States in order to operate a functional and fit for purpose extradition system.

In summary, the recommendations are as follows:

Accusation Extradition Requests:

a. European Investigation Orders
b. European Supervision Orders
c. Mutual Legal Assistance Requests
d. Pre-Trial hearings via Video Link
e. Dual Representation by both a UK Extradition Lawyer and a state funded Defence Lawyer in the Requesting State
f. Introduction of likely sentence, or sentence range, taken at the Prosecution's highest case rather than reliance on maximum sentence available.
g. Evidential test implementation.
h. UK financial support for those extradited to be bailed to a UK funded address should the criteria for bail in the Requesting State be met.
i. Assurances that resisting extradition cannot and will not be used to demonstrate flight risk potential and / or lack of respect for the Court in the Requesting State at any part of the proceedings, in particular in relation to bail.

j. Guaranteed immunity from any evidence submitted in the UK Extradition Proceedings being used by the prosecution in the Requesting State.
k. Guaranteed Repatriation to serve sentences in the UK for UK nationals on conviction abroad following extradition on Accusation Extradition Requests.

Conviction Extradition Requests:

l. No extradition for UK Nationals in relation to sentences imposed abroad but for UK Nationals to serve their sentence in the UK in relation to Conviction Extradition Requests.

Extradition Requests in General

m. Removal of an absolute irrefutable (in practical terms) presumption in favour of EU Member States.
n. Removal of blind acceptance of Government to Government Assurances in favour of a requirement for practical evidence of real change in the Requesting State not just in law, but in practice and procedure as well.
o. Right to equal and free medical treatment in Requesting State
p. Removal of the Westminster Magistrates' Court policy on ordering Costs against Requested Person's in extradition proceedings as a general rule.

General

q. Serious and fundamental revision to the "Forum Bar" to extradition to make it a realistic and practically possible alternative to extradition.
r. Removal of the possibility of a "permission" stage to the Statutory Extradition Appeal process.
s. Change in law to allow those subject to UK Domestic Prison Sentences, who are eligible for the National Offender Management Service's Early Removal Scheme to their home nation and who are also facing extradition to the same Requesting State, to be extradited at the point that they are eligible to be removed under the scheme rather than forced to remain until the end of the UK Domestic Sentence due to the extradition proceedings continuing (which cannot proceed until the end of the custodial element of the UK Domestic Sentence.

General

Does the UK's extradition law provide just outcomes?

- Is the UK's extradition law too complex? If so, what is the impact of this complexity on those whose extradition is sought?

1. The submission here is that yes it can provide just outcomes but equally it can provide unjust outcomes. It is very much Judge dependant and not uniform. The same argument put before two different District Judges could result in completely different outcomes. The decisions of the High Court on appeal tend more towards a

uniform approach which is why the right of appeal must be preserved in full and automatically without exception

Is extradition law fit for purpose in an era of increasingly multi-jurisdictional crime?

2. It is submitted that the broad brush approach of the "one size fits all" EAW simply does not work. Extradition Courts in the UK end up attempting to consider what the penalty or perceived seriousness of accusations or convictions and sentences would be under the law of England & Wales without knowledge of the legal, procedural, and cultural norms of the Issuing Judicial Authorities legal systems. There is no criticism of the UK Courts in this regard as they cannot be expected to have this knowledge but the EAW in its form, tends to suggest that all legal systems are the same and perception of offences are the same.

To what extent is extradition used as a first resort when prosecuting a crime committed in another jurisdiction? Should greater use be made of other remedies?

3. This is a serious problem with extradition requests by way of the European Arrest Warrant with an almost automatic, factory line methodology used in generating EAWs by certain Member States. The law means that there is absolutely no financial implication for issuing an EAW. There are many other tools that Member States and Requesting States could use in order to investigate and prepare their cases and an EAW or Extradition Request is often used as a first option rather than a last resort.

<u>European Arrest Warrant</u>

On balance, has the European Arrest Warrant (EAW) improved extradition arrangements between EU Member States?

- ***How should the wording or implementation of the EAW be reformed?***

4. There should be more detail required in the European Arrest Warrant in relation to the conduct description and the evidence against the Requested Person. In addition there should be not just a maximum sentence requirement but a likely sentence requirement. EAWs are issued for, for example, very minor shoplifting and the only sentence indication in the EAW is the maximum possible sentence in the Country for the crime in general, which could, for example, be 7 years. This then allows the EAW to meet the statutory criteria but in reality it may be that the sentencing range and likely sentence would be well below the extradition offence criteria which would impact greatly on consideration of bars to extradition and proportionality arguments under Article 8 ECHR.

5. The IJA should be made to specify the exact stage that they are at in the case procedurally and what the next stages are.

6. The EAW should only be issued by an actual Judge who has carefully considered the case and the evidence against the Requested Person once they have assured themselves that no other measure or tool is a more proportionate way forward.

- ***Are standards of justice across the EU similar enough to make the EAW an effective and just process for extradition?***

7. No. Each Member State has its own laws, procedures, sentencing policies, cultural norms, societal views on crime and punishment and so one crime in one jurisdiction could be considered and dealt with in a totally different way to another Country. There is no harmonisation of sentencing policy either.

- ***How will post-Lisbon Treaty arrangements change the EAW scheme once the UK opts back in to it?***

<u>Prima Facie Case</u>

In circumstances where a prima facie case is not required, do existing statutory bars (the human rights bar, for instance) provide sufficient protection for requested people?

- ***Are there territories that ought to be designated as not requiring a prima facie case to be made before extradition? What rationale should govern such designation? What parliamentary oversight of such designation ought there to be?***

8. An evidential test should be required in all cases outside of Europe regardless of the nature of the relationship between Governments. No person should face the terror of extradition with the possibility of never returning to their home nation without being able to examine and consider the case and the evidence against them and no Court or Government body should be capable of making such a decision or order on the basis of a perceived trust.

9. Extradition Requests come through Prosecutors, Elected Officials, Government Departments and Judges and each of these are capable of bias, and abuse of office. A uniform and unchallenged belief that mistakes cannot be made and bad faith would not exist should not exist.

10. In practice, a Person can be detained and then extradited to a different continent and then be faced with a choice of accepting a plea bargain deal which allows them to return home to their home nation, or risking a life in jail abroad without the possibility of repatriation to serve the sentence in a UK prison if convicted at trial, and all before they have seen the full case against them. It would not happen in the UK and the fact of extradition should not be in itself a punitive or prosecutorial leverage tool.

<u>UK/US Extradition</u>

Are the UK's extradition arrangements with the US comparable to other territories that do not need to show a prima facie case? If so, should the US nonetheless be required to provide a prima facie case, and why?

- ***Sir Scott Baker's 2011 'Review of the United Kingdom's Extradition Arrangements', among other reviews, concluded that the evidentiary requirements in the UK-US Treaty***

were broadly the same. However, are there other factors which support the argument that the UK's extradition arrangements with the US are unbalanced?

11. The US/UK arrangements are not equal in practice. From a practitioner's point of view, it feels like the Courts consider that there should be little resistance to a US Extradition Request as opposed to a request from another Part 2 territory such as Brazil or Argentina for example. It should be noted however that the arrangements between other Part 2 Extradition Act 2003 territories and the UK (in cases where the territories are also designated territories) face similar issues and challenges in relation to evidence.

12. Another feature of US extradition that should be revised is the threat of draconian sentences and refusal of repatriation in order to force a guilty plea to a lesser crime with a reduced sentence and guaranteed repatriation. This is an example of the fact of extradition being used as coercive tool for a prosecutor to gain an advantage over a suspect that would not exist if the suspect was in their own Country facing their own justice system.

Political and Policy Implications of Extradition

What effect has the removal of the Home Secretary's role in many aspects of the extradition process had on extradition from the UK?

- ***To what extent is it beneficial to have a political actor in the extradition process, in order to take account of any diplomatic consequences of judicial decisions?***

13. The Home Secretary has attempted to remove herself from the Extradition Process and from challenges being made to her in relation to Human Rights considerations. She claims to have removed her power to consider Human Rights considerations in Part 2 cases despite her duties as a public body pursuant to the Human Rights Act.

To what extent are decisions of where to prosecute certain crimes and whether to extradite influenced by broader political, diplomatic or security considerations?

14. The Forum Bar, it is submitted, is a bar that has no teeth. The Forum Bar needs to be redrafted in a way that actually allows for proper consideration of the most appropriate venue for prosecution and removes the possibility of any political or diplomatic considerations.

Human Rights Bar and Assurances

Is the human rights bar as worded in the Extradition Act 2003, and as implemented by the courts, sufficient to protect requested people's human rights?

15. It is submitted that in general, it is possible that extradition is barred on Human Rights grounds and practically this does occur not infrequently. In our experience there are greater chances of discharge on appeal in the High Court than at first instance in the Magistrates' Court.

Is the practice of accepting assurances from requesting states to offset human rights concerns sufficiently robust to ensure that requested people's rights are protected?

- ***What factors should the courts take into account when considering assurances?***
- ***Do these factors receive adequate consideration at the moment?***
- ***To what extent is the implementation of assurances monitored? Who is or should be responsible for such monitoring? What actions should be taken in cases where assurances are not honoured?***

16. It is our submission that the practice is absolutely not sufficiently robust to ensure the protection of a Requested Person's Human Rights. Where the risk of, or actual systemic and fundamental human rights' breaches have been proven to a UK Court, an assurance from a Requesting State would tend to override any concerns raised on the basis of mutual trust and diplomatic relations between States. Instead, every time the same issue is raised, for example Argentinean prison conditions and Article 3 ECHR breaches that would arise, the case has to be re-proven on the individual circumstances of each Requested Person so as not to set precedent in relation to that State and could be defeated easily by a Government Assurance that no breach would occur without any mention of the practical procedures that would be put in place to prevent the breach nor any mention of how, in practice, the procedures would be monitored independently. Cultural norms, practices, and procedures in countries do not simply change overnight with a letter from a Government minister in one country assuring a Government minister in another country that all will be fine.

<u>Other Bars to Extradition</u>

What will be the impact of the forum bar brought into force under the Crime and Courts Act 2013?

17. See above

What will be the impact of the proportionality bar in relation to European Arrest Warrant applications recently brought into force under the Anti-social Behaviour, Crime and Policing Act 2014?

18. This in principle should codify some of the existing Article 8 ECHR High Court authorities.

<u>Right to Appeal and Legal Aid</u>

To what extent have changes to the availability of legal aid affected extradition practice, and the provision of specialist legal advice to requested persons?

19. Extradition is a niche and specialist area of law that should not in any circumstances be dealt with on a first appearance at Court, and should not be considered without

specialist legal representation. In our submission, the means test for legal aid should be removed and the use of Counsel in the lower Court should be increased. This in turn would, in our view, reduce the number of effective Extradition Appeals as it would ensure that right outcome was achieved, following full consideration and argument by skilled advocates, in the first instance and that appeals would then only follow in more limited and justified circumstances

- ***What has been the impact of the removal of the automatic right to appeal extradition?***

20. As above, this would be a grave mistake and would amount to many serious miscarriages of justice in the present system

12 September 2014

Dr. Nisha Kapoor – Written evidence (EXL0040)

Submission of Evidence to the Select Committee on Extradition Law
10th September 2014
Submission from: Dr. Nisha Kapoor, Lecturer in Sociology, University of York.

1. I submit this evidence in a personal capacity as a researcher with a specialist interest in extradition, race and citizenship in the context of the War on Terror. I have been researching this area for three years with a particular interest in the cases of terrorism suspects who have been requested for extradition and extradited to the US.

2. The evidence I submit specifically concerns matters relating to the 2003 US-UK Extradition Treaty. There are two main issues that I wish to discuss and submit to the committee for consideration. The first concerns the imbalance of extradition and its use for prosecution of terrorism-related offences in the US. The second concerns the importance of retaining safeguards such as the requirement of prima facie evidence.

Extradition and terrorism-related offences

3. There has been much debate and concern regarding the issue of imbalance within the US-UK Treaty. While my purpose here is not to deliberate over the legal distinctions in evidentiary requirements set by each of the two nations, I would submit that there are clear imbalances which are revealed through examination of the extradition cases. It is clear, for example, from statistics that when extradition is invoked for terrorism-related offences the US has taken the lead role of prosecutor. Since the 2003 US-UK Treaty came into force all of the extradition requests for terrorism-related offences have been made from the US to the UK.[159] There were no requests from the UK to the US for terrorism-related offences.

4. These statistics do not merely look to be coincidental. There have been seven individuals who were extradited for terrorism-related offences between 2004, when the US-UK Treaty came into force in the UK, and 2013. Of these seven cases, at least four individuals were extradited for charges where links to the US were tenuous or when there was an arguable case for concurrent jurisdiction.

5. In the cases of Babar Ahmad and Talha Ahsan who were indicted for alleged terrorism-related offences that concerned associations with a website- Azzam Publications, the connections to the US were simply that one of the websites had been hosted for a short time on a US server. Despite the fact that the European Court interim decision on the cases of Ahmad and Ahsan stated that it had an acknowledgement from the UK Government that they could be tried in Britain,[160] in July 2004, October 2006 and December 2006, the Crown Prosecution Service (CPS) and the Attorney-General declared that there was insufficient evidence to charge Babar Ahmad with any criminal offence under UK law and that he should therefore be extradited. On 17 May 2005, Senior District Judge Timothy Workman approved Babar Ahmad's extradition at Bow Street

[159] Revealed from freedom of information request to the Home Office. Ref 26373, 11 April 2013.
[160] Babar Ahmad and Others v. the UK, European Court of Human Rights Partial Decision, 6 July 2010, para 175, p.71.

Magistrates Court, stating, 'This is a troubling and difficult case. The defendant is a British citizen who is alleged to have committed offences which, if the evidence were available, could have been prosecuted in this country...'. On 4 December 2011 Ahmad's lawyers received a letter from the CPS that admitted for the first time it was never given the evidence that was sent to the US, apart from a few documents. The bulk of the evidence was shipped straight to the US by the Metropolitan Police (House of Commons debate, 2011, c101). Talha Ahsan was not questioned at all by British authorities in regards to the charges he was being indicted for. He was simply arrested pending extradition.

6. In the case of Abid Naseer, who was extradited to the US in January 2013, the proceedings against him largely concerned allegations of a planned terrorist attack in Manchester, England. His lawyers wrote to the Director of Public Prosecutions (DPP) inviting him to proceed against Abid Naseer as a domestic UK terrorist trial. The DPP did not respond and District Judge Purdy refused to adjourn extradition proceedings pending any response from the DPP or the outcome of any judicial review, stating that 'The DPP was obviously long since aware of the April 2009 arrest and these extradition proceedings and had had ample opportunity to commence domestic proceedings but chose not to do so'.

7. In the case of Fahad Hashmi, a US citizen who had been studying in England and was extradited to the US in2007, he was accused of providing material support to a terrorist organization. Appealing against his extradition, his lawyers argued 'that his conduct…occurred wholly within the United Kingdom and had nothing to do with America'. The Judge stated 'essentially what he has said to have done is to have allowed his flat in London to be used by someone to store various items of clothing etc., pending their despatch by that person to Al Qaeda in Afghanistan'.[161] Yet there was judged to be limited connection to the UK.

Safeguards: innocent until proven guilty and the importance of prima facie evidence

8. It is worth noting that between 2004 and 2013 163 extradition requests were made by the US to the UK. Only 7 of these requests were for terrorism-related offences (4%). During this time 106 people were extradited, but only 7 were extradited for terrorism-related offences (though some of these related to pre-2003 requests). There are at least one or two cases currently pending. Thus terrorism-related cases only account for a small proportion of total extradition requests from the US. Yet it is the War on Terror which has been used politically to justify a shift in extradition arrangements.

9. In a House of Commons parliamentary debate on 5 December 2011 a number of MPs spoke against current arrangements with the US calling for greater safeguards and a redress of imbalances. But the call for greater safeguards in the political debate was fraught with a distinction being made between those accused of terrorism-related offences and those indicted for more 'mundane' affairs. Dominic Raab MP questioned

[161] Syed Hashmi v. The Government of the USA [2007] EWHC 564 (Admin) (20 March 2007), para 22.

'whether, in taking the fight to the terrorists and the serious criminals after 9/11, the pendulum swung too far the other way'[162]. David Davis MP stated that 'we should keep in mind that the rather draconian process that we have, which was put in place to defend us against terrorism, does not appear to have had much impact in that respect…The truth of the matter is that we will have far more Gary McKinnons extradited than Osama bin Ladens'[163]. The danger with this distinction apparent in the parliamentary debate is that there is an assumption of guilt in operation for terrorist suspects which is being used to legitimize a repeal of important safeguards for all. Exemplifying this sentiment, following the extradition of Babar Ahmad, Talha Ahsan, Abdul Bary, Khaled Al-Fawwaz and Abu Hamza, Theresa May opened up her speech to the 2012 Tory Party Conference with the remark 'Wasn't it great to say goodbye – at long last – to Abu Hamza and those four other terror suspects on Friday?'[164] None of those extradited had been tried in a court of law at that time, yet guilt was assumed through the celebration of their removal.

10. This points to the incredible importance of implementing robust judicial safeguards, including a requirement for prima facie evidence prior to extradition being granted. Judicial evidence from terrorism-related cases, supports this further, indicating that there is the potential for grave injustice. The case of Lofti Raissi is pertinent here. He was indicted and requested for extradition prior to the 2003 US-UK Extradition Treaty coming into force. On 21st September 2001, Lotfi Raissi, an Algerian National living in London, was the first person arrested in connection with the 9/11 attacks. He was detained in custody for a 7-day period. Immediately following his de-arrest for lack of evidence, he was re-arrested under a provisional extradition warrant issued by the United States. Lofti Raissi remained incarcerated in Belmarsh prison for four and a half months. The initial charges against him were minor offences which the US government declared to be 'holding charges' while they sought to collect evidence that would allow them to bring terrorism charges against him. On 24 April 2002, the case against him fell apart when prosecutors had failed to submit any robust evidence to support their claims, and Senior District Judge Workman discharged the appellant in relation to all the extradition charges. The Judge stated 'the court has received no evidence at all to support that allegation.'[165] It later transpired that the purpose of arresting Raissi had been for interrogation and information-gathering. In a report of the case in *The Washington Post*, an FBI official was quoted by the newspaper as stating "We put him in the category of maybe or maybe not, leaning towards probably not. Our goal is to get him back here and talk to him to find out more".[166] In an appeal hearing to the Supreme Court for compensation, Lord Justice Hooper stated:

[162] House of Commons Debate (2011) 'UK Extradition Arrangements' 5 December 2011, c82
http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111205/debtext/111205-0002.htm
[163] House of Commons Debate (2011) 'UK Extradition Arrangements' 5 December 2011, c91-92
http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111205/debtext/111205-0003.htm
[164] Theresa May (2012) Speech to the 2012 Conservative Party conference, 9 October 2012
http://www.politics.co.uk/comment-analysis/2012/10/09/theresa-may-speech-in-full
[165] Lofti Raissi and Secretary of State for the Home Department 2008 Case No: C1/2007/0694/, s.2.
[166] Ottaway, D.B. & stephens, J. (2001) 'In case of Algerian pilot, much uncertainty; officials back away from early assertions that Raissi trained four Sept. 11 hijackers', *The Washington Post*, 18 December 2001, p.A14.

> 'Viewed objectively, it appears to us to be likely that the extradition proceedings were used for an ulterior purpose, namely to secure the appellant's detention in custody in order to allow time for the US authorities to provide evidence of a terrorist offence. It should be noted that it would have been unlawful for the UK police to detain the appellant any longer without evidence to justify a charge; such evidence did not exist'[167]

11. Under the current arrangements in the 2003 US-UK Treaty, had Lofti Raissi's case been ongoing when the Treaty came into force, he would have likely suffered a very different fate and been extradited to the US in the way that others such as Babar Ahmad and Talha Ahsan subsequently have been. The removal of the prima facie evidence requirement opens up the possibility for extradition to occur when evidence against the accused is insufficient and would not meet the threshold in a British Court of Law. Lofti Raissi's case indicates that there may be a number of motivations by the US for requesting an individual in the context of the War on Terror, not all of which would hold up to scrutiny in a British court of law and thus warrant extradition.

12. There are then also further issues raised relating to the legal process in the US that has become customary for terrorism-related cases which includes the use of pre-trial solitary confinement and the extensive use of a plea bargain system that obstruct the rights to a fair trial and due process (I suspect other submissions will elaborate on this). We need to strongly consider the implications of extradition to the US where they enter a system in which most criminal cases do not go to trial. This stands to have serious consequences for the justice system and for individuals forced into making a guilty plea as the better alternative.

12 September 2014

[167] Lofti Raissi and Secretary of State for the Home Department 2008 Case No: C1/2007/0694/, s.144.

Summera Kauser – Written evidence (EXL0041)

Dear Sir/Madam,

1. I am writing regarding the Extradition Review by the Commission. I believe the matter of Extradition needs to be considered with justice at the forefront. As a family we have been unable to achieve justice relating to crimes that were committed here in the UK. The person has fled the UK to Pakistan and has been residing there for nearly two years. With the lack of treaty between the UK and Pakistan we have been unable to achieve Justice and as a result the person is question is getting away with incest. The matter is a complex one and as you can appreciate that we would like him to be prosecuted in the UK where the laws are clear coupled with justice being able to be served.
2. However, the concept of Extradition including the law, practice and procedures do not take into account the impact it has on victims and those who are direct victims as a consequence of the crimes committed. The impact and psychological consequences are damaging and long lasting. There should be a mention for such in the Extradition legislation and would invite the committee to consider victims matters into account when assessing, reviewing the matter of Extradition. I believe having international co operation and ensuring people who are to be prosecuted are prosecuted.
3. I hope you can take into account the above matters when considering the matter of Extradition. Thank you for your time and consideration.

Kind Regards

Miss Kauser

(On behalf of the Khan family)

12 September 2014

Pardiss Kebriaei, Sally Eberhardt, Baher Azmy, Arun Kundnani, William P. Quigley, Laura Rovner, Saskia Sassen, Jeanne Theoharis – Written evidence (EXL0049)

Submission to be found under Baher Azmy

Ben Keith, Paul Garlick QC and Daniel Sternberg - Oral evidence (QQ 106 - 119)

Transcript to be found under Paul Garlick QC

Ben Keith –Written evidence (EXL0077)

HOUSE OF LORDS EXTRADITION LAW COMMITTEE

ANSWERS TO QUESTIONS FOR 22 OCTOBER 2014

Ben Keith, Barrister, 5 St. Andrew's Hill

The human rights bar

1. To what extent does a swift and efficient extradition process allow for the examination of human rights concerns?

1. The process employed does in general allow the examination of human rights concerns. There is a tension between the desire of the judges at Westminster to deal with matters quickly and the need for examination but if a good case can be shown it will be considered. It is very difficult for an Article 8 argument to not be examined and many are successful. Whereas other potential breaches of the convention are generally weeded out by effective case management.

2. If the process were made much faster a lot of cases would not be properly dealt with, in particular because it is difficult to obtain funding in certain cases and difficult to show in Part 2 cases that evidence has been fabricated. Or indeed that torture has taken place.

Article 3

2. The test for discharging a person on Article 3 grounds has recently been applied, and extradition to Italy, Romania, Latvia, Hungary and Greece refused. On what grounds might it be said that the human rights protection afforded by the Extradition Act 2003 is "theoretical or illusionary"?' Please give examples of cases where you think the test to bar extradition has been misapplied.

3. Firstly I should correct the question which may be slightly misinformed. Article 3 is raised in a myriad of jurisdictions and extradition has been refused to the following jurisdictions as a result of Article 3:

    a. Russia
    b. Ukraine
    c. Moldova
    d. Turkey
    e. Azerbaijan
    f. Italy
    g. Greece
    h. Hungary

4. As yet the case of *Florea v Judge in Carai Courthouse, Satu Mare County, Romania* [2014] EWHC 2528 (Admin) in which I am involved has not concluded and whilst the Prison system has been found to be in breach of Article 3 we are still litigating whether the assurances that have been provided are sufficient.

5. In relation to Latvia I am not aware of any discharges in my case of *Brazuks and others v Latvia* [2014] EWHC 1021 (Admin) did not discharge any of the Appellants. Article 3 was only raised in the very narrow issue of Mr Brazuks co-defendant having been murdered whilst in prison and his fear that he would suffer the same fate.

6. However with respect the question is in my opinion aiming at the wrong matters. In my opinion the human rights protections are real – but – the problem comes with assurances and political cases where evidence is fabricated and when jurisdictions take liberties with the process. An example of the UK potentially falling onto that trap is the recently reported Aysha King case where parents removed their sick child from hospital and flew to Spain. The police made it very public that they did not in fact wish to prosecute the family which meant that the EAW had been issued on a false premise.

3. Arguments based on Article 3 require the requested person to use publically available material to demonstrate something "approaching an international consensus"

a. Can you give examples of cases where this bar might have been considered too high?

Nobody knows because we almost never find out what happens to those who are extradited.

b. Are there examples where cases funded by legal aid could not afford to commission the expert work necessary to demonstrate something "approaching an international consensus"?

Yes all of them – see comments below

c. Is there a danger that it may take time for an international consensus to form and for material to become available during which a person might be extradited and face a real risk of Article 3 breach?
Yes

d. Can you give examples of changes that might better balance comity with protecting against prospective breaches of Article 3?
Monitor assurances

7. The Law on Article 3 is not as straight forward as the "approaching an International Consensus test". Firstly, it is with respect a prosecutor's test made out of a desire to reduce

the impact of human rights on the extradition process. However, in actuality the court look at the real risk test in depth.[168]

8. Showing an international consensus is not well defined in the case law as it is applied differently and badly. However, the "real risk" test is well understood and in my experience applied well. It is almost impossible to show an "International Consensus" without support from the ECtHR where cases take on average 5 years. However, it is worth analysing the actual position there are two distinct types of challenge to prison conditions cases.

9. These effectively require different evidence; the first a systemic problem and the second a particularly acute one. For example in the Lithuania cases[169] one prison was found to be compliant after inspection but the rest were not. In Romania many are non-compliant[170] as in Italy. However in many cases inspections have been used and then assurances have followed

10. I cannot over-emphasise the importance of considering the impact of torture within Article 3 as the most disgusting and harrowing examples of the misuse of state power. That is why there is a separate treaty and the existence of OPCAT and the NPM. By way of example a client of mine gave the following account of a detention in Turkey in September 2010[which was found to be truthful]:

    1. They took me to the Istanbul Police Head-quarters Anti-Terrorism branch. Yet again, they took my finger prints and photograph and they brought out my previous case files. There, I was detained for three days. The torture I suffered on this occasion was the worst. The first day they beat me by slapping and hitting me with batons. They put me on 'falaka' which is beating on the soles of feet. They plunged my head in a bucket of water. They held my head in the bucket for some time. I felt as if I was going to drown. They continuously interrogated me about PKK.

    2. The second day they gave me electric shocks by connecting cables to my fingers. I lost consciousness during these shocks. When I came back to myself I was still in the interrogation room. They slapped and punched and beat me the entire day. They said "If you don't give us satisfactory information regarding KCK organisation and its founding members we are not going to release you." I said "I don't have any information about these matters, I am a CHP member. They said "We already know that you are a traitor and a separatist." They continued to torture me and insult and threaten me.

    3. The third day they took me to the roof. They told me that they would throw me off and report the incident as a suicide. I told them that I would find information about the links and involvement between my relatives, acquaintances and KCK in order to save myself. They took me back downstairs so that I would sign a document to confirm. They did not

[168] *R(Ullah) v Special Immigration Adjudicator* [2004] 2 AC 323, para 24; *Soering v UK 11 EHRR 439*, § 91 *Saadi v Italy* (2009) 49 EHRR 30, para 140. The test is an 'absolute' one, and there is no scope for balancing the interests of extradition against the prospective ill-treatment: see most recently *Babar Ahmad and Others v United Kingdom* [2012] ECHR 609 at §172-3. In the case of *Chahal v United Kingdom* 23 EHRR 413 the European Court of Human Rights examined the test again

[169] Alksynas

[170] *Florea v Judge in Carai Courthouse, Satu Mare County, Romania* [2014] EWHC 2528 (Admin)

allow me to read the document. I signed it due to fear. They put conditions for my release such as residing at a fixed address, reporting to the anti-terrorism branch once a month to give information to the police; they informed me that their investigation would continue and released me at the end of the third day.

4. Overall, I suffered from some serious injuries from the torture, of which I still have some marks on my body, including the rupturing of my testicle.

11. In report published by the European Committee for Torture ("CPT") in relation Moldova in 2011[171] the following comments were made (originally in French):

2. Torture and other ill-treatment

15. The proportion of prisoners (including women and children) who have reported police abuse in the months preceding the visit, about a third of those with whom the delegation spoke about it, remains high. The alleged ill-treatment consisted mostly of punches and kicks or knee, shortly after the arrest, while those involved were handcuffed. They would have been inflicted during searches or during preliminary interrogations conducted by police officers operating in the offices of a police station, the home of the person stopped or out of sight in a place little frequented. In some cases, these actions would have been encouraged by the officers of the police criminal investigation. The purpose of the alleged abuse would have been generally obtain confessions. A number of alleged ill-treatment could be described as acts of torture (severe beating, suffocation with a plastic bag, with batons on the soles of the feet).

Furthermore, it was reported oppressive interrogation methods (supported by groups of officers up to ten people), threats of rape (with presentation of a dildo) and mock summary executions.

The delegation also heard allegations of excessive use of force at the time of the arrest (in the form of punches once the person stopped under control), or by operational police officers or, in cases exceptional by hooded members of the brigade special intervention police.

In many cases, the delegation's doctors found bodily harm, and / or documented medical nature in the documents consulted, consistent with the statements of detainees encountered. In addition, traces of excessively tight handcuffing were also seen on the wrists of several detainees.

12. I can outline from my experience and knowledge the jurisdictions where Article 3 breaches have been found in the recent past, not just because of overall prison condition but because of the prevalence of torture; this does not include individual discharges on specific facts:

[171] http://www.cpt.coe.int/documents/mda/2012-22-inf-fra.pdf

Article 3 non-compliant	**Assurances given**	**Assurances accepted as preventing Article 3 breach**
Ukraine[172]	Yes	No
Russia[173]	Yes	No
Moldova[174]	No	
Turkey[175]	Yes	No
Lithuania[176]	Yes	Yes
Greece[177]	Yes	Yes and No
South Africa[178]	Yes	Yes
Romania[179]	Yes	Awaiting argument
Hungary	**Yes**	**Ongoing**
Trinidad and Tobago[180]	Yes	Yes
Italy[181]	Yes	No and Ongoing
Peru	Yes	Ongoing

[172] *Lutsyuk v Government of Ukraine* [2013] EWHC 189 (Admin); *Government of Ukraine v Igor Kononko* [2014] EWHC 1420 (Admin)

[173] *Kyastutis Musikyavicius v The Government of the Russian Federation***[**2011] EWHC 1549 (Admin)

Almost all WMC Decisions, most important that of SDJ Riddle in Russia v Fotinova

[174] Moldova v Antonov (WMC)

[175] *Tahir Konukserver v Government of Turkey* [2012] EWHC 2166 (Admin) (A number discharged in WMC)

[176] *Aleksynas v Minister of Justice, Republic of Lithuania* [2014] EWHC 437 (Admin)

[177] No assurances but no breach of art 3 in *Achmant v A Judicial Authority In Thessaloniki Greece* [2012] EWHC 3470 (Admin) assurances not accepted in Bosma WMC 2013

[178] Accepted in *Government of the Republic of South Africa v Dewani* [2014] EWHC 153 (Admin)

[179] *Florea v Judge in Carai Courthouse, Satu Mare County, Romania* [2014] EWHC 2528 (Admin)

[180] *Gomes v Trinidad and Tobago [2009] UKHL 21, [2009] 1 W.L.R. 1038*

[181] *Badre v Court of Florence, Italy* [2014] EWHC 614 (Admin)

13. Because there is no monitoring it is almost impossible to show a breach of any assurance. In all the cases I have acted in for both sides I know of only one case where an assurance was given and I am about to argue breached and that is a Polish case involving health care within prison for a severely disabled man. In the Lithuanian cases of course there was a breach of the assurance initially, only discovered because the defence lawyers found out by the client returning lawfully to the UK after release.

14. It is worth nothing that there has been one discharge in the magistrates in relation to Poland and Article 3 in the past few years.

Article 8

4. The factors relevant to determining Article 8 claims have been set out by Lady Hale in HH. Some witnesses have argued that they present too high a hurdle; others argue that since HH an increasing number of extraditions are being discharged on Article 8 grounds. Which view is more accurate?

15. Prior to HH the hurdle was too high. A Defendant had to be essentially dyeing or have terminally ill dependants. That however changed in July 2012 with the case of *Nikitins v Latvia* [2012] EWHC 2621 (Admin) in which I appeared, which was the first post-HH discharge on Article 8. Since then the test is a much more reasonable one and effectively a proper proportionality test. The following factors are now taken into account:

    a. The ill health of the Appellant; [182]
    b. Delays in the issue of the warrant, antecedent proceedings or certification by SOCA;[183]
    c. The period of time the RP has been on an electronic tag; [184]
    d. The relative lack of seriousness of the offence; [185]
    e. That the sentence originally imposed was suspended, that some conditions of the suspension were complied with including payment of relevant fines, then or during extradition proceedings;[186]
    f. The period the RP has served on remand in this country and the sentence remaining to be served, including whether the remaining sentence is close to the 4 month dual criminality threshold; [187]
    g. The Appellant's own Article 8 rights (as opposed to those of his family);[188]

[182] See, e.g.: *Zagul v Poland* [2013] EWHC 4177 (Admin), *GF v Latvia* (unreported), *Jansons v Latvia* [2009] EWHC 1845 (Admin).
[183] See, e.g.:*Neuman v Poland* [2013] EWHC 605 (Admin), *Cazan v Huneadora Court, Romania* [2012] EWHC 3991 (Admin,) *Potocky v Slovakia* [[2013] EWHC 2052 (Admin), *Juchniewicz v Poland* [2013] EWHC 1529 (Admin), *Garbowski v Poland* [2013] EWHC 3695 (Admin)
[184] *Goman v Poland* [2013] EWHC 3606 (Admin)
[185] *Urbanczak v Poland* [2013] EWHC 2390 (Admin), *Fridenberga v Latvia* [2013] EWHC 317 (Admin), *Gruszecki v Poland* [2013] EWHC 1920 (Admin), *Sobieraj v Poland* 19/07/2013, *Chmura v Poland* [2013] EWHC 3896 (Admin)
[186] *Podolski v Poland* [2013] EWHC 3593 (Admin), *Jesionowski v Poland* 29.01.14, *S v Poland* (Dec 2013 unreported); *S v Poland*, Dec 2013 unreported.
[187] *Neuman v Poland* [2013] EWHC 605 (Admin), *Gruszecki v Poland* [2013] EWHC 1920 (Admin). *Newman v Poland* [2012] EWHC 2931 (Admin), *Wysocki v Poland* [2010] EWHC 3430 (Admin), *Kupczynski v Poland* [2012] EWHC 3332 (Admin).
[188] *Sobieraj v Poland* [2013] EWHC 2450 (Admin)

h. The health of a child or spouse left behind.[189]
i. The type of offending, particularly is non-violent or sexual offending[190]

5. The committee received no evidence relating to Articles 5 and 6 of the ECHR, why do you think that was?

16. That is perhaps because it no specific questions were asked. Article 5 is rarely, if ever argued in an EAW case and in Part 2 cases it adds little to Article 6 or an abuse of process argument in general. Having been reminded by the evidence of Mark Summers QC there are a few Article 5 cases which are clear argument such as Dewani and Shankeran cases where it has been argued. But not in my experience often.

17. In my opinion to show an Article 6 breach is exceptionally hard because absent of political involvement (Ukraine, Turkey, Russia, Rwanda et al) all jurisdictions have different systems and it is very difficult to attack them for a common lawyer. The test is very high and not easily as a prospective breach to show. It is also easier for assurances to be perceived as realistic, for instance if a judge write that a Defendant will have to opportunity to cross examine witnesses, absent of political involvement or bad faith this will be nigh on impossible to displace.

18. The test for discharge in extradition proceedings is a "real risk of a flagrant denial of a fair trial" per R(Ullah) v Special Immigration Adjudicator [2004] 2 AC 323, para 24; Insanov v Azerbaijan Application No 16133/08.

19. A "flagrant denial of justice" is "synonymous with a trial which is manifestly contrary to the provisions of art. 6 or the principles embodied therein": Othman v UK (2012) 55 EHRR 1 at §259. It is common ground that strong evidence is required, and that the particular circumstances of the individual must be considered. As such, the following forms of unfairness have been held to be sufficient to meet the test:

    a. A trial which is summary in nature and conducted with a total disregard for the rights of the defence: see Bader v Sweden (2008) 46 EHRR 13 at §47;

    b. Detention without any access to an independent and impartial tribunal to have the legality the detention reviewed: Al-Moayad v Germany (2007) 44 E.H.R.R. SE22 at §101;

    c. Deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country: Al-Moayad v Germany (2007) 44 E.H.R.R. SE22 at §101;

[189] *Juszczak v Poland* [2013] EWHC 526 (Admin), *Ode v Ireland* [2013] EWHC 3718 (Admin); *Wielgus v District Court in Krakow*, *Poland* [2012] EWHC 3975 (Admin), *Nikitins v Latvia* [2012] EWHC 2621 (Admin), *Welke v Poland* [2013] EWHC 320 (Admin), *Tomaszewicz v Poland* [2013] EWHC 3670.
[190] *A and B v Hungary* [2013] EWHC 3132 (Admin). Moses LJ

d. A prosecutor who acts in bad faith and/or is corrupt: Dudko v Russia [2010] EWHC 1125 at para 41-43.

e. Restrictions on the defence's ability to call evidence at trial: Brown and others v Rwanda [2009] EWHC 770 (Admin) at §66;

f. The absence of an independent and impartial tribunal: Brown and others v Rwanda [2009] EWHC 770 (Admin) at §121; and/or,

g. The admission of any evidence obtained by torture, and potentially any evidence obtained by other forms of ill-treatment which fall short of torture: Othman at §267.

20. Any assessment of the prospective (un)fairness of a trial must examine the relevant judicial system "in all the circumstances", take into account all the available evidence which touches upon that system, and consider the issue by reference to the events in other proceedings: see Brown at §121. It is therefore an assessment to be conducted 'in the round'.

21. Very few people have argued Article 6 successfully and none to my knowledge within the EAW scheme in recent years.

Assurances

6. What proportion of extradition cases involve assurances?

22. I don't have statistics but a considerable number. There are however many different types of assurance. For instance in USA cases it used to be the case in murder extraditions that an assurance was sought that the death penalty would not be used. It is now commonly included within the request. Other assurances deal with the right to re-trial or health care. All those assurances that give a legal right in a trial or criminal process are more easily identifiable and hence very difficult to displace.

23. If an EAW partner says that according to their law a person will receive a right to re-trial, that can be challenged by expert evidence but is rarely if ever successful as a systematic challenge but in certain cases it can be as an individual challenge.

7. The test for assessing assurances includes consideration, on a case-by-case basis, of the extent to which their fulfilment is capable of being verified. The Court will also have regard to 11 factors as identified in Othman. Are these considerations given enough weight in practice, using examples of case law?

24. Assurances and their monitoring a weak legal safeguard. It must be remembered that in order for an assurance in an Article 3 or 6 case to be needed there must be fundamental problems with a jurisdictions human rights or respect for the rule of law.

25. Assurances are an easy way out for the courts. Jurisdictions can have fundamental problems with their prisons but a letter seems to be able to mend it. In the Lithuania cases the assurance was breached. In relation to prison condition cases there has been no real analysis of the practical impact of the monitoring of assurances. Many jurisdiction have not even implemented OPCAT and the NPM.

26. The problem with the above question is that the Othman criteria are given cursory analysis by the courts because it is usually obvious if a jurisdiction is going to deliberately breach them but not if they are simply unable to fulfil their promise. How for instance can a Defendant convicted of a serious crime serving 25 years with an assurance that he will have 3sqm of cell space be said to have that guaranteed for 25 years? What other factors might change in that time? How might they be treated by other inmates with less space and poorer conditions?

27. I have written a lot about European Prisons and that has been my expertise for the last 5 years. However, it is worth mentioning that the super max prisons in the USA are in my opinion by any European standards simply horrific[191].

Monitoring

8. Concern has been expressed as to the ability of an individual to report breaches of assurances after they have been returned to a requesting State and the remedies available in such cases.

a. How are breaches reported?
They aren't in my experience.
b. If a State is found to be in breach of the assurances it has given, how does the surrendering State address this?
As almost no one ever finds out. There is almost nothing that can be done. There is no legal remedy unless all parties are signatories to the ECtHR and then there is only declaratory relief and damages available.
c. Is it appropriate for these factors of reporting breaches and redress to be codified, and if so how could this be done?
In my opinion in relation to prions and Article 3 OPCAT and NPM should be sufficient. In relation to other matters it is very difficult to monitor as there is no mechanism other than to instruct a local lawyer. Extradition lawyers have no locus on finding out what has happened to clients who have been extradited.

Monitoring is extremely difficult in particular where breaches are caused by administrative rather than deliberate breaches. It is difficult for information to feed.

9. A number of suggestions have been received in written evidence as to how assurances might be monitored. These include monitoring being a function of UK foreign policy. It

[191] See http://www.amnestyusa.org/sites/default/files/amr510402014en.pdf

being overseen by the courts and the UK only entering into assurances with States which are party to the OPCAT. What would be the most effective way of monitoring assurances?

28. I agree with the Human Rights Implementation centre that the OPCAT and NPM mechanism is the best solution in most cases. However, in many jurisdictions it is not implemented or is implemented poorly. In reality the Courts once having found a fundamental breach of human rights be it Article 3 or 6 should be far more inclined to question the efficacy of the assurance. Consequently a proper monitoring mechanism is essential and so a UK court needs to be satisfied that there is a proper independent, robust and effective monitoring system within the requesting state. That is likely to consist of a proper OPCAT and NPM implementation.

24 October 2014

Arun Kundnani, Pardiss Kebriaei, Sally Eberhardt, Baher Azmy, William P. Quigley, Laura Rovner, Saskia Sassen, Jeanne Theoharis – Written evidence (EXL0049)

Submission to be found under Baher Azmy

Mike Laloe – Written evidence (EXL0025)

1. British residents should not be extradited without a basic (prima facie) case against them being tested in a UK court

2. If their alleged activity took place wholly or substantially in the UK, a judge should be able to bar their extradition – whether or not the CPS decides to prosecute in the UK

3. The automatic right of appeal against an extradition order should be reinstated

4. Extradition is part legal and part political – the Home Secretary should once more be obliged to block extraditions that would breach human rights

5. Legal aid in extradition cases should not be means tested

6 September 2014

The Law Society – Written evidence (EXL0046)

Response to the Call for Evidence by the House of Lords Select Committee on Extradition Law

Introduction

1. The Law Society of England and Wales (the Law Society/the Society) is the independent professional body, established for solicitors in England and Wales in 1825, that works globally to support and represent its 159,000 members, promoting the highest professional standards and the rule of law. The Law Society negotiates on behalf of the profession and makes representations to regulators and Government in both the domestic and European arena.

2. This submission is prepared in response to the Call for Evidence launched by the Extradition Law Select Committee of the House of Lords on Extradition Law.

Summary

- Recent amendments to the Extradition Act 2003 might be perceived to introduce a layer of complexity to the UK's extradition law, as they involve potentially significant changes to a regime that has been relatively static for the last decade. It may take some time before practitioners become fully acquainted with these arrangements and before their impact can be seen.
- The Law Society believes that extradition law must be seen to be responsive to the increase in multi-jurisdictional crime. While extradition does not address the problem of parallel criminal proceedings for multi-jurisdictional crime, it may indirectly reduce the prospect of parallel proceedings in jurisdictions which recognise double jeopardy protections.
- With regard to the European Arrest Warrant (EAW), while there is room for further improvements to the regime, it is clear that the introduction of the EAW scheme has improved extradition arrangements between EU Member States by considerably simplifying and speeding up the extradition process.
- The Law Society is of the view that the EAW scheme should, even in the absence of any amendments, improve organically as EU Member States become more familiar with the operation of each others' respective criminal justice systems and as common understandings develop. Any amendment of the EAW scheme would need to be carefully considered in order to avoid undermining the efficiency of the process. However, legislative amendments to the EAW scheme might ultimately be the only way to address concerns which have arisen in the EU Member States.
- There must be regular reviews of countries designated as not required to provide a prima facie case in support of a request, as recommended by the Baker Review.
- The perceived imbalance in the current UK-US extradition arrangements are due to differing requirements for UK and US extradition requests. In the Law Society's view, this difference is one of form and not substance. Any perceived injustice in US-UK extradition is likely to reflect the differences between the respective criminal justice systems.

General

Does the UK's extradition law provide just outcomes? Is the UK's extradition law too complex? If so, what is the impact of this complexity on those whose extradition is sought?

3. The Law Society is of the opinion that assessing whether legislation and procedural rules relating to extradition provides "*just outcomes*" is a subjective exercise. For whom should the outcome of extradition be "*just*" – for the requesting and requested States, for the person whose extradition is sought or for the victim of the extradition offence? Critical media commentary tends to focus on the position of the States, by asking whether extradition arrangements are appropriately reciprocal; notably in connection with the extradition arrangements between the UK and the US, which are widely (and incorrectly) perceived to be unbalanced. The Law Society would like more clarity on what the measure of a "*just outcome*" should be.

4. Recent amendments to the Extradition Act 2003 in the Crime and Courts Act 2013 and the Anti-Social Behaviour, Crime and Policing Act 2014 might be perceived to introduce a layer of complexity to the UK's extradition law, in that they involve potentially significant changes to a regime that has been relatively static for the last decade and which may take some time for practitioners to become fully acquainted with. A further potential complexity is inherent in the very nature of extradition – the UK courts, like the courts in every requesting State, have to grapple to some extent with foreign laws and procedures in order to confirm whether an extradition request is valid. For example, where a double criminality requirement has to be met the transposition exercise may not always be straightforward.

5. The impact of any legal complexity on those whose extradition is sought may not be readily apparent. Extradition is likely to be a confusing process to the person whose extradition is sought, under any circumstances. In order to ensure that the person whose extradition is sought is treated justly, despite any legal complexity, the procedural protections available should not be less than those available at trial.

Is extradition law fit for purpose in an era of increasingly multi-jurisdictional crime?

6. Extradition law, like any other law, must be responsive to the increase in multi-jurisdictional crime. Not only are people more mobile, but also the methods of offending (including by technological means) do not respect territorial boundaries. The availability of extradition is essential to enabling multi-jurisdictional crime to be dealt with/brought to justice, so if multi-jurisdictional crime is increasing it follows that any restrictions on the availability of extradition should be reduced. This has been the case under the European Arrest Warrant (EAW) regime operated by the EU Member States, but extradition arrangements other than between EU Member States have not been "streamlined" in a comparable way.

7. Extradition does not address the problem of which State should prosecute multi-jurisdictional crime, but it may indirectly avoid the prospect of parallel criminal prosecutions of the same offences at least in jurisdictions which recognise double

jeopardy protections. The introduction of the forum bar should enable the UK to pursue prosecutions of persons within its territory even if the conduct in question is already the subject of an overseas prosecution. Similarly, the new provisions requiring extradition to be postponed if the person whose extradition is sought has been charged with an offence in the UK should further bolster the ability of the UK authorities to pursue appropriate prosecutions unhampered by extradition requests. Conversely, the existence of functioning extradition arrangements might also incentivise States to exercise extra-territorial jurisdiction and thereby increase the prospect of jurisdictional conflict. The prospect of multiple criminal prosecutions of the same conduct is increasing, but it is not a problem that extradition can or should solve.

8. Instead, the value of extradition is that it enables multi-jurisdictional crime to be prosecuted at a national level. The alternatives would be incomplete prosecutions of multi-jurisdictional crime or prosecution by a supranational entity only.

To what extent is extradition used as a first resort when prosecuting a crime committed in another jurisdiction? Should greater use be made of other remedies?

9. The Law Society does not wish to make any generalisations about the practices adopted in other jurisdictions, whose criminal justice systems will inevitably differ considerably from the common law adversarial system in England and Wales. To the extent that extradition requests might, on occasion, be made prematurely, we note that the criteria for a valid request are such that an investigation would need to be at a reasonably advanced stage in order for them to be satisfied. Furthermore, we do not regard early extradition as problematic *per se* – particularly in light of the speed with which information is communicated and the ease of traversing national borders, which both increase a fugitive's flight risk. Instead, the focus should be on safeguards to ensure that the rights of an extradited person are respected after extradition has taken place – for example, by restricting the circumstances in which, and the period for which, an extradited person can be detained in advance of trial.

10. Recent amendments to the Extradition Act 2003 may address some of these concerns. Provisions introduced by the Anti-Social Behaviour, Crime and Policing Act 2014 enables the UK extradition court to refuse an EAW where the issuing State has not taken both a decision to charge and to try the person, unless the person's presence in that country is required in order for such a decision to be taken. The introduction of this provision should go some way to addressing concerns over the lengthy pre-trial detention of British citizens overseas, by discouraging premature extradition requests. A further provision enables the person whose extradition is sought to speak with the authorities in the requesting state before extradition takes place, either by way of a temporary transfer or by video link.

11. Concerns about early extradition may also be addressed by Framework Decision 2009/829/JHA[192] which applies the principle of mutual recognition to decisions on

[192] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:294:0020:0040:EN:PDF

supervision measures as an alternative to provisional detention. Moreover, a future EU instrument on minimum standards for pre-trial detention[193] could improve the position of extradited persons further.

European Arrest Warrant

On balance, has the European Arrest Warrant (EAW) improved extradition arrangements between EU Member States?

12. While there is room for further improvements to the EAW regime, it is clear that the introduction of the EAW has improved extradition arrangements between EU Member States by speeding up the extradition process. We agree with the Government's analysis that "*the European Arrest Warrant has been successful in streamlining extradition processes and returning serious criminals*."[194]

13. The EAW has reduced the length of extradition proceedings by removing some of the grounds for refusing extradition requests and by imposing strict time limits for acting on requests. Prior to the EAW, extradition of an individual used to take one year, on average. In 2011, the Commission reported that the time for extradition pursuant to the EAW scheme had been cut to an average of 48 days.[195] The extent of the improvement is readily apparent when contrasted with the length of extradition proceedings as between non-EU Member States, whether pursuant to bilateral or multilateral treaties or "special" extradition arrangements.

14. By speeding up the extradition process the EAW scheme should be benefiting both the requesting and requested States, as well as the accused – who should spend less time in pre-trial detention as a result.

15. We understand that the use of standard forms and procedures associated with the EAW has also introduced a greater degree of certainty of outcome, and thereby improved confidence in mutual legal assistance in general on the part of investigators and prosecutors.

How should the wording or implementation of the EAW be reformed?

16. We are aware that the Baker Review recommended amendments to improve the efficiency of the EAW scheme, by way of both legislative amendments and enhanced dialogue and cooperation at EU level. The Law Society agrees with this recommendation but adds the following considerations:

    - The EAW scheme should, even in the absence of any amendments, improve organically as EU Member States become more familiar with the operation of each others' respective criminal justice systems and as common understandings develop.

[193] Commission Green Paper on the application of EU criminal justice legislation in the field of detention
[194] European Scrutiny Committee - the UK's block opt-out of pre-Lisbon criminal law and policing measures, available at http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/683/68309.htm
[195] Commission Report 2011 http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52011DC0175

- Any amendment of the EAW scheme would need to be carefully considered in order to avoid undermining the efficiency of the current process.
- Legislative amendments to the EAW scheme might be the only way to address concerns which have arisen in the EU Member States.

17. A key amendment to the EAW scheme which has been mooted for some time now is the introduction of an express proportionality requirement. The principle of proportionality already exists in EU law – in accordance with Article 5(4) of the Treaty on the European Union (TEU), "*under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*". The extent to which this principle is reflected in the EAW scheme has been unclear since the inception of the process, in the absence of an express reference in the EAW Framework Decision. The issues which arose as a result have been well publicised, and were fully examined in the Baker Review.

18. The introduction of an express proportionality requirement into the EAW regime would function as a *de minimis* principle, preventing extradition for trivial offences. Such a proportionality check is now a feature of the domestic implementation of the EAW regime, following amendments to the Extradition Act 2003.[196] As a result, extradition requests made in respect of trivial offences should no longer be acted on by the UK authorities. Other EU Member States have also amended their legislation and procedures, in order to ensure that their requests are proportionate – for example, we understand that Polish prosecutors no longer apply the principle of legality when seeking to issue an EAW and that sentencing laws in Poland have been amended to reduce reliance on suspended custodial sentences.

19. Introducing a similar proportionality requirement into the EAW regime would ensure that the same approach is adopted by the other EU Member States. In the Law Society's view, this would be preferable to the current position, as Member States could adopt inconsistent approaches to proportionality in their implementing legislation. It would also make the EAW scheme consistent with the EIO scheme. Article 6(1) of the recently adopted Directive on the European Investigation Order provides that an EIO may only be issued if "*it is **necessary and proportionate** for the purpose of the proceedings [...] taking into account the rights of the suspected or accused person*".

20. We note that the introduction of a proportionality requirement is also supported by the European Parliament, which in its resolution of 27 February 2014 recommended that the Commission review the operation of the EAW scheme and submit, within a year, a legislative proposal for its amendment.[197] In particular, the European Parliament called for the introduction of a "*proportionality check when issuing mutual recognition decisions, based on all the relevant factors and circumstances such as the seriousness of the offence, whether the case is trial-ready, the impact on the rights of the requested person, including the protection of private and family life,*

[196] Section 157 of the Anti-Social Behaviour, Crime and Policing Act 2014 inserted a new section 21a into Part 1 of the Extradition Act 2003

[197] European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL))

the costs implications and the availability of an appropriate less intrusive alternative measure."

Are standards of justice across the EU similar enough to make the EAW an effective and just process for extradition?

21. The European Parliament in its 2014 resolution also recommended the introduction of a mandatory refusal ground where there are substantial grounds to believe that the execution of the request would be incompatible with the executing Member States' obligation under Article 6 TEU and the Charter. A similar position is already adopted in the UK's implementing legislation, which requires extradition to be refused if it would not be compatible with the Convention rights of the person whose extradition is sought. The Law Society would support the introduction of an express requirement to this effect into the EAW scheme for the same reasons that it would support the introduction of an express proportionality requirement – in order to ensure consistency throughout the EU.

22. Such an amendment would not, however, address the variation in standards of justice across the EU. While the common membership of the ECHR ensures a base level of procedural protections in the EU Member States, increased procedural rights protections are required to support the operation of mutual recognition instruments such as the EAW Framework Decision. The "roadmap" measures agreed as part of the EU Stockholm programme have sought to address this need, and the Law Society regrets that the UK has not opted in to all of these instruments. In particular, the Law Society regrets the UK Government's intention not to opt into the proposed Directive on provisional legal aid and legal aid in EAW proceedings.[198]

How will post-Lisbon Treaty arrangements change the EAW scheme once the UK opts back in to it?

23. The Law Society welcomes the Governments' intention to opt back into the EAW, as outlined in our written submissions on the exercise of the block opt-out.[199]

24. Post-Lisbon, the Court of Justice of the European Union (CJEU) will exercise a broader review jurisdiction over the EAW scheme. The court has previously had limited oversight of the operation of the EAW scheme, as a result of preliminary reference requests made by courts in Member States who, unlike the UK, had consented to the CJEU's jurisdiction over third pillar measures. The UK's domestic implementation of the EAW scheme will now become reviewable. However, the difference may not in practice be significant, as the UK courts have in the past nevertheless had regard to the CJEU's interpretations of the EAW Framework Decision.[200]

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[198] Com(2013) 824 final Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects of accused persons deprived of liberty and legal aid in European Arrest Warrant Proceedings

[199] Written evidence from the Law Society of England and Wales, December 2012, http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/Protocol36OptOut/VolofevidenceP36final220413.pdf Written Evidence from the Law Society of England and Wales and the Law Society of Scotland, October 2013 http://www.publications.parliament.uk/pa/cm201314/cmselect/cmjust/605/605vw06.htm

[200] For example, Case C-105/03 Pupino [2005] ECR I-5285; [2006] QB 83 was followed by the House of Lords in *Dabas v. High Court of Justice in Madrid, Spain* [2007] 2 AC 31

Prima Facie Case

In circumstances where a prima facie case is not required, do existing statutory bars (the human rights bar, for instance) provide sufficient protection for requested people?

25. The requirement of a *prima facie* case is no panacea. It may even provide a lesser form of protection for the person whose extradition is sought than the current statutory bars, as outlined in the Law Society's response to the Baker Review.[201]

Are there territories that ought to be designated as not requiring a prima facie case to be made before extradition? What rationale should govern such designation? What parliamentary oversight of such designation ought there to be?

26. The Law Society sees no reason in principle why certain territories should not be exempt from the requirement to demonstrate a prima facie case in support of an extradition request. As outlined in the Law Society's response to the Baker Review, this position reflects the UK's obligations as a signatory to the European Convention on Extradition 1957 not to require requests to be accompanied by evidence of a prima facie case unless it enters a reservation to this effect.

27. The Baker Review considered this question in some detail, and concluded that the existing statutory protections should be supplemented by periodic reviews of designated Category 2 territories so as to take proper account any adverse judicial pronouncements. The Government accepted the need for periodic reviews of designations,[202] and the Law Society hopes that such reviews are indeed being carried out. The Baker Review specifically concluded that diplomatic repercussions should not be a legitimate reason to not revoke a designation, and the Law Society agrees with this position.

US/EU Extradition

Are the UK's extradition arrangements with the US comparable to other territories that do not need to show a prima facie case? If so, should the US nonetheless be required to provide a prima facie case, and why?

28. As outlined in the Law Society's response to the Baker Review, there is a perceived imbalance in the current UK-US extradition arrangements due to the different requirements for UK and US extradition requests. Under the current UK-US treaty, US requests in accusation cases only need to identify the person sought, the facts of the offence, the applicable law and provide a copy of the domestic arrest warrant and any charging document. UK courts do not, therefore, assess the strength of evidence in extradition proceedings relating to US requests. By contrast, UK requests must additionally set out such information as would provide a reasonable basis to believe that the person sought committed the offence.

[201] Law Society response to the Home Office Extradition Review, March 2011 available at http://www.parliament.uk/documents/joint-committees/human-rights/Law_Society_Response_to_Home_Office_Review_of_Extradition.pdf
[202] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228566/8458.pdf

29. As the Baker Review concluded, the difference is one of form and not substance.[203] A US court needs to be satisfied, before issuing a domestic arrest warrant, that there is 'probable cause'. This is effectively the same as a requirement to provide a prima facie case.

30. The Law Society agrees with this conclusion and sees no obvious reason why the UK should seek to renegotiate its Extradition Treaty with the US so as to insert a prima facie case requirement. In our response to the Baker Review, we indicated that any perceived injustice in US-UK extradition cases may be less a result of the absence of a reciprocal prima facie evidence requirement than of the differences between the respective criminal justice systems. In its response to the Baker Review the Law Society noted that there is little scope for the UK courts when considering a US extradition request to take into account the practical realities of the disparity between the respective criminal justice systems such as the very different approaches to the availability of legal aid and to the practice of plea bargaining, the different sentencing practices and different conditions of detention. To date, such differences have not been found to violate the right to a fair trial under Article 6 ECHR or to merit a stay of extradition proceedings as an abuse of process.

Political and Policy Implications of Extradition

What effect has the removal of the Home Secretary's role in many aspects of the extradition process had on extradition from the UK?

To what extent is it beneficial to have a political actor in the extradition process, in order to take account of any diplomatic consequences of judicial decisions?

31. The Home Secretary's previous ability to exercise discretion provided a further safeguard for persons whose extradition was sought. It follows that the removal of this discretion meant that extradition could only be resisted through the courts.

To what extent are decisions of where to prosecute certain crimes and whether to extradite influenced by broader political, diplomatic or security considerations?

32. Considerations or international relations and national security considerations could potentially influence decisions to prosecute – for example, a decision might be taken not to prosecute if it would involve public disclosure of information or material that could harm international relations and national security. However, as a general rule political, diplomatic and security consideration tend not to play a prominent role in the guidance governing the exercise of prosecutorial discretion. Specifically as regards multi-jurisdictional offences, the Law Society notes that the Director of Public Prosecution's *Guidance on the handling of cases where the jurisdiction to prosecute is shared with prosecuting authorities*[204] do not expressly contemplate that

[203] The Baker Review concluded, at page 248, that "*there is no reasonable difference between the reasonable suspicion and the probable cause tests [...] there is no imbalance between the respective tests as they are applied in each jurisdiction*".
[204] Available at http://www.cps.gov.uk/publications/directors_guidance/director_s_guidance_on_concurrent_jurisdiction.html

decisions to prosecute should be influenced by broader political, diplomatic or security considerations.

33. The Law Society sees no reason in principle why the considerations governing decisions to extradite should be any different – provided that there is an avenue for scrutinising and if necessary challenging such decisions, whether by judicial review or by the constitutional convention of ministerial accountability. However, we note that such considerations might in certain circumstances breach the UK's international obligations – for example, where extradition requests are made in support of prosecutions of overseas bribery. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, to which the UK is a signatory, states in Article 5 that the investigation and prosecution of the bribery of a foreign public official shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved. Whilst this obligation does not expressly extend to the UK's provision of mutual legal assistance and extradition, a decision not to extradite a person accused or convicted of bribing an overseas public official might be argued to breach Article 5 if it is based on diplomatic considerations.

Human Rights Bar and Assurances

Is the human rights bar as worded in the Extradition Act, and as implemented by the courts, sufficient to protect requested people's human rights?

Is the practice of accepting assurances from requesting states to offset human rights concerns sufficiently robust to ensure that requested people's rights are protected?

What factors should the courts take into account when considering assurances? Do these factors receive adequate consideration at the moment?

To what extent is the implementation of assurances monitored? Who is or should be responsible for such monitoring? What actions should be taken in cases where assurances are not honoured?

34. The courts in England and Wales are, as public authorities for the purposes of the Human Rights Act 1998, obliged to act compatibly with the ECHR in the course of extradition proceedings like in all legal proceedings. In addition to the human rights bar, the courts also exercise an inherent jurisdiction to dismiss extradition proceedings as an abuse of process. Persons within the UK's jurisdiction would also have recourse to the European Court of Human Rights, and could seek interim measures to further safeguard their rights.

