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Select Committee on Extradition Law

2nd Report of Session 2014–15

Extradition: UK law and practice

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Select Committee on Extradition Law

The Select Committee on Extradition Law was appointed by the House of Lords on 12 June 2014 “to consider and report on the law and practice relating to extradition, in particular the Extradition Act 2003.”

Membership

The Members of the Select Committee on Extradition Law were:

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<u>Baroness Hamwee</u>	<u>Lord Hart of Chilton</u>
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Declaration of interests

See Appendix 1

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Evidence is published online at <http://www.parliament.uk/extradition-law> and available for inspection at the Parliamentary Archives (020 7219 3074).

Q in footnotes refers to a question in oral evidence.

SUMMARY

We were established in March 2014 to conduct post-legislative scrutiny into the law and practice relating to extradition, in particular the Extradition Act 2003 (the 2003 Act). The 2003 Act was introduced to modernise and streamline the UK's extradition procedures. It did this by bringing into UK law the European Arrest Warrant (EAW) scheme (a fast-tracked process of surrender between EU Member States) and by simplifying the process of extradition to other countries. Since its introduction, the 2003 Act has been the focus of much controversy, with critics arguing that it did not provide the necessary safeguards to prevent injustice. Its supporters have argued that the law needed updating as the previous extradition regime took too long and was not fit for purpose as crime became increasingly global, particularly in the light of the rise of online crime.

A number of reports and inquiries into the Act have been conducted, mostly recently by Sir Scott Baker at the request of the Home Secretary.

Our consideration of extradition law is based on some founding principles. We believe that to misunderstand these principles is to misunderstand extradition law:

- extradition is based on comity and cooperation between states. This requires countries to accept, within limits, the criminal justice systems of others;
- although such acceptance is a founding assumption, it is not absolute. For example, the UK has a responsibility to protect those it extradites from foreseeable human rights abuse;
- extradition is not a process concerned with determining the innocence or guilt of a person—that is a matter for trial in the Issuing State; and
- the fundamental purpose of extradition is to bring criminals to justice. The interests of the victims of crimes must therefore always be considered.

Our findings suggest that, although there are aspects of the law and practice which are of concern, there is no systemic problem with the UK's extradition regime. We do, however, reach a number of conclusions and make recommendations.

We are concerned about the system of accepting assurances to offset the risk of extradition leading to human rights abuse. Although we conclude that the courts are effective in balancing the need to protect human rights against the public interest in the administration of justice through extradition, we do not believe that the system of seeking, accepting and monitoring assurances provides sufficient confidence that the UK is meeting its human rights obligations. We believe we need, in the Home Secretary's words, "greater assurance to the assurances".

A number of changes have been made to the 2003 Act in recent years. These include the introduction of a proportionality bar (see Chapter 3) and a forum bar (see Chapter 4), changes in how legal aid is provided (see Chapter 6), amendments to the appeals process (yet to be implemented) and the removal of aspects of the Home Secretary's role (see Chapter 7). Although we received evidence on each of these changes, they are still new elements to the extradition regime and have yet to be fully tested in the courts.

Although it is too soon to say whether the proportionality bar, aimed at preventing the execution of EAWs for trivial offences, will be effective, we believe it was necessary for the Government to introduce such a bar. Similarly, the forum bar (which allows people to challenge extradition on the grounds that any prosecution should be in the UK) may or may not prove a real protection against inappropriate extradition. However, we note that there is the legal possibility of presenting forum arguments on human rights grounds, particularly since the welcome change in the application of Article 8 of the European Convention on Human Rights. Because of this, the forum bar and other factors it will be necessary to explore fully the impact of extradition on those who are not fugitives from crime in the traditional sense (see paragraph 172).

We noted the view expressed in the report by Sir Scott Baker that legal aid ought not to be means tested in extradition cases. We are sympathetic to this view, particularly as we believe that the cost-benefit analysis conducted by the Government on this issue was not sufficiently detailed to be useful. We recommend that the Government carry out a more precise analysis of the cost of removing means testing. Unless such an analysis concludes clearly in favour of retaining means testing, we believe legal aid ought to be awarded automatically in extradition cases. We make this recommendation bearing in mind that in most cases Requested People have yet to be convicted of any crime.

We also took evidence on the different extradition processes provided for by the 2003 Act: the EAW system for EU Member States and the system that applies to other countries. The EAW is a valuable tool in the fight against cross-border crime in the EU. However, we agree that it has been overused and, in some cases, misused in the past. Changes to UK and EU legislation, and developments in practices elsewhere in the EU should make such use much less likely in the future. We recommend that the Government continue to work with the European Commission and other Member States to ensure that there are the necessary procedural rights and mutual assistance measures to make the EAW an instrument of last, rather than first, resort.

We recognise the criticisms of the system in relation to other countries (including the US) such as the lack of a requirement for many countries to provide a *prima facie* case. Although some witnesses called for the reintroduction of a *prima facie* case requirement for all extradition requests, we believe this would be a retrograde step. We conclude that the existing law and practice provide sufficient opportunities to prevent inappropriate extradition.

Even appropriate extradition may be regarded as unfair or harsh by those subjected to it. With this in mind, we recommend that the process of extradition should be softened where possible to lessen its impact on those extradited, particularly where they have not yet been convicted of any crime. This should include, for example, providing greater information about the process or coming to arrangements with countries about returning people on bail pre-trial.

Extradition: UK law and practice

CHAPTER 1: INTRODUCTION

1. On 27 March 2014 the House agreed to appoint “an *ad hoc* post-legislative scrutiny committee to examine the Extradition Act 2003 and Extradition Legislation, to report by the end of the 2014–15 Session”.¹
2. The suggestion for this inquiry came in a letter to the Liaison Committee from Baroness Garden of Frognal in which she said, “the question of extradition remains as high up on the political agenda as ever”.²
3. The Committee was appointed on 12 June 2014 with the remit “to consider and report on the law and practice relating to extradition, in particular the Extradition Act 2003”.³

Extradition: general principles

4. Extradition takes place when a person who is accused or convicted of a criminal offence is returned from one country to another to be tried, sentenced or to serve a term of imprisonment. Extradition is a discrete legal process but it operates within the context of other legal, political and international considerations.
5. There are some essential principles which are fundamental to extradition law. It is worth making these explicit as without them it is easy to misunderstand what the rationale behind the law is and how it operates. These principles have guided our thinking and this report should be read with them in mind.
6. The first principle is that extradition is “a form of international cooperation in criminal matters, based on comity (rather than any overarching obligation under international law), intended to promote justice.”⁴ Because of its cooperative and bilateral nature, it is inherent in extradition that each country accepts to a certain degree the criminal justice systems of other countries. Each country has different views of different crimes and how they ought to be prosecuted and punished.
7. This acceptance is also not absolute. For example, extradition from the UK must be compliant with the European Convention on Human Rights (ECHR). Also, extradition is a two-way process; to refuse extradition to a country may lead to that country not honouring an extradition request from the UK. Maintaining good extradition relationships and honouring our international obligations in this regard ensures that countries do not become

¹ HL Deb, 27 March 2014, [col 594](#)

² Liaison Committee, [Review of select committee activity and proposals for new committee activity](#) (1st Report, Session 2013–14, HL Paper 145)

³ HL Deb, 12 June 2014, [cols 527–28](#)

⁴ *A Review of the United Kingdom’s Extradition Arrangements [‘the Baker Review’]*, 18 October 2011, p 20 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf [accessed 3 March 2015]

safe havens from justice, which would be the direct consequence of not doing so.

8. Secondly, the purpose of extradition is to return the Requested Person to the Issuing State either to stand trial or, if already convicted, to serve a sentence. Extradition proceedings are not therefore concerned with establishing innocence or guilt—that is a matter for trial in the Issuing State. Extradition is, as the Chief Magistrate’s Office put it, “simply a gate keeping mechanism.”⁵ Hence the dictum that it is better that 10 guilty persons go free than that one innocent person suffers has no direct relevance in this context since it is not the arena in which questions of guilt or innocence are determined. It should nevertheless also be recognised that extradition, involving as it does the removal of people from the UK to jurisdictions with which they may have little or no connection, may in some circumstances be considered harsh and distressing in itself. Senior District Judge Riddle spoke of the anticipated “horrors” of extradition leading to people being “very anxious” and that the court saw “significant incidents of self-harm.”⁶ However, though it may be harsh or unfamiliar, this does not mean that extradition is necessarily unjust.
9. Finally, much of the evidence we received focussed on the impact of the process on the Requested Person and on the perspective of the Issuing State. The purpose of extradition is to enable justice to be done in relation to crimes committed overseas; therefore it must take into account “the impact it has on victims ... as a consequence of the crimes committed”,⁷ as well as the overall importance of supporting the rule of law.

The Extradition Act 2003

10. Until 2003, extradition was governed by the Extradition Act 1989, itself a consolidation of three earlier pieces of legislation.⁸ The origins of the law relating to extradition go back hundreds of years.⁹
11. The Extradition Act 2003 (“the 2003 Act”) acknowledged extradition as an important tool in dealing with crime internationally; it emphasised that no one should be able to escape justice simply by crossing a border. The 2003 Act sought to provide a quick and effective framework for the extradition of a Requested Person to the Issuing State, provided this does not breach his or her fundamental human rights or one of the other bars to extradition contained in the 2003 Act.

Part 1 and Part 2 of the 2003 Act

12. In 2002, the Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States (the “Framework

⁵ Written evidence from the Office of the Chief Magistrate ([EXL0043](#))

⁶ [Q 134](#) (Senior District Judge Riddle)

⁷ Written evidence from Summera Kauser ([EXL0041](#))

⁸ Criminal Justice Act 1988, Part 1; Fugitive Offenders Act 1967; and Extradition Act 1870 (as amended)

⁹ Between 1174 and 1794, England concluded five extradition treaties. However, the modern law of extradition started to develop in the nineteenth century, when the United Kingdom began to negotiate extradition treaties with foreign states. Notable developments included the Jay Treaty with the United States (1794), and treaties with France and the USA in 1842 and 1843 respectively.

Decision”) was agreed. This was part of the policy to create what is now referred to as a single area of freedom, security and justice. It was implemented into UK law by Part 1 of the 2003 Act. The Framework Decision’s stated aim was to abolish “the formal extradition procedure ... among the Member States in respect of persons who are fleeing from justice after having been finally sentenced” and to speed up procedures “in respect of persons suspected of having committed an offence.”¹⁰ The main features of the fast track procedure which was introduced by the European Arrest Warrant (EAW) against the background of the evolving EU competence in justice and home affairs were:

- mutual recognition: the EAW requires the acceptance of a foreign warrant without inquiry into the facts of the case. There is no requirement for the Issuing State to make a *prima facie* case;
 - exclusively judicial procedure: the executive is removed from the process. Surrender can take place providing that an EAW is certified as being properly made out by a recognised authority;
 - removal of the dual criminality requirement for 32 categories of offences (as long as the offence is punishable with at least three years’ imprisonment in conviction cases);
 - no exception on the grounds of citizenship: though some countries would not extradite their own nationals to other countries, they must do so under the EAW; and
 - strict time limits within which surrender must take place.
13. Part 2 of the 2003 Act streamlined the judicial mechanism for extradition to non-EAW countries with which the UK has bilateral or multilateral extradition treaties (see Appendix 7). Some countries falling within Part 2 of the 2003 Act were further designated as not being required to provide *prima facie* evidence of the case against the Requested Person. Many, but not all, of these countries are signatories of the European Convention on Extradition (ECE)¹¹ (four others, Australia, Canada, New Zealand and the US, are also further designated).
14. There are many countries with which the UK does not have any extradition arrangements. In some cases this will be for diplomatic or political reasons (for example, the UK has no extradition treaty with Taiwan, a country which the UK does not formally recognise). In other cases—for example, Japan—the reason is less clear. Where necessary, *ad hoc* extradition arrangements can be brought into force. Under such *ad hoc* arrangements, once the Home Secretary has recognised a request from a territory with no standing arrangements, extradition follows the same process as for a Part 2 request.¹²

¹⁰ Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, [2002/584/JHA](#)

¹¹ European Convention on Extradition: <http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm> [accessed 3 March 2015]

¹² For example, the UK recently agreed to the extradition of Zain Taj Dean to Taiwan to face manslaughter charges despite the UK having no standing extradition arrangements with Taiwan.

Extradition process: an overview

15. In brief, the following process applies in extradition cases:
- an extradition request is received by the UK;
 - in the case of EAWs the request must be certified as being in order by the designated authority. In England, Wales and Northern Ireland this is the National Crime Agency (NCA). In Scotland it is the Crown Office and Procurator Fiscal Service;
 - Part 2 requests are certified by the Home Secretary;
 - once a request has been certified, a warrant for the Requested Person's arrest is issued; and
 - once arrested the Requested Person is brought before the court for an initial hearing. In England and Wales extradition cases are heard at the Westminster Magistrates' Court. In Scotland they are heard at the Sheriff Court in Edinburgh. In Northern Ireland cases are heard by designated county courts or resident magistrates.
16. At the initial hearing the judge must:
- confirm the identity of the Requested Person;
 - inform the person about the procedures for consenting to be surrendered to the Issuing State; and
 - fix a date for the extradition hearing if the requested person does not consent to extradition.
17. At the extradition hearing the judge must be satisfied that the offence for which the person is requested constitutes an extraditable offence and that none of the bars to extradition applies (see paragraph 19). If these conditions are met, the court must order the extradition of the Requested Person. If, however, any of the bars to extradition do apply, the judge must order the person's discharge.
18. Appeals may be lodged with the High Court and, if appropriate, the Supreme Court (see Chapter 7 for further discussion of the right to appeal).

Bars to extradition

19. The Act is drafted in such a way that a proper extradition request will be honoured unless extradition is prevented by one of the bars contained in the Act. These bars identify certain fundamental limits which circumscribe extradition law in the UK. Extradition may be barred on account of:
- double jeopardy (where a person has already been convicted for or acquitted of the relevant offence);
 - extraneous considerations (prosecution, detention or punishment on account of race, religion, nationality, gender, sexual orientation or political opinions);
 - the passage of time since the alleged offence;

- the age of the offender (where the offender was so young at the time of the offence that he or she would not be criminally liable in the UK);
- a lack of arrangements to prevent the Requested Person being prosecuted by the Issuing State for a crime other than that for which they were extradited (this is known as ‘specialty’);¹³
- earlier extradition to the United Kingdom or transfer from the International Criminal Court;
- human rights concerns, as defined by the ECHR (see Chapter 2);
- proportionality (see Chapter 3);
- forum (see Chapter 4);
- physical and mental health considerations which would make extradition unjust or oppressive;
- there being no guarantee of a re-trial for convictions where absence from the trial was not deliberate; and
- abuse of process: although not a statutory bar, when the question arises, under common law, both the Magistrates' Court and the High Court have the power and duty to enquire into an abuse of their processes in extradition proceedings.¹⁴

Amendments to the 2003 Act

20. The 2003 Act has been significantly amended four times:

- the Police and Justice Act 2006 which introduced a forum bar that was not brought into force (see Chapter 4);
- the Policing and Crime Act 2009 which, *inter alia*, introduced provisions to:
 - allow alerts requesting the arrest of a person for extradition purposes to be received via the second generation Schengen Information System (“SIS II”);
 - permit deferral of the extradition process in order to allow domestic proceedings to be concluded or a UK prison sentence to be served; and
 - make it possible for a judge to facilitate the Requested Person’s appearance at court if remanded into custody by giving a live link direction in Part 1 and 2 hearings (other than the substantive extradition hearing);

¹³ For example, specialty arrangements mean that an Issuing State cannot prosecute a person extradited on a drug dealing charge for a murder committed before extradition, unless the Requested Person had been given a reasonable opportunity to leave the Issuing state.

¹⁴ See *R(Kashamu) v Governor of Brixton Prison (No 2)* (2002) QB 887 at 27–31

- the Crime and Courts Act 2013 which introduced the forum bar now in force in England, Wales and Northern Ireland, and provided for the transfer of the Home Secretary's responsibilities to discharge extradition on grounds of human rights concerns (see Chapter 4 and 7); and
- the Anti-social Behaviour, Crime and Policing Act 2014 which made various amendments to the 2003 Act including:
 - introducing the proportionality bar (see Chapter 3);
 - allowing for the temporary transfer of Requested People in Part 1 cases;
 - providing for leave requirements for appeals (see Chapter 7); and
 - requiring a decision to prosecute to be made before an EAW can be executed (see Chapter 9).

Previous inquiries

21. Since the 2003 Act came into force aspects of it have been the subject of some controversy. There have, therefore, already been a number of Parliamentary reports into its operation. The House of Lords European Union Committee has published a number of reports about the EAW and other EU police and criminal justice measures.¹⁵ In June 2011, the Joint Committee on Human Rights published a report into the human rights implications of the UK's extradition law.¹⁶ In March 2012, the House of Commons Home Affairs Committee published a report on the UK's extradition arrangements with the US.¹⁷ In November 2014, this Committee published an interim report on the UK's opt-in to the EAW which concluded in favour of remaining within the EAW.¹⁸
22. In addition, in 2010 the Government commissioned a review by a former Lord Justice of Appeal, Sir Scott Baker (see Box 1).¹⁹
23. The controversy which the 2003 Act has attracted is not unique to that Act. Its predecessors, the Extradition Acts of 1870 and 1989, also gave rise to difficult cases (perhaps the most high profile being the extradition of the former Head of State of Chile, General Pinochet, to Spain).²⁰ Such

¹⁵ European Union Committee, *Counter-terrorism: the European Arrest Warrant* (6th Report, Session 2001–02, HL Paper 34); European Union Committee, *The European Arrest Warrant* (16th Report, Session 2001–02, HL Paper 89); European Union Committee, *European Arrest Warrant—Recent Developments* (30th Report, Session 2005–06, HL Paper 156); European Union Committee, *EU police and criminal justice measures: The UK's 2014 opt-out decision* (13th Report, Session 2012–13, HL Paper 159); and European Union Committee, *Follow-up report on EU police and criminal justice measures: The UK's 2014 opt-out decision* (5th Report, Session 2013–14, HL Paper 69)

¹⁶ Joint Committee on Human Rights, *The Human Rights Implications of UK Extradition Policy* (15th Report, Session 2010–12, HL Paper 156)

¹⁷ Home Affairs Committee, *The US-UK Extradition Treaty* (20th Report, Session 2010–12, HC Paper 644)

¹⁸ Extradition Law Committee, *The European Arrest Warrant Opt-in* (1st Report, Session 2014–15, HL Paper 63)

¹⁹ The Baker Review

²⁰ *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No. 1)* (2000) 1 AC 61; *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No. 2)* (2000) 1 AC 119; *R v Bow Street*

controversy has not been restricted to the UK; many other countries similarly grapple with the duties of comity between nations in the interests of international justice and the protection of their own citizens.²¹

Box 1: Sir Scott Baker's review of extradition

In October 2010, the Government appointed a panel of three independent lawyers to review the UK's extradition arrangements. It was chaired by Sir Scott Baker, a former Lord Justice of Appeal. David Perry QC, a barrister with 6 King's Bench Walk, and Anand Doobay, a partner at Peters & Peters, were the other members of the panel. The report was presented to the Home Secretary on 30 September 2011 and published on 18 October 2011.

The review panel was asked to look at five areas of extradition law:

- (1) the operation of the European Arrest Warrant;
- (2) whether a forum bar to extradition should be brought into force;
- (3) whether the US/UK extradition treaty was unbalanced;
- (4) whether states requesting extradition should be required to provide *prima facie* evidence; and
- (5) the breadth of the Home Secretary's discretion in an extradition case.

In its introduction, the review noted that "in the course of conducting our Review, it became apparent that some of the criticism directed at the Extradition Act 2003 was based on a misunderstanding of how the 2003 Act operates in practice ... we were struck by the fact that out of the hundreds of cases that are dealt with by the courts each year, only a handful is relied upon as support for the contention that the existing law is defective."²²

The panel made a number of conclusions and recommendations. Among them were:

- the introduction of a proportionality test;
- that no additional measures were needed to prevent the use of EAWs as aids to investigation rather than prosecution;
- support for enabling legal representation of Requested Persons in both the Issuing and Executing EAW Member State;
- that a forum bar ought not to be introduced;
- that the UK/US extradition treaty did not operate in an unbalanced manner;
- that *prima facie* case requirements should not be re-introduced for fully designated Part 2 states;
- that the designation of Part 2 states should be reviewed;

Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No. 3) (2000) 1 AC 147; and *R v SSHD ex p Kingdom of Belgium*, 15 February 2000, CO/236/00.

²¹ For example, during the course of our inquiry a Canadian extradition case concluded. This case involved the extradition of a Lebanese born sociology lecturer at the University of Ottawa, Hassan Diab, being extradited to France to face charges in relation to the bombing of a Parisian synagogue in 1980. Mr Diab protested his innocence and arguments were made about reliability of the evidence provided by the French authorities. His case took 6 years and was taken as far as the Canadian Supreme Court.

²² The Baker Review, pp 8–9

- that the Home Secretary’s discretion be removed so that human rights issues arising at the end of the extradition process under Part 2 of the Act should be dealt with by the courts;
- that legal aid should not be means tested; and
- in favour of the transferring of sentences to the UK where appropriate.

The Government published its response to the review in October 2012.²³ It agreed with some of the recommendations (such as the introduction of a proportionality bar and removal of the Home Secretary’s discretion) but not others (such as the means testing of legal aid and the introduction of a forum bar).

The inquiry

24. The Committee began its work in June 2014. We held 16 public evidence sessions and heard from 43 witnesses. We also received 93 pieces of written evidence. We are grateful to all those who provided evidence. Members of the Committee also visited Westminster Magistrates’ Court to witness a number of extradition hearings. We are grateful to the Senior District Judge, his colleagues and staff for facilitating these useful visits. We also thank Charlotte Powell, our Specialist Adviser, for her advice and support.
25. Our inquiry has been evidence-led and this report reflects the balance of the evidence we received, including some issues beyond the scope of our initial Call for Evidence which were raised during the inquiry.
26. One area on which we received only limited evidence was the importance of extradition from the point of view of those seeking justice for crimes committed against them. As noted in paragraph 9, the needs of the victims and of the wider community to have justice done are essential to the purpose of extradition. For example, the Iranian and Kurdish Woman’s Rights Organisation told us 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.”²⁴
27. Our evidence, including some submissions from those who had been extradited, gave details of a number of extradition cases. Though particular cases may be used to illustrate points made in evidence, we do not attempt to make judgments on whether extradition was correct in particular cases, which would be inappropriate for this Committee to seek to do.
28. In our Call for Evidence, published before the independence referendum in Scotland, we asked for submissions about extradition law and devolution. We received very little evidence on this topic and therefore this report does not consider the existing settlement or the possible implications of further

²³ Home Office, *The Government Response to Sir Scott Baker’s Review of the United Kingdom’s Extradition Arrangements*, Cm 8458, October 2012 [‘Government response to the Baker Review’]: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228566/8458.pdf [accessed 3 March 2015]

²⁴ Written evidence from the Iranian and Kurdish Woman’s Rights Organisation ([EXL0083](#))

devolution or independence. However, we did take evidence from witnesses on how the system currently works in Scotland and Northern Ireland where the law is largely (though not completely) the same as in England and Wales.

29. The report's structure covers two broad areas. Chapters 2 to 8 address issues which arise in the course of extradition proceedings (the bars to extradition, legal aid, appeal and so forth). Chapters 9 to 11 discuss the two different categories of extradition partners: the EAW countries governed by Part 1 of the Act and the Part 2 countries. Because of the controversy which has surrounded some cases and the weight of the evidence submitted to us a separate chapter on the UK's extradition relations with the US is included. However, it should be clear that the law and procedures which govern extradition to the US are exactly the same as those that apply to other Part 2 countries not required to provide a *prime facie* case.
30. It should be noted that extradition law in the UK has been evolving in recent years: for example, by judgments in relation to the human rights bar (see Chapter 2) and by the introduction of proportionality and forum bars (see Chapters 3 and 4). Our report is concerned with the law as it is now, including recent developments and their impact. These developments mean that many of the cases referred to in evidence submitted to us now need to be read in the light of subsequent changes which may have mitigated previous criticisms.

CHAPTER 2: HUMAN RIGHTS BAR AND ASSURANCES

Human rights bar

31. In the course of an extradition hearing, the judge must decide “whether the person’s extradition would be compatible with the Convention rights”, contained in the ECHR.²⁵ This applies to EAW and Part 2 cases and we were told that human rights points were “argued in virtually every extradition case that goes to a full hearing”.²⁶
32. Courts approaching the question of human rights begin with the presumption that a country with which the UK has extradition arrangements will not violate the human rights of a Requested Person. This presumption in favour of the Issuing State will be stronger in EAW cases because membership of the EU requires certain legal, judicial and human rights standards to be met. In Part 2 cases the presumption will generally be stronger in favour of those that are signatories of the ECHR and the European Convention on Extradition or with which the UK has long-standing and close ties. However, this presumption is rebuttable in all cases.
33. Some witnesses were concerned that the presumption in favour of the Issuing State put the bar too high making it too difficult to resist extradition on human rights grounds successfully. The Faculty of Advocates had “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.”²⁷ Noelle Quenivet and Richard Edwards of Euro Rights said there was “a danger that if the threshold is set too high the rights become theoretical and illusory”.²⁸
34. Other witnesses said that the bar was not too high. Daniel Sternberg, a barrister at 9–12 Bell Yard, said, “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.”²⁹
35. JUSTICE accepted that the bar was necessarily high as the courts were “being asked to predict the impact of extradition” but noted that the effect of the bar could be “harsh”.³⁰
36. Doctor Kimberley Trapp, Senior Lecturer in Public International Law at University College London, said that she could not cite “any examples where it has been too high” but was concerned that “it could be too high,

²⁵ Extradition Act 2003, sections 21(1), 21A(1)(a) and 87(1)

²⁶ Written evidence from Sheriff Maciver ([EXL0064](#))

²⁷ Written evidence from the Faculty of Advocates ([EXL0063](#))

²⁸ Written evidence from Noelle Quenivet and Richard Edwards (Euro Rights) ([EXL0044](#)). Noelle Quenivet is an Associate Professor at the Law Department of the University of the West of England, Bristol. Richard Edwards is a Senior Lecturer in Law at the University of Exeter. Euro Rights is a blog focusing on the ECHR.

²⁹ Written evidence from Daniel Sternberg ([EXL0051](#))

³⁰ Written evidence from JUSTICE ([EXL0073](#))

particularly because of the very unique factual matrix” of case law that defined how the bar was interpreted.³¹

Specific ECHR Articles

37. Dr Trapp’s point refers to the fact that how the bar is interpreted differs depending on which Article of the convention is being argued. The interpretation of each Article has evolved over time through case law.
38. The most frequently cited Articles in extradition cases are Article 3 (prohibiting torture and inhuman or degrading treatment or punishment) and Article 8 (protecting the right to private and family life).

Article 3

39. A judge must discharge a Requested Person where it is shown that there are substantial grounds for believing there is a real risk of inhuman or degrading treatment or punishment in the Issuing State (see Box 2).

Box 2: Article 3 of the ECHR

Article 3 of the ECHR states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

ECHR rights are either absolute or qualified. Article 3 is an absolute prohibition.

Key principles defining the application and scope of Article 3 include:

- a decision to extradite a person engages the responsibility of the UK under Article 3 where substantial grounds have been shown for believing that the person concerned, if extradited, faces a “real risk of exposure to inhuman or degrading treatment or punishment”³² if extradited to the Issuing State;
- the treatment alleged must attain a minimum level of severity if it is to fall within its scope;
- a ‘real risk’ is one that is more than merely fanciful and more than a mere possibility. It does not mean proof on the balance of probabilities, or more likely than not, and may be established by something less than proof of a 51% probability;
- decisions by courts in the UK and the European Court of Human Rights (ECtHR) have interpreted the meaning of Article 3 on a case-by-case basis;³³ what amounts to inhuman or degrading treatment depends on all the circumstances of each case;³⁴ and

³¹ [Q 123](#) (Dr Kimberley Trapp)

³² *Soering v United Kingdom* (1989) 11 EHRR 439

³³ *Harkins and Edwards v United Kingdom* (2012) 55 EHRR 19

³⁴ For example, in *Carl Peter Vernon, Gregory Hamilton, Fraser Heesom v Republic of South Africa* ((2014) EWHC 4417 (Admin)) at first instance the defence expert gave evidence that some inmates preferred to reside in a communal cell, despite widespread overcrowding. He attributed this fact to reflecting a personal history of not living alone and as a possible means of acquiring the protection of other inmates. Nevertheless, the judge ruled that the overcrowding was such that regardless of the preference of some inmates, the overcrowding would constitute an Article 3 violation; in *Harkins and Edwards v United Kingdom*, the ECtHR noted that failure of a state to provide a certain level of medical treatment within its jurisdiction has been held to be an Article 3 breach but similar violations have not always been

- once a risk of ill treatment is established to the requisite degree of likelihood and severity, the responsibility of the UK is engaged; it is for the Issuing State to dispel the finding of real risk.

Particular principles apply when the issue is whether Article 3 is engaged in respect of Contracting States to the ECHR and Member States of the EU:³⁵

- Member States of the Council of Europe are presumed to be able and willing to fulfil their obligations under the ECHR, in the absence of clear, cogent and compelling evidence to the contrary;
- evidence would have to show that there was a real risk of the Requested Person being subjected to torture or inhuman or degrading treatment or punishment;
- this presumption is of even greater importance in the case of Member States of the EU. In such cases there is a strong, albeit rebuttable, presumption that EU Member States will abide by their Convention obligations. Each Member State is entitled to have confidence that all other EU Member States will abide by their Convention obligations; and
- the evidence needed to rebut the presumption and to establish a breach of Article 3 by the EU Member State will have to be powerful; something approaching an international consensus is required if the presumption is to be rebutted.

40. With regard to Article 3, we were told there were two approaches to establishing the likelihood of a breach:

“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”.³⁶

41. The ‘international consensus’ test “applies in relation to EU Member States It does not apply to each and every extradition partner that we have”.³⁷ Direct evidence of a risk can be used in all cases.

42. Ben Keith, a barrister at 5 St Andrew’s Hill, told us that the international consensus test was not “applied terribly well” as it was:

“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

demonstrated in extra-territorial cases; and, in general, a country imposing a longer or harsher sentence than would be the case in the executing state does not necessarily constitute an Article 3 breach.

³⁵ See *Krolík (and others) v Several Judicial Authorities in Poland* (2013) 1 WLR 490, as summarised by Lord Justice Aikens in *Elashmawy v Italy* (2015) EWHC 28 (Admin)

³⁶ [Q 109](#) (Paul Garlick QC)

³⁷ [Q 109](#) (Daniel Sternberg)

need to show serious systematic breaches probably not over one report but a number of reports in a row.”³⁸

43. However, Mark Summers QC, a barrister at Matrix Chambers, said that the difficulties in making Article 3 arguments were appropriate as “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.”³⁹ In addition, the international consensus test became unnecessary where there was direct evidence of a real risk.
44. A number of examples were given of Article 3 arguments being successful.⁴⁰ Paul Garlick QC, a barrister at Furnival Chambers, said, “If you go before a judge at Westminster and tell the judge ... that you have an Article 3 argument they will always allow you to raise that because of the consequences ... I think that the protection that the Westminster court has given has been far from illusory; it has been very real.”⁴¹
45. Not all witnesses were content that the Article 3 arguments were as successful as they needed to be. Edward Grange, a solicitor at Hodge, Jones & Allen, and Rebecca Niblock, a solicitor at Kingsley Napley, said, “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”.⁴²

Article 8

46. Article 8(1) of the ECHR states, “Everyone has the right to respect for his private and family life, his home and his correspondence”. Arguments in relation to this Article have evolved significantly in recent years (see Box 3).

Box 3: Article 8 of the ECHR

Article 8(1) ECHR provides: “Everyone has the right to respect for his private and family life, his home and his correspondence.” Public authorities may not interfere with private and family life except in accordance with the law and as necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (Article 8(2)). Unlike Article 3, Article 8 is therefore a qualified right.

Baroness Hale in the Supreme Court judgment *HH & Others v Deputy Prosecutor of the Italian Republic, Genoa and Others*⁴³ (see Appendix 5) summarised conclusions to be drawn from case law interpreting Article 8 which include:

- there is no test of exceptionality;
- the question is always whether the interference with the private and family

³⁸ [Q 110](#) (Ben Keith)

³⁹ [Q 122](#) (Mark Summers QC)

⁴⁰ See for example, written evidence from the Office of the Chief Magistrate ([EXL0043](#)) and the Crown Prosecution Service ([EXL0054](#))

⁴¹ [Q 108](#) (Paul Garlick QC)

⁴² Written evidence from Edward Grange and Rebecca Niblock ([EXL0035](#))

⁴³ *HH v Deputy Prosecutor of the Italian Republic, Genoa* (2012) 3 WLR 90

lives of the requested person and other members of his family is outweighed by the public interest in extradition;

- there is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back;
- that public interest will always carry great weight, but the weight to be attached to it in the particular case varies according to the nature and seriousness of the crime or crimes involved;
- the delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life;
- hence, it is likely that the public interest in extradition will outweigh the Article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe.

