House of Lords
House of Commons

Joint Committee on Human Rights

The Human Rights Implications of UK Extradition Policy

Fifteenth Report of Session 2010–12

HL Paper 156

HC 767

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Report, together with formal minutes

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

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Footnotes

In the footnotes of this Report, references to oral evidence are indicated by 'Q' followed by the question number. References to evidence as EXT refers to written evidence as listed on pages 69 and 70. Both the oral and written evidence is published online at http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/publications/. Written evidence is also available for inspection in the Parliamentary Archives (020 7219 5315).

Contents

Report

Summary

Extradition is the process where one state seeks the return of a person from another state to face trial or serve a sentence. In this Report, we consider the human rights implications of UK extradition policy and in particular the Extradition Act 2003. This Report is intended to feed into the work of the Extradition Review launched by the Government to consider several aspects of the UK's extradition policy.

We fully support the process of extradition which is necessary to enable the return of those alleged to have committed a crime to another jurisdiction, particularly in the case of serious crimes such as terrorism. It is important, however, to balance the need to return alleged offenders to the country in which the crime took place with the need to respect the rights of those requested for extradition. In our Report we highlight a number of areas where we believe the protection of rights for these persons is significantly below the standard which a UK citizen should expect. It is important to strengthen the safeguards in the extradition process to ensure the protection of rights of persons involved in the process. We also recognise the importance of protecting the rights of UK citizens who are the victims of crime where the alleged offender has absconded abroad.

In this Report we make a number of conclusions which would require the renegotiation of the Framework Decision on the European Arrest Warrant. We welcome the Government's stance that renegotiation of the Framework Decision of the European Arrest Warrant is a possible option if deemed necessary.

The human rights safeguard in the Extradition Act 2003

The Extradition Act 2003 requires the judge in an extradition case to consider whether extradition would be compatible with the human rights of the person requested. Although we welcome recent developments that have seen courts apply a lower threshold to the test of whether a person's human rights would be at risk, in practice this safeguard does not offer adequate human rights protection. The threshold that has been set by case law for extradition to be refused on human rights grounds is very high. In order to make the bar more effective, material such as reports of the Committee on the Prevention of Torture should be regarded as relevant evidence of possible human rights abuses.

Safeguards in the Extradition Act 2003

We conclude in this Report that the mere presence of a "human rights bar" in the statutory framework is not enough to secure effective protection for human rights. For such protection to be practical and effective it is necessary to go beyond such generalised provisions and to spell out in the statutory framework specific and detailed safeguards for the rights in question.

To this end, we conclude that a "most appropriate forum" safeguard should be implemented. This would require the judge in an extradition case to consider whether it is in the interests of justice for the requested person to be tried in the requesting country and to refuse the extradition request if it is not. We conclude that a requirement for the requesting country to show a *prima facie* case or similarly robust evidential threshold should be introduced. The will reduce the likelihood that a person could be extradited on speculative

charges or for an alleged offence which they could not have committed. In extradition cases where identity is disputed we recommend that the facility to request further information is used. The UK should aim to secure longer time limits where such a request has been made.

It is clear that for persons subject to extradition proceedings legal representation in both the requested and requesting country will make the human rights bar and other safeguards in the extradition process more effective in protecting rights. The present provision of legal representation does not meet these needs. The Government should examine the provision of legal representation in extradition proceedings in order to ensure that requested persons are properly represented both in the requesting and requested country and we welcome the Extradition Review Panel's consideration of this issue.

The European Arrest Warrant

We consider the European Arrest Warrant in detail in our Report and set out some serious problems with its operation. As there is a varying protection of rights across the EU, the human rights bar to extradition must be effective in protecting the rights of extradited persons. We also have serious concerns about the number of requests for extradition under the European Arrest Warrant issued for comparatively minor offences. The Government should work with the European Commission and other Member States to implement a proportionality principle into the Framework Decision to ensure that the human rights implications of extradition are not disproportionate to the alleged crime.

The system for removal of EAW requests should be improved to prevent repeat arrests under a European Arrest Warrant where a court elsewhere in the EU has already refused to execute an extradition request. The Government must also ensure that other Member States do not use the European Arrest Warrant for purposes of investigation, by ensuring that the facility for requesting further information is used where there are doubts as to the stage of proceedings reached in the requesting state.

We also consider a number of further safeguards that could improve the protection of rights offered by the Framework Decision.

Bilateral Extradition Treaties

In relation to bilateral treaties, we consider whether the Secretary of State should have an increased role in the surrender of persons to non-EU countries. We do not believe such changes are necessary and if changes are made the Government must ensure that persons subject to extradition requests do not become political pawns as a result. In relation to the UK-US extradition treaty, the Government should look to raise the level of proof required when extraditing a person to the US to the same level required when extraditing a person from the US to the UK, that is sufficient evidence to establish probable cause.

The European Investigation Order

Our inquiry also considered the European Investigation Order, which would enable a judicial authority or public prosecutor in one Member State to seek assistance from the competent authority of another. The Government should negotiate for the inclusion of a provision to allow the refusal of an EIO on human rights grounds and a provision for dual criminality. It is also crucial that there is an effective proportionality safeguard in the

Directive, in order to ensure that the EIO operates effectively and that there are not numerous requests for information in minor cases.

Other issues

We also consider a number of other issues in relation to extradition including information provided during the extradition process, the relationship between extradition and immigration proceedings and the use of extradition where a suspect could be tried in the UK.

1 Introduction

1. Extradition is the process where one state seeks the return of a person from another state to face trial or serve a sentence. This process, which is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions, aims to further international co-operation in criminal justice matters and strengthen domestic law enforcement. The law of extradition is based on the assumption that the requesting state is acting in good faith and that a person will receive a fair trial there.

2. The European Arrest Warrant has replaced the previous formal process of extradition between Member States of the European Union (EU). Extradition arrangements with non-EU territories are generally governed by bilateral treaties. The bilateral treaties and the Framework Decision on the European Arrest Warrant are given domestic effect by the Extradition Act 2003. Figures provided by the Home Office show that in 2009–10 the UK surrendered 699 persons to other EU Member States under the EAW procedure and in 2010, 24 persons were extradited to non-EU countries under Part 2 of the Act.[1]

Balancing extradition and rights

3. We fully support the process of extradition and recognise the importance of the process for returning those alleged to have committed a crime to another jurisdiction, including to the UK, in order that they stand trial. This is particularly the case for serious crimes, such as terrorism. As the former Home Office Minister Baroness Neville-Jones noted "the chances of getting someone back are greatly increased by the existence of the system, for all its imperfections [...] the interests of justice are certainly served by both extraditing and facilitating the process under the rules."[2] We agree with this sentiment.