35. Diplomatic assurances must be treated with caution as they are necessarily an imperfect protection, and the courts must guard against their systematic use as a way for the UK to avoid its international obligations. The negotiation of and decision to place reliance on diplomatic assurances are inherently political decisions.

Other Bars to Extradition

What will be the impact of the forum bar brought into force under the Crime and Courts Act 2013?

36. Some commentators have suggested that the ability of a prosecutor to issue a certificate effectively preventing reliance on the forum bar renders the protection conferred by the forum bar illusory. An assessment of its impact is, however, premature.

What will be the impact of the proportionality bar in relation to European Arrest Warrant applications recently brought into force under the Anti-social behaviour, Crime and Policing Act 2014?

37. The Law Society believes that the symbolical significance of the proportionality bar should not be underestimated. An assessment of its impact is, however, premature.

Right to Appeal and Legal Aid

To what extent have changes to the availability of legal aid affected extradition practice, and the provision of specialist legal aid to requested persons?

What has been the impact of the removal of the automatic right to appeal extradition?

38. It is too early to assess what the impact will be of changes to the availability of legal aid and the removal of the automatic right to appeal extradition.

Devolution

14. Are the devolution settlements in Scotland and Northern Ireland fit for purpose in this area of law?

How might future devolution or Scottish independence affect extradition law and practice?

39. The Law Society is not in a position to respond to these questions.

12 September 2014

The Law Society of Northern Ireland – Written evidence (EXL0081)

RESPONSE TO THE HOUSE OF LORDS SELECT COMMITTEE ON EXTRADITION LAW

Introduction

1. The Society welcomes the opportunity to comment on the evidence considered by the House of Lords Select Committee on Extradition Law.

Access to specialist legal advice

2. Given what we believe to be the comparatively small number of extradition cases arising each year in Northern Ireland, we do not consider that an accreditation scheme would be viable in this jurisdiction. Such a scheme would be costly, requiring administrative and practical arrangements to be put in place for mandatory training and examination.

3. Furthermore, the Society understands that the high expectations and supervision of the judiciary in Northern Ireland ensures that only solicitors with the required level of specialist knowledge take instructions in extradition cases here.

Legal aid

4. In Northern Ireland the power to grant legal aid in connection with extradition proceedings before a County Court or High Court in Northern Ireland lies with an appropriate judge or High Court judge applying the test set out in Section 184 of the Extradition Act 2003. The work carried out by a solicitor and, when appropriate, counsel under this Section is payable at rates set out in Lord Chancellor's Direction No. 10, under Rule 4(1) of the Legal Aid in Criminal Proceedings (Costs) Rules (Northern Ireland) 1992 – see http://www.dojni.gov.uk/index/legalservices/northern-ireland-legal-services-commission-legal-profession/lord-chancellors-direction-no.10-extradition-cases.pdf

5. The Society understands that the number of extradition cases arising in Northern Ireland per annum is low. We have requested the specific number of cases processed in recent years. We will forward this information to the Committee if and when received.

6. For those extradition cases which do arise, the Society further understands that legal aid is almost invariably granted to the defendants concerned without unreasonable delay. We have also requested from the Northern Ireland Legal Services Commission (NILSC) the specific number of legal aid applications granted in recent years and the processing times for same, which we will forward to the Committee if and when received.

7. Subject to receipt of the information referred to in paragraphs 5 and 6, the Society considers that automatically granting legal aid in extradition cases is unlikely to result in a 'latent' group of defendants applying for and receiving legal aid.

8. In this jurisdiction, a Statement of Means is provided to the appropriate judge or High Court judge, which normally allows them to decide legal aid applications without undue delay.

9. The Society shares the view of others expressed in evidence already considered by the Committee with regards to a target period of 21 days in respect of extradition in EAW cases. The Society believes that this timeframe is simply unrealistic in light of our adversarial system.

10. The Society would welcome progression towards more efficient digital systems at the NILSC. Unfortunately there has not been significant investment to date in the available technology there to allow for an effective IT system.

11. A range of expert witnesses are often needed in connection with extradition proceedings. These include medical experts who assess the mental health of clients who may be disproportionately impacted by conditions in a requesting country, and social workers who, for example, can indicate the repercussions of extradition on children. Experts who carry out inspections of prison conditions in the requesting country will on occasion also be required. The experience of practitioners here is that there is a paucity of same in the United Kingdom, never mind in Northern Ireland.

12. Whilst legal aid authority may be granted to instruct an expert witness or to obtain expert advice, practitioners are on occasion encountering further difficulties in retaining a willing expert to carry out the necessary research for a case because the NILSC is unable to facilitate interim payments for such work. In one case, an expert witness has issued proceedings against the law firm which retained the expert because there was an inordinate delay in payment between the carrying out of the work and the payment for it. As a result, it is increasingly challenging for practitioners in this area to persuade expert witnesses to carry out work in order to advance the progression of these cases.

13. The Society therefore perceives a serious need for consideration in Northern Ireland to be given to statutory provisions which would allow interim payments of legal aid to be paid to expert witnesses and other disbursements in extradition proceedings.

Right of appeal

14. The Society regards the automatic right to appeal a decision to extradite as a very important safeguard against wrongful extradition.

15. Given that an applicant would be required to apply for leave to appeal if the proposal to remove an automatic right of appeal was given effect, an application which would not in itself bar extradition, we have grave concerns about whether it would be possible for a defendant to be extradited prior to receiving a decision on leave to appeal. Extradition should not occur before the applicant has had the opportunity to have the decision affecting them appropriately reconsidered.

16. In any event, the Society understands that its members take a very pragmatic approach to advice in respect of appeals. We do not believe that there is any evidence to suggest that current extradition appeals in this jurisdiction are considered vexatious or unmeritorious.

Miscellaneous

17. The High Court[205] and the Court of Appeal[206] in Northern Ireland have recently considered the human rights bar in relation to appeals centred on Article 8 of the ECHR and the existing guidance on that issue provided by the Supreme Court.[207] The exposition and interpretation of the human rights bar in those cases may assist the Committee in its consideration of the accusation that the bar has been 'softened'.

Conclusion

18. The Society is grateful for the opportunity to submit a response in respect of the evidence considered by the House of Lords Select Committee on Extradition Law. We trust our contribution is constructive and are happy to engage further with the Committee to discuss any of the issues raised herein if required.

Law Society of Northern Ireland
24 November 2014

[205] *Poland v KS* [2014] NIQB 86 - http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2014/[2014]%20NIQB%2086/j_j_HIG9209Final.htm
[206] *Poland v RP* [2014] NICA 59.- http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2014/%5B2014%5D%20NICA%2059/j_j_MOR9373Final.htm
[207] *R (on the application of HH) v Westminster City Magistrates' Court* [2012] UKSC 25.

The Law Society of Northern Ireland – Supplementary written evidence (EXL0089)

Office of the Chairman and Chief Executive
Mr Conor McCormick
Research Intern

Dear Conor

HOUSE OF LORDS SELECT COMMITTEE ON EXTRADITION LAW

I am writing to acknowledge receipt of your letter dated 19 November 2014.

I can confirm that the Society understands that the power to grant Legal Aid in connection with extradition proceedings before a County Court or High Court lies with an appropriate Judge is correct. For this reason the Commission does not hold details of the number of applications made before a Judge or how long it takes ot process an application for Legal Aid.

The table below details the number of Certificates which the Commission has captured on our case management system for the years 2009/10 and 2013/14 based on certificates registered for Extradition Court Type. I thought it might be helpful to also provide you with a breakdown of those Certificates granted for solicitor only, granted for one Counsel and granted for two Counsel.

Year	Total Extradition Certificates Granted	Granted for Solicitor only	Granted for One Counsel	Granted for Two Counsel
2009/10	**14**	0	13	1
2010/11	**68**	2	60	6
2011/12	**73**	5	62	6
2012/13	**68**	1	63	4
2013/14	**92**	6	81	5

You might wish to consider contacting the Northern Ireland Courts and Tribunal Service who might be able to provide you with information in relation to the number of applications for Legal Aid made in each of these years.

I hope this information is of assistance to you.

Yours sincerely

Paul

Paul Andrews
Chief Executive NICTS

Extradition Cases

Year	Legal Aid Granted	No Legal Aid	Total
2009	2	4	**6**
2010	13	5	**18**
2011	44	1	**45**
2012	54	1	**55**
2013	49	3	**52**
2014*	52	0	**52**
	214	**14**	**228**

*Figures up to and including 29/12/2014

Extradition Appeals

Year	Legal Aid Granted	No Legal Aid	Total
2009	0	0	**0**
2010	1	2	**3**
2011	15	0	**15**
2012	15	0	**15**
2013	14	1	**15**
2014*	16	0	**16**
	61	**3**	**64**

*Figures up to and including 29/12/2014

NILSC

Year	Total Extradition Certificates Granted	Granted for Solicitor only	Granted for One Counsel	Granted for Two Counsel
2009/10	**14**	0	13	1
2010/11	**68**	2	60	6
2011/12	**73**	5	62	6
2012/13	**68**	1	63	4
2013/14	**92**	6	81	5

Conor McCormick

Northern Ireland Courts and Tribunals Service
www.courtsni.gov.uk

Our Ref:FOI 184/14
31 December 2014

Dear Conor

SUBJECT: Freedom of Information Request

Thank you for your request for information about extradition cases in Northern Ireland. Your request was received on **3 December 2014** and has been handled under the terms of the Freedom of Information Act 2000 (FOI).

We can confirm that the Courts and Tribunals Service holds some of the information you are seeking:

Extradition Cases

Year	Legal Aid Granted	No Legal Aid	Total
2009	2	4	**6**
2010	13	5	**18**
2011	44	1	**45**
2012	54	1	**55**
2013	49	3	**52**
2014*	52	0	**52**
	214	**14**	**228**

*Figures up to and including 29/12/2014

Extradition Appeals

Year	Legal Aid Granted	No Legal Aid	Total
2009	0	0	**0**
2010	1	2	**3**
2011	15	0	**15**
2012	15	0	**15**
2013	14	1	**15**
2014*	16	0	**16**
	61	**3**	**64**

***Figures up to and including 29/12/2014**

There are no cases with legal aid refused orders made and there is only one case with a legal aid deferred order made, and this was subsequently granted and is included in the figures above.

You may wish to note that specific guidance for recording extradition cases was issued in late 2009 therefore figures for 2009 and 2010 may not be comprehensive. You may also wish to note that cases just recently resulted are within the time to appeal so the 2014 figures may change if appeals are subsequently lodged.

Unfortunately NICTS does not hold information on "the time taken to process legal aid applications" if by this you mean the time taken to consider the application by the judge in the courtroom. However if this is referring to the time taken to process the granted application by the NILSC you may wish to direct that part of your request directly to them.

If you are dissatisfied with this response you may ask the Courts and Tribunals Service to conduct an internal review in relation to your request. A request for an internal review must be made within two months of the date of this letter. The request for an internal review should be addressed to: Records and Information Access Team, 4th Floor, Laganside House, 23 -25 Oxford Street, Belfast, BT1 3LA. If following the internal review you remain dissatisfied with the Courts and Tribunals Service's treatment of your request then you are entitled to make a complaint to the Information Commissioner. The Information Commissioner's address is Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AFIf you have any queries about your request please do not hesitate to contact me.

Please remember to quote the reference number above in any future communications.

Yours sincerely

Business Support
NICTS

19 January 2015

The Law Society of Scotland – Written evidence (EXL0039)

Response to the Call for Evidence by Select Committee of House of Lords on Extradition Law

The Law Society of Scotland's response
September 2014

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

The Society's Criminal Law Committee (the Committee) welcomes the opportunity to respond to the Call for Evidence by the Select Committee of the House of Lords on Extradition Law and should like to respond to questions contained within this call for evidence as follows.

1: Does the UK's extradition law provide just outcomes? Is the UK's extradition law too complex? If so, what is the impact of this complexity on those whose extradition is sought?

1. The Committee is of the view that the UK's extradition law is not too complex, with the extradition process considered to be straightforward, overall. Due to recent amendments to the Extradition Act 2003, some provisions are new thereby creating a perception of complexity as those using the law gain experience in applying the new provisions.
2. While the extradition law itself is not complicated, individual cases become more complex once the human rights test is applied since many of the points made in the cases are novel and therefore require further development. Most of the case law on extradition has developed through the application of Article 8.

2. Is extradition law fit for purpose in an era of increasingly multi-jurisdictional crime?

3. The increase in cross-border crime requires legislation that can deal with the complexities of multi-jurisdictions such as the choice of forum (i.e. the place where a person ought to be prosecuted for an offence they have allegedly committed). Part 1 of Schedule 20 of the Crime and Courts Act 2013 amended the Extradition Act 2003 in order to provide for a new forum bar to extradition. The amendments to the 2003 Act provide that the judge is required, in an extradition case, to consider the forum issue when deciding on whether an individual should be extradited to another country to face prosecution. Extradition can be barred by reason of forum if the judge decides that (i) a substantial measure of the relevant activity was performed in the UK; and (ii) it would not be in the interests of justice, having regard to a list of specified matters, for the extradition to take place.

4. The Committee believes that the detailed provisions of forum are suitable to address new forms of multi-jurisdiction crime such as internet crime and is therefore being developed appropriately to be fit for purpose. We note, however, that provisions relating to forum have not been implemented in Scotland

3. To what extent is extradition used as a first resort when prosecuting a crime committed in another jurisdiction? Should greater use be made of other remedies?

5. The Committee is not in a position to comment on the extent to which extradition is used as a first resort when prosecuting a crime committed in another jurisdiction. We wish to highlight, however, the importance of effective and efficient cross-border cooperation and communication with prosecutors in other countries in order to ensure that the most appropriate means are always used.

European Arrest Warrant

4. On balance, has the European Arrest Warrant (EAW) improved extradition arrangements between EU Member States?

1. While there is room for improvement, the EAW offers a better system than was in place before and has improved extradition arrangements between EU Member States. We support the Government's analysis that "the European Arrest Warrant has been successful in streamlining extradition processes and returning serious criminals."

2. Prior to the EAW, the 1957 Council of Europe Convention on Extradition was applied. Some barriers existed under this Convention including the nationality of those sought and the statute of limitations. In general, the EAW has benefitted the accused as extradition proceedings are more efficient and pre-trial detention periods tend to be significantly shorter than under the previous instrument.

How should the wording or implementation of the EAW be reformed?

3. While the implementation of the EAW has improved extradition arrangements, concerns have arisen regarding the operation of the EAW in Member States. We note, in this instance, the conclusions of the Review Panel on extradition which stated that improvements could be made to the EAW to ensure it functions more effectively through both legislative amendments and enhanced dialogue and cooperation at EU level.

4. The principle of proportionality is provided for under EU law with Article 5(4) of the Treaty on the European Union stating that "under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties". However, this principle has been called into question since the introduction of the EAW in 2004. We note the Report on the review of extradition which acknowledged that difficulties had arisen over the question of proportionality in respect of the EAW.

5. We are of the view that a proportionality requirement as well as a de minimis principle should be applied in considering whether an offence is sufficiently serious for the issuance of an EAW and in action by which an order is able to be executed. In order to improve proportionality in the application of the EAW in the UK, we welcome the introduction of a proportionality check in the Anti-Social Behaviour, Crime and Policing Act 2014. Section 157 of this Act introduces a new section 21A into Part 1 of the 2003 Criminal Justice Act. We are of the view that such a proportionality requirement should be introduced in an amendment to the EAW at EU level.

6. The Committee notes, however, the difficulties that have arisen when considering the introduction of a proportionality principle in a mutual recognition instrument as a ground for refusal in the executing state. Some Member States simply do not recognise the principle of proportionality or wish to incorporate it into current mutual recognition instruments. Moreover, the introduction of such a principle may be considered as challenging the principle of mutual recognition agreed by the Member States as it allows an executing Member State to question the warrant issued by the issuing Member State and therefore the judgments of the court in that state. While such concerns exist, we note the recently adopted Directive on the European Investigation Order which can be used as an example of the introduction of a proportionality principle in a recent mutual recognition instrument. Article 6(1) of the Directive provides that an EIO may only be issued by an issuing authority if "it is necessary and proportionate for the purpose of the proceedings [...] taking into account the rights of the suspected or accused person".

7. In addition to proportionality, we welcome the introduction of Section 156 of the Anti-Social Behaviour, Crime and Policing Act 2014. This introduces a new section 12A to the 2003 Act dealing with pre-trial detention, thus enabling the UK courts to bar surrender of the subject of an EAW where the issuing state has not taken both a decision to charge and a decision to try the person, unless the person's presence in that country is required in order to do so. The introduction of such a provision addresses concerns existing around the lengthy pre-trial detention of some UK citizens overseas.

8. While measures have been taken at national level to improve the application of the EAW, we believe that an amendment of the EAW decision is required at EU level. We therefore welcome the European Parliament's resolution of 27 February 2014 with recommendations to the Commission on the review of the EAW and on the submission, within a year, of legislative proposals to amend the EAW.

9. In particular, we welcome the European Parliament's call to introduce legislative amendments in order to provide for a "proportionality check when issuing mutual recognition decisions, based on all the relevant factors and circumstances such as the seriousness of the offence, whether the case is trial-ready, the impact on the rights of the requested person, including the protection of private and family life, the costs implications and the availability of an appropriate, less intrusive, alternative measure." In addition to the need for the introduction of a proportionality requirement, we would welcome the introduction of a better definition of serious crimes where the EAW should apply.

10. We also welcome the Parliament's recommendation to introduce a mandatory refusal ground where there are substantial grounds to believe that the execution of the measure would be incompatible with the executing Member States' obligation in accordance with Article 6 TEU and the Charter, notably Article 52(1).

Are standards of justice across the EU similar enough to make the EAW an effective and just process for extradition?

11. While EU justice measures have closed the gap between different standards in the Member States, there is a need to ensure a consistent and clear application of Union law regarding procedural rights and effective legal remedy in European Arrest Warrant proceedings. An example of efforts to ensure this occurs with regard to the EAW is the recent Commission proposal for a Directive on legal aid in European Arrest Warrant proceedings. We note, however, the UK Government's intention not to opt in to the Commission's Proposal.

12. While the UK has introduced new legislation in recent years to resolve some of the problems existing in relation to the EAW and extradition, there is a need to ensure that all Member States apply the provisions of the instrument in the same manner through the amendment of the EAW decision, as described above.

How will post-Lisbon Treaty arrangements change the EAW scheme once the UK opts back in to it?

13. We welcome the UK Government including the EAW in the list of measures which it wishes to opt in to. We believe, however, that there is a need for reform of the EAW in order to ensure that some of the shortcomings that currently exist are resolved at European level.

Prima Facie Case

5. In circumstances where a prima facie case is not required, do existing statutory bars (the human rights bar, for instance) provide sufficient protection for requested people?

14. The Committee notes the results of Sir Scott Baker's review in 2011 of the United Kingdom's Extradition Arrangements, particularly with regard to its conclusions and recommendations on the prima facie case requirement. We note the "legitimate concerns" raised "that once a country has been designated as a category 2 territory, no subsequent reassessment of the designation takes place" and the invitation for the Government to "periodically review the [...] designations, taking into account adverse extradition decisions in the United Kingdom and adverse judgments of the European Court of Human Rights, or other courts and bodies responsible for monitoring compliance with international human rights standards". While the Government accepted, in its response to the review, to periodically review designations, we are concerned that this has not been done. While we accept that removing the designation of a country might cause diplomatic repercussions, we agree with the conclusions of the review which state that "these factors should not

outweigh the need to ensure that we do not maintain general extradition arrangements with countries which routinely violate human rights or abuse the system of international cooperation with extradition". We would therefore wish for a regular revision of the list of designated countries in order to ensure sufficient protection for requested people.

Are there territories that ought to be designated as not requiring a prima facie case to be made before extradition? What rationale should govern such designation? What parliamentary oversight of such designation ought there to be?

15. The Committee is not in a position to respond to this question.

US/EU Extradition

6. Are the UK's extradition arrangements with the US comparable to other territories that do not need to show a prima facie case? If so, should the US nonetheless be required to provide a prima facie case, and why?

16. The Committee is not in the position to comment on practical examples of extraditions between the UK and US. However, we note the concerns that have been raised with regard to the perceived differences in tests applied for the arrest and subsequent extradition of an individual. In the United States, the Fourth Amendment to the Constitution provides that arrest may only take place if the probable cause test is satisfied while in the United Kingdom, the test of reasonable suspicion is applied. The Baker Review on extradition stated that "there is no reasonable difference between the reasonable suspicion and the probable cause tests and [...] there is no imbalance between the respective tests as they are applied in each jurisdiction". The Committee notes the findings of the Baker Review which outlined that the extradition arrangements operate fairly against persons in the United Kingdom who are sought for trial in the United States.

Political and Policy Implications of Extradition

7. What effect has the removal of the Home Secretary's role in many aspects of the extradition process had on extradition from the UK?
To what extent is it beneficial to have a political actor in the extradition process, in order to take account of any diplomatic consequences of judicial decisions?

8. To what extent are decisions of where to prosecute certain crimes and whether to extradite influenced by broader political, diplomatic or security considerations?

18. The Committee is not in a position to respond to these questions.

Human Rights Bar and Assurances

9. Is the human rights bar as worded in the Extradition Act 2003, and as implemented by the courts, sufficient to protect requested people's human rights?

10. Is the practice of accepting assurances from requesting states to offset human rights concerns sufficiently robust to ensure that requested people's rights are protected?

What factors should the courts take into account when considering assurances? Do these factors receive adequate consideration at the moment?

To what extent is the implementation of assurances monitored? Who is or should be responsible for such monitoring? What actions should be taken in cases where assurances are not honoured?

19. Accepting assurances from requesting states to offset human rights relies on mutual trust existing between the UK and the country in question. We are of the view that risks are associated with basing such assurances on mutual trust.

20. In this regard the Committee notes the case of Wright v Scottish Ministers 2004 SLT 283 based on the Extradition Act 1989 where the Scottish Executive took the step of investigating facilities in Estonia as part of assurances given by authorities in that Jurisdiction.

The Committee also notes the case of Othman (Abu Qatada) v United Kingdom 8139/09 [2012] ECtHR 56 which held that Abu Qatada could not be deported to Jordan as this would contravene his Article 6 ECHR Right to a Fair Trial. Following ratification of a UK/Jordan treaty that evidence gained through torture could not be used against him in his forthcoming trial, he was subsequently deported.

Other Bars to Extradition

11. What will be the impact of the forum bar brought into force under the Crime and Courts Act 2013?

21. As outlined in our response to question 4 above, the Forum bar is not applied under Scottish law.

12. What will be the impact of the proportionality bar in relation to European Arrest Warrant implications recently brought into force under the Anti-Social Behaviour, Crime and Policing Act 2014?

22. The proportionality bar introduced in relation to the EAW will enhance the procedural rights of persons requested for extradition in another Member State/country, the input of which remains to be seen.

Right to Appeal and Legal Aid

13. To what extent have changes to the availability of legal aid affected extradition practice, and the provision of specialist legal aid to requested persons?

What has been the impact of the removal of the automatic right to appeal extradition?

In relation to extradition practice, a substantial amount of work is often carried out during the initial stages of an extradition case, including examination of foreign documents and cross-border liaison. A solicitor will have to investigate whether the client has grounds to stay and will also have to request additional information within a tight timeframe.

Section 26 of the 2003 Act was amended by the Anti-Social Behaviour, Crime and Policing 2014 Act. The amendment removed the automatic right to appeal against an order of extradition and introduced a requirement for leave to appeal to the High Court. We have concerns that the complex issues involved in an extradition case might not always be resolved at first instance. The automatic right of appeal provided an important safeguard against wrongful extradition. However, it is less than 12 months since the removal of the right to appeal and therefore it is premature, at this stage, to be able to properly assess the impact of the change.

In terms of legal aid, first instance extradition cases are dealt with under summary criminal legal aid arrangements. The applicant will qualify for legal aid if he or she is financially eligible and if a grant of legal aid is considered to be in the interests of justice. If leave of appeal to the High Court is granted, then sanction of junior counsel is automatic.

In extradition cases, the legal aid application is rarely, if ever, granted prior to the date of first appearance. Further, the grant of legal aid is not retrospective. In some cases, this means that a significant amount of work will have been undertaken without appropriate funding in place. We believe that the Government should take steps to ensure that legal aid funding for extradition cases is granted automatically from the date of first appearance.

Devolution

14. Are the devolution settlements in Scotland and Northern Ireland fit for purpose in this area of law?

How might future devolution or Scottish independence affect extradition law and practice?

24. The Committee notes that while extradition is a reserved matter, criminal law is devolved and accordingly both requests for the extradition of a person living in Scotland and an outgoing extradition request are dealt with in this jurisdiction.

While the Committee is unaware of any particular difficulties in this regard, it notes that future devolution or Scottish Independence will of course affect the current arrangements, but has no further comments at present.

12 September 2014

Andrea Leadsom MP – Written evidence (EXL0085)

I was first made aware of the impending extradition of and difficulties faced by my constituents Paul and Sandra Dunham throughout 2013 when they wrote to me seeking my help in the matter, and in particular to seek my assistance in their appeals against extradition. Their appeal was unsuccessful, however, and extradition went ahead at the beginning of 2014.

Upon arrival in the United States, Mr and Mrs Dunham sought and were denied bail on the grounds that their exhausting every legal avenue available to them to challenge the extradition request constituted a flight risk. I had previously been assured by representatives from the U.S. Embassy in London that, as in the UK, there is an assumption in favour of bail, and that for the 'white collar' charges being brought against an elderly couple it was unlikely that they would be remanded in custody.

The couple were sent to the Chesapeake detention facility in late May 2014, the conditions of which were outlined in Mr & Mrs Dunhams' own submission. Our extradition treaty with the US is based on the assumption that our legal systems are broadly comparable and crucially, that someone is 'innocent until proven guilty'. It would be useful to clarify for future cases whether a defendant contesting extradition is sufficient grounds to constitute a flight risk, and therefore to be denied bail. In total Mr and Mrs Dunham spent over four weeks in Chesapeake detention facility.

After being denied bail again at their first appeal, the couple had a final opportunity to appeal the detention order in June 2014. The couple were granted bail, and released into the custody of two friends from North Carolina, Mike Jones and Annie Hallinan. These friends had to put their home up as collateral, and take full responsibility for the Dunhams' welfare ahead of the trial.

Mr and Mrs Dunham have since been staying in North Carolina, electronically tagged and only able to leave the house for pre-approved court appointments and activities such as attending church.

They are also able to leave the house for medical appointments, but as the couple are not allowed to work, their ongoing medical costs – particularly for Mr Dunham who has an ongoing medical condition, which was one of the points raised in their challenge of the extradition order – are being met entirely by Mr Jones and Mrs Hallinan.

This particular issue has been of serious concern in recent weeks, as Mr Dunham required a new heart monitor, an operation that was estimated to cost at least $20,000 by the time he went in to hospital. I have written to the Home Office, Foreign Office and Department for Health to seek advice on what help we are able to give citizens in this situation. It seems there is no distinction given to the reasons for citizens being overseas and therefore all requests for help are subject to having a reciprocal agreement with the other country, an arrangement we do not have with the United States.

If Mr Dunham was in the United Kingdom before his trial, he would have had the operation on the NHS, and the government would have continued to meet his and his wife's basic living standards. Given that they are in the U.S. at the behest of the UK government, and are presumed by both US and UK governments to be innocent until proven guilty, it would be useful to investigate what support we can give to extradited citizens ahead of their trials.

I would be grateful if the Committee could look into the matters I have raised, particularly around provision of medical care and the issue of legally challenging extradition being used as evidence that citizens are a flight risk. If there is anything else I can do to help or clarify, I'd be delighted to do so.

Andrea Leadsom MP
Member of Parliament for South Northamptonshire

11 December 2014

Jeremy Lewis – Written evidence (EXL0015)

Dear Committee,

I am writing to reinforce Liberty's position in relation to Britain's extradition laws. My specific points are as follows:

1. British residents should not be extradited without a basic (*prima facie*) case against them being tested in a UK court
2. If their alleged activity took place wholly or substantially in the UK, a judge should be able to bar their extradition – whether or not the CPS decides to prosecute in the UK
3. The automatic right of appeal against an extradition order should be reinstated
4. Extradition is part legal and part political – the Home Secretary should once more be obliged to block extraditions that would breach human rights
5. Legal aid in extradition cases should not be means tested

Thank you for your time and attention in this matter.

Yours sincerely

Jeremy Lewis

26 August 2014

Liberty – Written evidence (EXL0066)

Liberty's written evidence to the Select Committee on Extradition Law

September 2014

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at
http://www.liberty-human-rights.org.uk/policy/

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Executive Summary

Liberty is pleased that the House of Lords has decided to give post-legislative scrutiny to the Extradition Act 2003. When the Act was passed we warned that it removed too many justice safeguards and would encourage and allow unfair and oppressive extraditions. In our view, this has been borne out in practice and the legislation and accompanying Treaties are in urgent need of modification. We make the following recommendations for reform –

1. The 'forum' safeguard should be re-drafted to provide full judicial discretion to bar extradition on grounds of forum taking into account all the circumstances of a case. The new forum test should be formulated as a presumption against extradition, capable of rebuttal by the requesting State. Judges should not be required to exclude forum considerations in cases where the CPS has decided not to prosecute.

2. The prima facie evidence requirement should be re-inserted for all our extradition partners. The removal of the requirement has allowed individuals to be extradited

from the UK on the basis of flimsy information in circumstances where there is arguably no case to answer. The Secretary of State's power to exempt additional countries from the evidence requirement, by Order, must be urgently repealed.

3. A judicial obligation to bar disproportionate extraditions should be added to Part 2 of the Act. British judges should have the ability to bar extradition requests which are disproportionate taking into account the facts of the case.

4. Legal aid in extradition cases should no longer be means tested.

5. The automatic right of appeal in extradition cases should be re-instated by repealing the recently inserted leave requirement.

Introduction

1. Liberty welcomes the House of Lords post-legislative scrutiny of the *Extradition Act 2003* (EA). This legislation was passed with much controversy at the height of the War on Terror and has continued to generate profound concern and public protest over its ten years of operation. Liberty fully recognises the importance of ensuring that suspected offenders, principally fugitives, face trial. But we believe that this objective must, and may, be reconciled with a system that retains sufficient discretion to protect people against unnecessary extradition.

2. Extradition permits the forcible removal to a foreign country of a person resident in the UK who may have no connection with the foreign jurisdiction. It has a profound and often irreversible effect on all aspects of a person's life, including their mental and physical health. Once extradited, a requested person is separated from friends, family and their emotional support network, considered a fugitive from justice and a flight risk so generally imprisoned on arrival and potentially held in custody for full pre-trial period. Detention conditions can vary greatly from those in the UK and in some jurisdictions can mean solitary confinement. The costs and challenges of mounting a defence overseas can also be crippling. For those extradited to the USA, the lengthy potential sentences faced make the pressure to plea bargain considerable. Even where an individual is later exonerated, extradition requires that a person's life is put on hold, often for a number of years

3. Regardless of the outcome, extradition is a punishment in and of itself. For that reason it is imperative that individuals are not extradited from the UK unless strictly necessary to serve the interests of justice. To ensure this is the case, domestic law requires safeguards to allow unnecessary, disproportionate and oppressive extraditions to be barred. In our view the 2003 Act prioritises speed and efficiency over safeguards and justice to the detriment of British residents. In this response we examine the loopholes that currently exist and make recommendations for reform.

Background

4. The formal surrender of a person from one country's territory to another to allow a prosecution to take place has traditionally been undertaken pursuant to treaty arrangements between the two countries. Thus the UK has a number of treaties with various

countries setting out the terms under which a person can be extradited. This system was first recognised in our domestic legal system by the Extradition Act 1870. The laws were consolidated by the Extradition Act 1989, and then underwent a major overhaul in the Extradition Act 2003 (EA).

5. The EA was the result of an extensive review of extradition law which began in 1997. The review took place against the highly charged political and legal background of the Chilean request to extradite General Pinochet from the UK. Indeed the review was halted while the litigation was continuing and proposals for consultation were ultimately published in March 2001.[208] The Home Office explained at the beginning of its paper that of particular significance was the way this case *"threw into high relief many of the problems of UK extradition law, most notably the lengthy delays which can occur in complex, contested extradition cases".*[209] The consultation also considered how to implement the Framework Decision of the European Council, which was to become effective on 1 January 2004.[210] The Framework Decision applies to all European Union Member States and replaced the traditional extradition scheme between those States.[211] The 2003 Act sets out three different processes by which extradition will operate:

(1) in relation to EU countries that are subject to the EAW (category 1 territories, governed by Part 1 of the EA);

(2) non-EU countries (category 2 territories, governed by Part 2 of the EA); and

(3) non-EU countries designated by order that therefore aren't required to prove a prima facie case (category 2 territories excepted by order, also governed by Part 2 of the EA).

6. The 2003 Act much reduced the discretion of the judiciary and the Executive to block extradition requests. In particular it removed 'forum' as a ground on which extradition could be barred, much eroded the applicability of the prima facie evidence requirement and repealed the Secretary of State's discretion to block extradition in the interests of justice. It also gave effect to fast track extradition within the EU whereby an arrest warrant issued in one Member State can be recognised and enforced in all other Member States so allowing for faster and simpler surrender procedures and removing Executive and judicial discretion to closely examine the request.

7. In the first six years of the Act's operation, broad public and parliamentary agreement emerged to the effect that UK extradition law lacked vital safeguards, unduly tied the hands of the British judiciary, and gave rise to unfair and perverse outcomes for British residents. Ahead of the last General Election, the former Home Secretary, David Blunkett, responsible both for the Act's passage and the negotiation and signing of the US-UK Extradition Treaty, conceded that too much had been given away. The Home Affairs Select Committee (HAC) and Joint Committee on Human Rights (JCHR) both investigated the

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[208] Home Office, *The Law on Extradition: A Review* (March 2001)
[209] Ibid, at para 8.
[210] *Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States* (2002/584/JHA), ('European Framework Decision') available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0001:0018:EN:PDF.
[211] See the recital to the Framework Decision, ibid.

operation of the Act and called for fundamental reforms. Both political parties now in the Coalition Government pledged reform if elected.

8. Since then public and parliamentary concern has continued. In 2012, 253 684 people signed a petition protesting the requested US extradition of Sheffield Hallam student, Richard O'Dwyer. In the same year, 141 000 people signed a petition protesting the requested extradition of British national, Babar Ahmad, to the USA. However, public disquiet and political rhetoric has not been matched by reform. Recently, some modest changes have been made to Part 1 of the EA in response to the injustice caused by the most glaring problems with fast track extradition under the European Arrest Warrant (EAW). But more widely, the Coalition Government has passed legislation that has further removed crucial safeguards – including removing the *automatic* right of appeal against an extradition order and repealing the Home Secretary's residual power to bar extradition to Part 2 countries on human rights grounds.

9. The process of reform has also been found wanting. The Government appointed Sir Scott Baker – a former Judge in the Court of Appeal - to conduct a review of the law in 2010 and following the publication of his Report in 2011 proceeded to cherry pick the conclusions it wished to accept or ignore, with next to no explanation.[212] Having outsourced policy development in this area, the Coalition then introduced a number of legislative changes via late-stage Government amendments to Bills leaving minimal opportunity for parliamentary scrutiny. These reforms have been confused and contradictory. Despite acknowledging the unfairness of the system the Government has legislated to downgrade extradition appeal rights. And despite announcing that that it would bar the extradition of Gary McKinnon to the US on the grounds that it would give rise to such a high risk of him ending his life that it would breach his human rights, the Government simultaneously legislated to remove the power of the Secretary of State to block future extraditions to the US and other Part 2 countries on human rights grounds.

10. In Liberty's view, while the Baker Review of extradition law was thorough, its analysis failed to take account of the human cost of unnecessary extradition and was in some areas deeply one-sided. Much of the Report's narrative and conclusions heavily deferred to concerns around diplomacy, cost and delay. Statutory bars to extradition will inevitably cause delay to some extradition requests but, as the last decade has shown, oppressive and unfair extraditions will always be challenged and delayed for a period. What the Review failed to acknowledge is that instead of delaying justice, greater procedural safeguards combined with sensible prosecutorial co-operation could increase efficiency, by ensuring that unnecessary extraditions are quickly barred and that, where appropriate, domestic prosecutions are undertaken instead.

Forum Bar

11. The forum safeguard ensures that where an alleged offence or act is conducted partly or wholly within the State from which extradition is sought, the State in question can

[212] *A Review of the United Kingdom's Extradition Arrangements*, 30 September 2011, is available at - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf. The Government Response to the 477 page review was published in October 2012 and stretches only to four substantive pages - (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228566/8458.pdf).

reject the extradition request on that basis. A forum safeguard is common in extradition treaties. This is unsurprising given that the overriding objective of extradition of individuals between nation states is to prevent individuals from escaping justice i.e. committing an offence in one territory and then seeking immunity in another.

12. The forum safeguard has a long lineage. The 1957 European Convention on Extradition provides that *"The requested Party may refuse to extradite a person claimed for an offence which is regarded by its law as having been committed in whole or in part in its territory or in a place treated as its territory."*[213] Under the Extradition Act 1989 the Secretary of State had a general discretion to block extradition and, as confirmed by the House of Lords in a 2001 case, forum could form one of the grounds on which that discretion was exercised.

13. A generous forum bar is also included in the current EU Framework Decision on the EAW which states that a judge may refuse to execute a EAW that relates to offences which "*are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such".*[214]

14. Despite this history and the specific provision made in the Framework Decision, a forum bar was not included in the list of factors for which extradition could be barred under the EA, for Part 1 countries. Forum as a bar to extradition was similarly not included in the list of bars under Part 2 of the 2003 Act. This meant that from 2004 until autumn 2013[215] the only way in which a defendant could make arguments as to forum was under the human rights bar, specifically the right to respect for family life found in Article 8 ECHR. In reality the success of such arguments was hampered by understandable judicial deference to the Executive's extradition agreements in a politically charged area of law and policy.

15. Why is the forum bar so badly needed? The need for an effective forum bar to extradition requests has becoming increasingly apparent in recent years. This is due in part to the wide jurisdiction claimed by the USA, a designated country under Part 2 of the EA, and in part the advent of the internet and its central role in the everyday lives of millions of Britons. Traditionally, common law countries have exercised jurisdiction on the basis that conduct amounting to a criminal offence occurred within their territory. In cases where activity takes place in more than one country, the general rule was that jurisdiction would only be sought if a substantial measure of activity occurred there. However, the US now interprets its legal jurisdiction much more widely. It asserts exorbitant jurisdiction for alleged criminal activity involving – no matter how tangentially - communications systems based in the US. It also pursues extraditions in cases where potential victims are in the US, in circumstances where there is no other US link (including for example in circumstances where alleged activity took place in the UK and on UK based computer systems). This approach to jurisdiction, combined with the ubiquity of the internet in daily life, means that it is now

[213] Article 7, European Convention on Extradition 1957, available at - http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm.
[214] Article 4.7(a) of the EU Framework Decision on the EAW, 13 June 2002, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32002F0584.
[215] A new forum bar, introduced in the Crime & Courts Act 2013, and now contained in sections 19B-19F and 83A-83E of the EA came into force in September 2013.

relatively easy for someone to be considered criminally liable in the US without the offender stepping outside their living room let alone crossing international borders.

16. Of course, online activity can result in serious criminal liability and we do not suggest that if the activity is sufficiently serious it should not be suitably punished. But the question is, in these so-called cross-border cases, what is the appropriate process for determining the appropriate forum for prosecution? We believe that where a significant part of the alleged activity takes place in the UK, the presumption should be that extradition is not granted and the CPS instead considers prosecution in the UK. There are a number of important reasons for this. First, as explained at paragraph 2, extradition is a punishment and trauma in and of itself. Where a British resident has allegedly committed offences on UK soil, it is right to expect that prosecution takes place in the UK. As well as the lengthy trauma of extradition, extradition will inevitably result in difficulties in defending a case given that witnesses and other defence evidence will be in the UK. Issuing a subpoena to a UK-based witness from another jurisdiction may well prove difficult (or impossible) and seriously affect a defendant's ability to mount a proper defence. This can be contrasted with the increased access to evidence and co-operation of prosecuting agencies.

17. The absence of a forum bar has led to a number of cases of clear injustice over the past decade. In the earliest such case, three British men, David Bermingham, Giles Darby & Gary Mulgrew (commonly referred to as the NatWest 3) were indicted by the US authorities in June 2002 and their extradition was requested in February 2004. It was alleged that they had conspired with two members of Enron to defraud the Natwest Bank in London although the alleged victim, NatWest Bank had never made a complaint against them. The NW3 appealed their extradition orders and argued that since they were three British citizens, living and working in the UK, accused of defrauding a British bank in the UK, they should face trial in the UK. In particular, they argued that all of the available evidence and defence witnesses were in the UK, and that if extradited they would have no access to either. Counsel for the Attorney General argued that the desirability of honouring the UK's international treaty obligations should outweigh a person's Article 8 rights in all but the most extreme cases. The High Court and House of Lords rejected their appeals and the men were consequently extradited to Houston, Texas, in July 2006. As they had predicted, the NW3 were unable, once in the US, to secure disclosure of documents or subpoena witnesses from the UK. They had had no sight of the prosecution documents until setting foot in the US, and in the absence of any UK proceedings, they had been unable to access any materials prior to extradition. In November 2007, the NW3 agreed to plead guilty to one count of 'wire fraud', and were sentenced in February 2008 to 37 months' imprisonment. They were transferred back to the UK in November 2008 to serve the remainder of their sentences.

18. Another glaring example of the disproportionality and injustice that can arise without an effective forum bar is the case of computer science student, Richard O'Dwyer. While studying at Sheffield Hallam, O'Dwyer set up TVShack – a web search engine that contained links to copyrighted films and TV programmes located elsewhere on the internet. The website contained no copyrighted content, and the website servers and users were not based in the US. Nonetheless, in 2011 the US Customs and Immigration Agency sought to prosecute O'Dwyer with conspiracy to commit copyright infringement and criminal

infringement of copyright and extradite him to the US. There was public outcry over his proposed extradition. In addition to the hundreds of thousands of signatures to an online petition, a YouGov poll found that 43% of the public thought he shouldn't be prosecuted at all and only 9% thought he should be extradited to the US.[216] However, his efforts to resist extradition on the grounds that the alleged activity took place in the UK, failed. He was ultimately spared extradition by reaching a deferred prosecution agreement with US prosecutors and paying a £20 000 fine.

19. The cases of Babar Ahmad and Talha Ahsan further demonstrate the perverse results that arise where discretion to block extraditions on forum grounds is absent. These two Britons were sought by the US for providing material support for terrorism on the basis of their involvement with a website between 1997-2000. The only connection with the US was that the website server was located in Connecticut for five of the months in question. The Metropolitan Police was initially involved in evidence gathering but handed the evidence over to the US and the CPS decided not to bring a prosecution in the UK. Ahmad and Ahsan were ultimately extradited to the US in 2012 and sentenced, following a plea bargains, earlier this year.

20. In response to growing public concern about the absence of a forum safeguard, in 2006, the House of Lords proposed a forum amendment to the EA. After huge resistance from the then Government, an amended version of the forum amendment was successfully passed, but never brought into force. It would have allowed a UK court to bar extradition if "*a significant part of the conduct that constituted the alleged offence took place in the UK*" and "*in view of that, and all other circumstances, it would not be in the interests of justice for the person to be tried for the offence in the requesting territory."*[217] Having supported it in Opposition, the Coalition Government opted not to bring this forum bar into force on the basis that it *"would have been cumbersome in practice"*.[218] Instead the Coalition introduced a new 'forum bar' via the Crime and Courts Act 2013 saying it was *"designed to minimise delays, while providing greater safeguards for those who are subject to extradition proceedings"*.[219] Despite its being in force for almost one year, there have been no defence successes under the new forum bar. This is unsurprising as it sets an impossibly high threshold for requested persons to meet.

21. Under the new test an extradition can be barred by a judge *"by reason of forum if the extradition would not be in the interests of justice."*[220] However this will only be the case where *"the judge decides that a substantial measure of D's relevant activity was performed in the UK"* and having regard to an exhaustive list of "*specified matters"* the judge decides that the extradition *"should not take place".* The first defect of the new test is that the exhaustive list of factors is heavily skewed in favour of extradition and excludes important matters from consideration. A genuinely discretionary interests of justice test would allow

[216] "Richard O'Dwyer's two year extradition ordeal ends in New York" *The Guardian*, 7 December 2012 available at - http://www.theguardian.com/uk/2012/dec/06/richard-o-dwyer-avoids-us-extradition.
[217] Police & Justice Act 2006, Schedule 13.
[218] See written statement of the Minister of State, Jeremy Brown MP, in a letter to the members of the Crime and Courts Public Bill Committee on 5th February 2013, as included in House of Commons Library Note SN/HA/6105 *Extradition and the European Arrest Warrant – Recent Developments* (6th February 2013), at page 20.
[219] Ibid.
[220] New sections 19B(1) and (2) and 83A(1) and (2) of the EA.

the judiciary to consider and accord due weight to *all* relevant factors. If a list of factors is to be provided then it should be genuinely balanced (including for example the ability of the requested person to mount a defence from the requesting State) and include reference to "any other factors which appear to the judge to be relevant".

22. However, the greatest flaw in the forum bar is the requirement that a judge *"must decide that the extradition is not barred by reason of forum if…the judge receives a prosecutor's certificate relating the extradition."*[221] A prosecutor's certificate can be given by a prosecutor in circumstances where (a) the prosecutor has considered the offences for which the requested person could be prosecuted in the UK; (b) decided that there are corresponding offences in the UK; and (c) decided not to prosecute due to his/her belief there would be insufficient admissible evidence or prosecution would not be in the public interest or (c) believes that the requested person should not be prosecuted because there are concerns about the disclosure of sensitive material.[222] A certificate not to prosecute is binding in terms of a forum decision and can only be judicially reviewed on appeal against an extradition order. The chances of successfully judicially reviewing such a decision are very slim. This new forum test unacceptably fetters judicial discretion undermining the proper function of the court in blocking unnecessary extraditions.

23. Decisions on forum in so-called cross-border cases are currently made by the two respective prosecuting agencies in negotiations behind closed doors. In the string of cases highlighted above, as well the high profile case of Gary McKinnon, UK prosecutions have not been pursued against the requested persons. This despite *all* the alleged activity taking place in the UK. This has given rise to understandable concern over the dynamic in the relationship between the two prosecuting agencies and the comparative power and control exercised by the US. As drafted, the new forum bar entrenches and increases the supremacy of these private negotiations. While the new forum bar was apparently enacted in response to public concern over requested extraditions of British residents for activity undertaken here, the bar as enacted would not even have been considered by the judiciary in these cases due to CPS decisions not to prosecute.

24. Further the DPP veto will arguably lead to perverse outcomes given that extradition will more likely occur in those cases where (despite generous provision for information and evidence sharing between prosecutors) a UK prosecutor has concluded that there is insufficient evidence for prosecution or prosecution is not in the public interest, perhaps because it is too trivial.

25. Liberty urges the Committee to recommend that the CPS veto be removed and the forum bar re-drafted in a manner that affords proper judicial discretion. A new forum bar should create a presumption—capable of rebuttal by a requesting State—that an extradition will not proceed if the alleged activity for which extradition is sought took place in part in the UK. To this end, Liberty supports the test proposed by Alun Jones QC during the passage of the Crime and Courts Bill 2013 which is almost identical to the test originally proposed by

[221] New sections 19C and 83B EA.
[222] New sections 19D and 83C EA.

the Liberal Democrats and Conservatives during the passage of the Police & Justice Bill in 2006 -

> *"If the conduct disclosed by the extradition request was partly committed, or intended to be committed in whole or in part, in the United Kingdom, the judge shall not order the extradition of the person unless it appears, in the light of all the circumstances, that it would be in the interests of justice that the person should be tried in the category [1 or 2] territory."*

26. This formulation is preferable to the current legislative forum test and the test eventually added in 2006 which reverses the presumption and requires the requested person to discharge the burden. As drafted above, the forum bar would be consistent with the principle of territoriality and the notion that extradition is principally an exercise in returning fugitives to territories from which they have fled. The test set out above is also likely to lead to early and sensible co-operation between prosecutors (as overseas prosecutors realise they have a burden to discharge) rather than the routine seizure of jurisdiction by, in the case of the US, a better resourced and more politically powerful prosecuting agency. Lastly, such a presumption would encourage transparency, as prosecutors would be required to persuade the judge to extradite and therefore disclose the factors that they believe weigh in favour of extradition in open court.

Prima Facie case

27. Historically all extradition requests to the UK had to satisfy a prima facie evidence requirement. This requirement does not require a full criminal trial, but rather an examination of the evidence to determine whether there is a case to answer.[223] The judge must determine whether the prosecution evidence, taken at its highest, is such that a properly directed jury could convict upon it, but the courts have been clear that "*District judges should be wary before embarking on the trappings of a trial, in particular testing the credibility of complainants by reference to alleged inconsistences in their accounts…"*[224] In applying this test a judge can reject evidence considered worthless and consider the evidence as a whole, including that introduced by a defendant.

28. The requirement acted as a standard for the quality of extradition request that the UK is prepared to accept, filtering out unmeritorious and speculative requests for extradition. As a Government Working Party on extradition observed as far back as 1970 *"the requirement of prima facie evidence remains the only real safeguard against the trumped up case, and we venture to this that it must serve to deter some applications for extradition where a warrant for arrest has been issued in a foreign State on largely unsupported suspicion of guilt."*[225]

29. The prima facie case requirement has now been excluded for extradition to Part 1 countries within Europe and for those countries designated by statutory order under Part 2

[223] R (Harkins) v Secretary of State for the Home Department [2007] EWHC 639.
[224] Fernandez and others v Governor of Her Majesty's Prison Brixton [2004] EWHC 2207 (Admin).
[225] Report of the Working Party on the Extradition Act 1970.

of the Act.[226] In addition to the USA, Canada and Australia, all non-EU Council of Europe countries have been designated, as well as a number of countries with highly dubious democratic and human rights records such as Azerbaijan, Georgia, Moldova, the Russian Federation and Turkey.[227] Nothing in the Act prohibits the designation of further countries under section 71(4). The effect of designation means that the requesting country need only provide 'information' rather than 'evidence' to satisfy the test for the issuing of an arrest warrant[228] and a judge need not require sufficient evidence to be produced before ordering the extradition of a person.[229]

30. Liberty believes that prima facie evidence should be required of all requesting states, including the US, and we urge the Committee to recommend the repeal of sections 71(4) and 73(5), of the EA which allow the Executive to designate Part 2 countries by Order.

31. The extradition request for Lofti Raissi, which took place before the 2003 Act was in force, and a number of extradition requests since, demonstrate aptly the importance of the prima facie case requirement. Lofti Raissi, an Algerian born UK resident and American trained pilot, was arrested under the *Terrorism Act 2000* shortly after 9/11 following an allegation that he had trained four of the men who hijacked the planes involved in the terrorist attack. He was detained by the UK police, and then released, without charge, seven days later. Immediately after his release, however, he was re-arrested and imprisoned after an extradition request was issued by the US. The charge on which the extradition request was based was a minor one, alleging that Mr Raissi had fraudulently completed a pilot's licence form by failing to reveal he had had knee surgery; the court was told that these were 'holding charges' and that charges of conspiracy to murder and terrorism were being considered by the US authorities. Mr Raissi was then detained for just under five months in Belmarsh high-security prison, without ever being charged with an offence by UK or US authorities.[230] It is important to note that this case was decided before the US-UK extradition treaty was in force; accordingly the prima facie case safeguard was applied by the judge. On 24 April 2002, Senior District Judge Workman discharged Mr Raissi in relation to all the extradition charges, on the basis that a prima facie case had not been made out. Senior District Judge Workman noted that although a number of allegations of terrorism were made, no evidence was ever received by the court to support the allegation.[231] Mr Raissi has since been completely exonerated.[232]

32. The Baker Review dismissively addressed the Raissi case by saying that the extradition judge who dealt with the case *"expressed the hope that the human rights protections in the 2003 Act would operate to provide a safeguard if a similar case were to*

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[226] See the *Extradition Act 2003 (Designation of Part 2 Territories) Order 2003*, and sections 71(4), 73(5), 84(7) and 86(7) of the *Extradition Act 2003* available at - http://www.legislation.gov.uk/ukdsi/2003/0110483146?view=plain.
[227] The Home Office has said that Council of Europe members have been designated because the prima facie case requirement was removed by the *European Convention on Extradition* which came into force in the UK on 14th May 1991.
[228] See sections 71(4) and 73(5) of the EA.
[229] See sections 84(1) and 86(1) of the EA.
[230] The facts of Mr Raissi's case are set out by Lord Justice Hooper in relation to Mr Raissi's compensation for wrongful imprisonment claim: *R (on the application of Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72.
[231] *R (on the application of Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72 per Lord Justice Hooper at para 2.
[232] Ibid, at para 154.

arise now that the USA has been designated."[233] Given the strict interpretation of the human rights bar and the limitations of the abuse of process jurisdiction, Liberty does not share such optimism. Instead, we retain grave concerns over the lack of evidence required for extradition to the US and elsewhere and the aggressive approach this has encouraged in US federal and state prosecutors.

33. In Richard O'Dwyer's case it was far from clear that the index links contained on his website amounted to copyright infringement under US law. Further the CPS decision not to prosecute in his case is widely believed to be based on the fact that domestic judicial interpretation of the relevant section 107(2.A) of the UK Copyright, Designs and Patents Act 1988 mitigated against prosecution.[234] The lack of a prima facie evidence requirement, however, meant that extradition was ordered. The agreement reached between O'Dwyer and US prosecutors has effectively prevented their case ever being tested.

34. The zealous approach of US prosecutors was again highlighted recently following the comments of US federal judge, Janet Hall, during the sentencing of extradited Britons Babar Ahmad and Talha Ahsan. Following their plea bargain for providing material support to the Taliban, Judge Hall rejected huge swathes of the Government's evidence and pushed back on prosecutorial claims that the pair helped Al Qaida, pointing out that in earlier hearings the Government's main co-operating witness had denied that defendants had helped Al Qaida: "*Your own witness doesn't support that. Fighting against US forces doesn't necessarily equate to support of al Qaida".*[235] The 150 month sentence arrived at for Ahmad was substantially less severe than the 25 years sought by US prosecutors.

35. The absence of the prima facie case requirement for extraditions within Europe has also given rise to serious injustice. In June 2008, Greece issued a European Arrest Warrant for Andrew Symeou, a 20 year old British national, to face charges equivalent to manslaughter arising out of an assault in a nightclub in July 2007. The UK courts, acting under Part 1 of the EA, ordered his extradition in 2008. Our courts were unable to consider whether or not he had a case to answer, even though all evidence strongly indicated that he did not. This despite the fact that two witness statements that implicated Symeou were immediately withdrawn after the witnesses were released from police custody, citing beatings and intimidation. No statement was taken from Symeou and other available evidence suggested he was not in the nightclub at the time the victim was assaulted. The High Court held that it is for the Greek courts to assess the quality and validity of the evidence. In holding that the requested extradition could not be barred the court noted: *"The absence of even an investigation before extradition into what has been shown by the Appellant here may seem uncomfortable; the consequences of the Framework Decision may be a matter for legitimate debate and concern."*[236]

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233 Baker Review, para 8.73.

234 R v Rock and Overton, Gloucester Crown Court, (6th February 2010) held that links as opposed to content, do not amount to copyright infringement.

235 "Briton Babar Ahmad given 12 year US prison term for aiding Taliban" *The Guardian*, 16 July 2014.

236 *Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece* [2009] EWHC 897 (Admin) at paragraph 39.

36. The Baker Review concluded that the prima facie evidential test should not be re-introduced for designated category 2 countries nor for extraditions within Europe under Part 1. The Panel was principally concerned with the importance of upholding existing treaty obligations and worried that introducing this safeguard would add to the length and complexity of the extradition process. They also felt that under existing 2003 Act provisions, such as the abuse of process jurisdiction, the courts are able to subject requests to sufficient scrutiny to identify injustice or oppression. In relation to category 2 designated territories under Part 2 of the Act, the Panel did accept that there are valid concerns about the human rights records of a number of these states and accordingly recommended that there ought to be periodic review of those designations.

37. As the cases above illustrate, our extradition partners request extraditions in circumstances where there is no case to answer and the abuse of process jurisdiction has proved an insufficient substitute for a prima facie evidence requirement. Further, in our view, arguments about saving time and money should not outweigh the rights of requested persons to have a preliminary review of the evidence by a local judge before their lives are uprooted. One need only look to specific case examples, such as the four year ordeal suffered by Andrew Symeou, to realise the implications of dispensing with the prima facie safeguard. The abuse of process jurisdiction did not prevent Symeou's extradition on the basis of flimsy and highly contested evidence. Symeou was found innocent of his crimes in 2011; but not before enduring maximum security prison and years of uncertainty.

38. Experience over the past ten years has also shown that in the absence of a prima facie case and forum safeguard, delays are still incurred as requested persons seek to resist unnecessary and unfair extradition on human rights or other grounds. Re-legislating for these safeguards would not necessarily add significant delay and may instead ensure that oppressive extradition requests are disposed with in a timely manner. We still require prima facie evidence from a large number of countries that we have extradition arrangements with and this doesn't cause inordinate delays and complication.

Human Rights Bar and Assurances

39. Before ordering extradition under Part 1 or sending the case to the Secretary of State under Part 2 a judge is required to determine whether the proposed extradition will be compliant with the human rights of the person subject to the proceedings as protected by the Human Rights Act 1998.[237] The Committee has asked whether the human rights bar is sufficient to protect requested people's human rights. Liberty doesn't believe it is, nor is it a substitute for the procedural safeguards discussed above.

40. Whilst the human rights bar is a crucially important backstop, there is understandable judicial reluctance to block extraditions on human rights grounds to countries with which the UK Government has opted to establish an extradition relationship. Further, judicial adjudication of the human rights bar is a complex undertaking, involving risk assessments and decisions concerning the justice system of a foreign jurisdiction. It is

[237] Under section 21 in Part 1; and section 87 in Part 2.

invariably more complex than adjudications on domestic procedural bars to extradition and places judges in an invidious position as they seek to show respect for the justice systems of requesting states. *S*ince the removal of a number of historic procedural protections in the 2003 Act, huge pressure has been put on the human rights bar by those seeking to prevent their unjust or unnecessary extradition. The result has been that the judicial threshold now set for extraditions to be blocked on account of human rights (for example due to a requested person's illness, or prison conditions in a requesting State) is high.

41. At the outset the courts took a highly restrictive approach and held that reliance on human rights to prevent extradition "demands presentation of a very strong case".[238] Indeed, the High Court held, in relation to Article 8, that "there is a strong public interest in 'honouring extradition treaties made with other states'" and where extradition is legally requested "a wholly exceptional case would in my judgment have to be shown to justify a finding that the extradition would be on the particular facts be disproportionate to its legitimate aim".[239] More recently the Supreme Court has held that it is not right to apply an exceptionality test and that the question in Article 8 cases is instead whether the interference with private and family life is outweighed by the public interest in extradition. This balancing exercise will consider the nature and seriousness of the crimes involved but because great weight will always be accorded to honouring extradition agreements *"only the gravest effects of interference with family life will be capable of rendering extradition disproportionate to the public interest that it serves"*.[240] The focus on honouring extradition treaties means that Article 8 will rarely be successful as a bar to extradition, save perhaps in circumstances where the crime concerned is of no great gravity and the requested person has a large number of dependent children whose lives would be severely disrupted.[241]

42. Given the mutual recognition principle at the heart of the European Framework, UK courts have at times appeared even more reluctant to find that another signatory state to the ECHR will breach basic rights. This despite abundant evidence that some Member States are regularly found to be in breach of the Convention with regard to criminal justice standards. Despite the fact that the EAW was negotiated over a decade ago, the standardisation of procedural safeguards for defendants are only now being negotiated at European level and are years away from reaching completion. Reforms made via the Crime and Courts Act 2013 to the operation of the EAW to deal with its use for trivial offences and lengthy pre-trial detention of British residents were welcome but do not adequately address remaining vulnerabilities such as routine ECHR breaches in the requesting State and the lack of a prima facie case evidence requirement.

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238 See *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, per Lord Bingham at para 24.
239 See *R (Bermingham) v Director of the Serious Fraud Office; Government of United States of America* [2006] EWHC 200 (Admin), [2007] QB 727, per Laws LJ at para 118. Note that the European Commission itself has said that: *"it is only in exceptional circumstances that the extradition of a person to face trial on charges of serious offences committed in the requesting state would be held to be an unjustified or disproportionate interference with the right to respect for family life"*: *Launder v United Kingdom* (1997) 25 EHRR CD 67 at page 74.
240 *Norris v United States of America* [2010] UKSC 9, at para 82.
241 HH (Appellan) v Deputy Prosecutor of the Italian Republic, Genoa (Respondent; PH (Appellant) v Deputy Prosecutor of the Italian Republic, Genoa (Respondent); FK (FC) (Appellant) v Polish Judicial Authority (Respondent) [2012] UKSC 25.

43. As regards extradition to the US, the European Court of Human Rights gave judgment in the test case of *Babar Ahmad and Others v UK*[242] in 2012 and ruled on the application of Article 3 of the Convention to US supermax prison conditions and sentencing policy. With regard to the restrictive conditions of US supermax prisons, the Court has set a high bar for an Article 3 violation. The restriction of inmates that are not physically dangerous to their cells for the vast majority of time will not amount to an Article 3 violation. In reaching this conclusion the Court took into account that at ADX Florence "*a great deal of in cell stimulation is provided through television and radio channels"* and that *"while inmates are in their cells talking to other inmates is possible, admittedly only through the ventilation system".*[243] The Court held that it was only if an applicant faced a real risk of indefinite detention in such conditions that Article 3 may be breached. In respect of sentencing, the Court again invoked the exceptionality principle and held only *"in a sufficiently exceptional case"*[244] if the applicant faced *"grossly disproportionate sentence in the receiving State"* would an extradition breach Article 3 of the ECHR.