As a result of *HH* and Lady Hale's formulation, the courts now consider a number of factors when weighing up whether the public interest in extradition is proportionate to the interference with family life that extradition involves. This might be seen in a recent case where extradition to Poland on an EAW was resisted on Article 8 grounds. In the course of his judgment, Mr Justice Blake said:

"it is nevertheless the case that since 2012 this court, in the exercise of its jurisdiction to review whether a decision is disproportionate, has been willing to give much greater weight to factors such as the pure passage of time, the age of the offender, the seriousness of the offence, the time served as well as the impact upon third parties"⁴⁴

47. Ben Keith described the impact of *HH* as a "sea change in Article 8 cases ... prior to *HH*, you had to be basically on death's door or have a terminally ill relative".⁴⁵ He told us that he had experienced a case 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'".⁴⁶

48. The Crown Prosecution Service (CPS) made similar points:

"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".⁴⁷

⁴⁴ *Matuszewski v Regional Court in Radom* (2014) EWHC 357 (Admin)

⁴⁵ [Q 112](#) (Ben Keith)

⁴⁶ *Ibid.*

⁴⁷ Written evidence by the Crown Prosecution Service ([EXL0054](#))

49. As Article 8 is a qualified right, a disproportionate, not any, interference will be required for a breach to be established. Witnesses generally thought it was being applied fairly.
50. Since *HH* Article 8 arguments are increasingly being used to make proportionality arguments. Daniel Sternberg said that it was 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.”⁴⁸
51. This development of Article 8 led Paul Garlick QC to conclude, “I think we have seen a softening of that approach, led by tremendously important judgments like *HH* ... In my judgment we have it about right at the moment.”⁴⁹ Liberty, on the other hand, considered the bar in relation to Article 8 still to be high: “The focus on honouring extradition treaties means that Article 8 will rarely be successful as a bar to extradition”.⁵⁰
52. Kaim Todner Ltd, a firm of solicitors, maintained a more hardline view that in all cases extradition could, to an extent, be considered a breach of a requested person’s Article 8 rights.⁵¹
53. For other witnesses the impact of *HH* ultimately remained to be seen. Edward Grange said the interpretation might change again, at least for EAW cases, in the light of a proportionality bar having been introduced⁵² (see Chapter 3). Daniel Sternberg said the effect of the judgment was “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.”⁵³

Articles 5 and 6

54. We also heard evidence in relation to the use of Articles 5 (the right to liberty and security of person) and 6 (the right to a fair trial). The test applied in both of these cases is that the breach would be ‘flagrant’ (see Box 4).

Box 4: Articles 5 and 6 of the ECHR

Article 5(1) of the ECHR states: “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.” The Article goes on to list circumstances under which it may be breached. Article 5 also protects the right to be informed promptly of the reasons for arrest and charge, to be brought promptly before a judge or other authorised judicial officer, to a trial within a reasonable time or to release pending trial, to take proceedings by which the lawfulness of detention shall be decided speedily by a court and release if the detention is not lawful, and to an enforceable right to compensation if not lawfully detained.

⁴⁸ [Q 112](#) (Daniel Sternberg)

⁴⁹ [Q 112](#) (Paul Garlick QC)

⁵⁰ Written evidence from Liberty ([EXL0066](#))

⁵¹ Written evidence by Kaim Todner Solicitors Ltd ([EXL0057](#))

⁵² [Q 99](#)

⁵³ [Q 113](#) (Daniel Sternberg)

Article 6 ECHR protects the right to a fair trial within a reasonable time. In principle, the risk that a trial in the Issuing State will be unfair is capable of being a bar to extradition, as the ECtHR held in *Soering*: “The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.”⁵⁴

Articles 5 and 6 have been argued in a number of prominent cases (with varying degrees of success). For example, in *Shankaran v India*⁵⁵ the District Judge at first instance was of the view that, but for adequate undertakings, extradition potentially followed by many years’ pre-trial detention, would constitute a ‘flagrant breach’ of the Appellant’s rights under Article 5 ECHR.

In *VB v Rwanda*⁵⁶ the Administrative Court ruled that extradition should be refused on Article 6 grounds because there was a real risk of a breach of the right to an independent and impartial tribunal (there were concerns, *inter alia*, about political influence over the court in Rwanda and the treatment of defence witnesses—see Appendix 5).

55. Ben Keith said that, in his experience, arguments on these grounds were seldom used. In the case of Article 5, he said that it was “very difficult to show what pre-trial detention should or should not be in another jurisdiction.”⁵⁷ Therefore demonstrating that a Requested Person was likely to be held not in accordance with the law of the Issuing State was difficult. Mark Summers QC disagreed. He said that Article 5 was “something that at least does play into my everyday practice”, citing a number of cases as examples.⁵⁸
56. In the case of Article 6, Ben Keith said that arguments were difficult to make because in the countries where there was a fear of a flagrant Article 6 breach it was “almost impossible to fathom how their trial system works for a common lawyer.”⁵⁹ Generalised arguments about a country’s legal system were therefore difficult to make, although not impossible, particularly if there was specific concern that a prosecution was politically motivated:

“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.”⁶⁰

Consideration by the courts

57. Some witnesses were concerned that the presumption in favour of the Issuing State meant that the courts did not allow sufficient consideration for human

⁵⁴ *Soering v United Kingdom* (1989) 11 EHRR 439 at 113

⁵⁵ *Shankaran v India* (2014) EWHC 957 (Admin)

⁵⁶ *Vincent Brown aka Vincent Bajinja, Charles Munyaneza, Emmanuel Nteziryayo, Celestin Ugirashebuja v The Government of Rwanda, The Secretary of State for the Home Department* (2009) EWHC 770 (Admin)

⁵⁷ [Q 113](#) (Ben Keith)

⁵⁸ [Q 131](#) (Mark Summers QC)

⁵⁹ [Q 113](#) (Ben Keith)

⁶⁰ [Q 113](#) (Ben Keith)

rights concerns. Jago Russell of Fair Trials International referred to the ruling of Mr Justice Mitting in 2010 that:

“as a matter of principle ... when prison conditions in a Convention category 1 state are raised as an obstacle to extradition, the district judge need not, save in wholly extraordinary circumstances in which the constitutional order of the requesting state has been upset—for example by a military coup or violent revolution—examine the question at all.”⁶¹

58. Jago Russell said that such an approach in which “it was completely beyond the realms of British courts to examine questions where there is another ECHR state involved” was “completely inappropriate”.⁶² This approach appears no longer to be guiding rule. In 2011, Lord Justice Toulson noted in a judgment that he felt Mr Justice Mitting had “put the matter too high”.⁶³ The Joint Committee on Human Rights welcomed this change in approach in its 2011 report.⁶⁴

59. The evidence put to us was that the courts generally did allow human rights concerns to be explored. For example, Daniel Sternberg said, “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”.⁶⁵ Indeed, the time taken by the UK courts and the ECtHR on these matters was something Amy Jeffress, a former Department of Justice attaché to the US Embassy in London, pointed out as causing concern in the US:

“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.”⁶⁶

60. **It is right that the human rights bar is set at a high level. Accusations of human rights breaches are serious and the courts should be as sure as possible that they can be substantiated.**

61. **We are content that the courts’ interpretation of the human rights bar is suitably responsive, where necessary, to the wide variety of circumstances presented in extradition cases. This provides a real protection to Requested People without interfering unduly with the extradition process. The changes in the application of Article 8 since *HH* are a welcome confirmation of this.**

⁶¹ *R. (on the application of Klimas) v Lithuania* (2010) EWHC 2076 (Admin)

⁶² [Q 25](#) (Jago Russell)

⁶³ *R. (on the application of Targosinski) v Judicial Authority of Poland* (2011) EWHC 312 (Admin)

⁶⁴ Joint Committee on Human Rights, *The Human Rights Implications of UK Extradition Policy* (15th Report, Session 2010–12, HL Paper 156)

⁶⁵ [Q 106](#) (Daniel Sternberg)

⁶⁶ [Q 67](#)

Assurances

62. In many cases where the courts find that there is a real risk of a Requested Person's human rights being breached, the Issuing State will offer an assurance to the contrary. For example, a number of cases have found that overcrowding in Italian prisons is such that a person's Article 3 rights would be breached if sent there. In the case of *Elashmawy v Italy* the Italian authorities provided the following assurance:

"I hereby assure the competent authorities of the United Kingdom that in the event that ELASHMAWY Mohamed is surrendered to the European Arrest Warrant issued by the Office of the Prosecutor General of the Republic attached to the Court of Appeal in Brescia on 24.10.2013, he will commence and serve his sentence at the prisons of C.C. Torino or Biella, which are now not overcrowded, and will not serve his sentence at Busto Arsizio or Piacenza or any prison that is not compliant with Article 3 of the ECHR."⁶⁷

63. In some cases assurances will be requested by the Requested Person's lawyers, in others the CPS, acting on an Issuing State's behalf, will advise that an assurance is necessary. The courts may also request that assurances be provided.
64. When considering assurances the courts assess them against criteria set out by the ECtHR in the case of *Othman (Abu Qatada) v United Kingdom*. Although this case was concerned with the deportation of Abu Qatada to Jordan, its principles are applicable to extradition law (see Box 5).

Box 5: 'Othman criteria'

In 2012, Omar Othman (otherwise known as Abu Qatada) challenged his deportation to Jordan where he had been convicted in his absence on various terrorism charges.⁶⁸ The court found there would be a violation of his Article 6 rights, given the real risk of the admission of evidence obtained by torture at his retrial in Jordan, reflecting the international consensus that the use of evidence obtained through torture made a fair trial impossible. On taking the case to the ECtHR, the Government was able to secure his expulsion with the use of assurances that such evidence would not be admitted.

The ECtHR gave guidance on factors relevant to assessing the quality and weight to be given to assurances, noting it was said that only in rare cases would the general situation in a country mean no weight at all could be given to such assurances:

- (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;

⁶⁷ *Elashmawy v Prosecutor General of the Republic of Italy* (2014) EWHC 322 (Admin)

⁶⁸ *Othman (Abu Qatada) v United Kingdom* (8139/09) (2012) 55 EHCR 1

- (5) whether the assurances concern treatment which is legal or illegal in the receiving state;
- (6) whether they have been given by a contracting state to the ECHR;
- (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 schemes, 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 by the receiving state; and
- (11) whether the reliability of the assurances has been examined by the domestic courts of the sending state.

These criteria confirmed the approach taken by the House of Lords two years previously in the case of *MT (Algeria) v SSHD*.⁶⁹

65. Assurances have been described as “not merely normal but indispensable in the operation of English extradition law”.⁷⁰ The issue for some therefore was not whether assurances ought to be part of the system but how the courts dealt with them.
66. As with the human rights bar, Paul Garlick QC observed, “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.”⁷¹ Other witnesses considered that despite this presumption, the courts were “assiduous”⁷² in examining assurances. Daniel Sternberg said that where there was a real doubt about compliance with human rights the courts regarded assurances as “necessary but not sufficient”, so that whilst “an assurance in itself is something that will give confidence to the magistrate or to the High Court ... that is not enough. You have to show that the assurance will be implemented and will be carried out.”⁷³ Similarly, Mark Summers QC said, “the Othman criteria are sufficiently robust” and that they were “taken seriously”.⁷⁴
67. We have seen an example of assurances which do not appear to have met the criteria but were accepted. Mariusz Wolkowicz, a Polish national, was

⁶⁹ *MT(Algeria) v SSHD* (2010) 2 AC at 22

⁷⁰ *Ravi Shankaran v The Government of the State of India, The Secretary of State for the Home Department* (2014) EWHC 957 (Admin)

⁷¹ [Q 115](#) (Paul Garlick QC)

⁷² Written evidence from the Crown Prosecution Service ([EXL0054](#))

⁷³ [Q 115](#) (Daniel Sternberg)

⁷⁴ [Q 128](#) (Mark Summers QC)

returned to Poland on an EAW subject to assurances about his medical treatment and prison conditions (see Appendix 5). The assurance was phrased in general terms about Polish prison conditions⁷⁵ (though we note that there may have been factors in Mr Wolkowicz’s case that made these generalised assurances adequate).⁷⁶ Mr Wolkowicz told us that the assurances were not honoured and the conditions in which he was held were not Article 3 compliant.⁷⁷ Indeed, he was released early from prison in order to prevent his human rights being breached. Mr Wolkowicz was in the process of taking his case to the ECtHR.

68. There are also examples of assurances being rejected by the courts for being too general. For example, in *Badre v Italy* in which the order to extradite was appealed on the grounds that there was a real risk of a breach of Article 3, Lord Justice McCombe described the assurance given by the Italian authorities as “general and not specific”. He therefore concluded that “the District Judge was wrong to be satisfied by this general letter of assurance”.⁷⁸

69. A number of witnesses found the practice of offsetting human rights concerns worrying. The Criminal Bar Association said:

“The use of assurances must be of real concern ... International, UN and European intergovernmental institutions and NGOs have consistently stressed the problems of recourse of assurances as inherently unreliable and often ineffective”.⁷⁹

70. Similarly, Frances Webber, a former barrister, described assurances as “inherently objectionable” and “inherently unreliable”⁸⁰ coming, as they do, from countries already found to be likely to breach their human rights obligations.

71. Some witnesses said that, even where the Othman criteria had been satisfied, assurances could not be relied upon. Kaim Todner Ltd said, “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.”⁸¹

72. Dr Trapp analysed the issue from an international law perspective, noting the relevance of states’ obligations to co-operate to bring to an end serious breaches of peremptory norms; for instance, the prohibition against torture. She observed:

“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

⁷⁵ Written evidence from William Bergstrom ([EXL0093](#))

⁷⁶ Mr Wolkowicz appealed the order to extradite. In the course of its ruling, the High Court noted that the District Judge had been “satisfied with the observations of the Polish Judicial Authority that there was no evidence that any penal institution had failed to provide proper medical care for Wolkowicz.” (*Polish Judicial Authority v Mariusz Wolkowicz (alias Del Ponti)* (2013) EWHC 102 (Admin) at 29)

⁷⁷ [Q 260](#)

⁷⁸ *Hayle Abdi Badre v Court of Florence, Italy* (2014) EWHC 614 (Admin)

⁷⁹ Written evidence from the Criminal Bar Association ([EXL0055](#))

⁸⁰ Written evidence from Frances Webber ([EXL0033](#))

⁸¹ Written evidence from Kaim Todner Solicitors Ltd ([EXL0057](#))

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.”⁸²

73. Mark Summers QC argued that it was not “the function of extradition law to bring about regime change”. Although he recognised the concerns about countries with wider human rights issues, his view was that the purpose of extradition law had to be limited to ensuring 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.”⁸³
74. Professor Rodney Morgan, Emeritus Professor of Criminal Justice at the University Bristol, recognised both points of view but said the “tacit admission” of poor human rights that providing assurances involved could add pressure to countries to improve their record, which could have “the potential to improve matters more generally.”⁸⁴
75. There were also practical concerns about assurances. Edward Grange and Rebecca Niblock were concerned that “little thought is given to the practicalities” of assurances.⁸⁵ Ben Keith noted that the ability of the courts to consider the practicalities was limited:
- “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?”⁸⁶
76. Jodie Blackstock, the director of Criminal and EU Justice Policy at JUSTICE, said that requiring a Requested Person to contest an assurance having already demonstrated that there was real risk of a human rights breach was unfair:
- “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”.⁸⁷
77. In her view, while demonstrating a human rights concern involved proving that a prospective breach was likely to take place, resisting an assurance involved proving a negative: that the assurance would not be sufficient. She

⁸² [Q 129](#) (Dr Kimberley Trapp)

⁸³ [Q 129](#) (Mark Summers QC)

⁸⁴ [Q 129](#) (Professor Rodney Morgan)

⁸⁵ Written evidence from Edward Grange and Rebecca Niblock ([EXL0035](#))

⁸⁶ Written evidence from Ben Keith ([EXL0077](#))

⁸⁷ [Q 187](#) (Jodie Blackstock)

said, “It becomes incredibly problematic to keep defeating these levels of evidence”.⁸⁸

Monitoring of assurances

78. A number of witnesses said that a difficulty with assurances was that, despite the Othman criteria requiring them to be capable of verification, “there is no systematic approach that is taken to assess ongoing compliance”⁸⁹ once a person had been extradited. Paul Garlick QC said it was “a very lonely existence for a prisoner in a foreign jurisdiction who is suffering and cannot get the message out.”⁹⁰
79. It is therefore unclear how often assurances are breached. A Lithuanian case was referred to by some witnesses in which an assurance in relation to prison conditions had not been honoured.⁹¹ Paul Garlick QC mentioned a case in Trinidad and Tobago where prison conditions had been the subject of assurances that were not complied with.⁹² As noted above, Mr Wolkowicz said that the assurances provided by the Polish authorities were not honoured.
80. Edward Grange, among others, said that a system of monitoring was needed “to ensure that the assurances that are being given can be carried out.”⁹³ In Anand Doobay’s view, the lack of such a system could create a “vicious circle” in which assurances from a country could be “given a great deal of weight, despite the fact that, actually, none of the assurances is being honoured.”⁹⁴
81. In evidence, a number of methods of monitoring were suggested. The Human Rights Implementation Centre at Bristol University proposed that assurances ought only to be accepted from countries party to the Optional Protocol to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). OPCAT requires signatories to “establish a national preventive mechanism (NPM). This should be an independent body (or bodies) which have the ‘required capabilities and professional knowledge’ to prevent torture including visiting places where individuals may be deprived of their liberty.”⁹⁵ We note that OPCAT signatories include some ECE countries cited as being of concern.
82. Other witnesses saw an increased role for the Government. Doctor Paul Arnell, a Reader in Law at Robert Gordon University, said, “The responsibility to monitor the implementation of assurances falls to the UK Government.”⁹⁶ Similarly, Daniel Sternberg said, “Monitoring of compliance

⁸⁸ *Ibid.*

⁸⁹ [Q 43](#)

⁹⁰ [Q 116](#) (Paul Garlick QC)

⁹¹ See, for example, [Q 128](#) (Mark Summers QC) and [Q 187](#) (Michael Evans).

⁹² [Q 114](#)

⁹³ [Q 103](#) (Edward Grange)

⁹⁴ [Q 16](#) (Anand Doobay)

⁹⁵ Written evidence from the Human Rights Implementation Centre, Bristol University ([EXL0031](#))

⁹⁶ Written evidence from Dr Paul Arnell ([EXL0016](#))

with assurances ought to be a function of the UK's foreign policy, given the diplomatic context in which assurances are provided.”⁹⁷

83. The Foreign and Commonwealth Office (FCO) already conducts a limited monitoring function in relation to British nationals held abroad. This involves consular officials making a judgment as to prison conditions and the vulnerability of particular prisoners. Where a concern is raised that a British national may be at risk the FCO “will always lobby the authorities for improvements, if given the authority to do so by the individual who is incarcerated.”⁹⁸ The Government's role and responsibility with regard to non-British nationals was less clear—for example, where a Requested Person was the national of another EU country⁹⁹ or where a non-British national was extradited to a third country (i.e. not his or her home state). The Home Secretary agreed that the question was “more difficult”.¹⁰⁰
84. The Home Secretary told us that the Home Office was working “with the FCO to see whether there are any measures that need to be taken to give greater assurance to the assurances.”¹⁰¹ This review would include consideration of “The different categories of British citizen, non-British citizen and dual national”.¹⁰² However, the Home Secretary also noted, “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.”¹⁰³
85. Dr Trapp explained that where an assurance was breached in relation to a British national, the UK's position was clear:
- “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.”¹⁰⁴
86. Such diplomatic protection is discretionary: the Government is not bound to take measures against the Issuing State. In cases of breaches of assurances in respect of non-British nationals, the UK's options were 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 ... The extent to which we can engage in countermeasures, for instance, is incredibly controversial as a matter of international law.”¹⁰⁵
87. James Brokenshire MP, Minister for Immigration and Security, said there was an incentive for states to honour assurances as, “There could be consequences of someone simply ignoring assurances that had been

⁹⁷ Written evidence from Daniel Sternberg ([EXL0051](#))

⁹⁸ Written evidence from the FCO ([EXL0082](#))

⁹⁹ In which case he or she may ask for support from the UK under the EU Charter of Fundamental Rights.

¹⁰⁰ [Q 200](#) (Rt Hon. Theresa May MP, Home Secretary)

¹⁰¹ [Q 199](#)

¹⁰² [Q 202](#)

¹⁰³ [Q 199](#)

¹⁰⁴ [Q 136](#) (Dr Kimberley Trapp)

¹⁰⁵ *Ibid.*

provided”.¹⁰⁶ Nonetheless, a number of witnesses emphasised the importance of there being greater “assurance to the assurances”, as once breached there was “no clawback”¹⁰⁷ or formal cross border remedy to enable the UK to rectify the situation.¹⁰⁸

88. We accept that assurances are an established part of the process and we believe the courts take their scrutiny of assurances seriously. However, **assurances are only used where serious fears of human rights breaches have been demonstrated. We therefore believe that assurances should always be handled carefully and subjected to rigorous scrutiny, particularly to ensure that they are properly and precisely drafted, and comply fully with the Othman criteria. The importance of ensuring that they are genuine and effective cannot be overestimated. They must provide Requested People with real protection from human rights abuse.** No doubt the CPS emphasises this to Issuing States when discussing assurances.
89. **With this in mind, we believe the arrangements in place for monitoring assurances are flawed. It is clear that there can be no confidence that assurances are not being breached, or that they can offer an effective remedy in the event of a breach.**
90. The UK has an obligation to avoid foreseeable risks of human rights breaches. Assurances help the UK to meet its obligation by addressing those risks demonstrated in court. However, without an effective monitoring system we cannot know whether assurances do in fact avoid the risks foreseen by the courts. **Therefore, it is questionable, in our view, whether the UK can be as certain as it should be that it is meeting its human rights obligations.**
91. The Home Secretary told us that the Home Office and FCO were reviewing the issue of monitoring. **We welcome the Government’s review of the monitoring of assurances as we are concerned that the current arrangements via consular services fall well below what is necessary.**
92. **We urge the Government to complete its review of the monitoring of assurances as a matter of urgency. Given the interest both Houses of Parliament have taken in the UK’s extradition law and the importance of this issue, the Government should present the outcomes of this review to both Houses for debate. (Recommendation 1)**
93. As part of its review, **we recommend the Government make arrangements for the details of assurances to be collated and published regularly to improve the transparency of the process, not least so that the international community and the authorities in a Requested Person’s home state can have greater information about when assurances have been required. (Recommendation 2)**

¹⁰⁶ [Q 43](#)

¹⁰⁷ [Q 88](#)

¹⁰⁸ [Q 43](#)

94. The courts should continue always to take into account evidence which suggests that previous assurances from an Issuing State have not been honoured. However, the Othman criteria require assurances only to be theoretically capable of verification; they ought also to explain how they would be verified in practice and how any breaches would be remedied. **We therefore recommend that greater consideration be given to including in assurances details of how they will be monitored. The Government and CPS should be particularly astute to request such details when they are seeking assurances. (Recommendation 3)**

CHAPTER 3: PROPORTIONALITY

Introduction

95. The proportionality bar was introduced to address concerns over the disproportionate use of EAWs by some Member States.
96. The Framework Decision permits the use of an EAW in accusation cases where a person is wanted to stand trial providing the offence in question carries a maximum penalty of at least three years' imprisonment in the Issuing State, or 12 months if the offence is also a crime in the Executing State. In conviction cases where the person has already been found guilty and sentenced, the EAW may be used if the custodial sentence to be served is four months or more.
97. The thresholds stipulated in the Framework Decision have not always been effective in preventing disproportionate requests. There is no restriction on the use of EAWs for offences which satisfy the sentencing requirements but are relatively minor cases of their type.
98. The EU's EAW handbook¹⁰⁹ says that an issuing Member State should perform a proportionality test, although this test is not a mandatory requirement of the Framework Decision. In some Member States, the requirement that a prosecution satisfies a public interest test acts as a *de facto* proportionality test prior to an EAW being issued. In other Member States, there is no prosecutorial discretion, instead the principle of legality means that prosecutors are obliged to use all legal means, the EAW included, to bring an individual to justice.
99. Although much more detailed analysis of the statistics would be needed to draw statistically sound conclusions about the operation of the EAW, the number of requests received by the UK at least provides an indication of the problem (see Table 1).

Table 1: EAWs received by England, Wales and Northern Ireland

Year	Number of requests
2006–07	3,515
2007–08	2,483
2008–09	3,526
2009–10	3,870
2010–11	5,770
2011–12	5,641
2012–13	6,263
2013–14	7,881

Source: NCA statistics <http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics>

¹⁰⁹ Revised version of the European Handbook on how to issue a European Arrest Warrant, 17 December 2010: <http://register.consilium.europa.eu/doc/srv?l=en&f=ST%2017195%202010%20REV%201> [accessed 4 March 2015]

100. The use of the EAW system to request the return of individuals for seemingly trivial matters was the principal issue with the EAW identified by the Baker Review which said, “apart from the problem of proportionality, we believe that the European Arrest Warrant scheme has worked reasonably well.”¹¹⁰
101. In its response to the Baker Review the Government said it would “take the opportunity of the 2014 Justice and Home Affairs (JHA) opt-out decision to work with the European Commission, and with other Member States, to reform the European Arrest Warrant so that it provides the protections that our citizens demand.”¹¹¹
102. The Home Secretary told us it became apparent in the course of these discussions that, “while others had similar concerns in some areas ... for example on proportionality—there was no appetite for opening up the whole directive.”¹¹² The Government therefore decided to bring forward domestic legislation to introduce a proportionality bar for EAW cases.

Amendments to the 2003 Act

103. A proportionality bar was introduced as section 21A of the 2003 Act by the Anti-social Behaviour, Crime and Policing Act 2014.¹¹³ It was brought into force on 21 July 2014. It applies to EAW accusation cases only, and limits the factors the judge is empowered to take into account in deciding proportionality, namely:
- the seriousness of the conduct alleged to constitute the extradition offence;
 - the likely penalty that would be imposed if the Requested Person was found guilty of the extradition offence; and
 - the possibility of the relevant foreign authorities taking measures that would be less coercive than extradition.
104. Under section 2 of the 2003 Act, the designated certifying authority¹¹⁴ must be satisfied that a request is properly made out and accompanied by the necessary information. In addition to this, a proportionality check was also introduced into the 2003 Act by the Anti-social Behaviour, Crime and Policing Act 2014. The designated certifying authority must now also “ensure that the most obviously disproportionate cases are filtered out at the very beginning of the process.”¹¹⁵ The amended 2003 Act stipulates that the designated UK authority should not certify an EAW if it was clear:

“that a judge proceeding under 21A would be required to order the person’s discharge on the basis that the extradition would be

¹¹⁰ The Baker Review, p 317

¹¹¹ The Government response to the Baker Review, p 3

¹¹² [Q 194](#)

¹¹³ Extradition Act 2003, section 21A as inserted by the Anti-social Behaviour, Crime and Policing Act 2014, section 157(2)

¹¹⁴ In England, Wales and Northern Ireland the designated certifying authority is the National Crime Agency (NCA); in Scotland, it is the Crown Office and Procurator Fiscal Service.

¹¹⁵ Written evidence from the Home Office ([EXL0060](#))

disproportionate. In deciding that question, the designated authority must apply any general guidance issued for the purposes of this subsection”¹¹⁶

Proportionality check

105. A number of witnesses told us the proportionality check could serve to lessen the burden on courts and the impact to the individual. Nick Vamos, Head of Extradition at the Crown Prosecution Service, said:

“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.”¹¹⁷

106. One witness said that the extent to which the proportionality check would filter out minor cases would be contingent on how effectively the test was conducted. Edward Grange reported that the courts were still receiving EAWs that although certified as satisfying section 2 of the Act, lacked basic information. He therefore hoped, “the proportionality bar, in bringing in this filtering process on certification, will be effective and active.”¹¹⁸

107. The CPS stated, “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.”¹¹⁹

108. The Government said that between 21 July 2014 and 5 September 2014, the NCA had refused certification of 14 EAWs. It is not known what proportion of the total number of EAWs for this period this represents. The Government estimated that “savings in excess of £180,000 are likely to have been made to the public purse.”¹²⁰

Criticisms of the proportionality bar

Too prescriptive

109. The proportionality bar was criticised for being too prescriptively drafted, restricting the courts to specified matters.¹²¹ This led the Criminal Bar Association to question its effectiveness:

“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.”¹²²

¹¹⁶ Extradition Act 2003, section 7A

¹¹⁷ [Q 85](#)

¹¹⁸ [Q 99](#)

¹¹⁹ Written evidence from the Crown Prosecution Service ([EXL0054](#))

¹²⁰ Written evidence from the Home Office ([EXL0060](#))

¹²¹ See for example [Q 6](#) (Sir Scott Baker).

¹²² Written evidence from the Criminal Bar Association ([EXL0055](#))

110. The Lord Chief Justice has issued practice guidance to the Courts on the interpretation of the specified matters.¹²³ Rebecca Niblock argued that this had been drafted in such a way as to mean that very few cases would be considered disproportionate. She said, “the exceptional circumstances set out [in the guidance] are, with respect, not all that exceptional”.¹²⁴

Additional litigation

111. Changes to statute are tested in the courts. Judge Riddle thought that since 2003 extradition law had been tested in the Supreme Court (and the House of Lords before that) more than any other branch of law. Judge Riddle said:

“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.”¹²⁵

112. It was suggested that the proportionality bar would be an additional avenue for litigation. Sheriff Maciver of the Edinburgh Sheriff Court thought the introduction of the bar would have a very significant effect on the workload of the courts:

“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.”¹²⁶

Restriction to accusation cases

113. The restriction of the proportionality bar to accusation cases was criticised by a number of witnesses. Jago Russell questioned what impact the bar would have as “most of these cases are suspended sentences that are reinvigorated after somebody leaves the country.”¹²⁷ It was suggested that many conviction cases were also clearly disproportionate and therefore the bar ought to be extended to them. Edward Grange and Rebecca Niblock gave an example:

“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.”¹²⁸

Applicability to Part 2 cases

114. Another criticism of the proportionality bar was that it applied only to Part 1 (EAW) cases. Some said that the more complicated process that Part 2 countries must follow meant they were unlikely to bring trivial and disproportionate claims. A proportionality bar for Part 2 countries was

¹²³ *Consolidated Criminal Practice Directions* (2014) EWCA Crim 1569, 23 July 2014, paragraphs 17A.2–5: <http://www.judiciary.gov.uk/wp-content/uploads/2014/07/new-CPDs-consolidated-with-amendment-no-2-july-2014.pdf> [accessed 3 March 2015]

¹²⁴ [Q 98](#) (Rebecca Niblock)

¹²⁵ [Q 142](#)

¹²⁶ Written evidence received from Sheriff Maciver ([EXL0064](#))

¹²⁷ [Q 30](#) (Jago Russell)

¹²⁸ Written evidence from Edward Grange and Rebecca Niblock ([EXL0035](#))

unnecessary and it would therefore be a “solution to a problem that does not exist.”¹²⁹ Again, the numbers of requests received by the UK from Part 2 countries, being so much lower than those for EAW requests, might be an indication of this point (see Table 2).

Table 2: Number of requests made by Part 2 countries

Year	Number of requests
2009–10	80
2010–11	102
2011–12	70
2012–13	84

Source: Written submission from the Home Office ([EXL0001](#))

115. Others said the bar ought to be introduced to guard against the possibility of trivial requests. Whilst fewer extradition requests were received from Part 2 countries, this did not “justify fewer protections for those requested under Part 2.”¹³⁰ Edward Grange and Rebecca Niblock thought that it was, “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.”¹³¹

Article 8 considerations

116. Prior to the introduction of the bar, proportionality arguments were made under Article 8 of the ECHR. Some witnesses said that the new bar would add nothing to what could already be achieved under the human rights bar. Edward Grange and Rebecca Niblock said that it “appears to echo what is already considered as part of the proportionality exercise in Article 8 ECHR cases.”

117. The Office of the Chief Magistrate thought that at present it was unclear whether the bar would “simply elongate the process or simplify matters.” However, Sheriff Maciver was critical of its introduction:

“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.”¹³²

118. One witness thought that the interpretation of the Article 8 bar might evolve again for Part 1 cases in the light of the new bar.¹³³ Another witness said that the issues at stake were important enough to merit two pegs on which to hang proportionality arguments. Michael Evans, a solicitor at Kaim Todner

¹²⁹ [Q 85](#)

¹³⁰ Written evidence from Liberty ([EXL0066](#))

¹³¹ Written evidence from Edward Grange and Rebecca Niblock ([EXL0035](#))

¹³² Written evidence from Sheriff Maciver ([EXL0064](#))

¹³³ [Q 99](#)

Ltd, said that Article 8 arguments should come “at the very end” of a judge’s “consideration of every other bar to extradition”, including the proportionality bar. If a case did not “succeed on that, you will move on to Article 8”. In his view Article 8 would still be used but “the proportionality bar is a codification of some of the Article 8 considerations that are already made.”¹³⁴

119. Nick Vamos said that the new bar would simplify proportionality arguments as they would no longer need to be crafted to suit the needs of Article 8:

“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.”¹³⁵

Proportionality and the Issuing State

120. Some witnesses said that a proportionality test should be undertaken by the Issuing State. The Office of the Chief Magistrate stated that in many cases, “there needs to be a requirement of proportionality and the consideration of other alternatives.”¹³⁶ Anand Doobay agreed there was a need for the Issuing State to consider proportionality, but cautioned that passage of time and changing circumstances meant there would still be the need for “assessment again in the executing Member State.”¹³⁷
121. The EU’s handbook on the EAW recommends that the Issuing State perform a proportionality check. However some witnesses thought this proportionality check should be a “binding requirement.”¹³⁸ Baroness Ludford, a former MEP and rapporteur on the EAW for the European Parliament’s Civil Liberties, Justice and Home Affairs Committee, said, “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.”¹³⁹
122. A number of witnesses cited Poland as issuing “a disproportionately large number of extradition requests for minor matters.”¹⁴⁰ Figures show that Poland has issued the most EAWs to the UK (see Table 3). Sheriff Maciver said:

“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.”¹⁴¹

¹³⁴ [Q 185](#) (Michael Evans)

¹³⁵ [Q 85](#)

¹³⁶ Written evidence from the Office of the Chief Magistrate ([EXL0043](#)); see also [Q 6](#) (Anand Doobay)

¹³⁷ [Q 7](#) (Anand Doobay); see also [Q 26](#) (Jago Russell).