4. It is important, however, to balance the need to return alleged offenders to the country in which the crime took place with the need to respect the rights of those requested for extradition. In our Report we highlight a number of areas where we believe the protection of rights for these persons is significantly below the standard which a UK citizen should expect. This is in part due to the introduction of a streamlined extradition process in the Extradition Act 2003, including the European Arrest Warrant, and the varying human rights protections within the European Union. It is essential that the benefits of the EAW system, particularly with regard to serious crimes, are not offset by reducing the protection of human rights to a level lower than that which existed prior to the introduction of the EAW. We make a number of recommendations in this Report for strengthening the safeguards in the extradition process to ensure that the protection of rights of persons in that process is raised to a reasonable standard. Without these safeguards those subject to extradition are at risk of a serious deprivation of their human rights. It is crucial to ensure a streamlined process of extradition does not reduce human rights protection to an unacceptable level.

5. It is also important that the rights are protected of UK citizens who are the victims of crime where the alleged offender has absconded abroad; in such cases extradition is the

1 See EXT 032 for a full breakdown of extradition figures.

2 Q 216

only method by which they can be returned to the United Kingdom to stand trial and we recognise this in our Report.

Our inquiry

6. UK extradition proceedings have recently come under scrutiny from parliamentarians, the press and the public, prompting questions about the effective operation of the Extradition Act 2003 and the fairness of extradition arrangements. A number of high-profile cases, including those of Gary McKinnon and Julian Assange, have further intensified this scrutiny.

7. In September 2010, the Government announced it would set up a panel, chaired by Sir Scott Baker, to review the UK's extradition arrangements. This review covers five main areas:

- The breadth of the Secretary of State's discretion in an extradition case;
- The operation of the European Arrest Warrant, including the way in which those of its safeguards which are optional have been transposed into UK law;
- Whether the forum bar to extradition should be commenced[3];
- Whether the US-UK extradition treaty is unbalanced;
- Whether requesting states should be required to provide *prima facie*[4] evidence.

In this Report we refer to this panel as the Extradition Review Panel.

8. In December 2010, we launched our inquiry into the human rights implications of UK extradition policy. This Report considers the findings of that inquiry. We consider the human rights implications of extradition for those subject to extradition proceedings and for the victims of crime.

9. Our Report ran in parallel to the Extradition Review Panel, but has no formal connection to it. We intend that our Report will feed into the Extradition Review process and we expect to follow up our inquiry once the Review Panel publishes its recommendations.

10. We are grateful to those who submitted oral and written evidence to the inquiry. We received oral evidence in February and March 2011 from UK based Non-Governmental Organisations with an interest in extradition, individuals with personal experience of the extradition process, representatives from the Police, the Director of Public Prosecutions and a practicing extradition lawyer. We also thank Professor Susan Nash, Specialist Adviser to the Committee for the inquiry.

3 The forum bar would allow a judge to consider the most appropriate location for the trial in an extradition offence if the alleged offence took place largely or wholly in the United Kingdom.

4 A *prima facie* case refers to evidence which, if not rebutted, would be sufficient to found a conviction. In the context of extradition, a requirement for a *prima facie* case would mean that a court could refuse extradition if it was not satisfied that a requesting country had shown that the requested person had a case to answer.

11. We also received evidence from Baroness Neville-Jones, at that time the Minister of State at the Home Office. We thank the former Minister for her contribution. We note that the ongoing Extradition Review meant that she could not comment on some of the issues covered during the course of our inquiry.

12. The European Commission has recently published a report considering the effectiveness of the European Arrest Warrant, *Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.*[5] We consider this report where appropriate.

Extradition Act 2003

13. The Extradition Act 2003 provides a framework for extradition proceedings in the UK. It aims to improve the fight against cross-border crime and bring to justice offenders who flee to other counties. The Act came into effect on 1 January 2004 and transposes the Framework Decision on the European Arrest Warrant into domestic legislation and retains, with some modifications, arrangements for extradition to non-EU territories.

14. The Act draws a distinction between category 1 territories which are EU Member States, and category 2 territories, which are all other territories with which the UK has extradition arrangements. Category 1 states are dealt with by Part 1 of the Act. Category 2 territories, including the United States, are dealt with by Part 2. Part 3 deals with the procedure for applying for a European Arrest Warrant from a Category 1 state and Part 4 sets out the powers available to the police in extradition cases. The flow charts provided by the Crown Prosecution Service show in detail the process of extradition (see Appendix 1).

Safeguards

15. Modern extradition treaties seek to balance the rights of the individual with the need to ensure the extradition process operates effectively. These are based on principles which are designed not only to protect the integrity of the process itself, but also to guarantee a degree of procedural fairness. These principles include:

- the requirement that the requested person has committed an extraditable offence, which is linked to the principle of double criminality;
- the rule of specialty;[6]
- the political offence exception;
- the restriction on return for military and religious offences;
- the prohibition on return in death row cases; and
- the principle of double jeopardy.[7]

5 COM (2011) 175 available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0175:FIN:EN:PDF

6 The speciality rule prevents a person for being tried for an offence other than that for which they were extradited.

7 That a person should not be tried twice for the same offence.

The European Arrest Warrant

16. The European Arrest Warrant (EAW) came into force on 1 January 2004. The EAW is based on the principle of mutual recognition of judicial decisions and an assumption of mutual trust in the criminal justice systems of other EU states. An arrest warrant issued in a Member State is valid in another Member State. Accordingly, the court and the central authority have limited discretion to refuse execution of a valid warrant. This initiative was designed to simplify judicial surrender procedures for the purposes of conducting a criminal prosecution or executing a sentence of imprisonment. Under this scheme, Member States can no longer automatically refuse surrender of their own nationals.