44. The highly restrictive application of the ECHR in the extradition context means that it is an insufficient safeguard against oppressive extradition. Further, whilst it is essential that the judiciary grapple with human rights considerations before extraditions are granted, weighing up whether the projected treatment of a particular person in a foreign justice system meets ECHR requirements is an inherently complex and uncertain process and should not be regarded as a watertight safety net.

45. In the absence of procedural safeguards over the past decade, increased pressure has been placed on the human rights bar as the catch-all for extradition injustice. For example, while solitary confinement and disproportionate sentencing were clearly of valid concern in the Ahmad and Ahsan cases, the greater source of perceived injustice was the issue of forum and the lack of evidence required for their extradition. In some cases, judges have had to consider questions of procedural injustice through the lens of the human rights bar leading to contorted results. By restoring proper procedural discretion to the judiciary in extradition cases, these outcomes can be avoided.

UK/US Extradition

46. One of the central flashpoints in public concern about the UK's extradition arrangements has been the volume and circumstances of extraditions requested by the USA. Much focus on the US-UK extradition relationship has been on the respective standards of information/evidence that each prosecuting agency has to produce before an extradition is sought. Under the terms of the treaty, the UK is required to submit sufficient evidence to satisfy the "probable cause" test in the Fourth Amendment to the US Constitution[245]

[242] Babar Ahmad and Others v UK (Applications nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09), 10 April 2012 available at - http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110267#{"itemid":["001-110267"]}.
[243] Ibid, para 222.
[244] Ibid, para 238.
[245] "The Fourth Amendment guarantees "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause,

whereas the US is required only to provide information that satisfies the reasonable suspicion test. Liberty maintains that the two standards differ. Probable cause is a logical belief which finds its basis in known facts and circumstances. Reasonable suspicion is a lower standard requiring only the basis for suspicion to be objectively justified. We do not wish to dwell on the varying standards here, save to stay that neither standard should trigger extradition proceedings, which should instead be triggered when sufficient evidence has been sought and gathered to justify committal to trial (i.e. a realistic prospect of conviction and therefore a prima facie case).

47. The focus on the different standards in the treaty has come at the expense of examination of other factors that make the extradition relationship between the US and UK imbalanced. Statistics demonstrate this imbalance. According to Home Office figures published in March 2014, between 2004-2013, the US made 106 extradition requests to England, Wales and Northern Ireland[246], compared with 48 made in the other direction. When set against the respective population sizes of each State, the scale of the imbalance is clear. The population of England, Wales & Northern Ireland was estimated to be 58.8 million in mid-2013 and the estimated population of the USA was 316.1 million at the time. The US therefore made over double the number of extradition requests to a population less than five times its own size. If the US was predominantly seeking to extradite US national fugitives, the statistics may better reflect the size of each country but information released following an FOI request in 2010 shows that roughly half of the people that had been extradited to the US from the UK since 2004 were UK nationals or people with dual citizenship.

48. The balance of nationalities of those extradited in both directions also demonstrates the imbalance. It appears that many more UK citizens are extradited to the US, than US citizens extradited to the UK. Between 2004 and June 2010, of the 33 people extradited from the US to the UK, 3 were known to be US nationals or to have dual citizenship. In the same period of the 62 people extradited to the US from the UK, 28 are known to be UK nationals or to have dual citizenship.

49. There may be many factors which drive the unusually high traffic of extraditions the US seeks from the UK. As noted previously, the US takes a much wider approach to jurisdiction and it also appears that US federal as well State prosecutors may seek to prosecute and extradite in circumstances where UK prosecutors would not consider that the public interest test had been satisfied. It is certainly no secret that the US has a much tougher criminal justice culture than we do in the UK. As of 2008, the US had the highest prison population rate in the world, and imprisoned almost half of the 9.8 million people imprisoned worldwide.[247] It is also clear from statistics and factual circumstances in individual cases, that US extradition is no longer predominantly concerned with the most serious offences. Of the US extradition requests received between 2004-2013, 9 related to

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supported by oath or affirmation, and particularly describing the place to be searched , and the person or things to be searched."

[246] Scotland's population figure is excluded because the extradition statistics referenced do not include requests between the US and Scotland.

[247] King's College London, International Centre for Prison Studies, World Prison Population List (eighth edition) Roy Walmsley.

murder, while 75 concerned fraud related and money laundering offences.[248] These imbalances and the jurisdictional overreach of US prosecutors, make the need for further judicial safeguards all the more urgent.

Other bars to extradition

50. Other limited statutory bars to extradition, including passage of time, extraneous conditions (prosecution on account of race, religion etc) etc are found in sections 11 and 79 of the EA. Liberty believes that in addition to these existing bars, the Committee should consider recommending that a proportionality or general public interest bar be added for extraditions to Part 2 countries. This could reflect the proportionality bar recently added to the EA in respect of Part 1 territories. New section 21A inserted by way of section 157 of the Anti-Social Behaviour, Crime & Policing Act 2014 allows a judge to bar disproportionate extraditions requested under the EAW system. There are no reasons of principle why British judges should now be able to block disproportionate extradition requests from EU Member States but not disproportionate extradition requests received from Part 2 requesting states. The sheer volume of disproportionate extradition requests under the EAW gave rise to the enactment of the new bar. While there may be fewer extradition requests under Part 2 than Part 1, this does not justify fewer protections for those requested under Part 2.

51. The cases of Richard O'Dwyer (discussed above) and Liberty client, Eileen Clark, demonstrate the need for a proportionality/public interest bar in respect of Part 2 countries. Eileen Clark left her husband in 1995. In 1998 she travelled to the UK with her 3 young children where they were granted leave to remain. She is a person of impeccable character – she spent her life here as a homemaker, doing occasional voluntary work. In 2010 she was informed that she was wanted on a warrant in a US Court for having removed the children unlawfully. Apparently she had initially been wanted on a charge of 'parental interference' which the US Prosecutor had discovered was not an extraditable offence. So the offence was effectively upgraded to one of international parental kidnapping. She was arrested 15 years after her marriage ended.

52. When Liberty took over the case we discovered significant evidence suggesting that Eileen Clark had been a victim of domestic abuse and violence. A great many people who had known her before she left her husband attested to the fact that she had disclosed living in fear of him. We located an old police report from before she left him in which she had reported domestic violence. We located a lawyer from whom she had sought advice who recalled that she had asked about the Family Violence Act and had been fearful of her husband. Clark was assessed by 2 experts – one a psychiatrist and one a psychologist – both of whom diagnosed PTSD consequent to domestic violence. Clark's GP shared this view. Clark was extradited to the USA in June 2014. By the time the proceedings were resolved in the UK she had been held on an electronic tag and curfew for well over 2 years and her mental state had deteriorated to the point that she could barely leave her house. Her children, now adults living in the UK, had resumed contact with their father and were opposed to her extradition.

[248] Extradition Requests 2004 – 2013, published by the Home Office, 25 March 2014.

53. This background, coupled with the passage of time meant, in our view, it was grossly disproportionate to extradite her. The highest sentence she could be given is three years in prison for this offence and she had already been on a tag for over 2 years. Yet there was no provision in law that enabled us to argue that it was not in the public interest to extradite her. Our proportionality arguments were confined to her right to family life which, when set against the overwhelming desire of the US Prosecutor to secure her extradition, proved fruitless. Because the criminal solicitors had not raised the domestic violence issue at the outset, it was extremely hard to get the court to accept the evidence.

54. Had there been a general provision within the EA enabling the judge to look at the case in the round and decide whether in all the circumstances extradition was proportionate and/or in the public interest, we believe Eileen Clark would have received a much fairer hearing and justice would have been done. The reach of US jurisdiction, the type of offences that they are prepared to pursue and the absence of other effective safeguards, make an urgent case for a proportionality bar.

Legal Aid

55. Legal aid for legal assistance and interpreters in extradition cases is now means tested. In practice this has been shown to produce unacceptable delay, and unfairness. In *Stopyra v District Court of Lubin [2012]*[249] the High Court attacked the means test on these grounds and noted the conflict it caused with the strict time requirements under the EAW.[250] The Baker Review further recommended that the MOJ urgently consider removing the means test in extradition cases yet the Government rejected this recommendation out of hand, saying *"the Ministry of Justice has carefully considered the position but does not consider that the business case to reintroduce non-means tested legal aid for extradition proceedings has been made out."*[251]

56. It is unacceptable that requested persons are routinely left languishing (sometimes in custody) without legal representation for weeks or even months while they are means tested. Even more absurd is that this situation persists despite the considerable cost savings that could be made across the system if pressure on custody, court time resources including adjournments applications, were reduced. The extradition judges that gave evidence to the Baker Review were of the view that there would be a considerable net saving of public money in granting free legal aid to requested persons.[252] The costings that the MoJ provided to the Baker Review were inconclusive and based on untested assumptions. We urge the Committee to recommend that the means test is removed in the interests of justice and pragmatism.

Right to appeal against extradition orders

[249] EWHC 1787 (Admin)
[250] Article 17 of the European Framework Decision provides that decisions on whether or not to execute an EAW should be made within 60 days.
[251] The Government Response to Sir Scott Baker's Review of the UK's Extradition Arrangements, October 2012, page 6.
[252] Baker Review page 312, para 10.31.

57. Section 160 of the *Anti-Social Behaviour, Crime & Policing Act 2014* (ASBCPA) (not yet in force) amended the 2003 Act to repeal the automatic right to appeal an extradition order from the Magistrates Court. Under the reform, extradition appeals on law or fact will in future only be granted with leave of the High Court. Currently, if a judge orders an individual's extradition under the EA, he or she has the right to appeal that decision to the High Court which will be able to consider whether the decision was right in fact and law. This backstop appeal mechanism is one of the last remaining - and critical - safeguards against wrongful extradition allowing individuals to raise new evidence which was not available at the time of the extradition hearing.

58. Large numbers of people subject to extradition requests cannot afford a lawyer and so are represented by one of hundreds of duty solicitors signed up to the extradition rota at Westminster Magistrates' Court. However, the majority of individual solicitors have never conducted an extradition case before. As the Committee is no doubt aware, the 2003 Act is immensely complex and has generated a vast amount of case law. At present where a mistake is made, the requested person is protected by an automatic appeal right to be exercised within 7 days of the extradition order. Given the pressures on duty solicitors and the minimal time allocated before an initial extradition hearing, this is a vital safety net.

59. A leave requirement will mean that an arguable case will need to be made before the High Court within the allotted period. Many requested persons are unrepresented during this period and will only be able to provide a brief argument/outline in their appeal notice before seeking expert legal representation once the appeal is lodged. Unrepresented or badly advised individuals will be unable to meet the arguable case threshold and it is possible that a person who is wrongly advised in the magistrates' court will be extradited before having the opportunity to have that decision reviewed. The oppressive nature of this reform is made worse by the inequality of arms inherent in circumstances where the extraditing State is automatically granted representation by specialist CPS lawyers.

60. In arguing for removal of automatic appeal rights the Government cited the high number of appeals. Given the implications of extradition for an individual it is unsurprising that many appeal. However judges routinely dispose of weak arguments quickly and a greater number of extradition bars on the statute book will reduce the number of unmeritorious appeals and the corresponding pressure on the High Court. The reform is at odds with growing public awareness that the system already lacks vital checks and balances. At the very least an automatic appeal mechanism is essential to maintaining a credible extradition system and Liberty urges the Committee to recommend the repeal of section 160 of the ASBCPA.

Conclusion

61. In a desire to appease international partners, successive Governments have forgone extradition safeguards that traditionally operated to protect British residents. This has coincided with an increased desire among some extradition partners to extradite in a disproportionate way or in circumstances where insufficient evidence exists or where jurisdiction to prosecute is tenuous. Liberty believes that a core and modest bundle of safeguards must be added to the EA, and certain international agreements, to prevent

further unjust and arbitrary extraditions. The Government frequently reminds us that its first duty is to protect those than live within its borders. In this sphere however, protection is badly lacking. Liberty believes the Select Committee on Extradition has a truly unique opportunity to make important recommendations for reform. In undertaking this task, we urge Committee members to reflect on the policy analysis, evidence and recommendations herein.

Isabella Sankey

24 September 2014

Liberty and Roger Burlingame, Kobre & Kim LLP - Oral evidence (QQ 54 - 66)

Transcript to be found under Roger Burlingame, Kobre & Kim LLP

Baroness Ludford – Written evidence (EXL0042)

Submission to Committee on Extradition Law

From

Baroness Sarah Ludford (MEP for London 1999-2014)

1. I am writing, and aiming to answer the committee's questions 3 and 4, as the author of a European Parliament report approved in February 2014 by an impressive cross-party consensus among my (then) MEP colleagues on the legislative and other changes necessary to improve the operation of the European Arrest Warrant. My report called for a legislative proposal from the European Commission and EU-wide support to ensure that the EAW, as a crucial crime-fighting tool but one in need of reform, is used not only efficiently but fairly and proportionately. We were assisted by a study carried out by the European Parliament's European Added Value Unit on the basis of assessments from Anand Doobay and Professor Anne Weyembergh.

2. I am confident that MEPs will during the European Parliament hearings press the nominees for Vice-President of the European Commission responsible for the rule of law and fundamental rights, Frans Timmermans, and Justice Commissioner, Vera Jourova, to make commitments to ensure that the Commission indeed makes such a reform proposal.

3. The EAW is an essential weapon in the fight against crime, helping the British police keep the public safe. It has replaced the traditional lengthy and cumbersome extradition system in which government ministers were involved; under that system it took 10 years to agree the extradition from the UK to France of Rachid Ramda, wanted for his role in the 1995 Paris metro bombings, compared to the few weeks taken on average now. The EAW makes it quicker and easier to bring criminals to justice as it is implemented through 'mutual recognition' of judicial decisions, with politicians out of the picture. The average time for extradition has decreased from one year pre-EAW to around 15 days with consent and 48 days without now.

4. Some successful examples of its use include:
   - attempted July 2005 London bomber Hussain Osman, returned from Italy to the UK in less than eight weeks and now serving a life sentence;
   - Jason McKay, convicted in 2012 for the manslaughter of his girlfriend, and extradited back from Poland and before a British court within 4 weeks of absconding from the UK;

- David Mather arrested in February 2014 in Spain, having been convicted in his absence of smuggling heroin and sentenced to 18 years.

5. While a strong supporter of the EAW and the UK's participation in it, I have however always acknowledged that there are flaws in the system and have argued for reform, not least having dealt with individual cases as an MEP and as a patron of the NGO *Fair Trials International*. I campaigned strongly for my own London constituent Andrew Symeou, who spent 11 months on remand in one of the most dangerous prisons in Greece following his extradition from the UK before being finally acquitted.

6. Varying criminal justice procedures and standards across the EU have meant some of those surrendered under the EAW suffer unfair treatment and breaches of their human rights. As well as sometimes long pre-trial detention periods, other legitimate criticisms include the issue of EAWs for relatively minor offences and poor prison conditions. The mutual trust in standards and practices which lies at the heart of the EAW system cannot just be assumed, it must have a solid foundation in good criminal justice practice in all Member States.

7. The 'road map' of procedural rights measures referred to below in which the UK is participating (except so far, regrettably, in the Directive on right of access to a lawyer in Criminal proceedings) should help to raise standards, and the various networking and exchange schemes may also contribute to that as well as to better understanding between judges, prosecutors and defence lawyers. But the workings of the EAW itself also need to be thoroughly addressed.

8. There is wide variation in the number of EAWs issued by Member States and in the number that lead to a person surrendered. In 2005-9 according to the European Commission 54,689 EAWs were issued and 11,630 executed, a surrender rate of only 21%. It is interesting to compare the figures in 2011 for Poland - 3,800 EAWs issued and 930 executed (24%) compared to the UK - 205 issued and 99 executed (48%). The full 2011 figures for the UK on issued and incoming EAWs can be seen at http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/615/615.pdf.

9. The UK government has estimated that it costs £20,000 to execute an incoming EAW which covers *inter alia* police, court and legal aid costs as well as detention prior to extradition. Even if the requested person is not surrendered, the national justice system will nevertheless incur costs. The UK's reform in the Anti-Social Behaviour, Crime and Policing Act 2014 to ensure that an EAW is refused in the UK as *executing* state for minor crimes may reduce the number of EAWs executed but will not necessarily reduce the large number of EAW requests UK courts receive and have to process. The EU-wide proportionality check in the *issuing* state which the European Parliament report recommends (see below) seeks to ensure that an EAW is reserved for cases the instrument is really designed to deal with. This would reduce the total

number of EAWs issued and thus the number of incoming requests the UK receives, delivering a significant saving in public funds.

10. While I support the recent UK legislative changes for handling EAWs such as the proportionality provisions in the Anti-Social Behaviour, Crime and Policing Act 2014, I believe the best long-term strategy is to have reform at EU level rather than through piecemeal and uncoordinated national initiatives. Some progress has been achieved through the procedural rights measures guaranteeing for defendants arrested anywhere in the EU the rights to interpretation & translation, information on their fair trial rights, and access to legal advice, but more change is needed, which Is why I seized the opportunity to do a report for the European Parliament.

11. The problem of EAWs being issued for minor and petty offences – such as the theft of piglets or a wheelbarrow – is well known. This challenges mutual trust and compromises the good functioning of the EAW system and mutual recognition by leading to unwarranted arrests, disproportionately interfering with the rights of the requested person and burdening the resources of Member States.

12. My report thus called for a proportionality check to be carried out before an EAW is issued: this should be based on all the relevant factors and circumstances such as the seriousness of the offence, whether the case is trial-ready, the impact on the rights of the requested person (including the protection of private and family life) and the availability of an appropriate less intrusive alternative measure.

13. My report also proposed a consultation procedure (for all mutual recognition instruments) whereby the competent authorities in the issuing and executing Member States can exchange information such as the assessment of proportionality and, in regard to the EAW, to ascertain trial-readiness. This would ensure that the EAW is not misused for fishing expeditions to interview witnesses or suspects or just have the suspect close to hand, as opposed to its intended purpose of criminal prosecution (or post-conviction sentence). If it transpires that the prosecution is not ready for trial, individuals should not be extradited prematurely to languish in pre-trial detention whilst the prosecution prepares its case.

14. In that context, I find it puzzling and regrettable that the Crown Prosecution Service recently sought and a judge approved the issue of an EAW for the parents of Aysha King, the boy needing health treatment who was removed from hospital in Southampton and taken to Spain when the criterion in the EAW framework decision is 'for the purposes of prosecution' and it was not apparent that a prosecution, if indeed envisaged at all, was imminent. I believe this instance represented the type of misuse of the EAW of which some British politicians regularly accuse other EU Member States, and I refer to press coverage such as http://www.theguardian.com/law/2014/sep/04/ashya-king-case-parents-let-down-law and http://www.theguardian.com/law/blog/2014/sep/04/ashya-king-eurosceptic-tories-lisbon-treaty-grievances

15. An EU-wide proportionality check and consultation procedure should reduce the number of EAWs issued incorrectly. But my report also called for the timely and effective implementation of the whole body of Union criminal justice measures, including not only the procedural rights/fair trial measures but also the new European Investigation Order (EIO) for securing evidence – an EU instrument partly replacing the mutual legal assistance Convention - and the European Supervision Order (ESO) for bail. This would take some of the strain off the EAW by making available to judicial authorities alternative and less intrusive mutual recognition instruments whilst also ensuring respect for the rights of suspects and accused persons.

16. However, as a backstop, my report also proposes a mandatory fundamental rights refusal ground for the court in the executing state where there are substantial grounds to believe that the execution of a measure such as the EAW would be incompatible with that Member State's obligation under Article 6 of the EU Treaty and the Charter of Fundamental Rights. An explicit human rights safeguard clause which is consistent across the EU should provide a robust level of protection to prevent damage to individual rights whilst being broad and flexible enough to accommodate the specific facts and circumstances of each case. I am not an expert in UK courts' use of section 21 of the Extradition Act 2003 which allows a judge to refuse an EAW if European Convention of Human Rights standards would be breached, but my understanding is that the test they follow requires demonstration of 'flagrancy' in denial of justice or violation of human rights, which is a high one and arguably too stringent for the EAW context.

17. My report calls for rights to an effective legal remedy to be available to individuals, such as the right to appeal in the executing Member State against a mutual recognition instrument such as the EAW, and the right for the person to challenge before a court any failure by the issuing Member State to comply with assurances given to the executing Member State. Appeal rights currently depend on individual Member State practice: in Spain there is no right whilst in Belgium the decision on execution is subject to a whole set of legal remedies. A right to appeal could prevent miscarriages of justice such as cases of sheer mistaken identity. The consultation procedure would also enable the authorities to exchange information to prevent errors. My report further calls on Member States to provide compensation for damage arising from a miscarriage of justice.

18. EAW proceedings are frequently delayed, making costly and damaging to the right to a fair trial, by the inexperience of many defence lawyers acting in EAW cases. If they understood the functioning of the EAW and the EU mutual recognition system, cases would be more expeditious and just. Therefore, my report called on Member States and the Commission to cooperate in strengthening contact networks of judges, prosecutors and criminal defence lawyers to facilitate effective and well-informed EAW proceedings, and to offer relevant training at national and Union level to

judicial and legal practitioners in *inter alia* the proper use of the EAW and the combined use of the different mutual recognition instruments. To accompany the existing Handbook on how to issue an EAW, I am asking the Commission to draft a practical Union handbook designed for defence lawyers acting in EAW proceedings and easily accessible throughout the Union, taking into account the existing work of the European Criminal Bar Association on this matter and complemented by national handbooks.

19. Excessively long periods of pre-trial detention together with poor prison conditions are not only detrimental for requested and accused persons but they can also prejudice mutual trust and judicial cooperation, undermining the proper functioning of the EAW. Indeed, the High Court of Justice in Northern Ireland in 2013 refused to grant the extradition of Liam Campbell to Lithuania on the grounds that it would breach Article 3 of the ECHR because he was likely to be held in inhuman and degrading conditions. My report therefore calls on the Commission to explore the legal and financial means available at Union level to improve standards of detention including legislative proposals on the conditions of pre-trial detention.

20. The UK is a leader in the field of criminal justice and I want our country to lead in the effort for EU-wide reform of the EAW, in order to guarantee effective and efficient justice whilst ensuring respect for the fundamental rights of suspects and accused persons. The EAW is considered crucial by UK police and prosecutors in tackling serious cross-border crime and increasingly high-tech criminal methods and avoiding the UK becoming a safe haven in Europe for criminals. I therefore believe that the EAW should be both retained, and reformed on an EU basis, and I hope that the UK government and UK parliamentarians will continue to take a lead in both efforts. I strongly welcome the inquiry by the Committee on Extradition Law and am at your disposal if I can be of assistance orally.

12 September 2014

Baroness Ludford and Jacob Rees-Mogg – Oral evidence (QQ 154-171)

Evidence Session No. 10 *Heard in Public* *Questions 154 - 171*

WEDNESDAY 5 NOVEMBER 2014

10.30 am

Witnesses: Jacob Rees-Mogg MP and Baroness Ludford

Members present

Lord Inglewood (Chairman)
Lord Brown of Eaton-under-Heywood
Baroness Hamwee
Lord Henley
Lord Hussain
Baroness Jay of Paddington
Lord Jones
Lord Mackay of Drumadoon
Lord Rowlands
Baroness Wilcox

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Examination of Witnesses

Jacob Rees-Mogg MP and **Baroness Ludford**

Q154 The Chairman: I extend a warm welcome to Jacob Rees-Mogg MP and Lady Ludford, who are taking part in this hearing as part of a one-off special report that we propose to produce about whether or not we feel Members of both Houses should vote to opt back into the European Arrest Warrant. Each of you has very kindly sent us a brief CV, so we know who each of you is and where you are roughly coming from. Just before we go into the meeting proper, first of all, as far as I know there are no specific interests anybody has to declare on the Committee; and secondly, if you could, just before you start, say who you are for the purposes of getting it into the transcript. We suggested to each of you that it might

be appropriate to begin with a concise statement of where each of you is coming from. We have agreed, Lady Ludford, that you will start so let me give you the floor. Would you like to make a brief statement?

Baroness Ludford: Thank you very much, Lord Chairman, and thank you very much for the invitation to give evidence. I am Sarah, Baroness Ludford, and until May I had spent 15 years as a Member of the European Parliament for London. In all of that time my main focus was on justice and home affairs including, but not exclusively, police and criminal justice … So I had a focus on justice and home affairs, including criminal justice. I should say that does not make me a legal expert or an extradition law expert, although I have paid close attention to those who are and have learnt a lot, particularly because I was the lead author on a report that the European Parliament produced in February. Not least, we had advice from Anand Doobay who, as you know, is a senior extradition law solicitor, and from Professor Anne Weyembergh at the Université Libre de Bruxelles in Brussels. In the course of my work in the last few years I have also been able to hear and read many distinguished people. I should probably mention that I am vice-chair of the NGO JUSTICE and I am also patron of Fair Trials International (FTI). I know certainly that FTI has given evidence to you.

My basic proposition is that the European Arrest Warrant has delivered big improvements in the speed of extradition through the free movement of judicial decisions in place of traditional inter-governmental relations. This is important for the public interest in bringing criminals to justice and it is also important for victims. I think it is very positive that, under the European Arrest Warrant, extradition is purely judicial and not political, which was the case under the pre-EAW system. Indeed, the review by Sir Scott Baker talked about how in the 1990s it became apparent that extradition proceedings were “cumbersome, beset by technicality and blighted by delay” with an average 18-month procedure in the UK, whereas

nowadays under the European Arrest Warrant the average is about 15 days with consent and 48 days without consent. There was a lot of duplication under the 1957 Council of Europe Convention with overlap between the Secretary of State and the courts, delay through appeals and judicial review, and I think the weight of practitioners—of lawyers, police, prosecutors—believe that the old system was cumbersome. I think that the European Arrest Warrant, therefore, helps justice in the sense that Article 6 of the European Convention on Human Rights mandates a "reasonable time" for criminal proceedings. Justice delayed is justice denied, so I think it helps there.

I should also note—somewhat, I have to say, even to my own surprise—that there has been a YouGov poll in the last few days that shows that overall 56% say that the UK should be in the European Arrest Warrant and only 18% disagree. There is more than 60% support among Conservative, Labour and Liberal Democrat voters, and even among UKIP supporters 42% say we should be in and 34% out. So there is a plurality, in fact, of UKIP voters.

I think that if the UK were to withdraw from the European Arrest Warrant it would mean a laborious process of having to negotiate alternative arrangements, almost certainly bilateral treaties with each EU state. I believe it is being suggested by some that the UK could replace the European Arrest Warrant with an extradition deal with the entire EU, but I have come across considerable doubt whether the EU can legally sign a treaty with one of its own Member States on behalf of 27 others. The precedents with Denmark were pre the Lisbon Treaty and I think the wording of the Lisbon treaty now suggests that the EU can only negotiate treaties with non-Member States.

The EU did negotiate an extradition treaty with Norway and Iceland. It took many years to negotiate and has not entered into force eight years after its signature. The other point is that this treaty is almost identical to the European Arrest Warrant. If you had a treaty with

the EU—even if that was legally possible—it would not free the UK from compliance with most of the European Arrest Warrant rules. For a critic of the European Arrest Warrant, that would not really improve things, and this is all without the question of whether there is time before 1 December to do that. It is likely that there would have to be bilateral deals with 27 different Member States, which could well take years. I also think having less stringent extradition laws in the UK than in the rest of the EU—they would all have the European Arrest Warrant; we would have the older, slower system—would risk turning the UK into a safe haven for criminals, and perhaps the rest of the EU would become an attractive bolthole for those that we wanted to extradite. You might even bring back the old problem of states not extraditing their own nationals if you went back to the old Council of Europe standards. Altogether, I think it would be a backwards step.

That is not to say that the European Arrest Warrant is at all perfect. My report was done for the European Parliament and I would be very happy to expand on that. It needs considerable improvement in its operation to avoid miscarriages of justice. I have followed quite a lot of those cases as a constituency MEP and as a patron of Fair Trails International, but I do not speak for Fair Trials, obviously. We need to avoid miscarriages of justice, save some of the money that is used up in some of the operational difficulties and make sure that surrender under the European Arrest Warrant is used only as a last resort, not as a fishing expedition, as an investigatory measure. A lot of what was covered in my European Parliament report was about this.

The European Arrest Warrant is based on mutual trust, not blind faith. We should not be dazzled by, “This is an EU measure therefore no one can question the problems”. I certainly do not take that attitude. There are problems about the lack of a proportionality check. My report preferred that that should be done in the issuing state. There needs to be an explicit

ground for refusal on human rights grounds across the whole EU. There needs to be a standardised consultation mechanism between the courts in the issuing and the executing state. There needs to be recourse to less intrusive and coercive methods. Now that we have the European investigation order, which is hopefully going to be a much more efficient mechanism for getting evidence than anything that has preceded it, we should hopefully be able to avoid misuse of the European Arrest Warrant. There are also traditional mutual legal assistance measures, like summons, video and telephone conferencing, and one does question why these methods are not being used sufficiently now.

Lastly I would mention the whole programme of procedural rights measures and defence rights measures, the so-called roadmap. I was the author of the report on the legislation on the first one, the right to interpretation and translation, and of course that is carrying on. I could perhaps mention that I am sorry the UK has not opted into the directive on the right to a lawyer, because I think we have the gold standard on that in the EU and it is a pity that we do not show leadership on that particular measure. We need to do all of that to try to raise the standards of criminal justice across the EU. We also need to use other measures that are coming into force or have already been in force for some time, such as the Financial Penalties Framework Decision, transfer of probation, transfer of sentences and the European Supervision Order, which is not a guarantee of the issuing state court granting bail but would hopefully avoid the major problem of excessive pre-trial detention that exists.

Perhaps I could just sum up with a quote from Anand Doobay in his study for the European Parliament: “It is possible to envisage a procedure where an accused person is summoned to court by a mutual legal assistance process, charged having appeared by video link and then placed on bail in the Member State they reside in—if this is not a Member State prosecuting them—before surrendering for trial. If they did not surrender for trial then a European

Arrest Warrant could be issued". It would be very much a last resort when you have explored all the other mechanisms.

Q155 The Chairman: Thank you for that opening statement. Now, Mr Rees-Mogg, it is your chance.

Jacob Rees-Mogg: Thank you very much for inviting me to appear in front of this Committee. As a Member of the House of Commons, it is a great privilege to come to the smarter end of the building, so I am grateful to be here. I am the Member of Parliament for North East Somerset and a Member of the European Scrutiny Committee. I am not a lawyer but on the European Scrutiny Committee we had the great benefit of learned counsel, Mr Hardy, and so I learnt a little bit of European law from listening to him, the benefit that your Committee is now very fortunate to have.

My view of the European Arrest Warrant is that it is of fundamental importance in the creation of the European justice and home affairs competence and, indeed, in the creation of supranational powers over justice and home affairs, with a fundamental implication for the administration of justice in the United Kingdom. I think what is happening at the moment is of the highest constitutional importance and, therefore, it needs to be looked at in those terms as well as in the administrative convenience of a particular form of extradition. I think that is a relevant starting point in this context.

Looking at the narrower focus, the administrative operation of extradition, the question is: are there alternative measures that do not raise these important constitutional issues? Here I think the obvious answer is—in spite of what Baroness Ludford has said—doing a bilateral arrangement with the European Union. There is certainly independent legal advice that this is possible under the treaties and that so far the response from the Commission has been a political answer, not a legal answer. They have said that they do not want to do it, not that

they cannot do it. I am sure they would have said they could not do it had that been the case. The Government, in some of the answers it has given to the European Scrutiny Committee, has done very little in terms of analysing whether that was a possibility. I think that is a considerable weakness in the Government's position: a failure to explore this in due time and now to say, "There is a great rush". If there is a great rush because you have not done things, that great rush is not the concern of constitutionalists; it is the concern of administrative failures of the Government. I think that would be the preferred option and it would require a separate treaty with Denmark and an opt-in by Ireland, in addition to a treaty with the European Union. It would be a treaty that crucially ensured that the decisions on how extradition operated were ones for the British courts rather than for the Court of Justice of the European Union (CJEU).

A great deal has been made of the protections that have recently been built in on proportionality and in protection of people from undue length of detention. The problem with that is that from 1 December those will be decisions made by the Court of Justice of the European Union; they will no longer be a matter for the British courts exclusively. That is the major change and my major concern. It is the enforceability of the arrest warrant by an action of the Commission taken to the Court of Justice of the European Union and therefore, unlike any other extradition treaty, no longer a matter exclusively of our law.

The issues then arise as to the changes that have been proposed within the arrest warrant itself and the feasibility of achieving those to answer some of our concerns, but it is striking that the Government decided not to do that. In evidence, which I may as well quote, from the Home Secretary to the European Scrutiny Committee, she said: "We had started some discussions with other Member States at an earlier stage as to whether it would be possible to reopen the framework directive on the European Arrest Warrant and perhaps make the

changes through that, and we will continue to discuss the overall shape of the European Arrest Warrant directive. However, it became clear that, if we wanted to make some changes within the timescale that we wished to operate, it was easier to do it within our own legislation". What that is saying is that we have introduced our changes unilaterally because we could not get them agreed, in the hope that they would then be accepted by the Court of Justice of the European Union. This seems to me a highly speculative approach to safeguarding the fundamental rights of British citizens who may be subject to arrest.

In that context, I wonder if I may enter into evidence the opinion given by Jonathan Fisher QC in relation to the European Arrest Warrant and habeas corpus. I do not think I need to go through what he is saying other than in summary, which is that there are not protections within the arrest warrant that we would expect for habeas corpus. That comes back to my point that it is a fundamental constitutional issue, not just one of administrative convenience. His opinion also raises the issue of the European Public Prosecutor's Office (EPPO). Here, once we have signed up the European Arrest Warrant, if a European public prosecutor were to be established that public prosecutor would be able to operate the arrest warrant within the United Kingdom even if we had not joined up to the public prosecutor. So our opt-out of the public prosecutor becomes ineffective in the event that we sign up to the arrest warrant. We are risking the support for a public prosecutor against votes—certainly in the House of Commons; I am not sure if your Lordships have similarly voted—against the referendum guarantee, against government policy, and we are sacrificing some element of protection of habeas corpus. As I say, it seems to me of the highest constitutional importance, and there was and is an alternative that the Government simply has not tried.

I am not suggesting that we go back to the pre-existing arrangements, though many of those still stand, because I accept that they are cumbersome and that we want to have more efficient extradition operations, but I would overlie that by saying that it is of the greatest importance that our extradition arrangements are just in the way that the United Kingdom accepts justice. That is more important, ultimately, than efficiency. It is a fundamental principle that it is better for 99 guilty men to go free than for one innocent man to be handed over. That is why, when it comes to a question of efficiency or justice, justice must win.

Q156 The Chairman: Thank you. One point arising from your remark, which is about the Jonathan Fisher opinion: I gather that mechanically you cannot submit it in written form but if there are any particular bits that you would like to draw to our attention, perhaps you could read them out.

Jacob Rees-Mogg: Sorry, yes. The key bit I have mentioned, on the public prosecutor and how it brings the public prosecutor into operation once it starts—if it starts—but there is a proposal—

The Chairman: That is a proposal. The public prosecutor has not gone beyond the proposal stage that nobody has yet agreed, is that not right?

Jacob Rees-Mogg: There is a proposal for enhanced co-operation so it may go ahead with a small number of states. Even with a small number of states going ahead, an arrest warrant from the public prosecutor issued by a Member State that had joined the enhanced co-operation would be effective in the United Kingdom, so then the—

The Chairman: Under the provisions of the EAW it was a Member State prosecution and not a European Union prosecution, is that correct?

Jacob Rees-Mogg: No, the public prosecutor would have the right to direct a Member State to issue an arrest warrant. It would be directly from the public prosecutor to a Member State that had signed up, which would then have immediate effect in the United Kingdom. It removes our opt-out from the public prosecutor. That is the one key part of this. There has been—

The Chairman: Tell us what you would like to.

Jacob Rees-Mogg: The other is on habeas corpus and it says: "In short, the protection afforded by the amendment to section 11 of the Extradition Act 2003 does nothing to meet the requirement enshrined in the historical writ of habeas corpus that where challenged to justify an arrest sufficiency of evidence will be considered by an independent judicial authority—domestic or foreign—in a public hearing within a reasonable period—days rather than weeks—after an EAW has been executed in the UK. In this connection, the Minister of State's lack of confidence is noted. When explaining the impact of the amendment, the Minister stopped short of an assertion that the problems in the extradition of Andrew Symeou would not be repeated but rather carefully saying that the purpose of the new legislation was 'to try to stop' repetition of a situation where a UK citizen is remanded in custody in an EU Member State for a lengthy period before the sufficiency of evidence is judicially considered. These aspects, together with the significant impact of the establishment of the EPPO and its ability to make use of the EAW arrangement as outlined in the opinion will be matters which Parliament will almost certainly wish to take into account when determining whether to use the opt-out". That is the relevant bit. I am sorry I cannot give you the full—

The Chairman: No. I was told by my support that that was the right way to deal with it.

Jacob Rees-Mogg: Thank you very much.

The Chairman: Thank you. Does anybody have any questions for either of them before we go on to Lady Jay?

Lord Brown of Eaton-under-Heywood: Could we not have the whole opinion? What is wrong with that?

Jacob Rees-Mogg: I would be delighted to give you the whole opinion. If I give it to your Lordship, you then might be able to enter it yourself. I do not know.

The Chairman: It is published elsewhere. It can be circulated but it cannot be published evidence to us.

Jacob Rees-Mogg: In your formal minutes?

The Chairman: Yes.

Jacob Rees-Mogg: Yes.

The Chairman: By all means. We will get it copied.

Lord Henley: Lord Chairman, does that mean that we would be allowed to see it?

The Chairman: Yes, it does. Everybody will be allowed to see it. Does anybody have any questions for either of them before we go on to Lady Jay?

Q157 Lord Rowlands: Mr Rees-Mogg, first of all, the role of the EPPO is related strictly to the question of a fraud in European finances.

Jacob Rees-Mogg: At the moment.

Lord Rowlands: It is not a general prosecutor's office.

Jacob Rees-Mogg: At the moment.

Lord Rowlands: Yes, but that is the proposal.

Jacob Rees-Mogg: That is the proposal.

Q158 Baroness Jay of Paddington: First of all, thank you very much, both of you, for an extremely comprehensive outline of your positions. I think that has covered quite a few of

the questions that we were intending to raise, although I am sure people will want to pursue the detail. Notwithstanding Mr Rees-Mogg's very important points about this being a fundamental constitutional issue, I wonder if we could just look at what you have described as the administrative potential of what would happen if we did opt out of the arrest warrant, because Baroness Ludford suggested that a way forward was to try to reform the arrest warrant. That is obviously a very practical path, but I think, Mr Rees-Mogg, you were simply saying that the only real practical alternative was to have individual treaties with all of the individual states. Could I ask you both to develop the position? If we do opt out in December, what should we do next? What is the most sensible way forward? Mr Rees-Mogg, perhaps you could begin, simply because Baroness Ludford began last time.

Jacob Rees-Mogg: Certainly. No, I was saying that the most straightforward thing is to do a bilateral treaty with the European Union. This would then require additional treaties with Denmark and an opt-in by Ireland, and that is just to be pedantic about the situation.

Baroness Jay of Paddington: I understand that.

Jacob Rees-Mogg: I think that would be easier than individual bilateral treaties. In the interim, there are transitional measures. Protocol 36, Article 10(4) sets out, without any detail, what transition measures could be. There is some discussion as to their effectiveness and as to whether they would work in the transition to a new system rather than simply opting back in, but there is certainly a respectable opinion that this would apply in the transition to setting up a new system as well as to opting in. The Home Secretary said, in relation to the transition measures, that she did not believe there would be an operational gap in transition terms because, "The transitional powers are such that we would not have the operational gap". The Home Secretary—and this is evidence to the European Scrutiny Committee in October last year—was confident that the transition powers were quite wide

and says as much. My solution would be to use the transition powers, although I would caveat that by saying that the Government could have got its act together earlier. We have had four plus years for this Government to have worked out how to do this and to say that we are all in a great panic because it is happening on 1 December seems to me to indicate a lack of competence rather than a need for people, like your Lordships, to be harried or cowed, although I am sure you will not be cowed into submission to anything. Governments that try to make things urgent that have only become urgent because of their own fault are not on very strong ground. I think we should use the transition mechanisms, and then overwhelmingly the preferred option is a bilateral treaty with the EU, bearing in mind that that would not then have to be subject to the CJEU. It could remain a matter for our courts as to its interpretation or we could—as Denmark does—allow the interpretation by the CJEU. But it would not be under the 1972 European Communities Act so it would not necessarily have automatic force of law in this country. It would be more like the recommendations of other international tribunals, so that ultimately the protection of extradition would be a matter for domestic politicians and judges.

Baroness Jay of Paddington: I understand the wish to preserve the standards of British justice, of course, but you talked in your opening statement about the potential uncertainty of some of the proposals that have been put forward. Surely what you are suggesting is extremely uncertain, in terms both of the extent of the transitional arrangements and indeed—probably more importantly—the reality of negotiating a single treaty with the Union.

Jacob Rees-Mogg: I think the single treaty ought to be relatively straightforward. Between 2009 and 2013 we asked back an average of 125 people a year and we were sending to Europe a huge multiple of that number. The EAW has worked to the benefit more of

European nations than it has to the United Kingdom in terms of the raw numbers, so I think they have quite a strong interest in ensuring that there is some continuation of an agreement and, therefore, there is the ability for them to continue either with the transition mechanism or by agreeing a joint treaty. There is also the ability to fast-track EU legislation under the main justice and home affairs section of the EU treaties, as was used in a different context by the previous Government, which wanted the UK to be bound by several EU directives in social and employment law before dedicated EU competence on this had been extended to the UK by treaty change. I am confident—on the basis that the EU also wants to have extradition with the UK, which I think is a fairly reasonable assumption—that it is possible, even with this tight timeframe, to keep arrangements in place that do not make life enormously easy for serious criminals after 1 December.

Q159 Lord Rowlands: Is it realistic to believe that the European Commission will negotiate with the United Kingdom a very different set of rules that change dramatically the arrangements they have among themselves through the European Arrest Warrant? How realistic is that?

Jacob Rees-Mogg: When becoming Commissioner, the new Commissioner said that he recognised that the UK had a particular relationship with the European Union and this had to be addressed, so I am taking him at his word. We have different arrangements with the EU on a whole host—

Lord Rowlands: But not at the expense of causing enormous problems with other Member States by creating an arrangement of the kind you are suggesting, so different from the one that prevails in the European Arrest Warrant.

Jacob Rees-Mogg: It is hard to see why this is such a problem for other Member States when the alternative is for us to pull out altogether. It is a lesser problem than the other

one. We must not be too weak in understanding the strength of our own negotiating position: they want something from us as much as we want something from them. This should all have been done by now.

Lord Rowlands: It has not been done.

Jacob Rees-Mogg: No, indeed it has not, but I do not think we should allow the incompetence of the Government to allow us to take constitutional steps that we do not want to take; otherwise Governments can always get what they want by idleness.

Q160 The Chairman: Can I come in at this point and say that we are arguing slightly hypothetically, and I would like to ask each of you what evidence you have seen to support the approach. Mr Rees-Mogg is saying, "They are going to be terribly keen to negotiate with us", and I think, Lady Ludford, you told us earlier that you thought that this was really rather a sanguine view. What evidence—

Baroness Jay of Paddington: We have not had a response—because Mr Rees-Mogg has been so interesting on the first point—from Baroness Ludford about my original question.

Baroness Ludford: Thank you very much, Lady Jay. I do not believe that the Government has been negligent; I think the Government has been persuaded that the most effective and efficient form of extradition arrangements with the other 27 Member States is the European Arrest Warrant, which is why it is on the list of 35 that they are recommending to opt back in to so anything else is second-best. Why opt for something that is slower and more cumbersome and would require the legal capacity, which I doubt? I have no evidence that the EU is capable of negotiating such a treaty with one of its own Member States. I look forward to seeing such legal advice, but the discussions that I have had suggest that the wording in the Lisbon treaty suggests that the EU can only negotiate treaties with non-

Member States, not with one of its own Member States. I do not know where the idea comes from that the EU has such a legal capacity.

Then you have the question of the political will to do so. If the UK had just pulled out of the European Arrest Warrant, is everyone going to run around making it a priority to negotiate something where, I think, essentially—because that is the evidence with Norway and Iceland and because you have 27 who are practising the European Arrest Warrant—the content of any treaty is going to be pretty similar to the European Arrest Warrant?

Also, I do not understand the point—and I am open to legal rebuttal—that there would be no jurisdiction by the CJEU, because I would have thought that there was. We would still be a Member State even if we are not in the European Arrest Warrant, so the ability of the court to have judicial oversight of this, I would have thought, remained. By the way, I do not see the oversight of the European Court of Justice (ECJ) as some great bogey. After all, it is a protection in many ways, not only for individuals but also for Member States. That is why UK Governments have never been afraid of CJEU or ECJ jurisdiction in the single market, for instance. We see it as a way to make sure that other Member States live up to their obligations and, to be honest, I quite look forward to the court being able to address the question of excessive pre-trial detention in some other Member States. This could help solve some of the problems.

If I could pick up this point of whether we can hope for reform, my understanding is that the Home Secretary tried to persuade a group of other Member States, which is still possible, to agree to put forward a proposal and did not get sufficient interest. However, I think what we achieved in the European Parliament was a big majority across all the sensible political groups—including the group the British Conservatives belong to, the ECR—to support that report and we called on the European Commission to put forward a proposal for reform. If

we could get the Council of Ministers and the European Parliament to have a sort of pincer movement on the Commission, I think other Member States would prefer a Commission proposal. There is a certain fear of a Pandora's Box and I think the UK Government has to be seen as committed to the European Arrest Warrant, not as a saboteur. I think once we have opted back in then we should try to work with the European Parliament and with partners in the Council to persuade the European Commission, and I think that some of the flanking measures will help.

To the extent that there remain problems that need fixing in the terms, the European Parliament has preferred what is called a "horizontal instrument" to address all the mutual recognition criminal measures: a proportionality check, a human rights refusal and a consultation procedure. We have all three, thanks to European Parliament negotiating clout, in the European Investigation Order, which is the EAW for evidence. I think there is quite a good basis for us working with sympathetic partners in the European Parliament and the Council, but that obviously is predicated upon our continued participation in the EAW. In a sense, I would not start from here to think of alternatives. Like the Government, I believe that anything other than the European Arrest Warrant—while it has flaws that need fixing—is second-best and more cumbersome.

If I may say so, I think there is a particular concern in Ireland. I have seen a reference by Naomi Long, the Alliance Party MP, to concern from both the Northern Ireland Justice Minister and the Irish Justice Minister about bringing back the politicisation that used to exist in extradition arrangements between the Republic and the UK. I think we should bear that in mind.

The Chairman: We are slipping timetable-wise, so I urge everyone to be concise. If I can try to help steer the debate, Mr Rees-Mogg, your principal objection, the main point that lies

behind what you are arguing in the context of this particular proposal is essentially a constitutional point, is it not?

Jacob Rees-Mogg: Yes.

The Chairman: Lady Ludford, I think you are principally focusing on the operational implications in what you do now. Is that right?

Baroness Ludford: Yes. I think the European Arrest Warrant is a good instrument but its operation could be made better.

The Chairman: Yes, and, however good it was, you still would have very serious reservations about it because of the constitutional aspect.

Jacob Rees-Mogg: Because of the constitutional aspects, but on a practical level the different levels of justice across the European Union. It is not true to say that every Member State has the same standard of justice.

Q161 Lord Mackay of Drumadoon: Can I you ask this question that to some extent you may have answered: if the United Kingdom does not opt back in to the European Arrest Warrant, is there anything either of you wish to add to what you have already said as to the alternative extradition arrangements that might be introduced with a view to guarding against the United Kingdom becoming a safe haven for criminals?

Jacob Rees-Mogg: I would just reiterate that the best option would be a bilateral treaty using the transition arrangements. To stop us being a haven for criminals is a matter for our own domestic law, so that we can arrest and throw out of this country people that we choose to. We can set out domestic law to do that and, if necessary, pass emergency legislation to enforce it.

Lord Mackay of Drumadoon: Lady Ludford, is there anything you wish to add?

Baroness Ludford: I think I have said mainly that I think anything else is second class—

Lord Mackay of Drumadoon: It is not easy to answer the question.

Baroness Ludford: There is also the time issue of what happens on 1 December. We surely do not want, from any point of view, to be in a sort of legal vacuum.

Q162 Lord Jones: I will be brief. What is your response to the support expressed by senior police and law enforcement representatives for the EAW and their doubts about the practicality of any alternative arrangements for cross-border co-operation?

Baroness Ludford: I listen very closely to what they say; I listen with humility. They are experienced. We know we have an extremely serious challenge of major and organised crime. Some accounts of the threats that we face are hair-raising: various kinds of drug trafficking, human trafficking, smuggling, cybercrime and so on. We surely cannot afford to take a lax view of the law enforcement aspect.

As I have said, at the same time as listening to the law enforcement experts I listen to both sides, not least because of the interest I mentioned at the beginning and as a parliamentarian. Andrew Symeou is one of my constituents. His was a horrendous case and a shocking example of miscarriage of justice. But if the police come along and say, "Anything else is going to hamper our ability to get people into prison", then I listen very closely to them. We know that in the exercises, particularly with Spain, Operation Captura and so on, we have had some spectacular successes in bringing people back. Hussain Osman, the would-be July 2005 bomber, is now serving 40 years in prison and he came back within days from Italy, whereas Rachid Ramda took 10 years to extradite to France. That is justice for victims as well as a result for law enforcement and it is important for all of us as citizens, so I believe they know what they are talking about.

Q163 The Chairman: Mr Rees-Mogg, what is your steer on this?

Jacob Rees-Mogg: They would, would they not? The police wanted 90 days' detention. The police always want more powers for the police. If I were a policeman I would want more powers for the police. Politicians want more powers for politicians, judges want more power for judges, and policemen want more powers for policemen. It is what you would expect them to say, and I would then question the proportionality. I have already said that between 2009 and 2013 on average 125 people were brought back into this country under the arrest warrant. That compares to an average of 400,000 indictable offences. So the argument that the arrest warrant is essential to the carrying on of British justice is simply not correct. The numbers do not support it.

The Chairman: Can you elaborate on how you get to that conclusion from the comment you made?

Jacob Rees-Mogg: So 125 arrest warrants have been used to bring wanted criminals back into this country, against 400,000 indicted offences on average in the same period.

The Chairman: In this country?

Jacob Rees-Mogg: In this country.

The Chairman: Surely the point about the 125 is these were the king villains.

Jacob Rees-Mogg: They happen to include the parents of a child who gets taken out of the country for medical treatment.

The Chairman: If I may say so, that was a mistake by the prosecuting authorities, which is accepted on all sides.

Jacob Rees-Mogg: What I would say is, even if you say these are the most important criminals in the country and there are more than 125, even then—and the number of murders are, what, about 800 in this country a year—the numbers are very small. We get told that the arrest warrant is essential to catch terrorists and paedophiles and murderers.

We then discover, first of all, that it is used mistakenly to get back the parents of a five year-old child who is ill. So it is not used for terrorists, murderers, or paedophiles in that case. We have two or three examples that we are given over the six- or seven-year life of this arrest warrant. We are not given hundreds of examples. We are given one terrorist brought back from Italy, again and again. I am simply saying that the police are saying that this is convenient because they would, but the numbers do not back it up as being this key tool of law enforcement. It is a minor aid to law enforcement that could be replaced by other ones. But we should not get too carried away about how essential it is to the security of this nation. It is a minor convenience to the police and no more than that.

Q164 Lord Rowlands: Let us just take the Spanish cases. There were 63 cases of British criminals free in Spain for years and years. They were not romantic robbers; they were murderers, they were committing fraud, and they were trafficking in drugs, besides the horrible case that the Home Secretary mentioned. It is not a question of efficiency, Mr Rees-Mogg. It is a question of justice.

Jacob Rees-Mogg: It is a question of very small numbers. This is not essential to the safety of the nation. We get told it is, but that is propaganda.

Lord Rowlands: It is essential to justice.

Jacob Rees-Mogg: Not necessarily, no.

Lord Rowlands: If I was a member of a family of someone who had been murdered by one of these criminals, and then watched them get away with it for years, I would consider that a matter of justice not efficiency.

Jacob Rees-Mogg: It is not essential to justice if it suspends habeas corpus. Habeas corpus is more essential to justice than getting back 63 people from Spain, and there are other ways of doing it as well.

Q165 Baroness Hamwee: On the 125 that you have obviously looked at, has somebody done a breakdown of the types of crime? I do not mean murder or drugs or sex trafficking or whatever, but so that they can be categorised as which might be organised crime.

Jacob Rees-Mogg: I have not, but I am sure the proponents of the arrest warrant would have come up with those figures if they were helpful.

Lord Brown of Eaton-under-Heywood: Has it occurred to you that there might be more than 125 if you did not have a system for bringing them back?

Jacob Rees-Mogg: I do not follow the question. If you do not have a system for bringing them back there would not be any.

Lord Brown of Eaton-under-Heywood: There would be more who are escaping justice by going abroad in order to escape trial in this country.

Jacob Rees-Mogg: I am in favour of having a system, I am just in favour of having a different system that is not coming under the competence of the European Union and, therefore, it remains a matter of UK law rather than—

Lord Brown of Eaton-under-Heywood: That is a separate point. Your real problem is not that there should not be a system, as there plainly should.

Jacob Rees-Mogg: There plainly should be a system.

Lord Brown of Eaton-under-Heywood: Exactly. So whether there are 125 or 500 is not your real point.

Jacob Rees-Mogg: No, I was—

Baroness Ludford: May I add a brief point to that, which is that the real point is your political constitution, is it not? We can argue until the cows come home about the different extent of the practicalities of it, but this is not really, from your perspective, a criminal justice issue.

Jacob Rees-Mogg: It is quite important because the answer needs to be given to the police. The police say, "This is absolutely essential". If the future of the nation were at stake there comes a point at which you say, "Realistically, we have to make compromises on the constitution". Pitt the Younger suspends habeas corpus because he believes the security of the nation is dependent upon it. We do much the same during the Second World War. There are circumstances under which you feel that the constitution has to be put second. But for 125 criminals a year I do not think that is the case. So there becomes a practical element within the constitutional element. There must be a degree of proportionality, even for the starchiest constitutionalist.

Baroness Ludford: There are also the criminals that we ship out. We surely do not want them to stay here if we have more difficult extradition arrangements. I do not have to hand the figures of the European Arrest Warrants that we execute in this country. I cannot remember them off the top of my head. If I may say so, the ultimate logic of Mr Rees-Mogg's approach seems to be that we do not really mind too much whether we have extradition at all, either incoming or outgoing. It has long been recognised in legal and public policy in this country, even under international law arrangements, that there is an interest in bringing criminals to justice across borders. I find an attitude that says that constitutional objections override the interests of justice rather odd and I do not agree with Mr Rees-Mogg's point on habeas corpus. Abuse of process arguments are still available to our courts and I would have thought habeas corpus was also still available. For instance, we have legislated in this country in the 2003 Extradition Act originally to have Section 21, which allows a court to refuse surrender if it would breach Convention rights, so I do not understand that habeas corpus point. I am all in favour, which is why the report we did for the European Parliament said that we should generalise that ability, hopefully as a last resort, to refuse extradition on

grounds of human rights breaches. Do not let us pretend that the Emperor has clothes if the Emperor in a particular case does not have any clothes.

The Chairman: Lady Hamwee, do you have anything else you would like to ask?

Baroness Hamwee: I think probably the questions about the impact on the criminal justice system, prison population, legal aid and so on may be implicit in the answers that we have already had.

Q166 Lord Hussain: The figures demonstrate that since 2009 only 4% of the surrenders from the UK in response to EAW requests have been British nationals. What impact does the EAW have on British citizens?

Baroness Ludford: If they are genuinely wanted criminals, a European Arrest Warrant is the appropriate instrument because it is for the purposes of prosecution, which is very important under the European Arrest Warrant, although of course there are differences between common law and civil law jurisdictions about the point at which you charge or try to charge. Amendments have been made to UK law recently and it is going to be interesting to see how that pans out in terms of finding out about when a charge and a trial are imminent. But certainly in the work we did in the European Parliament we were very keen that it should be ascertained that a case is trial-ready before someone is extradited under the European Arrest Warrant. If it is still at an investigation stage then you should use other instruments: a witness summons, video conferencing, telephone conferencing and so on. But if someone is a wanted criminal genuinely for trial then they should face justice, whether they are British or another nationality. Of course if they are non-British nationals then it is quite right that we should co-operate with the countries in which they are wanted.

In the 15 years that I have been an MEP, I have worked all the time—and very laudable work has been done, particularly by some NGOs and academics, whose work I follow with

interest—to make sure that the rights of the defence are not overruled. That is why in all the work that has been done in the EU on the procedural rights measures, which I mentioned earlier, there was an attempt made in the mid-2000s to have a comprehensive procedural rights instrument. I think that did not get support in London. So, to cut a long story short, a new attempt was made after 2009 to have a piece by piece set of instruments. This is the attempt to make sure that, in every Member State of the EU, the fundamentals of a proper defence are in place.

I agree that there are problems in some Member States, which is particularly why I want the UK—which on the whole has an extremely well regarded justice and law enforcement system—to take leadership in this area, because we will not be able to defend the rights of British citizens, as well as make sure that they are properly brought to trial, if we are not fully participating and engaging on this question. Our voice is potentially a very effective and well respected one. But if we are just on the sidelines then we cannot be as effective in ensuring British citizens get justice, both as victims and as the public, and that criminals are brought to justice, if we do not fully participate.

The Chairman: Mr Rees-Mogg, do you have any response to Lord Hussain?

Jacob Rees-Mogg: It is 217 people, but I think Britons who commit crimes may reasonably be extradited—I would not try to stop that—but it should be just. I think we provide better justice for them not by trying to rearrange the European furniture for arrest warrants but by protections under our own domestic law. The Andrew Symeou case is tremendously important—

The Chairman: That was the well known miscarriage of justice?

Jacob Rees-Mogg: That is right, where he was held in prison for two years. But the thing is the Greeks would have said when they asked for him they were trial-ready. He said this

himself in evidence he gave to a House of Commons Select Committee. So there are already failures to protect people, and the protections brought in as the amendment to the 2003 Extradition Act will not necessarily—and even the Government admits this—be effective after 1 December when they are justiciable in front of the CJEU. So I am not particularly worried about the 4% being British because I think that if we have dangerous criminals in here and a just process I am not against them being extradited, but I think it is tremendously important that we protect them under domestic law.

The Chairman: You are telling us that the EAW system is an unjust process, is that right?

Jacob Rees-Mogg: I think it can be unjust, yes. I think the protections we put in may turn out to have remarkably little effect because they are under UK domestic law and this is an EU competence from 1 December.

Q167 Lord Brown of Eaton-under-Heywood: Of course I understand your constitutional objection—a root and branch objection—to the whole furniture, as you put it. Although I do not necessarily agree with you, I understand your objection to the European Court of Justice taking jurisdiction in these matters. Assuming that you are reconciled to having a system for extradition, can you see other or different improvements to it from those that were identified by Baroness Ludford in the report, where she was the rapporteur, made to the European Commission on the whole future of this?

Jacob Rees-Mogg: I think the improvements that we have brought in to British domestic law are very sensible, although one might push them a little bit further and strengthen them a bit. But unfortunately they do not stand after 1 December, or they may stand. It becomes a matter of speculation whether they stand or not. That is why I think it would be better to continue with a bilateral system where the ultimate protections are our own and then,

crucially, if we find something that goes wrong, it is within the ability of the British political system to put it right in future, not a matter for these endless negotiations.

It is important in this context because I think this Committee was given evidence by Jacqueline Minor. In her evidence she said that from the Commission's point of view it is appropriate at present not to reopen the legal measure but to seek to make it more effective by flanking and complementary measures, including the rules on procedural law but also including non-legislative action. So there does not seem to be a great willingness to make fundamental improvements within the European Union to it. We all know that the reason for that is that it is much harder to make changes in the European Union than it is in domestic law.

Lord Brown of Eaton-under-Heywood: Given that, why are they going to crumble in the course of a bilateral agreement with us? Why would they do that if they are not prepared to deal with the scheme overall?

Jacob Rees-Mogg: Lord Inglewood asked for evidence. The evidence I would give is that the Prime Minister when threatening to wield a veto managed to get the EU to cut its budget. When you are in a position of refusing to do something, the European Union is a sensible negotiating body.

The Chairman: Does that work the other way around?

Jacob Rees-Mogg: They want to have an extradition agreement with us just as much as, if not more than, we want one with them. We sent them many, many more people than we get back. So it is hugely for the overall advantage of the other Member States to have some arrangement with us.

Baroness Ludford: I do not understand this point about the EU having—I am not persuaded of it—the legal capacity to make a treaty with one of its own Member States. Even if that

was true I do not understand that you would escape the jurisdiction of the European Court, the CJEU, because it would be an EU treaty and you would have 27 Member States. So this idea that only British courts would be able to exercise judicial supervision of a system in which you have the EU and one of its own Member States, I do not understand that at all. You would end up with the same substantive bundle but with fewer rights because you are not a full member of the European Arrest Warrant itself, so I think moving the boundaries like that is not effective.

On reform, one of my regrets of not being in the European Parliament recently was not being able to press the candidate for Justice Commissioner on this point, but questions were put to her. If I may say so, Claude Moraes—the British Labour MEP who is the chairman of the justice and home affairs committee, the LIBE Committee—I think shares this interest in reforming the European Arrest Warrant, so I hope and believe there will be a continuing interest in the European Parliament in pursuing this. If we can persuade the Council to put pressure on the Commission, it is not unknown for the Commission to react to political pressure to produce a proposal for a legislative measure. But then if that does not happen there is the possibility that you could get a quarter of Member States to agree that. Although it did not succeed when the Home Secretary tried, perhaps it would be a more formal attempt. So I am not discouraged by the idea of getting a reform, and I think it is better to have a uniform reform so that every Member State is doing a proportionality check and the issuing state has mandatory refusal on human rights grounds and so on. I am not opposing that measures be taken in this country, but I think it could be far better and less obviously open to challenge if it was enshrined in the EU legal instrument itself.