¹³⁸ Written evidence from the Crown Prosecution Service ([EXL0054](#))

¹³⁹ [Q 170](#) (Baroness Ludford)

¹⁴⁰ Written evidence from the Office of the Chief Magistrate ([EXL0043](#))

¹⁴¹ Written evidence from Sheriff Maciver ([EXL0064](#))

Table 3: EAW requests received by England, Wales and Northern Ireland (10 highest issuing states)

Country	2009–10	2010–11	2011–12	2012–13	2013–14	Total
Poland	2,238	1,871	1,455	1,664	1,824	9,052
Germany	231	772	737	672	1,087	3,499
Romania	193	561	567	680	1,015	3,016
Belgium	88	293	358	376	476	1,591
Spain	161	254	318	408	351	1,492
France	102	186	319	422	372	1,401
Netherlands	107	316	340	268	204	1,235
Italy	98	209	226	332	314	1,179
Hungary	67	270	195	201	387	1,120
Czech Republic	119	267	203	182	229	1,000

Source: NCA statistics <http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics>

123. The Polish Ministry of Justice told us that the high number of EAWs issued by Poland was a result of the principle of legality (which requires prosecutors to use all legal means to bring an individual to justice rather than having the discretion the principle of the public interest allows) and the fact that “a number of Polish nationals choose the United Kingdom as their destination taking advantage of the free movement of persons.” The Polish Criminal Procedure Code will, from July 2015, exempt EAWs from the principle of legality thereby allowing Polish prosecutors more discretion than currently. The Ministry thought the issue of proportionality to be overstated. It noted that even prior to the Criminal Procedural Code being amended, measures such as the dissemination of the EAW handbook and training for judges and prosecutors meant that between 2009 and 2013 the number of EAWs issued by Poland fell by approximately 40%.¹⁴² As a result, the Polish Ministry of Justice was “confident that the issue of proportionality has been successfully resolved.”¹⁴³

Compliance with EU legislation

124. There was concern as to the consequences of the UK enacting a proportionality bar in domestic legislation. The Law Society said that unilateral action risked “inconsistent approaches.”¹⁴⁴ Other witnesses questioned the compatibility of the bar with European law. Professor John Spencer, Professor Emeritus of Law at the University of Cambridge, said, “I foresee that it could eventually result in the European Court of Justice in Luxemburg having to make a ruling on the matter.”¹⁴⁵ Whilst acknowledging

¹⁴² Written evidence from the Polish Ministry of Justice (EXL0084) stated, “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%.”

¹⁴³ Written evidence from the Polish Ministry of Justice (EXL0084)

¹⁴⁴ Written evidence from the Law Society (EXL0046)

¹⁴⁵ Q 29 (Professor John Spencer); see also Q 155 .

that the question of compliance was an issue, Anand Doobay said that if European legislation was not forthcoming, it was “understandable that individual Member States are having to take action to try to deal with it themselves.”¹⁴⁶

125. The Home Secretary told us that it was unrealistic to expect the Commission to give “blanket guarantees” that the UK would not be subject to infraction proceedings. However, she said:

“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.”¹⁴⁷

126. In principle, it is for the Issuing State to take a view of the seriousness of a crime in its territory. The UK’s role is to ensure the human rights of the people it extradites are properly protected. That said, **the operation of the EAW, in particular the absence of an effective proportionality check by the Issuing State, means the Government was right to introduce the proportionality bar into domestic legislation.**
127. **We see no reason why the proportionality bar should not be extended to conviction cases given the number of EAWs received for trivial matters; the Government should therefore legislate accordingly. In order for the bar to be effective the NCA must be resourced accordingly and we also call on the Government to ensure that adequate resources are in place. (Recommendation 4)**
128. **We hope that over time improved practice will develop throughout the EU making the proportionality bar practically redundant.**
129. **We do not believe there to be a similar systemic risk of disproportionate requests to justify a proportionality bar for Part 2 countries.**

¹⁴⁶ [Q 7](#) (Anand Doobay)

¹⁴⁷ [Q 197](#)

CHAPTER 4: FORUM

Forum: an overview

130. Forum is the term used to describe the country in which a prosecution takes place. It arises as an issue in extradition law where the nature of a crime means that it could potentially be prosecuted in more than one country.
131. Questions around forum have become increasingly controversial as the nature of some crimes has changed. Traditional concepts of extradition involved seeking to return a fugitive to the country in which he or she had committed a crime. In cases such as murder or theft the question of forum is clear: the fugitive should be returned to stand trial in the country in which the murder or theft occurred. In the modern era crimes involving fraud on global markets or committed online, for example, raise more difficult questions of forum. Sir Scott Baker told us, “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 not moving at all.”¹⁴⁸
132. These kinds of cases are increasing. Sue Patten, Head of Specialist Fraud Division at the CPS, said, “My colleagues specialising in organised crime ... estimate that about 70% of their case load involves conduct in multiple jurisdictions”.¹⁴⁹ Rebecca Niblock said that her perception was that “there are a number of cases involving cross-jurisdictional elements and that these are on the rise.”¹⁵⁰

Prosecutors’ decisions in concurrent cases

133. The first point at which questions of forum are considered is during discussions between prosecutors from the Issuing State and the UK. When an Issuing State is considering making an extradition request to the UK its prosecuting authorities will consult the UK authorities. If an investigation has also been ongoing in the UK, the authorities will discuss which country would provide the most suitable forum for the prosecution. Such discussions are based on guidelines provided by the Director of Public Prosecutions (DPP).¹⁵¹ The guidelines include principles to be applied (see Box 6).

Box 6: DPP’s guidelines for concurrent cases: principles to be applied

The DPP’s guidelines are as follows:

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.

¹⁴⁸ [Q 5](#) (Sir Scott Baker)

¹⁴⁹ [Q 77](#)

¹⁵⁰ [Q 90](#) (Rebecca Niblock)

¹⁵¹ Attached as Appendix 1 to the written evidence from the Crown Prosecution Service ([EXL0054](#))

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:
 - (a) the location of the witnesses, their ability to give evidence in another jurisdiction and where appropriate, their right to be protected;
 - (b) the location of the accused and his or her connections with the United Kingdom;
 - (c) the location of any co-defendants and/or other suspects; and
 - (d) 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.”

134. These guidelines were criticised as not being adequately clear in cases like those described by Sir Scott Baker. Anand Doobay said:

“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 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?”¹⁵²

135. Because of this apparent lack of clarity, Edward Grange and Rebecca Niblock spoke about there being “cases in which directly contradictory decisions were made by the CPS”.¹⁵³ A number of high profile cases in recent years have involved these questions of criminality and loss or harm occurring

¹⁵² Q 13 (Anand Doobay)

¹⁵³ Written evidence from Edward Grange and Rebecca Niblock (EXL0035)

in different jurisdictions (see, for example, the cases of *McKinnon*, the *NatWest 3* and *O'Dwyer* in Appendix 5).

136. The evidence from the CPS was that they applied the guidelines consistently but that each case had to be considered on its own facts, and this would lead to different outcomes. Nick Vamos said:

“In the case that Sue [Patten] 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.”

137. The discussions between prosecutors were also criticised because they took place behind closed doors. Rebecca Niblock said, “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”.¹⁵⁴ Sue Patten said that where there were “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”.¹⁵⁵
138. **In our view, the CPS’s criterion of “where most of the criminality or most of the loss or harm occurred” is likely to continue to produce unpredictable outcomes. This is unavoidable.** Cases are fact-specific and balances must be struck where both parties have competing claims. This is particularly true in the modern era where traditional concepts of crime and jurisdiction are increasingly out-dated. **The current formulation provides the necessary discretion to the prosecutors to reach sensible conclusions.**
139. It is inevitable that prosecutors’ decisions will be criticised from time to time. **Further commentary on the prosecutors’ guidelines for cases of concurrent jurisdiction and their implementation may help to avoid ill-founded criticism. Similarly, providing complete and full information to Requested People about the rationale behind the decision to seek extradition in cases of concurrent jurisdiction may be helpful. We recommend the Government consider what additional information could be provided and issue the necessary guidance to the CPS. (Recommendation 5)**

¹⁵⁴ [Q 93](#) (Rebecca Niblock)

¹⁵⁵ [Q 83](#) (Sue Patten)

Forum bar

140. Critics of the way in which prosecutors reach their decisions have long argued in favour of a bar to extradition on grounds of forum. Liberty wrote:

“The absence of a forum bar has led to a number of cases of clear injustice over the past decade ...

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.”¹⁵⁶

141. With reference to concurrent cases involving the US, Isabella Sankey, Director of Policy at Liberty, concluded, “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.”¹⁵⁷ Liberty were in favour of a forum bar like that provided for in the EAW legislation (see Box 7).¹⁵⁸

Box 7: Forum bar under the EAW

The Framework Decision establishing the EAW included provisions to bar extradition on grounds of forum. Article 4(7)(a) states:

“The executing judicial authority may refuse to execute the European Arrest Warrant:

...

(7) where the European Arrest Warrant relates to offences which:

- (a) 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;”

This Article is drafted in permissive terms so Member States need not implement it, though some have. For example, the French Penal Code implements this provision and therefore allows extradition to be barred if all or some of the relevant offences were committed in French territory.¹⁵⁹

142. A forum bar was included in the Police and Justice Act 2006 but was never brought into force. The formulation in that Act barred extradition on grounds of forum if:

“(a) a significant part of the conduct alleged to constitute the extradition offence is conduct in the United Kingdom, and

¹⁵⁶ Written evidence from Liberty ([EXL0066](#))

¹⁵⁷ [Q 57](#) (Isabella Sankey)

¹⁵⁸ Written evidence from Liberty ([EXL0066](#))

¹⁵⁹ Code de procédure pénal, Article 695-24: <http://www.legifrance.gouv.fr/affichCode.do?idSectionTA=LEGISCTA000006182918&cidTexte=LEGITEXT000006071154&dateTexte=20150116> [accessed 3 March 2015]

(b) in view of that and all the other circumstances, it would not be in the interests of justice for the person to be tried for the offence in the requesting territory.”¹⁶⁰

143. As noted above, the question of whether to introduce a forum bar was one of the questions the Home Secretary posed for Sir Scott Baker’s review. The review concluded, “the forum bar provisions should not be implemented. Whilst a small number of high profile cases have highlighted the issue of forum, we have no evidence that any injustice is being caused by the present arrangements.”¹⁶¹
144. Despite this recommendation, a forum bar was introduced into the 2003 Act by the Crime and Courts Act 2013. It was brought into force in England, Wales and Northern Ireland (but not Scotland) in October 2013. This forum bar is worded quite differently to the 2006 version. It provides that extradition may be barred on grounds of forum if a substantial measure of the criminal activity took place in the UK and the judge decides, “having regard to the specified matters relating to the interests of justice (and only those matters), that the extradition should not take place.”¹⁶² The provisions go on to spell out the “specified matters”, namely:
- (a) the place where most of the loss or harm resulting from the extradition offence occurred or was intended to occur;
 - (b) the interests of any victims of the extradition offence;
 - (c) any belief of a prosecutor that the UK is not the most appropriate jurisdiction in which to pursue the prosecution;
 - (d) whether the evidence necessary to prove the offence is or could be made available in the UK, were the prosecution to take place here;
 - (e) any delay that might result from proceeding in one jurisdiction rather than another;
 - (f) the desirability and practicability of all prosecutions relating to the extradition offence taking place in one jurisdiction, having regard to:
 - (i) the jurisdictions in which witnesses, co-defendants and other suspects are located, and
 - (ii) the practicability of the evidence of such persons being given in the UK or in jurisdictions outside the UK; and
 - (g) the Requested Person’s connections with the United Kingdom.
145. The bar now in force also differs from the version included in the Police and Justice Act 2006 in that it includes provisions for the UK prosecuting authorities to veto consideration of forum by the court by producing a certificate to the effect that they would not prosecute in the UK, even if most

¹⁶⁰ Prospective sections 19B and 83A of the 2003 Act as inserted by the Police and Justice Act 2006, section 42

¹⁶¹ The Baker Review, p 13

¹⁶² Extradition Act 2003, sections 19B and 83A as inserted by the Crime and Courts Act 2013, section 50

of the criminal action took place in this country. A prosecutor's certificate may only be questioned on appeal. Consideration to grant leave to appeal a prosecutor's certificate must follow the procedures and principles that apply to judicial review.¹⁶³

146. The Government's position was that because it was "important that the public have confidence in the way in which the UK's extradition arrangements work"¹⁶⁴ it was necessary to bring "greater transparency in respect of where those [concurrent jurisdiction] cases should occur".¹⁶⁵
147. The forum bar has not been brought into force in Scotland. However, for many years the Lord Advocate has had the right to seek the agreement of the court to have criminal proceedings in Scotland either brought to an end completely (by an order of *desert simpliciter*) or suspended (by an order of *desert pro loco et tempore*). The Lord Advocate's power to seek such orders, though not specific to extradition or to questions of forum, can delay or prevent a prosecution taking place in Scotland. It may therefore be seen in some ways as not entirely dissimilar to a prosecutor's certificate.

Criticisms of the forum bar

148. As noted above, the Baker Review concluded against introducing a forum bar. In evidence to us, Sir Scott Baker explained his misgivings:

"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 ... Why, fundamentally, I do not like the idea of a forum bar is that the question of a forum bar is that the question of forum ... is essentially a prosecutorial decision."¹⁶⁶

149. Most witnesses did not object to a forum bar in principle but questioned the effectiveness of the bar in force. So far, only one case, that of *Dibden* (see Appendix 5), has made substantive arguments on grounds of forum at appeal.
150. One criticism was that the bar was too prescriptively drafted rather than simply asking the courts to make an interest of justice judgment (see Box 8). Rebecca Niblock said that "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."¹⁶⁷ Similarly, Jodie Blackstock said that "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."¹⁶⁸ Sir Scott Baker described the

¹⁶³ Extradition Act 2003, section 19(E)(1) and (2)

¹⁶⁴ Written evidence from the Home Office ([EXL0060](#))

¹⁶⁵ [Q 36](#)

¹⁶⁶ [Q 10](#) (Sir Scott Baker)

¹⁶⁷ [Q 95](#) (Rebecca Niblock)

¹⁶⁸ [Q 184](#) (Jodie Blackstock)

prescriptive nature of the bar as “a rather dangerous line of legislation, because it is always possible that something quite important has been overlooked.”¹⁶⁹ However, no witnesses offered any suggestions of relevant matters missing from the list included in the legislation.

Box 8: Interests of justice test

A number of provisions of the 2003 Act require the judge to determine whether a particular order of the court would be in the ‘interests of justice’. For example, section 8(5) empowers the judge to postpone an extradition hearing where he or she (presumed independent and experienced in extradition law) believes it to be in the interests of justice. Unlike the forum bar provisions, section 8(5) does not prescribe the factors relevant to the judge’s decision. Typically, relevant factors will include the needs of effective case management, costs and fairness to both the parties and victims, as well as the need to honour extradition arrangements. Judicial decisions are potentially subject to appeal or judicial review where relevant considerations are ignored or irrelevant considerations taken into account.

151. The Government’s view was that the bar had been drafted in such a way as to “strike the right balance between the interests of the individual and the interests of the prosecutor”.¹⁷⁰
152. Another criticism of the bar was that provisions for a prosecutor’s certificate (as describe in paragraph 145) rendered “the protection conferred by the forum bar illusory”.¹⁷¹ Liberty said that the existence of the certificate provisions fettered “judicial discretion undermining the proper function of the court in blocking unnecessary extraditions”.¹⁷² JUSTICE said that the certificate provisions were “so widely drawn that it will render the forum bar unworkable”.¹⁷³
153. In response to these criticisms, Nick Vamos explained:

“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

¹⁶⁹ [Q 12](#) (Sir Scott Baker)

¹⁷⁰ [Q 45](#)

¹⁷¹ Written evidence from the Law Society ([EXL0046](#))

¹⁷² Written evidence from Liberty ([EXL0066](#))

¹⁷³ Written evidence from JUSTICE ([EXL0073](#))

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.”

154. The CPS submitted a copy of their “Internal Process for Dealing with Forum Bar Cases”, which includes details of how they apply the certificate provisions, as written evidence.¹⁷⁴
155. Another concern raised about the certificate provisions was that they would “lead to perverse outcomes given that extradition will more likely occur in those cases where ... 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.”¹⁷⁵ The CPS said that a number of factors might make prosecution in the Issuing State appropriate even where action in the UK had been ruled out:

“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.”

156. Some witnesses concluded that it was too soon to comment confidently on the effectiveness of the bar. It was noted that so far only a few cases had gone to appeal citing forum and none had been successful.¹⁷⁶
157. Other witnesses concluded that the combination of the prescriptive drafting and the influence of the prosecutor meant that the bar in force had “no teeth”.¹⁷⁷ Julia O’Dwyer, the mother of Richard O’Dwyer (see Appendix 5), said that the earlier version of the forum bar would have been preferable and that “we have now been lumbered with a pretty watered-down version of the forum bar ... I think we will not see anybody benefiting from that very much at all.”¹⁷⁸

Forum under Article 8

158. Forum issues have arisen under Article 8. David Bermingham, who was extradited to the US, said that the NatWest 3 had argued that their extradition would breach their Article 8 rights because “it was not necessary

¹⁷⁴ Supplementary written evidence from the CPS ([EXL0075](#))

¹⁷⁵ Written evidence from Liberty ([EXL0066](#))

¹⁷⁶ For example, see written submission by Edward Grange and Rebecca Niblock ([EXL0035](#)), [Q 11](#) (Anand Doobay), [Q 71](#) and [Q 81](#) (Nick Vamos).

¹⁷⁷ Written evidence from Kaim Todner Solicitors Ltd ([EXL0057](#))

¹⁷⁸ [Q 184](#) (Julia O’Dwyer)

or proportionate because the case could and should be heard in London.”¹⁷⁹ Although David Bermingham was unsuccessful, the courts have held that addressing forum by way of Article 8 is a legal possibility. In *Norris v the US*,¹⁸⁰ Lord Phillips of Worth Matravers said:

“Extradition proceedings should not become the occasion for a debate about the most convenient forum for criminal proceedings. Rarely, if ever, on an issue of proportionality, could the possibility of bringing criminal proceedings in this jurisdiction be capable of tipping the scales against extradition ... Unless the judge reaches the conclusion that the scales are finely balanced he should not enter into an inquiry as to the possibility of prosecution in this country.”

159. This, however, has not yet been fully tested in the courts and therefore it is not clear how it would be applied in detail. For example, in the case *BH v the Lord Advocate* (which involved the extradition of a husband and wife with a number of children, two of whom were born while extradition proceedings were under way), the High Court of Justiciary in Scotland found that extradition could not be discharged on Article 8 grounds and therefore it was “unnecessary, following *Norris*, to consider the possibility of a prosecution in this country.”¹⁸¹ However, when the case was heard on appeal, Lord Hope of Craighead said:

“The best interests of the children do however suggest that the High Court of Justiciary was wrong to hold, as Lord Reed indicated in para 101 of his opinion, that it was unnecessary to consider the possibility of a prosecution in this country. It will not be necessary to do this in every case. But I would make an exception here.”¹⁸²

160. Despite the final decision to order the extradition of both parties in *BH*, this case suggests that successful forum arguments could conceivably be made in the context of Article 8 if a trial in this country would have a far less severe impact on the private and family life of the Requested Person.

161. In the light of this more developed approach to discussing forum, Nick Vamos noted that:

“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.”¹⁸³

Extradition of own nationals

162. One witness referred to 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

¹⁷⁹ [Q 247](#)

¹⁸⁰ *Norris v Government of United States of America* (2010) UKSC 9 at 67

¹⁸¹ *B H, K A S or H v The Lord Advocate, The Scottish Ministers* (2011) HCJAC 77 at 101

¹⁸² *BH (AP) and another v The Lord Advocate and another* (2012) UKSC 24 at 60

¹⁸³ [Q 81](#) (Nick Vamos)

should be prosecuted here”.¹⁸⁴ There are some countries which do not extradite their own nationals but this has not been the case in UK law for over a century.¹⁸⁵

163. However, a number of witnesses said that there should be a presumption that if a British national could be tried in the UK, he or she ought to be tried here. For example, David Bermingham said:

“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 ... 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.”¹⁸⁶

164. Similarly, Liberty proposed a forum bar based on “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.”¹⁸⁷

165. These variations on the forum bar are proposed to deal with the concerns that “Once extradited, a requested person is separated from friends, family and their emotional support network”.¹⁸⁸ For some they were necessary because they viewed it as inappropriate for extradition to be used in cases where the Requested Person has not “even set foot”¹⁸⁹ in the Issuing State.

166. Arguably, the impact of extradition on a person resident in the UK is more properly addressed by consideration of Article 8 of the ECHR as this can already take into account all aspects of his or her life and relationships in the UK (see Chapter 2).

167. **The forum bar is still a new element to extradition law. It is too soon to come to a view on its effectiveness.** In the light of this conclusion, it is not yet clear whether a Requested Person in Scotland is less protected from extradition than a person elsewhere in the UK. However, it is certainly clear that in Scotland a Requested Person has fewer opportunities to present forum arguments.

168. **It may be that a wider ‘interests of justice’ test ought to be allowed in the forum bar but, on the basis of the evidence we have heard, that is far from certain. With only a small number of cases having gone to appeal, it is too soon to conclude that the bar is too restrictive.**

¹⁸⁴ [Q 5](#) (Anand Doobay)

¹⁸⁵ In the course of a case of extradition to Switzerland in 1877 the Requested Person resisted extradition on the basis that the UK’s treaty with Switzerland precluded the surrender of British nationals. In his judgment the Lord Chief Justice, Sir Alexander Cockburn, said “I am chairman of the commission on the subject of extradition, and I will take care that, if possible, this blot upon the law shall be removed, so as to prevent an Englishman who commits an offence in a foreign country from escaping with impunity.” (*R v Wilson* (1877) 3 QBD 42)

¹⁸⁶ [Q 244](#)

¹⁸⁷ Written evidence from Liberty ([EXL0066](#))

¹⁸⁸ *Ibid.*

¹⁸⁹ Written evidence from Janis Sharp, the mother of Gary McKinnon ([EXL0080](#))

169. Unless case law demonstrates that the forum bar slows down extradition proceedings excessively, **we conclude that having a process whereby prosecutors' decisions can be directly scrutinised in open court is a valuable addition to the 2003 Act and has potential to make this part of the process more transparent. This may be a useful addition to the law given our conclusions in paragraphs 138 and 139.**
170. **We are content that the provisions concerning the prosecutors' certificate do not undermine the bar. The forum bar should not prevent extradition where a prosecution in the UK would not be possible. The CPS's approach to the certificate appears to us to be a proportionate use of the power to ensure that this does not happen.** We also note that the other bars to extradition are unaffected and would remain available to the Requested Person where forum arguments have not been successful.
171. **We do not consider that there should be (nor under the EAW scheme could there be) an absolute bar to extradition merely because it is sought in respect of a UK national whose criminal activity was performed entirely in this country.**
172. However, we note that there are cases where a person is a fugitive from a country in which he or she has physically committed a crime and cases where a person has not left the UK but has been engaged in, for example, cyber-crime or international fraud. In both instances the offences may be serious but the sense in which the Requested Person is a fugitive is different. In the latter cases, the UK is the Requested Person's home (with all the connections and ties which that implies) and, as such, they are different from those cases where a person's presence in the UK is a means to escape justice and seek a safe haven. In our view, questions of forum alone do not adequately address these differences.
173. **We recommend, therefore, that where a person is normally resident in the UK the courts should be particularly astute to ensure that:**
- (a) **no other less draconian measures are available to progress the case to a just outcome;**
 - (b) **the forum bar has been fully explored in court;**
 - (c) **all relevant Article 8 arguments have been fully evaluated to ensure extradition is not disproportionate; and**
 - (d) **due consideration has been given to the possibility of obtaining assurances as to:**
 - (i) **the prospects of pre-trial bail; and**
 - (ii) **the transfer back to the UK of at least part of any eventual sentences. (Recommendation 6)**

CHAPTER 5: EXTRADITION AND OTHER AREAS OF LAW

Introduction

174. In the course of our inquiry it became clear that, from time to time, there is an interaction between extradition law and other overlapping areas of law. These issues arose during our inquiry and had not been included in our Call for Evidence. We have therefore received only limited evidence on them. However, these appeared to us to be important issues worth noting in our report.

Extradition and sensitive material

Background and size of problem

175. The issue we received the most evidence on was how sensitive material could be dealt with during extradition cases. This was something recently considered by the Supreme Court. In the case of *VB v Rwanda*¹⁹⁰ the Supreme Court considered whether:

“in the absence of any relevant statutory power, it is open to the district judge hearing the extradition proceedings (a) to use a closed material procedure to receive evidence which the appellants wish to adduce, or (b) in the alternative in relation to some of such evidence to make an irrevocable non-disclosure order providing for the disclosure of such evidence to the Crown Prosecuting Service (“CPS”), but prohibiting its disclosure to the GoR [Government of Rwanda].”¹⁹¹

176. Arguments were put to the Court that, although the Extradition Act 2003 did not expressly provide for a closed material procedure (where evidence could be heard in private sitting with one of the parties excluded) or non-disclosure orders (where evidence could be heard in private by both parties on the basis that it would be kept confidential), extradition was similar enough to other areas of law in which these procedures were allowed that they ought also to be available in extradition hearings. A majority of the Court held that the 2003 Act allowed no implied exception to the principle of open justice allowing such powers or procedures.¹⁹² Further legislation would therefore be needed to provide the courts with such powers.

177. In evidence, the Committee heard that there were a number of situations in which a Requested Person might want to adduce sensitive evidence in the course of an extradition hearing. These included:

- where the person feared persecution in the Issuing State but was not in a position to apply for asylum in the UK¹⁹³ (this was the case in *VB v*

¹⁹⁰ *VB, CU, CM, EN v Westminster Magistrates’ Court, The Government of Rwanda* (2014) 3 WLR 1336

¹⁹¹ *VB, CU, CM, EN v Westminster Magistrates’ Court, The Government of Rwanda* (2014) 3 WLR 1336 at 2

¹⁹² Lord Toulson dissented from the majority judgment saying “I would hold that justice, and the respect for human rights on which the MoU was expressly predicated, require that at some stage in the process the evidence should be able to be considered” (*VB v Rwanda* at 84)

¹⁹³ In *Poland v Dytlow* (2009) EWHC 1009 (Admin) at 14 the High Court ruled that “all the indications in the 2003 Act are that the existence of refugee status does constitute a valid objection to the extradition of the refugee.”

Rwanda where one of the four Requested People was a British citizen and therefore asylum was not an option);¹⁹⁴

- where a person wished to demonstrate a real risk of human rights breach by relying on evidence provided by those who would not want their evidence being communicated back to the Issuing State (again, in *VB v Rwanda* there were fears that evidence from people in Rwanda would put those witnesses at risk of persecution by the Rwandan authorities or the wider community); and
- where a person wished to adduce evidence that would put witnesses in danger for reasons other than from persecution by state authorities, such as persecution by the wider community on religious or other grounds.¹⁹⁵

178. It was not clear how many cases were affected by these issues in practice. One witness summed it up as being “a minority, but not a *de minimis* minority. There is a concern. There is a problem.”¹⁹⁶

Possible solutions

179. Two broad solutions were proposed to us, each already used in other areas of law and each presenting difficulties in extradition. All witnesses agreed that the Supreme Court ruling made it clear that legislation would be needed.¹⁹⁷

180. The first solution would be to impose disclosure conditions on sensitive evidence. In deportation cases it is possible, under certain circumstances, for material about the home state to be used on condition it is not further disclosed to that country. In extradition this would require the CPS, acting as the lawyers for the Issuing State, to withhold information from their clients. This would give rise to a difficulty not present in deportation. Deportation cases are between the people concerned and the UK; the home state is not a party in the proceedings in the UK: it is simply the destination of the person concerned. Extradition cases are between the Requested People and the Issuing States, with the UK authorities acting on an Issuing State’s behalf in a client-solicitor relationship; the Issuing State is actively seeking the return of the Requested Person and engages the services of the CPS to fulfil that task.

181. Because of these differences Helen Malcolm QC, a barrister at Three Raymond Buildings, said:

“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 do not see any way in which they can be privy to information without disclosing it on to their client ... The whole point is that the CPS is just the solicitor for the requesting state, so I have problems with non-disclosure orders.”¹⁹⁸

¹⁹⁴ [QQ 231-2](#) (Clair Dobbin)

¹⁹⁵ [Q 232](#) (Helen Malcolm QC)

¹⁹⁶ [Q 232](#) (Raza Husain QC)

¹⁹⁷ See, for example, [Q 234](#) (Clair Dobbin) and [Q 235](#) (Raza Husain QC).

¹⁹⁸ [Q 234](#) (Helen Malcolm QC)

182. The second solution would be to provide for closed hearings in which an independent Counsel represented the Issuing State. This would allow for evidence to be presented and, to a degree, tested without compromising the client-solicitor relationship between the CPS and the Issuing State. A similar procedure is available in asylum cases where the defence is represented in closed hearings by a Special Advocate allowing sensitive material to be tested before the judge assesses its credibility.
183. This option also has downsides. Clair Dobbin, a barrister at Three Raymond Buildings, raised an objection on a point of principle. She said that in extradition cases there was “a particular need to interrogate and test the kind of evidence that is relied upon” but that the closed procedure model involved “shutting out a party to the litigation”.¹⁹⁹
184. There were practical concerns too. Jeremy Johnson QC, a barrister at 5 Essex Court, referred to such procedures as “cumbersome and costly”.²⁰⁰ Helen Malcolm QC described her experience of performing a similar role in immigration cases:
- “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.”²⁰¹
185. However, despite these issues, Helen Malcolm QC concluded that “It is certainly much better than nothing, which is the alternative.”²⁰²
186. Overall, witnesses agreed that if these procedures were appropriate in the asylum and deportation context it was difficult to justify, in principle, the different treatment of extradition proceedings. Witnesses differed over what should be the solution to this difficulty.
187. For both proposed solutions witnesses had serious reservations. Raza Husain QC, a barrister at Matrix Chambers, supported the idea of using closed proceedings with an independent Counsel representing the Issuing State but described it as “the least worst option.”²⁰³ Jeremy Johnson QC preferred a non-disclosure power but said he recognised the objections to it and that “every solution is imperfect.”²⁰⁴
188. In its response to these views, the CPS said that it would be “difficult to legislate in isolation” to require the CPS to withhold information from an

¹⁹⁹ [Q 234](#) (Clair Dobbin)

²⁰⁰ [Q 235](#) (Jeremy Johnson QC)

²⁰¹ [Q 235](#) (Helen Malcom QC)

²⁰² *Ibid.*

²⁰³ [Q 237](#) (Raza Hussain QC)

²⁰⁴ [Q 235](#) (Jeremy Johnson QC)

Issuing State. They said, “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.”²⁰⁵

189. This is an area of law in which the rights of an individual to put as strong a case as possible against his or her extradition must be balanced against the Issuing State’s legitimate interests. However, **it is not right that a person facing extradition is unable to present sensitive material in order to resist extradition without prejudice to others.**
190. **We recommend that the Government bring forward proposals to amend the 2003 Act to provide for an independent counsel procedure in order to enable sensitive material to be used in extradition hearings. (Recommendation 7)**

Family Court proceedings

191. Extradition cases sometimes raise issues that are more commonly the subject of Family Court proceedings. This overlap usually arises in the course of Article 8 arguments where the court may be asked to consider the position of the dependants of a Requested Person and what alternative care arrangements might be made if extradition were ordered.
192. According to the evidence submitted by Amelia Nice, barrister at 5 St Andrew’s Hill (assisted by barrister colleagues),²⁰⁶ issues which may arise in this area include:
- how the court liaises with the social services to get the necessary information about the Requested Person’s family life;
 - the time it may take for proper assessments to be made by the social services;
 - the fact the social services would normally assess a family situation as it is at the time whereas an extradition hearing requires prospective information about what would happen if the Requested Person were extradited. This may make assessments incomplete, less helpful than required or even counter-productive;
 - how information is disclosed from the Magistrates’ Court to the Family Courts; and
 - the fact that family proceedings are routinely held in private, unlike extradition hearings. This may lead to extradition hearings using evidence submitted from a Family Court which is redacted to such an extent that it is unusable.
193. Amelia Nice also referred to “numerous cases of the Family Court refusing to disclose CAFCASS²⁰⁷ reports or details” to the Magistrates’ Court.²⁰⁸ Our

²⁰⁵ Written evidence from the Crown Prosecution Service ([EXL0092](#))

²⁰⁶ Written evidence from Amelia Nice ([EXL0086](#))

²⁰⁷ The Children and Family Court Advisory and Support Service

²⁰⁸ Written evidence from Amelia Nice ([EXL0086](#))

evidence from the Senior District Judge and his colleagues demonstrated that they were aware of these issues. Judge Arbuthnot said:

“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.”²⁰⁹

194. For this reason the written evidence from the magistrates said that they 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.”²¹⁰
195. The Ministry of Justice (MoJ) said giving magistrates the authority to commission evidence would be “problematic”, as the LAA could only sanction payment for expert reports for legal aid recipients and it could cause “tensions if the defence solicitor did not regard the report as necessary.”²¹¹

Child abduction

196. According to Amelia Nice’s evidence, there is a “relatively small, but increasing” number of cases where a person might be requested from the UK on charges of child abduction. However, extradition proceedings alone make no provision for the child concerned. Without civil proceedings to ensure the return of the child, a person may be extradited to face abduction charges despite uncertain childcare arrangements for the child left in the UK. In one case a mother had taken her children from Sweden. The Swedish authorities successfully extradited her back to Sweden and her children were looked after by a friend in the UK. Some weeks later the Swedish authorities arranged for the return of the children to Sweden.²¹²
197. Amelia Nice concluded that:

“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.”²¹³

Trafficking

198. Amelia Nice’s evidence raised the issue of cases where the Requested Person claims to be the victim of human trafficking. Ms Nice referred to a “lack of

²⁰⁹ [Q 137](#) (Deputy Senior District Judge Arbuthnot)

²¹⁰ Written evidence from the Office of the Chief Magistrate ([EXL0043](#))

²¹¹ Written evidence from the Ministry of Justice ([EXL0091](#))

²¹² *Ljungkvist v Sweden*, (2013) EWHC 1682 (Admin), described in the written evidence from Amelia Nice ([EXL0086](#))

²¹³ Written evidence from Amelia Nice ([EXL0086](#))

guidance” and “scarcity of decisions”²¹⁴ which might inform the courts how best to deal with this situation. The relevant issues include:

- how extradition hearings should interact with the obligations that the ECHR places on a state where a person has been the victim of trafficking;²¹⁵
- how the courts can make a proper evaluation of whether the claim is true; and
- what assessment the courts can make of what potential there might be for being re-trafficked if extradited.