Box 1: Extradition to EU countries

The process of extradition from the UK to other territories takes place in three stages: the arrest of the requested person, an extradition hearing before a District Judge and an appeal by either party to the High Court, and in appropriate circumstances, to the Supreme Court. The process is as follows (section numbers in brackets refer to the relevant section of the Extradition Act 2003):[8]

- *When an EAW is received by the United Kingdom, the Serious Organised Crime Agency (SOCA) certifies the warrant.*
- *Following the certification, the person is arrested and is brought before a judge to determine whether the person is that who is specified in the EAW; the judge may detain or bail the person. A date is set for an extradition hearing within 21 days unless the person consents to be extradited.*
- *At this hearing, the judge considers whether the offence is an extradition offence (s 10), any potential bars to extradition (s 11), whether the person was convicted in their absence (s 20) and human rights considerations (s 21).*
- *Once the decision is made, the requested person and the requesting judicial authority can appeal to the High Court and apply for leave to appeal to the Supreme Court against a decision of the High Court.*
- *If the decision is made to extradite the requested person, surrender of the person must take place within 10 days of the decision being made final.*

17. The EAW is sent between judicial authorities, without involvement of an intermediary, removing the executive from the process. The EAW process reduces and removes many of the traditional bars to extradition. Refusal to execute a valid warrant is only permitted in limited circumstances including:

- Double jeopardy (s 12 of the Act);
- Extraneous considerations (s 13);

8 See EXT 17A for a flowchart depicting the process of extradition provided by the Crown Prosecution Service

- The passage of time (s14);
- The person's age (s15);
- Hostage-taking considerations (s16);
- Specialty (s17);
- Earlier extradition to the UK from another category 1 territory (s18) or a non-category 1 territory (s 19).

18. An EAW may be issued for an offence punishable by the law of the issuing state by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed, for sentences of at least four months. The EAW includes a list of 32 serious offences which, if punishable by a custodial sentence of at least three years, can result in extradition "without verification of the double criminality of the act". Thus, if a judge in the requesting state certifies that the offence is included in the European Framework list of 32 offences, the authorities in the requested state are not permitted to consider whether the alleged conduct amounts to an offence in their national law.

19. The EAW only applies within the EU; re-extradition to a third state requires agreement with the Member State which authorised the initial surrender.

Bilateral treaties

20. Part 2 of the Act deals with non-EU territories with which the UK has a bilateral extradition arrangement.

Box 2: Extradition to non-EU countries

The extradition process to a non-EU country with which the UK has a bilateral extradition treaty is as follows:[9]

- *Extradition request received by Judicial Co-operation Unit at the Home Office.*
- *A district judge at the City of Westminster Magistrates Court may issue an arrest warrant, after which the requested person is arrested if criteria of Extradition Act 2003 are satisfied (s 71) (those criteria are: is the act an extradition offence and is required evidence or information provided?).*
- *At the extradition hearing the judge considers the identity of the person, whether or not it is an extradition offence (s 7), the bars to extradition (s 79), evidence requirements (s 84) and human rights considerations (s 87).*
- *If the judge rules the criteria are met, the case is sent to the Secretary of State.*
- *The Secretary of State considers whether the death penalty (s 94), speciality (s 95) or earlier extradition (s 96) prohibit extradition.*

9 See EXT 17A for a flowchart depicting the process of extradition provided by the Crown Prosecution Service

- *The requested person and requesting country can appeal against the decision of the judge and the Secretary of State to the High Court. Both parties can also apply for leave to apply to the Supreme Court.*

21. Several safeguards apply to extradition proceedings with non-EU territories under Part 2 of the Act which do not apply under Part 1. This includes the consideration of whether a *prima facie* case[10] exists and the double criminality requirement.[11]

22. The UK-US extradition treaty was signed on 31 March 2003 and came into force in April 2007. The UK's arrangements for extradition to the US set out in the Treaty came into force in advance of this date as they were included within the Extradition Act 2003. The UK-US Treaty removes the requirement on the US to provide *prima facie* evidence when requesting extradition from the UK. The UK is required to satisfy a probable cause requirement when requesting the extradition of US nationals. The probable cause requirement is the standard required by the Constitution in the United States to obtain a warrant for arrest or to search and/or seize (see paragraph 187).

Previous consideration of the Extradition Act 2003 by the Committee

23. Our predecessor Committee considered the draft Extradition Bill in the 2001–02 Session.[12] The Committee considered whether the Bill in its draft form would provide adequate protection of human rights of a person subject to extradition. The Committee concluded that the requirement for a judge to consider the impact of extradition on a suspect's Convention rights would "provide adequate protection for Convention rights." In this report we reassess this conclusion through post-legislative scrutiny of the effectiveness of the Act from a human rights perspective. The Committee also raised human rights concerns in relation to the following aspects of the draft Bill:

- The lack of clarity on the face of the draft Bill in relation to the provisions of the Extradition Act 1989.
- The lack of express provision for mental or physical capacity to be a bar to extradition.
- The potential for removing the rule under which a person may not be extradited to face trial for a political offence.
- The weaknesses in the draft Bill in relation to assurances provided by the requesting country in relation to respect for rights.

10 A *prima facie* case refers to evidence which, if not rebutted, would be sufficient to found a conviction. In the context of extradition, a requirement for a *prima facie* case would mean that a court could refuse extradition if it was not satisfied that a requesting country had shown that the requested person had a case to answer.

11 The double criminality requirement is that the alleged offence is a crime in both the requesting and requested country

12 Joint Committee on Human Rights, 20th Report (2001–02): *Draft Extradition Bill* (HC Paper 1140, HL Paper 158)

The Government responded to this Report, which the Committee published in its Report on the Extradition Bill.[13] In this Report, the Committee concluded that it was satisfied the Government had addressed the first and second points of concern noted above. The Committee drew the attention of each House to its view that there should be an express provision written into the Bill in relation to assurances provided by requesting countries on respect of the rights of the suspect. The Committee did not feel that any of the changes in the Bill from the provisions in the draft Bill raised any significant human rights concerns.

Previous scrutiny of the extradition process

24. A number of other Committees of both Houses have previously considered the extradition process. During the negotiation of the European Arrest Warrant, both the House of Lords Select Committee on the European Union and the House of Commons European Scrutiny Committee considered the proposal in detail. In a letter to the Minister, Mr Bob Ainsworth MP, the Chairman of the Select Committee on the European Union noted that the European Arrest Warrant "will be a major step forward in the [...] fight against crime and the establishment of an area of freedom, security and justice" but went on to note "a number of difficulties and problems" with the text, including in relation to the protection of rights.[14] The European Scrutiny Committee raised concerns including "the absence of any explicit reference to the European Convention on Human Rights [...] the abandonment of dual criminality and the lack of definition of the offences for which this safeguard is being abandoned."[15] The Committees reported on the EAW before it was agreed in its final form in the European Union and before it was transposed into UK law in the Extradition Act 2003.