Jacob Rees-Mogg: As to the point on the jurisdiction of the CJEU on a bilateral treaty, like any other international treaty, that would have the dispute resolution mechanism set out in

the treaty. So it could be the CJEU or EU or it could be any other body. But the judgment that came forth would be like the judgment of the European Court of Human Rights, one that a British Parliament may then wish to enact, may usually enact, but would not have the force of law as judgments of the CJEU do when they are under the European treaties brought into British law through the 1972 European Communities Act. So that is why it would be fundamentally different and would remain a political decision of the United Kingdom rather than a full European competency.

Q168 Lord Henley: I was going to come on to numbers, because I think numbers are quite relevant in terms of what Mr Rees-Mogg was saying about possibly renegotiating and trying to find a new solution. You talked about 125 over a certain period coming back here. I think you then said a very much larger number were going out and, therefore, it was in their interests. But we do not have a figure for that other than the one you mentioned—but again I do not know if it is over the same period—217.

Jacob Rees-Mogg: It is 217 from 2009 to date, so that is not the same.

Lord Henley: So it is not the same period. But your 125 I presume is over—

Jacob Rees-Mogg: It is 2009 to 2013.

Lord Henley: So over a number of years, but a much larger number going back, presumably foreign nationals. We heard evidence earlier on that an awful lot are from Poland, presumably a great many of them for relatively minor offences. I do not know whether you want to comment on that as to whether there are appropriate safeguards for them. But I would be quite interested to know what the numbers are, and whether you have any evidence or whether you can provide any for the Committee at a later date.

Jacob Rees-Mogg: I can provide the figures because they have been provided by the Home Office. They include some wonderfully minor things. Somebody was deported back to

Poland for being drunk in charge of a bicycle. Those are now subject to the safeguards in UK law, but it is not known whether those safeguards will be applied by the Court of Justice of the European Union after 1 December if we opt back in. That will then be a matter for the Polish authority issuing an arrest warrant for a minor offence, us then not implementing it, taking us to the European Court and finding out what happens.

Lord Henley: Would that then apply the different safeguards in Poland or Slovenia or Slovakia or wherever?

Jacob Rees-Mogg: I imagine the safeguards would be applied uniformly across the European Union. It is worth saying that I had a Parliamentary Answer on this from the Home Secretary, or from the Home Office, which simply said that it would only be the most minor of offences that would be protected by the safeguards. So I think we could still expect a fair number of pretty trivial offences to be covered.

Lord Henley: Down as low as drunk in charge of a bicycle?

Jacob Rees-Mogg: I suppose they would hope to get rid of the ones that were so absurd that it allowed people like me to use them as a means of attacking the system. But I am not sure they would go much higher than that.

Q169 The Chairman: Do you expect the CJEU to rule that our domestic arrangements are in fact in breach if, given that, we would opt back with them in place?

Jacob Rees-Mogg: It is very hard for me to speculate on what the CJEU will do, but you have to bear in mind that it would require them to rule that an arrest warrant issued by a legitimate authority—being another Member State—was invalid. It is not as simple to say that they would be attacking the UK. Their decision one way or another would be attacking one Member State. The general push of the CJEU is to create an ever closer union and that underpins a lot of their work and it is in the treaty, so why would it not? I think if they

thought the arrest warrant met the strict terms of the treaties or regulations they would expect it to be implemented.

Q170 Lord Rowlands: As we understand it, since 2009-10 there have been 1,205 requests for them to do that, and it has been averaging at about 240 to 250 a year. Those are the actual figures.

Baroness Ludford: I think we have extradited around about 1,000 a year. The figures I have here are that we surrendered 922 in 2011-12 and 1,173 in the previous year. There has already been a drop in the issue of requests from Poland. A year ago in the European Parliament we heard from a senior Polish official about the changes they were making, through soft law measures, training judges and so on. They have a very decentralised system and they do not have such well trained extradition courts as we do. They also have—and my head has gone blank about the term—no discretion in their legal system about the issue. If they can issue a domestic warrant they have to issue a European Arrest Warrant. So they are making changes and I think they have changed the penal code to have a proportionality check. It has to be in the interests of justice to issue a European Arrest Warrant, so it is already coming through in the figures. They have been very sensitive to the criticisms. Although every country feels that its own domestic law is okay, as I say, they have made both these administrative changes and these legislative changes, which should see a considerable drop in the requests from Poland. Notwithstanding that, the European Parliament still thinks that you should have enshrined in EU law this necessary proportionality check in the issuing state, as you now have in a European Investigation Order. That should be generalised across all mutual recognition instruments, notably the European Arrest Warrant.

Lord Rowlands: You listed a series of changes needed in your report. There is not a chance that any of them are going to be in place before the Houses of Parliament have to make a decision to opt in or stay out.

Baroness Ludford: No.

Lord Rowlands: On the presently unreformed European Arrest Warrant, would you vote that we opt in, even to this arrest warrant?

Baroness Ludford: Definitely, and then work hard with the good persuasive powers I believe we have in the justice and home affairs area—

Lord Rowlands: Despite all the problems you identify in your—

Baroness Ludford: Yes, because I think the glass is three-quarters full and we can improve on things. I am absolutely clear-eyed about the problems there have been and scandalised that there have been miscarriages of justice, which is why I have wanted to work in this area, both as a constituency MEP and as a parliamentarian and legislator more generally. I have listened, as I say, extensively to the experts, both the lawyers and the police.

Lord Rowlands: It is non-reformable?

Jacob Rees-Mogg: Even if it were reformable, a year ago the Home Secretary could not get a quarter of Member States to act together to put forward reforms. You have had evidence to this very Committee saying that the European Commission is not looking to make these reforms. So I think it is deeply speculative to think that those reforms will come through in any reasonable timeframe.

Q171 The Chairman: I think one of the characteristics of the debate we have had is there has been a fair amount of speculation in all kinds of directions. I think the time has come when we ought to draw the proceedings to an end. Is there anything either of you would like to say in conclusion? I would just like to ask Mr Rees-Mogg: as I understand it, the thrust of

the argument you have given is that the European Union is a constitutional abomination that this country should have no part of. The *Daily Telegraph* in its leader on 30 October argued that you should get out of the European Union and, in the meantime, you should remain in the arrest warrant because that is the practical way of ensuring that we have some sort of system to deal with these matters in the interim. Have you any comments about that?

Jacob Rees-Mogg: First of all, that is not my position. I think that the European Union is a body of which we could remain a member. I think the Prime Minister's proposals for renegotiation are perfectly respectable. I do not think we should have changed the structures pre-Lisbon relating to justice and home affairs to maintain both unanimity and them being essentially intergovernmental, because I think justice and home affairs are fundamentally about the creation of a state in a different way from your trade arrangements. So I have a particular constitutional objection to the arrest warrant but I do not happen to agree with the *Telegraph* on this occasion, wise and learned journal that it is. Our relationship with the European Union is salvageable, though that may be difficult. But it makes absolutely no sense to say, "We want to get powers back. We want to reform our relationship with the European Union, but in the meantime we are going to give you something of fundamental importance and that is how our citizens can be arrested".

Baroness Ludford: I would add that often the example of Norway is mentioned. Norway is popularly known in the trade as "the fax democracy" because they take their instructions by fax from Brussels. They have no say in how EU law develops, no Members in the European Parliament and no representation in the Council. As far as I can understand this idea, which I come back to—and which I do not believe could happen legally—if the EU was to negotiate a treaty with one of its own members presumably then we would just be passive recipients of whatever the other Member States decided to do in the future with the European Arrest

Warrant. As I contend, I suspect that that treaty—if it could exist, theoretically—would essentially contain the elements of the European Arrest Warrant but we would simply be passive recipients of that. I do not think that is a position that the UK should be in and would want to be in with our heritage and our experience. Remember that next year is the 800th anniversary of Magna Carta. We are looked up to, we are respected in this area, and I do not think that for us to just passively accept what the other Member States decided in a treaty, or in changing the European Arrest Warrant and then changing this treaty, is either a functional or a respectable position for the UK to be in. We would be worse off than we are at the moment, where at least we have some hope of changing the European Arrest Warrant in the future.

Jacob Rees-Mogg: I think Lady Ludford is objecting to a proposal that nobody has made.

Baroness Ludford: The European Parliament has suggested it.

Jacob Rees-Mogg: But not from the British point of view—

The Chairman: We are not arguing this morning about a proposal that nobody has made, so perhaps this is the moment to draw to a conclusion and say thank you to both of you. I suspect that, if on nothing else, you can agree with the advice the Queen gave to the Scottish people: those who are taking these decisions should think carefully about it.

Lord Advocate – Written evidence (EXL0065)

THE RT HON FRANK MULHOLLAND QC

House of Lords Select Committee on Extradition Law
House of Lords
London
SW1A 0PW

16 September 2014

Dear Clerk to the Committee

General

The Extradition Act 2003 recognises Scotland as a separate jurisdiction.

The Act enjoins the Lord Advocate to conduct extradition proceedings before the Sheriff at Edinburgh, which is the appropriate judge and designated court. The Lord Advocate is also enjoined to give the issuing judicial authority such advice related to the extradition as is considered appropriate.

The Crown Agent is designated as the Scottish central authority for extradition.

In practice, lawyers within the International Cooperation Unit, a unit of the Serious and Organised Crime Division of the Crown Office, deal with both incoming and outgoing extradition requests on behalf of both the Lord Advocate and the Crown Agent.

A request for extradition by the Scottish authorities will always be proportionate.

The experience of Scottish prosecutors is that the Extradition Act 2003, as originally enacted, provides just outcomes, is not too complex and is fit for purpose.

The Scottish Criminal Justice system has not encountered the problems of proportionality reported in England and Wales and the experience of Scottish prosecutors has been that relatively few requests have been made by other countries seeking extradition of individuals for trivial offences.

European Arrest Warrant

The EAW measure has been a huge success story. It is frequently used as an effective tool and with great practical benefit, both in allowing Scottish law enforcement agencies and the prosecution service to seek the swift and efficient return of fugitives to Scotland to face trial and to facilitate the swift and efficient removal from Scotland of those who have fled a foreign jurisdiction and who are surrendered to face trial or sentence.

In 2013, 149 European Arrest Warrants were received by the Crown Office and Procurator Fiscal Service (COPFS) and 25 EAWs were issued.

The average extradition process required 97 days, which is a significant reduction from the time it would have taken under the 1957 Council of Europe Convention on Extradition.

The EAW has developed and encouraged greater transparency amongst the judicial authorities and enhanced judicial cooperation. This has been further developed with recourse to the European Judicial Network and Eurojust in appropriate cases within the competence of each body.

There are differences in national legislation on implementation of the pan European EAW Framework Decision which has been recorded in the fourth round evaluation. However differences in implementation, each Member State recognises and gives effect to the principle of mutual recognition and each Member State, as signatories to the Council of Europe European Convention on Human Rights, offers the requested person the protections afforded by the Convention.

If the United Kingdom is permitted to opt back in to the EAW scheme it is envisaged that combined with the engagement by the National Crime Agency of the Schengen Information System II, there will be greater opportunity afforded to Scottish law enforcement and prosecution authorities to trace the whereabouts outside the UK of Scottish fugitive offenders.

Prima facie case

Where a prima facie case is not required for an extradition request, courts still retain responsibility to ensure that the extradition request is compatible with the person's convention rights, as in any other case.

In practice, Scottish courts will hear all arguments against the granting of extradition including those advanced that convention rights or human rights will be breached if extradition is granted. The experience in Scotland is that these arguments are carefully and fully considered by the courts, applying the jurisprudence of both the wider UK courts and that of the European Court of Human Rights.

For instance, in the case of *BH (AP) and another and KAS or H (AP) v The Lord Advocate and another* [2012] UKSC 24 the Supreme Court considered whether extradition of the

appellants to the United States on drugs related charges would be incompatible with their family life under Article 8 of the European Convention on Human Rights.

The court considered all relevant factors in the interests of justice including the interests of the appellants' children and the impact extradition would have on the family. The court ultimately held that extradition was not disproportionate and that there were strong practical reasons to conclude that the US, where most of the witnesses resided and the degree of criminality involved would be best assessed, was the proper place for the appellants to be tried.

Extradition is reserved to the United Kingdom Parliament in terms of the Scotland Act 1998. The experience of COPFS is that designation and review of designation is undertaken by the Home Secretary without consultation of the devolved administrations, despite the considerable experience other UK jurisdictions may have of Part 2 territories. However the absence of designation does not preclude the Home Secretary designating a territory to enable extradition arrangements to be put in place.

UK/US Extradition

It is considered that the extradition arrangements with the US are broadly comparable to other territories that do not need to show a prima facie case. To require the US to provide a prima facie case would undoubtedly cause delay in the process which would be undesirable.

It is accepted that there is no practical difference between the US "probable cause" test and the UK "reasonable suspicion" test as concluded at paragraph 7.86 of the Scott Baker review. Scottish prosecutors have not found any evidence to suggest that the UK's extradition arrangements with the US are unbalanced.

Experience has shown that requests for extradition to the US from Scotland have been vigorously challenged in the courts, an example of this being the case of *BH (AP) and another and KAS or H (AP) v The Lord Advocate and another* [2012] UKSC 24, which was ultimately appealed to the United Kingdom Supreme Court. Notwithstanding the vigorous challenges made requests made have been ultimately successful.

Political and Policy implications of Extradition

It is not appropriate as the Independent head of the prosecution system in Scotland to comment on political considerations, however, what can be said is that since the EAW has become a purely judicial function it has streamlined the whole process of extradition and resulted in decisions on extradition within the EU being determined on purely factual and legal considerations.

Human Rights Bar and Assurances

It is considered that there is sufficient protection provided for in the Extradition Act 2003 of individual's human rights. The experience in Scotland is that all human rights arguments

that may be appropriately raised are raised and considered by the Courts, applying the appropriate standards and burden of proof for each issue raised in line with ECHR jurisprudence. The fact that all such arguments are aired within the setting of a publicly accessible court provides safeguards for requested persons as the whole process is open and transparent.

A right of appeal is available to the Supreme Court which exercises equitable supervisory jurisdiction over the application by the Courts of the European Convention of Human Rights in the separate jurisdictions of the UK.

A person subject to extradition within Scotland also has the right of individual petition to the European Court of Human Rights.

If there is a need for a country to provide assurances in order to secure extradition this inevitably raises questions of trust that such assurances will be observed. There are a number of factors that a court would have to take into account in assessing such assurances and whether a person's rights will be adequately protected. The question of assurances and how a court should consider the quality of them and assess whether they can be relied upon was considered recently by the European Court of Human Rights in the case of *Othman v UK (2012) 55 EHRR*. At paragraph 188 and 189 the court set out the approach to be taken and listed factors that a court should take into account:

> "[188] In assessing the practical application of assurances and determining what weight is to be given to them, the preliminary question is whether the general human-rights situation in the receiving state excludes accepting any assurances whatsoever. However, it will only be in rare cases that the general situation in a country will mean that no weight at all can be given to assurances.
>
> [189] More usually , the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving state' s practices they can be relied upon. In doing so, the Court will have regard, inter alia, to the following factors:
> (1) whether the terms of the assurances have been disclosed to the Court;
> (2) whether the assurances are specific or are general and vague;
> (3) who has given the assurances and whether that person can bind the receiving state;
> (4) if the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them;
> (5) whether the assurances concerns treatment which is legal or illegal in the receiving state;
> (6) whether they have been given by a Contracting State;
> (7) the length and strength of bilateral relations between the sending and receiving states, including the receiving state' s record in abiding by similar assurances;
> (8) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant' s lawyers;

> (9) whether there is an effective system of protection against torture in the receiving state, including whether it is willing to co-operate with international monitoring mechanisms (including international human-rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible;
> (10) whether the applicant has previously been ill-treated in the receiving state; and
> (11) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State"

Whilst the case of *Othman* was concerned with deportation the principles set out above would be equally applicable in an extradition case where assurances featured and accordingly UK courts would be bound to follow this approach.

Other Bars to Extradition

The provisions relating to forum bar brought into force under the Crime and Courts Act 2013 will only be implemented in Scotland if the Scottish Ministers request it. They have thus far not done so and, as far as I am aware, there is no intention to do so for the foreseeable future.

This is consistent with the historic position in Scotland where prosecutors are fully independent and have a fundamental discretion on whether to raise a prosecution or not and with the independent role of the Lord Advocate guaranteed by section 48(5) of the Scotland Act 1998 heading that prosecution system.

In practice, Scottish prosecutors will discuss cases with their counterparts in other jurisdictions where it transpires there is a mutual interest in prosecuting in order to reach a decision as to whether a prosecution should proceed in Scotland. Where there are conflicting views on jurisdiction recourse can be had to Eurojust to seek assistance on determining jurisdiction.

It is not thought that the introduction of the proportionality bar in relation to EAW applications brought into force under the Anti-social Behaviour, Crime and Policing Act 2014 will impact heavily in Scotland. Scottish courts have in the past demonstrated they deal with the issue of proportionality and where the person faces a less serious offence, which occurred some time ago and has family and social ties in Scotland, extradition will not be ordered. In addition, deputes in the International Cooperation Unit actively engage the issuing judicial authority in cases which would be captured by the amendment and encourage them to consider less coercive measures such as trial in absence. However, the Lord President is yet to issue guidance, as he is enjoined to do by the amendments, which may dictate a change of approach taken by Scottish courts.

Rights to Appeal and Legal Aid

In Scotland a person subject to extradition proceedings will always be afforded the services of a duty solicitor at any initial hearing before a Sheriff. It is accepted that extradition law requires particular expertise and knowledge. There are occasions were adjournments are

sought in order to seek legal aid for representation, either by solicitor or Counsel and this can cause delay. However requests for legal aid in Scotland are generally dealt with quickly and accordingly there have been no significant issues experienced in Scotland.

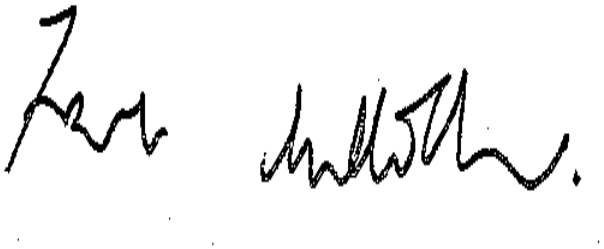
The volume of appeals in extradition cases in Scotland are not at a level that has caused concern for COPFS although anything that reduces pressure on the Appeals Court is to be welcomed. It is of note that the provisions removing the automatic right of appeal in extradition are not yet in force in Scotland.

Devolution

The Lord Advocate is, in terms of the Extradition Act 2003, designed as the competent authority in Scotland and is enjoined to act on behalf foreign authorities in the conduct of extradition proceedings in Scotland.

The act of the Lord Advocate in raising extradition proceedings on behalf of a foreign authority can be challenged in terms of section 34 of the Extradition Act 2003 and Schedule 6 of the Scotland Act 1998. Separately and additionally, an act of the Lord Advocate can be subject to challenge in terms of section 57(2) of the Scotland Act 1998 on the basis that it is incompatible with Convention rights. This additional means of challenge does not exist in England and Wales.

I hope you find this information is helpful. Should you require any other additional information I would be happy to assist in any way thought appropriate.



FRANK MULHOLLAND QC

16 September 2014

Lord Chancellor and Secretary of State for Justice – Written evidence (EXL0090)



The Right Honourable Chris Grayling MP
Lord Chancellor and
Secretary of State for Justice
www.gov.uk/moj

Lord Inglewood
Chairman
House of Lords Select Committee on Extradition Law
House of Lords
London SW1A 0PW

Your ref:
Our ref:

January 2015

HOUSE OF LORDS SELECT COMMITTEE ON EXTRADITION LAW:
CRIMINAL LEGAL AID

I am writing in response to concerns raised during recent oral evidence sessions regarding the impact on the timeliness of proceedings as a result of delays in processing legal aid applications. In particular, evidence given by the District Judges at City of Westminster Magistrates' Court highlighted that they have now expressly built in a three month delay between the first hearing and the subsequent substantive extradition hearing in order for issues of legal aid to be resolved.

As the UK Government is committed to processing extradition cases expeditiously – the Framework Decision governing the European Arrest Warrant anticipates that the process between arrest and surrender should take in most cases no more than 60 days, or 90 days where an extension is required – it becomes a source of considerable disquiet that legal aid may routinely be presented as the major reason for a failure to meet such deadlines.

I would recognise that some legal aid applications can present particular challenges and, when this arises, the impact on the timeliness of proceedings can be very serious as defence solicitors do commonly delay starting work on a case until confirmation of the grant of legal aid has been received. However, in evidence given by the District Judges, it would appear that only a relatively small proportion of all cases listed for final hearing were ineffective because of delays caused by legal aid. On this basis, it would seem disproportionate if, as

now appears may have happened, an automatic three month delay has been introduced, or proposed for introduction in all extradition cases.

As I am sure the Committee will recognise, there may be multiple reasons for delays in any one case. For example, adjournments may be required if there is late receipt of information from the requesting state or if the requested person raises an issue for the first time during the extradition hearing; equally, if an expert witness is required to investigate overseas prison conditions, this can add considerable delay to the proceedings. Yet in those cases where a decision on the grant of legal aid is taken promptly but delay does subsequently occur, it strikes me as unreasonable if responsibility for this is to be levelled at legal aid.

In order to mitigate the risk of disruption arising from legal aid applications, I know that the Legal Aid Agency is keen to work much more closely with the District Judges so that those applications posing the greatest risk for delay can be flagged at the earliest possible opportunity whilst those where no delay is expected can be listed much more quickly without the need for an automatic three month delay. As the LAA assumed responsibility for the processing of all legal aid applications submitted to City of Westminster Magistrates' Court in November 2014, it is keen to use this opportunity for fresh engagement with the District Judges to address these concerns.

Following the Home Secretary's appearance before your Committee on 4 December 2014, I have also been asked to respond to questions raised by Committee Members about the proportion of requested persons applying for criminal legal aid and the speed with which these applications are being processed.

Although the LAA collects data in relation to legal aid applications, data on the population of requested persons arrested under the European Arrest Warrant is published by the National Crime Agency (http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics). An analysis of the data sets for FY 2013/14 indicates that the proportion of requested persons appearing before City of Westminster Magistrates' Court who apply for criminal legal aid ranges between 70% and 75%, and that 95% of these applications are successful (see Table 1 annexed to my letter).

In reality, it is probable that these figures underestimate the actual proportion of requested persons applying for legal aid as an unrecorded number of extradition cases will be dealt with at the first hearing when the court duty solicitor is available to provide free representation. In such cases, the requested person will not, therefore, go on to submit a legal aid application.

Regarding the time taken by the LAA and Her Majesty's Courts Service to process legal aid application forms, nearly 92% of completed applications for extradition proceedings were processed within two working days during FY 2013/14. The LAA does not currently record the additional time taken if an incomplete application has to be returned to the defence solicitor for full completion before it can be processed.

CHRIS GRAYLING

Table 1

Legal aid provision to persons requested under a European Arrest Warrant (EAW): Financial Year 2013/14

Requested persons arrested under an EAW = 1,603

Total number of legal aid applications received = 1,163

Total number of successful legal aid applications = 1,109
This represents 95% of all applications and includes:

- **1,037 applicants who qualified as eligible when the application was first submitted; and**

- **72 applicants who were initially declined legal aid following the first assessment but subsequently submitted a successful application for a review of their financial circumstances and/or on the grounds of hardship.**

Indicative proportion of requested persons applying for legal aid is estimated to range between 70% and 75%

Data interpretation: Key notes

National Crime Agency (NCA) data on the number of arrests under a European Arrest Warrant (EAW) covers England, Wales and Northern Ireland (please note that EAW cases dealt with in Scotland are not covered by NCA data but fall within the remit of the Crown Office and Procurator Fiscal Service).

Although NCA data shows that there were 1,660 arrests under an EAW in 2013/14, only those arrested in England and Wales are brought before City of Westminster Magistrates' Court. Requested persons arrested under an EAW in Northern Ireland (57 arrests in 2013/14: source – Police Service Northern Ireland) are brought before the relevant court in Belfast.

The indicative range of requested persons applying for criminal legal aid reflects uncertainty driven by two factors:

- Data timing and sequencing - whilst most individuals arrested in FY 2013/14 will have been brought before City of Westminster Magistrates' Court and have applied for legal aid during the same period, these data sets are not directly comparable: for example, an individual arrested under an EAW in late March 2014 may not have appeared before court or applied for legal aid until April 2014.

- Data on the relatively very small number of non-EAW extradition cases has been omitted as it is collated on a calendar year basis as opposed to financial year basis and so cannot be directly compared with EAW data.

LAA data reflects a snapshot of the current status of relevant applications as at 11 December 2014. Since this date, it is possible that a very small number of additional applications for a reassessment on the grounds of a change in financial circumstances or under the hardship review provision may have been submitted. However, any subsequent impact on total volumes is only expected to be marginal.

26 January 2015

Lord Chief Justice – Written evidence (EXL0078)

LORD CHIEF JUSTICE
OF ENGLAND AND WALES

THE RIGHT HONOURABLE THE LORD THOMAS OF CWMGIEDD

Lord Inglewood
Chairman
Committee on Extradition Law
House of Lords

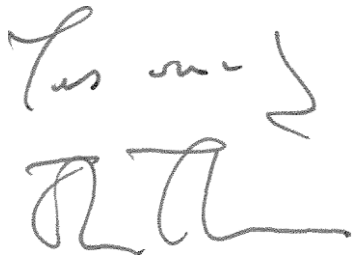
10 November 2014

Dear Lord Inglewood

I have seen your short report on the European Arrest Warrant Opt-In, published this morning. I very much regret that my court and other commitments prevented me being able to give evidence to your Committee. Had I been able to do so, I would have expressed the view that all of the evidence I have seen would lead me to a conclusion similar to that in paragraph 20 of your report.

A significant amount of reform has been carried out to improve the operation of the EAW over the past few years, following the inquiry conducted by Sir Scott Baker.

It is, of course, a matter for Parliament and Government as to whether the UK will opt back in to the EAW Framework Decision on 1December. It is not, at present, clear what regime would apply if the opt in is not exercised. Whatever regime applies, the courts would do their utmost to hear cases at first instance and on appeal with the greatest expedition.



Website www.judiciary.gov.uk

10 November 2014

Sheriff K.M. Maciver – Written evidence (EXL0064)

NOTE FOR THE SELECT COMMITTEE ON EXTRADITION LAW
(SHERIFF K. M. MACIVER)

I have received the call for evidence which was sent out in late July in relation to the House of Lords Select Committee on Extradition Law and I note the wide remit in relation to the 2003 Extradition Act. This note is prepared by me on behalf of the 4 sheriffs who undertake the first instance extradition work for Scotland, but the Lord President is aware that in this I may make reference also to certain matters which fall within the remit of the appellate court. In that connection you will be aware that under Scottish procedures in terms of the 2003 Act the final court of appeal is in Edinburgh unless there is an accompanying devolution issue raising human rights, in which case it may proceed to the UK Supreme Court. That is mentioned in greater detail below.

I now propose to deal with the various questions in the order in which they are asked but perhaps combining some of those where the answer covers the same ground.

General

1. Does the UK's extradition law provide just outcomes?

    - I do not think that it can be said that the UK's extradition law is too complex but there have now been 2 substantial amendments since 2003 and neither of them has made the Act any easier to interpret. Case law affecting the interpretation of statutory provisions can at times add to the difficulty of interpreting the strict terms of the Act and it is relatively clear to us that extradites sometimes find the law difficult to understand and accept in respect of the almost unattainable standard which they require to reach in respect of Article 8 arguments, since matters which they raise and which they think are of high importance come nowhere near outweighing the public interest in effecting extradition. Similarly, the "Kakis" guidelines in relation to passage of time in fugitive cases are often felt by them to be unrealistic since effectively they preclude any argument about delay – and often delay is a major feature in extradition requests from many jurisdictions. In general terms however rules like these are necessary to establish general principles which make extradition law workable for the court.

2. Is extradition law fit for purpose in an era of increasingly multi-jurisdictional crime?
    - Not entirely. There is undoubtedly scope for dealing with cases in the UK particularly in multi-jurisdictional crime although it is important to avoid a situation where accused persons can select their jurisdiction of choice. Greater use could be made in the modern era of statements rather than parole evidence, and live links in cases where evidence does require to be given.

3. To what extent is extradition used as a first resort when prosecuting a crime committed in another jurisdiction? Should greater use be made of other remedies?

- There is no evidence to suggest that this is the case, certainly not in cases that have passed through the Scottish court since 2003.

European Arrest Warrant

4. On balance, has the European Arrest Warrant (EAW) improved extradition arrangements between EU Member States?

- It is I think unarguable that the EAW has vastly improved extradition arrangements within the EU, although it is known from contact with judges in other jurisdictions that both practice and procedure vary considerably across the various states. However, in general the original Framework Decision has stood the test of time and the EAW is still a relatively workable document.
- The different justice systems and standards across the EU do occasionally make the EAW difficult to understand e.g. in terms of the reason for return being requested, whether for questioning, preliminary procedure, investigation or a trial, and again in sentence cases there can sometimes be a lack of clarity about exactly how and when sentencing has been imposed. The main complaint with the European Arrest Warrant system remains as it has always been that states use extradition requests at very different levels and since around 90% of the cases seen in Scotland are Polish, it is disappointing to see that quite a high percentage of these cases are in respect of relatively short sentences, or relatively trivial alleged crimes. There is no similarity between the level of gravity in cases in respect of which Scotland seeks extradition and the level of gravity at which other countries request extradition from Scotland. That problem may be completely insoluble but inevitably it is a matter that may have to be taken into account when we come to deal with the new proportionality bar.
- It is not possible to predict how post Lisbon Treaty arrangements will work out if the UK opts to return, but the general expectation is that the case load will increase in number rather than in difficulty or in character. If we were not to opt back in there would of course be the risk that the UK would become a haven for foreign criminals and accused persons who would be able to find here a state within the EU from which extradition would be more difficult and considerably slower.

Prima Facie Case

5. In circumstances where a prima facie case is not required, do existing statutory bars (the human rights bar, for instance) provide sufficient protection for requested people?

- Generally yes. There are territories such as Australia, New Zealand and Canada which due to the strength of their legal systems need not be required to satisfy us, and other commonwealth countries may be designated provided they are seen to be following Latimer House principles of judicial independence.

UK/US Extradition

6. Are the UK's extradition arrangements with the US comparable to other territories that do not need to show a prima facie case?

- Our position on this matter has not changed greatly since the presentation of our paper to Sir Scott Baker's 2011 Review and so we remain of the view that the current situation is satisfactory. However, a recent Scottish extradition (*H v Lord Advocate*) 2012 UKSC24 demonstrated, not for the first time that the US seeks extradition at a high level of gravity and when an extradition is effected plea bargaining takes place which has resulted in extradited persons being returned without sentence being passed as a consequence of co-accused taking the complete blame, all in return for a shorter sentence than we would have envisaged. Perhaps this arises because prosecutors there wish all accused at trial to avoid the absent accused being blamed.

Political and Policy Implications of Extradition

7. What effect has the removal of the Home Secretary's role in many aspects of the extradition process had on extradition from the UK?

- In high profile cases there is inevitably a political dimension involved. Situations in other states may change rapidly and it may be at the end of a long judicial process that the public interest requires the Home Secretary to step in. However, there have also been cases, like the McKinnon one where the intervention of the Home Secretary has caused inordinate delay and where the end result has not appeared to be one which can be explained in law. Our situation in Scotland is that Scottish Ministers have thus far had a relatively easy run in that no cases of high controversy in political terms have had to be dealt with. Obviously, the political aspect affects only part 2 extradition, but in general it is difficult to see why the remit to the Home Secretary/Scottish Ministers should be a mandatory aspect of every part 2 extradition case.

8. To what extent are decisions as to where to prosecute certain crimes and whether to extradite influenced by broader political, diplomatic or security considerations?

- It is of course always a political decision whether or not an extradition agreement is to be entered into with another state in the first place and perhaps more careful consideration of the states with whom we enter into such agreements would be the best way forward and would obviate later difficulty. It should also be possible for extradition arrangements to be brought to an end swiftly in the case of a state which is considered unsuitable because of e.g. regime change. We have had recent experience in Scotland of a one-off extradition arrangement with Taiwan, a state not recognised by the UK for diplomatic purposes nor by the United Nations. The decision (currently under appeal) was that this one off arrangement was valid and that the UK was entitled to make such an arrangement with Taiwan, and behind that one off extradition arrangement was a non-political crime which was high profile and which for a variety of reasons had caused a degree of public outrage in Taiwan.

An expansion of use of such one off arrangements, currently very rarely used, may well be a pointer to the future.
Equally the forum for prosecution is inevitably susceptible to political considerations and pressures, and difficult cases will always present problems in that area.

Human Rights Bar and Assurances

9. Is the human rights bar as worded in the Extradition Act 2003, and as implemented by the courts, sufficient to protect requested people's human rights?

- Generally yes, although preferably the wording of the section should be turned around with the test being whether extradition is incompatible with the extraditee's convention rights. ECHR provides rights subject to exceptions and it seems more appropriate to couch the legislation in this way and thus fit in also with the scheme set out in section 11 of the Extradition Act. It is however the most frequently visited area of the 2003 Act and the section appears to have stood the test of time relatively well. The correlation between extradition and convention rights appears appropriate and there is no suggestion there is not a correct way to test the fairness of extradition.

10. Is the practice of accepting assurances from requesting states to offset human rights concerns sufficiently robust to ensure that requested people's rights are protected?

- I think that it has to be understood that there may well be some issue in relation to equating assurances from part 1 states and assurances from part 2 states. In principle of course there is no difference but in practice extradition arrangements under the EAW are intended to run more swiftly and smoothly and a very high premium is placed on acceptance without question of the terms of the European Arrest Warrant and the terms of any accompanying documentation. That should be applied also to assurances which come from part 1 states, particularly if they come at the appropriate level.
- There is no formal monitoring of these assurances at present, although in a small jurisdiction like ours we do tend to follow up our own cases where possible and particularly if there has been an assurance which has weighed heavily in the decision. I can say that in one case one of us had a small issue with Spain, and we will I think be careful if a further similar assurance is received from that state, but of course it may well be an isolated problem. Our Appeal Court will shortly be looking at assurances which have been given by Taiwan and which are said by the defence in that case to be unreliable and not given in good faith. These are assurances which I were accepted at first instance on the basis that they have come at the very highest level and from an official of state who has been involved in every aspect of that extradition process from the outset. General state assurances about matters such as prison conditions have generally been accepted by courts in the UK up to the highest level and without detailed scrutiny because of the emphasis rightly placed on mutual trust and judicial respect, and this appears perfectly appropriate since scrutiny of assurances is an

extremely difficult and sensitive matter in international and political terms and one which fortunately is not encouraged by appellate courts.

Other Bars to Extradition

11. What will be the impact of the forum bar brought into force under the Crime and Courts Act 2013?

- It is likely to give rise to a number of contested cases and probable appeals. The law is relatively well settled in Scotland in that more than one state may have jurisdiction in a case where the criminal acts are alleged to have taken place across boundaries. Obviously it is a matter in the first instance for the criminal authorities of the states involved as to who should take the lead in investigation and prosecution and in European matters Eurojust have tended to assist where a dispute arises and to create a forum for discussing and determining these matters. Obviously the object of the whole exercise is to choose a forum which allows all of the competing interests to be satisfied and to bring the individual to trial in the country where these interests are best served and where the public interest is least prejudiced. Problems do occur in cases where the offence has occurred totally within this jurisdiction and another country claims jurisdiction by virtue of its own wide extra territorial jurisdiction over its nationals. Many European countries have this type of jurisdiction and in a recent Scottish case of *Kapri* (2013) UKSC48 an Albanian was tried in absence in his home state in respect of the murder of another Albanian in London. In fact he was during all of this process at large in the UK and was eventually traced to Scotland when the whole issue of forum was raised. Such cases are likely to appear again and with the forum bar now in place a case on similar facts in the future may have a different outcome. It should be noted however that the forum bar provision has not been implemented in relation to Scottish extradition cases.

12. What will be the impact of the proportionality bar in relation to European Arrest Warrant applications?

- In our view this is likely to have a very significant effect on our workload. As mentioned earlier 90% of our cases are Polish and they tend to be several years old before we see them. The cases also are often at a relatively low level and it is not uncommon for persons to be the subject of a request to return for a sentence well under 12 month's imprisonment. In the case of trial requests it is again regularly seen that the alleged crimes are, at least on the face of the EAW, relatively inconsequential. In Scotland we have been trying to take a pragmatic approach in relation to old and trivial cases, and particularly in relation to our interpretation of proportionality in the area of delay and oppression under section 11, but the new section brought in by the 2014 Anti-social Behaviour, Crime and Policing Act, is decidedly unwelcome. If proportionality had been restricted to section 21(A)3(a) matters it may have been more manageable, but the introduction of the type of consideration which is likely to be argued by the defence under subsections (b) and (c) make

this an extremely difficult and time consuming process since it is likely that defence solicitors and counsel will attempt to introduce the laws and practices of the requesting state into their arguments against extradition. We have long tried to be absolutely clear in extradition cases that what happened and is to happen in the requesting state is a matter for them and not for us, and of course that line is an important one to hold, since we do not want to enter into detailed investigations into the internal workings and sentencing policies of other countries. At present section 21 (Human Rights) is argued in virtually every extradition case that goes to a full hearing and that argument is likely now to be joined by a proportionality argument in every case. As currently advised I see some real difficulties and I am unclear as to the reasoning which lay behind the introduction of this additional bar to extradition – certainly we were never consulted.

Right to Appeal and Legal Aid

13. To what extent have changes to the availability of legal aid affected extradition practice?

- In almost all part 1 cases the extradition hearing fixed in terms of section 8 subsection 4 of the 2003 Act requires to be adjourned for legal aid. Obviously lawyers acting for the accused have certain difficulties usually involving language and also the fact that remand in custody is common and there are frequent delays in obtaining the documentation which the Scottish Legal Aid Board require. We are always very clear that no extraditee should face a hearing without legal representation unless he specifically wishes that and accordingly we have to allow time for legal aid to be in place. It is extremely rare for a hearing to take place within the 21 day period and delays as a direct result of legal aid issues are as inevitable as they are undesirable.

  What has been the impact of the removal of the automatic right to appeal extradition?

  This has not yet been seen but it is hoped that this may result in alleviation of a considerable problem which has afflicted extradition matters from the outset. Although the High Court of Appeal in Scotland have made significant improvements in recent years in terms of the timescale for hearing these appeals it is nonetheless still the case that counsel regularly seek adjournments and considerable delay takes place in quite simple cases before the appeal is heard. It is then commonly dropped on the day of the appeal and this culture of delay at the appellate stage is engineered so that the extraditee can serve as much of his sentence as he possibly can in this country rather than in what he perceives to be a harsher regime in his own country. The result frequently is that a person has served all of his time before he is returned and while some of this could be avoided by a more liberal use of bail release, we have had some negative experiences there as well with persons awaiting extradition failing to present themselves at the appellate court. Accordingly, it is a situation which

has long needed to be examined, but I am not particularly optimistic that this new provision will effect great improvement.

Devolution

14. Are the devolution settlements in Scotland and Northern Ireland fit for purpose in this area of law and how might further devolution affect extradition law and practice?

- Generally yes. The UK has difficult issues in terms of geography, time of travel etc. and it would be entirely impractical for all cases to be dealt with only in London for the whole of the UK. The 2003 Act recognises that 3 legal systems are involved, the requesting states are now fairly clear about the UK's position and co-operation between London and Edinburgh works very well in relation to enforcement and arrest. In Scotland we do have a local difficulty in relation to a particular area of law called Devolution Minutes and a continuing right in that area to an appeal to the UK Supreme Court contrary to the spirit of the 2003 Act, but that is a matter which unfortunately was not dealt with approximately two years ago when it could have been, and so it remains a problem for us and presents extraditees with a further avenue of appeal and a further opportunity for very considerable delay.
  Further devolution is unlikely to have any detrimental effect on extradition law and practice, and Scottish independence would simply bring an end to extradition under the 2003 Act and require new domestic legislation. Participation in the EAW scheme would of course depend on our status in the EU, and presumably an EAW or other extradition arrangement would be required between Scotland and the UK – and of course vice versa.

Edinburgh

5 September 2014

Sheriff Kenneth Maciver, Professor Rodney Morgan, Mark Summers QC and Dr Kimberley Trapp – Oral evidence (QQ 120 -131)

Evidence Session No. 8 *Heard in Public* *Questions 120 - 131*

WEDNESDAY 22 OCTOBER 2014

11.40 am

Witnesses: Professor Rodney Morgan, Dr Kimberley Trapp, Sheriff Kenneth Maciver and Mark Summers QC

Members present

Lord Inglewood (Chairman)
Lord Brown of Eaton-Under-Heywood
Lord Empey
Baroness Hamwee
Lord Hussain
Baroness Jay of Paddington
Lord Jones
Lord Mackay of Drumadoon
Lord Rowlands
Baroness Wilcox

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Examination of Witnesses

Professor Rodney Morgan, Human Rights Implementation Centre, Bristol University, **Dr Kimberley Trapp**, Faculty of Laws, University College London, **Sheriff Kenneth Maciver**, and **Mark Summers QC**, Barrister, Matrix Chambers

Q120 The Chairman: Shall we make a start on the second part of the proceedings? A warm welcome to our four witnesses: Professor Rodney Morgan, Dr Kimberley Trapp, Sheriff Kenneth Maciver and Mark Summers, a mixture of judges, academics and practicing barristers. It is jolly good of you to come. I know you have been hearing a lot of what we have already been discussing in the back of the room. We are in a sense going to cover many of the same points, possibly from slightly different perspectives.

Given that we are running a bit behind, could I please urge people to be concise in their responses. Do not allow that to stop you telling us what you think is important. If each of you would just briefly, for the purposes of the record, say who you are, I would appreciate it. Then if anybody has any opening statements please make them and then we will go into the hearing proper. Perhaps if I might start on the left—as I look at it—with Sheriff Maciver.

Sheriff Maciver: Good morning, my Lord. I will very briefly just say who I am, Kenneth Maciver, Sheriff at Edinburgh for the last 20 years or so. Since 2003 I have been one of four sheriffs who deal with all first-instance extradition work. I think for the moment that is all I need to say.

Professor Morgan: I am Rod Morgan. I am not a lawyer; I have no legal qualifications whatsoever. I am the co-author of the two best named guides to the European Convention for the Prevention of Torture, including that published by the Council of Europe. I am frequently commissioned to inspect custodial conditions and police practices overseas in preparation for extradition hearings, particularly where assurances have been given.

Mark Summers: I am Mark Summers, a barrister practising at Matrix. I practise in extradition and I represent both foreign authorities and defendants.

Dr Trapp: I am Kimberley Trapp, a senior lecturer at UCL Faculty of Laws, and I teach human rights and international law.

Q121 The Chairman: Thank you very much. As I said, unless there is a specific question, I will probably go to the panel, so everybody feel free to participate. My general opening question is the same one that I gave to the previous selection of witnesses: to what extent do you think an efficient extradition process allows for the examination of human rights concerned, bearing in mind—as we heard—that perhaps swift and efficient may not be coterminous? Who would like to start?

Sheriff Maciver: If I could just say very briefly—as I have said I think to the Scott Baker Committee and to you in the written submissions—I think it provides as good a measure as you can reasonably expect. There are obviously difficult cases and there are obviously exceptional situations but there is a requirement to be swift and, in general terms, I think that it does meet the needs.

Professor Morgan: I appear regularly in Westminster Magistrates' Court. I have also appeared in the Edinburgh court, the Belfast court and the Dublin court. In all those jurisdictions, human rights issues are taken seriously and I am listened to very attentively, usually in relation to Article 3 issues.

Mark Summers: I agree. There is a necessary and healthy tension between the need for a speedy and expeditious extradition process—and there is a need for such a process—and the need on the other side for proper consideration of human rights concerns. It is one that in my experience is given effect to in a balanced and meaningful way on the ground.

Dr Trapp: I think I will leave that one to the practitioners.

Q122 Lord Jones: Apologies if this is a little lengthy. Arguments based on Article 3 require the requested person to use publicly available material to demonstrate something approaching an international consensus. We are very anxious to obtain examples, so can you give examples of cases where this bar might have been considered too high? Are there examples where cases, funded by legal aid, could not afford to commission the expert work necessary to demonstrate something approaching an international consensus?

Mark Summers: Perhaps I may start here. It is important to understand the limitations of this question and what you are actually looking at. The international consensus test only applies in Part 1 cases to EU Member States and it is the function, and the necessary function, of the presumption that operates in those cases of convention compliance, and

the concomitant need to show clear and cogent evidence that a fellow EU Member State is going to breach the human rights to which it has signed up. In all of those cases, if we get it wrong there is another remedy for the requested person: he or she can access the Strasbourg court directly from that state. Moreover, it does not concern cases where the court is concerned with direct evidence of human rights violation[253].

You are therefore talking about a limited legal test that applies in a limited number of situations and in a limited number of factual situations. You are talking about complaints based on general human rights concerns. Against that, are there examples of cases where it has not worked? No, I do not think so to my knowledge. There are Article 3 issues where the courts can be argued to have struck the balance wrongly but they generally concern non-EU states. So my answer to that question would be: probably not.

Professor Morgan: I am frequently approached by solicitors to find out whether I would be willing to go to a particular jurisdiction to inspect particular establishments, and they apply for legal aid and nothing comes of it. I do not know the detail as to whether it is categorically refused or what happens. But the number of requests for assistance that I get, from which nothing subsequently comes, is significant. On the other hand, quite a few requests result in legal aid being granted and the work I undertake in those circumstances appears to be reasonably well funded.

The Chairman: You do not think that, on the legal aid front, setting aside eligibility, there is a particular or extreme problem?

Professor Morgan: This is quite tricky because I do not know how my services compare to those of others and thus what is allowed and what is not. All I can tell you is that I have quite a bit of work, most of which is funded on legal aid.

[253] Rather than generalised assertions of possible violation.

Sheriff Maciver: From my perspective, I learn in court that legal aid is sometimes refused. But it is very difficult for me sitting there to be clear whether or not it was fair or proper for legal aid to be refused, because usually these cases are fact-specific. Let us say it is a prison conditions case under Article 3, and it is a particular prison or a particular state or a particular type of prisoner who is being dealt with and who has made the complaint under Article 3. There is a vast amount of material potentially available to his defence.

In my experience, the Legal Aid Board never refuses to allow any line of inquiry. It is the extent of inquiry and the number of experts that can sometimes cause a problem and lead to legal aid being refused. They will usually not refuse legal aid for one expert, depending on the extent of the inquiry and the estimate, because they ask for an estimate of the cost. But they may well refuse legal aid for a second or a third or a fourth expert.

Mark Summers: Often rightly so. I do not think there is a real issue here. There is obviously a problem with getting legal aid in the first place, which the courts have addressed[254] but once you have it, and you identify a tenable and arguable human rights argument, in my experience I have never had any difficulty either identifying appropriate experts or obtaining authority to instruct them. It may be that the telephone calls that Rod receives that come to nothing may be because the court has shut out inquiry on proper, reasonable, robust case management grounds.

Q123 The Chairman: I think you have answered my question. Clearly there are two separate issues: one is whether legal aid is available and, secondly, if it is available does it meet the case?

Dr Trapp: In speaking to the first part of the question, whether the bar is too high, I cannot think of any examples where it has been too high. The worry is that it could be too high,

[254] See *Stopyra v District Court of Lublin, Poland* [2012] EWHC 1787 (Admin)

particularly because of the very unique factual matrix within which that test seems to have been developed. The European Court's case law was in regard to returns to Greece, and it was the change between the approach it took to the UK's return to Greece, which it found to be compliant with Article 3[255], and Belgium's return to Greece[256], which it found to be non-compliant with Article 3. In those circumstances, where the European Court was reversing itself effectively because of information that had become available in the interim, it suggested that it needed a very high level of evidence, which Justice Mitting then characterises as an international consensus because of the types of evidence that the European Court is relying on.

But I think we need to restrict that decision to the very particular facts that the court was addressing. Where you do not have either the European Court reversing themselves on a position they have taken in regard to a specific state, I would worry that the international consensus bar could be too high, particularly where there is compelling evidence from NGOs on the ground in the receiving state where that has not yet fed into the reporting cycles of international monitoring bodies, and so on. I cannot think of an example where it is too high, but it strikes me that it could very easily be too high and was only framed in reference to a very particular factual circumstance, which is not likely to apply often.

Lord Brown of Eaton-under-Heywood: May I just ask a brief supplementary? Mr Summers, you spoke about this principle being confined to Part 1 cases because they have to resort to Strasbourg. Is that right?

Mark Summers: That is one of the reasons why this higher test applies, yes.

[255] *K.R.S. v. the United Kingdom*, 32733/08, 2 December 2008
[256] *M.S.S. v. Belgium and Greece*, 30696/09, 21 January 2011

Lord Brown of Eaton-under-Heywood: But a number of Part 2 countries also have to resort to Strasbourg?

Mark Summers: Indeed.

Lord Brown of Eaton-under-Heywood: So it is a slight spectrum.

Mark Summers: The international consensus test applies within the EU for a number of reasons; one is that Strasbourg is ultimately a safety valve for human rights protection. But it is also because of the presumption of convention compliance and the need for clear and cogent evidence to displace that presumption. It is a shorthand test that wraps up all of those things. In Part 2 cases—which include some Council of Europe countries and some non-Council of Europe countries—the standard of proof required to establish an Article 3 breach is generally regarded as lower. There is debate as to how low it is but it is generally—

Lord Brown of Eaton-under-Heywood: It is a spectrum and that makes sense.

Mark Summers: Indeed.

Sheriff Maciver: Perhaps I can just add, in case there is any misapprehension about the position in Scotland vis-á-vis legal aid, which I know you are interested in. In Scotland there is an independent body, the Scottish Legal Aid Board, and they make the decisions in the grant for refusal of legal aid. The court has no input whatever into whether legal aid is to be made available for any particular line of inquiry. It is entirely a decision of the Scottish Legal Aid Board. I am not sure if that is precisely the position here.

Mark Summers: It is.

Q124 Lord Rowlands: Rather than repeat the question, I trust you all were here when we rehearsed the evidence. Have you anything to add or change in the kind of line that was taken by our previous witnesses on the issue of assurances?[257]

Sheriff Maciver: I would disagree slightly. I think there was an inference that that panel thought that assurances did not play a part in a large percentage of cases. I do not take that view. Perhaps it is a Scottish thing, I do not know, but we look for assurances quite often. Perhaps because we have a smaller number of cases we feel able, as judges, to go back and ask for assurances.

The Chairman: You put it positively—requesting countries, if they want assurances.

Sheriff Maciver: The Scottish ask for assurances, yes, and use them and rely on them quite a lot. I know that the High Court also does. I have a selection of cases here that I was reading this morning—and Lord Mackay was in at least two of them—where assurances were used as important levers in the decision-making process.

For example, if a prisoner has a Section 25 point, a suicide risk point, or a risk of assault from other prisoners because he is a police informant and because the other members of his gang, against whom he is giving evidence, are in prison, we will ask for assurances that he will be protected specifically. They play a very important part in the decision-making process that I have to make then in deciding whether he will be returned. We have absolutely no difficulty in getting such assurances. We have had assurances from several European countries in respect of how they will deal with a specific prisoner on his return, and I have accepted them without question because they come at an appropriate level.

[257] See Q114-115, evidence session 7, 22 October 2014

In the eastern European system they usually come under the signature of a judge, usually the judge who signed the European Arrest Warrant in the first place, and they are very important to me in the decision-making process.

Professor Morgan: I think in the previous session Paul Garlick indicated that he thought that a smaller proportion of cases involve assurances. I think that is possibly true but it is certainly not true in relation to certain jurisdictions. For example, almost every case currently being heard anywhere in the United Kingdom, in relation to Lithuania, is subject to a general assurance that a particular establishment will be used. Most of the African cases that I hear of involve assurances now. I have recently been to South Africa, where quite specific assurances were given.

I think the degree to which assurances will be asked for or given is increasing. For example, I recently gave evidence in the High Court in Copenhagen. The Danish courts had been routinely extraditing people to Lithuania but had learnt on the grapevine that we were not or that we were getting specific assurances. A process has now started there of seeking assurances on the same lines as have been given in the British courts.

I have just come back from Peru and I learnt from a conversation with a senior prosecutor that a German prosecutor had recently been to Peru and had said to the prosecution service there, "If you were to give a specific assurance that a particular establishment were used then we feel pretty certain that our courts would extradite the person". So there is some international learning and encouragement going on here. I anticipate that specific assurances will be used more and more as a tactic, particularly where extraditions have been refused on the basis of what I will call general consensus evidence, whether it is inhuman and degrading treatment found by the Committee for the Prevention of Torture or the European Court.

Q125 Baroness Jay of Paddington: It is interesting that you have both mentioned the breadth of this application because it was not just Mr Garlick—his colleagues accepted that. They said that it was a minority of cases. So it is very interesting that we have different evidence here.

Mark Summers: I think you do have different evidence. We are now a long way from the discussion that was going on 20 or 30 years ago about whether we should be looking at assurances at all. That is very interesting and it is one that we could talk about for a long time. But we are now in the position where assurances are internationally recognised as a legitimate means of curing human rights violations. They are also built into the Act. Aside from human rights assurances that deal with specific problems, under the Act, if a country wishes to retry somebody after a conviction in absence, it has to give an assurance to that effect under Section 20. There have to be speciality and other assurances that the Act talks about, such as death penalty assurances and temporary surrender assurances. It is part of everyday practice and it occurs frequently.

Baroness Jay of Paddington: The Sheriff raised an issue that I had wanted to take up but we rather ran out of time. We have talked a great deal about what I would call material assurances about prison conditions, and some of the other matters you have mentioned, but you also raised the question of mental health and potential suicide. I think you mentioned, Professor Morgan, that you have just been in South Africa. There has been a lot of concern about monitoring in relation to the Dewani case, that you get an assurance that this person will be properly treated in the way that he needs to be from the point of view of his mental health; but then an assurance that that will be judged to be appropriately satisfactory for him to be on trial.

My question is about these more complicated monitoring and assessment levels that go on, whatever the assurance you are given at the time of the proceedings.

Sheriff Maciver: Can I just say it is not just assurances in relation to things such as prison conditions. In answer to the question that you had for the previous panel, yes, guarantees and letters of comfort. We call them all sorts of things but they are all assurances. In one case, we had an assurance from Slovakia in the case of a woman who had 12 children in Scotland. There was a guarantee that the trial would take place within two months of her extradition, that an application could be made for bail and that, if bail was refused, she would be allowed contact by telephone and writing. So they are not just about conditions. We have sought assurances in a number of specific areas to deal with a point that is raised at the extradition hearing. That is not to make it go away but to deal with the point, so that it can be decided by the court whether that assurance meets the human rights argument that is being made.

As to monitoring, that of course is very difficult. I think I agree with what the last panel said about that. I think that there will be continuing concerns about whether or not assurances can be relied upon. As I say, we just have to deal with that as we get it, whether or not it can be relied upon. We have not had an occasion yet where an assurance has come back on us. We have not had an occasion where an assurance given in a previous case is cited in a subsequent case as not having been met. That will be a difficulty.

Lord Empey: Was there a Spanish case where you brought that up?

Sheriff Maciver: I talked about a Spanish case and I spoke to my brother sheriff who dealt with it. Spain is a continuing concern for us because of the length of time it takes to deal with its cases. It is purely an issue of length. In that case, I looked at the assurance carefully and I do not think the assurance was broken. I think what has happened was that we did not

have the full perception of quite how long it would take for this case to be dealt with in Spain. Again, it was a case involving a child. We had delayed extradition until the child was about three months old for the benefit of the child. Extradition then took place and we had some information from Spain about how they would deal with the issue of bail and what would happen to him. But it was a very serious charge. It was the murder of another child and, in fact, we were disappointed—I think that is the strongest I could put it—by the length of the time it took for the case to reach trial. But we knew about it because in our civil court we had the child welfare issues for the child who was remaining under our care with her grandparent in Scotland, so we knew exactly how long the Spanish case was taking.

All that we have done is to factor into our subsequent decisions on Spain the fact that they take up to four years, pre-trial, to deal with cases. We have not refused to send anybody back but we take account of the fact that we were disappointed in that case.

Lord Rowlands: How do you take account if you do send them back?

Sheriff Maciver: We will ask for some indication of what is going to happen when a person is returned, which we always get. We do not have any experience of a Part 1 country refusing to give us an answer to the question that we ask.

Baroness Jay of Paddington: Part 1 countries, not Part 2. One of the most interesting—

The Chairman: Do you try Part 2 countries?

Baroness Jay of Paddington: Yes, I was going to ask that.

Sheriff Maciver: Yes, we have cases in America where assurances have been given about treatment. We have Albanian cases that have gone before the Appeal Court, and a Taiwanese case that is currently before the Appeal Court in which the assurance given by Taiwan, in relation to treatment of a prisoner, is disputed on the basis that it is said they have broken previous international assurances. So it is coming back.

Lord Hussain: How are these breaches reported?

Sheriff Maciver: In the case in which the breach has been reported, it came back to me from the extraditee's counsel as a statement from the Foreign and Commonwealth Office that the Foreign and Commonwealth Office was disappointed at the breach of an international agreement, which Taiwan had reached in relation to the use of the death penalty. The death penalty did not play any part in the case in which the extradition was being heard, but it was an example of an international agreement that Taiwan was said to have breached and, therefore, it was said Taiwan could not be trusted to stick by its guarantee in the instant case, which was about how a prisoner would be treated upon return.

So I had to look at whether or not they had in fact broken the guarantee over the death penalty and took the view that they had not. Then I had to decide whether or not that was, in any event, relevant to the issue in hand about the treatment of the prisoner who was to be returned. There were two questions that had to be dealt with.

The Chairman: Professor Morgan, I think you want to come in.

Professor Morgan: My South African example was not Dewani.

Baroness Jay of Paddington: No, I did not mean that. I just meant it was based in South Africa.

Professor Morgan: There is an interesting issue that may or may not be within your scope. My South African example involves three white men in separate cases that have been joined together. The specific undertaking there was not just that they be held in a particular establishment but that they would enjoy particular conditions within that establishment: that they would be kept in separate cells which they would not have to share with any other prisoners. This is a very overcrowded prison where most prisoners are black and where most black prisoners are being packed into grotesquely overcrowded dormitories. So here

we have specific undertakings that these three white extradited persons will be kept in separate cells. At some point, I assume that the issue of fairness and whether or not that is constitutional might be raised in South Africa, but not being a lawyer it may be impertinent for me to raise that issue.

The second point is your question 6, which asks: if assurances are given, may the same assurances in the future not be acceptable fairly routinely? My answer to that is no. If the assurances are that people will be kept in a particular establishment and that they will enjoy particular conditions then, by definition, if those assurances are acceded to, in many cases the conditions within that establishment will change. So if everyone in Lithuania—as is currently the case—is being told that they will go to an establishment that is not currently overcrowded and that the CPT has not found to be inhuman and degrading, it will soon become very similar to the establishment that has been condemned. So these conditions and assurances have constantly to be updated and monitored.

Q126 The Chairman: On this subject, what can or should we do if, for example, we know that a prisoner—possibly a British citizen but not necessarily—has been extradited to somewhere and it subsequently turns out that the conditions in that place are such that it falls foul, shall we say, of Article 3? They may have gone in good faith. What responsibilities do we have and, if we have responsibilities, what mechanisms do we have to do anything about it?

Dr Trapp: There are a couple of parts to the answer to that question. One of them depends on the citizenship of the person. So if we are dealing with a British citizen, any injury to a British citizen, as a matter of international law, is an injury to the UK and the UK is entitled to exercise diplomatic protection on behalf of that citizen. So they can invoke the responsibility of the wrongdoing state—which is to say the receiving state that is acting

inconsistently with its obligations not to subject an individual to torture, for instance—and there are some options, as a matter of international law, for the UK. It can adopt countermeasures, and so on.

If the individual whom we have extradited is a non-British citizen, the options are significantly more limited. We cannot diplomatically protect non-citizens, even those to whom we have granted refugee status. As a matter of international law, we have no entitlement to do so, and so we are not invoking the responsibility of a wrongdoing state as an injured state; we are invoking the responsibility of a wrongdoing state as a broader member of the international community, which is a significantly less powerful invocation of state responsibility. The extent to which we can engage in countermeasures, for instance, is incredibly controversial as a matter of international law. So whether or not we can adopt conduct, vis-à-vis the wrongdoing state, that is itself in breach of our own international obligations to that state in order to pressure it to comply with its international obligations. It is very controversial in respect of non-citizens, when we are doing so in the community interest.

Our options are rather limited and assurances do not increase our options because, of course, assurances are non-binding and they do not add anything to the multilateral treaty framework that already exists for the protection of international human rights.

The Chairman: But then is it foolish of us to rely on assurances if they are non-binding?

Dr Trapp: Yes.

The Chairman: That is the question I am throwing out.

Sheriff Maciver: I think we are mainly talking about Part 2 countries here.

The Chairman: Mainly, yes.

Sheriff Maciver: Perhaps I can address them very briefly and say something that, as a judge, I should not say at all because it might be a political point. But I think we have to be more careful about the countries with whom we enter into extradition agreements and be prepared to take countries off the Part 2 list.

The Chairman: Would you advocate a regular kind of survey or should it just be ad hoc?

Sheriff Maciver: I certainly would. If you look at the Part 2 list—I shall not name the countries—there are countries on the list that any of us would be very reluctant to send our worst enemy back to. I think that it is because at the time that the extradition agreement was entered into that country may have been in a very different situation. But something has happened there over the last decade that has made it a place that is very difficult to envisage sending people to—

Lord Rowlands: Is there a mechanism to do it, to actually remove—

Sheriff Maciver: There must be because, since the Extradition Act came in, we have added countries to Parts 1 and 2. I do not see why we cannot take them off.

Baroness Jay of Paddington: One of our witnesses at the previous session said the problem was that international law depended on international good will, and where there is not that, presumably we can act.

Q127 Lord Brown of Eaton-under-Heywood: Does your answer take into account this: that if you take somebody off Part 2—say it was Turkey—the result is that every sensible murderer in Turkey comes over here and gets sanctuary because there is no way we can return them. Does one's response not have to be a bit more sophisticated than that?

Sheriff Maciver: I understand that, and that is why I do not say that this is a blanket provision in any sense. But if you reach a situation where there is a country with whom there is a specific problem and breach of undertakings, and through political and diplomatic

channels it becomes clear that there is an issue about extradition to that country then that country has to be looked at.