199. The Committee has not heard sufficient evidence to comment usefully on how extradition law ought to interact with proceedings in the Family Court, child abduction cases and people trafficking law. However, clearly these are areas where further investigation is necessary. We recommend that the Government commission a review into these matters. (Recommendation 8)

²¹⁴ *Ibid.*

²¹⁵ Article 4, the prohibition of slavery and forced labour, is interpreted as including “a procedural obligation to investigate where there is a credible suspicion that an individual’s rights under that Article have been violated”. European Court of Human Rights, *Guide to Article 4 of the Convention: Prohibition of slavery and forced labour*, second edition, June 2014, p 14: http://www.echr.coe.int/Documents/Guide_Art_4_ENG.pdf [accessed 3 March 2015]

CHAPTER 6: LEGAL ADVICE, LEGAL AID AND EXPERT EVIDENCE

200. For Requested People to be able to make full and fair use of the extradition process they must have adequate legal advice, have access to legal aid and be able to make use of appropriate expert evidence. These three factors are therefore linked.

Legal advice

201. Witnesses were generally complimentary of specialist extradition solicitors and barristers. However, concern was raised about the duty solicitor rota which provides legal advice to Requested People who do not have access to a lawyer of their own. Whilst it is a duty rota specifically for extradition work, the only criterion for joining it is to declare oneself able to carry out the work; there is no assessment or qualification (see Box 9).
202. This may lead to representation by a lawyer with no experience of extradition law, despite the weight of evidence that extradition legislation and case law is niche and complex.²¹⁶ Liberty said that:
- “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 ... the 2003 Act is immensely complex and has generated a vast amount of case law.”²¹⁷
203. There was a concern that lack of expertise could result in poor quality advice to vulnerable individuals. Jago Russell said that Fair Trials International saw “numerous cases” where Requested People received poor representation at the initial hearing.²¹⁸
204. The duty solicitor role is an important one. Judge Riddle said that his court was “enormously reliant on our duty solicitors.”²¹⁹ At the initial hearing the Requested Person must decide whether to contest extradition or not. This is clearly a significant decision requiring reliable advice. It may well be in the best interests of the Requested Person to return to the Issuing State rather than enduring the hardships of a full extradition hearing.²²⁰ There was also concern that, if inadequate advice was given at the early stages of proceedings, relevant issues might not be raised at the appropriate point. Jago Russell gave an example of a Polish man whose extradition was discharged on Article 8 grounds at appeal “because it was discovered that he was the sole carer for a very severely disabled daughter”. This had not been

²¹⁶ See for example, [Q 36](#), written evidence from the Criminal Bar Association ([EXL0055](#)) and Kaim Todner Solicitors Ltd ([EXL0057](#)).

²¹⁷ Written evidence from Liberty ([EXL0066](#))

²¹⁸ [Q 34](#) (Jago Russell)

²¹⁹ [Q 133](#)

²²⁰ [QQ 133–4](#) (Senior District Judge Riddle)

raised in earlier proceedings because “the duty solicitor, who was not an expert in extradition, had not even noted that fact.”²²¹

205. Despite the evidence from some witnesses, the extent to which the rota arrangements caused problems in practice was not clear. Judge Riddle reported that he had only received two complaints regarding duty solicitors in four years.²²²

206. At present, Westminster Magistrates’ Court provides training for duty solicitors, though this is not compulsory. Judge Riddle thought it would not be “very difficult or very expensive for duty solicitors new to the rota to have the ticket.”²²³

207. The MoJ did not believe there to be a serious problem with the current process of self-certification and opposed a ticketing system on the grounds of cost. Hugh Barrett, Director of Legal Aid Commissioning and Strategy at the Ministry of Justice, said:

“I am not completely convinced 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.”²²⁴

Box 9: Duty solicitor rota and “ticketing”

All magistrates’ courts run a duty solicitor scheme that permits appointed solicitors to represent defendants at the first magistrates’ court appearance if they do not have, or have not yet contacted, their own solicitor. To become a duty solicitor, a solicitor must submit a portfolio of some 25 cases dealt with at court and undertake a live-recorded exercise of a first appearance with an actor playing the defendant and the examiner watching and recording the live session. This duty solicitor qualification is called the Criminal Law Accreditation Scheme.

In addition to the general duty rota, Westminster Magistrates’ Court has introduced a specialist extradition rota for duty solicitors permitted to represent defendants at the first appearance in extradition proceedings. The appointment simply requires that an existing duty solicitor ask to be put on the specialist extradition duty rota. This is a process of self-certification, without needing to demonstrate experience or expertise in the field. This specialist duty scheme has seen over 400 solicitors appointed to it—how many of these ultimately take extradition cases is unclear.

In recognition of the peculiarities and complexities of extradition law, other parties in the extradition process must be certified as specialist practitioners. For example, appointment to the CPS’s expert panel of extradition prosecution Counsel involves a formal competition. Similarly, to be appointed as an extradition judge, a District Judge must first undertake a period of shadowing and approval. The process whereby a District Judge is appointed to undertake extradition casework is sometimes referred to as “ticketing”.

²²¹ [Q 34](#) (Jago Russell); see also [Q 180](#) (Michael Evans).

²²² [Q 133](#)

²²³ *Ibid.*

²²⁴ [Q 146](#)

In other areas of law, such as asylum and immigration, duty solicitors are required to undergo an externally assessed and accredited “ticketing” process before being added to the rota.

208. Extradition is a complex area of law. No one should appear before the courts at any stage in the process without access to appropriately specialist legal representation. **We recommend that a ticketing system be introduced to manage access to the duty rota in order to ensure proper expertise is available from the earliest point in proceedings to help the Requested Person and the courts. The Government should make the necessary arrangements to require this. (Recommendation 9)**

Legal aid

209. Legal aid is a contribution by the state towards the cost of legal advice, family mediation and representation in court. Means testing is an assessment of whether an individual meets stipulated criteria and is therefore eligible for state assistance. In England, Wales and Scotland legal aid for extradition cases is means tested. This process is administered by the Legal Aid Agency (LAA) in England and Wales. In Scotland, legal aid is a devolved matter and the process is administered by the Scottish Legal Aid Board (SLAB). Means testing for extradition cases is not in operation in Northern Ireland.
210. The Baker Review was critical of the impact of means testing for legal aid in extradition cases. It recommended that “careful but urgent consideration, looking at both the financial implications and the interests of justice” should be given “to reintroducing non means-tested legal aid for extradition proceedings in England, Wales and Scotland.”²²⁵ A number of witnesses to our inquiry also called for the removal of means testing.

Cost-benefit considerations

211. Sir Scott Baker told us that he remained of the view that non-means tested legal aid would overall “create a saving, as well as facilitate the administration of justice.”²²⁶ It was for this reason that his review had called for a cost-benefit analysis.
212. Other witnesses agreed with Sir Scott Baker’s assessment that savings could be made. Reductions in the number of individuals held in custody and adjourned proceedings were cited as areas of potential savings. Edward Grange and Rebecca Niblock said that granting legal aid irrespective of means “would curtail delays in the system and save court time through avoiding wasted hearings and ... prolonged periods in custody at the State’s expense.”²²⁷
213. The Office of the Chief Magistrate took a similar view:
- “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

²²⁵ The Baker Review, p 17

²²⁶ [Q 2](#) (Sir Scott Baker)

²²⁷ Written evidence from Edward Grange and Rebecca Niblock ([EXL0035](#))

hearing cannot be mitigated by any perceived savings to the legal aid bill”.²²⁸

214. In its response to the Baker Review, the Government rejected the report’s recommendation. It conducted a high-level cost-benefit analysis²²⁹ into the question and concluded that it did not consider that “the business case to reintroduce non-means tested legal aid for extradition proceedings has been made out”.²³⁰ See Table 4 for a summary of the estimates used in the analysis.

Table 4: Estimate Annual Costs & Savings Table

Cost Type	Annual Increase in Potential Costs	Annual Potential Savings
Criminal legal aid costs	£450,000	
Remand places		£100,000 to £550,000
Claims from Central Funds		£100,000
Courts		£20,000 to £40,000
CPS		£20,000 to £40,000
Total	£450,000	£250,000 to £750,000

Source: Baker Review, Appendix F, pp 477–78

215. The MoJ said that any potential saving would be difficult to realise and would not necessarily result in a “cash saving”. Hilda Massey, Deputy Director Legal Aid Policy at the Ministry of Justice, told us:

“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.”²³¹

Legal aid application process

216. The majority of applications for legal aid by people facing extradition are successful. The Government told us that this success rate is “in the region of 94%”.²³²
217. However, in the evidence we received concerns were not based on what proportion of people ultimately received legal aid, but the length of time taken for an award to be made. Many Requested People find it difficult to

²²⁸ Written evidence from the Office of the Chief Magistrate ([EXL0043](#))

²²⁹ The analysis was published as Appendix F to the Baker Review.

²³⁰ The Government Response to the Baker Review, p 6

²³¹ [Q 147](#) (Hilda Massey)

²³² [Q 149](#) (Hilda Massey)

satisfy the documentary requirements of the LAA. Many are migrant workers and are more likely to be self-employed or work cash-in-hand and therefore, according to Jago Russell, “find it incredibly difficult to get the information together to satisfy a means test.”²³³ The Office of the Chief Magistrate also described this problem:

“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.”²³⁴

218. This problem did not affect those who were remanded in custody during the extradition process. In such cases the Requested Person could self-certify and there was no “requirement to provide supporting evidence”²³⁵ when applying for legal aid.
219. The LAA are part-way through introducing an e-form to the legal aid application process. Hugh Barrett said that where the e-form had been introduced there had been a 50% reduction in the number of forms that “ping pong back and forth between the Legal Aid Agency and the solicitors firms who are applying for legal aid.”²³⁶

Delays to court proceedings

220. Under the Extradition Act 2003 the timeframe for commencing extradition proceedings depends on whether the case falls under Part 1 or Part 2 of the Act.
221. In Part 1 cases the permitted period between arrest and the first substantive hearing is 21 days.²³⁷ Part 1 of the Act transposes the Framework Decision on the European Arrest Warrant (EAW) into UK law. The Framework Decision states that an EAW should be executed as a “matter of urgency”²³⁸ and the final decision taken within 60 days in those cases in which the Requested Person does not consent to extradition.²³⁹
222. In Part 2 cases the Act states that the first substantive hearing must be no more than two months after the initial hearing.²⁴⁰
223. Several witnesses said that the legal aid application process was causing extradition cases to be routinely delayed. Daniel Sternberg told us that:

“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—

²³³ [Q 27](#) (Jago Russell)

²³⁴ Written evidence from the Office of the Chief Magistrate ([EXL0043](#))

²³⁵ [Q 145](#) (Hugh Barrett)

²³⁶ [Q 149](#) (Hugh Barrett)

²³⁷ Extradition Act 2003, section 8(4)

²³⁸ Framework Decision on the European Arrest Warrant, [2002/584/JHA](#)

²³⁹ Framework Decision on the European Arrest Warrant, [2002/584/JHA](#), Article 17(3)

²⁴⁰ Extradition Act 2003, section 75(2)

where cases are fixed and then taken out many times because the defendant does not have legal aid.”²⁴¹

224. As a consequence, the courts were unable to ensure that EAW proceedings commenced within the 21 days stipulated. Sheriff Maciver of the Edinburgh Sheriff Court said that it was “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.”²⁴²
225. The issue appeared to be even more acute in the Westminster Magistrates’ Court. Judge Riddle said, “We faithfully tried to stick to 21 days until earlier this year [2014] when it became absolutely obvious that all we were doing was adjourning for 21 days and then adjourning again.” To address the situation the Court had “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’”.²⁴³
226. The three month delay in commencing extradition proceedings contravenes the time limits set-out in the Framework Decision on the EAW.²⁴⁴ In relation to the UK the European Commission’s principal concern was delays in dealing with certain EAWs. Olivier Tell, Head of Unit, Procedural Criminal Law at the European Commission, told us, “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.”²⁴⁵
227. We did not receive direct evidence as to the impact of delays in court proceedings on Part 2 cases. However, it seems reasonable to infer, if there is routinely a delay of three months between first appearance and the commencement of substantive proceedings, a final decision might not be delivered within the 60 days stipulated in the 2003 Act.
228. Beyond the issues of cost to the state, delays in court proceedings draw out the extradition process for the Requested Person. For those not granted bail and held in pre-trial detention this can mean more time spent in custody. Judge Riddle said, “there are undoubtedly people in custody longer than might have been the case.”²⁴⁶
229. Factors aside from legal aid could result in delays to court proceedings. Hugh Barrett gave the example of delays in obtaining expert evidence and cautioned, “we should not see reducing the period for legal aid as automatically going to mean that you are going to meet the overall timescale.”²⁴⁷
230. The Lord Chancellor said the three month delay in proceedings at Westminster Magistrates’ Court was “disproportionate” and a “a source of considerable disquiet that legal aid may routinely be presented as a major

²⁴¹ [Q 110](#) (Daniel Sternberg)

²⁴² Written evidence from Sheriff Maciver ([EXL0064](#))

²⁴³ [Q 135](#) (Senior District Judge Riddle)

²⁴⁴ Framework Decision the European Arrest Warrant, [2002/584/JHA](#), Article 17(3)

²⁴⁵ [Q 221](#)

²⁴⁶ [Q 135](#) (Senior District Judge Riddle)

²⁴⁷ [Q 150](#) (Hugh Barrett)

reason for a failure to meet such deadlines”. He also noted that the LAA was keen to work with the Court so that “applications posing the greatest risk for delay can be flagged at the earliest opportunity whilst those where no delay is expected can be listed much more quickly without the need for an automatic three month delay.”²⁴⁸

Extradition as a particular case

231. Some witnesses said that an exception to the means testing rules ought to be made for extradition law because it was fundamentally different to other areas of criminal law. Michael Evans told us, “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.”²⁴⁹

232. The complexity of extradition law was also cited as justification for making an exception to the legal aid rules. Anand Doobay spoke of extradition being a particularly “technical process” which meant that “there are all sorts of difficulties about having unrepresented defendants going through the magistrates’ court process.”²⁵⁰ This was a point also picked up by Judge Riddle:

“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.”²⁵¹

233. The MoJ rejected the idea of making extradition a “special case”. Hilda Massey said:

“[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.”²⁵²

234. Instead of making extradition a “special case” the MoJ believed “the right solution is to make the process work more efficiently and more effectively.”²⁵³

Dual representation

235. Dual representation refers to the practice of having a lawyer representing the Requested Person in the Issuing State as well as in the UK.

236. A number of witnesses spoke of the importance of representation in the Issuing State.²⁵⁴ This was particularly the case in relation to minor offences, outstanding fines or breaches of probation conditions where discussions

²⁴⁸ Written evidence from Rt Hon. Chris Grayling MP, Lord Chancellor ([EXL0090](#))

²⁴⁹ [Q 153](#) (Michael Evans)

²⁵⁰ [Q 2](#) (Anand Doobay)

²⁵¹ [Q 135](#) (Senior District Judge Riddle)

²⁵² [Q 149](#) (Hilda Massey)

²⁵³ [Q 150](#) (Hilda Massey)

²⁵⁴ See [Q 104](#) (Rebecca Niblock), [Q 179](#) (Graham Mitchell), [Q 179](#) (Michael Evans), and [Q 179](#) (Jodie Blackstock)

between a lawyer and the authorities in the Issuing State could find simpler resolutions to matters than extradition, such as paying an outstanding fine. Edward Grange and Rebecca Niblock said that dual representation could be the most effective way of resisting many EAWs and that they advised all of their clients “to get a lawyer in the Requesting State as soon as possible.”²⁵⁵ Michael Evans offered similar advice:

“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.”²⁵⁶

237. A provision on the right of Requested Persons to receive legal aid in both states was included in the European Commission’s Directive on access to provisional legal aid.²⁵⁷ In July 2014, the Government confirmed its decision not to opt in to this proposal.
238. Jodie Blackstock told us that dual representation “is possible on legal aid—although tortuous, I imagine—to make these arguments to obtain legal assistance in the Issuing State”.²⁵⁸
239. We are concerned that the legal aid application process is causing delays to court proceedings. **It is not acceptable that individuals are kept in any unnecessary pre-trial detention, from either their own perspective or that of the state. Delays to the extradition process are contrary to the interests of justice and place an additional burden on the taxpayer.**
240. **We regret the fact that the district judges at Westminster Magistrates’ Court have found it necessary to insert a three month delay into the system. In the light of the Lord Chancellor’s comments and the concern expressed by the European Commission, we hope that the Court will keep this automatic delay under review, that the Government will take the necessary steps to eliminate it and that it will therefore be removed at the earliest opportunity.**
241. Extradition proceedings are different to other types of criminal law in not pronouncing on individuals’ guilt, but instead deciding whether or not they should be sent to other jurisdictions to stand trial. In contrast to domestic criminal prosecutions, the court proceedings cannot be revisited in this country once the person has been extradited.
242. Given the weight of evidence put before the Committee and the wide range of estimated costs and savings used in the analysis, **we believe the high-level cost-benefit analysis provided to the Baker Review is neither a sufficient nor a credible response to the concerns raised about means testing for legal aid. The Government should conduct and publish a full and detailed cost-benefit analysis. In our view, unless a cost-**

²⁵⁵ [Q 104](#) (Rebecca Niblock)

²⁵⁶ [Q 179](#) (Michael Evans)

²⁵⁷ Proposal for a directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European Arrest Warrant proceedings, [COM\(2013\) 824](#)

²⁵⁸ [Q 179](#) (Jodie Blackstock)

benefit analysis very clearly favours retaining means testing, the interests of justice should take priority. (Recommendation 10)

243. **This more detailed cost-benefit analysis should include consideration of the savings that could be made by matters being resolved by lawyers in the Issuing State. (Recommendation 11)**
244. It may be that automatic legal aid, followed by a period of means testing using the e-form, would offer a more balanced system, one which removes legal aid if the higher earnings threshold is met. Alternatively, additional funding for dual representation could be offset by fewer proceedings in the UK. **Again, if the cost-benefit is balanced, the interests of justice ought to take priority. (Recommendation 12)**
245. In the meantime, **the Government should, as a matter of urgency, pursue solutions, such as the e-form, to make the process of applying for legal aid work more efficiently and effectively. (Recommendation 13)**

Expert evidence

246. Solicitors firms can make an application to the LAA for permission to engage an expert witness, for example to provide evidence on prison conditions in the Issuing State. The LAA considers cases and makes a judgment on the rates charged by the requested witness.
247. In the experience of Judge Arbuthnot, a decision on an application could take some time, with the court sometimes having “to prod the legal aid fund.”²⁵⁹ The MoJ told us that in 90% of cases this judgment is delivered within two weeks.²⁶⁰
248. Some witnesses told us that there was a problem either getting court time to commission expert witnesses (thereby prolonging the process) or enough money to afford the right expert. Daniel Sternberg said, “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.”²⁶¹
249. Opinion was divided as to the scale of the problem. Rebecca Niblock said that she had never been unable to engage an expert, but could “think of numerous cases where we have not been able to instruct the expert that we would have instructed had we been privately funded.”²⁶²
250. Ben Keith told us it was “sometimes the quality of expert that is difficult to find for those rates” though he added “Some of the very best experts will work for legal aid rates.” He also said, “once you have legal aid, and you have enough time, you will be able to find a suitable academic to assist

²⁵⁹ [Q 137](#) (Deputy Senior District Judge Arbuthnot)

²⁶⁰ [Q 151](#) (Hugh Barratt)

²⁶¹ [Q 110](#) (Daniel Sternberg)

²⁶² [Q 104](#) (Rebecca Niblock)

you.”²⁶³ Mark Summers QC told us he had “never had any difficulty either identifying appropriate experts or obtaining authority to instruct them.”²⁶⁴

251. Others thought there was only a problem where counsel wished to adduce more expert evidence than courts thought necessary and that the courts had a “very keen judgment” about which arguments were real and which were “specious arguments.”²⁶⁵ Where they were satisfied that there were real arguments to be made, the courts understood the need to get appropriate expert evidence and would allow “sufficient time for proper evidence to be obtained”.²⁶⁶ In the experience of Sheriff Maciver it was “the extent of inquiry and the number of experts that can sometimes cause a problem and lead to legal aid being refused.”²⁶⁷
252. Expert evidence is clearly necessary in some cases. **From the submissions we have received we have been persuaded that it is possible for the necessary expert evidence to be obtained on legal aid.**

²⁶³ [Q 110](#) (Ben Keith)

²⁶⁴ [Q 122](#) (Mark Summers QC)

²⁶⁵ [Q 107](#) (Paul Garlick QC)

²⁶⁶ *Ibid.*

²⁶⁷ [Q 122](#) (Sheriff Maciver)

CHAPTER 7: RIGHT TO APPEAL AND THE ROLE OF THE HOME SECRETARY

Right to appeal

Introduction

253. The Anti-social Behaviour, Crime and Policing Act 2014 amended the Extradition Act 2003 to remove the automatic right to appeal in extradition cases.
254. Under the new provisions, which are yet to come into force, an application to appeal must be lodged within 7 days of the extradition order being made in EAW cases; and within 14 days in Part 2 cases. Where the notice period is missed the courts “must not for that reason refuse to entertain the application if the person did everything reasonably possible” to meet the deadline.²⁶⁸
255. The threshold for leave to appeal to be granted is that an arguable case can be made. The application for permission to appeal can be dismissed without a hearing. Nonetheless, if the application for permission to appeal is refused the Criminal Procedure Rules²⁶⁹ allow the application for permission to be renewed orally at a hearing.
256. The Government described the anticipated benefit of removing the automatic right to appeal:
- “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.”²⁷⁰
257. In addition, we heard that the changes would bring the appeals process for extradition law into line with other types of criminal law. Sir Scott Baker said, “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.”²⁷¹

²⁶⁸ Extradition Act 2003, sections 26(5), 103(10) and 108(7A) as inserted by the Anti-social Behaviour, Crime and Policing Act 2014, section 160(1)(c)

²⁶⁹ The Criminal Procedure Rules (rule 17.22), 6 October 2014: <https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/crim-proc-rules-2014-part-17.pdf> [accessed 3 March 2015]

²⁷⁰ Written evidence from the Home Office ([EXL0060](#))

²⁷¹ [Q 3](#) (Sir Scott Baker)

Criticism

258. Many witnesses argued that the leave to appeal provisions were not appropriate in extradition cases.²⁷² Extradition was a unique legal situation where “complex issues involved in an extradition case might not always be resolved at first instance.”²⁷³
259. An automatic right to appeal was viewed by some as an important “safety net”²⁷⁴ that made up for deficiencies earlier in the process and was “an important safeguard against wrongful extradition”.²⁷⁵ Liberty’s view was that it “should be re-instated by repealing the recently inserted leave requirement.”²⁷⁶ JUSTICE also concluded that a leave requirement “should not be imposed on Requested Persons.”²⁷⁷

Legal aid and specialist advice

260. Several witnesses discussed the changes to the appeal process in the light of criticisms about access to legal aid and specialist legal advice.
261. All witnesses agreed that it was preferable for arguments to be fully explored at the earliest possible stage in the process. However, as noted in Chapter 6, under current arrangements a Requested Person may not receive the appropriate advice or have access to legal representation earlier in the extradition process.
262. By contrast, legal aid is granted automatically for extradition appeals. As a result, the substantive arguments may only be “raised for the first time on appeal.”²⁷⁸
263. Liberty summed up the situation:
- “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.”²⁷⁹

264. Michael Evans said that the fact that issues might not be addressed until appeal combined with the short period for lodging an appeal made the system unworkable. He said, “If you had a longer timescale and legal aid from the beginning of that for solicitor and counsel before you had to issue

²⁷² See for example written submission from JUSTICE ([EXL0073](#)), written evidence from Liberty ([EXL0066](#)) and [Q 188](#).

²⁷³ Written evidence from the Law Society of Scotland ([EXL0039](#))

²⁷⁴ [Q 92](#)

²⁷⁵ Written evidence from the Law Society of Scotland ([EXL0039](#))

²⁷⁶ Written evidence from Liberty ([EXL0066](#))

²⁷⁷ Written evidence from JUSTICE ([EXL0073](#))

²⁷⁸ [Q 3](#) (Anand Doobay)

²⁷⁹ Written evidence from Liberty ([EXL0066](#))

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.”²⁸⁰ In his view, these factors could “reduce the number of appeals but perhaps not for the right reason.”²⁸¹

265. The Government said, “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.”²⁸²

Arguable case

266. Jago Russell from Fair Trials International told us that whilst he had opposed the introduction of a leave requirement, the provisions as introduced were not as troubling as he had feared. He said the arguable case test and the Requested Person’s right to an oral hearing if their leave to appeal was refused on papers meant it was “not going to be as considerable an issue as we had feared.”²⁸³

267. Michael Evans thought the arguable case requirement was in any event unnecessary as the vast majority of lawyers would not bring unarguable appeals to court. He said:

“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 is ‘is it arguable’”.²⁸⁴

Spurious appeals

268. Some witnesses said that if the aim was to weed out spurious appeals being made by litigants in person, the leave provisions would make very little difference because the application could be renewed orally, simply adding a layer of complexity and cost to appeal proceedings without achieving the aim of reducing hearing times. Daniel Sternberg said, “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.”²⁸⁵

269. It was suggested that some Requested People preferred to serve custodial time in the UK, rather than the Issuing State—what we might call penal tourism. As such, the appeals process was commonly used as a means to stall extradition and serve more of the sentence in UK prisons. Judge Zani stated:

“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

²⁸⁰ [Q 188](#)

²⁸¹ [Q 189](#) (Michael Evans)

²⁸² Written evidence from the Home Office ([EXL0060](#))

²⁸³ [Q 34](#) (Jago Russell)

²⁸⁴ [Q 188](#)

²⁸⁵ Written evidence from Daniel Sternberg ([EXL0051](#))

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.”²⁸⁶

270. Sheriff Maciver was “not particularly optimistic that this new provision will effect great improvement”²⁸⁷ in the use of appeals to delay extradition and serve sentences in the UK rather than a harsher regime in the Issuing State.
271. However, the Crown Solicitor’s Office said that the leave requirement “should serve to filter out the hopeless cases where an appeal is merely used to delay further the carrying out of the extradition.”²⁸⁸

Complicate the appeals process

272. Some thought that the leave to appeal provisions would make the appeal process more problematic. The Criminal Bar Association said, “it will complicate rather than simplify proceedings as unrepresented defendants have to comply with more steps, not fewer.”²⁸⁹
273. Chapters 2 to 6 demonstrate that extradition law and its associated case law are complex, perhaps increasingly so. With this in mind, it is essential that those legitimately resisting extradition have adequate access to the appeals process.
274. In our view, the leave to appeal conditions are inextricably linked with the issues of specialist legal advice and access to legal aid. Without resolving those issues the leave requirement creates a serious risk that Requested People will not be able to make full use of the legal proceedings open to them and could be extradited without having been able to make their case properly. The short deadlines for requesting leave to appeal may make this concern more acute. **We support in principle the introduction of a leave requirement for appeals but the Government should not bring these provisions into effect until there is confidence that the problems with access to legal aid and specialist legal advice have been resolved. (Recommendation 14)**

Role of the Home Secretary

Introduction

275. The role of the Secretary of State was also discussed in the context of appeals. Following the Baker Review, the Home Secretary transferred her responsibilities with regard to human rights considerations to the courts.
276. The Crime and Courts Act 2013 came into effect in July 2013. It amended the Extradition Act 2003 to:

²⁸⁶ [Q 139](#) (Judge Zani)

²⁸⁷ Written evidence received from Sheriff Maciver ([EXL0064](#))

²⁸⁸ Written evidence from the Crown Solicitors Office ([EXL0034](#))

²⁸⁹ Written evidence from the Criminal Bar Association ([EXL0055](#))

- remove 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;²⁹⁰ and
- amend the provisions on appeals in Scottish cases.

Political involvement

277. The Home Secretary explained the rationale for the changes:

“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.”²⁹¹

278. The Baker Review concluded that ensuring that human rights issues arising at the end of the extradition process were decided by the courts would ensure the process was a “transparently non-political one”.²⁹² Most witnesses agreed that extradition ought to be as judicial a process as possible. Edward Grange and Rebecca Niblock stated, “We do not think it is beneficial to the rule of law to have a political actor taking decisions in respect of extradition proceedings.”²⁹³

279. Witnesses said that whilst there may be a political angle to some extradition cases, this emphasised the need for it to be a judicial process. The Office of the Chief Magistrate stated:

“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.”²⁹⁴

Simplify the process

280. A number of witnesses thought that moving the decision making to the courts would expedite proceedings. Sheriff Maciver said there had been cases “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.”²⁹⁵

281. Sir Scott Baker expressed a similar view:

²⁹⁰ Extradition Act 2003, section 108 as inserted by the Crime and Courts Act 2013, section 50

²⁹¹ [Q 208](#)

²⁹² The Baker Review, p 292

²⁹³ Written evidence from Edward Grange and Rebecca Niblock ([EXL0035](#)). See also [Q 19](#) (Sir Scott Baker).

²⁹⁴ Written evidence from the Office of the Chief Magistrate ([EXL0043](#))

²⁹⁵ Written evidence from Sheriff Maciver ([EXL0064](#))

“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.”²⁹⁶

282. The CPS said that the effect of the change was to:

“increase the speed with which surrenders take place and to reduce complexity, without a perceptible diminution of the protections afforded to Requested Persons.”²⁹⁷

Removing a safeguard

283. Some witnesses disputed whether the Home Secretary could devolve her responsibilities to the courts; her duties under the Human Rights Act 1998 meant that she was still responsible for ensuring the extradition orders were compliant with the ECHR. Jodie Blackstock said, “I cannot see how the obligation to comply with our human rights obligations can be removed in such a way ... because it is implicit irrespective of whether the Human Rights Act is expressly disavowed or not.”²⁹⁸

284. Others thought it was not desirable for the Home Secretary to devolve these responsibilities. JUSTICE stated:

“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.”²⁹⁹

285. The involvement of the Secretary of State was seen by some as an important backstop and “a further safeguard for persons whose extradition was sought”.³⁰⁰ It was suggested that the Secretary of State might be privy to information that was not available to the courts. Jodie Blackstock said:

“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.”³⁰¹

286. The Home Secretary stated that her role was a limited one:

“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

²⁹⁶ [Q 19](#) (Sir Scott Baker)

²⁹⁷ Written evidence from the Crown Prosecution Service ([EXL0054](#))

²⁹⁸ [Q 186](#) (Jodie Blackstock)

²⁹⁹ Written evidence from JUSTICE ([EXL0073](#)), see also written evidence from Kaim Todner Solicitors Ltd ([EXL0057](#)).

³⁰⁰ Written evidence from the Law Society ([EXL0046](#))

³⁰¹ [Q 186](#) (Jodie Blackstock);

addressed to make an initial decision about an extradition request.³⁰² Beyond that, it is for the courts to determine whether the extradition request should be accepted.”³⁰³

287. Anand Doobay said that Home Secretary did not have “discretion” in handling extradition appeals, her role was to decide where there was “sufficient evidence presented to her to suggest that the person’s human rights will be violated and, therefore, she should not order extradition.”³⁰⁴ Therefore, devolving responsibilities to the courts could not result in a loss of discretion.
288. In addition, should new information arise after the courts have ordered extradition there remained “a way of dealing with these situations”.³⁰⁵ The Requested Person could make an application to have the appeal re-opened.³⁰⁶
289. **We support the changes that have already been made to the Home Secretary’s responsibilities. Extradition should, to the greatest possible extent, be a judicial procedure.**
290. **We are content that the courts are able to deal with late appeals in the Home Secretary’s place.** The combination of the ‘arguable case’ threshold, the ability to renew an application orally and the requirement that the courts consider a late appeal “if the person did everything reasonably possible to ensure that notice was given as soon as it could be given”,³⁰⁷ mean that late applications which require the courts’ attention could be heard.

³⁰² Extradition Act 2003, section 93(2): “The Secretary of State must decide whether he is prohibited from ordering the person’s extradition under any of these sections: (a) section 94 (death penalty); (b) section 95 (specialty); (c) section 96 (earlier extradition to United Kingdom from other territory); (d) section 96A (earlier transfer to United Kingdom by International Criminal Court).”

³⁰³ [Q 208](#)

³⁰⁴ [Q 19](#) (Anand Doobay)

³⁰⁵ [Q 19](#) (Sir Scott Baker)

³⁰⁶ The circumstances in which an appeal can be re-opened were affirmed in *Taylor v the US* (2009) EWHC 1020 (Admin). The same criteria as laid out in the Civil Procedure Rules apply: “52.17.(1) The Court of Appeal or the High Court will not re-open a final determination of any appeal unless – (a) it is necessary to do so in order to avoid real injustice; (b) the circumstances are exceptional and make it appropriate to re-open the appeal; and (c) there is no alternative effective remedy.”