25. A number of Committees have considered the extradition process after the coming into force of the Extradition Act 2003. The House of Lords European Union Committee considered the EAW again in 2006.[16] The House of Commons Justice Committee considered the EAW as part of their inquiry *Justice issues in Europe.*[17] The Home Affairs Committee has also considered extradition policy in the United Kingdom in this session.[18]

Renegotiation of the Framework Decision on the European Arrest Warrant

26. We note that as an EU-wide initiative, implementing changes to the Framework Decision governing the EAW is more complex than amending UK legislation. Depending on the nature of the change, implementing certain recommendations would require

13 Joint Committee on Human Rights, 1st Report (2002–03): *Scrutiny of Bills: Progress Report* (HC Paper 191, HL Paper 24)

14 Letter from Letter from the Lord Brabazon of Tara, Chairman of the Select Committee on the European Union to Mr Bob Ainsworth MP, Parliamentary Under Secretary of State, Home Office dated 13 December 2001 in Select Committee on the European Union, 16th Report (2001–02) (HL Paper 89)

15 European Scrutiny Committee, 17th Report (2001–02) (HC Paper 152)

16 European Union Committee, 13th Report (2005–06), *European Arrest Warrant: Recent Developments* (HL Paper 156). The Committee also briefly considered the European Arrest Warrant as part of a wider inquiry into the EU's internal security strategy. European Union Committee, 17th report (2010–12): *The EU Internal Security Strategy* (HL 149)

17 Justice Committee, Seventh Report (2009–10), *Justice issues in Europe* (HC Paper 162)

18 See http://www.parliament.uk/homeaffairscom

renegotiation of the Framework Decision at EU level. In terms of possible renegotiation, the Minister told us that:

> "if the level of dissatisfaction with this piece of legislation is very great indeed, it would be right to try to do something about it. I do not take the view that in no circumstances would we be willing to reopen. It would be difficult and one also has to bear in mind the fact that you might get outcomes that were unwanted as well as ones that we wanted."[19]

27. In this Report we make recommendations that would require renegotiation of the Framework Decision. **We welcome the Government's stance on possible renegotiation of the Framework Decision of the European Arrest Warrant if necessary.**

19 Q 228

2 Human rights and extradition

28. In this chapter we consider the effectiveness of the requirement for a judge to consider whether extradition of a requested person would be compatible with that person's human rights. Section 21 (category 1 territories) and 87 (category 2 territories) of the Extradition Act 2003 sets out this requirement:

> "**21 Human rights**
>
> (1)If the judge is required to proceed under this section (by virtue of section 11 or 20) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42)."

If a judge decides that surrender would result in a breach of human rights as defined in the Human Rights Act 1998, the extradition request will be refused.

29. The articles of the European Convention on Human Rights (ECHR) that are most often engaged by extradition cases are:

- Article 3, prohibition of torture, or inhuman or degrading treatment.
- Article 5, right to liberty and security.
- Article 6, right to a fair trial.
- Article 8, right to respect for private and family life.
- Article 14, prohibition of discrimination.

30. Article 3 is an absolute, non-derogable right. Articles 5 and 6 are rights which are qualified only in times of war or a public emergency when they may be subject to limited derogation. Article 8 is a qualified right which allows for some interference where it is in accordance with the law and proportionate to a legitimate aim. Article 14 can only be invoked in conjunction with another Convention right.

Human Rights case law

General principles

31. Courts in the United Kingdom are subject to a strong interpretative obligation to construe Part 1 of the Extradition Act 2003 in a manner that removes the complexity and potential for delay inherent in previous extradition procedures.[20] In *Brussels v Cando-Armas,* the first Part 1 case to be considered by the House of Lords, Lord Bingham said that:

20 *Office of the Kings Prosecutor, Brussels v Cando Armas* [2005] 3 WLR 1079*; Dabas v High Court of Justice in Madrid, Spain* [2007] UKHR 6 and *The Governor of HMP Wandsworth v Antanas Kinderis* [2007] EWHC 998 (Admin); Pulpino

> "Part 1 of the 2003 Act did not effect a simple and straightforward transposition, and it did not on the whole use the language of the Framework Decision. But its interpretation must be approached on the twin assumptions that Parliament did not intend the provisions of Part 1 to be inconsistent with the Framework Decision and that, while Parliament might properly provide for a greater measure of co-operation by the United Kingdom than the Decision required, it did not intend to provide for less."[21]

32. The EAW initiative is based on the principle of mutual recognition of judicial decisions and on mutual trust between the judicial authorities of EU states. Acknowledging the importance of this principle, Lord Bingham in *Dabas v High Court of Justice in Madrid, Spain* noted that:

> "The important underlying assumption of the Framework Decision is that member states, sharing common values and recognising common rights, can and should trust the integrity and fairness of each other's judicial institutions."[22]

Human Rights

33. Although courts are required to consider whether extradition is compatible with human rights, there has been a presumption in many decisions that all EU states will comply with their ECHR obligations. Attempts to resist extradition by reference to the Human Rights Act 1998 have rarely been successful even when supported by evidence. In *Jaso, Lopez, Hernandez v Central Criminal Court No 2 Madrid,*[23] one of the grounds of appeal related to fear that suspected terrorists would be subjected to ill-treatment in prison in breach of Article 3 of the ECHR. The court considered that the substance of this appeal sought:

> "[…] to impeach the processes of the Spanish judicial authorities. What is common to all of these grounds is a lack of trust in these authorities. If our courts were to accede to such arguments, they would be defeating the assumption which underpins the Framework Decision that member states should trust the integrity and fairness of each other's judicial institutions."

An evidence-based report which concluded that while ill treatment was not a regular practice in Spain its occurrence was "more than sporadic and incidental" was insufficient to establish a case for non-surrender.[24]

34. The EAW system is intended to provide an effective means of improving the fight against cross-border crime. Facilitating extradition within the EU is an important public interest. Consequently, the courts have set a high threshold test for establishing a breach of human rights. In *R (Jan Rot) v Poland* [25] Mr Justice Mitting noted that:

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21 *Office of the Kings Prosecutor, Brussels v Cando Armas* [2005] 3 WLR 1079.

22 [2007] UKHL 6, [2007] 2 AC 31, para 4

23 [2007] EWHC 2983 (Admin)

24 UN Commission on Human Rights, *Report of the Special Rapporteur on the question of torture*, 6 February 2004, para 58

25 [2010] EWHC 1820 (Admin)

> "Category 1 States can be taken to have accepted between themselves that conditions of detention and the adequacy of fairness of criminal justice systems in such states will not be required to be examined by other states when considering extradition applications by them. For those reasons, and in my opinion, for the purposes of Articles 2, 3 and if relevant 8, the treatment of a person extradited to a Category 1 State which is a signatory of the Convention is a matter between the individual extradited and that state, and not between the United Kingdom."