Lord Brown of Eaton-under-Heywood: I entirely accept that, but surely the foreign country that wants to get people back to try them has an interest in honouring these assurances. Therefore, so long as you can and do monitor, and try to do your best to ensure them, generally speaking, there will be a satisfactory scheme for assurances. What about the suggestion, which I think was made by Paul Garlick in the earlier session, of four individual assurances? You can get within them assurances that they will allow monitoring. So this is not the consular service; this is allowing our diplomats abroad, on an ad hoc individual case basis, to make sure that cases are being heard if they have been assured that they are going to be heard in time, that people are being incarcerated in the appropriate way and so on.

Sheriff Maciver: Yes. I think that is why the Abu Qatada case is so important. There are 11 strict categories and that is a very useful step.

Lord Brown of Eaton-under-Heywood: Absolutely, and those assurances were ultimately met of course.

Baroness Wilcox: Chairman, will we be seeing witnesses who will be doing this monitoring?

Professor Morgan: It seems to me that there are two broad possibilities for monitoring assurances, which, I think most of us agree, are becoming more common. The first is that most of the Council of Europe Member States have ratified the OPCAT, the United Nation's mechanism. One of your obligations once you have ratified the OPCAT is that you must establish a national preventive mechanism with the capacity to monitor conditions.

It is not an easy solution because, frankly, if you talk to people in the United Nations I think they will observe that some of the mechanisms that have been cited as fulfilling this obligation are probably not up to the task or do not have the funds to do it. It is usually an

ombudsperson who may not have the resources, frankly, to attend to police station conditions, prisons, secure mental hospitals and so on. But that is a mechanism that we should rely on probably to an increasing extent in the future.

The other example that was cited in the first session is whether the Foreign and Commonwealth Office personnel could have a role here. It is worth noting that we have in this country an organisation called Prisoners Abroad. Prisoners Abroad provide grants for all British nationals held in certain jurisdictions where, frankly, nothing is provided for prisoners. So I will come back to Peru. In Peru, the food is pretty dreadful; nothing is provided by way of toiletries; clothing is not provided; even decent drinking water is not provided. So Prisoners Abroad provides, through the British Embassy in Lima, so much money per quarter for every British national in Peru. Someone from the embassy literally goes to the prison and distributes these moneys. There is a mechanism in some countries already—through charitable giving and co-operation with the Foreign and Commonwealth Office—to monitor what is happening and, to some extent, to look after the welfare of prisoners in certain jurisdictions. Where that already exists, it might not be too great a burden to add to it monitoring the assurances that might have been given when the person—

Lord Brown of Eaton-under-Heywood: That only avails British citizens.

Professor Morgan: Yes, that is true.

Lord Brown of Eaton-under-Heywood: We have been given statistics and, certainly in Part 1 cases, less than 5% of those who are extradited are in fact British citizens. The great bulk—and presumably this is even more obvious in Part 2 cases—are not British citizens.

Professor Morgan: Yes.

Lord Brown of Eaton-under-Heywood: Do you know what the proportion is of British citizens under Part 2 who are extradited?

Professor Morgan: I do not know. I imagine it is low.

Lord Brown of Eaton-under-Heywood: Lower even than EAWs?

Professor Morgan: It is difficult to assess.

Sheriff Maciver: I would think it might be higher than EAWs.

Lord Brown of Eaton-under-Heywood: But we are talking about roughly 5%.

Professor Morgan: Yes.

Q128 The Chairman: What is the British Government's attitude to being subject to these kind of monitoring arrangements? After all, extradition is a two-way street. Does anyone know?

Professor Morgan: We have to recognise that in this country we have a prisons inspectorate, which is generally recognised as being robust and independent. Very few jurisdictions have robust, independent prison inspectorates. It is usually—as I have already indicated—a function of the ombudsperson, who has a global responsibility in relation to a whole range of institutions. Their capacity normally to monitor what is happening is very small.

The Chairman: In short, you are telling us that what we do in this country firmly meets the general principles you have described, regardless of the legal framework within which they are set.

Professor Morgan: I would say yes.

The Chairman: We are doing pretty well and we accept this is a proper thing to be done in our regime.

Professor Morgan: Yes. My big problem, when I am commissioned to go abroad, is getting access to the prison that the lawyers wish to have inspected. In many jurisdictions there is just no tradition of allowing someone from outside to come in, to walk around the establishment, to talk out of sight and out of hearing to prisoners to find out what is going on. There is no precedent for that sort of inspection so monitoring assurances is extremely difficult.

Lord Brown of Eaton-under-Heywood: As a matter of interest, do you know any case where we—the UK—have had to give assurances to secure extradition to this country?

Sheriff MacIver: I know that in Scotland we have been asked about the jury system, which is obviously strange to some countries. They have asked us how that operates. I know that we have been asked about a common law as opposed to having a criminal code—

Lord Brown of Eaton-under-Heywood: I have no doubt that you have been asked about it but have you ever had to give an assurance?

Sheriff MacIver: I sign outgoing warrants under Part 3 of the Act but generally the assurance will be signed by the Lord Advocate, the head of the prosecution service. I have never been asked to sign an assurance but I know that he has.

Lord Brown of Eaton-under-Heywood: What about?

Sheriff MacIver: Usually about procedural matters: how long it will be for the trial to take place and what the form of the trial is. I know that in relation to murder and life imprisonment we have been asked questions about how the Parole Board system works and technical things. I do not think we have ever had to give assurances—as far as I know—about the conditions in which someone will be kept.

Mark Summers: Although it is fair to say that the latest CPT report on British prisons does not make pleasant reading, and if the message gets out that the UK is refusing to extradite based on prison conditions it may be a problem that comes back to haunt us.

I know this discussion has been fairly wide-ranging but I think there are four separate issues here: the first is whether in the pre-surrender stage—while the requested person is engaged in extradition proceedings in the UK—there exists a sufficiently robust procedure for assessing assurances. On that, I think probably the evidence you have heard indicates that there is and that the Othman criteria are sufficiently robust. There are numerous examples at Strasbourg level of the European court refusing to sanction extradition based on concerns about assurances. The UK court has refused to sanction extradition based on human rights concerns, for example in relation to Russian prison conditions, and in the face of inadequate assurances. Personally, I think my view on the first issue would be that there is a sufficiently robust system. The Othman criteria are there and the discussions you have heard indicate that they are taken seriously.

Secondly, whether there is sufficient monitoring post-surrender? In relation to that, acknowledging all of the concerns that the Committee has heard, I would like to add two things: first that these assurances are in reality self-monitoring. The requesting state understands that breaches will have serious consequences; that if it breaches it will have difficulty the next time it has a rapist it wants to have serve a 25-year sentence. So there is a real incentive for requesting states to abide by their assurances. Secondly, each of these requested persons were legally represented in this jurisdiction. Responsible defence lawyers keep in contact with their clients. I know exactly what happens to my clients post-surrender and I know when there are issues. So far as extradited defendants are concerned, there is that mechanism on a practical level for reporting problems. It is ultimately only the

surrendered person who knows whether his or her assurance has been breached, whether he is in the wrong prison, and it is the focus on that mechanism for reporting back to somebody who can do something about it that needs to exist. Of course this feeds back into the Othman criteria. Monitoring is one of the Othman criteria; it is incumbent on the court to be sure before it surrenders that there will be an adequate monitoring system in place, whether it is OPCAT or whether it is an individual system that is reflected in the individual assurance.

The third issue—I am not stopping for breath; forgive me—is what to do if there is a breach? If it has all gone wrong and there is a problem. Extradition cannot be unwound. There is no provision in domestic or international law for getting somebody back in that circumstance, but what does exist is the ability for UK lawyers to go before a UK court and obtain a declaration that the assurance has been breached. That can then feed into diplomatic efforts to put the situation right, or legal remedies in the foreign state concerned.

The Chairman: Is that frequent?

Mark Summers: I have certainly been involved in one case that was mentioned by Mr Garlick. I was for the Trinidad Government in Goodyer and Gomes where we were in court on an application for a declaration. In that case, the breach was innocent and all was, in the result, put right. But Lithuania has had problems with monitoring or enforcing assurances in the right way. To my knowledge, there has not been a case that has come to that yet because, on proper analysis, breaches are often found to be innocent or administrative and capable of being put right, but in theory that exists.

The fourth issue is if that all goes wrong and you are faced with a country that has given assurances, has breached them, and is at risk of doing so again, what to do about those territories? The first answer is that you would not extradite because, on the Othman

criteria, the next person who came along would have a decent argument based on the prior breaches of assurance. The second is that there is the mechanism for de-designation in extreme cases. But it is a power that needs to be exercised responsibly and, if exercised, could have really serious consequences; Lord Brown identified them. If Turkey was suddenly a country to which extradition were no longer possible, or at least not readily possible—there always exists the possibility of ad hoc extradition arrangements—you enter into discussions or problems with safe havens. We do not extradite to Japan at the moment; it is not a problem we are unfamiliar with.

Q129 The Chairman: As a matter of interest, is there any kind of correlation between systemic breaches of human rights and breaching assurances?

Mark Summers: Absolutely there is. The Strasbourg case law on this is absolutely clear. The fact that you have an assurance does not absolve the court of the necessity to examine the reality on the ground, and cannot trump evidence of systemic general problems. The case law on that is absolutely clear so, yes, there is a real—

The Chairman: The evidence is quite clear, too, that those who have run the worst systems in general tend to be those who breached the assurances most frequently.

Mark Summers: I imagine that that would necessarily follow.

Dr Trapp: I think part of the difficulty—and this is less so in the extradition context and more so in the deportation context where we have national security concerns to which we are trying to respond—is that states where torture is practised, systemically and routinely, are precisely the states that are not willing to accept monitoring mechanisms.

We do have cases before SIAC where assurances were accepted despite the receiving State's refusal to accept a monitoring mechanism. We then have a paradox because the basis of accepting the assurance is that this country is going to be susceptible to UK

pressure, diplomatic pressure, which will force it to comply with its assurances but, of course, it is precisely the fact that it is not interested in foreign intervention—for instance, Algeria's post-colonial sensitivity to intervention—which results in its not accepting monitoring. For the cases where we are accepting assurances without any monitoring mechanism, in states where torture is practised routinely, that is a serious problem. What might these monitoring mechanisms do? At the very least they can feed back into the system, as my colleague, Mr Summers, has suggested. The difficulty there, of course, is that there is no facility for making their reports public. So part of what would be a relevant consideration in evaluating the extent to which monitoring mechanisms are going to be effective is obviously the extent to which the monitoring body is independent, and that is something that the UK courts consider quite well. The other is the extent to which the reports are going to be transparent because of course, both the sending state and the receiving state have—and without intending to suggest that there is bad faith here—an interest in not having breaches of assurances made public, particularly where we are relying on assurances so that we can deport individuals for national security reasons. That transparency is, in fact, crucial if the monitoring mechanism is going to add anything to assurances. When I said, "Should we rely on assurances? No", what I meant is should not rely on assurances alone without independent monitoring because I do not think they add anything to the system. In fact, they only give us an opportunity to exercise diplomatic pressure on a foreign state, which we already have the opportunity to exercise.

The Chairman: Any thoughts on that?

Mark Summers: On that, no. May I just add one more thing though? I understand we are stretched for time. Question 7 occurred to me to be one that might not be entirely well placed. It is not the function of extradition law to bring about regime change. The function

of extradition law is to ensure that a specific defendant is returned in accordance with the interests of justice and is accorded his own particular human rights, which is why we have assurances; the individual's case-specific assurances. An approach to extradition law that set about trying to force general human rights reform in other countries would be one that was fraught with real danger. I say this only because I would not want my silence to have been taken as an acceptance of the premise of question 7.

Dr Trapp: May I just say something in respect of that? With all due respect, taking the international law perspective, it strikes me that one thing that might be relevant is states' obligations to co-operate to bring to an end serious breaches of peremptory norms; for instance, the prohibition against torture. States have actively to co-operate to bring to an end these types of breaches. It occurs to me that seeking assurances in respect of individuals from states where torture is otherwise systemic is contrary to at least the spirit of that obligation, which is to co-operate to bring to an end the general practice of torture. While I appreciate that there are concerns about having extradition law shoulder this burden, at the same time we do need to think about the way in which we develop domestic law in a way that is compliant with our international legal obligations. I do think it is a question we should be asking. Whether extradition law can answer the question alone is an entirely different matter.

Mark Summers: I agree entirely. It is a real question to be answered; I am just not sure that extradition law is the appropriate mechanism to answer it.

The Chairman: I understand the point that you are making. You are obviously not condoning any of the malpractices; it just is about mechanisms and systems to bring about the kind of things I think we all probably—

Mark Summers: Personally, I should like the system to be otherwise but it is not the proper focus of extradition.

The Chairman: No, I understand that. Does Professor Morgan have any thoughts on that?

Professor Morgan: No, except what I said earlier about specific assurances: that X will be treated well; X will be kept in a place that is superior to that where many of our other prisoners are kept. There are many difficulties about monitoring but, on the other hand, it represents—or potentially represents—to some extent progress in raising standards generally. It acknowledges, for example, that if a country says, "We are going to use a particular establishment and not most of our establishments", that is a tacit admission that the standards in most of their establishments are not acceptable. That increases the pressure to make sure that there is equity in the provision for all persons detained in the establishment. That possibly sounds naive but I think it has the potential to improve matters more generally.

Q130 The Chairman: We are getting to the end of our allocated time and I would like to turn briefly to Sheriff Maciver—I apologise for not pronouncing your name properly earlier on in the proceedings—to say that one of the differences between extradition law in England and extradition law in Scotland is that the forum bar does not apply in Scotland. You told us you did not think this made a substantive difference. I would just be interested whether you have any thoughts that would elaborate on that.

Sheriff Maciver: We have been advised that it is unlikely to take effect in the near future. It is not likely to be something that happens in Scotland. No, I do not think so. I think that there are certain types of cases in which there will always be a claim that the prosecution should be undertaken in this country, in any event. We have had some of those, particularly with Italy with Mafia-type cases where the operation has been run from the UK or from

Scotland but the prosecution is taking place in Italy, usually because it is phone tapping evidence that they have. The argument is always that that kind of case, where there is a cross-jurisdictional issue, could be prosecuted in Scotland. It has to be said there is a reluctance to prosecute unless there is both an accused and a victim who are Scottish citizens, or there is a substantial Scottish interest within the facts of the case. So there have been very few cases where we have entered into any form of discussion about taking over the prosecution from the requesting state. It has not really been an issue; it has not been a great problem in any case thus raised. It may be out of turn—because I know you are short of time—but there is one point I do have to make. You will probably be speaking to the Westminster judges at some stage and I had their submissions after I had sent in my own. There is a divergence in practice and procedure that has not happened hitherto. We have kept very closely in contact with what each other are doing and followed each other's cases. But in paragraph 3 of their second submission, they list about 10 countries, six of which are EU countries, in which they say they do not now order extradition. They say this means, "In effect that we have extradition arrangements with many countries to whom in practice we will not order extradition". That is not the position for Scotland. There are no countries to which we will not order extradition because we look at every situation on a case-specific basis. If a Lithuanian case comes before me, and there is no issue raised on prisoner conditions, I do not *ex proprio motu* raise it. If it is raised, we will deal with it in the same way as any other case and examine it and look at the prison and the conditions. I know that the main case that brought all this about is an Italy case. But again, even if it were Italy, we would look at the prison and the situation and we would not automatically decline to order extradition. I regret to say, although we have regular contact with them, we do depart from our Westminster colleagues in paragraph 3 of their submissions 2.

Q131 The Chairman: Thank you very much for pointing that out. That is interesting and helpful to know.

I think time has probably come when we must draw the hearing to an end. We have had a wide-ranging discussion which is, I think, good because we are interested in extradition, the law and the practice, and its implications. If any of you have anything you would like to say covering that broad area, and we have not covered it, I would be delighted if you were to do so now.

Professor Morgan: I would just like to add: I noticed in some of the written evidence that you have received that particular countries are marked out—this is the proportionality issue—as saying that prosecutors have no discretion. They must seek a European Arrest Warrant for anyone who has been sentenced, even where it is quite minor, and I think Poland is cited. That applies to several countries. I have the understanding from prosecutors in Lithuania that they routinely apply for the extradition of anyone who is in breach of a sentence or has fled the country, having been charged with even quite minor offences.

Lord Brown: So 90% of your cases are Polish. Have you had any discussions with Polish authorities about how to try to change this?

Sheriff Maciver: Yes we have. We met with Polish judges on an informal but professional basis about three or four years ago. They were anxious as well to deal with the triviality issue but they cannot. It would have required a change of domestic law and there was no will to change it, so they feel very much the same way as we do about sending the trivial cases to us. But of course the Extradition Act, following the terms of the framework decision, allows for it in any case where the sentence is more than four months and so they operate that.

The Chairman: It could be a case for saying that perhaps the successor of the framework decision—the directive or whatever it is going to be—ought to be reworded at European level and then you could cut it out right across the piece, could you not?

Sheriff Maciver: I think that is right, yes. We could certainly encourage that.

Lord Rowlands: There was an amendment, was there not, to 21(a) and there is—

The Chairman: There is 21(b).

Lord Rowlands: You could look for alternative methods. Could that not be explored in the Polish context?

Sheriff Maciver: It could. The proportionality bar newly imposed only takes effect for a request to return for trial and not for sentence. So in these cases the test is slightly higher in any event. But, yes, it could be explored but we have a more generous interpretation of the words, "Unjust and oppressive" in section 14 than they do in Westminster. We have occasionally refused to extradite someone to Poland, for example, if the case is very old and he has started and is pursuing a new life here and if he argues undue delay in the execution of the warrant. We have taken a favourable attitude towards these cases where they are both old and trivial, but we are using section 14 and the interpretation of "harsh" and "oppressive".

Lord Brown of Eaton-Under-Heywood: Why do you not use Article 8?

Sheriff Maciver: For Part 1? We have never used Article 8 for Part 1, for that. There is a view that we should not even be using section 14 because the Act sets its own bar at four months. That is the bar that the Act sets, not that a sentence imposed has more than four months remaining on it. In fact on one view—and we have had to deal with this as well—if you read the Act literally, if the original sentence was four months, even if he served three months of it, they can ask for him to go back for the remaining month. We have refused to

do that; we have interpreted it as being four months remaining, minimum. That is the way that the framework decision was originally set out.

Lord Rowlands: Of all these Polish cases, how many are refused?

Sheriff Maciver: Very few, because we can only properly refuse them, in terms of the legislation, if the warrant had been existing for a long time in Poland and we can be clear that there has been an undue delay in the enforcement of it. We operated a seven or eight-year—

Lord Rowlands: Seven or eight years?

Sheriff Maciver: Some of them are older than that. They sit for a long time on warrants before they come here very often. Schengen might make a difference to this, I may say. But until that comes in there are still some old cases that come to us, and if the chap has been here for half a dozen years, has started a new life, has been in no trouble in this country and it is a fairly minor matter and a short sentence, on the basis of section 14 we have declined to return. It has not been appealed by Poland thus far.

The Chairman: Anyone else?

Mark Summers: At risk of trespassing on the Committee's time, we have not dealt with Articles 5 and 6. You heard evidence about that this morning. I am not entirely sure I agree with the tenor of that evidence.

The Chairman: Thank you for telling us that.

Mark Summers: The evidence, as I understood it, was that they were provisions of very little utility because they attract the flagrancy threshold that the Strasbourg Court has held to apply to Articles 5, 6, 7. I am not entirely sure I agree with that. I can think off-hand of three Article 5 cases where flagrant breaches have been upheld: the practice of civil commitment

of sex offenders in America[258]; Dewani[259] is an Article 5 case, on preventative detention of mentally ill persons; Shankaran[260] is an Indian case where the length of prospective pre-trial detention was such that it engaged Article 5. Each of them was capable of being remedied by assurances; some were, some were not, but it is something that at least does play into my everyday practice.

I think Article 6 is slightly behind in that respect. I can think of a number of examples where the courts have found no flagrant denial, where personally I think it should have done, where the Strasbourg Court has spoken strongly on the topic and the court has acknowledged an Article 6 breach but not found that it is flagrant. I think that is still a workable and evolving area of extradition law that should not be consigned entirely to add-ons to other arguments. It does have utility in specific cases and extreme cases, but specific ones.

The Chairman: As you say, time has moved on. Thank you very much, each of you. We are very grateful to you. It has been of considerable help to us I am sure.

258 *Sullivan v The Government of the United States of America & Anor* [2012] EWHC 1680 (Admin)

259 *Government of the Republic of South Africa v Dewani* [2014] EWHC 153 (Admin)

260 *Shankaran v The Government of the State of India & Anor* [2014] EWHC 957 (Admin)

Helen Malcolm QC, Clair Dobbin, Jeremy Johnson QC and Raza Husain QC – Oral evidence (QQ 230 - 237)

Submission to be found under Clair Dobbin

Gary Mann – Written evidence (EXL0002)

To the Parliament extradition committee

Evidence from Garry Mann 31/07/2014

My name is Garry Mann,

I was arrested in Albuferia, Portugal on 15/6/2004 the charge was not known to me.

1. I was tried within 48 hours under Temporary Portuguese legislation for the European football championship only. After a trial ruled in a British court on 18/7/2005 to be unfair and the conviction "obtained in circumstances that are so unfair as to be incompatible with the respondents' right to a fair trial under Article 6 of the Human rights to a fair Trial I was convicted of leading a riot and ordered to serve 2 years in prison.
2. On 18/6/2004 I was released and sent back to the UK, statements I had read to me by the British embassy and later confirmed by the Metropolitan Police stated i was voluntary deported and would not serve a 2 year prison sentence.
3. On 18/7/2005 Judge Day rules the court in Portugal unfair.
4. On 19/3/2009 I was arrested under the European Arrest Warrant by Interpol officers.
5. On 19/3/2009 i was bought before the now retired Judge Workman, after several court appearances Judge Workman confirmed my extradition stating he did have to take into consideration any judgement from the previous court case and Judgement in the Uxbridge Magistrates court on 18/7/2005 which judged the Portugal court unfair. Judge Workman basically stated he had no choice under the terms of the extradition act 2003 but to rubber stamp the Portuguese ruling.
6. On 26/3/2009 my solicitor missed my appeal date to the Magistrates court so I could no longer appeal the decision I then went straight to Judicial Review in the High Court.
7. On 19/1/2010 in the High Court Lord Moses remarks on "the inability of the court to rectify what appears to be a serious injustice to Mr. Mann".
8. On 26/3/2010 lord Moses said "this is a source of embarrassment to everybody this whole case should disappear".
9. On 9/5/2010 I was extradited to Portugal where i served one year in prison , i was then transferred to spend the rest of my sentence in the United Kingdom which was 3 months in wands worth prison and 3 months on Parole.
10. The safeguards to prevent an unfair trial are not strong enough in foreign courts, basic rights are being ignored, as the courts are under civil law not common law as in the United Kingdom, the system of Mutual Recognition cannot be guaranteed, in my case and these are confirmed by a British police officer on duty that day in court.

a) I was not informed of the charges against me till 5 minutes before convicted.
b) I was not informed I could halt the trial for 15 days.
c) I shared one interpreter between 13 of us accused.
d) Interpreters only wrote down court proceedings on notebooks never relaying what was being said in court.
e) There were illegal Dock Identifications in court.

f) No consultation allowed with defence for cross examination.
g) Witnesses were denied for the defence because of the 48 hour time restraint on the court.
h) CCTV evidence was denied because of time limits of the court.
i) Finally my lawyer could only speak a little English

11. When I appeared in the magistrate's court in Westminster the executing Judge was not able to evaluate evidence from the defence and just relied on the prosecution evidence and then rubber stamped the extradition, this judge must then have the power to evaluate defence evidence and to refuse extradition if seeing evidence of an injustice. This Judge must also be empowered to take into account previous court judgments which have a bearing on extradition.
12. As regards to the extradition act 2003, The bars of Article 6 are set way to high and are abused by The crown prosecution to deny nearly all appeals against extradition, they use the term "flagrant breach "in Article 6, flagrant breach is being interpreted by the Crown to mean in danger of death or torture which is unfair as many people including myself have received unfair trials and although not in danger of death or torture this should not mean we should be extradited, the interpretation the crown put forward is virtually impossible to meet and so really unfair.
13. The high court judges should have the final say in that after looking at evidence from the Crown and the Defence and if they see an injustice has taken place, they must have the power under legislation to overrule the European Arrest Warrant and deny extradition.
14. legislation must be changed for those who are extradited ,they should have parole after they have served their half sentence in foreign countries, for even though I had served my half sentence in Portugal I still had to serve half of the remaining sentence in the united kingdom. This is totally unfair as I served one and a half years of a two year sentence more than any prisoner in the United Kingdom after good behaviour would ever do.
15. Given my experience of the extradition act 2003 and the European Arrest warrant i firmly believe we should not opt back in to the EAW. But if we do the legislation and practice should be amended as I have outlined in my evidence.

Garry Mann.

31 July 2014

Rt Hon Theresa May MP, Kenny Bowie and Ross Goodwin – Oral evidence (QQ 191-211)

Evidence Session No. 12 *Heard in Public* *Questions 191 - 211*

THURSDAY 4 DECEMBER 2014

10 am

Witnesses: Rt Hon Theresa May MP, Kenny Bowie and Ross Goodwin

Members present

Lord Inglewood (Chairman)
Lord Brown of Eaton-under-Heywood
Lord Empey
Baroness Hamwee
Lord Hart of Chilton
Lord Henley
Lord Hussain
Baroness Jay of Paddington
Lord Jones
Lord Mackay of Drumadoon
Baroness Wilcox

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Examination of Witnesses

Rt Hon Theresa May MP, Home Secretary, **Kenny Bowie**, Head of International Criminality Unit, Home Office, and **Ross Goodwin**, Legal Advisors Branch, Home Office

Q191 The Chairman: Home Secretary, thank you very much indeed for coming along to talk to us. You have come with two of your colleagues. They are both equally welcome. If they wish to intervene, they should feel free to do so, from our point of view. I remind everybody that proceedings are being televised. Home Secretary, is there anything you would like to say as an opening statement or would you rather proceed directly to the question and answer session? We have given you an indication of the topics that we are interested in.

Rt Hon Theresa May MP: I thought that I would, if I may, comment slightly tangentially, and thank the Committee for the work that it did on the European Arrest Warrant and note that we have now opted back in to all of the 35 measures in the package of the justice and home affairs opt-in, including the European Arrest Warrant.

The Chairman: Is it actually on the statute here now?

Rt Hon Theresa May MP: Everything has been done and the regulations have been signed.

Q192 The Chairman: I will ask the first question. Criticism has been levelled at the European Arrest Warrant such that it subjugates the rights of individuals to the expediency of justice. Do you agree? A whole series of procedural aspects derive from that. How do you, over time, propose to deal with some of those?

Rt Hon Theresa May MP: I am aware that over time the European Arrest Warrant has come under some criticism for some of its aspects. The fact that it is a smoother and speedier process for extradition is good. One of the problems with the previous arrangements that were in place was the length of time that it took for extraditions to take place. But that has to be balanced properly against concerns in relation to the rights of the individual. Some of those issues that have been raised previously—that the procedures did not properly balance those rights—we have acted on to mitigate and deal with here in UK legislation. There are two issues that I would raise particularly. One is the proportionality issue, which was a long-term concern for Members of both Houses and the public. We have now introduced the requirement to consider proportionality here in UK law. There are a number of other things in relation to the measures in Europe that support this as well. For example, we will be joining SIS II, the second-generation Schengen Information System, which within it has a requirement to consider proportionality. That is the main means by which information on arrest warrants is exchanged. Introducing a proportionality element has helped to deal with one of the criticisms about the procedures within the European Arrest Warrant. The other was the question of lengthy detention before any charge or trial was brought. We have now introduced a requirement for the case to be trial ready and for the requesting country to be in a position to charge or take someone to trial rather than simply taking an individual from the UK and keeping them in detention for a significant period of time. Alongside that, we have introduced some other procedures that can help. Where there is an issue about getting evidence, if the individual subject to the European Arrest Warrant consents, they can be taken temporarily to give evidence and then brought back to the UK. We have made

arrangements in relation to things such as video links on evidence. I am sorry that this is a lengthy answer, but finally I would also point out that, having signed up to the European investigation order, that is one of the issues that will start to reduce the reliance on European Arrest Warrants that has occurred in the past. It smoothes the evidence-gathering element of the process of justice.

The Chairman: That is interesting. You have told us that some things are happening. Have you other ideas in the pipeline for taking some of these things forward? There has been a lot of criticism about some aspects of this.

Rt Hon Theresa May MP: I would hope that the changes that we have already made in UK legislation crucially will be those that will deal with the key issues that people have raised. We are already seeing European Arrest Warrants being refused here in the UK as a result of the changes to legislation that we have made.

Q193 The Chairman: Could you be a little more specific about arrangements regarding video links, which is a topic that has come up a number of times?

Rt Hon Theresa May MP: I may ask one of my officials to give some of the more technical details in relation to the video links.

Kenny Bowie: Essentially, one of the criticisms of the arrest warrant was that it was issued at the investigatory stage of proceedings rather than when the case was trial ready. The introduction of video link evidence would mean that, rather than having to extradite the person when the case is not potentially trial ready, what can happen now is that, if the individual consents, they can speak with the issuing judicial authority in the requesting state and essentially give their version of events.

The Chairman: Who is providing the link?

Kenny Bowie: Most of the time it will be done through Westminster Magistrates' Court.

The Chairman: It is dependent on the person affected agreeing to this procedure.

Kenny Bowie: Yes, and the issuing judicial authority being happy for that to happen as well. This is something that other Member States do as well and which we understand from them has been quite effective.

Q194 The Chairman: Finally, following on from that, the character of the European Arrest Warrant is part of a system that extends way beyond our borders here. To a significant extent, the credibility of the whole thing depends on how well it works right across Europe.

Are we planning to take a leading role in trying to refine and improve on an ongoing basis the workings of the system?

Rt Hon Theresa May MP: We have already undertaken some work with individual Member States. For example, the country where people were most concerned about the proportionality argument was Poland. A significant number of European Arrest Warrants had been requested by Poland. The Poles themselves are looking at bringing in new legislation to introduce a proportionality threshold for the requests for European Arrest Warrants. That is one example.

When we started the process of looking at the EAW mainly as part of the JHA opt-out issues, we looked at the possibility of whether there would be a consensus within the European Union from other Member States of looking at the directive itself and making some changes to it. What I discovered was that while others had similar concerns in some areas to those that we had—for example on proportionality—there was no appetite for opening up the whole directive. The concern was that it was working well and there was potential for ending up with something that was not as good an instrument as the one that we have at the moment, rather than a better instrument. That is why we looked to what other countries did.

Some other countries have proportionality measures already available to them, so that is why we chose to legislate within the UK. The Commission has made it very clear that it did not think that the directive should be opened up. The European Parliament raised some issues with it. Baroness Ludford worked on a report from the European Parliament that touched on some of these issues of length of detention before trial and proportionality. But so far there has been no great appetite for looking at the directive itself. There may be some appetite for co-operation in terms of some of the processes that we go through, but not in terms of the actual legislative framework.

The Chairman: It is fair to say that we are interested in reforming and amending the details of the way that the process set down in the directive works, but we are not in the business of trying to replace it with something else.

Rt Hon Theresa May MP: The experience so far is that there would not be a consensus for replacing it given that the Commission has said that it does not want to act on this. It would be a Member State initiative, which requires nine Member States to come together. We

explored that, but did not find agreement elsewhere. Hence, we have dealt with the issues that were of concern through our own legislation.

The Chairman: From the UK perspective on justice concerns, do you think that we are managing to secure what is desirable?

Rt Hon Theresa May MP: I think that we are. As I indicated, there were some other measures in addition to the European Arrest Warrant that now change the environment in which it operates, such as the investigation order. Indeed, when Sir Scott Baker's panel reported on extradition arrangements, I recall that it referred to the European investigation order as something that could change the reliance on European Arrest Warrants.

The Chairman: I have slightly trespassed on an area that Lord Mackay wanted to talk about, so I will hand over to him.

Q195 Lord Mackay of Drumadoon: Thank you very much. It may well be that the question that I was going to ask will already have been answered, but I want to be quite clear about it. It is framed in these terms: in the light of the recent amendments to the Extradition Act 2003, what changes to the European Arrest Warrant framework decision do the Government want to see and what are they doing to bring these about? I understand from what you have helpfully told us thus far that there are no changes to the framework decision that you want at the moment. There are, however, some administrative procedures that you would be comfortable and interested in changing to help the administration but not the actual basic skeleton of the procedure as set out in the framework decision.

Rt Hon Theresa May MP: We started off looking at whether the best way to achieve what we wanted was to try to change the framework decision. It was clear that there was no appetite to do that. We looked at what we could do in our own legislation, and have done, and have been talking with other Member States such as Poland, as I indicated, about what they might do in their legislation as well. There are some other issues that still need to be addressed, but we can start to look at that through some of the administrative procedures. On the question of an arrest warrant being refused by one country but then being exercised in another country, for example, we want to put information on to this twin system is to flag that an arrest warrant has been refused in the UK so that another Member State seeing that arrest warrant would recognise that it had already been refused by a Member State. One of

the issues is somebody feeling that their arrest warrant has been refused then finding themselves arrested in a third Member State.

Lord Mackay of Drumadoon: It would be of interest to this Committee to have an outline set out in writing of what these other matters are.

Rt Hon Theresa May MP: We are very happy to do that.

Q196 Lord Mackay of Drumadoon: It is quite a common occurrence in our House for a government Minister to volunteer. You have joined the volunteering. Finally, you may have gathered from my name and accent that I live in Scotland, where the procedure is not hugely different, but different in certain respects from that followed in England, Wales and Northern Ireland, as I understand it. Has there been consultation with the Scottish Government—if they are not too busy settling into their future—so that any Scottish concern has been considered and resolved in a satisfactory way?

Rt Hon Theresa May MP: Yes, when we were looking to introduce the changes in our legislation here, we consulted with the Scottish Government. All the devolved Administrations would have been consulted on the impact.

Q197 Lord Empey: Good morning, Secretary of State. Having gone back into the EAW, are you satisfied that the Commission will not be subjecting the United Kingdom to any infringement proceedings as a result of amendments to the 2003 Act?

Rt Hon Theresa May MP: I think it is probably not realistic to consider that the Commission will ever give any blanket guarantees on issues such as this. The issue is less one of where the Commission would be—of course, the Commission has recently changed. There is no indication so far from the new Commissioners that this is an issue that they wish to look at. The concern that has been expressed to me more generally—it was certainly expressed in the Chamber in the other place—is the question of the jurisdiction of the European Court of Justice on these matters and whether the European Court would in fact take issue with this. First, some other Member States have some of these measures in their toolkit already—on proportionality, for example. Germany has already been exercising a proportionality threshold and there has been no suggestion that this should be something that they overturn. There have also been some cases in the court recently that actually support us. In the Radu case, the court did not address the question of whether or not we should have regard to fundamental rights including proportionality, but decided to avoid that question. The court did not feel that that was something it should look at. It made an assessment of

fundamental rights and decided that there was no need for an additional hearing in the issuing state before a warrant is issued. The court has looked at part of these issues and come out with a judgment that we believe supports our case. There is also some domestic case law that supports us. There is domestic case law in Germany and in Ireland that supports this.

Lord Empey: You alluded to the fact that the Commission has recently changed. Have you any reason to believe that there might be a different approach? Obviously, a new Commissioner comes in and presumably we approached the outgoing Commissioner to get a steer. There is no guarantee that the new Commissioner would take the same position. In other words, is there a doubt still out there regarding the new Commissioner's attitude?

Rt Hon Theresa May MP: From the interaction that I have had with the new Commissioners so far, there is no suggestion that they would take a different approach in relation to this matter. Of course, the new Commission came in during the process of us opting back in to the 35 measures covered by JHA protocol 36 and took exactly the same approach taken by the previous Commissioner and Commission. So there is no suggestion that they intend to change their view in relation to this matter. As I say, this is not something where the United Kingdom is out on a limb. These are areas where other Member States have, through various means, applied similar arrangements within their own domestic decision-making processes as well.

Q198 Lord Brown of Eaton-under-Heywood: That is very helpful, Home Secretary. There are ways in which you are striving to delay the issue of the European Arrest Warrant and trying, instead of making it a first option, to make it a much later option; you are putting in place, hopefully, provisions in the law to make it necessary to be trial-ready and relating to video links and things of that order. Once the European Arrest Warrant is issued, the question then comes, of course, of bail and of our old friend the European supervision order. We have signed up for it, but I do not think we have implemented it yet, have we? What are we doing about that? "Eurobail" is its other common term.

Rt Hon Theresa May MP: Yes, that is exactly right. The intention is that that will be implemented. It is one of the 35 measures.

Lord Brown of Eaton-under-Heywood: But when? Why has it not been by now?

Rt Hon Theresa May MP: The regulations that we signed actually implemented it. Sorry, I have been corrected—as of today.

The Chairman: This is where you heard it first.

Lord Brown of Eaton-under-Heywood: Are other steps being taken to try to ensure that one does not have to wait so very long for trials in other Member States? The delays in countries such as, famously, Italy and so forth are legendary. Are any steps being taken to try to harmonise pre-trial delays?

Rt Hon Theresa May MP: I am tempted to say, Lord Brown, that it is an interesting enough job trying to harmonise and make more efficient the criminal justice system in the United Kingdom, let alone trying to do it in other Member States as well. That was a slightly flippant response but, as I said earlier, we are going into a different scenario now with these various different measures that will be in place in Europe, which provide, I think, a greater comfort to people here in the United Kingdom in terms of what might happen. I cannot guarantee that other Member States will speed up their processes, but I know that with our own measures and with the European investigation order it should be much less likely for somebody to be arrested, taken back to a Member State and held while the evidence is being gathered. That is down to the various measures that we have taken.

The Chairman: Are you satisfied, from the perspective of the administration of justice, that the process of bringing people back here will equally benefit from what is going on?

Rt Hon Theresa May MP: Yes, indeed. We have had some very good examples where we have been able to exercise the European Arrest Warrant and bring people back in a timely fashion, which has been beneficial.

Q199 Baroness Jay of Paddington: Home Secretary, we have heard quite a lot about the question of assurances as something that is increasing in extradition cases. You may well say, as you did on the previous question, that this is a major challenge of trying to harmonise systems, but one of things that has concerned us has been the extreme informality of the undertakings that seem to be given in terms of prison conditions and even the possibility of torture et cetera. Do the Government feel that these procedures for maintaining and monitoring assurances should be more formal?

Rt Hon Theresa May MP: You are absolutely right, of course, that assurances have become in a sense more a part of some of the extradition arrangements that take place, particularly, obviously, with countries outside the European Union and outside the exercise of the European Arrest Warrant. That is a process where very often it is the court that makes requirements in terms of the assurances and looks at the nature of those that are being

given, so that they satisfy the court in terms of making an extradition decision. The very nature of assurances is such that it is difficult to put in place a one-size-fits-all model that is going to apply in all circumstances. Obviously, assurances will be looked at on a case-by-case basis. Of course, the individual British citizen who is taken and extradited under those arrangements has access to consular support should there be any change in the assurances that have been given. I have been made aware of one case where an assurance was broken but in fact, subsequently, the individual decided that he did not wish to return to the basis of that original assurance and is happy with the arrangements that are now in place.

Baroness Jay of Paddington: We have had evidence from the Foreign Office about the consular arrangements for British citizens, but obviously we are also talking about people who may not originally be British subjects or citizens, so there is an additional issue there. One of the proposals suggested to us is that, rather than relying, for example, on the consular system for everybody, we should perhaps give this role to the courts and that our courts should be responsible for monitoring.

Rt Hon Theresa May MP: Obviously, the courts are responsible for determining the strength of the assurances that they see in the first place. It is an interesting question. We are doing some work with the FCO to look at this aspect of the issue and we recognise the concerns that have been raised about it. There could very well be some challenges for our courts if they were being required to monitor assurances in respect of things that were taking place abroad but, as I say, it is an issue that we have started to look at and are happy to look at with the FCO.

Baroness Jay of Paddington: The issue for us, looking at the policy, is the question of formality. As you say, one size cannot fit all, but can we get some more strict arrangements in for monitoring and indeed for enabling challenges to a system if assurances are not kept?

Rt Hon Theresa May MP: I understand the point that you are making. We are looking at this with the FCO to see whether there are any measures that need to be taken to give greater assurance to the assurances.

Q200 The Chairman: What view do the Government take about those who have been extradited from this country who are not British citizens and who then, as a result of extradition, end up in prison in some other country, possibly a category 2 country, where it is almost impossible to know in detail what is going on in jail? What responsibilities do we have towards such a person, who is not a British national?

Rt Hon Theresa May MP: Are you talking about a situation where, as part of the extradition, the court has determined that certain assurances—

The Chairman: A situation where somebody has been extradited from an area where they have certain rights, which are reasonably easily enforceable, into a country that may not have those rights in the same form at all—anyway, someone who has gone pretty far beyond the radar. What, if anything, do we feel we should do in respect of them?

Rt Hon Theresa May MP: I think that this is a more difficult question, because of course, as Lady Jay indicated, where it is a British national the consular arrangements naturally kick in, if I can describe it that way. Where it is somebody who is not a British national, that is more difficult and there would obviously not be the same arrangements. I am being told that we have made arrangements with the Foreign Office whereby they will undertake to follow up in certain circumstances. Kenny, perhaps you could explain.

Kenny Bowie: My understanding is that, when there are situations of particular concern or when it is a particular country, not in every case but in a certain number of cases the FCO will follow up. I will provide you with further information as to exactly how, but I understand that it is done on a sort of risk-based approach at the moment.

Rt Hon Theresa May MP: That is an area where perhaps we may volunteer to write to the Committee, perhaps with some further information.

Q201 The Chairman: That would be extremely helpful. The other question, which relates to that, is if you are in a country where it is all a bit vague what is happening. Say somebody is moved from jail A to jail B inside the prison system, how do we know if they have gone from a place which is acceptable to a place which is not?

Rt Hon Theresa May MP: This is one of the issues that we need to address. The only other comment I would make is that, where somebody is being extradited to be taken to justice because there is an allegation that they have committed a crime, although I recognise that standards of justice and standards of prisons vary across the world, we should not lose sight of the fact that there is a purpose for the extradition.

The Chairman: But just because you are put in prison it does not automatically follow that whatever rights you may have had just evaporate. That is the point I am interested in.

Lord Mackay of Drumadoon: May I make a short contribution on this matter? In my practical experience—first, appearing in court and then sitting as a judge in court—I have observed a number of occasions when a judge has been quite expert in asking questions

seeking to clarify what assurances are available and what steps would be taken locally to enforce them. The very simple fact is that if a foreign country refuses to live up to its assurances then it will face practical problems in this country if it comes seeking to extradite someone back to it.

Rt Hon Theresa May MP: Yes, indeed. Lord Mackay makes a very important point. If somebody is extradited with assurances and those are not kept, then the next extradition request made to the United Kingdom might very well be looked at with a rather more sceptical eye.

Q202 Lord Hussain: My question is about a person who holds dual nationality and is extradited to the country where he holds the nationality other than the British. He is basically in a country where he is considered to be their national too. What would be our course of action in terms of extradition and assurances? How far will that country be held to assurances?

Rt Hon Theresa May MP: That is one of the issues that we are exploring, The Immigration Minister wrote earlier this year to the Foreign Secretary about this issue, raising in particular the question of non-British citizens—that is in relation to the earlier part of the question. The different categories of British citizen, non-British citizen and dual national are three categories that we will be looking at with the Foreign Office to see what the various arrangements would be in place for looking at potential breaches of assurance. We will be covering that issue in those discussions.

Q203 Baroness Wilcox: In the light of the threat posed by radicalised individuals committing terrorist acts in the UK and then fleeing abroad, how will the Government facilitate import extradition to the UK from countries that do not have arrangements with us, such as Egypt, Indonesia or Pakistan?

Rt Hon Theresa May MP: Obviously, there are a number of countries with which we have bilateral treaties. There will always be challenges in some cases with those countries where we do not have bilateral treaties. Where we do not have formal treaties, there are other elements that we can consider. Section 193 of the Extradition Act 2003 provides that, where we do not have extradition relations with a particular territory, an international convention to which both the UK and the other territory were parties could form the basis for extradition, where the territory has been designated under the Act. We have to make some changes here as to how we do that designation process. We are now designating

conventions rather than countries, because it was impractical to update the order every time a territory ratified a convention. Where we have designated a convention, and a country is a party to it, we can rely on that convention for the extradition. Countries such as Indonesia, Syria and Pakistan have all ratified the UN Convention on Transnational Organized Crime and other UN terrorism-related conventions. In those countries, the basic framework should be there to allow for extradition to take place. Even if there is no extradition treaty or signature to a relevant convention, we can make an ad hoc arrangement on a bilateral basis with a country if that is what appears to be appropriate given all the requirements on safeguards for individuals.

Q204 The Chairman: In the *Times* earlier this week there was a report on a henchman of Adolf Eichmann, allegedly in Damascus, who it was said had been assisting in training people in how to torture. The Germans tried to extradite him but were unsuccessful. In practice, how much of the world is a no-go area for extradition for us? Do you know? You may not. I will not ask you to name names.

Baroness Wilcox: Today.

Rt Hon Theresa May MP: I would hesitate to try to give a description of that. It is probably not quite such a binary decision. I suspect that you would find that there were countries where some extraditions would be allowed and others would not. It will not necessarily just be that country A will always refuse extraditions from the UK, Germany or some other country, but they would probably look at it on a case-by-case basis.

The Chairman: That is presumably what we would do with some other countries if the roles were reversed.

Rt Hon Theresa May MP: Yes.

The Chairman: Systemically, is the system pretty comprehensive, or are there any black holes? To mix my metaphors, is it a little like Gouda cheese?

Rt Hon Theresa May MP: It is a system that gives us a reasonably comprehensive cover, but there will always be countries with which it is difficult to operate. There will be countries which for various reasons may not wish to cooperate with us on certain matters and also countries where we will have very real concerns about the conditions in which somebody who was extradited to that country would be treated. There will be decisions for us in relation to human rights and safeguards and the judicial systems of other countries. Those will change over time as well, as different regimes may operate different systems.

Q205 Lord Hussain: Home Secretary, you have partly answered this question. The experience of individuals extradited to countries such as the United States, although judged to be human rights compliant, is by no means pleasant. How might aspects of the process be amended to lessen the impact on the requested people?

Rt Hon Theresa May MP: We have looked in general at our extradition arrangements. I recognise that people often raise the question of our extradition arrangements with the United States. Of course, Sir Scott Baker and his panel looked at the balance in our arrangements with the United States and were comfortable that there was a balance there. Issues have been raised in relation to the US but, in general, the very issue that we have been discussing is one of the ways in which one can look at any concerns about how an individual would be treated so that assurances can be gained from the country to which an individual is being extradited. There was a recent example of that in relation to the case of Aswat, who was suffering from mental illness. We were able to obtain further assurances from the US about his treatment. The High Court decided on the basis of further assurances that he could indeed be extradited to the United States. Assurances are one way of doing it. Of course, we have inserted a further threshold here in the UK in relation to extraditions that are not subject to the European Arrest Warrant. An issue that came up particularly in relation to the United States was whether somebody should be tried here in the UK or in the United States depending on the nature of the alleged criminality that has taken place. We have inserted the forum bar now, which is being exercised in UK courts in relation to US extradition requests. We have added an extra protection in the United Kingdom in relation to such extraditions.

Q206 The Chairman: Is that the type of approach—putting an extra safety measure in place—an attribute as far as you know of most civilised jurisdictions? Are we out on a limb in looking at it this way or is this something that is happening more generally? You may not have a precise answer to that.

Rt Hon Theresa May MP: I am not sure that we have a precise answer. As I indicated earlier in relation to the EAW, there are certain measures that we have put in place that other countries have also put in place. I think that it is true to say that the forum bar was not universally popular outside the United Kingdom when we introduced it. I am not aware of what others have.

Ross Goodwin: In the European Arrest Warrant framework decision, there is an Article that allows countries to refuse extradition if the conduct is regarded to have taken place in that country. It is certainly something that is compatible with European law and other Member States are able to use that. I do not think that we have any statistics on exactly how many have used that. Outside the European Arrest Warrant situation, I am not sure.

The Chairman: What about the Council of Europe category 2 countries? Does that come into their thinking in a more general sense?

Kenny Bowie: The point here is that, where there is concurrent jurisdiction, it will always be entirely appropriate for both sides to consider an issue and come to a view as to where prosecution is most appropriate. What has been done by inserting the forum bar into the legislation is to ensure that that system is as transparent as possible and that in the interests of justice the extradition is operating fairly and is seen to be operating fairly in that way.

Q207 Baroness Hamwee: Could we stick with the United States for a moment? You will not be surprised that we have had a lot of evidence about prison conditions and the length of time before trial in the States and generally of the more aggressive approach to prosecution. I was a little surprised—I appreciate that this is not your department, Home Secretary—but we have had a note from the Foreign and Commonwealth Office about the monitoring of assurances. The point is relevant to this issue as well. The FCO said that in countries where prison standards are broadly comparable to or exceed those in the UK, we do not generally visit regularly unless there are particular individual circumstances. This approach applies in, for example, western Europe, North America and Australia. We have not heard anything about Australia, but we have had a lot of criticism about the United States and about a number of countries in western Europe. The case of the US goes beyond the European Arrest Warrant, but I wondered if there was anything else that we should hear from you about the relationship with the US. I do not want to leave a lacuna.

Rt Hon Theresa May MP: Obviously, the decisions that the Foreign Office makes about how it approaches the issue of assurances are for the FCO but, as I indicated earlier, we are looking at working with the FCO on the question of assurances and looking at whether more needs to be done in that area. There are other aspects of the relationship with the United States that I hope could also give some greater confidence to people. It is possible within our mutual legal assistance treaty with the United States, for example, for video evidence to

be given. There are other parts of the system that can mitigate some of the concerns about people being taken to the United States on extradition.

Baroness Hamwee: Clearly, a lot of this is beyond legislation. It is a matter of the relationship between the countries, but we have had some very passionate evidence about the delays and so forth with the United States.

Rt Hon Theresa May MP: I recognise that there have been a number of headline cases that have reached the public more generally in relation to the treatment of individuals and their extradition to the United States. Obviously, there are questions about the relationship but, to return to the point that I made earlier, we must never forget that extradition is there for a purpose. It is there because somebody is alleged to have undertaken a criminal act and the other country wishes to bring them to justice. We need arrangements that work well and work smoothly. They must be undertaken in a timely manner and give confidence that people are being properly brought to justice while obviously safeguarding individual rights. We must make sure that people are not simply being taken to other countries—as we have done with the European Arrest Warrant—to be in detention for a significant period of time before the evidence is there to be able to charge them and take them to trial.

Q208 The Chairman: Do you, in this context, have any way of looking at systems of justice in other countries that are obviously different—their approach is different and their sentencing policy is different? Are there any tests that you apply that determine in your own mind whether things have gone beyond what is actually justice? A lot of criticism that we hear is that it is not right, and the inference behind it is that it is because it is not what we do here.

Baroness Jay of Paddington: Can I add a small point to that, which I was going to make at the end of Lady Hamwee's question? One of the problems about the States which is suggested to us is the question of local justice being so politicised. Local judges are running for re-election, there is a great deal of build-up about that sort of thing in a particular area and there is no federal standard of jurisdiction. It is very much down to the local state jurisdiction and even, below that, to politics. That is one of the problems.

Rt Hon Theresa May MP: Yes. If I may take those two together, you asked, Chairman, what we did in the Home Office in terms of looking at these issues and looking at standards of justice elsewhere. However, it is not my job as Home Secretary on any individual extradition request to make those judgments. There is a certain set of criteria that I have to look at. I

think that there are four issues that have to be addressed to make an initial decision about an extradition request. Beyond that, it is for the courts to determine whether the extradition request should be accepted. The courts can take into account these very issues about what the individual will be taken to in terms of the justice system that they are being extradited into and how that would operate. It is right that our courts take that decision and are able to look at all the evidence presented to them.

The Chairman: Having lost your discretion in the system—as Home Secretary you presided over that change, so I imagine you must approve of it—is this a consequence of that?

Rt Hon Theresa May MP: Yes. What I took away was the ability of the Home Secretary to make a final human rights decision and put that decision to the courts. That is right. In the course of my time, I have made one very particular decision in relation to an extradition request, which people are well aware of, on that human rights ground. But it is preferable for the courts to be able to look at all the evidence with the experience that they have of looking at these issues. It means that you do not get intense pressure on a single individual to move this way or that way. A lot of pressure can come from both sides of the argument, so it is right that cases are taken appropriately through the courts so that, with their experience and ability to look at all the evidence, they can look at that properly.

Q209 Lord Brown of Eaton-under-Heywood: Home Secretary, the final question listed is about category 2 designations and whether they should now be reviewed. We are talking here about further designations—countries that are not required to provide a prima facie case in order to justify an extradition from this country. Basically, the countries that we are concerned with are the non-EU states that have signed up to the European Convention on Extradition—the other members of the Council of Europe, together with one or two others that have signed up, such as Israel, South Africa and South Korea, as well as a few favoured nations, such as Australia, New Zealand, Canada and the United States. The Scott Baker review, as you know, recommended that from time to time the category 2 further designations should be reviewed. As you know, we were told by the Minister earlier in our sessions that no such review is yet in prospect. Could I have your response on this? Certain of these countries are serial offenders in terms of extradition requests, which routinely now apparently we are refusing on account largely of prison conditions but also because of the risks of ill treatment of prisoners by the police and other state authorities and so forth on return. I am able to name the miscreants. Russia, Ukraine, Moldova and Turkey are the main

offenders. What, if anything, are we doing to review categorisation? What powers do we have in that regard? Is it necessary, given the other defences, such as human rights defences and so forth, that are built into legislation?

Mrs Theresa May MP: You are right that the Baker review raised this issue. We made it clear that we would look at the designation of category 2 territories and that work is now under way in the Home Office. It would perhaps be helpful to set a couple of aspects of that work in context. First, the Scott Baker report did not recommend that we introduce a requirement for prima facie evidence to be provided. The report said: "No evidence was presented to us to suggest that European Arrest Warrants are being issued in cases where there is insufficient evidence … we consider that the extradition judges are able to subject extradition cases to scrutiny and ensure that any abusive … request is identified and dealt with appropriately". It is also worth bearing in mind that, just because a country is designated under part 2, it obviously does not mean that an extradition request is going to be automatically granted, as you indicated yourself. Some of the reforms that I have introduced will have an impact here as well, the forum bar being one of them.

The other aspect is that we have to look at this in the context of our international obligations. Where countries have ratified the 1957 European Convention on Extradition, we have made it clear that there will be no requirement for prima facie evidence to be provided. Some other treaties also remove the need for prima facie evidence to be provided, so no review will be able to lead to changes in that respect. Some of the countries that may be of interest to you may fall into that area. But we are reviewing whether we have the right designations in place—that could operate both ways, in terms of countries on the list and those not on the list but which might be added to it.

Lord Brown of Eaton-under-Heywood: I absolutely understand your answer, but if the review cannot impose the requirement to produce prima facie evidence, what can it do? What can your review achieve?

Kenny Bowie: It is important to realise that there are two different levels of category 2 designations. One class, if you like, of designation removes the need for prima facie evidence and the second class of category designations means that we have extradition arrangements with the country.

Lord Brown of Eaton-under-Heywood: Yes, they are within part 2 of the legislation.

Kenny Bowie: We can have a look at all of that.

Lord Brown of Eaton-under-Heywood: So we are reviewing both categories, are we?

Kenny Bowie: We are reviewing both categories. Some of the initial work has been done looking at the 1957 convention. For example, we know that San Marino and—

Lord Brown of Eaton-under-Heywood: San Marino, as I understand it, and Monaco are coming in under the 1957 convention.

Kenny Bowie: Yes, that is one element—

Lord Brown of Eaton-under-Heywood: But in so far as you are reviewing those which are not further designated, you might simply take them out of the legislation altogether and then have to leave it to ad hoc arrangements on a case-by-case basis. Is that what you are contemplating?

Mrs Theresa May MP: The point is that the review will look at whether we have the right countries in the list and whether there are any that need to be added. We will look at those countries that are in the list. When the review is completed, we would, as I understand it, bring changes to Parliament for consideration.

The Chairman: Do you know what the timeframe might be?

Mrs Theresa May MP: We hope to conclude it by the end of this Parliament. We would use the affirmative procedure to bring the instrument before Parliament, so there would obviously be scrutiny at that stage as well.

Lord Empey: Secretary of State, I presume that in reviewing these categories you are relying heavily on information supplied by the Foreign Office. Are you using your own, additional sources?

Mrs Theresa May MP: We would be doing both. Obviously the Foreign Office would be a major source of information for us in relation to this, but we would also look at the experience: the cases that have been looked at and the decisions that have been taken in individual cases, and therefore what has been happening in relation to individual countries.

The Chairman: As far as the European convention is concerned, once we have signed up, we cannot retrospectively re-juggle our position, can we? We either leave it and start again or take it as it stands.

Rt Hon Theresa May MP: Yes.

Q210 Lord Hart of Chilton: Many witnesses have come to this Committee to complain that there is no automatic right to legal aid in extradition cases and they have told us that that matter should be changed. I know that legal aid is not a policy matter for you, but I would

like to hear your comments. It is not really a question of cost-benefit analysis, as the MoJ officials have told us. It is important in extradition cases where people are so vulnerable. The view has been expressed that in the interests of justice legal aid should be automatic.

Rt Hon Theresa May MP: It is obviously a matter for the Ministry of Justice to look at the question of legal aid. Obviously, the Government have been making changes over the past few years to the operation of legal aid. It is not automatic, but from the figures that I have been given, which might be of help to the Committee, between the start of October 2012 and the end of July 2014 nearly 2,000 individuals applied for criminal legal aid to fund representation at extradition hearings taking place at Westminster Magistrates' Court. In approximately 95% of those cases, criminal legal aid was granted to the individual.

Lord Hart of Chilton: It would be very interesting if we could have those figures to look at. There is a question of proportions here—how many of how many. We would be very grateful if you would let us have those.

Rt Hon Theresa May MP: Yes, certainly we can arrange for the Ministry of Justice to give those figures to you. Also, I understand that, if an individual is held to be financially ineligible for criminal legal aid, a hardship review mechanism acts as a safety net for those who still maintain that they are unable to pay privately for their defence costs, so there are other mechanisms as well. Perhaps if I may, Chairman, I will ask the Ministry of Justice to set this out more fully to the Committee so that you can see the mechanisms.

Lord Hart of Chilton: There is also a question of speed. The length of time that it takes to process that sort of operation eats into the time when individuals are in their most sensitive position.

Rt Hon Theresa May MP: Yes.

The Chairman: That is something that we are interested in. We have also had quite a lot of evidence that, if you can get someone properly represented legally right at the outset, you can substantially shorten the period of the process and deal with it in a much better way. If it is possible to break the figures down to show how long it takes once you are in the system, that would be very helpful.

Rt Hon Theresa May MP: Yes. I will ask that.

Baroness Jay of Paddington: There is also the question of how that might potentially reduce the number of cases on appeal. That has also been suggested to us.

Q211 The Chairman: We are drawing the session to a conclusion. Thank you for being so crisp and answering our questions so much to the point. Is there anything else that you would like to say to us that you have not said in response to questions, which have ranged quite widely, I think?

Rt Hon Theresa May MP: No thank you, Chairman. I think that we have covered everything that I felt needed to be covered.

The Chairman: Does the Committee have any further questions for the Home Secretary? You told us about the assurances review that is going on. If you could give us some details of the timetable, that would be very helpful to us.

Rt Hon Theresa May MP: We will certainly do that. There are a number of issues that I have undertaken to write to the Committee on and we will certainly do that.

The Chairman: I thank all three of you very much indeed.

Metropolitan Police Service – Written evidence (EXL0069)

House of Lords Select Committee on Extradition Law Call for Evidence: Metropolitan Police Service Response

General

1. Does the UK's extradition law provide just outcomes?

1.1 In order to contextualise the Metropolitan Police Service (MPS) response to this question, some background data is provided. Between April 2013 and March 2014, there were 1096 requests for extradition.

1.2 MPS data shows that of the 1096 requests, 582 resulted in an arrest or removal:

- 553 were Part 1 EAW extraditions.
- 29 were Part 2 extraditions.

1.3 In order to fully assess whether or not the extradition law provides 'just outcomes' it is the MPS view that outcome data from several sources should be analysed. These sources are the Crown Prosecution Service (CPS), The National Crime Agency (NCA) and the Home Office. The NCA are the central authority for EAWs and the Home Office are the central authority for Part 2 extradition warrants. Analysis of data relating to incoming and outgoing Part 1, 2 and 3 extradition warrants from these agencies would properly inform a response to the question.

1.4 The Extradition Act 2003 has been used as an effective law enforcement tool to extradite high risk offenders living in the UK. Examples of these can be provided as an illustration if necessary.

1.5 Conversely, there have been a number of cases which have attracted negative media coverage and have questioned the effectiveness and fairness of the Extradition Act. Examples of this are also available as an illustration.

1.6 The MPS will only take action in relation to either Part 1 or Part 2 warrants once they have been passed through the designated authority (the NCA or the Home Office). This effectively provides a safeguard for the MPS that the warrant is valid.

- ***Is the UK's extradition law too complex? If so, what is the impact of this complexity on those whose extradition is sought?***

1.7 Extradition is a complex subject. However, the MPS have a dedicated Extradition Unit of 18 staff which provides 24/7 specialist advice and assistance to officers and partner agencies.

1.8 There are differences between the process for Part 1 and Part 2 warrants which, in practice, mean that Part 1 warrants are less complex to obtain.

1.9 Part 1 of the Extradition Act (which relates to applications received by the UK to export fugitives from the UK to any of the other 26 Member States of the European Union), has a framework which standardises the system making it practical to follow from an enforcement perspective. It has removed the previous complexity that arose from having to understand different bilateral arrangements.

1.10 The UK process for dealing with Part 1 European Arrest Warrants differs from the process in other Member States. The incoming request is received by the NCA as the designated authority for receipt of the EAW. The NCA has a responsibility to certify warrants and quality assure them to ensure that the requirements of section 2 of the 2003 act are met prior to dissemination to the relevant law enforcement agency.