³⁰⁷ Extradition Act 2003, sections 26(5), 103(10) and 108(7A) as inserted by the Anti-social Behaviour, Crime and Policing Act 2014, section 160(1)(c)

CHAPTER 8: CHANGES TO PRACTICE

Introduction

291. In the course of evidence a number of changes to practice were suggested that could help to lessen the impact of extradition on Requested People. These were things that would either not require changes to the law or simply require greater use of existing provisions. There are some other measures developed at EU level which would also lessen the impact of extradition which the UK has not opted in to (see Appendix 6).

Video evidence

292. Some witnesses suggested that greater use could be made of technology to question Requested People prior to their extradition. The Office of the Chief Magistrate said:

“A more imaginative, and more productive, approach than legislative change is to increase mutual international cooperation by a more extensive use of modern technology ... There have been numerous cases where evidence from abroad has been received by way of Skype ... We see no reason in principle why these procedures should not be followed more commonly in cases of extradition from the United Kingdom.”³⁰⁸

293. Jodie Blackstock echoed this, “Any procedural hearing, short of trial, where actual evidence needs to be taken, in my view, could be considered through video link”.³⁰⁹
294. In discussing amendments to the 2003 Act, the Home Secretary noted that the Government had “made arrangements in relation to things such as video links on evidence.”³¹⁰ Section 21B of the Act enables a Requested Person to request contact with representatives of the Issuing State, including by video link.³¹¹
295. Although Section 21B is now in force, the Government must also make sure it is technically possible. Christopher Tappin, whose extradition to the US pre-dated this provision (see Appendix 5), told us, “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’.”³¹²

Return on bail

296. Another process which would lessen the impact of extradition in EAW cases would be making greater use of temporary transfer powers. The Home Secretary confirmed that “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.”³¹³ This process could occur prior to formal

³⁰⁸ Written evidence from the Office of the Chief Magistrate ([EXL0043](#))

³⁰⁹ [Q 181](#) (Jodie Blackstock)

³¹⁰ [Q 192](#)

³¹¹ Written evidence from the Home Office ([EXL0001](#))

³¹² Written evidence from Christopher Tappin ([EXL0028](#))

³¹³ [Q 192](#)

extradition hearings. Alternatively, under European Supervision Order provisions,³¹⁴ a person could be subject to bail conditions imposed by the Issuing State pending trial.

297. Anand Doobay said, “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.”³¹⁵ Such a scenario might avoid experiences like that of the Dunhams where they spent over four months on bail in the US.³¹⁶

Transfer of sentences

298. Some witnesses said that greater use should be made of arrangements to transfer extradited people back to the UK to serve their sentences.³¹⁷
299. Such arrangements are also already possible. In EAW cases the Framework Decision on Prisoner Transfer allows for this.³¹⁸ Olivier Tell of the European Commission said the powers should be used “so that the sentence is executed in the habitual residence of that person in order to ensure social rehabilitation.”³¹⁹
300. The Government also said that the Framework Decision should be “used to its fullest extent so that British citizens extradited and convicted can be returned to serve their sentence here.”³²⁰
301. This is also possible in Part 2 cases. Amy Jeffress described the position in relation to extradition to the US:

“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.”³²¹

302. In some countries, the concept of returning extradited people to serve their sentences in their home country is deeply rooted. For example, the Netherlands entered the following Declaration to the European Convention on Extradition:

“Netherlands nationals may be extradited for purposes of prosecution if the requesting State provides a guarantee that the person claimed may be returned to the Netherlands to serve his sentence there if, following

³¹⁴ Council Framework Decision 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, [2009/829/JHA](#)

³¹⁵ [Q 23](#) (Anand Doobay)

³¹⁶ Written evidence from Paul and Sandra Dunham ([EXL0047](#))

³¹⁷ For example, see written evidence from JUSTICE ([EXL0073](#))

³¹⁸ Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, [2008/909/JHA](#)

³¹⁹ [Q 223](#)

³²⁰ Written evidence from the Home Office ([EXL0060](#))

³²¹ [Q 73](#)

his extradition, a custodial sentence other than a suspended sentence or a measure depriving him of his liberty is imposed upon him”.³²²

Information about the extradition process

303. We heard in evidence that the extradition process could be quite confusing as there is little information provided. Mrs O’Dwyer, said the process was:

“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.”³²³

304. Michael Evans agreed and said that because of the lack of information he sent “every client at the beginning of the case not just a standard file-opening letter but a six-page letter ... 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”.³²⁴

Conditions in transit to Issuing State

305. A number of submissions came from people who had been extradited. These submissions included descriptions of how they had been treated in transit from the UK to the Issuing State. In some cases, these conditions seem to be excessive given the nature of the crimes concerned and the fact that they affected people yet to be convicted. For example, Paul and Sandra Dunham, a husband and wife extradited to the US (see Appendix 5), described their flight to the US:

“At this point we were chained up and taken onto the aircraft we each had a US Marshall sat either side of us ... 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”.³²⁵

306. Mr Wolkowicz also gave evidence of his treatment in transit. He described being forced to sit in a seat that was not appropriate to his medical condition and being “hit several times” on the chest in order to force him to move. He said, “they dragged me by force to this armchair. They tied me up there in every possible way.”³²⁶

³²² Council of Europe, ‘List of declarations made with respect to treaty No. 024’: <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=024&CM=8&DF=&CL=ENG&VL=1> [accessed 3 March 2015]

³²³ Written evidence from Julia O’Dwyer ([EXL0050](#))

³²⁴ [Q 174](#) (Michael Evans)

³²⁵ Written evidence from Paul and Sandra Dunham ([EXL0047](#))

³²⁶ [Q 262](#)

Other matters

Ongoing medical care

307. Some witnesses noted the access to medical care people have post-extradition. Jodie Blackstock explained that having an ongoing medical condition was rarely grounds for resisting extradition for a non-British national as “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.”³²⁷
308. Two witnesses also referred to the medical condition of Mr Dunham. Andrea Leadsom MP (in whose constituency the Dunhams live) told us that Mr Dunham had an ongoing heart condition. Whilst in the US he required a new heart monitor. The necessary operation was “estimated to cost at least \$20,000 by the time he went in to hospital” but she was informed by the FCO that the UK could not fund this without there being “a reciprocal agreement with the other country, an arrangement we do not have with the United States.”³²⁸ Michael Evans said, “As it happens, he has had the operation; the doctors agreed to do it for I think \$3,000 to be paid later.” However, he criticised the solution relying “on the kindness of individuals”.³²⁹
309. The FCO, in describing more broadly what support is offered to British nationals held abroad said, “Prisoners Abroad are also able to make payments for certain medical services, to ensure that British Nationals can access these.”³³⁰

Accommodation in the Issuing State

310. Some witnesses said accommodation in the Issuing State could be a problem pre-trial. This was because a Requested Person was unlikely to be granted bail if he or she had no-where to live. Michael Evans referred particularly to the situation in the US:

“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.”³³¹

311. David Bermingham told us this had been his experience and that bail had only been granted once his lawyer said he would accommodate him. He said that in the US:

³²⁷ Written evidence from JUSTICE ([EXL0073](#))

³²⁸ Written evidence from Andrea Leadsom MP ([EXL0085](#))

³²⁹ [Q 190](#) (Michael Evans)

³³⁰ Written evidence from the FCO ([EXL0082](#))

³³¹ [Q 190](#) (Michael Evans)

“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.”³³²

312. **The inherent risk of distress caused by removal from one’s place of residence persuades us that there is scope in some cases to make greater use of existing legislation and to improve practices in order to lessen the impact of extradition.** We make this recommendation particularly bearing in mind the fact that in most cases Requested People have yet to be found guilty of any crime.
313. **Changes in practice should include: providing better information to Requested People about the process; making greater use of video evidence; making greater use of temporary transfer to the Issuing State pre-extradition and pre-trial release on bail in the UK; and increasing the use of transfer of sentences when appropriate.**
314. **We recommend the Government take the necessary steps, such as issuing guidance to the courts and seeking agreements with other countries, to make these changes. Where reciprocal commitments from the UK are required to achieve agreement, these should be given. (Recommendation 15)**
315. **In the case of EAWs, the Government and the European Commission should work to establish further guidelines on the execution of EAWs to ensure that they are conducted in the least hostile manner possible. (Recommendation 16)**

³³² [Q 246](#)

CHAPTER 9: EUROPEAN ARREST WARRANT

Introduction

316. The European Arrest Warrant (EAW) was established by the Framework Decision on the European Arrest Warrant and surrender procedures between Member States, which was adopted by the European Council on 13 June 2002.³³³ Part 1 of the Extradition Act 2003 transposes the Framework Decision into UK legislation. The EAW came into effect in the UK on 1 January 2004.
317. In Sir Scott Baker's words, the EAW "marked an attempt to replace extradition in the traditional sense with a system of surrender without the involvement of the executive and with the minimum of formality."³³⁴ The key characteristics of the system are described in paragraph 12.
318. We have already published a short interim report on aspects of the EAW.³³⁵

Arguments in favour of the EAW

319. Many witnesses said the EAW system was broadly successful. While recognising the problems with some EAWs, the Office of the Chief Magistrate concluded that, "On the whole the EAW is seen as an effective and just process."³³⁶
320. A number of witnesses thought that the EAW had improved extradition arrangements between EU States. Sheriff Maciver said:
- "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."³³⁷
321. The EAW system was said to have standardised extradition procedures, thereby making it a "swifter and more streamlined process."³³⁸ This view was shared by the Law Society, which stated that the EAW had, "improved extradition arrangements between EU Member States by considerably simplifying and speeding up the extradition process."³³⁹
322. Whilst it was acknowledged that there were problems with the system, it was said that the EAW had "benefited the UK",³⁴⁰ as well as being in the

³³³ Framework Decision on the European Arrest Warrant, [2002/584/JHA](#)

³³⁴ The Baker Review, p 116

³³⁵ Extradition Law Committee, *The European Arrest Warrant Opt-in* (1st Report, Session 2014–15, HL Paper 63)

³³⁶ Written evidence from the Office of the Chief Magistrate ([EXL0043](#))

³³⁷ Written evidence from Sheriff Maciver ([EXL0064](#)). See also written evidence from Eurojust ([EXL0061](#)) and the Faculty of Advocates ([EXL0063](#))

³³⁸ Written evidence from Daniel Sternberg ([EXL0051](#))

³³⁹ Written evidence from the Law Society ([EXL0046](#))

³⁴⁰ Written evidence from Daniel Sternberg ([EXL0051](#))

interests of victims. Baroness Ludford, a former MEP, said that the EAW had:

“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.”³⁴¹

323. The Government said that the EAW had enabled the return to the UK of serious criminals, who might otherwise have escaped justice. It cited the example of Operation Captura, a joint initiative between the National Crime Agency (NCA) and Spanish police, which has led to the arrest and return of 61 “wanted criminals”³⁴² since its launch in 2006.

Criticisms of the EAW

Inadequate protections

324. The EAW was criticised as making extradition too quick and too easy. It did not strike the right balance between a swift system and one that adequately protected those subjected to it. The main criticism of the EAW scheme was that “expediency is often placed before justice.”³⁴³ Mr and Mrs Symeou, the parents of Andrew Symeou who was extradited to Greece on an EAW in 2009 (see Appendix 5), said:

“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.”³⁴⁴

Mutual recognition

325. The principle of mutual recognition underpins the EAW system. Olivier Tell of the EU Commission described the principle as involving “improving cross-border co-operation without harmonising legal systems” and requiring that “decisions made in other legal systems are recognised with minimum formalities and without questioning the process through which the decision was taken.”³⁴⁵ However, this approach was criticised as there was said to be a “gulf of difference between the standards of justice across the EU”³⁴⁶ and, as a result, “the broad brush approach of the ‘one size fits all’ EAW simply does not work.”³⁴⁷

326. This point was picked up by Baroness Ludford:

³⁴¹ [Q 154](#)

³⁴² Written evidence from the Home Office ([EXL0060](#))

³⁴³ Written evidence from the Freedom Association ([EXL0059](#))

³⁴⁴ Written evidence from Mr and Mrs Symeou ([EXL0027](#))

³⁴⁵ [Q 219](#)

³⁴⁶ Written evidence from Edward Grange and Rebecca Niblock ([EXL0035](#))

³⁴⁷ Written evidence from Kaim Todner Solicitors Ltd ([EXL0057](#))

“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.”³⁴⁸

327. Another criticism of the EAW’s reliance on mutual recognition was that Member States’ adherence to the ECHR varied. The Criminal Bar Association summarised the concern:

“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.”³⁴⁹

328. We heard from Graham Mitchell, who in 1995 was tried for attempted murder in Portugal (see Appendix 5). Mr Mitchell was acquitted at that time but his acquittal was subsequently overturned by the Portuguese Supreme Court. In 2012, not knowing his acquittal had been overturned, he was arrested in the UK on an EAW issued by the Portuguese authorities for the same offence. Mr Mitchell said of his experience, “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.”³⁵⁰
329. The CPS recognised these issues, but argued that given the appropriate safeguards were in place, the EAW scheme was an improvement on the extradition arrangements that went before it:

“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.”³⁵¹

330. Sir Scott Baker thought it natural that the UK looks at other countries’ judicial systems more critically than we do our own:

“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

³⁴⁸ Written evidence from Baroness Ludford ([EXL0042](#))

³⁴⁹ Written evidence from the Criminal Bar Association ([EXL0055](#))

³⁵⁰ [Q 174](#) (Graham Mitchell)

³⁵¹ Written evidence from the Crown Prosecution Service ([EXL0075](#))

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.”³⁵²

Misuse

331. Many witnesses raised concerns about the use of the EAW for minor or trivial cases. Kaim Todner Ltd said there was 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 ... an EAW or Extradition Request is often used as a first option rather than a last resort.”³⁵³
332. Poland was mentioned frequently as issuing too many EAWs, with little regard to proportionality.³⁵⁴ We cover this point in Chapter 3. However, it is worth noting here that the numbers of EAWs from Poland are reducing and the evidence from the Polish Ministry of Justice said that the causes of Poland’s high use of the EAW were being addressed.³⁵⁵
333. The CPS said that it was important that EAWs were only 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.”³⁵⁶
334. However, witnesses said that the EAW had been used to pursue investigations rather than enable prosecutions. In short, it was being used as a measure of first, rather than last, resort. The swift and efficient nature of the EAW meant that it was used extensively, even when lesser measures might be available. Jodie Blackstock described the situation:

“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.”³⁵⁷

Sovereignty

335. One witness said that the EAW was incompatible with the sovereignty of the British constitution. Jacob Rees-Mogg MP said that “justice and home affairs are fundamentally about the creation of a state” and therefore he had “a particular constitutional objection to the arrest warrant.”³⁵⁸

³⁵² [Q 9](#) (Sir Scott Baker)

³⁵³ Written evidence from Kaim Todner Solicitors Ltd ([EXL0057](#))

³⁵⁴ Written evidence from the Office of the Chief Magistrate ([EXL0043](#))

³⁵⁵ Written evidence from the Polish Ministry of Justice ([EXL0084](#))

³⁵⁶ Written evidence from the Crown Prosecution Service ([EXL0075](#))

³⁵⁷ [Q 174](#) (Jodie Blackstock)

³⁵⁸ [Q 171](#) (Jacob Rees-Mogg MP)

Reforming the EAW

336. As a result of the criticisms levelled at the EAW many witnesses said reform was required. Opinion was divided as to what type of reform was desirable or practicable.

EU-wide reform

337. The majority of witnesses, including many who were critical of the system, argued in favour of reform at EU-level. Baroness Ludford said, “the best long-term strategy is to have reform at EU level rather than through piecemeal and uncoordinated national initiatives.”³⁵⁹

338. A number of witnesses called for the introduction of a mandatory proportionality check by the Issuing State (see Chapter 3).

339. In February 2014 the European Parliament endorsed a report by Baroness Ludford on reforms to the EAW and called for the Commission to put forward a proposal for reform.³⁶⁰

340. At present the Commission’s preferred option for reforming the EAW is to rely on practice improving through increased guidance, cooperation and training. It does not want to amend the EAW Framework Decision. Jacqueline Minor, the Head of Representation for the European Commission in London, told us, “it is not appropriate at present to reopen the legal measure”, instead the Commission wanted to make the EAW “more effective by flanking and complementary measures, including the rules on procedural law but also including non-legislative actions.”³⁶¹ These are the so-called “soft law” measures.³⁶²

Rights of the individual

341. Edward Grange and Rebecca Niblock said, “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.”³⁶³ However, they said that the rights of the individual and the state has not developed equally:

“We note that the development of EU policy on policing and criminal justice appears ... 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.”³⁶⁴

³⁵⁹ Written evidence from Baroness Ludford ([EXL0042](#))

³⁶⁰ [Q 160](#) (Baroness Ludford)

³⁶¹ [Q 25](#) (Jacqueline Minor)

³⁶² See, for example, [Q 217](#) and [Q 228](#) .

³⁶³ Written evidence from Edward Grange and Rebecca Niblock ([EXL0035](#))

³⁶⁴ *Ibid.*

342. The EU's proposals on the development of criminal procedural rights are commonly referred to as "the Roadmap".³⁶⁵ Since the Roadmap was published, a number of proposals have been brought forward (see Appendix 6). The UK has opted in to two of these (the Directives on translation and interpretation and on the right to information). The Government has confirmed that it will not opt in to three (the Directives on legal aid, on the presumption of innocence and on safeguards for children). The UK has not opted in to a further Directive (on the right of access to a lawyer) but the Government has indicated that it will review this position.

343. A number of witnesses expressed concern that the UK had not participated in the full programme of procedural rights measures. Baroness Ludford drew particular reference to the directive on the right of access to a lawyer:

"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."³⁶⁶

344. With regard to the directives on legal aid and access to a lawyer, the Polish Ministry of Justice said the "decision [not to participate] is puzzling, since participation would serve to allay many of the fears voiced by UK authorities on breaches of fundamental rights in EAW proceedings."³⁶⁷

Opting-back in to the EAW

345. We received some evidence about the impact of the UK opting back into the EAW under the arrangement of the Lisbon Treaty. Now that the UK has opted back into the EAW, its enacting legislation (Part 1 of the 2003 Act) and practice are subject to the European Court of Justice of the European Union.

346. For some this was an unacceptable extension of European judicial influence. Jacob Rees-Mogg MP advocated leaving the EAW and negotiating a bilateral treaty with the EU, thereby ensuring, "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)."³⁶⁸

347. For others, it was an opportunity to resolve some of the criticisms of the EAW. For example, the Court could be asked to rule on whether the Framework Decision ought to be interpreted as requiring a proportionality filter at Issuing State level. Edward Grange and Rebecca Niblock said:

"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 ... Our view is that this will assist in achieving the harmonisation of our law with that of other Member States."³⁶⁹

³⁶⁵ Resolution of the European Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, [2009/C.295/01](#)

³⁶⁶ [Q 154](#)

³⁶⁷ Written evidence from the Polish Ministry of Justice ([EXL0084](#))

³⁶⁸ [Q 155](#)

³⁶⁹ Written evidence from Edward Grange and Rebecca Niblock ([EXL0035](#))

348. The Committee has already reported in favour of the opt in to the EAW.³⁷⁰

UK domestic reform

349. The Government said it explored the possibility of amending the EAW Framework Decision, but did not find the requisite support amongst other Member States to do this. The Government therefore “dealt with the issues that were of concern through our own legislation.”³⁷¹

350. The Government brought forward legislation to amend the 2003 Act so as to include two additional bars to extradition for Part 1 cases:

- Proportionality bar (see Chapter 3);
- Absence of prosecution decision (requirement that a case be trial ready).³⁷²

351. The Home Secretary told us that, “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.”³⁷³

352. Jacob Rees-Mogg MP said that it was uncertain whether the amendments to the 2003 Act would be compatible with EU legislation. He said that whilst he thought the changes were “very sensible ... unfortunately they do not stand after 1 December [2014], or they may stand. It becomes a matter of speculation whether they stand or not.”³⁷⁴

353. The Home Secretary told us that there was “no indication so far from the new Commissioners that this is an issue that they wish to look at.” She noted that a number of other Member States, such as Germany, had similar proportionality checks and that, therefore the UK was not “out on a limb.”³⁷⁵

Alternatives to the EAW

354. It was said that the implementation of the EU-wide criminal justice and policing powers were unbalanced. The EAW was used extensively whereas other, less coercive, mutual assistance measures were not used enough.

355. Olivier Tell summarised the alternative “flanking” measures:

“there are ... 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

³⁷⁰ Extradition Law Committee, *The European Arrest Warrant Opt-in* (1st Report, Session 2014–15, HL Paper 63)

³⁷¹ [Q 194](#)

³⁷² Extradition Act 2003, section 12A as inserted by the Anti-social Behaviour, Crime and Policing Act 2014, section 156

³⁷³ [Q 192](#)

³⁷⁴ [Q 167](#) (Jacob Rees-Mogg MP)

³⁷⁵ [Q 197](#)

European Investigation Order, which enter into application only in 2017.”³⁷⁶

356. Take-up of each of the flanking measures varies. Olivier Tell noted that only 19 states (including the UK) had implemented the instrument on transfer of prisoners.³⁷⁷ The Polish Ministry of Justice commented that it was regrettable that the UK had decided not participate in some measures and had decided not to opt back in to the Framework Decision on the Mutual Recognition of Probation Measures.³⁷⁸

357. A number of witnesses, including Professor John Spencer of Cambridge University,³⁷⁹ thought these measures were needed so that the EAW could become an instrument of last resort. Michael Evans said the measures would allow EAWs only to be 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.” He said that in this scenario an EAW would only be needed if the Requested Person went “missing or refused to go”.³⁸⁰

358. Anand Doobay described the situation:

“if you do not have these other measures that are supposed to complement it [the EAW], 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.”³⁸¹

359. The Office of the Chief Magistrate said:

“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.”³⁸²

³⁷⁶ [Q 223](#)

³⁷⁷ *Ibid.*

³⁷⁸ Written evidence from the Polish Ministry of Justice ([EXL0084](#))

³⁷⁹ [Q 30](#) (Professor John Spencer)

³⁸⁰ [Q 181](#) (Michael Evans)

³⁸¹ [Q 21](#) (Anand Doobay)

³⁸² Written evidence from the Office of the Chief Magistrate ([EXL0043](#))

360. Jodie Blackstock identified the use of video links, the Framework Decision on Financial Penalties and the Transfers of Prisoners Framework Decision as measures that were already available and should be used more widely.³⁸³
361. The Home Secretary said that the changes in UK and EU law and practice meant that how the EAW was used would change:
- “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 Order³⁸⁴ 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.”³⁸⁵
362. **We believe that the EAW provides an improved system of extradition between Member States and we support the UK having opted back in to it.**
363. We are not blind to the criticisms of the EAW or to the injustices that have occurred. In our view, the Government, the Commission, the European Parliament and other Member States have also recognised its shortcomings. The amendments to the Extradition Act, developments in case law, changes in how other Member States (such as Poland) are approaching the EAW and the increased adoption of other mutual assistance and procedural rights measures mean that criticisms of how the legislation has been applied in the last 11 years should increasingly be answered. It should not be possible for cases of injustice, like those Graham Mitchell or Andrew Symeou, to happen again.
364. **We believe the Government should be working towards a model whereby the EAW is an instrument of last resort, used in the event that other mutual assistance and flanking measures are inadequate. We ask the Government to set out its plans for implementation of the measures already adopted as a matter of priority, and to review and re-evaluate those mutual assistance and criminal procedural rights measures which it has not yet joined. (Recommendation 17)**

³⁸³ [Q 181](#) (Jodie Blackstock)

³⁸⁴ [Q 198](#). The European Supervision Order (ESO) came into effect in the UK on 4 December 2014.

³⁸⁵ [Q 198](#)

CHAPTER 10: PART 2 COUNTRIES

Introduction

365. Part 1 of the Extradition Act 2003 deals with extradition to states operating the European Arrest Warrant. Part 2 of the Act deals with all other countries with which the UK has extradition arrangements. These Part 2 countries comprise:
- (1) countries with bilateral or multilateral treaties with the UK;
 - (2) the 19 non-EAW countries that are signatories of the European Convention on Extradition (ECE); and
 - (3) Australia, Canada, New Zealand and the US.³⁸⁶
366. The 2003 Act gives the Home Secretary the power to designate countries as Part 2 countries. Designation is made by statutory instrument subject to affirmative resolution in both Houses of Parliament.³⁸⁷
367. The majority of Part 2 countries, when submitting an extradition request to the UK must make a *prima facie* case in support of extradition.
368. Signatories to the ECE and Australia, Canada, New Zealand and the US are further designated and are not required to make such a *prima facie* case.

Designation

European Convention on Extradition (ECE)

369. A number of witnesses raised concerns about ECE countries that ought not to benefit from the simpler extradition arrangements provided by the convention.
370. Ben Keith raised Article 3 concerns with regard to Moldova, Russia, Turkey and Ukraine, stating that these countries “have serious issues with torture and of mistreatment of prisoners by police services, security services and prison guards, rather than just generalised conditions.”³⁸⁸
371. Ben Keith and Paul Garlick QC drew attention to the issue of ‘political’ extradition cases.³⁸⁹ Azerbaijan, Moldova, Russia, Turkey and Ukraine were the ECE countries mentioned in this regard. In referring to Russia, Ben Keith stated:

“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

³⁸⁶ The *Baker Review* stated, “The Government explained the designation of Australia, Canada, and New Zealand not because of any treaty obligations but on the basis that they are democratic states and trusted extradition partners.” (p 270)

³⁸⁷ Extradition Act 2003, sections 69(1), 71(4), 73(5), 74(11)(b), 84(7), 86(7) and 223(5)

³⁸⁸ [Q 108](#) (Ben Keith)

³⁸⁹ [Q 115](#) (Ben Keith), [Q 112](#) (Paul Garlick QC)

a high probability that, if you get involved, extradition will be requested.”³⁹⁰

372. Currently these concerns are handled via successful arguments to bar extradition on human rights grounds or to stay proceedings as an abuse of process. Anand Doobay summarised the position:

“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 ... 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.”³⁹¹

373. The Office of the Chief Magistrate stated that there were countries to which the UK did not extradite people, despite being Part 2 designated or EAW states, because concerns were so widespread:

“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.”³⁹²

374. Given that a number of countries are further designated but routinely not extradited to, some witnesses said that it was unclear what the rationale was behind designation.³⁹³

Review of designations

375. In its recommendations, the Baker Review invited the Government to “periodically review designations for Category 2 territories”.³⁹⁴ As part of its response to the Review, the Government accepted this recommendation.³⁹⁵

376. The Home Secretary told us that this review had begun. She said that “work is now under way in the Home Office” and that she hoped it would conclude “by the end of this Parliament.”³⁹⁶

377. A number of witnesses agreed that the Government should carry out a review of designations.³⁹⁷ There were a variety of suggestions as to what form a

³⁹⁰ Q 115 (Ben Keith)

³⁹¹ Q 17 (Anand Doobay)

³⁹² Written evidence from the Office of the Chief Magistrate (EXL0043)

³⁹³ See for example written evidence from Daniel Sternberg (EXL0051).

³⁹⁴ The Baker Review, p 332

³⁹⁵ The Government Response to the Baker Review, p 4

³⁹⁶ Q 209 (Rt Hon. Theresa May MP, Home Secretary)

³⁹⁷ See, for example written, evidence from Daniel Sternberg (EXL0051), Edward Grange and Rebecca Niblock (EXL0035).

review should take. Some thought designations should be reviewed on a regular basis. Daniel Sternberg suggested, “Parliament ought to review the list of territories so designated each year.”³⁹⁸

378. Rather than an annual review of all Part 2 designations, Edward Grange and Rebecca Niblock urged Parliament to consider countries on a case-by-case basis and “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.”³⁹⁹
379. Some witnesses proposed designation on completely different grounds to the current arrangements. Dr Ted Bromund and Andrew Southam of the Heritage Foundation said:

“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 ... while all other nations should”.⁴⁰⁰

380. Some witnesses said one potential outcome of the review should be that a country’s designation be revoked. The Law Society told us, “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.”⁴⁰¹ Sheriff Maciver also said, “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.”⁴⁰²
381. However, others pointed out that options open to the Government in regard to the ECE were limited. Should a review of designations conclude that *prima facie* evidence was required from an ECE state, the UK would have to withdraw and renegotiate with individual ECE state parties or seek amendments to the Convention at Council of Europe level. It would not be an easy proposition to require ECE states to provide a *prima facie* case.
382. Some countries had entered reservations on signing the Convention which re-imposed the *prima facie* evidence requirement. The UK did not enter such a reservation and it would not be practically possible to do this now. Doctor Danae Azaria, Lecturer in Law at University College London, told us:
- “The late formulation of a reservation would render it invalid ... 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.”⁴⁰³
383. Anand Doobay also described the limited options open to the Government:

³⁹⁸ Written evidence from Daniel Sternberg ([EXL0051](#)). See also Law Society of Scotland ([EXL0039](#))

³⁹⁹ Written evidence from Edward Grange and Rebecca Niblock ([EXL0035](#))

⁴⁰⁰ Written evidence from Dr Ted Bromund and Andrew Southam ([EXL0048](#))

⁴⁰¹ Written evidence from the Law Society ([EXL0046](#)), see also [Q 126](#) (Sheriff Maciver)

⁴⁰² [Q 126](#) (Sheriff Maciver)

⁴⁰³ Written evidence from Dr Danae Azaria ([EXL0087](#))

“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.”⁴⁰⁴

384. Alternatively, Dr Azaria considered a range of arguable alternatives (beyond the scope of this report to consider in detail) including:

- suspending the ECE’s operation in whole or in part in the UK’s relationship with the defaulting state;
- the UK withholding performance under the ECE; and
- the UK adopting counter-measures.⁴⁰⁵

385. We received some evidence that the US in particular should be required to present a *prima facie* case when submitting an extradition request.⁴⁰⁶ However, a number of witnesses said that would be inappropriate whilst not having the same requirement for other Part 2 countries of greater concern. Edward Grange and Rebecca Niblock said:

“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.”⁴⁰⁷

386. The Home Secretary, in her evidence, accepted the practical limitations of the review:

“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.”⁴⁰⁸

⁴⁰⁴ [Q 17](#) (Anand Doobay)

⁴⁰⁵ Written evidence from Dr Danae Azaria ([EXL0087](#))

⁴⁰⁶ See, for example, written evidence from David Bermingham ([EXL0052](#))

⁴⁰⁷ Written evidence from Edward Grange and Rebecca Niblock ([EXL0035](#)). See also written evidence from Daniel Sternberg ([EXL0051](#)) and written evidence from Dr Ted Bromund and Andrew Southam ([EXL0048](#)).

⁴⁰⁸ [Q 209](#) (Rt Hon. Theresa May MP, Home Secretary)

Prima facie requirement

387. Some witnesses viewed *prima facie* evidence as an essential safeguard, regardless of specific human rights concerns (see Box 10).

Box 10: *Prima facie* case

Where a *prima facie* case is required, the judge must decide whether there is evidence that “would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him” (section 84(1) of the 2003 Act). This is a slight modification of the test which applies in criminal committal proceedings under section 6(1) of the Magistrates’ Court Act 1980 where the magistrate is required to see whether:

“if the evidence stood alone at the trial, a reasonable jury, properly directed, could accept it and find a verdict of guilty”.⁴⁰⁹

But, whether in the extradition or criminal context, the evidence required to make a *prima facie* case falls far short of proof of guilt.

If the judge decides the evidence is insufficient to make out a case requiring an answer at a summary trial, he must order the person's discharge (section 84(5)). If the evidence is sufficient, then the judge must proceed to consider human rights issues (section 84(6)). Section 84(7) explains that the need to make out a *prima facie* case/a case requiring an answer does not apply to further designated Part 2 territories.

388. One of the central points made by Liberty was that the current safeguards and statutory bars in the UK’s extradition arrangements were not sufficient to replace the safeguard of a *prima facie* case. They argued it imposed “a standard for the quality of extradition request that the UK is prepared to accept, filtering out unmeritorious and speculative requests for extradition.”⁴¹⁰ They illustrated their position with reference to the case of Lofti Raissi whose extradition to the US under the previous Extradition Act was prevented following scrutiny of the *prima facie* evidence provided.⁴¹¹

389. Other witnesses were less convinced that a *prima facie* case requirement was an effective safeguard. Ben Keith told us that:

“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.”⁴¹²

⁴⁰⁹ *Schtraks v Government of Israel* (1964) AC 556 at 580

⁴¹⁰ Written evidence from Liberty ([EXL0066](#)), see also Moray Bowater ([EXL0003](#)), Christopher Burke ([EXL0012](#)), Philippa Drew ([EXL0032](#)), Rachel Hasted ([EXL0004](#)), Jeremy Lewis ([EXL0015](#)).