35. Further support for this approach can be found in *Klimas v Lithuania*[26]. The court observed 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."

Recent case-law

36. There is some evidence, however, that the practical application of the EAW is testing the level of judicial support for the principle of mutual trust. Recent case-law indicates a greater willingness to rebut the presumption in favour of surrender. In *Targosinski, R (on the application of) v Judicial Authority of Poland*[27] the court considered that it is possible to envisage circumstances in which a defendant could rebut the presumption. A finding by the European Court of Human Rights that there had been systemic violations of the Convention rights of prisoners could therefore be considered as clear and cogent evidence.[28]

Article 8

37. It is difficult to challenge extradition on the grounds of a qualified right such as Article 8, which permits interference which is proportionate to the legitimate aim of extradition. In *Jaso and others v Central Criminal Court No 2 Madrid,*[29] the court considered whether the interference with a person's right to respect for family life would be proportionate to the legitimate aim of honouring an extradition treaty. Lord Justice Dyson stated that:

> "in an extradition case there will have to be striking and unusual facts to lead to the conclusion that it is disproportionate to interfere with an extraditee's article 8 rights."

38. Refusing an appeal based on Article 8, the court in *Symeou v Greece*[30] observed that it would take "a very strong case for the interests which are mutually engaged in the extradition process under the Framework Decision to be set aside." A similar approach has been taken when considering an Article 8 appeal against extradition to a non-EU state. In

26 [2010] EWHC 2076 (Admin)

27 [2011] EWHC 312 (Admin)

28 In *Orchowski v Poland* application 17885/04, 22 January 2010 the ECtHR concluded that there had been systemic violations of the Convention rights of prisoners in Polish prisons from 2000 until May 2008.

29 [2007] EWHC 2983 (Admin)

30 [2009] EWHC 897 (Admin)

Norris v Government of the United States of America[31], the court considered that a successful appeal must demonstrate that "the consequences of interference with Article 8 rights must be exceptionally serious before this can outweigh the importance of extradition."

39. However, in *Jansons v Latvia* [32] an appeal was allowed on Article 8 grounds because it would be oppressive to order extradition for the theft of two mobile phones where there was evidence of a substantial risk that the appellant would commit suicide. In subsequent cases, appeals based on evidence of mental health problems have been unsuccessful. Similarly, arguments based on triviality and proportionality generally fail. In *Sandru v Romania*[33] the appellant had been convicted of killing his neighbour's chickens in Romania. Refusing his appeal, Lord Justice Elias considered that refusing extradition on grounds of proportionality would risk undermining the principle of mutual respect. We also note the recent decisions of the High Court in *Iwinski v Regional Court in Bydgoszcz, Poland*[34] and *Gryncewicz v Polish Judicial Authority*[35] where the Court examined the proportionality of extradition in relation to the personal circumstances of the extraditee. The Human Rights Bar was designed to enable this sort of assessment.

Effectiveness of the human rights bar to extradition in the Extradition Act 2003

40. We asked witnesses whether the human rights bar set out in Sections 21 and 87 of the Extradition Act 2003 was effective in protecting the rights of those requested for extradition. There was no unanimous view on this or on how the bar could be made more effective.

41. Several witnesses criticised the effectiveness of the bar and argued that courts had, in practice, been unwilling to refuse extradition on human rights grounds.[36] Liberty argued that "in practice the Sections have provided very little protection to a minimal number of persons."[37] Sally Ireland, Director of Criminal Justice Policy at JUSTICE, agreed that courts were "very unwilling to find violations."[38] This was echoed by Catherine Heard, Head of Policy at Fair Trials International, who argued that "in practice English courts seem to be unwilling" to bar extradition on human rights grounds.[39] Fair Trials International argued that its casework had shown that "courts are not proactive enough when alerted to a potential risk of rights infringement."[40]

31 [2008] UKHL 16

32 [2009] EWHC 1845 (Admin)

33 [2009] EWHC 2879 (Admin)

34 [2011] All DR 116

35 [2011] All ER 70

36 Fair Trials International, Liberty, JUSTICE, David Bermingham and Charlotte Powell all made the point to the Committee that the human rights bar was ineffective in practice.

37 EXT 6

38 Q 3

39 Q 3

40 EXT 25

42. Witnesses gave three reasons for the ineffectiveness of the bar and the unwillingness of judges to refuse extradition on human rights grounds: the high threshold test established by the courts, the difficulty experienced by defence lawyers in obtaining evidence to support a case and the unwillingness of the judiciary to engage in the political process of extradition. The first issue is considered from paragraph 45.

43. On the second issue, Jodie Blackstock, Barrister and Senior Legal Officer, EU Justice and Home Affairs at JUSTICE, told us that "often extradition defence lawyers are given instructions by their clients [...] which engage human rights issues, but they are not given the requisite evidence to prove those to the standards that our courts expect."[41] Charlotte Powell, a practising extradition lawyer, also noted the difficulty "defence lawyers have in trying to locate evidence to put before the court to substantiate the risk of a breach of human rights."[42] We return to this issue and possible solutions in Chapter 3.

44. On the third issue, Liberty argued that "in practice the sections have provided very little protection to a minimal number of persons, mostly due to judicial reluctance to engage in what is seen as the largely diplomatic and political process which is extradition."[43] We return to this issue later in this Chapter and in Chapter 5.

The threshold for refusing extradition on human rights grounds

45. Many witnesses noted the importance of case law in setting the threshold of the human rights bar to extradition. The then Minister told us that "the question of the right level of human rights protections is itself controverted and to some extent that level is moving. Individual cases give rise to changes in law."[44]

Extradition within the EU

46. There was much discussion of this high threshold and some witnesses questioned whether the Act provides sufficient protection for persons subject to extradition.