1.11 The MPS considers that this certification by the NCA acts as a safeguard and prevents the dismissal of a warrant due to 'a want of particularity' (a technicality).

1.12 The Extradition Act gives *either* the wanted person or the requesting state a right of appeal against the decision of the district judge. This provides an opportunity for a challenge to the validity of the warrant on both sides and the opportunity for the courts to further consider the human rights of the subject wanted on warrant.

1.13 The MPS supports the continued use of the European Arrest Warrant and considers it a vital crime fighting tool. It provides the necessary legal power to remove high risk and dangerous fugitives from the UK, safeguarding the British public. It also allows the import extradition of outstanding wanted fugitives and enables UK law enforcement agencies to bring them to justice.

1.14 The EAW standardised framework does not exist for Part 2 warrants and some countries are required to provide full evidence files. In practice, this means that Part 2 extradition warrants are more complex to manage and often take longer to process.

1.15 There are some states that are not designated as either category 1 or 2 territories. In these circumstances, extradition is still possible using legislation under section 194 which makes provision for 'Special extradition arrangements' with the non-designated category countries, but from a policing perspective these are not common.

1.16 Prior extradition arrangements under the 1957 convention required the authority to proceed with the warrant from the Secretary of State and all documents were received in paper format through diplomatic channels. This was a much slower process than the current one.

2. Is extradition law fit for purpose in an era of increasingly multi-jurisdictional crime?

2.1 The MPS supports the view that EAW is an effective system which provides police with powers to deal with trans-national crime and criminals more effectively. It is simpler, faster, more economical and more reliable than the systems that pre-dated its introduction.

2.2 Trans-national crime is far more prevalent than it has been historically. Organised criminal groups run their enterprises across European boundaries and citizens of the EU have much greater freedom to travel across the continent. Criminals have depended on borders to shield themselves and evidence of their crimes from detection. Judicial and police cooperation is essential in order to tackle cross border crime and to take away those barriers. To illustrate this point, the MPS arrested 582 persons wanted for extradition between April and March 2014. 532 were Foreign National Offenders.

3. To what extent is extradition used as a first resort when prosecuting a crime committed in another jurisdiction? Should greater use be made of other remedies?

3.1 Extradition is used as a first resort in one of two scenarios:

- The investigation is case ready and evidence is available which meets the CPS full code test for charging, OR
- The suspect has been charged and has absconded.

3.2 In these circumstances, a decision to instigate extradition proceedings will be considered by the Crime Manager of the investigation Operational Command Unit (OCU) in terms of proportionality, cost versus outcome and the likelihood of the offender being brought to justice.

3.3 An alternative remedy is one of 'transfer proceedings'. This occurs when a fugitive is a national of a country that will not extradite their own nationals. In these cases, a request *could* be made for that person to be prosecuted through their own criminal justice system. There is, however, no data available which shows if, or how often, this has been used.

3.4 The MPS will often consider the used of the Immigration Act 2014, if appropriate.

European Arrest Warrant

4. On balance, has the European Arrest Warrant (EAW) improved extradition arrangements between EU Member States?

4.1 The MPS considers the EAW to be an efficient extradition tool built on mutual recognition of criminal justice systems between Member States with an obligation to comply with a properly constructed warrant.

4.2 The barriers which previously existed have been removed. Under previous arrangements, many European states (for example, Germany, France and Poland) did not allow their nationals to be extradited and required them to be tried in their home state. There are, however, some non-EU states where this is still the case.

4.3 Prior to the introduction of the EAW, extradition between participating European states could take many months in uncontested cases, and many years in those instances where the case was contested.

4.4 By comparison, EAW data from the Commission to the European Parliament shows that across the EU it now takes, on average, 17 days to surrender a wanted person in cases with consent and 48 days in non-consensual cases.

4.5 The MPS acknowledges that the EAW is not a perfect system. There has been some criticism that individuals have been subject to extradition for relatively minor cases. However, there are proposed changes to the Extradition Act 2003 to include a new section which introduces a proportionality test which may address these concerns (Section 21A - Person not convicted: human rights and proportionality).

4.6 The MPS SCO7 Extradition Unit have been liaising and working with EU countries to improve the quality of the evidence they send with the EAWs.

- ***How should the wording or implementation of the EAW be reformed?***

4.7 MPS supports the proposal there should be a proportionality test for extradition requests. This would assist to minimise the extradition requests for those matters which may be considered in the UK as minor. If an accused/wanted person is believed to be residing in the UK and their location is unknown, significant time and resources are often used to locate and arrest the subject of the EAW, regardless of the severity of the offence.

- ***Are standards of justice across the EU similar enough to make the EAW an effective and just process for extradition?***

4.8 The MPS view is that, in practitioner's terms, executing Part 1 extradition requests (once the subject is located) is uncomplicated.

4.9 In addition, the collection of Part 3 extradition warrants from overseas countries presents few challenges.

4.10 There have been occasions when problems have been encountered when bringing an accused into the UK under a Part 3 warrant when the accused is not a British National and there is an absence of a passport or ID card.

- ***How will post-Lisbon Treaty arrangements change the EAW scheme once the UK opts back in to it?***

4.11 There are no anticipated adverse implications to the UK enforcement role as a result of post-Lisbon Treaty arrangements.

Prima Facie Case

5. In circumstances where a prima facie case is not required, do existing statutory bars (the human rights bar, for instance) provide sufficient protection for requested people?

- ***Are there territories that ought to be designated as not requiring a prima facie case to be made before extradition? What rationale should govern such designation? What parliamentary oversight of such designation ought there to be?***

5.1 The MPS has a role in the enforcement of Part 1 & Part 2 extradition warrants. Once the EAW has been passed to the MPS, there is no provision for discretion to be exercised in terms of executing the warrant. The MPS are not the appropriate authority to comment on this issue.

UK/US Extradition

6. Are the UK's extradition arrangements with the US comparable to other territories that do not need to show a prima facie case? If so, should the US nonetheless be required to provide a prima facie case, and why?

6.1 The MPS is not the most appropriate authority to comment on the issue of the provision of a prima facie case by the US.

- ***Sir Scott Baker's 2011 'Review of the United Kingdom's Extradition Arrangements', among other reviews, concluded that the evidentiary requirements in the UK-US Treaty were broadly the same. However, are there other factors which support the argument that the UK's extradition arrangements with the US are unbalanced?***

6.2 As above. The MPS is not the best placed authority to comment on the issue of the provision of a prima facie case by the US.

Political and Policy Implications of Extradition

7. What effect has the removal of the Home Secretary's role in many aspects of the extradition process had on extradition from the UK?
To what extent is it beneficial to have a political actor in the extradition process, in order to take account of any diplomatic consequences of judicial decisions?

7.1 There are no significant implications for the MPS in respect of this

8. To what extent are decisions of where to prosecute certain crimes and whether to extradite influenced by broader political, diplomatic or security considerations?

8.1 The MPS has a law enforcement role within the extradition process. This is governed by the Extradition Act 2003 and the central authorities (NCA and Home Office). Our role is to receive the extradition warrant and to ensure that the central authorities have sanctioned them for execution. The MPS does not have discretion to refuse to execute extradition requests. As such, any third-party influences which affect decisions to prosecute are not an issue for the MPS to consider.

Human Rights Bar and Assurances

9. Is the human rights bar as worded in the Extradition Act 2003, and as implemented by the courts, sufficient to protect requested people's human rights?

9.1 The MPS is not the most appropriate authority to comment on this.

10. Is the practice of accepting assurances from requesting states to offset human* rights *concerns sufficiently robust to ensure that requested people's rights are protected?

- ***What factors should the courts take into account when considering assurances? Do these factors receive adequate consideration at the moment?***

- ***To what extent is the implementation of assurances monitored? Who is or should be responsible for such monitoring? What actions should be taken in cases where assurances are not honoured?***

10.1 The MPS is not the most appropriate authority to comment on these issues. However, we believe that that monitoring of assurances should be carried out by the body ordering extradition. Assurances should be sought when considering the ordering of extradition on an individual from an overseas state.

Other Bars to Extradition

11. What will be the impact of the forum bar brought into force under the Crime and Courts Act 2013?

11.1 The MPS is not the most appropriate authority to comment on this.

12. What will be the impact of the proportionality bar in relation to European Arrest Warrant applications recently brought into force under the Anti-social Behaviour, Crime and Policing Act 2014?

12.1 The MPS supports the proposal there should be a proportionality test for extradition requests. This would assist to minimise the extradition requests for those matters which may be considered in the UK as minor. If an accused/wanted person is believed to be residing in the UK and their location is unknown, significant time and resources are often used to locate and arrest the subject of the EAW, regardless of the severity of the offence.

Right to Appeal and Legal Aid

13. ***To what extent have changes to the availability of legal aid affected extradition practice, and the provision of specialist legal advice to requested persons?***

- ***What has been the impact of the removal of the automatic right to appeal extradition?***

13.1 The MPS is not the appropriate authority to provide an answer to this question.

Devolution

14. Are the devolution settlements in Scotland and Northern Ireland fit for purpose in this area of law?

- *How might further devolution or Scottish independence affect extradition law and practice?*

a. The MPS is not the most appropriate authority to comment on this.

26 September 2014

Jacqueline Minor, Jago Russell, and Professor John R. Spencer – Oral evidence (QQ 24 – 35)

Evidence Session No. 2 *Heard in Public* *Questions 24 - 35*

WEDNESDAY 16 JULY 2014

10.40 am

Witnesses: Jago Russell, Jacqueline Minor and Professor John R Spencer

Members present

Lord Inglewood (Chairman)
Lord Brown of Eaton-under-Heywood
Lord Empey
Lord Hart of Chilton
Lord Henley
Lord Hussain
Baroness Jay of Paddington
Lord Jones
Lord Mackay of Drumadoon
Lord Rowlands CBE
Baroness Wilcox

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Examination of Witnesses

Jago Russell, Chief Executive, Fair Trials International, **Jacqueline Minor**, Head of Representation, London Office of the European Commission, and **Professor John R Spencer**, Cambridge University

Q24 The Chairman: Good morning, and on behalf of the Committee I extend a warm welcome to Jago Russell, from Fair Trials International; Jacqueline Minor, who is head of representation for the European Commission; and Professor John Spencer, from the University of Cambridge. We are very pleased that you are here with us. As I explained earlier, we are trying to identify some of the important themes for our inquiry, so you can respond in that way. You have kindly let us see CVs, so we know who you are. From the point of view of the Committee, I should say, I am advised we do not have any special conflicts of interests or declarations to make in front of this hearing. Before we get into the questioning, could each of you identify yourself for the benefit of the record, and then we will proceed into the hearing proper? Start at whichever end you like.

Jacqueline Minor: My name is Jacqueline Minor; I am the Head of the Commission Representation here in the United Kingdom.
Professor Spencer: My name is John Spencer; I am a professor emeritus, University of Cambridge.
Jago Russell: I am Jago Russell, chief executive of Fair Trials International.
The Chairman: Thank you very much for that. Of course, one of the criticisms we have heard quite widely about the European Arrest Warrant system is it assumes that, although there are different judicial systems across the European Union, equivalent standards of justice exist across it, yet this does not seem to be the case. What steps do you think either the United Kingdom or the Commission might take to improve things? I do not know which of you would like to start.
Jago Russell: That is a key point—10 years of operation of the arrest warrant has very much served to show up the different standards of criminal justice across Europe, with significant human implications. I know we are tight on time, but I will very happily send you updated case studies of some of the clients we have worked with whose cases demonstrate the different standards of justice across Europe. There are two solutions to that, and Fair Trials International's view is not that the solution is for the UK to withdraw from the European Arrest Warrant altogether. There are two solutions; one is to create a sound basis for the mutual trust that is required for a mutual recognition measure like the European Arrest Warrant, so more work by the European Union to create minimum defence rights standards across the EU, and crucially to enforce those standards. We now have three directives on key aspects of the right to a fair trial, but we have a very long way to go before we can be confident that those standards are being met. That is the first thing: build a sound basis.
The Chairman: In other words, amend and extend the existing directives.
Jago Russell: Absolutely, and there are three more directives on the table now. It is disappointing that the UK is not engaging constructively in negotiations on those directives, because my view as a British lawyer is we have a lot of constructive things we could be offering in those negotiations, so that is very disappointing. However, I also think it needs to go a bit further, so at the moment the EU institutions are not proposing any measures in relation to pre-trial detention. One of the key issues arising as part of the arrest warrant is how long people are being forced to wait in prison pending their trial following extradition. I think we need more minimum defence rights standards across Europe.
Then I think we also need to inject mutual recognition with a bit of realism. The reality is that, even with these minimum standards, there will always be cases where there is a serious risk of human rights violations, or where somebody is being sought for extradition where there is a real risk their rights have already been violated. For that reason, it is absolutely crucial there is a clear back-stop power to refuse extradition where it would result in human rights violations. The UK has that power now. Sadly, for a very long time the UK courts were incredibly restrictive in ever applying that, effectively saying that there needs to be some kind of breakdown in the rule of law in the requesting country before they would step in and stop extradition. However, we need those powers, and all the EU Member States should have a power to refuse extradition on human rights grounds. Crucially, the arrest warrant framework decision should be amended, or supplemented, to make it absolutely clear that this concept of mutual recognition does not trump respect for basic human rights.
Jacqueline Minor: I would agree with much of what Mr Russell has just said. The difficulties of applying a measure based on mutual recognition are not unique to the area of justice; it

is a common problem in the enforcement of European rules. You need both the carrot and the stick, if I can put it that way. You need an active and vigorous policy of enforcement, which will become easier for the Commission after these measures have been Lisbonised at the end of this year. However, you also need supportive and flanking measures, in terms of exchange of good practice, training of judges and the circulation of advisory guidelines. The Commission attempts to do all of those things as well to inculcate a kind of common understanding of the rules and common practice in their application.

Just on the human rights point—the last point that was made—the Commission's view is that there is inherent not only in the European Arrest Warrant framework decision itself but also in European law as a matter of principle a respect for human rights. In cases of breaches of fundamental rights, the executing authority would be entitled to refuse to execute an arrest warrant.

Professor Spencer: I strongly agree with the first point that Jago Russell made. The best way the UK could help to improve matters would be to apply its muscle to push ahead with further EU measures to try to improve defence rights. The UK is in a strong position to do this. We used to make a mess of pre-trial matters in this country, until after the Police and Criminal Evidence Act. With the safeguards of the Police and Criminal Evidence Act, I think we lead Europe in the sane and sensible treatment of suspects during the police investigation stage. We also have a long and creditable history of not detaining people for unreasonable periods pre-trial. We have the high moral ground on these matters, and it is most unlikely that any EU measures would damage our system. I think it is a great shame that the UK, first of all, halted the previous move towards EU defence rights back in 2006, and that we have now gone cool on them, after initially welcoming the Road Map several years ago.

Q25 The Chairman: Jacqueline Minor, is it the Commission's view that there are significant shortcomings in the way the existing system works that need to be addressed?

Jacqueline Minor: The Commission, I think—looking at this from the perspective of Europe as a whole—believes that on balance the European Arrest Warrant can be considered a success. That does not mean to say there are not improvements to be made in it. Up until the end of last year, we think over 100,000 arrest warrants had been issued, which shows that it is now part of the armoury of criminal enforcement and criminal procedural law in the European Union. But we do acknowledge that a lot of work has gone into the scrutiny of its operation in practice; we are particularly paying attention to the report issued by the European Parliament earlier this year, which was drafted under the leadership of Baroness Ludford, the rapporteur. However, the current feeling in the Commission—and of course the Commission is coming to the end of its mandate, so this may change with a new Commission—is that it is not appropriate at present to reopen the legal measure, but to seek to make it more effective by flanking and complementary measures, including the rules on procedural law but also including non-legislative actions.

Lord Brown of Eaton-under-Heywood: Can I follow up on the point about the whether the courts are supposed to be monitoring the Human Rights Act? What would the Commission think if the courts started saying of various Member States' legal systems, "We have not got confidence"? The whole scheme is based on mutual trust and confidence. "We are going to examine in detail the position in wherever"—Lithuania, Greece, whatever—"and even though these countries are subject to the Strasbourg jurisdiction, we are going to second guess as to whether we think there would be a violation of Article 6 on trial if we extradite

to these countries". Is that something the Commission would tolerate or welcome? How would it feel about that?

Jacqueline Minor: I think the Commission's view would be that the examination had to take account of all the circumstances of the case. It would have to be looked at in the context of the particular demand; the individual's circumstances; the reason why the arrest warrant had been issued; and the likely course of either the investigation or the trial subsequently. The more general question of a persistent refusal to execute arrest warrants coming from individual Member States would certainly attract the attention of the Commission, and, according to the normal rules of European law, might be the basis on which infringement proceedings could be opened. I cannot prejudge the investigation.

Lord Brown of Eaton-under-Heywood: Hitherto, we have not been able to take infringement proceedings. The Commission has not been able to, but if we opt back in, it will be able to. Is that the position?

Jacqueline Minor: Once all of the justice and home affairs measures become part of the normal body of European Law, the Commission will be able to take infringement proceedings against those Member States who have participated in those measures, so for measures which the UK opts in to, yes.

Jago Russell: Very briefly to come back on that point, my feeling is that the UK courts have historically been far too concerned about a very strong response to refusing extradition on human rights grounds. You have the Mitting decision back in 2010, when Mr Justice Mitting said, "When prison conditions in a convention category 1 state are raised as an obstacle to extradition, the judge need not, save in wholly extraordinary circumstances, examine the question at all". The idea was that it was completely beyond the realms of British courts to examine questions where there is another ECHR state involved. That seems to me to be completely inappropriate, particularly because the Commission has itself now recognised that the mutual recognition measures such as the arrest warrant in fact require minimum defence rights standards to be created. By creating these new directives, the Commission has demonstrated its belief that there is a need to raise minimum defence right standards, and I think that really points in the direction that the courts ought to be more robust in questioning human rights, even in other EU Member States.

Q26 Lord Rowlands: Much has been made of the European Parliament's report. What do you think of those recommendations? Would you support them? Do you think they answer the problem?

Jago Russell: We support them very much. They do not go quite as far as we would like in some regards. The one particular thing I would point out is that Baroness Ludford's report suggested there should be a proportionality test, but only in the issuing country. In my view there also needs to be a back-stop proportionality test in the executing country, because individual circumstances can change and you could have a problem where countries are rubber-stamping or ticking the proportionality box, but cases are nevertheless coming through to the British courts, where extradition would in fact be disproportionate. We would have liked her to go slightly further on that, but in general we are very supportive.

Jacqueline Minor: I think the Commission, as I said, acknowledges the expertise and all the work that went into that report. I think we accept some of its arguments, but not all of them. On proportionality, for example, the Commission does not feel the proportionality test either in the issuing state or in the executing state would be a desirable amendment to the framework position at this stage. That is not to say we do not think proportionality in the application of the European Arrest Warrant is a good thing; we would encourage the use

of a proportionality test by the authority in the issuing state at all times. However, as I have said, the feeling in the Commission is that this is a relatively new measure; it is yet to have reached the stage of maturity when it would be desirable to reopen it and to amend it.
Lord Rowlands: I wondered also whether we should remind ourselves where we were before the European Arrest Warrant: enormous delays in justice took place, and I do not see any emphasis on concerns of that kind. Would any of these proposals in fact increase the length of time and lead to the kind of lengthening of periods when no decisions were made, like we had before the arrest warrant was introduced?
Jago Russell: We are very mindful of those concerns at Fair Trials, so we certainly do not think it is realistic or appropriate to try to return to decades-old rules, where you used to have prima facie test cases, et cetera. We are a very long way from that. Some additional safeguards are needed. In some cases, that will require a little bit of additional judicial scrutiny, which may take some more time. However, all of the reform proposals we have been pushing for are designed to be operable within a fast and effective extradition system. They are not at all designed to slow down the process.
Lord Henley: Going back to what you said, Mr Russell, in your opening remarks, you offered an update on case studies. I note that in the pamphlet that you provided for the Committee—Fair Trials International, *Justice in Europe: the Arrest Warrant*—you provide two cases but you do not give a date to either. Will you be able to give dates to any further case studies that you put before us? It is very important to see how it has changed over the years. The Committee would find that rather useful.
Jago Russell: Yes, of course.
Q27 Baroness Jay of Paddington: This really goes back to the discussion with Lord Rowlands about Baroness Ludford's report and the wider implications of that. In general, do people who are requested in the United Kingdom have sufficient access under the European Arrest Warrant to diplomatic assistance and, in obvious cases, translation services et cetera?
Jacqueline Minor: Do you mean those who are requested where the United Kingdom is an executing state?
Baroness Jay of Paddington: Yes, I am sorry; I mean those requested from the United Kingdom.
Jacqueline Minor: Yes. On balance, the rights and facilities made available to requested persons are adequate in the United Kingdom.
Baroness Jay of Paddington: Are there any other comments on that?
Jago Russell: In terms of people being extradited from the United Kingdom to other countries, do they get treated fairly at the other end?
Baroness Jay of Paddington: No, it is at both ends. For example, we heard from Sir Scott Baker last week that he was concerned that some of his suggestions, of some years ago now, about extending free legal aid, et cetera, had not been adopted. I wondered if this had any relevance to the area we are talking about this morning.
Jago Russell: Absolutely. On the free legal aid point, we were entirely in agreement with Sir Scott Baker's recommendations there. We have seen numerous cases—and see them week in, week out at Fair Trials—where people have been represented by duty solicitors or had very poor representation at first hearings, and where the substantive arguments are really only raised at appeal. That is a real concern for us, because many of these people are very vulnerable. Many of them find it incredibly difficult to get the information together to satisfy a means test. Lots of these people have not lived in the United Kingdom for many years; they do not have bank accounts they can easily access; a lot of them have relatively

disordered lives. The requirement for a means test in legal aid is a real problem. It is disappointing that the Government have not implemented that.

Baroness Jay of Paddington: Is that specifically a concern under the EAW, as well as more generally?

Jago Russell: It is specifically a concern under the EAW because of the timeframes. Because these things happen so very quickly, it is even more important to make sure people have proper, expert representation at the magistrates' court to try to reduce the number of cases that end up having to go to appeal.

Q28 Lord Hart of Chilton: Have the real problems over the lack of interpreters a year or so back been remedied now?

Jago Russell: I do not have an updated view on that. I was aware of cases a year or so back where there were adjournments as a result of a lack of interpreting in magistrates' courts hearings in extradition cases, but I do not know what the current situation is.

The Chairman: Professor Spencer, you have been very quiet; is there anything you would like to say, having heard the discussion?

Professor Spencer: Your advice was to be succinct, so I will not talk when I have nothing to say, Lord Chairman.

The Chairman: I wish everybody felt like that. We will now move on. One of the characteristics of the discussion we have had so far, which has been extremely helpful, seems to be that the order of the questions that we have has gone completely all over the place, which shows a shortcoming on the part of the Chairman. What I propose is to try to edit the questions as we go along. I hope you will forgive me, members of the Committee. I would like now to have Lord Brown.

Q29 Lord Brown of Eaton-under-Heywood: This is a group of questions on proportionality, which we have touched on already. As I understand it, there are now two new sections[261] not yet in force but passed in the Christmas tree Bill[262] that became the Anti-social Behaviour, Crime and Policing Act of this year. Those do introduce, do they not, a measure of domestic rights to decline to extradite on requests from other EU countries because of proportionality? Do you welcome those provisions? Will they meet the problems? I do not know who might wish to start by having a look at that.

Jacqueline Minor: As I said, the Commission's view is that a proportionality test in the executing state is inappropriate and not compassed by the framework decision, because it would dilute the principle of mutual recognition on which the framework decision is based. Having said that, we recognise that criticisms in relation to practice in the past certainly related to the disproportionate use of requests for arrest. That has been addressed, the Commission feels, by better training, advice and guidance on when it is appropriate to issue an arrest warrant. We know that Member States other than the United Kingdom have made considerable efforts to pass that message to their judiciary and to their issuing authorities. We feel that the problem is much less significant than it was a few years ago.

The other answer might well be that the decision makes provision for consultations between the issuing authority and the executing authority. If the executing authority in this country felt that a warrant had been issued where it was disproportionate to the facts of the case, it could make that argument back to the issuing authority, which might then choose to

[261] New sections of the Extradition Act 2003

[262] A "Christmas tree Bill" is a term used to describe a large multi-topic Bill for which a wide range of provisions can be attached, like baubles hung on a Christmas tree.

withdraw the warrant. There is provision for a degree of iteration between the two authorities.

Lord Brown of Eaton-under-Heywood: I should perhaps have identified the two sections. It is 21A, which is the primary obligation on the court to take it into account before making the order. The supplementary is Subsection 2(7A), which for the first time introduces the power in the National Crime Agency, formerly SOCA, in effect not even to take it to court if it is in their view likely to be eventually thrown out on proportionality grounds. That is how the scheme is now suggested. You say, however, that the Commission would not like that.

Jacqueline Minor: I do not want to answer a hypothetical question. The provision is not yet in force and at present, of course, the Commission does not have infringement powers in relation to the framework decision. It would certainly be a provision the Commission would look at with interest, I would say.

The Chairman: Can I follow up on this one? Once this legislation is lisbonised, the provisions of the EU Charter of Fundamental Rights will cut in, so the capacity of the court—forget about the administration—to exercise its judgment over matters of proportionality would seem to me to be legitimate at both ends of the process. Looking at that as a matter of principle, would you accept that that would be right?

Jacqueline Minor: By "the court", what do you mean?

The Chairman: On the assumption that this country opts back in, it then becomes justiciable.

Jacqueline Minor: Yes.

The Chairman: The treaty provisions on proportionality apply generally. In addition, it seems to me that the provisions in the EU Charter of Fundamental Rights come into play. It seems to me that the consequence of that, from the perspective of the defendant, is that it is likely that UK courts—or, for that matter, any other Member State's courts—dealing with a European Arrest Warrant in fact have more wriggle room to deal with these matters within the framework of the law as it currently would be.

Jacqueline Minor: I would follow you on the point of fundamental rights, because fundamental rights are a principle of law common to the legal traditions of the Member States. As I said earlier, the Commission accepts that an abuse or infringement of fundamental rights would be a reason, in exceptional cases, to refuse execution of an arrest warrant. On the other hand, in my view, proportionality—and this is a personal view—is inculcated into the measure itself. Proportionality is something legislators have to consider before they adopt a regulation, a directive or, in this case, a framework decision. Although it would be a principle used by the European Court in the interpretation of a measure, it would not as such be an additional element to be applied by national authorities in their application of the measure. That would normally be taken into account in the formulation of the rules themselves.

The Chairman: Professor Spencer, do you have any thoughts on that? It sounds like a "University of Cambridge" question.

Professor Spencer: As a matter of high principle, I am in favour in there being a power in the executing state to stop it on grounds of disproportionality. As an aside, a German court managed to say that the German courts could do exactly that. We published the decision in the *Criminal Law Review*. I could send the Committee a copy of it, if the members would be interested. As a matter of practice, I am slightly worried, because I have heard mutterings from friends in the judiciary about how, when this comes in, cases will slow down and they will have even more to do, and we will have delays. There will be unwanted side effects.

A third thought I have about this is: is it really compatible with European law and the framework decision under which this operates? Different views can be taken on this matter. I foresee that it could eventually result in the European Court of Justice in Luxembourg having to make a ruling on the matter.

Q30 Lord Rowlands: Is the problem not really a Polish one? When one looks at the figures, there are around 800 Polish cases; the next is Lithuania on about 120 cases. Could we not address the Polish question and thereby the proportionality issue would actually find its own feet?

Professor Spencer: I discussed this once with a Polish magistrate, who said, "Part of the trouble is we do not have any other means of getting co-operation out of other Member States in order to enforce justice in relatively minor matters. We once tried to get summonses from our courts served by the UK authorities on Poles who migrated to this country. They said, 'No, we are sorry. We have too much to do. We will only intervene if there is a European Arrest Warrant.'" What we badly need, as I have said in other contexts, is a system for dealing across borders not only with grave and organised crime but with disorganised crime on a small scale. There do exist some EU measures—although they are not much respected and not much implemented in practice—for the trans-border enforcement of fines, which tend to be the sort of thing involved in small cases and so forth.

The Chairman: I can speak to that from personal experience, having received a parking fine in Italy.

Professor Spencer: I am sorry to embarrass you, Lord Chairman.

The Chairman: No, it was fine; I managed to get off.

Professor Spencer: The Polish problem is partly that Poland and some other countries have a principle of mandatory prosecution, and prosecutors think they have no alternative but to proceed in a case where they have the elements of an offence before them. However, it is also partly because they are faced with the difficulty of a failure of justice or using a disproportionate measure to enforce justice. A lot of these problems could be resolved by having further, lower-level European measures to deal with trans-border, small-scale crime.

Lord Mackay of Drumadoon: I have a small point. There was a suggestion made that, whoever was representing the country seeking the extradition of an individual, if they had concerns about proportionality, they could raise it. Have I understood what was said correctly?

Jacqueline Minor: What I said was that the issuing country should consider proportionality before it issues an arrest warrant.

Lord Mackay of Drumadoon: Yes. However, having issued an arrest warrant and it being received by the people who have to seek to enforce it before the courts, the latter could raise it with the issuing authority.

Jacqueline Minor: Exactly, yes.

Lord Mackay of Drumadoon: I raise that because—you may have worked this out from my accent—I am Scottish, and in Scotland the party that represents the extraditing country is the Lord Advocate, who is in charge of public prosecutions in Scotland. If he has authority to raise it with the issuing country, it is very difficult to understand how the judges who are sitting and listening to him or whoever is appearing on his behalf are in some ways inhibited from doing so. I can speak to having heard, when the court has been expressing some concerns about the management of the case and a judge or judges saying, "Mr So-and-so, we wish this be raised at the highest possible level before the next hearing." That then falls to the Lord Advocate.

Jago Russell: In practice we see that happen; in practice it does sometimes happen. If you are lucky enough to be able to access a local lawyer in a very controversial case where it seems to be very disproportionate, where the British courts are raising concerns, it does happen that the issuing country is persuaded to withdraw the warrant. From time to time, that does happen. The question for me is how many hours are spent in court and how much is incurred in terms of legal bills before that pragmatic solution is reached. However, it does sometimes happen.

I would hope that is what would happen with the National Crime Agency decision not to authorise a disproportionate warrant would mean that they would revert to the country concerned and say, "What about trying something less serious than a European Arrest Warrant for this minor case?"

On the amendments, the impact of them should not be overestimated. Most of these minor crimes are actually conviction warrants rather than accusation warrants but the proportionality test only applies to accusation warrants. Most of these cases are suspended sentences that are reinvigorated after somebody leaves the country. It is not going to have an enormous impact. The other thing is that the British police already exercise a lot of sensible discretion when deciding whether or not to seek out and arrest people for these very minor European Arrest Warrants. They do not go and look for people for every arrest warrant they ever hear of. Most of these minor cases purely come up because somebody gets stopped for speeding or something. There is already a degree of discretion, albeit that it happens at the police level rather than at National Crime Agency level.

The key point for me on the proportionality issue is that we need to see good references to the EU Court. It would be really helpful to get some EU Court guidance on this: does the arrest warrant allow refusal of extraditions where it is disproportionate, or does the arrest warrant require countries to question proportionality before issuing warrants? One of the really sad things about the fact that UK courts have not had the opportunity to refer these kinds of questions to the EU Court is that these questions remain unanswered. There was one opportunity where the Court could have addressed this in a case called Radu. The Commission did not seem that opposed to some consideration of proportionality in its intervention in that case, but the EU Court ducked the question and did not address it. That is what we really need: some guidance from the EU institutions on what is required on proportionality.

Lord Brown of Eaton-under-Heywood: We are not going to get an answer out of the European Court for a couple of years at best, even if it assumes a jurisdiction.

Jago Russell: I do not think that is true. Because there is an urgent procedure where somebody is in detention, it is quite possible for the EU Court to turn around a reference decision very quickly—in a matter of weeks, where somebody is in detention. If you get the right British court referring the right question after 1 December, you could get a really useful decision on this quite quickly.

Q31 Lord Brown of Eaton-under-Heywood: Can I just ask a short supplementary? Should the proportionality test take into account any harm done to the victim? It does not sound to me like a particularly mighty consideration, but is it something that we should have regard to? Under our scheme, only certain matters should be taken into account, as stipulated by the legislation, and not victim harm. Should it be included?

Jago Russell: I would have thought the "seriousness of the offence" criteria would include the level of harm to the victim.

Lord Brown of Eaton-under-Heywood: Yes, exactly.

Lord Empey: I have a quick supplementary. Do you have—perhaps I have missed them somewhere—statistics for the point that Mr Russell made his opening remarks about on-remand situations? Are there statistics that compare equivalent cases here with cases in other jurisdictions, as to how long people will be on remand before their cases are actually heard?

Jago Russell: There is information on what the maximum legal amount is in different EU countries. It varies very significantly in terms of pre-trial—

Lord Empey: I was thinking of the practical outcomes.

Jago Russell: No, we do not have statistics for the practical outcomes. There is the EU Justice Scoreboard. I know it is politically very unpopular in the United Kingdom, but it already covers civil matters; we would also like to see that kind of EU-level data gathering on criminal justice matters to try to answer questions like how long people are waiting for trial.

Jacqueline Minor: I do not think we have that information, but I will ask my authorities back in Brussels and if we do, I will make it available to you.

Lord Rowlands: There was a figure in the 2006 report that the average was five and a half months.

The Chairman: Do you want to ask anything about parallel measures?

Q32 Lord Mackay of Drumadoon: It is probably a question of seeking factual information and no more than that. There are alternative measures available, such as surrendering for interview or transfer of sentences. Is there any statistical evidence as to how often these are used?

Jacqueline Minor: I am sure there is, but I do not have it in front of me. Again, I will ask.

Lord Mackay of Drumadoon: Do any of you have any practical experience of it being used other than occasionally?

Jago Russell: In terms of alternative measures, one of the alternatives is the European supervision order. Given the casework we do, we would expect to see a lot of use of the European supervision order, but with a network of 150 criminal lawyers in all EU countries, we are not aware of a single example of the European supervision order being used to transfer somebody back to their home country pending trial.

Just last week we had a case of a British lady facing extradition to France, who was tried in absentia. She had actually already co-operated via mutual legal assistance to give evidence to the French police, but instead of issuing a summons through the British Home Office to try to get her to attend her trial, the French authorities decided to go straight ahead, try her in her absence and issue a European Arrest Warrant. We see this kind of thing quite often. It is because it is the first tool in the box that judges and prosecutors reach for. It is the easiest thing for them to use. In fact, it would have been much better for her and for the French to have issued a summons so she could have turned up at court in France and defended herself. It is the kind of practical example we see quite often, but I am afraid we do not have any statistics.

Professor Spencer: There is the Green Paper from the Commission, now three or four years old, on pre-trial detention, which I imagine the Committee is well aware of.

Q33 Lord Brown of Eaton-under-Heywood: There are new provisions, not yet in force, under the 2014 Act that touch on this, too, are there not? There are Sections 12A and 21B—one of which, under the heading "absence of prosecution decision", tries to some extent to combat the risk that people are at a fairly early investigative stage, rather than quite having

reached the point of prosecution. Under 21B you can be transferred for questioning only—or something like that. Are they going to address this problem?

Jago Russell: Section 21B(3)(b), if you have it in front of you, is probably the most significant provision in these amendments. It basically allows the court to adjourn hearings while it looks at whether there is another way of advancing the investigation and the prosecution short of extradition. That is the kind of thing we would like to see used in practice much more. This is a very practical question of, "Why have you not tried interviewing this person via video link?" Those kinds of really practical things could avoid some of those cases of people being extradited long before trial.

Jacqueline Minor: The Commission would entirely support that approach. It would encourage every issuing authority to consider alternatives that would be less onerous to the person requested than a European Arrest Warrant. There is the recently agreed European investigation order, which precisely allows for the taking of evidence by videoconference, for example, which would enable the person to remain in their country of residence. There is also the European supervision order, because many of the arrest warrants, as you said, Lord Chairman, are issued when a suspended sentence has been passed and the person is not in the country. Therefore they cannot fulfil the conditions of supervision, and consequently an arrest warrant is issued.

The framework decision on probation would enable the supervision of a sentence issued in Member State A to take place in this country and, therefore, might avoid the issue of a number of arrest warrants. So there are a number of provisions coming along that are less advanced in their use and their application, with which the judiciary are probably less familiar and which might in some respects alleviate the instinct to reach for the arrest warrant as the first tool in the box.

The Chairman: We are getting towards the end of the time we have. I would like, if I may, to switch the way we are questioning slightly. I will ask Lord Hart if he would put the question about appeals that he wanted to.

Q34 Lord Hart of Chilton: I would like to know how significant the removal of the automatic right of appeal against extradition decisions under the arrest warrant regime is.

Jacqueline Minor: Looked at from certain perspectives, one of the advantages of the European Arrest Warrant is the speed with which it can be executed. It is a much more rapid and efficient tool of judicial co-operation than, for example, the Council of Europe convention. However, in terms of the right of appeal, you also have to look at the other changes that have been made and are being made to the Extradition Act. The more grounds for resisting the execution of a warrant that are placed into the Act, the more significant the existence or the absence of a right of appeal becomes. The combination of the two is that one offsets the other, to some extent. More grounds are being put into the Act for resisting the execution of a warrant—but, on the other hand, the automatic right of appeal is being withdrawn.

Lord Hart of Chilton: Do you see that as a quid pro quo?

Jacqueline Minor: In some respects, yes.

Professor Spencer: A real problem with Part 1 of the Extradition Act, as originally enacted, was the strict time limits for exercising such rights of appeal as there are, and there being no possibility for the court to waive non-compliance with them. That was one of the things that was at the root of the Gary Mann case, with which I am sure the Members of this Committee are familiar. Part 1 of the Extradition Act is being amended, as I understand it, to

give the court the power to override a non-compliance with a strict time limit. That is to be welcomed—and it should have been in the Act as originally drafted.

Jago Russell: The only thing I would add is that perhaps the impact of the leave to appeal requirement is perhaps not as significant as it might have been, because the Criminal Procedure Rules Committee has decided that it will be applied in a way that means there is an arguable-case test rather than a much more difficult test that we had feared might be applied. It is also not as significant because it has made it clear that there will be the right to an oral hearing if your leave to appeal is refused on the papers. We opposed the introduction of a leave requirement, but the way it is going to be applied in practice seems to suggest that it is not going to be as considerable an issue as we had feared.

Lord Brown of Eaton-under-Heywood: However, it does link to a degree with the other issue as to whether there should be legal aid, because if there is no legal aid, that creates its own difficulties in terms of exercising this new requirement to get leave.

Jago Russell: Yes, there are numerous cases that demonstrate that. There is the case of a Polish man whose extradition was refused on Article 8 grounds on appeal, because it was discovered that he was the sole carer for a very severely disabled daughter. Actually, the duty solicitor, who was not an expert in extradition, had not even noted that fact. That really important issue had not been raised in the first instance hearing. If you fix the legal aid point and make sure that people get good representation up front, hopefully those kinds of cases would not need to be resolved on appeal.

Q35 Lord Henley: Since you used the word "lisbonised" earlier, I think I can use it. I would very quickly ask, post-lisbonification, as it were, once the EAW system has been brought in, what scope will there be for the UK Parliament to make any changes or improvements to Part 1 of the Act, or, after that moment, will we not have much scope?

Professor Spencer: At present, the UK is obliged to conform to the directive and other parts of EU law in this area, but, if it does not, nothing much can happen except naming and shaming, because infringement proceedings cannot be brought in the Luxembourg Court against a Member State that fails to carry out its obligations under Third Pillar instruments. Formally, the position will not change after the Court acquires jurisdiction; it is just that if the legal position is not respected, something can be done about it.

Jago Russell: The only addition is the greater ease of making references to get these questions resolved, which will be a significant and welcome change post 1 December.

The Chairman: With some regret I feel we have to draw this session to a close. However, I want to ask each of you, for the transcript, to distil what you have been telling us. First of all, would you agree that the system of extradition across Europe as it is currently constituted is essentially a bit incoherent and that the effect of opting in—the lisbonisation of the process, which will bring the entire process under the umbrella of European law—should help to make it more coherent? Secondly, and in parallel with that, the existing EAW arrangements, as part of a wider system of criminal justice across Europe, are in themselves incomplete. In order to further the needs of justice and law and order, there is still a need for a number of the smaller measures we have heard discussed to be put in place to make the thing more user-friendly for everybody. Can I ask each of you whether that is a fair analysis of what you are telling us?

Professor Spencer: I would agree with all of that.

Jacqueline Minor: I would agree and I have nothing to add except that it is a process—and it is not necessarily via legislation that this incoherence will be reduced. It can be reduced by other measures.

Jago Russell: The only thing I would add is that the process of Lisbonisation could raise the issue of whether or not the EU law, the framework decision itself, needs to be amended to clarify points such as human rights and proportionality. It is the lack of explicit provisions on those that might mean the EU Court making decisions that prevent countries refusing extradition on human rights grounds or on proportionality grounds. It might just push the political issue of whether or not the framework decision itself needs to be amended.
The Chairman: The focus of political attention, then, should be on the European legislation and not the domestic legislation.
Jago Russell: Yes, that is very much my view—not just for the UK, but also because other countries across Europe are suffering from the same kinds of issues in terms of implementation.
The Chairman: Thank you very much to each of you. We are very grateful.

Ministry of Justice and Chief Magistrate's Office – Oral evidence (QQ 132-153)

Transcript to be found under Chief Magistrates Office

Ministry of Justice – Written evidence (EXL0091)



Hilda Massey & Caroline Crowther
Deputy Director for Legal Aid Policy
Legal Aid Team

Lord Inglewood
Chairman
House of Lords Select Committee on Extradition Law
House of Lords
London SW1A 0PW

22 January 2015

Re: House of Lords Select Committee on Extradition Law - Evidence Session No.9

When Hilda Massey, Deputy Director, Legal Aid Policy, Ministry of Justice, attended your Committee on 29 October 2014 to give evidence in relation to the provision of legal aid, she undertook to write to the Committee on two specific issues. As Ms Massey is currently away from the office, I am responding on her behalf.

The number of requested persons held on remand within the prison population – the Ministry of Justice publishes quarterly data on the remand population in '*Offender Management Statistics Bulletin, England and Wales*'. [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368368/offender-management-statistics-april-june-2014.pdf]. Whilst this includes headline data on the remand prison population – representing approximately 12,000 individuals within a wider prison population of some 86,000, as at 30 September 2014 – as well as data on the foreign national population in custody, it is regrettably not currently possible to identify the number of requested persons within the remand prison population.

The commissioning of expert reports by the court – in order to ensure the management of extradition proceedings more effectively, the District Judges at City of Westminster Magistrates' Court have asked for authority to commission expert reports themselves. From the perspective of the Legal Aid Agency (LAA), this would be problematic in so far as it only

has the power to consider and sanction payment for expert reports in relation to requested persons who are legally aided, as opposed to those who may be privately funded or appear unrepresented. As the LAA can only consider requests from the individual solicitor concerned, it could also give rise to possible tensions if the defence solicitor did not regard the report as necessary.

In circumstances where the court is endorsing the solicitor's application for a report, the LAA is currently considering how its staff can work more closely and collaboratively with the district judges so that decisions can be expedited with minimum risk of delay. However, even where agreement on the need for an expert report can be reached promptly, the LAA's public duty to manage its spending responsibly means that agreement about payments to be made in respect of the report have to be considered carefully, particularly when some of the amounts can be very significant. The co-operation of the solicitor in providing full details in support of the application remains central to the LAA's ability to resolve such issues as swiftly as possible.

Yours sincerely

Caroline Crowther
Deputy Director for Legal Aid Policy

26 January 2015

Ministry of Justice, Republic of Poland – Written evidence (EXL0084)

Evidence for the House of Lords on the European Arrest Warrant

General considerations

The European Arrest Warrant (EAW) system has been introduced in a 2002 framework decision[263] as a response to the increasingly open European borders being abused by criminals to evade justice. The extradition system in place previously proved too unwieldy and lengthy and ultimately powerless to address this issue. To replace it, Member States agreed on a simplified procedure which was based on mutual trust and common standards in their legal systems flowing from the European Convention on Human Rights and EU law.

Specific questions

1. What are the features of the Polish criminal system that contribute to the high number of EAWs issued by Poland?

The Polish legal system, as many continental systems, provides for the principle of legality. This means that law enforcement authorities are obliged to prosecute every offence brought to their attention and, generally, have to employ all means necessary to bring the offender to justice. The consequence is that, faced with no other alternative, a prosecutor will request the issue of an EAW if this is the way to bring a person to trial or execute a binding judgment.

However, there is a number of reasons for the relatively high number of EAWs issued by Poland and the aforementioned principle of legality represents only one factor. The most important reasons are of a social and economic nature. A number of Polish nationals choose the United Kingdom as their destination taking advantage of the free movement of persons.

It only stands to reason that among immigrants, there will be a percentage of those, who abuse the freedom of movement in order to flee justice. Without recourse to other measures (see below), issuing an EAW is often the only way to bring such persons to justice – both to try offenders and to ensure that those who are already sentenced actually serve their sentence. It therefore

[263] Council framework decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States.

serves to mitigate the adverse effects of migration and actually furthers the interests of the States being the frequent destination by reducing the number of criminals walking their streets.

2. The Committee has heard evidence that lack of prosecutorial discretion is a factor in the number of EAWs issued by Poland. Would you agree with this statement?

The question of procedural discretion in issuing an EAW is closely linked with the principle of legality mentioned above. While the general rule is that there is no discretion, Poland has introduced a specific exception from this principle for the EAW. An amendment of the Criminal Procedure Code which enters into force on 1st July 2015 explicitly states that issue of an EAW is inadmissible if it would be contrary to the interests of justice[264]. The issuing authority will have to consider the proportionality of issuing an EAW *vis-a-vis* the costs involved, both from the financial and international relations perspective.

This amendment has been put forward following a detailed analysis of the operation of the EAW system, including feedback from our partners in the EU, the UK among them.

However even before that, various measures have been undertaken at the national level to reduce the number of EAWs issued. These took the form of awareness rising, dissemination of the EAW handbook and trainings for judges and prosecutors. The results of these measures are very tangible: the number of EAWs issued by Poland dropped from 4844 per year (2009) to 2972 per year (2013). This represents a reduction of about 40%.

It must be stated that the concern about proportionality, which has all but dominated the discussions about the EAW in recent years, seems to be exaggerated. No conclusive or comprehensive analysis of the question of proportionality has been presented and much of the discourse is still based on distorted and unreliable media information in a few constantly recalled cases.

In the light of the above and with the aforementioned self-regulation measures in place, we are confident that the issue of proportionality has been successfully resolved.

3. How content is Poland with the EAW system. Are there changes to the EAW that Poland would wish to see enacted?

[264] The amended Article on the admissibility of the issue of an EAW states:
"Article 607b. A warrant is inadmissible if it is not required by the interest of justice. Moreover, a warrant is inadmissible:
1) in connection with the criminal proceedings conducted against the prosecuted person for an offence subject to the penalty of deprivation of liberty up to one year,
2) to execute the penalty of deprivation of liberty sentencing for up to 4 months or another measure consisting in deprivation of liberty for a period not exceeding 4 months.".

Considering changes to the EAW system one must keep in mind that it is not a stand-alone measure existing in a legal void. It is but a part of a wider framework of interlocking and mutually-complementary measures. These measure include, on one hand, ones providing alternatives for an EAW (mutual recognition of probation measures, The European Investigation Order) and, on the other, measures which guarantee procedural rights to persons sought by an EAW (directive on the right to translation and interpretation, directive on information in criminal proceedings, directive on access to a lawyer, proposed directive on legal aid). As such we see no need to amend the EAW framework decision at this point. Member States should instead strive to fully implement other related measures in order to complete the legal framework and ensure the effectiveness and fairness of international cooperation.

In this context it is regrettable that the UK refuses to participate in many of the aforementioned measures. The UK decided not to opt back into the framework decision on mutual recognition of probation measures[265]. Employment of the provisions of this framework decision would allow other Member States to limit their number of EAWs transferred to the UK. This is because when a person does not discharge their obligations relating to probation (such as payment of maintenance, undergoing treatment) and flees to another State, that State could enforce such obligations. Without recourse to the framework decision, the only alternative is to issue and EAW and bring such person back. This is particularly important consideration in the case of relations with Poland as according to estimates around 2/3 of the EAWs from Poland are issued for the purpose of execution of a sentence.

The UK also decided not to opt-into the directive on access to a lawyer[266] and the proposed directive on legal aid. The aim of these directives is to provide wide access to professional representation to, among others, persons sought by an EAW and ensure that their rights are respected. This decision is puzzling, since participation would serve to allay many of the fears voiced by UK authorities on breaches of fundamental rights in EAW proceedings. Of particular note is the right to dual defence (i.e. in both the issuing and executing Member State) foreseen by the directive on access to a lawyer.

[265] Council framework decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

[266] Directive 2013/48/EU of the European parliament and the Council of 22 October 2012 on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

4. It has been stated in evidence that Poland is considering changes to its sentencing system that may result in less EAWs being generated. Are you able to give any details on these changes?

This matter has effectively been addressed under question 2. As already mentioned, the Polish authorities have adopted new law introducing the 'interests of justice' test when issuing an EAW.

Conclusions

As follows from the above remarks, major improvement has already been achieved through 'soft measures' and we expect an even greater reduction in the number of EAWs issued once the 'interest of justice' test becomes binding law.

We do however note with concern action undertaken by the UK. Not only does the UK refuse to participate in several vital measures which act as a counterbalance to the repressive aspects of the EAW system (framework decision on mutual recognition of probation measures[267], directive on the access to a lawyer), but also introduces unilateral changes to national legislation that are not conducive to improving the operation of the EAW because they lower mutual trust. We mean specifically the right to refuse the execution of an EAW based on an arbitrary 'proportionality' test. The EAW framework decision provides for no such ground and the European Commission has made it clear on a number of occasions that proportionality is to be assessed in the issuing State only.

As such we respectfully ask Your Lordships to consider this issue when drafting new extradition legislation.

9 December 2014

[267] The UK has merely stated the intention to 'reconsider the merits' of participation albeit without any suggested timeframe (see Council document 11057/14 Rev 1 of 20 June 2014).

Graham Mitchell, Julia O'Dwyer, Jodie Blackstock and Michael Evans – Oral evidence (QQ 172-190)

Transcript to be found under Jodie Blackstock

A.M. Moorwood Leyland – Written evidence (EXL0030)

1. I would like the noble Lords to consider very carefully all the many seriously flawed cases for which the U.S. Government have sought extradition of British citizens and, in particular, the case of the "NatWest/Enron 3". It is clear with hindsight that the purpose of this extradition was not the pursuit of criminals but the manipulation of people into situations where they would be intimidated by an alien and heavily biased legal system into entering into plea bargains by means of which the American prosecutors might gain evidence they would not otherwise have found. There were so many flaws in this case as it proceeded not least the constant delay in bringing the issues to trial, the inability of the defendants to summon witnesses for their defence and, in the end, the inevitable plea bargaining. It is this latter aspect of the American legal system that I find so alien to our own modern legal system as it encourages defendants to say anything about anyone rather as those under torture from mediaeval "examiners" used to do.

2. I submit this evidence because I have a very real interest and indeed latent fear. I was once an Assistant Secretary employed by Her Majesty's Caymanian Civil Service to regulate the financial affairs of insurance entities and personnel in the Cayman Islands. Under the laws pertaining to that jurisdiction I cannot give any detail to your Lordships of particular cases and that would also be the case should any US prosecutor ever wish to ask me questions. I regularly travel to the USA but always with that fear that I might be summarily arrested to take part in some show trial relating to some perceived "fraud" on the US tax system. I know I have never committed any offences myself but the judicial history of the USA shows that this is apparently of little count. They are even considering prosecuting a Catholic priest for refusing to reveal confessional secrets.

3. I urge your Lordships to bear in mind the imminent octocentenary of our own Magna Carta which set out the basis on which we have built the rules of Habeas Corpus under which all of us have a right to know of what we are charged and to trial by our own peers. We should always insist that residents of the UK should not be extradited without a *prima facie* case against them being tested in a UK court. More importantly, if the alleged crime took place in the UK or one of its Crown Dependencies, a UK judge should be able to bar their extradition so that they can be tried in a UK court – or not if the CPS so decides. I am also horrified to discover that the automatic right of appeal against an extradition order has been taken away. This is surely a breach of all of our human rights and it should be reinstated as soon as possible. I also understand that the Home Secretary is no longer able to block extraditions that would breach human rights and again I find this unacceptable. This country is a signatory to the Human Rights Convention which protects the right to conscience and liberty and insists on due process of law. The American legal system has, sadly, moved a long way away from such principles and should be strongly resisted. Given that country's political and economic power I feel that legal aid for cases involving extradition should never be means tested.

4. I had previously ended there but in the interim the case of baby King has occurred. I do not know if due process was actually followed but, if true, then the due process seems extra-ordinarily flawed. I have also read today of a case where Interpol were alerted to track down a couple who had quite legally gone to France with their baby. Such cases bring the whole European Arrest Warrant into disrepute at a time when as a tool against gangsters and terrorism it needs strengthening.

5. We have a long and proud history of resisting tyrants and tyranny – I ask your Lordships to see this matter as exactly that kind of battle. The history of recent extradition cases to the USA is riddled with so many poorly constructed cases, all put together either to force evidence from unwilling witnesses or to make political capital out of what have seemed to be foolish people who have committed quite trivial and unremarkable offences usually in this country. Our country. The country you not the American Senate and Congress legislate for. As to the European angle, please put the powers given to magistrates back where they belong – in the fight against terrorism and cross-border gangs.

8 September 2014

Professor Rodney Morgan, Mark Summers QC, Dr Kimberley Trapp and Sheriff Kenneth Maciver – Oral evidence (QQ 120-131)

Transcript to be found under Sheriff Kenneth Maciver

National Crime Agency – Written evidence (EXL0036)

Response to the House of Lords Select Committee on Extradition Law – Call for Evidence

This is the National Crime Agency's (NCA) response to the call for evidence from the House of Lords Select Committee on Extradition Law.

It should be noted that the NCA's response is limited to UK extradition law as it relates to the European Arrest Warrant (EAW).

Context

The NCA is the principal Central Authority in the UK for the receipt, certification and transmission of European Arrest Warrants (EAW), the other being the Crown Office and Procurator Fiscal Service (COPFS) in Scotland. The NCA does not have a policy role in respect of the EAW, but provides an administrative service for law enforcement partners in the UK and the EU by facilitating requests between judicial authorities for the surrender of persons wanted. The NCA was established on 7 October 2013 and took over the role of Central Authority from the Serious Organised Crime Agency.

NCA view

Undoubtedly the EAW plays a key role in ensuring that those suspected or convicted of serious crimes have been surrendered more quickly, both to the UK (Part 3) and from the UK to another EU Member State (Part 1) to face justice, than under the extradition arrangements that the EAW replaced. Furthermore, figures show that the number of EAW requests made to the UK has increased year on year since the Extradition Act came into force in 2004.

The existence of the EAW has enabled the NCA (and previously SOCA) to run high-profile campaigns to locate and arrest the UK's most wanted individuals and return them to the UK to face justice. All of those featured in the campaigns have been wanted for, or in connection with, serious offences. Three separate campaigns, run jointly with Crimestoppers have targeted individuals believed to be residing in Spain, the Netherlands and Cyprus. The three campaigns combined have resulted in over 70 individuals being arrested and returned to the UK.

The proportionality bar has been in force since 21 July 2014. The NCA is responsible for conducting an administrative proportionality check to identify the most trivial requests. Although it is too soon to make any assessment of the efficacy of this procedure, as of 5 September 2014, the NCA had rejected 14 EAW requests.

National Crime Agency

11 September 2014

Rebecca Niblock and Edward Grange – Written evidence (EXL0035)

Submission to be found under Edward Grange

Rebecca Niblock, Edward Grange and Crown Prosecution Service – Oral evidence (QQ 76-105)

Transcript to be found under Crown Prosecution Service

Amelia Nice – Written evidence (EXL0086)

WRITTEN EVIDENCE ON EXTRADITION

AND OVERLAPPING PROCEEDINGS

THE HOUSE OF LORDS EXTRADITION COMMITTEE

This evidence addresses extradition proceedings where they overlap with family court proceedings, international child abduction and situations where the requested person may be a victim of trafficking.

FAMILY PROCEEDINGS: Many cases involve overlapping Family Court proceedings and a number of issues arise. The approach of extradition courts to liaising with the family courts is ad hoc and there are no rules or informal guidelines to assist. That the extradition system is adversarial can create problems, as courts may be reluctant to direct that (e.g.) social services provide information, where it is nevertheless necessary. Extradition and Family Courts have different approaches to disclosure and confidentiality. Delays are frequent, if not inevitable. Where extradition might result in the separation of a parent/s from their child/ren, the Extradition Act contains no obvious practical provisions to allow an extradited person to take a child with them, or for the child to go to the requesting state into the care of a family member.

CHILD ABDUCTION: A relatively small, but increasing number of case have involved extradition pursuant to allegations of child kidnapping/abduction. The primary issue of concern is the use of criminal proceedings as a first resort, rather than deploying an extradition request alongside civil proceedings. This is problematic and can lead to additional unnecessary distress for the child/ren. Absent civil proceedings, extradition for child abduction does not secure the return of the child. This means that child may be taken into care in this country rather than returned to the care of family members or the care system in the requesting state. The civil courts are able to ensure the return of the child and are also equipped and experienced in hearing specialized evidence about the child's best interests. Extradition courts ought to be aware of the possibility that extradition proceedings can be manipulated or affected by a left behind parent. There is also an issue of extradition practitioners being insufficiently aware of the civil mechanisms for dealing with child abduction.

TRAFFICKING: Some cases involve a requested person who is/alleges they are a victim of trafficking. The UK has implemented the international law and treaty framework applicable and introduced the 'National Referral Mechanism' to deal with the identification of victims

of trafficking. The obligations to protect such victims are clear. However, somewhat surprisingly, no extradition case law has addressed the correct or best practice procedure for how extradition courts should deal with the extradition request in such circumstances. That is despite it being well established that the definition of trafficking is broad and that, once identified, a potential victim should be treated as a victim and has certain entitlements. The dearth of decisions and guidance in this context creates a worrying potential for prejudice in the extradition courts. Relevant issues include what role the CPS should play in consulting the requesting state about the trafficking, particularly where it may be linked to the (extradition) offending; the role of the courts in progressing and supporting the identification of and support to a victim of trafficking, and given their own human rights obligations; who is best placed to assess the requested person's account and the inevitable concern that for a requested person to first talk about his/her experiences when giving evidence in court is inappropriate.

INTRODUCTION

1. This note is provided in relation to the overlap between extradition proceedings and proceedings involving:
   - A. Family Court proceedings
   - B. International child abduction
   - C. The identification of a victim of human trafficking (whether that be national or international)

2. We seek to make a number of observations connected to competing international obligations for which there does not appear to be any clear guidance to date. Each of these jurisdictions is intended to be a specialism, dealt with by those with specific training. Our experience, however, suggests that without guidance and good practice, one jurisdiction can inadvertently influence another, causing prejudice.

3. Many examples can be provided, but, within this document we try to substantiate our concerns with reference to particular cases within our experience.

4. We have experience prosecuting and defending extradition cases.

A. FAMILY PROCEEDINGS

5. Many extradition cases overlap with family proceedings, substantively and procedurally.

6. Due to the prevalence of cases raising "family life" via Article 8 as a bar to extradition, the Court frequently makes findings about the facts behind each family as part of the "proportionality exercise".

7. In some cases, however, the family courts are already involved, in relation to private family law proceedings or where Care and adoption proceedings are already ongoing. In other cases, the family courts might become involved as result of extradition proceedings, because of the prospective separation of a parent/s and his/her/their child and the potential need to have the child taken into Care.

8. Many issues arise in respect of such proceedings that cause tensions for the courts managing the extradition proceedings (and vice versa).

Involvement of Social Services

9. Since the Supreme Court case of ***HH***[268], many more cases have involved an approach to the Local Authority to provide evidence following arrest about a requested person's family and what support may be necessary for the left behind family. In some cases, this has included use of the provisions to allow for children to be taken into temporary or more permanent Care under (section 17 of the 1989 Children Act) (as referred to in ***HH***).

10. A number of issues arise.

11. Practically, one of the major issues is that it is not clear who engages and/or liaises with Social Services if further information is deemed necessary. Anecdotally whether the Court might take the initiative or leave it to defence representatives depends on the circumstances and both the approach of an individual representative and the Judge and his or her assessment of Court resources.

12. The time scales involved almost inevitably lead to delays - which are often said to be inconsistent with the extradition proceedings. In one recent case, it took Social Services 6 months to produce a report in relation to a family where the left behind mother of the three young children had a chronic physical disability such that coping with the physical demands of her young children was very challenging.

13. An additional issue is that the focus of a social services report, when obtained, may be unintentionally unhelpful, and sometimes misleading. A helpful report must be forward looking, based on the premise that the parent, or parents (for example) is not present. However, social workers are sometimes not clearly instructed about this, so inadvertently provide assessments of the status quo or address whether or not extradition should go ahead, as opposed to assessing the impact of removal of parent.

14. We understand that the Official Solicitor is becoming involved with more extradition cases but it is not necessarily apparent how (and at whose behest). The funding provisions at first instance are opaque. Representation of the child has never been granted at first instance, is very difficult to obtain on appeal and has been granted in a handful of cases only. By contrast, it is routine for children in civil family and abduction proceedings to receive separate representation, even down to separate Counsel for each sibling. While the issues considered by the separate jurisdictions may be distinct, in so far as the effect of the decision is to uproot a child and change where s/he live, this is perhaps a surprising distinction.

Disclosure & Burden

15. Procedurally, disclosure issues also arise from the involvement of the Local Authority. For example, if the Court seeks evidence, then it will receive it first. In at least one case, an extradition District Judge has then made an order preventing full disclosure of the report to the defendant, in a well-intentioned (but it was submitted misguided) misguided effort to try and protect the integrity of ongoing Care Proceedings which had pre-dated extradition proceedings.

16. In ordinary criminal proceedings, the CPS may be required to obtain disclosure about family

[268] ***R (HH) v Deputy Prosecutor of the Italian Republic, Genoa*** [2012] UKSC 25

court proceedings. This is done by a formal application for disclosure and includes payment of a fee and the consent of all the parties. It is then considered by the relevant family Judge.