⁴¹¹ *Lofti Raissi v SSHD* (2008) 3 WLR 375

⁴¹² [Q 26](#) (Ben Keith)

390. Similarly, the Law Society argued, “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.”⁴¹³
391. The requirement of a *prima facie* case was said to be “against the prevailing trend in extradition proceedings of leaving ‘trial issues’ for the courts of requesting States.”⁴¹⁴ Jago Russell from Fair Trials International stated, “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.”⁴¹⁵

Countries with no extradition arrangements

392. As noted in paragraph 14, there are some countries with which the UK does not have extradition arrangements. In these circumstances, an international convention to which the UK and the other country are party could form the basis of extradition, or an *ad hoc* bilateral treaty could be concluded. However, the Home Secretary cautioned that:
- “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.”⁴¹⁶
393. We agree with the concerns raised about some further designated countries. However, withdrawal from the ECE (and therefore from our extradition arrangements with 19 countries) would be a wholly unrealistic and disproportionate response. **We are satisfied that extradition requests from countries of concern are dealt with effectively by the courts, and that the statutory bars provide the necessary protection to Requested Persons. In our view, this is the appropriate way of dealing with these concerns.**
394. The Government recently began its review of Part 2 designations. It will not be feasible to remove a country’s designation. Therefore the scope of the review would seem to be limited to assessing whether additional countries should be designated. **We urge the Government to conclude and publish the findings of the review of Part 2 designations at the earliest opportunity. (Recommendation 18)**
395. **Although it would be impractical to attempt to remove the Part 2 designation from a signatory to the European Convention on Extradition, the Government should still consider these countries in its review. No doubt such consideration would help to inform the FCO’s ‘country of concern’ reports. Such information may be useful**

⁴¹³ Written evidence from the Law Society ([EXL0046](#))

⁴¹⁴ Written evidence from the Crown Prosecution Service ([EXL0054](#))

⁴¹⁵ [Q 26](#) (Jago Russell)

⁴¹⁶ [Q 204](#)

when considering human rights arguments put in relation to those countries. (Recommendation 19)

396. **The Committee is not persuaded by the view that a *prima facie* case requirement ought to be re-introduced into UK extradition law. In our view this would be a retrograde step, which would result in more drawn out procedures, with little material benefit in the light of the existing safeguards, including the common law abuse of process jurisdiction.**

CHAPTER 11: UK/US EXTRADITION

Introduction

397. The UK's extradition arrangements with the US have been the subject of controversy ever since the UK negotiated a new treaty with the US in 2003. We received many submissions criticising the arrangements. Many of the most high profile cases have involved extradition to the US (see Appendix 5). This ground has already been well-covered elsewhere. For example, whether the UK/US treaty was imbalanced was a question the Home Secretary asked of the Baker Review and the House of Commons Home Affairs Committee published a report specifically on UK/US extradition. This report does not attempt to revisit this area in the same detail.
398. As was noted in Chapter 1, the US is a Part 2 country like many others. Our extradition arrangements with them are the same as with, for example, the Russian Federation. Furthermore, we note that the number of extraditions to the US account for a very small proportion of the number of extraditions from the UK in total. However, the issues relating to the US have attracted more evidence than other Part 2 countries and therefore the arrangements merit a separate chapter.

UK/US Extradition Treaty 2003

Background

399. In 2003 the UK concluded negotiations with the US to replace the 1972 Extradition Treaty. The new treaty was brought into effect in UK law under Part 2 of the 2003 Act on 1 January 2004. The US Senate did not ratify the treaty until April 2007.
400. A number of witnesses said that the treaty was unbalanced, favouring extradition to the US. For some this was demonstrated by the numbers of successful requests from the US. Liberty cited Home Office figures stating that between 2004–13 the US:
- “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 ... 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 ... The balance of nationalities of those extradited in both directions also demonstrates the imbalance.”⁴¹⁷
401. Liberty added, “There may be many factors which drive the unusually high traffic of extraditions the US seeks from the UK”.⁴¹⁸
402. The Government rejected the claim that statistics supported the contention that the arrangements were unbalanced. It said that it did 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

⁴¹⁷ Written evidence from Liberty ([EXL0066](#))

⁴¹⁸ *Ibid.*

or fair. Indeed, it is not unusual for the number of incoming and outgoing requests made under a bilateral treaty to be very different”.⁴¹⁹ It also noted 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.”⁴²⁰

403. **Simply comparing the numbers of people extradited to and from the US is not a reliable method of assessing the operation of the treaty, and does not prove the hypothesis that the treaty is unbalanced. There may be many legitimate factors that underpin the figures. Without much more detailed research the statistics do not allow for sound conclusions. The principle of comity does not require symmetrical justice systems; the important principle is that extradition cannot and does not go ahead where any of the statutory bars are found to apply.**

Evidentiary tests

404. One of the most controversial aspects of the treaty has been over the evidence required to support extradition requests. Under the 1972 Treaty both parties were required to submit *prima facie* evidence. Under the 2003 Treaty requests from the UK to the US must be accompanied only by “such information as would provide a reasonable basis to believe that the person sought committed the offence for which extradition is requested” (the ‘probable cause’ test).⁴²¹ The Treaty makes no provision for the evidentiary requirements for extradition from the UK to the US so these are governed by the 2003 Act. Under section 71 of the Act, requests from further designated Part 2 countries (including requests from the US) must be accompanied by sufficient information to “justify the issue of a warrant for the arrest of a person accused of the offence” (the ‘reasonable suspicion’ test).⁴²²
405. As the US Senate did not ratify the treaty until some time after its provisions were brought into UK law, UK/US extradition operated for over three years on the basis of different agreements. The situation was summarised in a table in the Baker Review (see Table 5).

Table 5: Evidence requirements in UK/US extradition

Period	Requests to the United States	Requests to the United Kingdom
Before 1 January 2004	Probable cause evidence	<i>Prima facie</i> evidence
January 2004 to 26 April 2007	Probable cause evidence	Information satisfying the reasonable suspicion test
26 April 2007 to date	Information satisfying the probable cause test	Information satisfying the reasonable suspicion test

Source: Baker Review, p237

⁴¹⁹ Written evidence from the Home Office ([EXL0060](#))

⁴²⁰ *Ibid.*

⁴²¹ The wording in the treaty reflects accepted definitions of the ‘probable cause’ test contained in the Fourth Amendment to the US Constitution.

⁴²² The wording in the treaty reflects the ‘reasonable suspicion’ test common in UK law.

406. Even after the Senate ratified the treaty, the difference between ‘probable cause’ and ‘reasonable suspicion’ tests remained a source of controversy. For example, the Islamic Human Rights Commission referred to an “imbalance of threshold requirements”.⁴²³
407. In UK law in general there is a recognised difference between ‘belief’ and ‘suspicion’:
- “Belief is a state of mind by which the person in question thinks that X is the case. Suspicion is a state of mind by which the person in question thinks that X may be the case.”⁴²⁴
- A similar distinction is made in US law.⁴²⁵
408. The Baker Review concluded that there was “no significant difference”⁴²⁶ between the two tests. The Review noted that:
- “(i) Both tests are based on reasonableness;
- (ii) Both tests are supported by the same documentation;
- (iii) Both tests represent the standard of proof that police officers in the United States and the United Kingdom must satisfy domestically before a judge in order to arrest a suspect.”
409. In evidence to us, Roger Burlingame, a former US federal prosecutor, said that the tests were “functionally the same” as he could not think of a case that “would have turned on the difference between those two standards”.⁴²⁷
410. Others were less satisfied. Isabella Sankey said that the Baker Review had been “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.” She said that Liberty’s view was “We do not think the matter has necessarily yet been investigated”.⁴²⁸
411. However, Isabella Sankey, in common with a number of witnesses, did not focus on concerns that there was “no reciprocity between the two nations”.⁴²⁹ Rather, witnesses were critical of aspects of the US justice system which they felt made extradition inappropriate or unjust.
412. Given that UK law regards “a reasonable basis to believe” as a higher threshold than “reasonable suspicion”, **we conclude that the evidentiary tests in our extradition arrangements with the US are different.**

⁴²³ Written evidence from the Islamic Human Rights Commission ([EXL0062](#))

⁴²⁴ *A, B, C, D, E, F, G, H, Mahmoud Abu Rideh, Jamal Ajouaou v Secretary of State for the Home Department* (2005) 1 WLR 414 at 229

⁴²⁵ In *Terry v Ohio* (392 U.S. 1 (1968)), the US Supreme Court ruled that stop and search could be permissible subject to a police officer on the basis of reasonable suspicion whereas a more rigorous search or seizure would require reasonable belief to satisfy the ‘probable cause’ test of the Constitution’s Fourth Amendment.

⁴²⁶ The Baker Review, p 1

⁴²⁷ [Q 55](#)

⁴²⁸ [Q 54](#) (Isabella Sankey)

⁴²⁹ *Ibid.*

However, whether this difference has any practical effect is debatable. The view that experience to date demonstrates that they are “functionally” the same is persuasive.

Aspects of the US justice system

413. One aspect of the US system of justice which a number of witnesses criticised was what one witness called the “notorious ‘plea bargaining’ travesty”.⁴³⁰
414. Plea bargaining has been the subject of much discussion in the US generally. A research paper by the Bureau of Justice Assistance estimated that 90–95% of state and federal court cases were resolved through plea bargaining.⁴³¹ The Innocence Project (a New York-based legal organisation which works to exonerate wrongly convicted people) estimates that 2.3–5% of all prisoners in the US are innocent.⁴³² Jed Rakoff (a US District Judge for the Southern District of New York) has noted that if 1% of all convictions were false, given the size of the prison population in the US and the number of cases resolved through plea bargaining, there would be around 20,000 innocent people in prison as a result of plea bargaining.⁴³³
415. A number of witnesses said that plea bargaining placed undue pressure on Requested People, particularly when they were “far away from home without support, facing an alien justice system”.⁴³⁴ Michael Evans summed it up saying, “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.”⁴³⁵
416. The degree to which plea bargaining has become a feature in determining sentences in the US, including those facilitated by extradition, was a matter of considerable concern to some witnesses as plea bargaining places considerable power in the hands of the public prosecutor. Michael Evans went so far as to suggest that it might lead to a situation in which the eventual bargain reached with a Requested Person would mean such a minimal sentence that extradition might not have been considered proportionate. He cited the case of Eileen Clark, a US citizen extradited from the UK to the US to face charges of absconding with her children and leaving the US in the late 1990s. After resisting extradition from the UK, Ms Clark pleaded guilty to the charges in the US in return for the possibility of a jail sentence being removed. Mr Evans said, “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

⁴³⁰ Written evidence from Cllr Jim Tucker ([EXL0023](#))

⁴³¹ Bureau of Justice Assistance (US Department of Justice), *Plea and Charge Bargaining: Research Summary*, (January 2011) p 1: <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> [accessed 3 March 2015]

⁴³² Innocence Project, ‘How many innocent people are there in prison’: http://www.innocenceproject.org/Content/How_many_innocent_people_are_there_in_prison.php [accessed 3 March 2015]

⁴³³ Jed Rakoff, ‘Why Innocent People Plead Guilty’, *The New York Review of Books* (20 November 2014): <http://www.nybooks.com/Articles/archives/2014/nov/20/why-innocent-people-plead-guilty/> [accessed 3 March 2015]

⁴³⁴ [Q 63](#) (Isabella Sankey)

⁴³⁵ [Q 178](#)

in the sense that she should never set foot in jail, then she does not meet the criteria for extradition.”⁴³⁶

417. In evidence to us, plea bargaining was also defended. Roger Burlingame said, “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.”⁴³⁷ Similarly, Amy Jeffress said, “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.”⁴³⁸
418. Cases arguing against plea bargaining have been heard in a number of courts. In the US, the Supreme Court has ruled in favour of plea bargaining a number of times.⁴³⁹ The European Court of Human Rights in *Natsvlishvili and Togonidze v Georgia* recently heard an appeal against Georgia's plea bargaining system. This was the first case at European level to consider plea bargaining's compatibility with the ECHR. The Court described plea bargaining as a common feature across the EU, which breached neither the presumption of innocence nor the right to a fair trial. This was so even in the context of a very high conviction rate in Georgia of around 99% of cases.
419. The Court ruled that plea bargaining in principle was consistent with Convention rights provided the bargain was in practice established in “an unequivocal manner ... attended by minimum safeguards commensurate with its importance” (including judicial oversight) and was not contrary to the public interest. With reference to the particular case, it ruled that “(a) the bargain had to be accepted by the first applicant in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and (b) the content of the bargain and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review.”⁴⁴⁰
420. In the context of plea bargaining post-extradition, the House of Lords has ruled that:
- “it would only be in a wholly extreme case ... that the court should properly regard any encouragement to accused persons to surrender for trial and plead guilty, in particular if made by a prosecutor during a regulated process of plea bargaining, as so unconscionable as to constitute an abuse of process justifying the requested state's refusal to extradite the accused.”⁴⁴¹

⁴³⁶ *Ibid.*

⁴³⁷ [Q 23](#) (Roger Burlingame)

⁴³⁸ [Q 72](#)

⁴³⁹ In particular, see *Bordenkircher v Hayes*, 434 US 357 (1978).

⁴⁴⁰ *Natsvlishvili and Togonidze v Georgia*, no. 2043/05, (2014) ECHR 454

⁴⁴¹ *McKinnon v Government of the United States of America and another*, (2008) 1 WLR 1739 at 41

421. It is notable that where extradition to the US has been resisted on Article 6 grounds (the right to a fair trial) due to plea bargaining or other factors, such arguments have not been successful.
422. Another aspect of concern raised was the contention that where a person had resisted extradition the courts would automatically be refused bail in the US. This was the experience of Christopher Tappin, who was extradited to the US (see Appendix 5). He said, “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.”⁴⁴²
423. Michael Evans said that this was tantamount to a punishment for challenging extradition:
- “When you get there ... 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’.”⁴⁴³
424. Similarly, some prison conditions were cited as making extradition to the US excessively harsh. In their written submission, Mr and Mrs Dunham described being held in a ‘supermax’ prison “designed and in fact used to hold terrorists and dangerous prisoners.”⁴⁴⁴ Frances Webber, describing her research into such prisons dating back to 2002, said:
- “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”.⁴⁴⁵
425. David Bermingham described a number of the prisons in which he was held. Some he described as “hellhole prisons”⁴⁴⁶ though he spent the majority of his time in the low security wing of a prison in California which he described as being “not a bad place to be, oddly enough—I was in the army; to me it was a bit like basic training on steroids.”⁴⁴⁷
426. As with plea bargaining, the ECtHR has not found US prison conditions to be in breach of the ECHR.⁴⁴⁸ Amy Jeffress said:

⁴⁴² Written evidence from Christopher Tappin ([EXL0028](#)). Mr Tappin also noted that he was granted bail after over two months in detention providing he resided first with his lawyer and then in a rented apartment no more than five miles of his lawyer’s home.

⁴⁴³ [Q 178](#)

⁴⁴⁴ Written evidence from Paul and Sandra Dunham ([EXL0047](#))

⁴⁴⁵ Written evidence from Frances Webber ([EXL0033](#))

⁴⁴⁶ [Q 245](#)

⁴⁴⁷ [Q 251](#)

⁴⁴⁸ This was the finding of the ECtHR in the case of case of *Babar Ahmad and others v the United Kingdom* ((2013) 56 EHRR 1)

“the European Court concluded that the conditions in US prisons are, in fact, superior in many ways to those in many European prisons ... prison conditions in the United States ... are actually broadly similar to those in the United Kingdom ... Generally, the United States prisons are humane; they are well run and well operated.”⁴⁴⁹

427. The practice in some states of electing judges was also cited as concerning.⁴⁵⁰ This has also been the subject of some criticism in the US.⁴⁵¹ Again, Amy Jeffress rejected these criticisms, “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.”⁴⁵²

428. Responding to all of these criticisms in general, Amy Jeffress said:

“The extradition treaty that we have is premised on mutual trust and respect ... 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 ... courts in the United Kingdom routinely admit evidence that would violate our fourth amendment,⁴⁵³ and hearsay evidence that would violate our sixth amendment.⁴⁵⁴ Defendants in the United Kingdom do not have the protections of the United States’ Fifth Amendment ... 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.”⁴⁵⁵

429. Sir Scott Baker recognised many of the concerns about the US system. For example, he said, “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.”⁴⁵⁶

430. However, the Baker Review did not find that these criticisms meant that the UK/US treaty operated unfairly. Anand Doobay summarised the position:

“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 ... if we want to say they are unacceptable ... We have to work out on what basis we are going to complain about these aspects of

⁴⁴⁹ [Q 73](#)

⁴⁵⁰ Written evidence from David Bermingham ([EXL0052](#))

⁴⁵¹ See, for example, Brennan Center for Justice, *New Politics of Judicial Elections 2011–12* (October 2013): <http://www.brennancenter.org/sites/default/files/publications/New%20Politics%20of%20Judicial%20Elections%202012.pdf> [accessed 3 March 2015]

⁴⁵² [Q 74](#)

⁴⁵³ The fourth amendment to the US Constitution requires searches and seizures to be justified by probable cause. Evidence obtained through searches and seizures where there was not probable cause is inadmissible in US courts. UK law applies reasonable suspicion test (see paragraph 405)

⁴⁵⁴ The sixth amendment to the US Constitution gives defendants the right to confront those giving evidence against them. Hearsay evidence is therefore not permitted.

⁴⁵⁵ [Q 73](#)

⁴⁵⁶ [Q 14](#) (Sir Scott Baker)

their system if it is not that they are not compliant with the European Convention on Human Rights.”⁴⁵⁷

Differences in prosecutorial cultures

431. Some of the criticisms of the UK’s extradition arrangements with the US were based on the countries’ different approaches to jurisdiction and prosecution. There was concern that the US took an inappropriately broad view of its jurisdiction. Isabella Sankey said that the US might claim jurisdiction based on a connection “as small as a computer being used with a US server based in the US for a matter of months.”⁴⁵⁸
432. Others agreed that the US took a broader view of jurisdiction but that did not necessarily make it inappropriate. Anand Doobay said the US took “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.”⁴⁵⁹ Roger Burlingame agreed with this view. He said the difference was a result of “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.”⁴⁶⁰
433. The CPS noted that regardless of approaches to jurisdiction, the principle of dual criminality still applied:
- “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.”⁴⁶¹
434. Even where it was agreed that a case might legitimately be considered as concurrent, some witnesses said that the differences between the prosecuting authorities meant that the US would inevitably take precedence. Isabella Sankey said:
- “I am not aware of a single case of concurrent jurisdiction where the UK has successfully extradited someone from the US to the UK ... 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 ... our prosecutors decide not to pursue prosecutions and US prosecutors do ... The evidence demonstrates that the US much more aggressively seeks extradition and prosecution in concurrent-jurisdiction cases.”⁴⁶²

⁴⁵⁷ [Q 14](#) (Anand Doobay)

⁴⁵⁸ [Q 66](#) (Isabella Sankey)

⁴⁵⁹ [Q 14](#) (Anand Doobay)

⁴⁶⁰ [Q 66](#) (Roger Burlingame)

⁴⁶¹ Written evidence from the Crown Prosecution Service ([EXL0054](#))

⁴⁶² [Q 57](#) (Isabella Sankey)

435. Roger Burlingame disagreed. He said, “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.”⁴⁶³ If it was the case that the US was more often “more advanced in the investigation” he put that down to “a prosecutorial resources issue” saying that the US had “a huge, huge amount of law enforcement”.⁴⁶⁴ He described a picture of US prosecutors being “people in their 30s with boundless energy, who are the most Type A aggressive achievers up to that point in their lives ... with virtually unlimited resources working around the clock to pursue these kinds of cases.”⁴⁶⁵
436. The CPS did not agree that the US had an advantage in prosecutorial discussions, maintaining the view that pursuit of prosecutions by UK authorities was robust. Sue Patten said:
- “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 ... Whether somebody shouts louder than somebody else or what have you is not really the issue.”⁴⁶⁶
437. Nick Vamos also told the Committee that, having been the CPS liaison in Washington, he did 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.”⁴⁶⁷
438. Both Nick Vamos and Sue Patten cited examples of UK and US authorities working closely together. Sue Patten described a case involving “a website that was facilitating fraud and it was a global matter” which was investigated by the NCA, supported by evidence provided by the FBI and prosecuted in the UK.⁴⁶⁸ Nick Vamos referred to the prosecution of Anonymous hackers⁴⁶⁹ which used evidence and witnesses from the US but was prosecuted in the UK. He said, “it did not seem like there was any desire by the Americans to just override UK prosecution and extradite those people”.⁴⁷⁰
439. One difference between UK and US prosecutors that was noted was that US prosecutors have investigatory powers. Nick Vamos explained that “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

⁴⁶³ [Q 66](#) (Roger Burlingame)

⁴⁶⁴ [Q 57](#) (Roger Burlingame)

⁴⁶⁵ *Ibid.*

⁴⁶⁶ [Q 84](#) (Sue Patten)

⁴⁶⁷ [Q 84](#) (Nick Vamos)

⁴⁶⁸ [Q 78](#) (Sue Patten)

⁴⁶⁹ ‘Anonymous’ is a loosely associated international network of computer hackers.

⁴⁷⁰ [Q 84](#) (Nick Vamos)

investigation, and we can advise or suggest. We do not direct it; we do not drive it. It is not our investigation.”⁴⁷¹

440. **Much of the evidence we received about aspects of the US justice system is concerning. Some of the accounts we received from those who had been extradited to the US were, in places, quite moving. The risks of such experiences are inherent to extradition to any foreign jurisdiction, although we are concerned that some conditions and procedures in the US may not always be worthy of the tacit approval that extradition implies.**
441. However, **the ECtHR has considered whether these concerns ought to prevent extradition to the US. It has found that extradition to the US does not constitute a human rights breach because of these concerns. The ECHR is, correctly, the UK’s baseline for considering whether the justice systems of other countries makes extradition human rights compliant. We do not, therefore, propose any changes in our legal arrangements with the US.** Of course, all of the normal bars to extradition apply in US cases and if the US were found by the courts to be seriously or systemically in breach of the ECHR, they would (as the courts have done with other countries) become far more circumspect about ordering extradition to the US, potentially to the point of refusing extradition very frequently.
442. It must be recognised that were the UK courts to find certain aspects of the US system of justice so objectionable as to constitute a bar to the extradition of a UK national so too would we be unable to extradite to the US any other Requested Person. If, for example, the usual plea bargaining processes there were held to constitute an abuse of process (contrary to what was held by the House of Lords in *McKinnon*), US citizens in the UK would be entitled to resist extradition to the US no less than our own nationals and the UK would speedily become a safe haven for all those seeking impunity for crimes in or against the US.
443. Having said that, ensuring extradition arrangements with the US command general public support is very important. The fact that no breaches of the ECHR have been found in relation to extradition to the US ought to provide that support. However, **it is clear from the evidence that, rightly or wrongly, a sentiment remains that pre-trial conditions in the US risk being excessively harsh. This is particularly the case for those assessed in the UK as presenting a low risk of either being violent or absconding, but who are nevertheless subjected to the use of force on flights or detention in high security facilities, and for non-US residents unable to provide a suitable bail addresses.**
444. In the light of these concerns, **we urge the Government to make representations to the US authorities to agree the treatment of those extradited from the UK, with particular regard to transfer, pre-trial detention and bail. (Recommendation 20)**
445. However, **we do not consider the US to be a special case. The Government ought also to make similar representations to any**

⁴⁷¹ [Q 84](#) (Nick Vamos)

extradition partner whose conditions do not breach the ECHR but might be considered excessively harsh. (Recommendation 21)

446. **The outcome of these representations should be formalised into a Memorandum of Understanding in order to clarify the positions of each country in relation to the standards of treatment expected when a person is extradited. (Recommendation 22)**
447. We would hope that the US authorities would be open to this recommendation as it must be to their advantage as much as ours for the public to have confidence in our extradition arrangements.
448. **We do not take the view that the US's interpretation of jurisdiction is inappropriate. The US is clearly more active in prosecuting cross-border crimes than many other countries but this does not mean its interpretation is excessive.**

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Human Rights Bar and Assurances

1. It is right that the human rights bar is set at a high level. Accusations of human rights breaches are serious and the courts should be as sure as possible that they can be substantiated. (Paragraph 60)
2. We are content that the courts' interpretation of the human rights bar is suitably responsive, where necessary, to the wide variety of circumstances presented in extradition cases. This provides a real protection to Requested People without interfering unduly with the extradition process. The changes in the application of Article 8 since *HH* are a welcome confirmation of this. (Paragraph 61)
3. Assurances are only used where serious fears of human rights breaches have been demonstrated. We therefore believe that assurances should always be handled carefully and subjected to rigorous scrutiny, particularly to ensure that they are properly and precisely drafted, and comply fully with the Othman criteria. The importance of ensuring that they are genuine and effective cannot be overestimated. They must provide Requested People with real protection from human rights abuse. (Paragraph 88)
4. We believe the arrangements in place for monitoring assurances are flawed. It is clear that there can be no confidence that assurances are not being breached, or that they can offer an effective remedy in the event of a breach. (Paragraph 89)
5. It is questionable, in our view, whether the UK can be as certain as it should be that it is meeting its human rights obligations. (Paragraph 90)
6. We welcome the Government's review of the monitoring of assurances as we are concerned that the current arrangements via consular services fall well below what is necessary. (Paragraph 91)
7. We urge the Government to complete its review of the monitoring of assurances as a matter of urgency. Given the interest both Houses of Parliament have taken in the UK's extradition law and the importance of this issue, the Government should present the outcomes of this review to both Houses for debate. (Recommendation 1) (Paragraph 92)
8. We recommend the Government make arrangements for the details of assurances to be collated and published regularly to improve the transparency of the process, not least so that the international community and the authorities in a Requested Person's home state can have greater information about when assurances have been required. (Recommendation 2) (Paragraph 93)
9. We recommend that greater consideration be given to including in assurances details of how they will be monitored. The Government and CPS should be particularly astute to request such details when they are seeking assurances. (Recommendation 3) (Paragraph 94)

Proportionality

10. The operation of the EAW, in particular the absence of an effective proportionality check by the Issuing State, means the Government was right to introduce the proportionality bar into domestic legislation. (Paragraph 126)
11. We see no reason why the proportionality bar should not be extended to conviction cases given the number of EAWs received for trivial matters; the Government should therefore legislate accordingly. In order for the bar to be effective the National Crime Agency must be resourced accordingly and we also call on the Government to ensure that adequate resources are in place. (Recommendation 4) (Paragraph 127)
12. We hope that over time improved practice will develop throughout the EU making the proportionality bar practically redundant. (Paragraph 128)
13. We do not believe there to be a similar systemic risk of disproportionate requests to justify a proportionality bar for Part 2 countries. (Paragraph 129)

Forum

14. In our view, the CPS's criterion of "where most of the criminality or most of the loss or harm occurred" is likely to continue to produce unpredictable outcomes. This is unavoidable... The current formulation provides the necessary discretion to the prosecutors to reach sensible conclusions. (Paragraph 138)
15. Further commentary on the prosecutors' guidelines for cases of concurrent jurisdiction and their implementation may help to avoid ill-founded criticism. Similarly, providing complete and full information to Requested People about the rationale behind the decision to seek extradition in cases of concurrent jurisdiction may be helpful. We recommend the Government consider what additional information could be provided and issue the necessary guidance to the CPS. (Recommendation 5) (Paragraph 139)
16. The forum bar is still a new element to extradition law. It is too soon to come to a view on its effectiveness. (Paragraph 167)
17. It may be that a wider 'interests of justice' test ought to be allowed in the forum bar but, on the basis of the evidence we have heard, that is far from certain. With only a small number of cases having gone to appeal, it is too soon to conclude that the bar is too restrictive. (Paragraph 168)
18. We conclude that having a process whereby prosecutors' decisions can be directly scrutinised in open court is a valuable addition to the 2003 Act and has potential to make this part of the process more transparent. This may be a useful addition to the law given our conclusions in paragraphs 138 and 139. (Paragraph 169)
19. We are content that the provisions concerning the prosecutors' certificate do not undermine the bar. The forum bar should not prevent extradition where a prosecution in the UK would not be possible. The CPS's approach to the certificate appears to us to be a proportionate use of the power to ensure that this does not happen. (Paragraph 170)

20. We do not consider that there should be (nor under the EAW scheme could there be) an absolute bar to extradition merely because it is sought in respect of a UK national whose criminal activity was performed entirely in this country. (Paragraph 171)
21. We recommend that where a person is normally resident in the UK the courts should be particularly astute to ensure that:
- (a) no other less draconian measures are available to progress the case to a just outcome;
 - (b) the forum bar has been fully explored in court;
 - (c) all relevant Article 8 arguments have been fully evaluated to ensure extradition is not disproportionate; and
 - (d) due consideration has been given to the possibility of obtaining assurances as to:
 - (i) the prospects of pre-trial bail; and
 - (ii) the transfer back to the UK of at least part of any eventual sentences. (Recommendation 6) (Paragraph 173)

Extradition and Other Areas of Law

22. It is not right that a person facing extradition is unable to present sensitive material in order to resist extradition without prejudice to others. (Paragraph 189)
23. We recommend that the Government bring forward proposals to amend the 2003 Act to provide for an independent counsel procedure in order to enable sensitive material to be used in extradition hearings. (Recommendation 7) (Paragraph 190)
24. The Committee has not heard sufficient evidence to comment usefully on how extradition law ought to interact with proceedings in the Family Court, child abduction cases and people trafficking law. However, clearly these are areas where further investigation is necessary. We recommend that the Government commission a review into these matters. (Recommendation 8) (Paragraph 199)

Legal Advice, Legal Aid and Expert Evidence

25. We recommend that a ticketing system be introduced to manage access to the duty rota in order to ensure proper expertise is available from the earliest point in proceedings to help the Requested Person and the courts. The Government should make the necessary arrangements to require this. (Recommendation 9) (Paragraph 208)
26. It is not acceptable that individuals are kept in any unnecessary pre-trial detention, from either their own perspective or that of the state. Delays to the extradition process are contrary to the interests of justice and place an additional burden on the taxpayer. (Paragraph 239)
27. We regret the fact that the district judges at Westminster Magistrates' Court have found it necessary to insert a three month delay into the system. In the

light of the Lord Chancellor's comments and the concern expressed by the European Commission, we hope that the Court will keep this automatic delay under review, that the Government will take the necessary steps to eliminate it and that it will therefore be removed at the earliest opportunity. (Paragraph 240)

28. We believe the high-level cost-benefit analysis provided to the Baker Review is neither a sufficient nor a credible response to the concerns raised about means testing for legal aid. The Government should conduct and publish a full and detailed cost-benefit analysis. In our view, unless a cost-benefit analysis very clearly favours retaining means testing, the interests of justice should take priority. (Recommendation 10) (Paragraph 242)
29. This more detailed cost-benefit analysis should include consideration of the savings that could be made by matters being resolved by lawyers in the Issuing State. (Recommendation 11) (Paragraph 243)
30. Again, if the cost-benefit is balanced, the interests of justice ought to take priority. (Recommendation 12) (Paragraph 244)
31. The Government should, as a matter of urgency, pursue solutions, such as the e-form, to make the process of applying for legal aid work more efficiently and effectively. (Recommendation 13) (Paragraph 245)
32. From the submissions we have received we have been persuaded that it is possible for the necessary expert evidence to be obtained on legal aid. (Paragraph 252)

Right to Appeal and the Role of the Home Secretary

33. We support in principle the introduction of a leave requirement for appeals but the Government should not bring these provisions into effect until there is confidence that the problems with access to legal aid and specialist legal advice have been resolved. (Recommendation 14) (Paragraph 274)
34. We support the changes that have already been made to the Home Secretary's responsibilities. Extradition should, to the greatest possible extent, be a judicial procedure. (Paragraph 289)
35. We are content that the courts are able to deal with late appeals in the Home Secretary's place. (Paragraph 290)

Changes to Practice

36. The inherent risk of distress caused by removal from one's place of residence persuades us that there is scope in some cases to make greater use of existing legislation and to improve practices in order to lessen the impact of extradition. (Paragraph 312)
37. Changes in practice should include: providing better information to Requested People about the process; making greater use of video evidence; making greater use of temporary transfer to the Issuing State pre-extradition and pre-trial release on bail in the UK; and increasing the use of transfer of sentences when appropriate. (Paragraph 313)
38. We recommend the Government take the necessary steps, such as issuing guidance to the courts and seeking agreements with other countries, to make

these changes. Where reciprocal commitments from the UK are required to achieve agreement, these should be given. (Recommendation 15) (Paragraph 314)

European Arrest Warrant

39. The Government and the European Commission should work to establish further guidelines on the execution of EAWs to ensure that they are conducted in the least hostile manner possible. (Recommendation 16) (Paragraph 315)
40. We believe that the EAW provides an improved system of extradition between Member States and we support the UK having opted back in to it. (Paragraph 362)
41. We believe the Government should be working towards a model whereby the EAW is an instrument of last resort, used in the event that other mutual assistance and flanking measures are inadequate. We ask the Government to set out its plans for implementation of the measures already adopted as a matter of priority, and to review and re-evaluate those mutual assistance and criminal procedural rights measures which it has not yet joined. (Recommendation 17) (Paragraph 364)

Part 2 Countries

42. We are satisfied that extradition requests from countries of concern are dealt with effectively by the courts, and that the statutory bars provide the necessary protection to Requested Persons. In our view, this is the appropriate way of dealing with these concerns. (Paragraph 393)
43. We urge the Government to conclude and publish the findings of the review of Part 2 designations at the earliest opportunity. (Recommendation 18) (Paragraph 394)
44. Although it would be impractical to attempt to remove the Part 2 designation from a signatory to the European Convention on Extradition, the Government should still consider these countries in its review. No doubt such consideration would help to inform the FCO's 'country of concern' reports. Such information may be useful when considering human rights arguments put in relation to those countries. (Recommendation 19) (Paragraph 395)
45. The Committee is not persuaded by the view that a *prima facie* case requirement ought to be re-introduced into UK extradition law. In our view this would be a retrograde step, which would result in more drawn out procedures, with little material benefit in the light of the existing safeguards, including the common law abuse of process jurisdiction. (Paragraph 396)

UK/US Extradition

46. Simply comparing the numbers of people extradited to and from the US is not a reliable method of assessing the operation of the treaty, and does not prove the hypothesis that the treaty is unbalanced. There may be many legitimate factors that underpin the figures. Without much more detailed research the statistics do not allow for sound conclusions. The principle of comity does not require symmetrical justice systems; the important principle

is that extradition cannot and does not go ahead where any of the statutory bars are found to apply. (Paragraph 403)

47. We conclude that the evidentiary tests in our extradition arrangements with the US are different. However, whether this difference has any practical effect is debatable. The view that experience to date demonstrates that they are “functionally” the same is persuasive. (Paragraph 412)
48. Much of the evidence we received about aspects of the US justice system is concerning. Some of the accounts we received from those who had been extradited to the US were, in places, quite moving. The risks of such experiences are inherent to extradition to any foreign jurisdiction, although we are concerned that some conditions and procedures in the US may not always be worthy of the tacit approval that extradition implies. (Paragraph 440)
49. The ECtHR has considered whether these concerns ought to prevent extradition to the US. It has found that extradition to the US does not constitute a human rights breach because of these concerns. The ECHR is, correctly, the UK’s baseline for considering whether the justice systems of other countries makes extradition human rights compliant. We do not, therefore, propose any changes in our legal arrangements with the US. (Paragraph 441)
50. It is clear from the evidence that, rightly or wrongly, a sentiment remains that pre-trial conditions in the US risk being excessively harsh. This is particularly the case for those assessed in the UK as presenting a low risk of either being violent or absconding, but who are nevertheless subjected to the use of force on flights or detention in high security facilities, and for non-US residents unable to provide a suitable bail addresses. (Paragraph 443)
51. We urge the Government to make representations to the US authorities to agree the treatment of those extradited from the UK, with particular regard to transfer, pre-trial detention and bail. (Recommendation 20) (Paragraph 444)
52. We do not consider the US to be a special case. The Government ought also to make similar representations to any extradition partner whose conditions do not breach the ECHR but might be considered excessively harsh. (Recommendation 21) (Paragraph 445)
53. The outcome of these representations should be formalised into a Memorandum of Understanding in order to clarify the positions of each country in relation to the standards of treatment expected when a person is extradited. (Recommendation 22) (Paragraph 446)
54. We do not take the view that the US’s interpretation of jurisdiction is inappropriate. The US is clearly more active in prosecuting cross-border crimes than many other countries but this does not mean its interpretation is excessive. (Paragraph 448)

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members:

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

During consideration of the report the following Member declared an interest:

Lord Brown of Eaton-under-Heywood

Sat as a Lord of Appeal in Ordinary and a Supreme Court Justice in a number of extradition cases including:

- *McKinnon v Government of the United States of America and another* (2008) UKHL 59;
- *Norris v United States* (2010) UKSC 9; and
- *HH & Ors v Deputy Prosecutor of the Italian Republic, Genoa & Ors* (2012) UKSC 25.