47. Jodie Blackstock said that "the starting point of our courts is not to go behind their systems. We have to have an element of trust in the way that they work."[45] The Director of Public Prosecutions, Crown Prosecution Service, Keir Starmer QC, explained that "the approach has been that the individual can rebut that presumption by clear and cogent evidence that there will be a breach of his or her human rights."[46] Jodie Blackstock argued that "had they [the courts] been looking at prison conditions in the UK, they would apply a more critical analysis to the evidence that is presented before them."[47]

48. In its submission to the Extradition Review, the Law Society explained that:

41 Q 3

42 Q 138

43 EXT 6

44 Q 218

45 Q 3

46 Q 175

47 Q 3

> "a higher threshold for establishing a breach of rights is applied in extradition proceedings than would otherwise be purely domestic criminal proceedings. UK courts will presume that parties to the ECHR and other international human rights agreements will comply with their obligations; particularly so where the requesting State is an EU Member State."[48]

49. Charlotte Powell noted that the cases of *Jan Rot* and *Klimas* had excluded any possibility of a defendant in extradition proceedings rebutting the presumption that signatories of the ECHR would meet their obligations under the Convention. In the case of *Klimas*, the judgment suggested that "the district judge need not, save in wholly extraordinary circumstances [...] examine the question at all."[49] The Director of Public Prosecutions agreed that "in the case of *Klimas*, it was suggested that the threshold is quite high. You would have to show that there was some constitutional defect in the country requesting whereby the human rights would not be upheld—possibility revolution or constitutional turmoil." He continued that "I can understand why people would have been anxious about the higher threshold."[50]

50. Both the Director of Public Prosecutions and Charlotte Powell noted that a recent authority challenged the high threshold test established in earlier cases. The DPP explained that in the case of *Targosinski,* the judge had said that if the Strasbourg court had found evidence of systematic human rights violations in a country, in this case Poland, that "might be sufficient for clear and cogent" evidence of the risk of a human rights breach if extradition proceeded. This meant that "if you can show consistent breaches that have been found by the Strasbourg court, you are getting close to clear and cogent evidence of a breach of human rights."[51] Ms Powell told us that "that is helpful to us as practitioners because it enables us to be aware that it is possible to use Section 21 of the Extradition Act 2003 to argue that extradition should be barred on human rights grounds."[52]

51. Fair Trials International and JUSTICE referred to *MSS v Belgium and Greece* where the ECtHR had held that:

> "the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment."[53]

The Court concluded that "any complaint that expulsion to another country will expose an individual to treatment prohibited by Article 3 [...] requires close and rigorous scrutiny."[54]

52. Fair Trials International noted a further difficulty in showing the necessary clear and cogent evidence of the risk of a breach of rights. It explained many challenges to extradition on human rights grounds failed as they did not show the risk of rights

48 Law Society response to the Home Office Extradition Review, March 2011, p.4, available at on the Committee website (www.parliament.uk/jchr)

49 Q 138

50 Q 175

51 Q 175

52 Q 139

53 EXT 20, EXT 25

54 EXT 25

infringements "with enough cogency or speficity to satisfy the judge that the requested individual risks a rights infringement."[55]

53. As a result, Fair Trials International considered that the human rights test made it "almost impossible" to challenge successfully extradition on Article 6 grounds. They cited the case of Andrew Symeou:

> "The mere theoretical availability of a legal remedy in the issuing state should not absolve the executing state of the duty to conduct a proper legal review of the risk of infringement raised by the requested extradition and to provide the protection necessary to safeguard those rights, including where necessary by refusing to extradite."[56]

54. Fair Trials International also cited the case of Da An Chen who was tried *in absentia* in Romania without his knowledge. During his extradition hearing the High Court held that "as Romania was bound by the ECHR, the provisions of its domestic law giving its courts a merely discretionary power to grant a retrial, should be interpreted so as to grant a right to a retrial" even though expert evidence was provided to show that Romanian law only granted the right to apply for retrial. Since his extradition, Da An Chen has been refused a retrial.[57] Liberty agreed that there was a concerning "tendency for a judge to assume that an adverse judgment from the ECtHR will have been rectified by the Member State in question."[58]

55. The recent European Commission report on the operation of the European Arrest Warrant similarly noted that "while an individual can have recourse to the European Court of Human Rights to assert rights [...] this can only be done after an alleged breach has occurred." It concluded that "this has not proved to be an effective means of ensuring that signatories comply with the Convention's standards."[59]

Extradition to non-EU territories

56. Although category 2 territories are not necessarily signatories to the ECHR, witnesses suggested that there was still a presumption that territories with which the UK had extradition arrangements would respect fundamental rights.

57. Mr David Bermingham told us about his experience of being extradited to the United States under Part 2 of the Act (commonly known as the "NatWest Three" case). He said that "with Article 6 [right to a fair trial], we knew we were always going to lose because it has long been European jurisprudence that the standard test that you must meet in order to demonstrate that your chances of a fair trial are slim is flagrant breach." His case relied on Article 8 [right to private and family life]:

55 Ibid.

56 EXT 25

57 Ibid.

58 EXT 24

59 COM (2011) 175

> "what we argued [...] was it was neither necessary nor proportionate to extradite us because the case not only could but should have been heard in the UK because all of the facts, all of the evidence and substantially all of the witnesses were here."

He concluded that "if we stick with the current framework of the Extradition Act there are basically no protections [of human rights]".[60]

58. Mr Bermingham said that the case of Babar Ahmad demonstrated implicit trust that extradition arrangements with the US would respect fundamental rights. The judge had found in this case that:

> "the fundamental assumption of good faith on behalf of the requesting state where the requesting state is one in which the UK has for many years reposed the confidence not only of general good relations but also of successive bilateral treaties consistently honoured, the evidence required to displace good faith must possess special force."[61]

59. On the other hand, John Hardy QC, an extradition lawyer, argued in his submission that Part 2 of the Act had worked well in terms of protection of the rights of requested persons: "the fact that this Part of the Act works tolerably well is attested to by the relatively high number of cases, often of media prominence, which have resulted in the discharge of the person sought."[62]

Improving the effectiveness of the human rights bar

60. Several witnesses suggested methods for making the human rights bar to extradition more effective in protecting the rights of those subject to extradition.

61. Although Ms Powell welcomed the *Targosinki* decision, she considered that this judgment did not go far enough. She argued that practitioners may wish to point to a wide range of sources when looking to show the possibility of a breach of rights. These might include, "other experts in foreign jurisdictions such as lawyers from the requesting state who may be party to appeals that are being brought against requesting states that have not yet got to the European Court of Human Rights."[63]

62. We asked Ms Powell to clarify how she felt the human rights threshold should be revised. She explained that it should be amended so that "a person's extradition could be barred if evidence were to lead the judge to conclude reasonably that it would give rise to a real risk that that person would be subject to treatment which is contrary to or unlawful according to the Human Rights Act 1998."[64]

63. Fair Trials International have proposed an amendment to the human rights bar in relation to Category 1 states to make it more effective in protecting rights:

60 Qq 62–3.

61 Q 71

62 EXT 28

63 Q 142

64 Q 143

"(6) The person's extradition would not be compatible with the Convention rights if—

(a) there is a real risk that the person, if surrendered, would be subject to treatment in the category 1 territory that, if taking place in the United Kingdom, would be an act or omission made unlawful by section 6 of the 1998 Act;

(b) in relation to the matters giving rise to the Part 1 warrant, the person has been subject to such treatment in that territory; or

(c) the person's removal from the United Kingdom would be incompatible with the Convention rights.