17. However, the parameters for disclosure in extradition proceedings are quite different[269] such that the usual domestic disclosure rules do not apply. The CPS in extradition cases, is not regarded as a prosecutor but as a lawyer acting on behalf of a foreign client. The issuing judicial authority or requesting state decides what material is adduced in support of the extradition request.

18. Prosecuting authorities, both the requesting state and the CPS owe the court a duty of candour and good faith. However, that does not extend to any duty on the CPS or the requesting state to make enquiries of state agencies within the UK for material that might undermine or cast doubt upon the requesting state's case.[270]

19. The established duty of the CPS in extradition cases is therefore limited to disclosure of documents already in its possession. It therefore follows, that the CPS cannot be directed to seek disclosure of family court proceedings, as they ordinarily would do in criminal proceedings.

20. However, since in many cases that information must be obtained in order to properly consider a case, it then falls to the court to determine whether it will obtain the information of its own volition or whether the defence ought to do the same. Litigants in person present obvious extra problems.

21. On one view, it is simply for the defence to obtain information about care arrangements should extradition proceed. Nicol J noted in ***Udavardy v Hungary*** **[2013] EWHC 4338 (Admin),** that extradition proceedings are still essentially adversarial and the court relies on the parties to put the necessary evidence before the court rather than act as a court of inquisition of its own. For that reason he refused to direct Social Services to provide a report on the child.

22. The difficulty with placing the burden on the defence however, is that, as a public body, the Court must have regard to the child's rights and that in turn might necessitate obtaining information from the Local Authority. Moreover, inevitably, a request from the Court directly to a family court or Local Authority is likely to be dealt with more expeditiously, whereas defence requests encounter inevitable difficulties with confidentiality and resultant delays.

23. A lack of resources and or funding to cover liaison with Local Authorities and so on, is a further distinct issue, in terms of court staff and the ability of defence representatives to justify an enquiry with the Legal Aid Agency.

24. As noted above, there are related problems with the Court obtaining evidence. In particular it marks a shift away from the adversarial towards a more inquisitorial system, without clear boundaries being laid down (as they have been in family cases, where judicial evidence gathering is strictly regulated).

25. The result of this lack of clarity and the finite resources has been inconsistent and ad hoc

[269] E.g. ***Wellington v Governor of HMP Belmarsh*** [2004] EWHC 418 (Admin) and ***Knowles v USA and Bahamas*** [2006] UKPC 38.
[270] ***R (Gambrah) v CPS*** [2013] EWHC 4126 (Admin).

disclosure, not necessarily according to need. It is often said that each case will turn on different facts, however where the underlying facility to build a case for or against extradition rests on an inconsistent basis, this does or can result in unfairness.

26. There is a tension, which is not properly resolved by either the legislation or procedure. Section 2 of the Human Rights Act is such that it is a fundamental part of the Court and CPS duty to consider the rights of those person's requested for extradition, that is extended now to dependents. However, these rights are not applied consistently by the courts. The other issue is apparent non-cooperation by the family court. A case recently before Collins J had to be adjourned for 6 months because the family court would not (for whatever reason) assist. There are also numerous cases of the Family Court refusing to disclose CAFCASS reports or details, either to lawyers or even judges of the High Court. This failure can of course be challenged by Judicial Review or appeal of that decision, but would be better dealt with by a practice direction binding on both Extradition and Family courts, allowing the sensitive evidence to be used but either having the hearings *in camera* or by automatic reporting restrictions. If it were thought by the family division to be unworkable then an interim procedure whereby a High Court judge or master could order disclosure of family proceeding documents on an interim application basis might perhaps be an alternative.

Adjournments for Care proceedings

27. Delay is an obvious issue arising due to concurrent extradition and family proceedings. We have encountered many cases where one jurisdiction attempts to wait for other and, short of one Judge taking the initiative to contact the other, a stalemate results.

28. In some cases, especially those where Care or Adoption proceedings have begun before the extradition arrest, the courts tend to adjourn, recognizing that a parent's ability to resist their child being taken into care or adopted must take precedence. However, this is not always the case.

29. In one case ('MB', unreported) the defendant (mother) had recently had a baby and had separated from the baby's father. The baby lived with the father, but care proceedings were ongoing. As the child was living with its biological father, the District Judge dismissed the Article 8 arguments and the matter proceeded to appeal. On appeal, the High Court agreed to adjourn the hearing to allow progress in the family proceedings, recognizing that the presence of the defendant mother would make a huge difference to the final decisions about care and child arrangements (contact). As part of that process and due to the findings of the District Judge, the requested person sought disclosure of the Contact Notes made by the Social Services of her visits with her baby. This required a formal application to the family court which listed the matter for hearing and eventually granted the application. Social services then delayed by some weeks the provision of that information. The knock on effect was that the appeal hearing was adjourned and re listed for some months later.

30. Ultimately, before the hearing date, the EAW was in any case withdrawn. Although no formal reason was given for the withdrawal, the defendant had instructed lawyers in Poland who had fully explained her circumstances to the Polish Court. This case illustrates the importance of consideration perhaps being given by requesting states to alternatives to extradition, in some cases. The EAW originally concerned theft from an employer of about £600 in relation to which the RP should have paid a fine, which she eventually paid after her arrest on the EAW.

31. One observation by many legal representatives is that in a relatively small number of cases it might be appropriate for the CPS or Court to consider setting out in detail, for the benefit of the requesting Court, the family issues being raised as part of the argument against extradition. This is not systematically done, nor is the CPS under a duty to represent an IJA only if there are 'reasonable prospects' of extradition being effected, or similar. Nevertheless, in the case referred to above (paragraphs 29 and 30) , the case might have been bought to a speedier and less costly resolution by more active management Courts and perhaps the CPS.

32. The case of ***Sburatoru v Romania*** [2014] EWHC 2333 (Admin) is one which case which demonstrates the difficulties encountered by the extradition Courts where there are ongoing proceedings in the Family Division of the High Court. The Appellant, a father of nine children, was sought to serve 3½ years imprisonment for fraud and to stand trial for driving offences. The extradition proceedings lasted approximately 18 months, with the appeal adjourned twice due to the prolonged Family Division proceedings which were determining whether or not the Appellant's 9 children should be permanently taken into care. The mother was unable to cope without the Appellant who was remanded into custody for the majority of the extradition case. The parents and children were all separately represented in the Family Division, but the Family representatives would not disclose details to the extradition representatives. A stalemate emerged between the two jurisdictions, only resolved by direct liaison between the Judges directly. The extradition appeal was eventually allowed due to a combination of his suicide risk, the relative lack of seriousness of the conviction and his familial responsibilities combined which rendered his extradition a disproportionate interference with his and his family's Article 8 rights.

Confidentiality

33. Another area of conflict arising from concurrent extradition and family proceedings is the conflicting approach to confidentiality. Extradition proceedings are public although it is open to representatives to apply for reporting restrictions (pursuant to s39 of the Children and Young Persons Act 1933 (CYPA 1933)). However, such applications are often missed (perhaps another example where training and good practice could have positive results) and even when they are made they are not necessarily granted. This means that the protection which ought to be afforded to children in such proceedings is not always in place.

34. By contrast, family proceedings are routinely held in private. Disclosure of information from family proceedings requires a formal application. In some cases (as Judges have noted) this results in the disclosure of information which is redacted to such an extent that it then becomes difficult for the extradition judge to make a meaningful assessment of the true facts (see, paragraph 26, above).

Machinery

35. In ***HH,*** Lady Hale observed that there was a lack of "obvious machinery" to streamline extradition decisions. A more nuanced issue is also that despite recent amendments, the Extradition Act contains no obvious practical provisions to allow an extradited person to take a child with them, or for the child to go to the requesting state into the care of a family member. This might arise, for example, in cases where the mother is breast-feeding, or the parent is sought for a long term sentence and the child ought either to be placed with other family members in the requesting state, or taken in to care (or the equivalent) in that country.

36. An example of this is ***Zibala v Latvia*** [2014] EWHC 1021 (Admin) giving the lead Judgment of the Divisional Court, Collins J found that extradition of a young child's single mother would be proportionate, partly because the child could live with his grandparents in Latvia. At paragraph 36, Collins J observed "there are arrangements which can ensure that V is cared for and it seems clear that he should accompany the appellant to Latvia. Since V has no travel documents, arrangements will have to be made to ensure that he can accompany the appellant. That will need co-operation from the Latvian authorities who, if they want to ensure the appellant's extradition, will no doubt oblige." In fact, the practicalities of obtaining safe passage for the child were not secured, leading to the grant of interim relief by the European Court of Human Rights under Rule 39.

37. There are a number of other cases which illustrate the same problem and where the requesting state can provide information about the theoretical and/legal basis for provision of care to a child but where that is irrelevant in the absence of practical mechanisms for ensuring the child's safe return.

B. CHILD ABDUCTION

38. A relatively small, but increasing number of case have involved extradition pursuant to allegations of child kidnapping/abduction. The primary issue of concern is the use of criminal proceedings as a first resort, rather than deploying an extradition request alongside civil proceedings, particularly given that the latter are better placed to ensure the return of the child and hear specialized evidence.

39. There are two reported cases on this issue.

40. In ***Clark v SSHD; USA*** **[2014] EWHC 1879 (Admin)** the Appellant mother lost her extradition appeal (and renewed extradition appeal) against surrender to America for offences of child kidnap. Her case was that she had fled the USA 20 years earlier following domestic abuse by her husband and had lived in this country since, with their three children, two of whom are now adults.

41. In 2010, a formal extradition request was made and an Extradition Order granted by the Secretary of State. In 2012, Mrs Clark failed in an initial appeal of the Order. A renewed application for leave to seek judicial review of the initial refusal was subsequently made submitting, amongst other arguments, that Mrs Clark was suffering from post-traumatic stress disorder ('PTSD'). In June 2014, the High Court rejected that challenge, finding that a truly cogent case could not be established based on the PTSD and stating that "the removal of children from another jurisdiction without parental consent is a serious matter and recognised as such by our courts and foreign courts. The need for international cooperation is particularly strong." Matters relating to the context of her leaving the country with the children i.e. the domestic violence claims and PTSD, may be a relevant factor before the US court on her return but were not sufficient to bar her extradition. Hague Convention proceedings were not raised.

42. In ***Ljungkvist v Sweden*** [2013] EWHC 1682 (Admin), the Appellant mother's extradition appeal in relation to child abduction was dismissed. The Court held that there was great public interest in deterring parents from abducting their children from the care of the state, particularly where the court had made arrangements for the children's care. In a case in which a mother had wrongfully removed her children from the care of the Swedish authorities and brought them to the United Kingdom, the children's rights under the European Convention on Human Rights 1950 Article 8 did not trump either the public interest or the UK's international obligations.

43. One of the unusual features of this case was that after being brought here by their mother, the children were apparently doing well in her care. The Appeal court also noted that it was 'surprising' that Hague convention proceedings were not used. There can be little doubt that an Order for return would have been made under the civil proceedings.

44. In the end, after extradition a friend of the Appellant looked after the children in the UK for (it seems) some weeks before Swedish Social Services then took them back to Sweden.

45. The reason this case is somewhat surprising is that extradition for the offence of child abduction is very often the last resort for the simple reason that it does not secure the return of the child and, in the majority of cases, that is all the parent left behind is hoping to achieve. This is particularly true where the abducting parent has gone to a country where there can be no parallel Hague Convention application because then there is always the worry that the child will be put into care or hidden by relatives if the abducting parent is removed.

46. In terms of import extradition requests, other considerations which make the UK wary of requesting extradition for this offence are the fact that many prosecutions are dropped if and when the abducted child is returned before extradition proceedings have concluded, as well as the type of sentences imposed [unless the requested person is a repeat offender].

Hague (or Brussels II) - not extradition

47. However, a small number of cases appear to involve extradition requests where there should probably have been at least concurrent Hague Convention proceedings. In these cases, in the absence of any formal information, one can only speculate as to the reason behind the prosecutors whether bad faith (on the part of the left behind parent in the requesting state supporting a prosecution) and/or a lack of understanding by requesting state prosecutors.

48. In one case, Belgium requested extradition of a single mother for kidnapping her son. She was also the sole carer for two other children. What became clear was that the father had not involvement for a long time and the son did not want to have any contact with his father. Extradition of the mother to Belgium would have left all the children without her (or their father as he was still in Belgium). Ultimately, separate family proceedings legitimized the mother's role via a Wardship application in the High Court. The High Court made various efforts to engage with the father and obtain his input but he did not repsond and ultimately final custody was awarded to the mother. This could not then be ignored by the extradition court, which discharged the extradition request. Arguably, the father should have instituted Hague Convention proceedings.

49. In another case, the mother of two young children and a baby was arrested on an EAW from Cyprus for child abduction. At the same time, SOCA (as they were then, now the NCA) served an order from the High Court awarding temporary custody to the father under the Hague Convention, following an ex parte application. The circumstances of the mother's arrest were unimpressive on any view; a woman of good character, she was arrested in the early morning in front of her children who were then left with their father, who they had not seen for a long time. Of more concern (particularly given the multiple formal commitments to consideration of family/domestic violence) was the apparent absence of any risk assessment in relation to the father and his care of the children. Hague Convention proceedings were then instituted in parallel. Eventually, the Hague convention application was refused and the boys were retuned to the mother with a helpful judgment from the family division of the High Court stating that the father should do everything in his power to withdraw the warrant in Cyprus. The process took approximately 6 months. The family did not hear from the father again.

50. These examples support the observation that extradition courts ought to be aware of the possibility that extradition proceedings can be manipulated or affected by a left behind parent and on occasion the Court and / or representatives should make enquiries accordingly.

51. The Court should also be aware of the practical limitations to extradition in this context which can be remedied by the family courts in Hague proceedings where the return of the children can be provided for and where CAFCASS officers are in easy reach. (See paragraphs 60 and 61 below)

52. There is also an issue of extradition practitioners being insufficiently aware of the civil mechanisms for dealing with child abduction.

Coordination

53. In countries such as the United States of America there is an office which co-ordinates extradition requests with Hague Convention applications – but this is the exception rather than the norm.

New offences

54. The recent decision of the Law Commission to introduce the offence of retention of a child is an interesting recent development and perhaps likely to lead to an increase in cases with concurrent criminal and civil proceedings. The proposed changes are welcomed by the members of the Ministry of Justice Child Abduction Co-ordination Group and the charity Relate. The changes address the deficiencies in the regime created by the Child Abduction Act 1984 (the 1984 Act) which were highlighted in the cases of ***Kayani*** [2011] EWCA Crim 2871, [2012] 1 WLR 1927 and R **(*Nicolaou) v Redbridge Magistrates' Court*** [2012] EWHC 1647 (Admin), [2012] 2 Cr App R 23, respectively.

55. There are two child abduction offences under the 1984 Act. First, section 1, child abduction by parents (or connected persons), committed by taking or sending a child out of the UK without the appropriate consent. Secondly, section 2, child abduction by other persons, committed by taking or detaining a child from persons with lawful control of the child.

56. ***Kayani*** concerned conjoined appeals against sentence on behalf of two fathers who had been separately convicted of the abduction of their children contrary to section 1 of the 1984 Act. In dismissing the appeals, the Lord Chief Justice observed that 'the abduction of children from a loving parent is an offence of unspeakable cruelty'. The Court of Appeal also disapproved previous authority to the effect that child abduction offences should be preferred over a kidnapping charge in all cases of parental abduction and invited the Law Commission to address that issue together with an increase in the maximum sentence.

57. ***Nicolaou*** concerned a child who had been kept in Cyprus by his father for a number of years, despite a court order authorising only a 3-week trip. Hague Convention proceedings found that the child had been wrongfully retained and an order for his immediate return was granted. The father took the child into hiding to avoid enforcement of this order. A warrant was issued for the father's arrest, upon which a European Arrest Warrant requesting his extradition was based. However, the domestic warrant was quashed by the High Court, as it was held that the father's act of *retaining* the child, did not come within the definition of section 1 of the 1984 Act and hence the crime had not been committed.

58. The Law Commission recommends that the problem identified in ***Kayani*** be solved simply by an increase to the maximum sentence for the child abduction offences in the 1984 Act from 7 to 14 years' imprisonment.

59. As to the ***Nicolaou*** problem, the Commission recommends extending the offence in section 1 of the 1984 Act to situations in which, having taken or sent the child out of the UK with the appropriate consent, a connected person *keeps or retains* that child outside the UK without the appropriate consent or in breach of the conditions of that consent.

60. Interestingly, the Law Commission recognizes that disputes between parents about where a child should live are in general better resolved through the civil rather than the criminal law. Any criminal offence should therefore be confined to actions, which frustrate the civil court's process; criminal proceedings are not concerned with the substantive question of where the child should eventually live, and the civil and criminal processes operate quite independently of each other. Where a person takes a child abroad, proceedings under the Hague Convention may recover the child but are not designed to recover the abductor. Conversely an extradition request for the purposes of criminal proceedings may recover the abductor but are not designed to recover the child.

61. It would thus be useful if the extradition courts could consider the possibility of civil proceedings and make relevant enquiries, particularly if it is submitted (or found) that it would be in the best interests of the child to be returned to the requesting state with their parent/s. This is far preferable to the rather blunt conclusion reached in some cases that where some family care or local authority care is available for a child, such care is necessarily sufficient.

C. TRAFFICKING

62. Trafficking arises in extradition cases in two ways. Firstly, where the defendant is simply accused of trafficking offences, which is dealt with in the ordinary way. What is more difficult is where an extradition defendant asserts that s/he has been a victim of human trafficking, often into this country, sometimes as part of the circumstances of the underlying extradition offence(s). We have direct experience of at least 7 of these cases.

63. The lack of guidance is illustrated by the scarcity of decisions which deal with this issue and which are in any event are restricted to their own facts.[271] What has not, to date been addressed is the correct or best practice procedure for how the extradition court should deal with the extradition request and proceedings where a requested person alleges they are a victim of trafficking. That is despite it being well established that the definition of trafficking is broad and that, once identified, a potential victim should be treated as a victim and has certain entitlements. Even for those working full time in the field of trafficking it is easy to overlook potential victims, whereas the dearth of decisions and guidance in this context creates a

[271] There are two reported cases:
Lithuania v AI [2010 EWHC 2299 (Admn) in which the Appellant breached suspended sentence in leaving IJA but it was accepted on appeal that she had been trafficked into this country for the purposes of forced prostitution and had been been finally determined to be a person who has been the victim of trafficking, following an investigation by the United Kingdom Human Trafficking Centre. Her personal circumstances, health and assistance to the police made extradition disproportionate.
In Zubkova (or Z) v Poland [2014[EWHC 1242 (Admin) the Appellant alleged she was victim of trafficking and her extradition was refused on appeal.

worrying potential for prejudice in the extradition courts.

64. The issues which arise concern the (arguably) mutually exclusive legal obligations which pertain to the courts/CPS in relation both to their duty to a requesting state and their duty to a victim of trafficking; the necessary procedure and management of extradition proceedings where an allegation of trafficking is made; and, how the court ought to proceed to hear evidence of a potential victim.

International Instruments

65. Trafficking is a human rights violation, which falls within Article 4 of the ECHR, the Prohibition of slavery and forced labour. See, ***Rantsev v Cyrpus*** [2010] 51 EHRR 1; ***Siliadin v France*** (App No 73316/01).

66. Article 4 (like Article 3) involves positive obligations on the state to effectively investigate allegations of trafficking and to introduce preventative measures in order to prevent contraventions of this non-derogable right, whether it relate to 'slavery', 'servitude' or 'forced and compulsory labour'.

67. The International Law and Treaty framework is contained in:
    - UN Convention Trafficking Protocol (Palermo Protocol), 2000
    - European Convention, 2005
    - EU Directive on Trafficking, 2011

68. We also note the impact of the Modern Slavery Bill, predicted to come into force in 2015.

Victim based approach and positive obligation

69. Article 1(1)(b) of the European Convention and Article 2(B) of the Protocol establish as one of their purposes the protection of the human rights of the victims of trafficking. Article 5(3) of the Convention includes the obligation for Parties to promote a human rights-based approach in the development, implementation and assessment of the policies and programmes to prevent trafficking. A victim centred approach is required.

70. Such an approach includes the non-punishment provisions of the European Convention; there should be the possibility of not imposing penalties on victims for their involvement in unlawful activities if they have been compelled to do so. (See, Art.26 Convention, Art 8 of the Directive.)

71. In addition, States are under a positive obligation to ensure anti-trafficking legislation in place and to positively investigate any allegations of the same. Such investigation is <u>not dependent</u> on reporting by the victim (Art.9, Directive).

Re victimization

72. Beyond duties concerned with prevention, the Protocol, Convention and Directive all specify provisions relating to prevention of re-victimisation and re-trafficking. (See, Art 9(b) Protocol; Art 16.5 of Convention; Directive 2011 –).

UK Law

73. The UK anti-trafficking legislation is not contained in a single Act and the offences concerning human trafficking and other relevant offences are to be found in numerous different laws (Asylum and Immigration Act 2004, Gang Master's Licensing Act 2004, Trafficking in prostitution, S145 of the Nationality, Immigration and Asylum Act 2002, Sexual Offences Act 2003, S71 Coroners and Justice Act 2009).

74. In April 2009, in order to meet its commitments at the time that the Convention entered into force in the UK, the Government introduced new procedures to examine cases of individuals presumed to be trafficked referred to as the 'National Referral Mechanism'.

UK National Referral Mechanism and 'Competent Authorities'

75. The Convention uses the concept of 'competent authorities' in relation to those who come into contact with presumed trafficked persons and are empowered to provide services to them or to make decisions affecting them.

76. The UKHTC and Home Office are the two separate agencies identified as Competent Authorities. The Met police is tasked with investigating and gathering evidence on human trafficking. They work with UKBA and ACPO, the NCA and the UKHTC. The NCA hosts the NRM.[272]

The National Referral Mechanism and 'First Responders'

77. The UK's NRM specifies a series of 'First Responders', frontline agencies and statutory bodies which come into direct contact with presumed trafficked persons and which are formally entitled to refer the cases of individuals to a Competent Authority, in the UK either UKBA or UKHTC.

78. In general, First Responders refer cases to the UKHTC. The UKHTC refers on to the UKBA any cases in which questions are raised about an individual's immigration status in the UK.

79. Once a referral has been made, trained experts in the CA will assess the case and make a decision on whether an individual is a victim of trafficking.

Stage 1 – reasonable grounds

80. The CA has five days from the receipt of the referral to reach a decision on whether there are reasonable grounds to believe that the individual is a 'potential' victim of trafficking - a PVoT. The "reasonable grounds" test has a low threshold). The test that should be applied is whether the statement 'I suspect but cannot prove' would be true and whether a reasonable person would be of the opinion that, having regard to the

[272] http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism

information in the mind of the decision maker, there were reasonable grounds to suspect the individual concerned had been trafficked'.

81. If after five days the CA decides there are reasonable grounds then ordinarily the potential victim will be:
    - allocated a place within Government funded safe house accommodation, if required;
    - granted a recovery and reflection period of 45 days. This allows the victim to begin to recover from their ordeal and to reflect on what they want to do next, for example, co-operate with police enquiries, return home etc.

82. The referred person and the first responder are both notified of the decision by letter.

83. The purpose of the recovery and reflection period is to enable the victim to access the support and assistance necessary to escape and recover from the trafficking situation and also to take an informed decision on whether to cooperate with the authorities.

Stage two – "Conclusive decision"

84. During the 45-day recovery and reflection period the CA gathers further information relating to the referral from the first responder and other agencies.

85. This additional information is used to make a conclusive decision on whether the referred person is a victim of human trafficking. The CA's target for a conclusive decision is within the 45 recovery and reflection period.

86. The case manager's threshold for a Conclusive Decision is that on the balance of probability "it is more likely than not" that the individual is a victim of human trafficking.

CPS

87. The CPS Director of Public Prosecutions published a policy for prosecuting cases of human trafficking in May 2011, following which a revised version of the CPS Legal Guidance on human trafficking and smuggling, updated June 2011. This guidance supports Article 26 of the Convention (to provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent they have been compelled to do so). It makes clear that prosecutors should consider whether the public interest lies in proceeding to prosecute or not, where there is evidence of the offending is linked to the (would be) defendant having been trafficked.

88. The guidance advises prosecutors on the steps to be taken when it comes to their notice that the suspect is a credible trafficked victim. This guidance was the subject of comment in the judgment by the Court of Appeal in ***R v O*** [2008] EWCA Crim 2835. The Court emphasised the duty of both Prosecutors and Defence lawyers to make proper enquiries in criminal prosecutions involving individuals who may be victims of trafficking. In that case, a 17-year-old defendant was sentenced by the Crown Court to a period of imprisonment without reference to the relevant protocols by either the prosecution or

defence, and without reasonable enquiries having been made as to the defendant's trafficking history.

89. See also the Court of Appeal case of ***LM & Ors v R*** [2010] EWCA Crim 2327 (21 October 2010) which gives guidance on the prosecution of victims of trafficking in light of Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings which requires States to provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities to the extent that they have been compelled to do so.

Issues

90. For the extradition Courts the issues which flow from this law and NRM mechanism include:

Referral to NRM

91. There is no "Competent Authority" specifically able to assess allegations of trafficking in the extradition context.

92. It follows that the Court (or CPS) should make or consider making the referral to the relevant specialist agency for assessment (probably the UKHTC) who then decide whether there are reasonable grounds to conclude the individual is a victim of trafficking. Under the NRM, a trained specialist in a designated competent authority will investigate the matter further. See, Home Office, Jan 2013, Victims of human trafficking: guidance for frontline staff. [273] Although an individual can self refer (and have done so in some of the cases) one of the important issues is that there is no obligation on them to do so, but there **is** an obligation on the Courts to positively investigate any allegations of the same. Such investigation is not dependent on reporting by the victim (Art.9, Directive).

93. Wider case law on this point makes clear that the authorities must act of their own motion once the issue has come to their attention and that such action does not depend on a complaint by the victim.

94. That the Court or CPS should consider referral is also consistent with the 'human rights approach' to the issue and the fact that the court is a public authority within the meaning of the Human Rights Act; as above, trafficking falls within the Convention on Human Rights of which Article 4 contains a positive obligation to protect victims of trafficking. This is not simply an obligation to protect the victim. The requirement to investigate potential trafficking was aimed at identifying and punishing traffickers and does not depend on a complaint from the victim or their next of kin; **Re W' Application for Judicial Review** *[2010] NIQB 37*

95. A proper evaluation of whether the person has been trafficked, the impact on them of being returned and the potential for being re-trafficked will then potentially be relevant to arguments raised under Section 14, Section 20, Section 21 and Section 25, for example.

273 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/275239/Human_trafficking.pdf

Consultation with the IJA / Requesting State

96. It is submitted that it is clear that if the index EAW criminality is linked to an RP's status as a trafficked person the IJA should be informed of the status or alleged status of an RP as a trafficked person, ether directly (via the NCA and Interpol, as usual) or via Eurojust, given their proactive role in enhancing international cooperation to facilitate victim based to combat trafficking. See, e.g., Recital (5), Directive 2011 and the comments of Mitting J, ***Z v Poland*** [2014] EWHC 1242 (Admin), paragraph 17.

97. In ***Z v Poland***, Mr. J Mitting accepted the Appellant may have been trafficked into this country and previously into Poland. Noting the lack of information and the international obligations that both the UK and Poland had in relation to trafficking, he took the Appellant's evidence into account when dismissing the case on the grounds of injustice under passage of time. As to the issue of whether the IJA should have been on notice about her account, he noted:

> 17 On the bare facts of this case as set out in the European Arrest Warrant, given the fact that the appellant was a single 19-year-old woman of Lithuanian origin, staying for a short time in a foreign country with friends who, according to the Polish authorities, turned out to be serious criminals, the possibility that the conduct alleged against her occurred, if the charge is a true one, because she was trafficked is one that I would have expected the Polish authorities to have considered and, if necessary, investigated. If they had done that and concluded that the circumstances did give rise to an inference that the offence had been committed in consequence of trafficking then I would have expected them to have said so and as they have done frankly in relation to the all of the other issues in the case. If they had done so, a real question of oppression would have arisen because there would have had to have been balanced against the long but sad and unfortunate life that the appellant has experienced in the United Kingdom, the possibility or probability that, by applying Article 8 of the Directive, she would not have been prosecuted for this offence now whatever the situation may have been in 1997.

98. It is further arguable however, that it is good practice for the IJA to be made aware of an individuals' trafficking status, whether or not it is linked to the index offending. This is consistent with the positive duties on each Member State in relation to victims of trafficking and the broader commitments to eradicating trafficking. This was referred to by the Court in ***Rantsev***, which noted the duty on Member States to co-operate effectively with the relevant authorities of other states in cross-border trafficking cases - a duty in keeping with the objectives of Member States to adopt a comprehensive international approach to trafficking in the countries of origin, transit and destination.

Adjournment

99. Any consultation with the IJA will typically involve a 3-4 week adjournment.

100. More significantly, referral to the NRM for a conclusive decision will take 45 days and is something Courts have been worried would lead to unnecessary delays.

101. In addition, where there is evidence to suggest the requested person is vulnerable to being re-trafficked, further specialised evidence (often psychological or psychiatric) may be sought which inevitably involves time to obtain.

102. Thus, as with cases involving concurrent family proceedings and / or civil private law proceedings, there is real tension between the desire of the judges to deal with matters quickly and the time frame applicable to NRM proceedings of 45 days in which a conclusive decision has to be reached.

Assessing the evidence

103. It is respectfully submitted that an NRM Competent Authority is best placed to assess a requested person's account. This is consistent with the various guidelines on implementation of the Directive and Convention. See, Art. 10 Convention, Art 18.3., of the Directive and the requirement that CA's are staffed by those trained and qualified in identifying and helping victims.

104. The June 2013 Report by the UK Anti-Trafficking Monitoring Group, 'In the Dock', notes the difficulties that arise as a result of the lack of understanding across the criminal justice system of what trafficking is and how it affects those who are trafficked. In particular, it refers to the fact that the psycho-social consequences of trafficking can impede a trafficked person's ability to give evidence in court proceedings (as a defendant or witness). That may result in inconsistent evidence, which is then perceived to be lie. However, to our knowledge, requested persons who have alleged they are victims of trafficking have simply given evidence in the normal way and may be speaking for the first time about their experiences, when they are giving evidence.

105. The 'In the Dock' Report also interviewed a number of Crown Court Judges who noted the lack of training on trafficking provided by the Judicial College. It cites the suggestion of those interviewed of something akin to the 'rape ticketing' scheme which allows judges to preside over rape trial and suggests judges undergo specialised training to hear evidence from victims of trafficking.

106. In this particular context, it is also arguable that the weighty consideration given to 'mutual trust' and the ability of a requesting state to be able to protect the RP ought to be considered with caution given that the implementation of anti trafficking measures and the development of laws to ensure prevention and protection are in their infancy across Member States.

107. On 9 December 2014 Simon J dismissed the appeal of ***Igbinovia v Spain*** (CO/4893/2014) which demonstrates an instance where extradition proceedings ran concurrently with the NRM identification process. In brief, extradition was requested to enforce the remainder of a sentence imposed for drug importation in 2006. The Appellant had admitted the offence in Spain but advanced mitigation that he was forced to do it by others. At that stage the international trafficking instruments were not in force in Spain. After the Appellant due to the EAW he provided the same instructions to his lawyers who helped him start the NRM referral process. The Home Office later found that there were reasonable grounds to find that the Appellant had been a victim of trafficking, starting the 45-day recovery and reflection period. The District Judge at first instance refused to adjourn the extradition case until after the 45 day period had expired and proceeded to hear evidence from the Appellant, testing him with robust cross examination as is usual in the criminal Courts. Based on that evidence the District Judge made findings that the Appellant had not been trafficked (partly because he found the Appellant

to be “evasive”) and undertook to send his final decision to the Home Office. Without further consultation, (with the Appellant or his designated caseworker) the Home Office then gave their “conclusive grounds” decision, which was that the Appellant had not been trafficked. Whether or not the findings were justified on the facts, this illustrates the difficulties encountered where the same individual is passing through different procedures and jurisdictions simultaneously. The clear policy of a “victim focused” approach on the one hand sits uneasily with the adversarial system and strict time limits involved in extradition.

21 DECEMBER 2014
AMELIA NICE

Contributors; Mary Westcott, Benjamin Keith, Giovanna Fiorentino

5 January 2015

Julia O'Dwyer – Written evidence (EXL0050)

House of Lords Extradition Law Committee
Submission from: Julia O'Dwyer mother of Richard O'Dwyer 12/09/2014

In order to avoid repetition by reinforcing points raised by other people who can write more eloquently and knowledgably on the subject of extradition between the UK and US I am not going to comment on much of those matters. I would instead here state that I fully endorse and agree with all submissions provided to you by David Bermingham, Janis Sharp, Liberty, Fair Trials International, Christopher Tappin, Hamja Ahsan and all those others who have been and still are vociferously campaigning against the insidious treaty between the UK and the US.

GENERAL

1: DOES UK EXTRADITION LAW PROVIDE JUST OUTCOMES?

Not always, a prime recent example is the case of Talha Ahsan who was imprisoned without charge in UK prisons, extradited to the US and recently freed by a US Judge who said he was not a terrorist and citing the "unreliable" evidence supplied by UK and US prosecutors. Many years of a man's life lost. The eventual outcome in the US is **always** via their Plea Bargain system which requires people plead guilty (even if innocent) to a usually reduced offence in order to get home to their families and avoid lengthy incarceration in America's dreadful prisons even while awaiting a trial. This system is described by many in authority in the UK as being abhorrent. Others will provide detailed comment on this.

2: COMPLEXITY (Impact on victims)

Extradition law between the UK and US is highly complex and specialised. The impact of this upon victims (*those for whom extradition is sought*) is that there is the necessity to:

- Seek the expertise of specialist extradition lawyers and barristers which are mainly only practicing in London.
- Travel to London at all times for numerous court hearings and legal meetings, this is both expensive and time consuming. In my son's case, since he was a student at the time so all costs fell to me I would estimate that the total cost involved was in the region of £50-55,000 over the 2 year period. This does not include legal costs which were covered by legal aid.

In addition the whole process is extremely disruptive to everyday life, traumatic and frightening due to a lack of explanation and information from the Police in the early stages and due to the aggressive attitude displayed by US prosecutors. I was required to find out everything for myself from the internet. We would have appreciated some sort of information leaflet given to us at the same time as the Extradition warrant was being briefly wafted in front of our eyes with no explanation given.

There is no support available for extradition victims in the UK, our support and advice came from other victims who were extremely knowledgeable as a result of their own horrendous

experiences. As a result we "victims" now support others and a website serves to be a great source of support and information. However victims remain forced to trawl the internet to find information.

People whose extradition is requested by the US are always treated as a guilty criminal even before any trial, taken into custody in the UK, placed on bail and then when finally extradited thrown into solitary confinement in a Federal prison before being transported all around the US to various jails for high category prisoners regardless of the alleged crime. This is not how people accused of a crime are normally treated in the UK.

3: JURISDICTION

The use of extradition to prosecute an alleged crime where the accused has never ever set foot in that country in my opinion is not appropriate, we have a legal system in the UK which should be perfectly able to deal with these cases. As regards Jurisdiction and in relation to the US we should be asking ourselves, **Is there no limit to US jurisdiction?** There appears not to be, the US enjoys a perversely extraterritorial jurisdiction the like of which is not exercised by any other nation. This is wrong and unjust, the United Kingdom is a Sovereign state with its own judicial system.

Up to date figures on UK /US extradition requests obtained from the Home Office under the Freedom of Information Act have highlighted that there are **many** more requests for extradition by the US to the UK than from the UK to the US and that furthermore the UK does not request many extraditions from the US. If the UK did make as many requests to the US, no doubt plenty would be refused since the UK has never requested and the *UK has never ever requested the extradition of a US citizen to the UK for a crime committed whilst in the US.* It is well known that the US would not agree to extradite a US Citizen for an alleged offence committed whilst in the US. Meanwhile the Home Office and US Embassy frequently assert that the US always agrees to extradite those requested whilst the UK refuses cases, the reasons for that are apparent in the FOI above.

Other ways of dealing with these matters should be more widely publicised, explored and utilised. People should have the opportunity to sort their situation out without being extradited to the US (In cases where they have never even set foot in the US)

4:UK/US EXTRADITION (personal experience)

When my son Richard was threatened with extradition to the US I vowed that this would happen "over my dead body". We set about on the horrendous journey through the extradition legalise pathway, myself working every day all day on the internet fact finding, speaking to experts in the UK and US while Richard carried on "head in sand" intent on completing his University degree. (Which he did in spite of everything gaining a 2:1 degree) Meanwhile many lawyers in the UK and in the US were contacting me offering their assistance pro bono. Expert Copyright and Internet lawyers assured me that Richard had not committed the crimes he was accused of by the US. Many "tech" journals wrote about Richard's case highlighting the injustice and the wrongful interpretation of the law. A **quarter of a million** people signed Jimmy Wales' petition against Richard's extradition,

many of them MP's, Copyright lawyers and renowned internet giants and entrepreneurs in the UK and US. Throughout the two year period I was driven by the injustice of this rotten extradition treaty with the US, my own simmering anger and a mother's need and determination to defend her child against an aggressor. I kept on top of the lawyer's progress constantly, scrutinising and questioning every legal submission and sending them mountains of copyright information which could be useful in the case.

It was becoming apparent to me and Richard that the US prosecutors firstly did not have the technical knowledge and understanding of the relevant matters and had not fully investigated other similar cases which had been thrown out of court. I pointed this out to them in no uncertain terms and via Richards lawyer suggested that they might like to "do the right thing" and drop the case. This did not happen but I was aware later that the US Prosecutor had actually advised those higher up that there was no case to answer and that they would not win and to drop the case. But the US being the US insisted the case was pursued to the bitter end. i.e. to extradition. The US is known to have an adversarial legal system, we have experienced this at first hand along with the vindictive approach, the absolute refusal to back down even when in the wrong and the need to save face at all costs. The US and organisation behind the legal case were perturbed by the amount of public support there was against Richard's extradition and also by the growing petition to the degree that they tried to launch a **PR Campaign** to gain support for their own actions. This was exposed and brought to my attention by a vigilant "Tech" Journal author and was a complete failure.

While the lengthy legal process was being followed for nearly two years I was exploring other options behind the scenes almost from day one. The source of advice for this was not a lawyer, the home office or the police but another victim of this horrendous piece of legislation David Bermingham who was himself extradited to the US, forced to take a plea bargain before he could get back to the UK. Extradition lawyers brilliant though they are fight cases through the law and interpretation of the law. Richard's case was due to go to appeal at the High Court but I had little faith in system at the time but later heard from the legal team that the Judge "was minded to allow the appeal". We chose to continue with our behind the scenes efforts. David Bermingham advised me at day one to request the lawyers try to negotiate with the Prosecutors in the US to try to resolve the matter with the least damage possible and to avoid extradition. This process was in progress for many months and resulted in a surprisingly better outcome than what Richard had been faced with. This was aided by copyright lawyers in the UK and US working together and pro bono with Extradition lawyers and the US prosecutors to agree the way forward. In the end the US prosecutor after discussion with the US Copyright lawyer was forced to reluctantly accept his assertion that Richard had not committed the crime they were trying to charge him with in the US. In the end Richard was not charged with any crime in the US or the UK.

5: Human Rights Bar –

People subject to extradition requests from the US have not been shown to be able to argue that their Human Rights are being affected. (Gary Mckinnon the exception and where a great deal of politics came into play) Indeed the Home Office and United States government have previously taken extraordinary measures to influence the decision making of the ECHR

in respect of UK to US extradition. *"ECHR judges were likely influenced by a visit to Washington on March 1, when five current and former members attended a closed-door conference—"Judicial Process and the Protection of Rights"—with Supreme Court Justices Stephen Breyer, Samuel Alito, Anthony Kennedy and Sonia Sotomayor, as well as State Department legal adviser Harold Koh and Derek Walton, Britain's lead lawyer in Ahmad. A month later, the ECHR ruled that the extradition could proceed"*

This meeting with a closed session occurred just before the ECHR were due to deliver their decisions in respect of Babar Ahmad and Talha Ahsan and *which had already been expected to block their extradition* on Human Rights grounds.

https://www.youtube.com/watch?v=qgUWrY9sHRc

In my view after following numerous cases, in respect of the extradition of British citizens to the US, victims simply appear to have no human rights whatsoever.

6: Forum Bar- Crime & Courts Act 2013

After the 2003 Act was brought into force there remained on the statute a perfectly drafted section relating to the Forum Bar against extradition, this was never brought into force. Lately some amendments have been made to the extradition act and a different Forum Bar enacted. In my view this has made a terrible situation worse than ever. Others will have provided details on this I am sure. These changes to the Extradition Act 2003 in respect of forum bar are as yet untested and it remains to be seen as to whether the forum is in reality an option for accused persons, somehow I don't think so. There remains an inclination for extradition to be the first option rather than the last.

Other extradition reforms have been introduced with regard to extradition to "Category 1" countries within Europe. Such as the "proportionality test" changes could go further and should now be extended to extraditions to countries beyond Europe – such as the US. The Extradition Act 2003 was brought into force after terrorist attacks and was meant to be used to deal with heinous crimes such as terrorism and murder which most reasonable people would agree is necessary. Extradition is being used to deal with non-serious matters that could and should be dealt with in our own justice system indeed I have a letter from Keir Starmer the then head of the CPS stating that Richard's case was not a serious matter when asked if the Crown Prosecutors guidelines Concurrent Jurisdictional Cases were followed. This case further illustrates that the Extradition Treaty between the UK and US is being misused time and time again and will continue to be so until a proper Forum Bar is applied in cases where the accused had never ventured to the US.

12 September 2014

Julia O'Dwyer, Jodie Blackstock, Michael Evans and Graham Mitchell – Oral Evidence (QQ 172-190)

Submission to be found under Jodie Blackstock

J.R. Parker – Written evidence (EXL0072)

I would urge the Committee to recommend that a prima-facie case must be established before an extradition is ordered, that there must be a right of appeal -no reason why this procedure should differ from an "ordinary" case-and legal aid should be available.

1 October 2014

Noelle Quenivet and Richard Edwards (Euro Rights) – Written evidence (EXL0044)

Summary
We welcome the opportunity to comment on the law of extradition. In our submission detailed below we focus primarily on matters relating to international law and human rights.

First, we believe that the maxim *aut dedere, aut judicare* needs to be interpreted as containing equal alternatives. As a consequence greater consideration should be given to the prosecution of alleged offenders within the UK, where appropriate. Bearing in mind the human rights bar we recommend the UK to review its statutes to ensure that, should it be in a position whereby it cannot extradite the individual, it can assert jurisdiction over offences covered in treaties containing *aut dedere, aut judicare* clauses. Further we would like the UK to be more pro-active in prosecuting individuals rather than wait for an extradition request to examine the acts of the alleged offenders.

Second, we make suggestions for the improvement of the protection of human rights during and after extradition. We believe that the Extradition Act needs to be amended to require courts to consider EU Charter rights as a bar to extradition. We have also formed the view that the human rights bar in the Extradition Act might be supplemented by a schedule detailing the form of human rights abuse likely to give rise to difficulties in the extradition context. Moreover, ideally we would like States listed in Category 2 to be further divided into States with good/poor human rights records. We however understand that this might not be possible for diplomatic reasons and thus make modest suggestions with regard to the interpretation of the law.

Third, we propose the UK to streamline its use of memoranda of understanding and make suggestions as to the content and form of these legal instruments. In particular memoranda of understanding should take the form of treaties and contain sections on the safeguard of human rights, a dedicated post-transfer monitoring mechanism, the reaffirmation of the receiving State's willingness to cooperate with international monitoring mechanisms as well as a dispute settlement clause.

General

4. To what extent is extradition used as a first resort when prosecuting a crime committed in another jurisdiction? Should greater use be made of other remedies?

1. The Latin maxim *aut dedere, aut judicare* is often used in international law to denote the obligation of a State to extradite as a first resort and then, failing to secure an extradition (because of e.g. possible human rights infringement or the lack of an extradition treaty) or unwilling to extradite the individual, to prosecute the individual (the so-called 'Hague' formula).[274] Treaties which contain such clauses reaffirm the

[274] *See* Article 7 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft. For a full list of treaties, *see* Report of the International Law Commission, Sixty-fifth session (6 May–7 June and 8 July–9 August 2013), UN

principle of jurisdiction based on territory as the strongest and primary basis of jurisdiction[275] as they give priority to extradition to the State in whose territory the crime is committed. In this context *aut dedere aut judicare* are not equal alternatives as the duty to extradite is viewed as paramount, for the duty to prosecute only arises when the requested State's domestic legislation or international obligations are a bar to extradition.

2. We submit that the prevailing view that extradition as the principal method of bringing fugitive offenders to justice must be revisited in light of the UK's human rights obligations. Indeed, the near automaticity of accepting extradition requests means that individuals who have good grounds to believe that their human rights will be infringed in the State prosecuting them frequently seek to appeal (we note here with concern the removal of the automatic right to appeal (s.160 of the Antisocial Behaviour Crime and Policing Act 2014 Amending s.26 Extradition Act 2003)). Often a long legal battle ensues (e.g. Gary McKinnon, Abu Qatada, etc.) and this provides bad publicity for the Home Office, delay in replying to extradition requests (which could damage bilateral relations with the requesting State), and possible proceedings before the European Court of Human Rights (that may unnecessarily prolong the extradition process with the inevitable interim measures[276]).

3. In *all* extradition requests the UK must carefully examine whether the surrender of the alleged offender complies with its human rights obligations (see below, answer to *Question 9, para 10*).
4. If the individual cannot be extradited then the UK must examine whether it has jurisdiction over the crime. Undoubtedly, the UK must ensure that it fulfils its duty to cooperate in combating impunity as provided through the obligation to extradite or prosecute enshrined in a number of treaties[277] it has ratified. As a result, we recommend that the UK review its statutes to ensure that it has criminalized all relevant offences (those listed in the treaties to which the UK is a party) under domestic law and establish/expand its jurisdiction over such offences committed abroad so as to ensure that the individual can be tried in the UK, and that consequently the UK does not breach its legal obligations under the *aut dedere aut judicare* principle. The UK must enable itself to opt for the prosecution alternative. An excellent illustration whereby the UK has satisfied its international legal obligations occurred when the House of Lords upheld the request by Spain to extradite Pinochet to face charges of torture under the Criminal Justice Act 1988 (which implements the UK's duties under the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). The 1998 Act made it a crime under English law for anyone to commit torture anywhere in the world.[278]

Doc A/68/10, Annex A, Report of the Working Group on the Obligation to Extradite or Prosecute, footnote 28 (hereinafter ILC Report).

[275] *Bankovic and Others v Belgium and 16 Other Contracting States,* Application 52207/99, 12 December 2001, para 59; *Al Skeini and others v UK,* Application No 55741/07, 7 July 2001, para 131; *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] ICJ Rep 136, para 109.

[276] See e.g. *Khemais v Italy*, Application No 246/07, 24 February 2009, paras 80-83; *Trabelsi v Belgium,* Application No 140/10, 4 September 2014, paras 144-154.

[277] ILC Report, *supra* note 1, para 2.

[278] *Ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147.

More of this is needed. There should be less (ideally, no) cases where individuals who cannot be extradited because of the human rights bar are simply not facing justice. For example, following a judicial decision not to extradite four Rwandans[279] the UK did not start criminal proceedings against them as it did not have jurisdiction (this has been remedied with the Coroners and Justice Act 2009 that amends the International Criminal Court Act 2001) and the individuals were released from custody (to be arrested again in May 2013 following a renewed extradition request by Rwanda).

5. That being said, in some instances, the UK is granted by virtue of international law jurisdiction over some crimes and thus obliged to prosecute the individual irrespective of whether an extradition request has been made. Some treaties contain a *judicare vel dedere* clause that does not make 'this obligation conditional on refusal to honour a prior extradition request'.[280] We believe that here more could be done by the UK to prosecute alleged criminals residing in the UK. Not only is the UK violating international law[281] but it is also putting itself in a position whereby it is 'inviting' extradition requests that will then need to be carefully reviewed.

6. In particular the Geneva Conventions (Articles 49 GC I, 50 GC II, 129 GC III, 146 GC IV) and Additional Protocol I (Article 86) oblige the UK to actively seek individuals who have alleged committed grave breaches. The Commentary to the Geneva Conventions is very clear 'The obligation on the High Contracting Parties to search for persons accused of having committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all despatch. The necessary police action should be taken spontaneously, therefore, and not merely in pursuance of a request from another State'.[282] With regard to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 the CAT Committee has explained that 'the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition'[283] and the International Court of Justice has come to a similar conclusion.[284]

7. Under such treaties extradition is an option unless the State refuses to prosecute the individual. When faced with an extradition request under such treaties, the UK is obliged to choose between either proceeding with the extradition or submitting the case to its own judicial authorities[285] as extradition and prosecution are alternative

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[279] *Vincent Brown aka Vincent Bajinja, Charles Munyaneza, Emmanuel Nteziryayo, Celestin Ugirashebuja v The Government of Rwanda and The Secretary of State for the Home Department*, [2009] EWHC 770 (Admin).
[280] International Law Commission, Sixty-first session, Geneva, 4 May-5 June and 6 July-7 August 2009, *The Obligation to Extradite or Prosecute (aut dedere aut judicare), Comments and Information Received from Governments*, UN Doc A/CN.4/612, para 15; ILC Report, *supra* note 1, para 15.
[281] *Questions Relating to the Obligations to Prosecute or Extradite (Belgium v Senegal*) [2012] ICJ Rep 422, para 95.
[282] Jean Pictet, ed., *Commentary on the Geneva Conventions of 12 August 1949 relative to the Protection of Civilian Persons in Time of War* (Geneva, International Committee of the Red Cross, 1956), p 621.
[283] Communication No 181/201, *Suleymane Guengueng et al v Senegal*, UN Doc CAT/C/36/D/181/2001, 17 May 2006, para 9.7
[284] *Belgium v Senegal, supra* note 8, para 94.
[285] *Suleymane Guengueng, supra* note 10, para 9.7.

ways to fight impunity.[286] That being said, 'national authorities are left to decide whether or not to initiate proceedings in light of the evidence before them and the relevant rules of criminal procedure'[287] as the obligation is actually only a duty to submit the case to the prosecuting authorities.[288] We thus submit that it would be more judicious for the UK to start proceedings against the individual whenever found on the territory of the UK rather than wait to be served with an extradition request.

8. Further, with the establishment of the International Criminal Court and various *ad hoc* international or hybrid criminal tribunals, a State might now have recourse to another alternative, namely to surrender the individual to the competent tribunal although clearly this solution would only work in situations where the tribunal has jurisdiction over the crimes.

Human Rights Bar and Assurances

9. Is the human rights bar as worded in the Extradition Act 2003, and as implemented by the courts, sufficient to protect requested people's human rights?

9. We believe that the protection of human rights in the extradition process could be further improved. With respect to Category 1 (European Arrest Warrant) cases there should be a statutory requirement to consider the rights and freedoms protected by the Charter of Fundamental Rights of the European Union. In our opinion the Charter has already legal effect in this context. Although the EAW is governed by a Framework Decision under the old pillar structure and thus not of direct effect (Article 34 TEU) the Court has in *Pupino*[289] stated that such decisions could have indirect effect, i.e. national courts are required to interpret domestic law in light of the wording and purpose of the framework decision. Accordingly we contend that this is an area governed by EU law, albeit indirectly, and consequently falls within the scope of application of the Charter.[290] Of course, once the existing Framework Decision is replaced or repealed, the new provisions will not enjoy the protection of Protocol No 36 on Transitional Provisions (TEU) and will become justiciable. However we believe that the enhanced protection of human rights in this context requires that the UK take a proactive role in this context before bowing to the inevitable. We believe that Sections 21 and 87 of the Extradition Act should be amended to require courts to consider Charter rights as a bar to extradition in addition to convention ones when dealing with Category 1 cases. In many cases the practical effect of these changes will be limited. However there might be cases where the broader range of rights and freedoms in the Charter could assist the administration of justice.

10. Moreover we have formed the view that the human rights bar in the Extradition Act might usefully be supplemented by a schedule detailing the form of human rights abuse likely to give rise to difficulties in the extradition context. The case-law of the

[286] *Belgium v Senegal, supra* note 8, para 50.
[287] *Belgium v Senegal, supra* note 8, para 95.
[288] ILC Report, *supra* note 1, para 27.
[289] Case C-105/03, *Pupino* [2005] ECR I-5309, para 43.
[290] Case C-617/10, *Åklagaren v Hans Åkerberg Fransson* [2013] ECR (nyr), paras 19-20.

European Court of Human Rights highlights that an individual cannot be extradited if there is a risk that:

- He/she will be arbitrarily deprived of his/her life;[291]
- He/she will be subject to ill-treatment or torture;[292]
- His/her security and liberty will not be safeguarded;[293]
- He/she will not be given a fair trial;[294]
- He/she will be discriminated against on the grounds of social status, race, ethnic origin or religious belief;
- If sentenced, he/she will be given irreducible life without parole.[295]

11. Such a clear elucidation of the human rights grounds would undoubtedly assist in the administration of justice. This should be married to a more liberal approach to evidential matters. A wider range of materials might be judicially taken notice of. The European Court of Human Rights examines 'recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources, including the US State Department'[296] as well as materials produced by the international organisations, including the United Nations and its charter- and treaty-bodies (e.g. UN High Commissioner for Human Rights, Human Rights Council, Committee against Torture).[297] Just as there is a strong presumption in the case of some States that they are fulfilling their obligations as contracting States of the Council of Europe and members of the European Union and that evidence from 'recognisable sources' with the need to rebut it,[298] the reserve is also true.

12. Ideally, we would recommend that Category 2 be further divided into States with a good 2(1) and a poor 2(2) human rights record respectively. For those States listed in 2(1) the court should apply the law as it is. For those States listed in 2(2) if the individual whose extradition is sought can raise legitimate concerns of a risk of his/her rights to be violated then it should be for the executive to rebut this presumption.

13. The lists of Category 2(1) and 2(2) could be compiled using third party documentation.[299] The UK is no stranger to either such lists or them being used for presumption purposes, for, Asylum Procedure Directive 2005/85/EC (to be replaced by Directive 2013/32/EU on 21 July 2015) recognise that certain States can be designated as generally safe for their nationals. We however would like to stress that the list should only be used as a procedural tool. As said earlier, it does not divest the UK from its obligation to examine whether the surrender of the alleged offender complies with its human rights obligations.

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[291] *Bader and Kanbor v Sweden*, Application No 13284/04, 8 November 2005, para 42.
[292] *Soering v UK*, Application No 14038/88, 7 July 1989, para 91.
[293] *Othman v UK,* Application No 8139/09, 17 January 2012, para 231.
[294] *Othman, supra* note 20, para 258.
[295] *Trabelsi, supra* note 3, para 138.
[296] *Klein v Russia*, Application No 24268/08, 1 April 2010, para 47.
[297] See the range of materials used by the European Court of Human Rights in *Othman, supra* note 20.
[298] *Badre v Ct of Florence Italy* [2014] EWHC 614 (Admin), para 41.
[299] See examples of materials used in *Klein, supra* note 23 and *Othman, supra* note 20.

14. We however recognise that for diplomatic reasons it might not be possible to divide Category 2 in further categories and thus in the alternative submit that an individual whose extradition is sought should be able to show that there is *a* risk rather than *a real* risk of being subjected to one of the heads of potential abuse listed above. Indeed, there has been for some time concern expressed that the threshold has been set at too high a level for success in cases where an individual seeks to rely on them as a bar to extradition.[300] While it is of course important to recognise that there are other interests at play in this context (e.g. comity) there is a danger that if the threshold is set too high the rights become theoretical and illusory. On reflection we have come to the conclusion that when requests emanate from Category 2 states with an established good human rights record then the court should apply the law as it is.

10. Is the Practice of Accepting Assurances from Requesting States to Offset Human Rights Concerns Sufficiently Robust to Ensure that Requested People's Rights are Protected?

15. Compared to other Member States of the Council of Europe the UK has made extensive use of diplomatic assurances in extradition cases. Further, in contrast to other Member States that rely on diplomatic assurances given on an *ad hoc* basis, the UK has formalised them via bilateral memoranda of understanding. Nonetheless the European Court of Human Rights has since 1996[301] shown great reluctance to accept diplomatic assurances as such and has stressed that such assurances must be judicially reviewed.[302] We would like to stress that diplomatic assurances are only one of the elements to ascertain whether the State has complied with its Convention obligations. As a result such diplomatic assurances must be examined on a case-by-case basis.

16. Needless to say that the provision of diplomatic assurances does not relieve the UK from its obligation to conduct a *full* assessment of the risks incurred by sending the individual to the requesting State. Recourse to memoranda of understanding should be limited to cases where there is a real risk that the extradition of an individual would violate his/her human rights and because of practical or jurisdictional problems it is impossible to prosecute the individual in the UK (see above, answer to *Question 3, para 4*). In this regard memoranda of understanding enable the UK to fulfil its duty to cooperate with other States in the fight against impunity whilst it complies with its human rights obligations under notably the European Convention on Human Rights but also the International Covenant on Civil and Political Rights and the Convention against *Torture* and Other Cruel, Inhuman or Degrading Treatment or Punishment. We suggest the UK to streamline its use of memoranda of understandings so as to fulfil its obligations.[303]

[300] Human Rights Joint Committee, *The Human Rights Implications of UK Extradition Policy,* 7 June 2011, para 71.
[301] *Chahal v UK,* Application No 22414/93, 15 November 1996.
[302] *Saadi v Italy,* Application No 37201/06, 28 February 2009, para 148.
[303] See *Othman, supra* note 20, para 189.

17. The European Court of Human Rights has not only cautioned against reliance on diplomatic assurances in States with poor human rights record[304] but also in a number of cases[305] found that even assurances that are well formulated (i.e. safeguarding the rights of the individuals, providing individualised information, etc) they may not constitute a way for the requesting State to fulfil its obligations under the ECHR when the receiving State has a poor human rights record. In other words virtually no diplomatic assurances would offer sufficient protection. In line with Thomas Hammarberg (former Council of Europe Commissioner for Human Rights) we believe that diplomatic assurances "should never be relied on, where torture or ill-treatment is condoned by… Governments and is widely practiced"[306] or if the individual is unfairly tried. If extradition is sought by such a State, it is recommended that the UK acts in substituting prosecution and asks the requesting State to collaborate with the investigation and trial. The requesting State should also be entitled to send observers to the trial, unless security issues justify their non-admittance.

18. In cases where there are doubts that the human rights of the individual extradited will be respected the UK could use a memorandum of understanding, especially with States with which the UK has strong bilateral relations and which have previously complied with diplomatic assurances[307] or with the European Convention on Human Rights (though not EAW States) contracting parties.[308] Although Article 2 of the Vienna Convention on the Law of Treaties acknowledges that treaties can take any form we recommend that the UK makes it clear that the memoranda of understanding are treaties and thus legally binding upon the parties. Whilst the ECtHR has considered both oral[309] and written assurances in various forms the UK would find it easier in a case brought before the ECtHR to demonstrate that it complies with the requirement for the assurances to be legally binding. This would also mean that the UK would fulfil the requirement that the assurances are provided by the relevant authority[310] and binding on all branches of the State (executive, judicial, legislative) and levels of the State (national and local authorities[311]).
19. Bearing in mind the case-law of the ECtHR the UK must ensure that each treaty contains as a minimum the following items:
    - A section on the safeguarded human rights that specifies the relevant international treaties in relation to the rights we listed under *Question 9, para 10*. With regard to the risk of the individual being sentenced to an irreducible life sentence, the State might be amenable to a suggestion that the person serves his/her sentence he/she would benefit from the domestic rules on parole.

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[304] *Chahal, supra* note 28, para 105; *Ismoilov v Russia*, Application No 2947/06, 24 April 2008, para 127; *Saadi v Italy*, Application No 37201/06, 28 February 2009, para 147; *Soldatenko v Ukraine,* Application No 2440/07, 23 October 2008, paras 71, 73.

[305] *See* e.g. *Gaforov v Russia*, Application No 25404/09, 21 October 2010, para 138; *Sultanov v Russia*, Application No 15303/09, 4 November 2010, para 73.

[306] Memorandum by Commissioner for Human Rights of the Council of Europe, cOMMdh (2008)23, 18 September 2008, paras 92-93.

[307] *Babar Ahmad and others*, Applications Nos 24027/07, 11949/08 and 36742/08, 6 July 2010, paras 107-108.

[308] *Chentiev and Ibragimov v Slovakia,* Application Nos 21055/08 and 51946/08, 14 September 2010; *Gasayev v Spain,* Application No 48514/06, 7 February 2009.

[309] *See* e.g. *Shamayev and Others v Georgia and Russia,* Application No 36378/02, 12 April 2005, para 184.

[310] *Khemais, supra* note 3, para 59; *Soldatenko*, *supra* note 31, para 73.

[311] *Chahal, supra* note 28, paras 105-107.

- A dedicated post-transfer monitoring mechanism[312] that is effective,[313] detailed, objective, impartial and sufficiently trustworthy.[314] For example, either UK diplomatic personnel could monitor the applicant[315] or the States would agree that a specific NGO[316] undertakes the monitoring. That being said, we would like to sound a note of caution here as victims of ill-treatment, fearing reprisal, are reluctant to speak about their abuse, or are not believed if they do.
- A reaffirmation that the receiving State is willing to cooperate with international monitoring mechanisms as well as investigate allegations of torture and punish those responsible.[317]
- A dispute settlement clause whereby the two States agree to set up a mechanism that will provide for the interpretation and enforcement of the treaty.

20. The individual to be extradited must be able to request judicial review of his detention[318] which, as expressly stated by the European Court of Human Rights,[319] includes a review of the diplomatic assurances. Further the undertakings must be individualised and not enshrined in a formulaic document. For example the UK must take into account that the individual might have been previously ill-treated there.[320]

12 September 2014

312 *Gasayev, supra* note 35
313 *Sellem v Italy,* Application No 12584/08, 5 May 2009, para 42.
314 See *Pelit v Azerbaijan,* Communication No 281/2005, 29 May 2007.
315 See e.g. *Gasayev, supra* note 35.
316 See e.g. *Othman, supra* note 20.
317 *Soldatenko*, *supra* note 31, para 73; *Koktysh v Ukraine*, Application No 43707/07, 10 December 2009, para 63.
318 *Ryabikin v Russia,* Application No 8320/04, 19 June 2008, para 137.
319 *Babar Ahmad and others*, *supra* note 34, para 106.
320 *Koktysh v Ukraine*, *supra* note 44, para 64.