A full list of Members' interests can be found in the Register of Lords Interests <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at <http://www.parliament.uk/extradition-law> and available for inspection at the Parliamentary Archives (020 7219 3074)

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses marked with ** gave both oral and written evidence. Those marked with * gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only.

Oral evidence in chronological order

- | | | |
|----|--|-----------------------------------|
| * | Sir Scott Baker, lead author of ‘A Review of the United Kingdom’s Extradition Arrangements’ | <u>QQ 1–23</u> |
| ** | Anand Doobay, Consultant, Business Crime, Peters & Peters, panel member on ‘A Review of the United Kingdom’s Extradition Arrangements’ | |
| * | Jacqueline Minor, Head of Representation, London Office of the European Commission | <u>QQ 24–35</u> |
| * | Jago Russell, Chief Executive, Fair Trials International | |
| * | Professor John R Spencer, Professor Emeritus of Law, Cambridge University | |
| * | James Brokenshire MP, Minister for Immigration and Security | <u>QQ 36–53</u> |
| * | Roger Burlingame, Kobre & Kim LLP | <u>QQ 54–66</u> |
| ** | Isabella Sankey, Director of Policy, Liberty | |
| * | Amy Jeffress, former Department of Justice Attaché to the US Embassy in London and currently Partner at Arnold & Porter, Washington DC | <u>QQ 67–75</u> |
| ** | Rebecca Niblock, Associate, Kingsley Napley LLP | <u>QQ 76–105</u> |
| ** | Edward Grange, Associate, Hodge Jones & Allen LLP | |
| ** | Sue Patten, Head of Specialist Fraud Division, Crown Prosecution Service | |
| ** | Nick Vamos, Head of Extradition, Crown Prosecution Service | |
| ** | Ben Keith, Barrister, 5 St Andrew’s Hill | <u>QQ 106–119</u> |
| * | Paul Garlick QC, Barrister, Furnival Chambers | |
| * | Daniel Sternberg, Barrister, 9-12 Bell Yard | |
| ** | Sheriff Kenneth Maciver, Edinburgh Sheriff Court | <u>QQ 120–131</u> |
| ** | Professor Rodney Morgan, Human Rights Implementation Centre, Bristol University | |
| * | Dr Kimberley Trapp, Faculty of Laws, University College London | |
| * | Mark Summers QC, Barrister, Matrix Chambers | |

- ** Deputy Senior District Judge Emma Arbuthnot, Westminster Magistrates' Court [QQ 132–153](#)
- ** Senior District Judge Howard Riddle, Chief Magistrate, Westminster Magistrates' Court
- ** District Judge John Zani, Westminster Magistrates' Court
- ** Hugh Barrett, Director of Legal Aid Commissioning and Strategy, Ministry of Justice
- ** Hilda Massey, Deputy Director Legal Aid Policy, Ministry of Justice
- ** Baroness Ludford [QQ 154–171](#)
- * Jacob Rees-Mogg MP
- ** Jodie Blackstock, Director of Criminal and EU Justice Policy, JUSTICE [QQ 172–190](#)
- ** Michael Evans, Extradition Manager, Kaim Todner Solicitors Ltd
- * Graham Mitchell
- ** Julia O'Dwyer
- ** Kenny Bowie, Head of International Criminality Unit, Home Office [QQ 191–211](#)
- ** Ross Goodwin, Legal Advisors Branch, Home Office
- ** Rt Hon Theresa May MP, Home Secretary
- ** Michèle Coninx, President of Eurojust [QQ 211–229](#)
- * Olivier Tell, Head of Unit, Procedural Criminal Law, Directorate-General for Justice, European Commission.
- * Clair Dobbin, Barrister, 3 Raymond Buildings [QQ 230–237](#)
- * Raza Husain QC, Barrister, Matrix Chambers
- * Jeremy Johnson QC, Barrister, 5 Essex Court
- * Helen Malcolm QC, Barrister, 3 Raymond Buildings
- ** David Bermingham [QQ 238–254](#)
- * William Bergstrom, Solicitor, TV Edwards [QQ 255–263](#)
- * Mariusz Wolkowicz

Alphabetical list of all witnesses

- Syed Talha Ahsan, a British man extradited to the US [EXL0067](#)
- Amnesty International Secretariat [EXL0070](#)
- Dr Paul Arnell, Reader in Law, Robert Gordon University, Aberdeen [EXL0016](#)
- Dr Danae Azaria, Lecturer of Laws, Faculty of Law, UCL [EXL0087](#)
- Baher Azmy [EXL0049](#)

- * Rt Hon. Sir Scott Baker, lead author of ‘A Review of the United Kingdom’s Extradition Arrangements’ (QQ 1–23)
- ** David Bermingham (see Appendix 5) (QQ 238–254) [EXL0052](#)
- * Jodie Blackstock, Director of Criminal and EU Justice Policy, JUSTICE (QQ 172–190)
- Rt Hon. David Blunkett MP, former Home Secretary [EXL0018](#)
- Moray Bowater [EXL0033](#)
- Michael Boyd [EXL0011](#)
- * James Brokenshire MP, Minister for Immigration and Security (QQ 36–53)
- Dr. Ted R. Bromund, Heritage Foundation [EXL0048](#)
- Dr Phil Brooke [EXL0037](#)
- Christopher Burke [EXL0012](#)
- * Roger Burlingame, Kobre & Kim LLP
- ** Chief Magistrate’s Office (QQ132–153) [EXL0043](#)
- Simon Clayton [EXL0071](#)
- The Criminal Bar Association [EXL0055](#)
- ** Crown Prosecution Service (QQ 76–105) [EXL0054](#)
[EXL0075](#)
- Crown Solicitor’s Office [EXL0034](#)
- * Clair Dobbin, Barrister, 3 Raymond Buildings
- ** Anand Doobay, Consultant, Business Crime, Peters & Peters, panellist on ‘A Review of the United Kingdom’s Extradition Arrangements’ (QQ 1–23) [EXL0079](#)
- Philippa Drew [EXL0032](#)
- David Dugdale [EXL0022](#)
- Paul and Sandra Dunham (see Appendix 5) [EXL0047](#)
- Jelena Dzankic, Marie Curie Fellow, European University Institute [EXL0029](#)
- Sally Eberhardt [EXL0049](#)
- Clifford Entwistle, father of Neil Entwistle, a British man extradited to the US [EXL0017](#)
- Simon Erskine [EXL0013](#)
- ** Eurojust (QQ 211–229) [EXL0061](#)
- * The European Commission (QQ 24–35) (QQ 211–229)
- Euro Rights [EXL0044](#)
- * Michael Evans, Extradition Manager, Kaim Todner Solicitors Ltd (QQ 172–190)
- Faculty of Advocates [EXL0063](#)

Duncan Ferguson	<u>EXL0026</u>
Rowena Foote	<u>EXL0038</u>
Foreign and Commonwealth Office	<u>EXL0082</u>
The Freedom Association	<u>EXL0059</u>
Maddy Fry	<u>EXL0058</u>
* Paul Garlick QC, Barrister, Furnival Chambers (QQ 106–119)	
Robert Goundry	<u>EXL0008</u>
** Edward Grange, Associate, Hodge Jones & Allen LLP	<u>EXL0035</u>
Hilary Griffin	<u>EXL0021</u>
Rachel Hasted	<u>EXL0004</u>
** Home Office (QQ 191–211)	<u>EXL0001</u> <u>EXL0060</u>
* Raza Husain QC, Barrister, Matrix Chambers (QQ 230–237)	
Human Rights Implementation Centre, University of Bristol	<u>EXL0031</u>
Iranian and Kurdish Woman’s Rights Organisation (IKWRO)	<u>EXL0083</u>
Islamic Human Rights Commission	<u>EXL0062</u>
* Amy Jeffress, former Department of Justice Attaché to the US Embassy in London and currently Partner at Arnold & Porter, Washington DC (QQ 67–75)	
* Jeremy Johnson QC, Barrister, 5 Essex Court (QQ 230–237)	
JUSTICE	<u>EXL0073</u>
Kaim Todner Solicitors Ltd	<u>EXL0057</u>
Dr. Nisha Kapoor, Lecturer in Sociology, University of York	<u>EXL0040</u>
Summera Kauser	<u>EXL0041</u>
Pardiss Kebriaei	<u>EXL0049</u>
** Ben Keith, Barrister, 5 St Andrew’s Hill (QQ 106–119)	<u>EXL0077</u>
Arun Kundnani	<u>EXL0049</u>
Mike Laloe	<u>EXL0025</u>
The Law Society	<u>EXL0046</u>
The Law Society of Northern Ireland	<u>EXL0081</u>
The Law Society of Scotland	<u>EXL0039</u>
Andrea Leadsom MP	<u>EXL0085</u>
Jeremy Lewis	<u>EXL0015</u>
Liberty	<u>EXL0066</u>
** Baroness Ludford, a former MEP (QQ 154–171)	<u>EXL0042</u>
Lord Advocate	<u>EXL0065</u>

Lord Chancellor and Secretary of State for Justice	<u>EXL0090</u>
Lord Chief Justice	<u>EXL0078</u>
** Sheriff Kenneth Maciver, Edinburgh Sheriff Court (QQ 120–131)	<u>EXL0064</u>
* Helen Malcolm QC, Barrister, 3 Raymond Buildings (QQ 230–237)	
Gary Mann, a British man extradited to Portugal on an EAW	<u>EXL0002</u>
* Rt Hon Theresa May MP, Home Secretary (QQ 191–211)	
Metropolitan Police Service	<u>EXL0069</u>
* Jacqueline Minor, Head of Representation, London Office of the European Commission (QQ 24–35)	
** Ministry of Justice (QQ 132–153)	<u>EXL0091</u>
Ministry of Justice, Republic of Poland	<u>EXL0084</u>
* Graham Mitchell (see Appendix 5) (QQ 172–190)	
A.M. Moorwood Leyland	<u>EXL0030</u>
** Professor Rodney Morgan, Professor Emeritus, University of Bristol (QQ 120–131)	<u>EXL0031</u>
National Crime Agency	<u>EXL0036</u>
** Rebecca Niblock, Associate, Kingsley Napley LLP (QQ 76–105)	<u>EXL0035</u>
Amelia Nice, Barrister, 5 St Andrew’s Hill	<u>EXL0086</u>
** Julia O’Dwyer, mother of Richard O’Dwyer (see Appendix 5) (QQ 172–190)	<u>EXL0050</u>
J.R. Parker	<u>EXL0072</u>
William P. Quigley	<u>EXL0049</u>
* Jacob Rees-Mogg MP (QQ 154–171)	
Laura Rovner	<u>EXL0049</u>
M. Robinson	<u>EXL0009</u>
* Jago Russell, Chief Executive, Fair Trials International (QQ 24–35)	
Saskia Sassen	<u>EXL0049</u>
Janis Sharp, mother of Gary McKinnon (see Appendix 5)	<u>EXL0080</u>
* Professor John R. Spencer, Professor Emeritus of Law, University of Cambridge (QQ 24–35)	
** Daniel Sternberg, Barrister, 9–12 Bell Yard	<u>EXL0051</u>
* Mark Summers QC, Barrister, Matrix Chambers (QQ 120–131)	
Florentzos Symeou, father of Andrew Symeou (see Appendix 5)	<u>EXL0027</u>
John Tanburn	<u>EXL0006</u>

Christopher Tappin (see Appendix 5)	<u>EXL0008</u>
Jeanne Theoharis	<u>EXL0049</u>
* Dr Kimberley Trapp, Faculty of Laws, University College London (QQ 120–131)	
Jim Tucker	<u>EXL0023</u>
US Department of Justice	<u>EXL0074</u>
Frances Webber	<u>EXL0033</u>
Mark A. Williams	<u>EXL0005</u>
Pam Wortley	<u>EXL0014</u>

APPENDIX 3: CALL FOR EVIDENCE

Select Committee on Extradition Law

The Select Committee on the Extradition Law was set up on 12 June 2014. Its remit is “to consider and report on the law and practice relating to extradition, in particular the Extradition Act 2003”. The Committee will therefore be looking at the 2003 Act, to see whether it provides an effective and just extradition procedure, but will also consider whether the law and practice relating to extradition generally is satisfactory, and whether the law, practice and procedure might need amending. The Committee has to report by 5 March 2014.

This is a public call for written evidence to be submitted to the Committee. The deadline is 12 September 2014.

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?
2. Is extradition law fit for purpose in an era of increasingly 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?

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?

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?

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?

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?

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?

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?

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?

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?

APPENDIX 4: GLOSSARY OF TERMS AND ABBREVIATIONS

1989 Act	Extradition Act 1989 (c.33)
2003 Act	Extradition Act 2003 (c.41)
2006 Act	Police and Justice Act 2006 (c.48)
2009 Act	Policing and Crime Act 2009 (c.26)
2013 Act	Crime and Courts Act 2013 (c.22)
2014 Act	Anti-social Behaviour, Crime and Policing Act 2014 (c.12)
Abuse of process	Something so unfair and wrong with the prosecution that the court should not allow the case to proceed.
Accusation case	A case that has yet to be tried.
Arguable case threshold	Requirement to demonstrate that there are adequate legal grounds for the case to be heard at appeal.
Assurances	An undertaking given by the Issuing State usually addressing concerns about a Requested Person's human rights in the event of extradition.
Baker Review	A Review of the United Kingdom's Extradition Arrangements, September 2011
CAFCASS	Children and Family Court Advisory and Support Service
CJEU	Court of Justice of the European Union
CPS	Crown Prosecution Service
Conviction case	A case that has gone to trial and on which a guilty verdict has been returned.
Duty solicitor	Lawyer on the duty rota representing the Requested Person at their initial hearing.
Double jeopardy	The rule that prevents a person from being tried or punished twice for the same offence.
DoJ	Department of Justice (United States)
DPP	Director of Public Prosecutions
Dual criminality	The principle that extradition should only take place in respect of conduct which is not only an offence against the law of the Issuing State but also against the law of the Executing State. The principle does not apply in most EAW cases.
Dual representation	Practice of having a lawyer representing the Requested Person in both the Issuing and Executing State.
Duty rota	Schedule at magistrates' courts specifying which duty solicitor is working at a given time. The Westminster Magistrates' Court has a specialist extradition duty solicitor rota (see Box 9).
EAW	European Arrest Warrant

EAW handbook	Good practice guidelines for issuing EAW published by the Council of the European Union
ECE	European Convention on Extradition
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIO	European Investigation Order
ESO	European Supervision Order
EU	European Union
Executing State	Country that receives the extradition request.
Extradition	Legal process whereby one country transfers a person to another country to stand trial or serve a custodial sentence.
FBI	Federal Bureau of Investigation (United States)
Forum	The country in which prosecution takes place.
Forum bar	Provision to bar extradition on the grounds of forum (see Chapter 4).
FCO	Foreign and Commonwealth Office
Framework Decision	Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190, 18.7.2002
Full Code Test	A test applied by UK prosecutors requiring that, in the light of a complete investigation having been conducted, there is sufficient evidence to provide a realistic prospect of conviction and that the evidence demonstrates prosecution would be in the public interest.
HAC Report	<i>The US-UK Extradition Treaty</i> , House of Commons Home Affairs Committee, 20th Report of the Session 2010–12, HC 644
Human Rights Bar	Provision to bar extradition on the grounds that it would contravene the rights contained in the ECHR (see Chapter 2).
Initial hearing	Requested Person's first appearance in court at which either a person may consent to extradition or the judge will set a date for a substantive hearing.
Issuing State	Country seeking the extradition of an individual or individuals (also referred to as the Requesting or Receiving State).
JCHR Report	<i>The Human Rights Implications of UK Extradition Policy</i> , Joint Committee on Human Rights, 15th Report of Session 2010–12, HL 156, HC 767
LAA	Legal Aid Agency

Leave to appeal	Submission by the Requested Person as to why they should be allowed to appeal a lower court's decision to allow extradition.
Legal aid	Contribution by the state towards the cost of legal advice, family mediation and representation in court.
Legality	Obligation on prosecutors in some EAW Member States to use all legal means to bring an individual to justice.
Means test	Assessment of whether an individual meets stipulated criteria to be eligible for state assistance.
MoJ	Ministry of Justice
NCA	National Crime Agency
NPM	National preventive mechanism
OPCAT	Optional Protocol to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Othman criteria	Criteria used by the courts to test the robustness of assurances offered by the Issuing State (see Box 5).
Part 1 country	Refers to countries falling under Part 1 of the Extradition Act 2003; these being countries operating the EAW.
Part 2 country	Refers to countries falling under Part 2 of the Extradition Act 2003; these being all countries, aside from EAW Member States, with which the UK has extradition arrangements.
Plea bargain	An agreement between the prosecutor and defendant whereby the defendant agrees to plead guilty in exchange for facing lesser charges and/or a reduced sentence.
Proportionality bar	Provision to bar extradition on the grounds that it would be disproportionate. Applicable to EAW accusation cases only. If a judge finds extradition to be disproportionate he must order the Requested Person's discharge (see Chapter 3).
Protocol 36	Protocol (No 36) on Transitional Provisions, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union
Public interest test	Consideration by the Crown Prosecution Service of specified criteria so as to decide whether to bring a prosecution.
Requested Person	Person sought for extradition.
Requesting State	See 'Issuing State'.
Schengen Information System (SIS II)	Database which enables the 26 Member Countries of the Schengen Area to share data on law enforcement.
SIS	Schengen Information System

SIS II	Second-generation Schengen Information System. SIS II will become the main way of transmitting information about people wanted on EAWs.
SLAB	Scottish Legal Aid Board
Special Advocate	A lawyer appointed to represent the interests of a party in closed proceedings.
Specialty	Rule prohibiting a person being dealt with in the Issuing State for matters other than those referred to in the extradition request. The Extradition Act 2003 refers to specialty as 'speciality'.
Supermax prison	A shorthand term to describe 'super maximum security' prison in the US.
Threshold Test	A test applied by prosecutors which is lower than the Full Code Test and is applied where the suspect presents a substantial bail risk and not all the evidence is available at the time when he or she must be released from custody unless charged.
Ticketing	Process whereby legal professionals are accredited to work in specialist areas of the law (see Box 9).
US-UK Treaty	Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America (United States No. 1 (2003), Cm 5821)

APPENDIX 5: CASE SUMMARIES

BH

BH (AP) and another v The Lord Advocate and another (2012) UKSC 24

The case of *BH* involved the extradition of a husband and wife to the US on charges to import to the US “chemicals used to manufacture methamphetamine, knowing or having reasonable cause to believe that they would be used for that purpose.”⁴⁷²

The case was complicated by the fact that the wife, Mrs H, was the mother of six children who lived with the couple. The youngest two children had been conceived and born while the extradition proceedings were underway.

In addition, Mr H had had two other children prior to his relationship with Mrs H, both of whom had previously been removed from his care and, in one case, sexual abuse had been alleged. In the light of this background, and prior to the birth of the youngest three of the children, Mr H had been ordered to have no contact with the older three of Mrs H’s children. In 2011, Mr and Mrs H’s relationship ended.

The case revolved around the impact on the six children of Mr and Mrs H’s extradition and whether the potential breach of the children’s Article 8 rights would outweigh the public interest in extraditing Mr and Mrs H.

Both the High Court of Justiciary and the Supreme Court held that the impact on the children of extraditing Mr H “did not come close to meriting his discharge”. In the case of Mrs H the judgment was more finely balanced. Both courts concluded that though it would be in the interests of the children not to be separated from their mother, this did not outweigh the public interest in ordering her extradition.

As discussed in paragraphs 158–61 of Chapter 4, the courts differed in their interpretation of how the facts of this case were to be judged in the light of case law with regard to considering prosecution in the UK.

The case was heard by the Supreme Court simultaneously with that of *HH* (see below).

Dibden

Dibden v Tribunal De Grande Instance De Lille France (2014) EWHC 3074 (Admin)

The case of Daniel Dibden was the first to make substantive use of the forum provisions of the 2003 Act as the basis of an appeal against extradition.

Mr Dibden was charged with being a principal participant in the smuggling of drugs from the Netherlands to the UK via France. There were also two co-accused who were arrested in France with over 60kg of amphetamines and 6kg of cocaine, which they intended to transport to the UK in a microlight aeroplane.

⁴⁷² *BH (AP) and another v The Lord Advocate and another* (2012) UKSC 24 at 1

Mr Dibden, who was based in the UK throughout the relevant period, was charged by the French authorities with importing illegal substances as part of an organised gang and the acquisition and transportation of narcotic drugs.

Extradition was ordered and appealed. Both Mr Dibden and the Issuing State recognised that “a substantial measure of his activity was performed in the UK”.⁴⁷³ However the defence disagreed with the way in which the judge had balanced the “specified matters relating to the interests of justice” contained in section 19B(3) of the 2003 Act.

The defence argued that extradition would go against the interests of justice as:

- the drugs were intended for use in the UK;
- the defendant resided in the UK;
- much of the evidence in this case was based in the UK;
- prosecution in France would cause unnecessary delay in the transfer and translation of evidence; and
- Mr Dibden had a 13-week-old son.

The Issuing State, France, argued that although the offence was intended to cause harm in the UK, it was a trans-national offence with significant harm occurring in France and the Netherlands. With regard to trial proceedings, the strength of the UK-based evidence was unclear and it was not yet known whether it would be sufficient to prove the offences. It was also argued that the trial for these offences should occur in France because, as a general principle, all prosecutions for related crimes should happen in one jurisdiction and proceedings in France were already well advanced for linked offences.

The appeal was dismissed and extradition was ordered.

Paul and Sandra Dunham

Paul Dunham, Sandra Dunham v Government of the United States (2014) EWHC 334 (Admin)

Between 2002 and 2009, Mr and Mrs Dunham worked for an electronics company in the US, Pace Inc. The company also operated in the UK. Mr and Mrs Dunham were accused of having “defrauded their employer by the dishonest misuse of company credit cards and by rendering dishonest claims for expense on the basis that they had been incurred on the companies' behalf”.⁴⁷⁴ Both Mr and Mrs Dunham were in their late 50s. They had lived and worked in the UK all of their lives, apart from seven years in the US during which time the offences were said to have taken place.

Following disagreements with the owner of Pace Inc. and its UK operation, Pace Europe, Mr and Mrs Dunham left the company and returned to the UK. Civil proceedings were then started against them in the US by Pace Inc. for fraud and gross misconduct. Mr and Mrs Dunham denied the charges. The trial in relation to these charges was heard in the US on 28 June 2010. Mr and Mrs Dunham were

⁴⁷³ As per the forum bar in the Extradition Act 2003, section 19B(2)(a)

⁴⁷⁴ *Paul Dunham, Sandra Dunham v Government of the United States* (2014) EWHC 334 (Admin) at 6

absent from these proceedings. They were found guilty and were ordered to pay damages of \$5,382,780.90. Pace Inc. then sought to enforce this ruling on the Dunhams in the UK. The Dunhams resisted this but were ultimately ordered by the High Court to pay \$1,794,260.30.

In the meantime, criminal proceedings commenced in the US in relation to the same offences. A request for their extradition was made in April 2012 and they were arrested in the UK on 13 November 2012.

The Dunhams resisted their extradition on a number of grounds:

- (1) that it constituted an abuse of process as it reflected a personal vendetta by Eric Seigel, the son of the owner of Pace Inc. and Pace Europe;
- (2) that the offences were not sufficiently serious to merit extradition (they were described as being “only an expenses fraud”);⁴⁷⁵
- (3) that the charge of conspiracy to defraud could not have been brought against them if the conduct had occurred in the UK as Mr and Mrs Dunham were the only people indicted and therefore there could be no conspiracy;
- (4) that there had been an unreasonable delay between the offences and the extradition request; and
- (5) that the psychiatric and medical conditions of Mr and Mrs Dunham meant that extradition would be a disproportionate breach of their Article 8 rights.

It was only this final argument to which the courts attached significant weight.

The courts heard medical evidence that the threat of extradition meant that Mr and Mrs Dunham suffered from moderate to severe depression. In Mr Dunham’s case in particular, this condition would worsen if he were extradited and detained in a ‘supermax’ prison like Chesapeake Detention Facility (CDF). Having already attempted suicide in the course of the extradition proceedings, it was reported that there was a high likelihood of his trying again and succeeding.

The judge, Mr Justice Simon, concluded:

“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 ... [Mr Dunham’s] mental condition does not approach the threshold ... that it would be unjust or oppressive to order extradition ... 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 ... So far as Mrs Dunham is concerned, her mental condition is not so serious as her husband's, and there is no real

⁴⁷⁵ *Paul Dunham, Sandra Dunham v Government of the United States* (2014) EWHC 334 (Admin) at 35

evidence that her detention before trial would not be adequately addressed.”⁴⁷⁶

Their appeal was therefore dismissed and their extradition ordered.

The written evidence from Mr and Mrs Dunham⁴⁷⁷ and from their constituency MP, Andrea Leadsom MP⁴⁷⁸ provide descriptions of the impact of the process of extradition, including an attempted suicide by both Mr and Mrs Dunham. They also provide details of the time the couple spent on remand in the US, on bail and Mr Dunham’s ongoing heart condition.

On 10 December 2014, Mr and Mrs Dunham agreed to a plea bargain. Both pleaded guilty to conspiracy to commit wire fraud. Mr Dunham also pleaded guilty to a separate charge of money laundering.

Paul Dunham’s agreement stated that it was contingent on his wife agreeing a separate plea bargain. Paul Dunham was originally indicted with 13 offences, but under the terms of the plea bargain he was charged with two offences with a maximum of 20 years imprisonment. He was sentenced to four years in prison followed by three years of supervised release. Mrs Dunham pleaded guilty to one charge and was sentenced to 60 days in prison, 42 of which had already been served on remand. The remainder of her sentence was to be served in home detention.

HH

HH & Ors v Deputy Prosecutor of the Italian Republic, Genoa & Ors (2012) UKSC 25

The case of *HH* involved three appeals against extradition to Italy on Article 8 grounds. Two of the appellants, HH and PH, were married with three young children (HH being the mother of the children and PH, the father). The other appellant, F-K, had five children. The appeals argued that extradition would be a disproportionate breach of the Article 8 rights of the children. The Supreme Court considered the case in the light of an earlier case, *Norris v US*, which found that:

“the consequences of interference with article 8 rights must be exceptionally serious before this can outweigh the importance of extradition.”⁴⁷⁹

The Court in *Norris* also found that the impact of extradition should not be viewed only from the Requested Person’s point of view; the effect on family members may also be considered relevant. For example:

“If extradition for an offence of no great gravity were sought in relation to someone who had sole responsibility for an incapacitated family member, this combination of circumstances might well lead a judge to discharge the extraditee”.⁴⁸⁰

⁴⁷⁶ *Paul Dunham, Sandra Dunham v Government of the United States* (2014) EWHC 334 (Admin) at 57–60

⁴⁷⁷ Written evidence from Paul and Sandra Dunham ([EXL0047](#))

⁴⁷⁸ Written evidence from Andrea Leadsom MP ([EXL0085](#))

⁴⁷⁹ *Norris v United States* (2010) UKSC 9 at 56

⁴⁸⁰ *Norris v United States* (2010) UKSC 9 at 65

In her judgment on *HH*, Baroness Hale concluded there was no overall test of exceptionality in extradition law. This view was drawn from the judgment in *Norris* in which Lord Hope had said that the courts should not seek to set “a threshold which must be surmounted before it can be held in any case that the article 8 right would be violated”. Also in *Norris*, Lord Mance said that to approach Article 8 considerations in this way risked diverting “attention from consideration of the potential impact of extradition on the particular persons involved and their private and family life towards a search for factors (particularly external factors) which can be regarded as out of the run of the mill.” Baroness Hale emphasised that the proper approach to such questions was to judge whether “the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition.” She noted that the public interest in extradition was unlikely to be outweighed unless its impact was “exceptionally severe”. She also said that when reaching this judgment on the balance between the impact of extradition and the public interest, the courts would take into account matters such as the severity of the crime and the passage of time (see Box 3).

In the case of F-K, Baroness Hale noted:

“During that lapse of time, the appellant and her family have made a new, useful and blameless life for themselves in this country. Two more children have been born ... At neither time did the parents have any reason to believe that the Polish authorities were seeking the mother's return.”⁴⁸¹

On those grounds, the Court unanimously found that extradition would be a disproportionate breach of F-K's Article 8 rights.

With regard to the cases of *HH* and *PH*, Baroness Hale said, “The circumstances in this case can properly be described as exceptional. The effect upon the children ... of extraditing both their parents will be exceptionally severe.” She therefore considered whether both *HH*, the mother of the children, and *PH*, their father, should be extradited. In her view, *HH*'s extradition could not be discharged on Article 8 grounds because, on the one hand, her mental capacity made her unlikely to be able to look after her children alone and, on the other, the Italian authorities considered her offences to be more serious than those of *PH*. In common, therefore, with all the other members of the Court she dismissed *HH*'s appeal.

Baroness Hale dissented, however, in the case of *PH* the husband; she would have allowed his appeal on the basis that his offences were less serious and the effect of extraditing both parents would be “exceptionally severe”. The other six members of the Court concluded that the strong public interest in extradition outweighed the painful and damaging effects of separation for the children and dismissed her appeal too.

McKinnon

McKinnon v Government of the United States of America and another (2008) UKHL 59

In 2001–02, Gary McKinnon gained unauthorised access from his home computer in London to 97 US Government computers, including those of the Army, Navy,

⁴⁸¹ *HH & Ors v Deputy Prosecutor of the Italian Republic, Genoa & Ors* (2012) UKSC 25 at 47

Air Force, NASA and the Department of Defence. He deleted critical operating system files, significantly disrupting government functions and leaving the network vulnerable to other intruders. He also copied data and files onto his own computers. The US alleged his conduct was intentional and calculated to influence the US Government by intimidation and coercion. It damaged computers by impairing the integrity, availability and operation of programmes, systems, information and data, rendering them unreliable. The cost of repair was alleged to total over \$700,000.

Analysis of Mr McKinnon's home computer confirmed the allegations and in interview under caution he admitted responsibility (although not that he had caused damage). He stated his ultimate goal was access to the US military classified information network. He admitted leaving a note on one army computer reading:

“US foreign policy is akin to government-sponsored terrorism these days ... It was not a mistake that there was a huge security stand down on September 11 last year ... I am SOLO. I will continue to disrupt at the highest levels ...”

Between 2002–03 plea-bargaining discussions took place before an extradition request was made. US prosecutors indicated that if Mr McKinnon were to go to the US voluntarily and plead guilty it was likely a sentence of 3–4 years would be passed and, after serving 6–12 months, he would be repatriated to complete his sentence in the UK. In this event he might serve only 18 months to two years in total. If, however, he chose not to cooperate and were then extradited and convicted, he might expect to receive a sentence of 8–10 years, possibly longer, and would not be repatriated to the UK for any part of it.

The predicted sentences were so widely different because of the different bases upon which the prosecutor proposed to put the case. Upon a plea of guilty, the prosecutor was prepared to put the damage resulting from his actions in a lower bracket than they believed they could prove, including nothing for the losses resulting from the inability for a time to access the computers and overlooking too the disruption to US Government functions and the significant endangering of national security.

The plea bargain was refused and, in 2004, the US formally requested Mr McKinnon's extradition.