(7) The judge shall not treat a matter set out in subsection (6) (a) or (b) as established unless there is material before him on which a court might reasonably so conclude; but if there is such material before him, he shall treat that matter as established unless satisfied to the contrary."[65]

64. Fair Trials International considered that this amendment would ensure that the threshold was not set too high (as suggested by Ms Powell) and would place the burden of providing evidential proof of the risk on the requested person. Once the requested person had shown the risk of interference with a Convention right, it would be up to the requesting country to justify this interference.

65. JUSTICE agreed that UK courts should consider reports from organisations such as the Committee for the Prevention of Torture (CPT): "they should not require evidence (often impossible to obtain) that, in a state where conditions frequently breach Article 3, that the person will be sent to a facility where conditions are similarly poor."[66]

66. Jodie Blackstock was not convinced that it would be possible to amend the test itself to make it more effective. Instead she suggested an amendment to Section 21 of the Act, which requires the courts to look at human right issues from the perspective of the Charter on Fundamental Rights of the European Union. She suggested that looking at these issues from the perspective of the Charter instead would lower the threshold required to prove a violation.[67] In its submission to the Extradition Review, JUSTICE argued that "the Charter is a more contemporary and extensive human rights instrument, which explicitly provides that the ECHR standards should not prevent the Union providing more extensive protection." It concluded that by including the Charter within the human rights bar to extradition "certain standards could be raised within the EU."[68]

67. Liberty suggested that the greater protection for the human rights of requested persons would not come from amending the threshold, but from adding further procedural safeguards into the Act which the judge would be required to consider in each case: "the technique of having a generalised bar on human rights grounds is not an adequate

65 Fair Trials International submission to the Extradition Review Panel, 21 December 2010, available at: http://www.fairtrials.net/publications/article/submission_to_the_extradition_review_panel

66 EXT 20

67 Q 4

68 JUSTICE Response to the Home Office Extradition Review, January 2011, p. 13, available at: http://www.justice.org.uk/data/files/resources/163/Home_Office_Extradition_Review_-JUSTICE_response_jan11.pdf

substitute for other procedural legislative protections."[69] We consider the safeguards suggested by witnesses, including particularly a most appropriate forum and *prima facie* case requirement, in Chapter 3 of this Report.

68. Other groups have suggested that there is no need to amend the threshold. The Director of Public Prosecutions told us that the threshold had at first been set very high but, as noted above, recent cases had lowered it. In its submission to the Extradition Review, the Law Society similarly concluded that it did not believe that the court's powers need to be strengthened although the submission called upon courts to "exercise their inherent abuse jurisdiction where appropriate."[70]

69. John Hardy QC noted that when the Extradition Bill was before Parliament the prevailing view was that the human rights "provisions constituted some sort of universal panacea against injustice and/or unfairness in the scheme and processes of extradition. In the view of many, they have proved to be anything but." He continued, however, that in his view:

> "the courts have set the bar at the right level [...] there is a strong presumption that the requesting judicial authority will honour its Convention rights obligations, and that presumption can only be displaced by cogent and powerful evidence. Any student of the jurisprudence of the courts of the United Kingdom will see this test appropriately applied in the vast majority of cases."

He noted that "any extradition scheme will inevitably produce cases which expose its innate imperfections."[71]

70. As the Extradition Review was in progress when the then Minister gave oral evidence, she did not comment on the operation of the threshold beyond noting the importance of case law in setting the level of the threshold of the human rights bar and the problems that had been raised by commentators.[72]

71. **We have heard evidence that Sections 21 and 87 of the Extradition Act 2003 do not, in practice, offer adequate human rights protection for those subject to proceedings and that the courts have set their interpretation of the threshold too high. We welcome recent developments that have seen UK courts apply an apparently lower threshold, as demonstrated in the case of Targosinski v Judicial Authority of Poland. The defendant should have a realistic opportunity to rebut the presumption that their human rights will be respected if extradited to a country which is a signatory to the ECHR or with which the UK has good relations.**

72. **Several witnesses have suggested that defence lawyers should be able to call upon a wider range of evidence, including reports of the Committee on the Prevention of Torture, to illustrate human rights concerns in the requesting country. The human rights bar would be more effective if material such as reports of the Committee on the Prevention of Torture were regarded as relevant evidence. We find the concerns about**

69 EXT 6

70 Law Society response to the Home Office Extradition Review, March 2011, p 5

71 EXT 28

72 Q 218

the effectiveness of the bar persuasive. Below we examine the suggested safeguards and specific amendments to UK extradition policy with a view to improving human rights protection.

Increased judicial involvement in extradition process

73. Several witnesses commented on the importance of the role of the judiciary in the extradition process and were critical of the automatic nature of the extradition process. The courts were criticised for insufficient scrutiny of extradition requests.

74. Liberty argued that "the flaws of the extradition system have also been highlighted by numerous judges whose role in relation to extradition has, in many cases, been confined to a rubber stamp by the 2003 Act."[73] The Freedom Association agreed that "the national judiciary's role in the process is just to rubber stamp the extradition of a UK citizen, even if it has grave concerns about the case and about the treatment the citizen will receive."[74]

75. Witnesses were not in favour of involving the Executive in Part 1 cases or increasing its role in Part 2 and instead favoured increasing the effectiveness of the role of the judiciary. We return to the role of the Executive in Chapter 5.

76. Catherine Heard argued that it was important "to build in sufficient discretion for judges who are dealing with extradition requests to make sure that certain flexibility remains in the system to avoid miscarriages of justice in extradition cases."[75] Further safeguards and clarification of the human rights bar could ensure that the judiciary played a role beyond "rubber-stamping" of requests. Others, including the Law Society as noted above, have called for the courts to make use of the powers available to them.