William P. Quigley, Arun Kundnani, Pardiss Kebriaei, Sally Eberhardt, Baher Azmy, Laura Rovner, Saskia Sassen, Jeanne Theoharis – Written evidence (EXL0049)

Submission to be found under Baher Azmy

Jacob Rees-Mogg and Baroness Ludford – Oral evidence (QQ 154-171)

Submission to be found under Baroness Ludford

Laura Rovner, William P. Quigley, Arun Kundnani, Pardiss Kebriaei, Sally Eberhardt, Baher Azmy, Saskia Sassen, Jeanne Theoharis – Written evidence (EXL0049)

Submission to be found under Baher Azmy

M. Robinson – Written evidence (EXL0009)

Please extradition law is fit for purpose:

I urge the Committee to recommend that the law be changed as follows:

- British residents should not be extradited without a basic (prima facie) case against them being tested in a UK court

- If their alleged activity took place wholly or substantially in the UK, a judge should be able to bar their extradition – whether or not the CPS decides to prosecute in the UK

- The automatic right of appeal against an extradition order should be reinstated

- Extradition is part legal and part political – the Home Secretary should once more be obliged to block extraditions that would breach human rights

- Legal aid in extradition cases should not be means tested

Thanks

M. Robinson

22 August 2014

Jago Russell, Jacqueline Minor and Professor John R. Spencer – Oral evidence (QQ 24 – 35)

Submission to be found under Jacqueline Minor

Liberty and Kobre & Kim LLP- Oral evidence (QQ 54- 66)

Submission to be found under Kobre & Kim LLP

Saskia Sassen, Laura Rovner, William P. Quigley, Arun Kundnani, Pardiss Kebriaei, Sally Eberhardt, Baher Azmy, Jeanne Theoharis – Written evidence (EXL0049)

Submission to be found under Baher Azmy

Janis Sharp – Written evidence (EXL0080)

House of Lords Extradition Law Committee

Submission from Janis Sharp - Mother of Gary McKinnon

REASONS FOR EXTRADITION:

Prior to the 2003 extradition treaty, extradition was mainly used to capture and return fugitives to a country they had fled from after committing a heinous crime. However since the current extradition treaty came into use, many of the reasons given for extradition requests include ever more flimsy offences, often for alleged crimes that are the furthest thing from heinous or terrorist offences than could be imagined.

As being a fugitive is a legal requirement for extradition to take place, we surely cannot allow people to simply be labelled as fugitives, when they have never fled from or even set foot in the requesting country and clearly do not meet the definition of the word fugitive.

ATTEMPED SUICIDE. INNOCENT UNTIL PROVEN GUILTY NO LONGER APPLIES.

Paul & Sandra Dunham, a couple in their late 50s, took an overdose on the eve of their extradition to the U.S but were fortunately saved in the early hours of the morning by journalists camping outside their home who called the emergency services when they became concerned for their welfare.

David McIntyre, a former British soldier suffering from PTSD was extradited to America on **3rd July 2014** for alleged fraud. Mr McIntyre served as a soldier in the British Army and as a reservist in the Military Police and has seen active tours of duty in Afghanistan, Bosnia and Northern Ireland and provided security services to the US authorities in Iraq.

Whilst stationed with the Military Police at Camp Bastion in Afghanistan, on 4 July 2012, Dave McIntyre was informed by his senior officers that he was being sent back to the UK to be arrested on the basis of an American extradition request.

It transpired that a former business colleague had been prosecuted in the US and in order to successfully reduce his own sentence, had made allegations against Mr McIntyre of overcharging whilst contracted to provide security services to a US NGO.

As long as people such as British soldier David McIntyre would rather be fighting and being shot at in Afghanistan than to be extradited to the U.S for alleged overcharging/fraud, and vulnerable people such as Mr & Mrs Dunham try to take their own lives to avoid extradition to the U.S for what is basically an employment dispute/alleged fraud; it seems clear that changes to the extradition treaty are urgently required to provide much needed safeguards.

PLEA BARGAINS. NO EVIDENCE REQUIRED.

The U.S prosecutors know that in 96% of cases they will never need to prove guilt or need to defend their position in a trial, as at least 96% of all cases are dealt with by plea bargain in the U.S and never go to trial.

In cases involving the extradition of British citizens to the U.S I believe the percentage of plea bargains is significantly higher.

The U.S prosecutors therefore have virtually no need to concern themselves with whether or not they could convince 12 jurors of guilt, as the need to prove guilt beyond reasonable doubt will rarely arise in cases where British people have been extradited to the U.S, as plea bargains are generally the order of the day whether or not those accused are innocent.

A former U.S federal prosecutor has stated, including in evidence to this committee, that It is very rare that a Grand Jury stands in the way of an indictment and that it is basically a rubber-stamping excercise.

DIPLOMATIC RELATIONS AFFECT ON DECISIONS BY U.K JUDGES AND U.K PROSECUTORS TO EXTRADITE IN CASES OF CONCURRENT EXTRADITION

I believe that Theresa May introduced Forum in the understandable belief that our Prosecutors and Judges would be more inclined to refuse extradition in cases where concurrent jurisdiction applied.

However it is highly likely that U.K prosecutors and our judges take into account the view of U.S officials who have stated, including in evidence to this committee, that **our overall diplomatic relationship would be affected, even in a small way, if the U.K refuse to extradite someone that the U.S has applied for**.

This is undoubtedly an added pressure on the CPS to refuse to prosecute in the U.K in cases of concurrent jurisdiction and on our judiciary to favour rather than to refuse extradition to the U.S.

In cases of concurrent jurisdiction, there are currently no proper safeguards in place to avoid the cruel and extreme punishment of extradition. Ensuring that priority is given to prosecution here in the U.K. would go a long way to help, which, I believe, was the intention of Mrs May when she introduced a forum bar.

The U.S is inexplicably awarded precedence in almost all such cases. In fact I am not aware of a single case of concurrent jurisdiction where the UK has successfully extradited someone from the US.

In such cases the UK does not appear to seek extradition but instead affords the U.S justice system the respect and trust, that they are capable of trying and dealing with offenders who have committed crimes while physically on U.S soil, without having to resort to extradition and the outsourcing of their justice.

It seems however that we are not afforded the same respect and trust by the U.S to deal with our own citizens. Successful safeguards that existed for centuries in British extradition law have all too hastily been discarded.

EQUAL RIGHT TO CONTEST EVIDENCE IN COURT PRIOR TO EXTRADITION

Innocent until proven guilty has effectively been dispensed with in cases of extradition, as people in Britain can now be punished by extradition on hearsay, with no right to contest either evidence or hearsay in a British court before extradition can take place.

In extradition cases from the U.S to Britain; the initial determination from a judge in the U.S that there is probable cause for arrest, can be challenged in a U.S court hearing prior to extradition being decided upon.

People in Britain should at the very least be given the same rights as their American counterparts to challenge evidence or hearsay in a British court before the extreme punishment of extradition can take place. It is wholly unreasonable to continue to disadvantage our countrymen by denying them equal rights in this regard.

ALLEGED EVIDENCE BEING HELD IN THE U.S

In the case of my son Gary McKinnon and in the case of Richard O'Dwyer, Talha Ahsan and others; the British Police handed over the alleged evidence to their US equivalents, otherwise it would have remained here in the U.K, thus giving the CPS the wherewithal to launch prosecutions against them here in the U.K, providing the evidence was strong enough to warrant it.

Astoundingly, more than a decade after the U.S indictment; on the 14th December 2012 the CPS announced that they were refusing to prosecute my son Gary as they did not believe they had the evidence that could lead to a conviction and additionally because of the passage of time.

In the words of Lord Justice Stanley Burnton in court in 2009 after first reading the CPS report detailing the acute lack of evidence against Gary submitted by U.S prosecutors; Justice Stanley Burnton said:

"Do you realise how embarrassing this would be if Mr McKinnon were to be tried in the U.K"? The CPS lawyer answered "Yes my Lord".

OVER ZEALOUS U.S PROSECUTORS PURSUING EXTRADITION EVEN WHEN DISPROPORTIONATE

Prima Facie worked well in Britain and afforded the protection needed. Controversy on extradition arose when the 2003 extradition treaty began to be used in late 2004 and U.S prosecutors simultaneously became overzealous with numerous extradition requests for offences that would never previously have warranted extradition.
Extradition in the case of heinous crimes that a fugitive has fled from the scene of is clearly in the interests of everyone. However extradition is deemed by the public to be disproportionate for many of the crimes that people in Britain are now being extradited for, hence the disquiet currently existing here in many quarters.

In the case of Richard O'Dwyer, it was clearly not in the public interest to extradite a young student for a copyright offence relating to part of his studies at university.

IMBALANCE

In information from the Home Office provided under the FOI act; in 2010, 33 people had been extradited from the US to the UK, and only three of those were known to be US nationals under the new arrangements, with the 2003 treaty and Act. In that same period, 62 had been extradited from the UK to the US; 28 were known to be British nationals or had dual citizenship. That shows, in that period, more than nine times the number of British nationals were being extradited to the US than vice versa and, given the different sizes in population, you would expect that to actually be the reverse. The statistics reflect the imbalance that exists.

We are told that the United States has never, ever denied the U.K an extradition request. However to my knowledge the U.K has never, ever requested the extradition from America of anyone who had never set foot in Britain or of anyone who was physically in the U.S when their alleged crime was committed, whereas the opposite is true in regard to extradition requests from U.S prosecutors.

In Article three section two of the us constitution it states:

> *The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed*

NO EVIDENCE REQUIRED TO LOSE YOUR LIFE

The devastating effects that fighting extradition has and is having, on individuals and families that the Extradition Treaty was never meant to apply to cannot be overstated.

People, who are extradited under the current extradition treaty, stand to lose their jobs, their homes, their families and their lives....and all without any contestable evidence of guilt having to be provided. Evidence that can be contested in a court by the accused prior to extradition has been dispensed with.

My son Gary McKinnon denied the U.S allegations of damage which made the alleged crime extraditable. Allegations that appeared to be used to turn a section 2 computer misuse offence with a then 6 months to one year sentence, into an extraditable crime with a potential 60 year sentence (10 years per count)

After a decade of mental torment, Theresa May thankfully refused to extradite my son under Article 3 of the Human rights act, and for that I am forever grateful.

FORUM. TECHNOLOGY REPLACING EXTRADITION

Something that might be acceptable to all and would help to quell the current disquiet, is for people in Britain who have never set foot in the requesting country, to automatically be tried in the U.K by a jury of their peers.

Evidence from the U.S could be presented via video link, which in this high tech age would be relatively simple and would avoid the extremely cruel punishment of extradition and incarceration in a foreign land, of our countrymen who have the absolute right to avoid punishment and be considered innocent until proven guilty beyond reasonable doubt.

U.S born Mr Stanley Tollman was allowed to plead guilty and to be sentenced via video link in the U.K in 2006, thus avoiding the trauma of extradition to the U.S. I can see no reasonable argument not to extending the use of technology, as opposed to continuing with the outdated alternative of extradition. Extradition is a cruel and unnecessary punishment being inflicted on those supposedly presumed innocent until proven otherwise.

PRIMA FACIE EVIDENCE NOT PRESENTED IN 2002 DESPITE IT BEING REQUIRED AND THE 2003 EXTRADITION TREATY NOT YET HAVING BEEN WRITTEN

Had Gary been allowed to challenge the allegations of damage subsequent to his arrest in March 2002 when Prima Facie evidence was required but not presented, or after his re-arrest in July 2005, (when no evidence was required to extradite) then my son and our family would not have had to endure the worst ten years of our lives. Gary has lost ten years of his youth and I have lost ten of my twilight years.

Surely there should be a statute of limitations with regard to the pursuit of extradition when the allegations do not relate to murder or other heinous crimes.
The requirement of evidence that can be contested by the accused in an English court must surely be reinstated if our judicial system is to once again become fair and credible and afford British citizens the protection they are entitled to.
Our forefathers fought and died to gain and to retain those rights to protect British citizens. To betray those rights is to betray the brave men and women who died to uphold them. To betray those rights means that the terrorists have won.

PUNISHMENT GOES ON.

Those who have been extradited even when innocent, have to start all over again when they return to the U.K. They have no job, no income and sometimes no home to come back to and the breakup of family or the death of family members may have taken place.
My son Gary's punishment continues as his father who lives in Scotland has had a stroke but as Theresa May's decision not to extradite applies under English law, Gary cannot travel outside of England or Wales without risking extradition to the U.S. Gary cannot visit his father in hospital in Scotland and will be unable to attend his dad's eventual funeral, which pains him deeply.
However we are incredibly grateful that Gary's life was saved and that we have him with us and consider ourselves to be infinitely more fortunate than most, thanks to Theresa May's courageous decision and to all the good people who helped us.

Do not believe that the extradition squad will never come knocking on your door, or grabbing you in the street and bundling you into a car as they did in Gary's case. Without protections being reinstated, it could very easily be any one of your family next. These protections are needed for your children, your great grandchildren and your descendants beyond.

Thank you for taking the time to read my views. I personally have great faith in the Lords and believe that you will take the brave decisions needed to be taken to safeguard and uphold the values and retain the rights that so many young British men and women died to achieve.

With deepest respect

Yours Sincerely

Janis Sharp (Mother of Gary McKinnon)

19 November 2014

Andrew Southam and Dr. Ted R. Bromund – Written evidence (EXL0048)

Submission to be found under Dr. Ted R. Bromund

Professor John R. Spencer, Jago Russell and Jacqueline Minor – Oral evidence (QQ 24 – 35)

Submission to be found under Jacqueline Minor

Daniel Sternberg – Written evidence (EXL0051)

HOUSE OF LORDS SELECT COMMITTEE ON EXTRADITION LAW
RESPONSE TO CALL FOR EVIDENCE – Daniel Sternberg

1. This is a response to the House of Lords Select Committee on Extradition law call for evidence. I am a barrister practising in the field of Extradition Law. I represent both requesting authorities (prosecuting) and requested persons (defending). I regularly appear in extradition hearing in Westminster Magistrates' Court, in appeals to the High Court and in associated Judicial Review proceedings. I also advise in 'import' extradition cases; where the extradition of a person to the UK is sought or takes place. I advised the CPS on extradition law aspects in the case of *R v Jeremy Forrest* in 2013 following his extradition to the UK.

2. In addition to practising in Extradition law I have written on the subject. Together with Katherine Tyler of Kinsgley Napley LLP and Anand Doobay of Peters and Peters, I re-drafted the chapter on Extradition in *Blackstone's Criminal Practice* a practitioner text. With Katherine Tyler I am the author of a number of Articles on *Westlaw Insight* – an online legal encyclopaedia covering topics including Initial Hearings, Extradition Hearings, Consent, time limits, Human Rights and changes to the Extradition Act introduced by the Crime and Courts Act 2013 and the Anti-Social Behaviour, Crime and Policing Act 2014. I am the Vice-Chairman of the Young Barrister's Committee of the Bar Council and a member of the Extradition Lawyer's Association and the Criminal Bar Association. All the views expressed in this response are entirely my own and I accept responsibility for any errors in this document. It sets out a practitioner's view and is not, and should not be considered to be, legal advice.

General

1. Does the UK's extradition law provide just outcomes? Is the UK's extradition law too complex? If so, what is the impact of this complexity on those whose extradition is sought?

3. In the majority of cases the UK's extradition law does provide just outcomes. It is applied properly by Judges at first instance and on appeal. The majority of extradition lawyers are skilled at properly deploying arguments for their clients'. Judges who sit in extradition cases are generally up to date with major developments in case law and also seek to do justice to the facts of a case, notwithstanding the 'hard-edged' rules and technical arguments that can arise in extradition cases.

4. It is easy to take the view that extradition proceedings are very specialised almost to the point of being cryptic. Lawyers practising in this area may jealously guard against outside intrusion. However, compared with general criminal law, extradition proceedings are relatively straightforward. The consolidation of nearly all extradition law in a single act of parliament assists practitioners and courts alike. The Extradition Act 2003 ('the 2003 Act') sets out the stages of the extradition hearing in a logical

process which can generally be explained to persons whose extradition is sought. However, given the myriad of different points that can be argued in an extradition hearing, it can be difficult for defendants to understand the process of extradition and the evidence that can be deployed in their cases. However, these issues of complexity are not entirely the fault of the underlying legislation, but due to the breadth of challenges that can be mounted to extradition. Further, the rapidly changing body of case-law can provide challenges to lawyers trying to advise clients. For example, the case law on Article 8 of the European Convention on Human Rights ('ECHR') that has developed since the Supreme Court's decision in *HH v Italy* [2012] UKSC may now be changed or reversed by the recent enactment of the proportionality bar in section 21A of the 2003 Act and associated guidance from the Lord Chief Justice.

2. Is extradition law fit for purpose in an era of increasingly multi-jurisdictional crime?

5. An adequate answer to this question cannot be given in the confines of a brief response to a call for evidence. The fact that parts of multi-jurisdictional crime may occur in the country from which extradition is requested is not a basis to refuse extradition (see *Cando Armas* [2005] 67). The forum bar, considered below, should provide protection from extradition for persons who should properly be tried in this jurisdiction. Assuming that defendants to offences which span jurisdictions should only be prosecuted once in one country, so as not to offend double jeopardy, it is still necessary to extradite defendants if they are outside the country in which the principal harm involved in an offence occurred. Ultimately, closer cross-border liaison between investigating and prosecuting authorities should lead to decisions as to the jurisdiction in which a prosecution should occur and hence from which country extradition should be sought or if multiple prosecutions should occur in different countries.

3. To what extent is extradition used as a first resort when prosecuting a crime committed in another jurisdiction? Should greater use be made of other remedies?

6. For the most part extradition is only used as a first resort where there is urgency in seeking the arrest and return of a person accused of a crime. It is a fundamental principle of extradition law that it cannot be used to obtain the return of a person to be interviewed or questioned. Extradition should not be requested until the prosecuting authorities are ready to bring a prosecution, even if formal stages of charging can only be completed on return of a requested person. The recent changes to the 2003 Act including sections 12A and 21B ought to allow preliminary stages of criminal proceedings overseas to be completed so as to permit extradition and speedy trial on return if extradition is ordered.

European Arrest Warrant

4. On balance, has the European Arrest Warrant (EAW) improved extradition arrangements between EU Member States? How should the wording or implementation of the EAW be reformed? Are standards of justice across the EU similar enough to make

the EAW an effective and just process for extradition? How will post-Lisbon Treaty arrangements change the EAW scheme once the UK opts back in to it?

7. The EAW has undoubtedly made extradition between EU Member States a swifter and more streamlined process. This process has benefitted the UK in ensuring the speedy return of persons accused of crimes in this jurisdiction. Reform of the EAW is a highly politically-charged subject. The use of the EAW in practice should be improved by the implementation of common standards across members of the EAW as to when an EAW should be issued. This should avoid the use of EAWs for offences such as theft of a chicken or attempted theft of a bicycle. Those are matters for the UK Government to take forward at a European level, rather than for further legislative amendments at a national level.

8. The EAW is premised on the principles of mutual trust and confidence between judicial authorities operating it as a fast track system of surrender. If standards of justice in the EU fall below the minimum standards required to make the EAW effective and just then the Courts of this jurisdiction should not shirk from refusing extradition. However, as far as I am aware, there are no judgments of the High Court in England and Wales holding that standards of justice in an EAW Member State are so different from our own as to violate Article 6 ECHR or to make extradition unjust. Given the differing legal traditions of the other states operating the EAW it is implicit within the system that acceptable levels of fairness apply to proceedings in all EAW Member States. All the signatories to the EAW are members of the Council of Europe and are signatories to the ECHR. If they are failing in providing appropriate standards of justice it will not only be in extradition cases that this issue will arise but also in litigation before the European Court of Human Rights. As to the post-Lisbon treaty opt out and opt back into the EAW, in theory this might preserve the status quo in operating the EAW. However, if for political reasons the UK's re-entry to the EAW was not successful, this would cast the UK's extradition relations into a state of great uncertainty.

Prima Facie Case

5. In circumstances where a prima facie case is not required, do existing statutory bars (the human rights bar, for instance) provide sufficient protection for requested people? Are there territories that ought to be designated as not requiring a prima facie case to be made before extradition? What rationale should govern such designation? What parliamentary oversight of such designation ought there to be?

9. It is inherent in EAW cases that there is no examination of the underlying evidence. That position pertained before the introduction of the EAW under the European Convention on Extradition. Since, other than in wholly exceptional circumstances, the extradition court is not concerned with the evidence in an EAW case, statutory bars to extradition and human rights provide a proper basis to resist extradition. As noted above, the statutory bases to resist extradition can be very broad. Additionally, judicially created bars to extradition such as validity under section 2 of

the 2003 Act for EAWs and abuse of process also provide broad protection for requested persons.

10. 23 countries are currently designated as not having to provide evidence of a case to answer under Article 3 of SI 3334 of 2003. There are approximately 94 countries designated as category 2 territories under Article 2 of that SI. A broad range of countries do not have to provide evidence of a case to answer including Canada, Switzerland, Russia, Ukraine, Norway, South Africa and Turkey. A large number of commonwealth countries are designated as part 2 territories but have to provide evidence of a case to answer. The rationale as to which territories are now designated as not having to provide a prima facie case is not entirely clear, other than the lack of such a requirement under multi-lateral agreements such as the European Convention on Extradition. Designation of territories not having to provide evidence of a case to answer should be extended to states where the UK has confidence in the justice system of that state rather than being based on diplomatic or political considerations. Parliament ought to review the list of territories so designated each year.

UK/US Extradition

6. Are the UK's extradition arrangements with the US comparable to other territories that do not need to show a prima facie case? If so, should the US nonetheless be required to provide a prima facie case, and why?

Sir Scott Baker's 2011 'Review of the United Kingdom's Extradition Arrangements', among other reviews, concluded that the evidentiary requirements in the UK-US Treaty were broadly the same. However, are there other factors which support the argument that the UK's extradition arrangements with the US are unbalanced?

11. The Scott Baker review was conducted by an experienced retired Court of Appeal Judge together with two highly experienced extradition practitioners. I agree with the conclusion of that report in relation to the similarity of evidential requirements in extradition requests made by the UK and US. In my experience, the United States does not request extradition where it does not have evidence of a case to answer against a requested person. Whilst the direct evidence is not presented to the extradition court, it is invariably summarised in an affidavit made in support of the request for extradition. It is unclear why the United States should be treated less favourably than countries such as Russia, where there are serious concerns about the fairness of trials, if its designation under Article 3 of SI 3334 of 2003 is removed. The fact that British citizens may be extradited to the USA to stand trial or serve sentences is not in itself a sufficient basis to treat the USA less favourably than Albania or Azerbaijan. The media say the UK-US extradition relationship is unbalanced. The general experience of extradition practitioners does not, in my opinion, bear this out.

Political and Policy Implications of Extradition

7. What effect has the removal of the Home Secretary's role in many aspects of the extradition process had on extradition from the UK? To what extent is it beneficial to have a political actor in the extradition process, in order to take account of any diplomatic consequences of judicial decisions?

8. To what extent are decisions of where to prosecute certain crimes and whether to extradite influenced by broader political, diplomatic or security considerations?

12. The removal of the Home Secretary's role in some aspects of extradition is a comparatively recent development. It is right that extradition should be primarily a judicial rather than a political process. Political considerations ought not to over-ride a judge's decision as to whether a person should be extradited. The diplomatic consequences of extradition ought to be considered before the initiation of a process which can deprive a person of their liberty and livelihood. Whilst the multi-jurisdictional effects of cross-border crime are considered above, decisions as to where certain crimes should be prosecuted should depend on factors including where the evidence is located and where the harm occurred (see section 19B of the 2003 Act) rather than because of political or diplomatic considerations, assuming that an equally fair and just trial takes place in either the requesting or requested state.

Human Rights Bar and Assurances

9. Is the human rights bar as worded in the Extradition Act 2003, and as implemented by the courts, sufficient to protect requested people's human rights?

13. The Courts' interpretation of human rights in extradition is fluid rather than fixed. Currently, it is predicated on a rebuttable presumption that an EAW and EU Member State is generally capable of protecting a person's convention rights, unless there is an international consensus to the contrary (see *Krolik and others v Poland* [2012] EWHC 2357 (Admin) for the general position and *Badre v Italy* [2014] EWHC 614 (Admin) for an illustration of a finding of systematic non-compliance with the ECHR). For non-EAW members the situation varies from country to country. The evolving standards of human rights established by both the European Court of Human Rights and the UK courts generally provides sufficient protection from extradition in breach of those standards. However, because of the evolving case-law, in particular of the Administrative Court and Supreme Court in London, rather than the European Court, it is possible for differing results to occur on the same facts. For example, the change in approach to Article 8 rights to family and private life following the Supreme Court's decision in *HH* (cited above) has meant persons who would previously have been extradited are now discharged. This change is not indicative of a failure to protect human rights, but of a changing and dynamic understanding of their reach and extent.

10. Is the practice of accepting assurances from requesting states to offset human rights concerns sufficiently robust to ensure that requested people's rights are protected? What factors should the courts take into account when considering assurances? Do these factors receive adequate consideration at the moment? To what extent is the implementation of

assurances monitored? Who is or should be responsible for such monitoring? What actions should be taken in cases where assurances are not honoured?

14. It is important to emphasis that the giving of assurances in extradition is founded in the context of an assumption of trust between states that have agreed extradition treaties or are signatories to the Framework decision on the EAW. In my experience, the Magistrates' and High Court subject assurances to scrutiny in accordance with the factors set out by the European Court of Human Rights' decision in *Othman v UK* (2012) 55 EHRR 1, in particular paragraphs 187-189 of that decision. Assurances that are insufficiently precise or are unenforceable may be rejected (see *Badre* above for an example of this). Monitoring of assurances post-extradition is more complex. Ultimately, if extradition partners cannot be trusted to deliver on assurances then those assurances should not be accepted. Monitoring of compliance with assurances ought to be a function of the UK's foreign policy, given the diplomatic context in which assurances are provided.

Other Bars to Extradition

11. What will be the impact of the forum bar brought into force under the Crime and Courts Act 2013?

12. What will be the impact of the proportionality bar in relation to European Arrest Warrant applications recently brought into force under the Anti-social Behaviour, Crime and Policing Act 2014?

15. The forum and proportionality bars are now being raised frequently in extradition cases at first instance and on appeal. Forum ought to prevent extradition where a trial ought properly to take place in the UK. It is yet to have full impact. The proportionality bar in section 21A gives statutory guidance to the Courts as to when extradition will not be proportionate, in addition to the existing body of case law on convention rights. Whilst not a 'triviality' bar in name, the proportionality bar ought to prevent extradition for the least serious offences (see also the Lord Chief Justice's guidance at section 17A of the Criminal Practice Direction).

Right to Appeal and Legal Aid

13. To what extent have changes to the availability of legal aid affected extradition practice, and the provision of specialist legal advice to requested persons? What has been the impact of the removal of the automatic right to appeal extradition?

16. Extradition cases at first instance are still bedevilled by delays in legal aid being granted or following refusal of legal aid. The position is unchanged from that set out in *Stopyra v Poland* [2012] EWHC 1787. It remains a serious and troubling problem at first instance. At present legal aid is regularly granted on appeal, allowing proper specialist representation. The automatic right of appeal remains in place at the time of drafting so I cannot comment in detail on the impact that the introduction of a permission stage will have on appeals. I suspect it may not reduce the High Court's

workload greatly if the refusal of permission to appeal can be renewed orally before a judge.

Devolution

14. Are the devolution settlements in Scotland and Northern Ireland fit for purpose in this area of law? How might further devolution or Scottish independence affect extradition law and practice?

17. As I only practice in England I am not well qualified to answer the final questions in this call for evidence. From my limited experience of liaison with prosecutors in Scotland, the devolution settlement in Scotland is fit for purpose with respect to extradition law. If Scotland votes for independence, its entire relationship with other EU members (and thus EAW territories) will be altered and an independent Scotland would have to make clear how far it considered itself bound by extradition treaties entered into by the UK government. Without knowledge of any post-independence settlement it is impossible to answer further.

Conclusion

18. I hope that the answers to the committee's questions are clear. If any part of this document requires explanation I would be happy to assist the committee in providing clarification.

DANIEL STERNBERG

12 September 2014

Daniel Sternberg, Ben Keith, Paul Garlick QC - Oral evidence (QQ 106-119)

Transcript to be found under Paul Garlick QC

Mark Summers QC, Dr Kimberley Trapp, Professor Rodney Morgan and Sheriff Kenneth Maciver – Oral evidence (QQ 120-131)

Submission to be found under Sheriff Kenneth Maciver

Mr and Mrs Symeou – Written evidence (EXL0027)

HOUSE OF LORDS
SELECT COMMITTEE ON EXTRADITION LAW

7th September 2014

Introduction

MR F and MRS H Symeou,
Parents of Andrew Symeou who was wrongly accused of murder over the death of a young Welsh man in Zante, Greece in 2007.

Background

1. In the summer of 2007 after an alleged altercation in a nightclub in Laganas on the island of Zante, witnesses claimed that their friend, an 18 year-old Welsh holidaymaker, was punched to the side of the face causing him to fall from a raised dance podium. The young man was immediately rendered unconscious and tragically died two days later in an Athens hospital.

2. The police investigation was conducted over four days by the local police department on the small island. These comprised of word-for-word identical statements, claimed by police to have been taken by different police officers on different days and times; Furthermore, it was found that statements made by the same witnesses back in the UK to South Wales Police, differed greatly to the statements in the Greek Police file.

3. After being shown a sequence of photographs taken in the club from the night before, the victim's friends had picked out a number of possible suspects including Andrew. At the time the photograph was taken, Andrew had a beard and moustache, however statements made in Greece described the perpetrator as clean-shaven and in South Wales gave no mention of a beard in the very detailed descriptions. The whole identification process in Greece was disorganised, chaotic and was not conducted even to a minimum level of competency expected in a manslaughter inquiry.

4. With this information, the police showed a montage of photographs in the hotels in the area. The hotel manager where Andrew and a number of his friends were staying was shown these photographs and identified Andrew as having been a guest. The majority of the group, including Andrew, had returned home on their scheduled flight, leaving behind two of their group who had booked a different package. On being informed by the hotel manager, these two friends were taken into custody and interrogated for eight hours. They were intimidated, threatened, slapped and punched, until they signed statements that were written in Greek, incriminating Andrew. The following day, the two reported this to the British Consul, saying that they were forced to sign false statements, written in Greek that they did not

understand. Once in the UK the parents of the two complained to the Foreign Office and also to the Zante police.

5. Regardless, in 2008, almost 12 months after the incident and four-day Greek police investigation, our son Andrew was arrested at our home in Enfield Middlesex on murder charges via a European Arrest Warrant, to be extradited to Greece in connection with the death of a man he had never crossed paths with.

6. The case against Andrew was based on a flawed and corrupt Greek police investigation. Police in Zante had fabricated evidence against him, which has been described by Private Eye magazine as "flawed, contradictory and in places ludicrous."

7. More recently, a British Coroner slammed the investigation as being “a misguided effort to solve the crime” and “not worth the paper it was written on.” A British court saw this evidence in 2008, but was not allowed to prevent Andrew’s extradition because of the EAW, and the basis on which it was formed – trust.

8. In July 2009 Andrew was extradited to Greece even though the High Court judges stated there was clearly abuse in the investigation.

9. In Greece Andrew was denied bail and suffered in prison for 11 months awaiting trial. He then spent a further year on bail unable to leave Greece before being finally acquitted in June 2011, after a stressful trial lasting over four months. Throughout this ordeal Andrew was on strong anti-anxiety medication and therapy.

10. Andrew was finally acquitted on the evidence originally shown to a British court three years earlier, before his extradition, however the opinion of the British court was that Andrew had grounds to fight the charges made against him in the jurisdiction that had requested his extradition.

General

11. It is fair to say that the UK’s extradition law has provided some just outcomes, however it is also clear that over the past few years cases such as Gary McKinnon, Deborah Dark, Gary Mann and Andrew Symeou have come to light where extradition law falls short of the judicial authority’s duty to protect the innocent, vulnerable and victimised.

12. In the majority of cases, extradition is used as a first resort when prosecuting an alleged crime committed in another jurisdiction. However, if there is strong evidence that contradicts the evidence presented in a case file, or shows an abuse of process or blatant manipulation and fabrication of evidence, there must be another remedy in place prior to a court decision being made, that safeguards innocent or vulnerable people from being extradited.

13. In the UK, the CPS examines case files before a decision is made to prosecute. However, in extradition cases the CPS represents a foreign jurisdiction, trusting the authority that there is a case to answer, or the case against that person has been conducted following high standards of procedure with ethical and transparent codes of practice. We believe that in certain extradition cases, the CPS should review the evidence and make a judgement as to whether a case for extradition and subsequent trial is justified.

14. We should add at this point that initially the Greek judicial authorities began the process of requesting Mutual Assistance from the UK. Unfortunately, the process stalled due to administrative incompetence in Zante and was never re-instated. It is fair to say that had the UK police been allowed to assist in their investigation, Andrew would not have been extradited. It came to light at the Cardiff Coroners Court in April 2011, that the Greek authorities did not respond to South Wales Police requests for information regarding the case.

The European Arrest Warrant

15. On balance, the European Arrest Warrant has not improved extradition arrangements between EU Member States. There are well documented cases of countries such as Poland using the EAW to request the extradition of people accused of trivial crimes, clogging up the system and resulting in avoidable court costs.

16. It is our opinion that the European Arrest Warrant was rushed through Parliament in the wake of 9/11, hidden within the wider Terrorism Act without sufficient safeguards. As we are well aware, when an EAW for a British national is issued by another European Member State, authorities in the UK must cooperate and extradite that person. A British court has little or no discretion to prevent an extradition based on prima-facie evidence in an appeal, even if the evidence is proof of innocence. It is our experience that the existing bars do not provide enough of a safeguard to prevent the extradition of an individual who is in possession of evidence that proves either their innocence, proves that there is no case to answer, or more seriously that the case against them has been clearly concocted and is based on evidence manipulated or fabricated by poorly trained, corrupt local police.

17. Andrew's case highlights the fundamental flaws with the EAW. Recently, Deputy Prime Minister Nick Clegg had told 'The Independent' newspaper that Andrew's case was a "travesty" showing "real problems" with the way that the EAW operates, and Immigration Minister James Brokenshire publically admitted on the Sunday Politics Show that his extradition was a mistake.

18. My wife and I have neither legal nor political backgrounds, so are therefore unable to offer an expert opinion on the wording or the legalities of the EAW. What we can show is the human and emotional side and offer an insight into the consequences and effects the scheme has on innocent people accused of a crime, and the heartache, financial struggle and sacrifices made by families of the accused.

19. On the question of whether the standards of justice across the EU are similar enough to make the EAW scheme effective, it is evident that this is in fact not the case. Greece is regarded as a modern and advanced country, with a sound political and legal system; and of course on the surface this is the case. However, Greece is a failing economy with endemic corruption stemming back to the days of the Ottoman Empire.

20. Our experience shows that many people in seats of authority do not question what subordinates have previously done. For example, in Andrew's case, the Investigating Magistrate did not seriously question the police about blatant manipulation of witness statements and the accusations of police brutality. Moving up the ladder, the local Public Prosecutor in Zante did not seriously question the Investigating Magistrate nor ask her to look into these matters.

21. Even further up the ladder, the Public Prosecutor in the Competent Judicial Authority that issued the EAW, again did not question the case file and took it on face value that a competent investigation was carried out and proceeded with the issue of the warrant.

22. In actual fact, it was this authority that lied to the CPS during Andrew's extradition hearing, claiming that there were 28 statements in the case file, the majority of which stated that Andrew Symeou was the perpetrator of the crime. This was a flagrant lie in an official document from the Public Prosecutor of the Competent Judicial Authority to the British CPS who had to stand up in court and represent the Greek authority. This illustrates that the EAW is ineffective and an unjust process for extradition, because trust is simply not enough. There needs to be a mechanism of transparency and accountability.

23. Moreover, unfortunately in our experience the Greek authorities were indignant and defensive when notified of the flawed investigation. This led to Andrew being placed in a dangerously vulnerable situation in a foreign country, which could have very easily led to a more permanent miscarriage of justice.

Prima Facie Case

24. In circumstances where a prima facie case is not required, such as extradition under the EAW scheme, the fact that Andrew Symeou was extradited is a clear indication that the existing statutory bars do not provide sufficient protection for requested people. By definition, if sufficient protection were in place Andrew would not have been extradited.

25. For the committee's information, our family instigated a formal complaint in Greece regarding the police investigation. The official response was that it was felt to be a competent and well-conducted investigation. As mentioned previously, this is not the opinion of the UK authorities, far from it in fact.

Statement by Andrew Symeou

26. "Firstly I would like to state that I am a law-abiding person with moral values and expectations and come from a loving and happy family. I did not deserve any of the treatment that I experienced from the ages of 19-22 years and the residual fall-out beyond. I should never have experienced that level of humiliation, emotional pain and trauma in my lifetime. I was a very young man deprived of the safety of his home, his education and family life. I was also deprived of the privilege of having evidence allowed which would prove categorically I was not the perpetrator. I feel the committee must understand that once the extradition process had begun I felt instantly convicted and sentenced.

27. If anyone in the committee would care to join me on a journey following the path of prisons and police cells I was made to endure, it may not be such a bad thing to see first hand the affects of the EAW on my life and that of my family.

28. I was twenty years old when I was dragged from my life at University and taken away from my family, friends and girlfriend. When landing in Greece, there was a row of police vans and police officers on the runway holding machine guns. From that point onwards, I was treated like a guilty man.

29. For four months I was held in a juvenile prison called Avlona. The summer was scorching and I was covered from head to toe in fleabites. The winter was close to freezing and I was made to sleep next to an open window; I would be rained or snowed on at night.

30. When I turned 21 I was transferred to Korydallos maximum-security prison, which was my worst fear. I was held there for a further seven months. Three prisoners and I shared a tiny cell with a sewage hole in the corner to use as a toilet. The cell was infested with cockroaches that would crawl over my body at night. The prison hallway was full of stray cats and the showers were covered in semen and faeces. The violence was intolerable and I witnessed racial-gang related riots that lasted for weeks. I was subjected to heroin users on a daily basis and was often stolen from by drug-addicted cellmates.

31. In June 2010 I was taken to Patras, another Greek city, for trial. This trial was adjourned due to administrative incompetence, having failed to summon key witnesses on time. I was then granted bail, which allowed me to stay in an apartment in Athens, but unable to leave the country another year of my life and education wasted.

32. I was on bail for an entire year before an emotion wrenching trial in Patras that lasted for four months in 2011. I felt I was deemed guilty in court and had to prove my innocence, a task made even harder as the Greek Police had claimed to have 'lost' vital CCTV evidence that would have cleared me immediately, also denying the brutality allegations against them. I was finally acquitted in June 2011".

What would have prevented Andrew's suffering?

33. The CPS should have been allowed to look at evidence and question witnesses if felt necessary. Had the CCTV footage been provided at that time, Andrew would have been cleared immediately as he was not in the venue at the time of the altercation. The UK police should have been allowed to 'insist' on Mutual Legal Assistance in the Greek investigation.

Was he deprived of a family life?

34. Yes, without doubt. Almost 11 months behind bars in various Greek prisons and police transfer units; A further 12 months on bail unable to leave the country, until finally being acquitted on the evidence that was present before his extradition.

35. For two horrendous years Andrew and our family were prevented from living a normal family life, split between a surreal existence in Greece and our home in the UK.

Was Andrew subjected to degrading and inhuman treatment?

36. Without a shadow of a doubt – No hot water for four months at the Avlona juvenile prison, where inmates were expected to wash with a hosepipe and cold water during the freezing winter months.

37. Andrew was subjected to overcrowded squalid conditions in a maximum-security prison in Athens described by Amnesty International as one of the worst in Europe.

7 September 2014

John Tanburn – Written evidence (EXL0006)

SUBMISSION to the House of Lords Committee on Extradition

I am a law graduate and author of a forthcoming book on the jurisprudence of freedom.
I have three main concerns on extradition:

1. No British citizen should ever be extradited without a *prima facie* case being affirmed by a judge of High Court or higher, and the right of appeal should apply to extradition cases as to other cases.
2. This should be an exclusively judicial process. To involve any member of the executive on grounds of diplomacy or political expediency, however pressing, is a betrayal of justice. Step forward Pontius Pilate.
3. Extradition arrangements with other jurisdictions must always be, and be seen to be, transparently mutual and equal. This is especially important in relation to the USA.

21 August 2014

Christopher Tappin – Written evidence (EXL0008)

To: The House of Lords: Committee on Extradition Law

Introduction

1. My name is Christopher Tappin and I have had firsthand experience of the US/UK Extradition Treaty, as I was extradited in February 2012 to Texas, and I have compiled a number of compelling reasons why it is unfair in its present form. My report acknowledges that a treaty is of mutual benefit to both countries but the U.S. Department of Justice would appear to have far wider parameters and agendas for its use. I will endeavour to highlight the reality of living under the threat of extradition and the devastating effects for those unfortunate enough to become embroiled in it.

Pre-extradition

2. Having been served an Extradition Notice but prior to extradition one has a number of legal processes in law that can be taken:

- Present your defence at your hearing at the Magistrate's Court
- Appeal the decision at the High Court
- Appeal the decision at the Supreme Court
- Appeal to the European Court of Human Rights

The above processes are available for use but in reality are completely ineffectual because the merits of the case are not open to debate, and the judiciary have their hands tied, by the Extradition Act (2003). After presenting my case for the defence, no challenge was made by the lawyer representing the U.S. Government. The prosecution offered no evidence at all, nor did they have to under the present arrangement. This meant that the credibility of any evidence against me could not be tested in any of our courts. All that was required was merely an accusation; not one shred of testimony or witness evidence. The same applied at the High Court, The Supreme Court and the European Court; no testing of evidence was required merely an accusation.

3. The European Court will consider your Human Rights and if you are a terrorist they will probably not allow extradition to the U.S.A. This is because the U.S.A. have had and still have an appalling record on Human Rights with additional penalties for going to trial, extremely long sentences and, of course, Capital Punishment. If the U.S.A. were to apply for E.U. membership it would be rejected on the Death Penalty issue alone.

Extradition

4. On 24 February 2012 I was taken from Heathrow by two Air Marshalls to El Paso in Texas. On arrival at Otero Federal Prison I was put into the SHU (Solitary Housing Unit) for two weeks. I was held in a cell with no window, the light on 24 hours a day, no way of telling the time as my watch was taken from me, my food was delivered three times a day through a

hatch in the door. I had no books or television to pass the time. After 36 hours I was taken in chains to a 20' x 20' cage for exercise, 1 hour per day, and once a week to shower and shave. When after 2 weeks I met The Warden of the prison, I asked why I was being treated so harshly and his response was "You opposed extradition, well that's the reason why boy, welcome to America". Later I learnt the official version was that I had requested to be held in solitary for my own safety. It was quite unbelievable. Would we treat our prisoners the same way subjecting them to such hostile and harsh conditions, if presumed innocent and an old age pensioner to boot.

Post Extradition

5. Having been extradited a number of rules which one takes for granted as part of the Extradition Act were ignored. Under the terms of the Agreement the trial should have taken place within 70 days of my arrival, but did not because there was a lack of evidence for the prosecution to proceed; despite having had 6 years to prepare the case for trial.

6. 10 days after arrival I was manacled hands and feet and taken at 4.00am, after breakfast, to the Court House where I was put in a solitary cage for over 5 hours. Finally I was taken to the court room to find out that the judge and the prosecution had already decided my fate. Bail was opposed because I was not a US citizen therefore I had no ties or family connection to the community and I was automatically deemed a flight risk. I was brought into America and cleared through Immigration not on a visa commensurate with the purpose of extradition, but on a four day parole. This meant that after 4 days I was automatically an illegal immigrant with no rights whatsoever and certainly no protection from the Constitution, which is afforded to their own citizens.

7. After two weeks I was transferred from the SHU to a cell which I shared with 5 others and after 2 months, and a further two hearings, I was eventually granted bail to reside with my lawyer in Houston until I found an apartment to rent within 5 miles of his home. At the 70 day mark at a hearing in El Paso, the Judge granted a Prosecution motion to delay trial on the grounds that there was insufficient evidence to proceed, and they needed more time to travel to London to obtain this evidence. When this motion expired another motion was filed to allow the prosecution time to study, in greater depth the evidence already in their possession.

8. There were more motions planned which would have delayed the trial even further and which would have kept me in the U.S. living alone, exiled from my friends and family and under the constant threat of imprisonment for the rest of my natural life.

9. Witnesses from the UK are not allowed to give evidence via a video link to the US. The reason given by the US Department of Justice is "They do not have the technology". Of course this is not true. Two of my defence witnesses refused to give evidence in the U.S. Courts for fear they might be charged with the same offence I was facing.

Conclusion

10. Based upon my experience and the reality of the U.S. Judicial system, there must be some sort of checks and balances procedure e.g. (prima facie case) before British citizens are routinely extradited without any evidence required or indeed offered. Allowing the U.S. Department of Justice to pluck and fast track our own subjects on the next plane, based purely on an accusation, is tantamount to bypassing our own citizen's rights in favour of a higher power. This higher power, has the ability to override our own judicial system, with absolutely no recourse to our own legislature. We have abrogated our responsibilities to our own citizens by eroding the traditional British justice safeguards, thus permitting other countries to dictate their standards of judiciary, whether inferior or superior. But, it is not our law and not the law, we as free men and women should be subject to as British citizens and taxpayers. Where is our law when we require it to protect our interests?

11. There is an aspect of the Extradition Act (2003) that is available but the U.K.Government seems reluctant to enforce. A Forum bar should be implemented allowing judges to prevent extradition where an alleged offence takes place partly or wholly within the U.K.; surely a British citizen has the right to be tried in his home country by his own peers. Without an effective Forum bar any foreign accusation of law breaking cannot be tested in British Courts of justice. Do we believe we should merely handover our citizens, to be dealt with by another judiciary with another set of laws, many of which are very different from our own.

12. Every country has its own set of laws and in the international community, especially when trading between countries, a standard set of rules should apply. This however does not happen in reality as each country passes laws to suit their own needs and service their own society. So laws passed in one country to protect their trade/self interests may differ from other countries. Our prime objective should be to protect British citizens from unfair accusations made by foreign countries with their own agendas. Certainly not to surrender our justice system which has stood the test of time, to a foreign government with an unproven accusation?

Personal Note

13. I would be prepared to give a more extensive report on my experience with the U.S. Judicial system once my Home Detention Curfew (HDC) has expired. Maybe it is a coincidence but within 10 days of my interview in "The Times" criticising the U.S. I was imprisoned for breaching my HDC. It took me a month residing in the Drug Wing of a Cat 'B' local prison before my appeal was heard. With the assistance of members from both Houses of Parliament my appeal was upheld and I was eventually released. I am reluctant to repeat this experience and wish to be out of reach of the U.S. government tentacles before detailing more controversial aspects of *justice* in America.

Christopher Tappin

8 September 2014

Jeanne Theoharis, Saskia Sassen, Laura Rovner, William P. Quigley, Arun Kundnani, Pardiss Kebriaei, Sally Eberhardt, Baher Azmy – Written evidence (EXL0049)

Submission to be found under Baher Azmy

Dr Kimberley Trapp, Mark Summers QC, Professor Rodney Morgan and Sheriff Kenneth Maciver – Oral evidence (QQ 120-131)

Transcript to be found under Sheriff Kenneth Maciver

Jim Tucker – Written evidence (EXL0023)

Submission to Extradition Law Committee
from Cllr Jim Tucker, 6 Sep 2014

1. Overview

The Extradition Act (2003) henceforth called "EA2003" undermines UK democracy and has been applied in a way that promotes fear among our citizens.

Specific events and specific extraditions have been well documented in the submissions of other parties - notably those of "Liberty80" and "Extradition Watch" so will not be repeated here.

The aim of this submission is to highlight two observations concerning EA2003

2. Undermining democracy

2.1 EA2003 provides for the extradition of people who are simply accused of a crime under the laws of a foreign state. Those foreign laws can be laws of the sub-states of the foreign state - notably the individual States of the USA.

2.2 Extraditions of UK citizens have been granted in many cases to the USA on the basis of the applicant state simply telling the UK court that it has evidence but refusing to disclose any evidence.

2.3 I submit that such provisions abrogate a key purpose of an elected government being to protect the freedoms of the citizens.

3. Application of EA2003 to promote fear

3.1 The "promotion of fear" is one attribute of "terrorism".

3.2 Some foreign states (notably the USA) have applied the provisions of EA2003 in a way that subjects the citizens of the UK to a FEAR that they might be abducted by such foreign states and then extradited merely for exposing crime or corruption in that foreign state.

3.3 Some foreign states (notably the USA), once successful in an extradition application, subject the defendant to a third world legal system based on the notorious "plea bargaining" travesty. The defendant is required to pay costs an order of magnitude greater then they would face in the UK, worn down physically and mentally and faced with a choice of falsely admitting guilt of having the "evidence" twisted to convict them of a far more serious crime.

3.4 I submit that the provisions of EA2003 have proved inadequate to protect our citizens from its aggressive misuse by unscrupulous foreign commercials interests.

4 EA2003 is beyond repair

4.1 EA2003 serves to make a laughing stock of our Sovereign State, our law-makers and our people by subjugating our laws to those of foreign states.

4.2 Undermining of Democracy and the Promotion of Fear have allowed for both the tests of "forum" and "duality" to be abused by one applicant on many occassions.

4.3 I submit that the underlying principles that so egregiously compromise both the freedoms and rights of UK citizens are not repairable by amendment and that EA2003 should be repealed in its entirety.

6 September 2014

US Department of Justice – Written evidence (EXL0074)

House of Lords Extradition Law Committee

Thank you for the opportunity to respond to the Committee's Call for Evidence. We consider that our previous input to Sir Scott Baker's Review of the United Kingdom's Extradition Arrangements addresses significant matters within the scope of the Committee's review, and we do not believe it necessary to repeat those comments.

With regard to the subsequent issue of the UK's forum bar, we consider that experience under the provision is too new for us to address.

We note that the Committee in its hearings has raised an issue not addressed in the Baker Review: Whether some states' systems for electing, rather than appointing, judges should be taken into account during extradition hearings. We consider that to do so would be contrary to the nature of our treaty relationship, which does not envisage such an analysis and is based on mutual trust in our respective judicial systems. As the Baker Report put it:

> "States have increasingly recognised that effective extradition should operate on the basis of mutual trust and confidence (not suspicion and disrespect). . . . If it is suggested that the justice administered in the United States is not to be trusted, then there should be no extradition at all. In fact, the history of extradition between the United States and the United Kingdom provides no basis for concluding that individuals returned to that jurisdiction are generally not treated fairly. As has been recognised by the courts in this jurisdiction, the United States is a rights-based democracy where accused persons have protections provided by the Constitution to ensure that they are able to participate effectively in a criminal trial process that is conducted fairly: extradition from the United Kingdom to the United States takes place against the background of this protection."

All persons extradited to the United States to face United States federal criminal charges are under the jurisdiction of United States judges who are appointed, not elected.

We hope that the committee will find this useful.

6 October 2014

Frances Webber – Written evidence (EXL0033)

Written evidence to the House of Lords Select Committee on Extradition Law

1. I am a retired barrister, called to the Bar in 1979 and in practice until 2008. For the last twenty or so years of practice I specialised in immigration and asylum casework, but I have a small amount of experience of extradition. I was junior counsel for Amnesty International in the *Pinochet* series of cases in the High Court and the House of Lords (1998-2000).

2. Since my retirement I have written on issues including government policy on immigration, race, national security, human rights and the rule of law for journals and online news/ comment sites. I am the author of *Borderline Justice: the fight for refugee and migrant rights* (Pluto Press, 2012), and a part-time lecturer in law at Birkbeck, vice-chair of the Institute of Race Relations, an honorary vice-president of the Haldane Society and a member of the Human Rights Advisory Board of the Helen Bamber Foundation.

3. I am concerned that the UK's extradition law does not provide just outcomes for requested persons and that the demands of comity between states take precedence over concerns of justice and human rights. Given my limited familiarity with the daily practice of extradition, I do not propose to deal with all the Committee's questions, but will make general observations on those where I feel qualified to comment.

4. **European Arrest Warrant:** I am concerned at the lack of a double criminality requirement or of any evidential requirement, and the inadequacy of protection for human rights, in the context of the huge variation in standards and procedures in criminal justice systems and in prison conditions.

5. It is unacceptable that the EAW Framework Decision does not require the Requesting State to demonstrate double criminality, given the disparities in behaviours deemed criminal in different Member States.

6. It is unacceptable, too, that there is no minimal evidential requirement which would ensure that persons who are the victims of mistaken identity or other errors cannot stop their extradition. In the UK, although since the abolition of committal hearings magistrates no longer consider whether there is a *prima facie* case before a case goes to the crown court, the CPS may only initiate prosecutions where there is a reasonable prospect of conviction. It will not prosecute where there is insufficient evidence. It is unfair that requested persons are sent with no consideration of the evidence to another country where such safeguards may have not been applied.

7. The human rights bar on extradition has been set far too high. Nearly all witnesses who gave evidence to the Joint Parliamentary Committee on Human Rights (15th report 2010-12: the human rights implications of extradition) agreed that there is effectively a presumption that Member States comply with their ECHR obligations, which is very difficult to dislodge even where there is clear and cogent evidence of

violations. Greece's repeated condemnation by the ECtHR for breaches of Article 3 (inhuman/ degrading treatment) in respect of prison conditions is a good example. Similar issues arise here as under the Dublin Regulation (which requires asylum seekers who travelled through another EU Member State to be returned there), except that domestic legislation giving effect to Dublin contains an explicit presumption of safety and human rights compliance, while the presumption in extradition derives from case law and judicial considerations of 'mutual trust' and comity. Judges have in many cases refused to examine prison conditions in the Requesting State, and have refused to admit evidence of systemic or widespread violations. This means that requested persons' rights (in particular to fair trial and to freedom from inhuman or degrading treatment) are frequently violated by their extradition.

8. The problem is that Member States' criminal laws and practices have not been sufficiently reformed to ensure that the EAW does not lead to injustice. The political requirements of 'mutual trust' and of easy and fast extradition have been prioritised over the requirements of justice and fairness – which in the long term undermines the whole project of the EU as an area of freedom, security and justice.

9. To remedy this situation, legislation needs to make clear that in considering whether extradition is compatible with the requested person's human rights, the threshold should be the same as that applying in other cases where human rights are engaged by expulsion (eg, deportation). Further, no presumption of compliance with human rights obligations on the part of Requesting States should be applied, and that evidence from reputable human rights organisations is admissible in determining whether there is a real risk of violation in the Requesting State.

10. ***Prima facie* case**: see my observations at para 6 above. The human rights bar does not provide sufficient protection. A minimal evidential requirement (which does not necessarily need to be as high as a *prima facie* case, but could be the US standard of 'probable cause') should be universally applied. There is no good reason why the protection owed to British citizens on extradition should be less than that owed to US citizens.

11. **Human rights bar**: it is widely accepted that this is not adequate to protect requested persons' human rights, see my observations at paras 7 and 9 above, and the conclusions of the Joint Human Rights Committee 15th report 2010-12 at paras 47-59.

12. The conduct of criminal proceedings and the length and conditions of detention in the Requesting State, and their impact, particularly on physically or mentally vulnerable people, give rise to the most serious human rights concerns. As an example, in early 2002 I conducted research into conditions in 'supermax' prisons in the US, and into the differences between the protections afforded by the Eighth Amendment (prohibition on cruel and unusual punishment) and Article 3 of the ECHR, in the context of the *Al-Fawwaz* case. Features of supermax incarceration included the excessive use of solitary confinement; 24-hour surveillance in bare

concrete cells with constant artificial light; the use of female guards to monitor male prisoners, including watching them performing intimate bodily functions; punishment chairs which forced prisoners into stress positions for hours; barred cages and many other indignities and cruelties which had been upheld by the US courts. The appellants and the third-party interveners in the case of *Babar Ahmad and others v United Kingdom* (2013) 56 EHRR 1 presented a wealth of evidence (focussing on solitary confinement and sensory deprivation) which indicated in those areas at least, nothing had changed in the intervening years. I have read nothing to indicate improvements in other aspects of supermax prisons' treatment of inmates.

13. The Court's judgment, upholding the men's extradition, has been widely criticised as unfortunate in suggesting that a higher threshold for Article 3 violations exists for extra-territorial cases (and hinting at an even higher threshold when the Requesting State has a history of respect for justice and human rights): see eg Mavronicola and Messineo, 'Relatively absolute: the undermining of Article 3 ECHR in *Ahmad v UK*', *Modern Law Review* 2013, 76(3), 589.

14. If the international human rights system is to provide effective protection against human rights violations, in particular those which involve violations of absolute rights such as the protection from inhuman or degrading treatment, it is particularly important that treatment which would be condemned in the domestic context is not condoned, overlooked or tolerated in the extradition context. For this purpose legislation should make it clear that a judge considering whether someone's extradition is compatible with their human rights should not apply a higher threshold of harm than would be applied in the domestic context.

15. Inordinately lengthy detention at both ends of the extradition process – both awaiting extradition, and pre-trial in the Requesting State, has been tolerated by the judiciary. Requested persons should not be languishing in prison for six, seven, eight or ten years before extradition. In addition, the requirements of Article 8 ECHR (right to respect for family and private life) are rarely recognised in extradition cases, despite the frequently lengthy separation from family members which is entailed. There seems to be a *de facto* rule that Article 8 rights are always outweighed by the public interest in extradition, regardless of the nature and gravity (or lack of it) of the extradition offence.

16. **Assurances**: the core problem here is that an assurance from the Requesting State promises a protection which is not afforded to everyone within its jurisdiction (otherwise it would not be necessary to obtain it). Frequently this means that the State concerned is in breach of its international obligations – at least this is the case with national security deportations, when deportation is frequently to torturing states. The use and acceptance of diplomatic assurances as a substitute for insistence on compliance with universal human rights standards undermines the rule of law.

17. The effective monitoring of assurances is an acutely difficult problem. It is by no means unknown for prisoners to face severe reprisals for reporting human rights

violations (this happened in the case of Ali Aarrass, whose extradition by Spain to Morocco in December 2010 (on the basis of assurances) was recently condemned by UNHRC, see eg EDM 310 2013-14, 26 June 2013). The Special Immigration Appeals Commission allowed national security deportations to Algeria despite the Algerian government's refusal to permit any independent monitoring of its assurances, which has resulted in allegations by deportees of torture and now, following substantial litigation, in a halt to deportations there. Assurances from Jordan were breached in the case of HA, who was detained without trial for a lengthy period following his deportation, apparently without response by the British government.

18. Assurances from states which fail to comply with human rights standards are not only inherently objectionable but also inherently unreliable, and very difficult to monitor effectively. In addition, both States (the Requesting or destination State and the Requested or deporting State) have an interest in turning a blind eye to breaches.

19. **The forum bar**: As a matter of principle the forum bar is an extremely welcome development. It is eminently sensible that a judge should be able to take into account the interests of justice, and in particular where most of the harm occurred, the interests of any victims and a requested person's connections with the UK (*inter alia*) in deciding whether to allow extradition or not.

20. However, the ability of the forum bar to do justice is severely compromised by the prosecutor's certificate mechanism, and the criteria for its exercise. It is wrong, as well as wholly counter-intuitive, that a prosecutor's certificate that there is insufficient admissible evidence to prosecute in the UK, or that there is no public interest in prosecution, should lead to extradition rather than discharge. The Joint Human Rights Committee recognised (at para 195) that the problem derives from Article 5(3) of the US-UK Treaty, but it does not just affect extraditions to the US.

21. It is equally objectionable that, having removed the role of the Home Secretary so as to render extradition less susceptible to diplomatic or political considerations, those same considerations should be re-imported as a means of overriding the forum bar to extradition in cases where the interests of justice require prosecution in the UK. Political and diplomatic considerations should not trump the interests of justice. The interests of justice also come second to the interests of non-disclosure of 'sensitive' material in this provision; they should not.

22. Under these certification provisions, it is likely that Gary McKinnon would have been extradited, particularly since the Secretary of State's discretion to decline extradition at the end of the judicial process has been removed. It is almost certain that because of the certification provisions, the forum bar would not have prevented the extradition of Talha Ahsan and Babar Ahmad, whose lack of any connection to the US apart from their internet server rendered their extradition there a matter causing grave public concern.

23. **Legal aid** for extradition proceedings is vital to ensure equality of arms, given that Requesting States receive specialist legal assistance. Liberty has reported that most requested persons are represented by duty solicitors, most of whom have no specialist knowledge of extradition law. This is a particularly serious problem when combined with the removal of automatic rights of appeal.

    Frances Webber

10 September 2014

Mark A. Williams – Written evidence (EXL0005)

I urge the Committee to recommend that the law be changed as follows:

- British residents should not be extradited without a basic (prima facie) case against them being tested in a UK court

- If their alleged activity took place wholly or substantially in the UK, a judge should be able to bar their extradition – whether or not the CPS decides to prosecute in the UK

- The automatic right of appeal against an extradition order should be reinstated

- Extradition is part legal and part political – the Home Secretary should once more be obliged to block extraditions that would breach human rights

- Legal aid in extradition cases should not be means tested

21 August 2014

Mariusz Wolkowicz and William Bergstrom – Oral evidence (QQ 255 - 263)

Transcript to be found under William Bergstrom

Pam Wortley – Written evidence (EXL0014)

I urge the Committee to recommend that the law be changed as follows:

- British residents should not be extradited without a basic (*prima facie*) case against them being tested in a UK court

- If their alleged activity took place wholly or substantially in the UK, a judge should be able to bar their extradition – whether or not the CPS decides to prosecute in the UK

- The automatic right of appeal against an extradition order should be reinstated

- Extradition is part legal and part political – the Home Secretary should once more be obliged to block extraditions that would breach human rights

- Legal aid in extradition cases should not be means tested

25 August 2014

[i] Statistics taken from National Crime Agency (NCA), analysis by Crown Prosecution Service (CPS)