In 2006, the District Judge recommended extradition and sent the matter to the Secretary of State for a final decision whether to order extradition, as was the procedure at the time. The extradition order was made and appealed. The High Court dismissed the appeal in 2007.

In 2008, the House of Lords granted leave to appeal in respect of one question: whether the plea bargain, including the threat that there would be no possibility of serving part of his sentence in the UK if he resisted extradition, constituted “an abuse of process requiring the defendant's discharge from the extradition proceedings.”⁴⁸²

The appellant argued that for some defendants, the very process of comparing the two alternatives offered under a plea bargain would create pressure to tender a

⁴⁸² *McKinnon v Government of the United States of America and another* (2008) UKHL 59 at 9

guilty plea. It was argued that despite his resistance to the offer, the fact of the “deal” was an abuse of process, calculated to interfere with the extradition proceedings.

In his judgment, Lord Brown of Eaton-under-Heywood concluded:

“In one sense all discounts for pleas of guilty could be said to subject the defendant to pressure, and the greater the discount the greater the pressure. But the discount would have to be very substantially more generous than anything promised here ... before it constituted unlawful pressure such as to vitiate the process. So too would the predicted consequences of non-cooperation need to go significantly beyond what could properly be regarded as the defendant’s just desserts on conviction for that to constitute unlawful pressure.”⁴⁸³

The House of Lords therefore dismissed the appeal.

In August 2008, Mr McKinnon lost his appeal to the ECtHR and his lawyers revealed he had recently been diagnosed with Asperger’s Syndrome, adding: “The offences for which our client’s extradition is sought were committed on British soil and we maintain that any prosecution ought to be carried out by the appropriate British authorities.” New representations were made to the then Home Secretary, who decided to order extradition.

In 2009, Mr McKinnon signed a confession, and offered to face trial in the UK. The CPS declined to prosecute indicating that the criminality alleged to have occurred in the US far exceeded the evidence of criminality in the UK.

Mr McKinnon launched a judicial review of the Home Secretary’s decision to order extradition despite his Asperger’s Syndrome and requested leave of the High Court to appeal to the Supreme Court. His request to appeal to the Supreme Court was declined.

In 2009, the Home Office sought and received assurances that Mr McKinnon’s medical needs would be met in the US.

In 2010, permission to judicially review the Home Secretary’s decision to order extradition was granted. The Home Secretary, Theresa May MP, announced she would adjourn her decision on extradition.

In 2012, following further medical assessment of Mr McKinnon’s medical condition, the Home Secretary decided to refuse to order extradition.

Mitchell

In May 1994, Graham Mitchell and a friend, Warren Tozer, were on holiday in the Algarve. Whilst there they were arrested by Portuguese police investigating a serious assault on Andre Jorling, a 26-year-old German. Mr Jorling had sustained severe injuries after falling off a 12ft-high sea wall. He was left paralysed from the waist down. Mr Mitchell and Mr Tozer were accused of attempted murder.

Mr Mitchell was held in pre-trial detention for a year. At trial, both he and Mr Tozer were found not guilty and released. On his return to the UK

⁴⁸³ *McKinnon v Government of the United States of America and another* (2008) UKHL 59 at 38

Mr Mitchell was treated for post-traumatic stress related to his detention in Portugal.

In 1996, Portugal's Supreme Court quashed Mr Mitchell's acquittal and ordered a new trial. In 2008, the Portuguese authorities submitted an EAW to secure Mr Mitchell's return to face the same attempted murder charges. The EAW was certified by the Serious Organised Crime Agency (then the designated certifying authority) in November 2009. Of none of these developments had Mr Mitchell been made aware. In March 2012, Mr Mitchell was arrested at his home and extradition proceedings began in Westminster Magistrates' Court.

In May 2012, the Portuguese authorities withdrew the EAW request.

NatWest 3 (David Bermingham, Gary Mulgrew and Giles Darby)

R. (on application of Bermingham and others) v Director of the Serious Fraud Office, the Attorney General and the Secretary of State for the Home Department (2006) EWHC 200 (Admin)

David Bermingham, Gary Mulgrew and Giles Darby (often referred to as the NatWest 3) worked for NatWest Bank's investment banking arm in 2000. They were British citizens, resident in the UK. NatWest had offices in London and Texas. Enron was a company based in Houston, Texas, managed by Mr Michael Kopper and Mr Andrew Fastow. Enron was a client of NatWest Bank.

A company called LJM Swap Sub, owned by Mr Kopper and Mr Fastow, was based in the Cayman Islands. NatWest Bank and Enron were advised to invest in LJM Swap Sub, which they did. The value of LJM Swap Sub was thought to be low until, in early 2000, there was a marked increase. On 29th January 2000, Mr Bermingham sent an email (relied on by the US prosecutor) to his NatWest colleague Mr Darby, saying:

“One last thing. An unexpected change of circumstances re LJM [Swap Sub]. We have always assumed that the swap sub assets have nil value, because of the mark to market value of the Rhythm Net Put. This was true up to about 10 days ago, when Enron became a virtual company, and its shares went through \$60. I ran the numbers last night, and I would say there is quite some value there now. The trick will be in capturing it. I have a couple of ideas, but it may be good if I don't share them with anyone until we know our fate!!!”

It was alleged the NatWest 3 travelled to Houston, Texas, in February 2000 to meet Mr Fastow to explore ways of unlocking the value in LJM Swap Sub for their own benefit. The prosecution relied on material contained in contemporary e-mails to show that the defendants concealed the meeting from Kevin Howard, NatWest Bank's manager with responsibility for the Enron account.

Prosecutors also alleged that between February and August 2000 the NatWest 3 dishonestly advised their employer to sell its stake in LJM Swap Sub for \$1 million, despite knowing it was worth significantly more. At their recommendation, NatWest Bank agreed to sell its interest in Swap Sub for \$1 million.

The NatWest 3 left NatWest Bank and bought interests in LJM Swap Sub. Mr Kopper fraudulently told Enron that the owners of LJM Swap Sub had agreed to sell their share to Enron in exchange for \$30 million. Enron paid \$30 million for

LJM Swap Sub. LJM Swap Sub gave \$1 million to NatWest Bank and the co-defendants shared the remainder.

As a result of their participation, the NatWest 3 received approximately \$7.3 million between them. Mr Kopper and Mr Fastow shared approximately \$12.3 million (they were subsequently also prosecuted in the US). The remaining \$10 million went to another investor bank not implicated in any wrongdoing.

The indictment made reference to the means of communication in which evidence of the conspiracy to defraud was contained: a fax from Houston to London; five communications from the UK to Texas; and one electronic transfer from Houston to the Cayman Islands. These communications were represented by specific charges (counts one to seven) but all related to the same conspiracy.

The US requested the extradition of the NatWest 3 in 2004, shortly after the 2003 Act came into force. Following a number of attempts to resist extradition—including bringing legal proceedings against the Serious Fraud Office for not prosecuting them in the UK (which would have prevented their extradition)—the NatWest 3 were extradited to the US in 2006.

In November 2007, the defendants agreed to plead guilty to count four relating to the email from London to Houston containing the final LJM Swap Sub sale documents. They undertook to repay \$7.3 million 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 sentence. The three were released in August 2010.

O'Dwyer

Richard O'Dwyer's extradition was requested by the US in 2011 on two charges:

- (1) conspiracy to commit copyright infringement; and
- (2) criminal infringement of copyright.

Both offences were punishable by a maximum term of imprisonment of 5 years.

The elements of criminal infringement of copyright are:

- (a) a copyright is infringed;
- (b) such infringement is wilfully and knowingly done; and
- (c) such infringement is done for the purpose of commercial advantage and private financial gain, or by making material available on a computer-based network accessible to members of the public, knowing that the work was intended for commercial distribution.

It was alleged that in 2007 Mr O'Dwyer conspired with individuals based in the US to offer links to third-party websites that illegally hosted thousands of copyrighted films and television programmes to the public throughout the world (including the US), free of charge and without authorisation from copyright holders.

Mr O'Dwyer's website linking users to the films and television programmes was called TVShack.net and was hosted in the Netherlands. Co-conspirators assisted the operation and maintenance of the website.

Although TVShack was free for users, Mr O'Dwyer allegedly earned money from hosting advertising.

In order to demonstrate that Mr O'Dwyer's website constituted criminal infringement of copyright, prosecutors relied on a response issued by TVShack when users complained that the illegally obtainable material was too slow to download:

“you're saving quite a lot of money (especially when putting several visits together or seasons together) by having to wait a little bit of time.”

In June 2010, a US judge ordered the domain name TVShack.net be seized for operating in violation of US copyright laws. Within a day, the domain name and its contents had been changed to TVShack.cc.

In extradition proceedings the defence argued the request should be refused because the conduct had not been criminal (asserting the website was akin to a search engine such as Yahoo! or Google) or, alternatively, that the prosecution should be brought in the UK because TVShack had been hosted on a server in the Netherlands.

Extradition was ordered and appealed. In 2012, Mr O'Dwyer announced he had voluntarily travelled to the US and signed a deferred prosecution agreement to avoid extradition, and the risk of a criminal record. He was ordered to pay a fine of £20,000.

VB v Rwanda

VB & Others v Westminster Magistrates' Court, The Government of Rwanda & Others (2014) UKSC 59

In this case, four individuals were sought for extradition to Rwanda to face charges of genocide, murder and crimes against humanity carried out during the Rwandan civil war in 1994. Rwanda had previously sought the extradition of the four defendants but the District Judge had found that, although there was a *prima facie* case sufficient to warrant their extradition to Rwanda, there was a real risk of a flagrant denial of justice.

In this second extradition request, the four defendants again claimed that if they were extradited they would be at risk of serious human rights breaches. The defence also argued that some of the evidence to support this claim could put others in Rwanda at risk of similar breaches. The Supreme Court was asked to rule on whether such sensitive information could be heard in closed proceedings or subjected to disclosure conditions. The Court ruled that there was no statutory basis for such procedure and that they would be contrary to the principles of open justice (see Chapter 5). However, Lord Toulson entered a dissenting judgment. He noted that the District Judge had read the evidence concerned and had found it to be relevant and important. He noted the tension between avoiding prejudice to the Issuing State if the Court agreed to non-disclosure and the fact that appellants were likely to suffer a denial of their human rights if the Court shut its eyes to their evidence, “In my view that is unacceptable. The evidential problem is very real, but it is not a satisfactory answer simply to apply a blindfold to the evidence. To refuse to consider it has the same practical effect as assuming the evidence to be untrue, which cannot be assumed.” He therefore concluded that an exception to the principle of open justice ought to be made where not ordering a

closed material hearing or not prohibiting disclosure to the Issuing State would facilitate a foreseeable and potentially serious breach of human rights.

Symeou

Andrew Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece (2009) EWHC 897 (Admin)

Andrew Symeou was extradited to Greece on an EAW to stand trial for manslaughter following an alleged altercation in a night club on the Greek island, Zakynthos. It was alleged that on 20 July 2007 he had punched another British man who had remonstrated with Mr Symeou for urinating on the floor of the club. The man fell to the ground, hitting his head. He suffered brain injuries from which he died two days later. Mr Symeou left Greece at the end of his holiday. In June 2008 an EAW issued by the Greek authorities was certified and, on 26 June 2008, Mr Symeou was arrested at his home.

Following a hearing at Westminster Magistrates' Court on 30 October 2008, Mr Symeou's extradition was ordered. Mr Symeou appealed the decision. His appeal was heard at the High Court on 12 March 2009. Mr Symeou's appeal was dismissed and he was subsequently extradited to Greece. He was held in pre-trial detention until, on 17 June 2011, the Greek courts acquitted him of the charges and he returned to the UK.

The two main arguments put forward during Mr Symeou's appeal were concerned with abuse of process. As noted in paragraph 19, although abuse of process is not a statutory bar to extradition included in the 2003 Act, it is settled case law that such a bar can be applied. Mr Symeou argued abuse of process on two grounds: that the case against him was based on false testimony and witness statements obtained by intimidation and that domestic Greek criminal procedures had not been followed meaning that the EAW was invalid.

Part of the Greek case against Mr Symeou relied on witness statement from two of his friends on holiday with him testifying that he had punched the victim. However, it was alleged that the Greek police had written their statements and that they had been coerced into signing them. There were also discrepancies in statements from other witnesses and inconsistencies between evidence presented to the Greek police and evidence heard during the coroner's inquiry in the UK.

Neither the District Court nor the High Court ruled conclusively whether, in their view, there had been coercion of witnesses and manufacturing of evidence by the Greek police. In his ruling, Mr Justice Ouseley clarified that such a determination was beyond the scope of abuse of process which "concerns abuse of the extradition process by the prosecuting authorities ... [it] does not extend to considering misconduct or bad faith by the police".⁴⁸⁴ Such matters were for the courts in the Issuing State to consider and "decide whether evidence was improperly obtained".⁴⁸⁵ Mr Justice Ouseley added:

⁴⁸⁴ *Andrew Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece* (2009) EWHC 897 (Admin) at 33 and 34

⁴⁸⁵ *Andrew Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece* (2009) EWHC 897 (Admin) at 35

“The same process would be applied in reverse were the English authorities to seek the extradition of a Greek citizen who contended that the English police had obtained evidence by violence or manipulation. It would be for the English and not the Greek Courts to resolve the issues.”⁴⁸⁶

Regarding the argument that Greek criminal justice procedures had not been followed in relation to the issuing of the EAW, Mr Justice Ouseley noted that there was contradictory evidence on the matter from Greek legal experts but, again, it would be for the Greek court to address the issue. He accepted the possibility that a failure to follow domestic criminal procedures could in some cases constitute an abuse of process on the prosecutor’s behalf but the facts of Mr Syemou’s case “could not show an absence of the assumed good faith, such as an attempt to pervert the system to obtain an extradition which could not otherwise have been maintained, or to obtain the return of the Appellant for some collateral purpose.”⁴⁸⁷

Tappin

Christopher Tappin v The Government of the United States of America (2012) EWHC 22 (Admin)

In 2007, the US charged Christopher Tappin and others with the commission of three offences:

- (1) conspiracy to export batteries;
- (2) attempting to export, and aiding and abetting the attempted export of, the batteries; and
- (3) conspiring to conduct illegal financial transactions in transferring funds to pay for the batteries.

In 2010, the US submitted an extradition request to the UK for his surrender to stand trial.

The facts alleged were that Mr Tappin and another UK citizen operated an export business in Cyprus, and that they conspired with Mr Gibson, a US citizen, to export and sell material requiring a licence.

MGE was a shell company established by the US Department of Homeland Security, Immigration and Customs Enforcement, and staffed with its employees. MGE monitored and investigated suspicious activities of companies or individuals seeking to circumvent prohibitions on exporting technology requiring a licence.

It was alleged that, in 2005, a potential buyer of licensable technology contacted MGE asking to buy licensable technology (surveillance equipment) and avoiding licence controls. The buyer said Mr Gibson would be in contact. When Mr Gibson contacted MGE he confirmed his intention to avoid licence requirements, in particular he asked about Hawk missile batteries.

⁴⁸⁶ *Andrew Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece* (2009) EWHC 897 (Admin) at 39

⁴⁸⁷ *Andrew Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece* (2009) EWHC 897 (Admin) at 54

In 2006, Mr Gibson met an MGE agent in New York to see the technology and Hawk batteries before purchase and shipping. Mr Gibson said Mr Tappin would arrange collection of the materials. Mr Gibson was arrested (unknown to Mr Tappin) and agreed to share emails between them with the authorities. Their emails detailed the negotiations for the purchase of Hawk Missile batteries and other licensable technology, and the problems of ordering the batteries in the US. Mr Gibson was to purchase the batteries, whilst Mr Tappin was to arrange shipping in exchange for 50% of the profits from the sale of batteries.

Mr Gibson explained to MGE that the batteries were to be shipped from the US to The Netherlands and then on to Iran; they had used that route for prior illegal exports of US technology to Iran. The route via The Netherlands avoided the UK prohibition on exporting military components to Iran. He confessed he was buying the technology and Hawk batteries for a long-standing Iranian customer in Teheran.

Mr Tappin told MGE he wanted to proceed with the order and requested a quotation for the price of five batteries. He gave a telephone contact number in the UK that matched that which Mr Gibson had given for Mr Tappin. Mr Gibson contacted the Iranian customer at the request of MGE, who said that in Gibson's absence he was dealing directly with Mr Tappin for the purchase of both the licensable technology and the Hawk Missile batteries.

In October 2006, Mr Tappin contacted MGE to negotiate a purchase price. Mr Tappin devised the cover that the batteries were for electroplating by a Dutch chemical company. He gave MGE the shipping details, asking the batteries be addressed to Senator International BV, Schipol Airport, The Netherlands ("Senator"), and that the licensable technology be sent to him in the UK. Mr Tappin agreed to submit a purchase order describing the batteries in a manner of his choosing reflected in the invoice, but with a true invoice describing the batteries correctly for the end user in Iran.

MGE's agents gave Mr Tappin an opportunity to withdraw from the transaction on 19 October 2006, but he persisted saying he would be placing more orders for this type of battery once these were shipped.

On 26 October, Mr Tappin was told that a US Customs and Borders Protection officer had detained the licensable technology destined for the UK. Senator was also told the batteries had been detained. One of MGE's agents told Mr Tappin not to worry and that if Customs contacted him he should say he ordered what was indicated on the shippers' export declaration.

In a conversation with US customs officer on the 1 November, Mr Tappin said the licensable technology was destined for an oil company in Norway. He said he did not know whether it was licensable or not, that being a decision for the exporter. The following day, Mr Tappin emailed customs officers to say the Norwegian company was called Kvaerner, a name which in fact appeared in emails and facsimiles between Mr Gibson and Mr Tappin as a cover for Iranian exports.

On the 7 November, Mr Tappin contacted MGE to ask what explanation he could give US customs' officers about the batteries' use. He was told by MGE their only use was for the Hawk Missile system. Mr Tappin suggested a possible automotive use and asked MGE's agent about describing the batteries for use in electroplating. He told the MGE agent that he wanted their stories to match. It was that same day that Mr Tappin informed Senator that the batteries were

destined for a Dutch chemicals company, that they were for electroplating, and that he did not know of any licensing restrictions in Europe which applied to them.

Mr Tappin then told MGE they would be contacted by a Mr Caldwell. When Mr Caldwell contacted MGE he described himself as Mr Tappin's agent, and agreed to buy batteries from MGE in a domestic US sale so that he and Mr Tappin could export them by January 2007. Shortly thereafter, Mr Tappin contacted MGE to ask whether the difficulties with US customs had been overcome, and discussed future orders.

Mr Tappin and the others were charged with criminal offences in the US. Following his guilty plea, Mr Gibson was sentenced to two years' imprisonment in February 2007. A jury convicted Mr Caldwell of aiding and abetting the illegal export of Hawk missile batteries in June 2007 and, later that year, he was sentenced to 20 months' imprisonment. Nothing happened in relation to Mr Tappin until December 2009. Throughout the process he denied the allegations. He contended that he was the victim of the unlawful conduct of US agents working for MGE who, he asserts, acted deceitfully in order to ensnare and entrap him.

The arguments raised on appeal were:

- oppression: that extradition should be barred by virtue of the passage of time since the offence;
- Article 8: that there was an “exceptionally compelling” feature about the effect of extradition on the family unit that made it disproportionate;
- whether the offence constituted an extradition offence and lack of dual criminality;
- abuse of process: that the US prosecutors had abused their power by bringing a prosecution based on entrapment and that it was an abuse of the process of the UK extradition court to maintain the request.

The appeal was dismissed on every ground.

Mr Tappin was extradited to the US on 24 February 2012. He was held in pre-trial detention in Otero County jail in New Mexico until he was granted bail on 25 April 2012. On 1 November 2012, Mr Tappin pleaded guilty as part of a plea bargain. The original charges against him could have resulted in up to 35 years in prison. Under the terms of the plea bargain he pleaded guilty to one indictment and was sentenced to 33 months in prison and was fined \$11,357. On 28 September 2013, he was returned to the UK to serve the remaining 14 months of his sentence at HM Prison Wandsworth.

Mariusz Wolkowicz

Polish Judicial Authority v Mariusz Wolkowicz (alias Del Ponti) (2013) EWHC 102 (Admin)

On 26 May 2011, the Polish authorities issued a conviction EAW against Mr Wolkowicz. The EAW related to 24 different offences including burglary, forgery, theft, assault, robbery and several offences of escaping from custody and failing to surrender. He had been sentenced to a total of 14 years imprisonment and had at least nine years left to serve. Towards the end of the proceedings in relation to the initial EAW, the Polish authorities also issued an accusation EAW

in relation to obtaining a pecuniary advantage by deception by selling fake gold rings.

Mr Wolkowicz was arrested in the UK on unrelated matters under the alias Del Ponti. According to Mr Wolkowicz he had moved to the UK to join family members as he was disabled and hoped to receive better medical treatment in the UK.

In both Westminster Magistrates' Court and the High Court, it was argued that Mr Wolkowicz's extradition would be disproportionate due to his medical conditions. The courts heard expert evidence from two urologists, a neurologist and a psychiatrist. In addition, Mr Wolkowicz commenced judicial review proceedings in relation to his detention on remand. These proceedings included evidence from a second psychiatrist.

The High Court found that although Mr Wolkowicz's physical and mental conditions were genuine (though there was conflicting evidence about the severity of his psychiatric condition), this did not amount to sufficient reason to prevent his extradition. The Court noted that the District Judge had been "satisfied with the observations of the Polish Judicial Authority that there was no evidence that any penal institution had failed to provide proper medical care for Wolkowicz",⁴⁸⁸ including his mental health and the risk of suicide, his urological condition and the fact that he was largely wheelchair bound. He also noted that there was "no evidence at all to impugn the ability of the Polish authorities"⁴⁸⁹ to take suitable steps to mitigate the risk of Mr Wolkowicz committing suicide. Extradition was therefore ordered.

Upon his return to Poland, Mr Wolkowicz alleges that he was badly treated by the prison authorities. His transit from the UK to Poland was not suitable to his condition. He was moved several times from one prison to another. He was placed in cells that were inappropriate for a wheelchair user. He received inadequate medical care.

In view of their inability to ensure his proper treatment, the Polish authorities decided to release Mr Wolkowicz as further detention could pose a risk to his life or cause serious damage to his health.

Mr Wolkowicz has since commenced proceedings in the ECtHR against the Polish and UK authorities. Assurances were given to the UK authorities that he would receive a suitable standard of treatment in Poland, which he alleges were not honoured.

⁴⁸⁸ *Polish Judicial Authority v Mariusz Wolkowicz (alias Del Ponti)* (2013) EWHC 102 (Admin) at 29

⁴⁸⁹ *Polish Judicial Authority v Mariusz Wolkowicz (alias Del Ponti)* (2013) EWHC 102 (Admin) at 39

APPENDIX 6: CRIMINAL PROCEDURE MEASURES

Introduction

European Union criminal procedure measures are rules intended to protect defendants and victims. Since 1999, in its three successive five year plans for Justice and Home Affairs (JHA) legislation,⁴⁹⁰ the European Council has repeatedly called for criminal procedural rights legislation

The adoption of the Lisbon Treaty gave fresh impetus to EU legislation under Title V of the Treaty which states, “The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States”.⁴⁹¹

In 2009, the European Council adopted the Resolution on a Roadmap strengthening procedural rights of suspected and accused persons in criminal proceedings (“the Roadmap”).⁴⁹² As result of the Roadmap, a number of proposals have been made by the Commission and adopted by the Council.

In accordance with Protocol 21 of the Lisbon Treaty, freedom, security and justice matters do not, in principle, apply to the UK. However, the Government may decide to opt in to proposals and legislation.

The House of Lords EU Select Committee (“the EU Committee”) scrutinises the EU’s criminal justice legislation.⁴⁹³ It has published a number of reports on various proposals.

Roadmap measures

The annex to Roadmap resolution listed five measures to “give an indication of the proposed action”. Each measure was accompanied by a brief description (see Table 1).

Table 1: The Roadmap measures

Roadmap measure	Brief description
Measure A: Translation and Interpretation	The suspected or accused person must be able to understand what is happening and to make him/herself understood. A suspected or accused person who does not speak or understand the language that is used in the proceedings will need an interpreter and translation of essential procedural documents. Particular attention should also be paid to the needs of suspected or accused persons with hearing impediments.

⁴⁹⁰ The Tampere Programme covering the period 2000–04, the Hague Programme covering the period 2005–09 and the Stockholm Programme covering the period 2010–14.

⁴⁹¹ Article 67

⁴⁹² Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009/C 295/01](#)

⁴⁹³ Details of the Sub-Committee’s work can be found on the Parliamentary website: <http://www.parliament.uk/hleue> [accessed 3 March 2015]

Roadmap measure	Brief description
Measure B: Information on Rights and Information about the Charges	A person that is suspected or accused of a crime should get information on his/her basic rights orally or, where appropriate, in writing, e.g. by way of a Letter of Rights. Furthermore, that person should also receive information promptly about the nature and cause of the accusation against him or her. A person who has been charged should be entitled, at the appropriate time, to the information necessary for the preparation of his or her defence, it being understood that this should not prejudice the due course of the criminal proceedings.
Measure C: Legal Advice and Legal Aid	The right to legal advice (through a legal counsel) for the suspected or accused person in criminal proceedings at the earliest appropriate stage of such proceedings is fundamental in order to safeguard the fairness of the proceedings; the right to legal aid should ensure effective access to the aforementioned right to legal advice.
Measure D: Communication with Relatives, Employers and Consular Authorities	A suspected or accused person who is deprived of his or her liberty shall be promptly informed of the right to have at least one person, such as a relative or employer, informed of the deprivation of liberty, it being understood that this should not prejudice the due course of the criminal proceedings. In addition, a suspected or accused person who is deprived of his or her liberty in a State other than his or her own shall be informed of the right to have the competent consular authorities informed of the deprivation of liberty.
Measure E: Special Safeguards for Suspected or Accused Persons who are Vulnerable	In order to safeguard the fairness of the proceedings, it is important that special attention is shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition.
Measure F: A Green Paper on Pre-Trial Detention	The time that a person can spend in detention before being tried in court and during the court proceedings varies considerably between the Member States. Excessively long periods of pre-trial detention are detrimental for the individual, can prejudice the judicial cooperation between the Member States and do not represent the values for which the European Union stands. Appropriate measures in this context should be examined in a Green Paper.

Source: *Resolution on a Roadmap strengthening procedural rights of suspected and accused persons in criminal proceedings, Annex, 2009/C 295/01*

Subsequent legislation

Since the publication of the Roadmap, the Commission has proposed a number of Directives to fulfil the intentions of the Roadmap measures. In some cases the UK has opted in to, in others it has not (see Table 2). The EU Committee's default

position on the Roadmap proposals was that “the UK should opt in to proposals for criminal procedure legislation at an early stage unless there is clear justification for not doing so.”⁴⁹⁴

Table 2: Subsequent legislation

Directive	UK’s position and the EU Committee’s view
Directive providing for a suspect’s right to translation and interpretation ⁴⁹⁵	EU Committee advised the Government to opt in. The UK has opted in.
Directive on the right to information in criminal proceedings ⁴⁹⁶	EU Committee advised the Government to opt in. The UK has opted in.
Directive 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 ⁴⁹⁷	EU Committee advised against opting in as it was concerned about a number of aspects, for example, the implications of requiring face-to-face access to a lawyer in more remote parts of the country. ⁴⁹⁸ The UK did not opt in to this Directive. The Government promised to review the position. Participating Member States adopted the Directive in October 2013. The Government’s review remains outstanding.

⁴⁹⁴ European Union Committee, *The European Union’s Policy on Criminal Procedure* (30th Report, Session 2010–12, HL Paper 288)

⁴⁹⁵ Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings, [2010/64/EU](#)

⁴⁹⁶ Directive of the European Parliament and of the Council on the right to information in criminal proceedings, [2012/13/EU](#)

⁴⁹⁷ Directive of the European Parliament and of the Council 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, [2013/48/EU](#)

⁴⁹⁸ European Union Committee, *The European Union’s Policy on Criminal Procedure* (30th Report, Session 2010–12, HL Paper 288)

Directive	UK's position and the EU Committee's view
Proposed a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings ⁴⁹⁹	EU Committee suggested the Government await the outcome of negotiations before deciding whether to opt in. The Committee had concerns that the proposals would require substantive changes to UK law—in particular, to accommodate the dual representation provisions. In July 2014, the Government confirmed its decision not to opt in and that it has no intention of opting-in at any time.
Proposed Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings ⁵⁰⁰	EU Committee recommended that the Government should not opt in. The proposal remains under discussion in the Council. The Government have confirmed that they do not plan to opt in.
Proposed Directive on procedural safeguards for children suspected or accused in criminal proceedings ⁵⁰¹	EU Committee concluded that the Government should opt in to the proposed Directive, subject to certain changes being made in negotiations. In July 2014, the Government confirmed its decision not to opt in to this proposal. The proposal remains under discussion in the Council, though a general approach was agreed in May 2014.

⁴⁹⁹ Proposal for a directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, [COM\(2013\) 824](#)

⁵⁰⁰ Proposal for a directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, [COM\(2013\) 821](#)

⁵⁰¹ Proposal for a directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, [COM\(2013\) 408](#)

APPENDIX 7: DESIGNATIONS

Designations under Part 1 of the 2003 Act

Part 1 of the Extradition Act 2003 deals with countries operating the European Arrest Warrant (EAW). Countries designated under Part 1 of the Act are set out in Box 1.

Box 1: Part 1 (EAW) countries

Austria	Ireland
Belgium	Italy
Bulgaria	Latvia
Croatia	Lithuania
Cyprus	Luxembourg
Czech Republic	Malta
Denmark	The Netherlands
Estonia	Poland
Finland	Portugal
France	Romania
Germany	Slovakia
Gibraltar	Slovenia
Greece	Spain
Hungary	Sweden

Designations under Part 2 of the 2003 Act

Part 2 of the 2003 Act deals with all other countries with which the UK has extradition arrangements. Most countries designated under Part 2 of the act are required to make a *prima facie* case when submitting an extradition request to the UK. These countries are set out in Box 2.

Box 2: Designated Part 2 countries

Algeria	Maldives
Antigua and Barbuda	Mauritius
Argentina	Mexico
The Bahamas	Monaco ⁵⁰²
Bangladesh	Montenegro ⁵⁰³
Barbados	Nauru

⁵⁰² Monaco is due to be removed from this list, see Box 5.

⁵⁰³ Montenegro is due to be removed from this list, see Box 5.

Belize	Nicaragua
Bolivia	Nigeria
Botswana	Panama
Brazil	Papua New Guinea
Brunei	Paraguay
Chile	Peru
Colombia	Saint Christopher and Nevis
Cook Islands	Saint Lucia
Cuba	Saint Vincent and the Grenadines
Dominica	San Marino
Ecuador	Serbia
El Salvador	Seychelles
Fiji	Sierra Leone
The Gambia	Singapore
Ghana	Solomon Islands
Grenada	Sri Lanka
Guatemala	Swaziland
Guyana	Tanzania
Hong Kong Special Administrative Region	Thailand
Haiti	Tonga
India	Trinidad and Tobago
Iraq	Tuvalu
Jamaica	Uganda
Kenya	Uruguay
Kiribati	The United Arab Emirates
Lesotho	Vanuatu
Liberia	Western Samoa
Libya	Zambia
Malawi	Zimbabwe
Malaysia	

In January 2015 the Government brought forward proposals to designate additional territories for the purposes of Part 2 of the Act.⁵⁰⁴ These territories are set out in Box 3.

⁵⁰⁴ Draft Extradition Act 2003 (Amendment to Designations and Appeals) Order 2015 <http://www.legislation.gov.uk/ukdsi/2015/9780111127322> [accessed 3 March 2015]

Box 3: Proposed additions to Part 2 designations

Anguilla	Philippines
Bermuda	Pitcairn, Henderson, Ducie and Oeno Islands
British Antarctic Territory	Saint Helena, Ascension and Tristan da Cunha
British Indian Ocean Territory	South Georgia and the Sandwich Islands
Cayman Islands	The Sovereign Base Areas of Akrotiri and Dhekalia ⁵⁰⁵
Falkland Islands	Turks and Caicos Islands
Kosovo	Virgin Islands
Montserrat	

As noted in paragraph 368, some Part 2 countries are further designated, meaning they are not required to present a *prima facie* case when submitting an extradition request to the UK. Further designated Part 2 countries are set out in Box 4.

Box 4: Further designated Part 2 countries as pursuant to section 84 (7) of the 2003 Act

Albania	Moldova
Andorra	New Zealand
Armenia	Norway
Australia	The Republic of Korea
Azerbaijan	Russian Federation
Bosnia and Herzegovina	Serbia
Canada	South Africa
Georgia	Switzerland
Iceland	Turkey
Israel	Ukraine
Liechtenstein	The United States of America
Macedonia, FYR	<i>Hong Kong Special Administrative Region</i> ⁵⁰⁶

In January 2015, the Government brought forward proposals to further designate other territories.⁵⁰⁷ These territories are set out in Box 5.

⁵⁰⁵ That is to say the areas mentioned in the section 2(1) of the Cyprus Act 1960(c).

⁵⁰⁶ Hong Kong Special Administrative Region is further designated for the purposes of issuing an arrest warrant in relation to Requested Person. For extradition to go ahead a *prima facie* case is still required, hence its inclusion in Box 4.

Box 5: Proposed additions to Part 2 further designated countries

Aruba	Montenegro
Bonaire	Saba
Curaçao	San Marino
Faroe Islands	Sint Eustatius
Greenland	Sint Maarten
Monaco	

⁵⁰⁷ Draft Extradition Act 2003 (Amendment to Designations and Appeals) Order 2015
<http://www.legislation.gov.uk/ukdsi/2015/9780111127322> [accessed 3 March 2015]