77. John Hardy QC agreed that "the virtual extinction of judicial discretion, and the paring down of the function of judicial evaluation are inherently unsatisfactory from a common law perspective." He continued that "in Part 1 cases [...] the judicial control theoretically envisaged by the Framework Decision must depend on the capacity of the Act to permit the proper exercise of judicial decision-making."[76]

78. Witnesses argued that the increasing automaticity of extradition under both Parts 1 and 2 of the Extradition Act 2003 and the diminished role of the judiciary had reduced human rights protection when discussing safeguards or the human rights threshold, but the role of the judiciary is inextricably linked to both these areas. The human rights threshold and safeguards are the tools by which the judiciary can ensure that the rights of those requested for extradition are protected. **The effectiveness of human rights protection would be improved if judges in extradition cases took a more active role in the extradition process, through the implementation of safeguards and the use of the human rights bar to ensure that the role of a judge in an extradition case is more than only "rubber stamping" extradition requests.**

73 EXT 6

74 EXT 2

75 Q 15

76 EXT 28

Human rights in deportation cases compared to extradition cases

79. During the course of our inquiry, we asked witnesses to compare the human rights protections available in deportation cases. Charlotte Powell noted that "in an immigration or a deportation case, I have to concede that the person who is being sent back is not necessarily wanted for the commission of an offence. Therefore, there might be a different balancing exercise in the threshold test which is set."[77]

80. The Director of Public Prosecutions told us that in deportation cases "there is obviously very extensive scrutiny, because you are talking about a situation where somebody might lose their life or be subjected to torture." In extradition cases "more often you would be dealing with Article 5 on the right to liberty, Article 6 on fair trials and Article 8. They are by their nature different rights." He concluded that you would deal with a deportation case in more detail as their life is more likely to be at risk than in an extradition case.[78]

81. The effect of both extradition and deportation process are the same in that they can both lead to removal from the UK. However, witnesses have noted fundamental differences: deportation may be for breach of a condition of entry and unlike extradition it is not part of the criminal process. We note a further difference. In many deportation cases, the individual has been convicted of a criminal offence, whereas in extradition cases the presumption of innocence still applies (except in cases where a person is extradited to serve a sentence). The discrepancies between the standards of human rights protection in extradition and deportation cases are likely to become more evident, given the increasing number of successful challenges to deportation orders under Article 8.

The rights of victims in the extradition process

82. A number of different groups of people are affected by extradition. In this Report, we consider the rights of UK citizens or residents in the United Kingdom who are accused of crimes overseas and are requested for extradition. Victims of crime are also affected by the UK's extradition policy: both those UK citizens or residents who have been the victim of a crime and the accused is either resident in, or has absconded to, a foreign jurisdiction and the victims of crimes in foreign jurisdictions where the accused is resident in the United Kingdom. We consider the rights of all victims, in particular those resident in the UK, as well as the rights of requested persons in the extradition process in this Report.

83. When we discussed this issue with the then Minister she agreed that "it is not always just the suspect who has cause for anxiety; it is also the victim." She also noted that "the interests of justice are certainly served by both extraditing and facilitating the process under the rules."[79] Through extradition, the accused can be returned to the country where the crime allegedly took place in order to facilitate the process of justice, which is in the interests of the victims of crime. The extradition process has to be effective in order to ensure that alleged offenders can be returned to the United Kingdom, as well as protecting the rights of persons requested for extradition abroad.

77 Qq 144–5

78 Q 176

79 Qq 215–6

84. We received evidence from an individual who asked us not to print his name. This individual set out his experience of the extradition process from the perspective of a victim of a crime, the alleged perpetrator of which had absconded to another country. They criticised our inquiry and particularly the Call for Evidence for not including the rights of victims of crime or the extradition of persons to the UK to be tried: "there is a high probability that evidence will be biased heavily towards issues surrounding export extradition of suspects with little balance for import extradition of suspects or victims of crime in both import and export extradition cases."[80] In response to these comments, Committee staff contacted victims' organisations in an attempt to receive evidence representing this point of view but without success. This Report intends to address these issues as well as the rights of those requested for extradition.

85. **We urge the Government and the Extradition Review Panel, when considering changes to the extradition process, to take into account the rights of victims of crime, both in the UK and other countries, as well as the rights of those subject to extradition. The process of extradition is important in ensuring that criminals are brought to justice and there is a need to ensure balance between this and protecting rights of those subject to extradition.**

80 EXT 3

3 Improving the protection of Human Rights in the Extradition Act 2003

86. This chapter examines the suggestions for further human rights safeguards that could apply to extradition proceedings generally.

Most appropriate forum provision

87. Many witnesses argued that the Extradition Act 2003 should be amended to include a forum safeguard. This would require the judge to consider whether it is in the interests of justice for the requested person to be tried in the requesting country and to refuse the extradition request if it is not. This would not apply to extradition requests where the offence had taken place wholly in the requesting country.

Previous attempts to introduce a forum bar

88. It was noted by Fair Trials International and Liberty[81] that Article 4(7)(a) of the Framework Decision provides that extradition can be refused where the alleged offence is regarded as having been committed "in whole or in part in the territory of the executing Member State." This, in effect, constitutes a forum bar to extradition.

89. Not all of the optional bars to extradition in Article 4 were transposed into the Extradition Act 2003. The forum bar to extradition was not transposed and neither did the Act include a forum bar for extradition to Category 2 countries. During the passage of the Police and Justice Bill 2006, the House of Lords agreed an amendment to the Extradition Act 2003 to allow a court to bar extradition to both Category 1 and Category 2 countries if it was felt that this was not in the interests of justice:

> "19B Forum
>
> "19B(1)A person's extradition to a category 1 territory ("the requesting territory") is barred by reason of forum if (and only if) it appears that—
>
> (a)a significant part of the conduct alleged to constitute the extradition offence is conduct in the United Kingdom, and
>
> (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.
>
> (2)For the purposes of subsection (1)(b) the judge must take into account whether the relevant prosecution authorities in the United Kingdom have decided not to take proceedings against the person in respect of the conduct in question.
>
> (3)This section does not apply if the person is alleged to be unlawfully at large after conviction of the extradition offence."

81 EXT 5 and EXT 6

90. These amendments were incorporated in the legislation alongside an additional clause that required a resolution of both Houses of Parliament to bring the amendments into force. This has never happened. During the House of Commons debate on the Bill, the then Home Secretary John Reid explained the inclusion of the additional clause as follows:

> "We have tabled the amendments in their proposed form simply to ensure that the Bill does not fall. As a technical measure to comply with the conventions of both Houses, we have inserted a so-called sunrise provision, which ensures that the amendments never see the light of day. Under the amendments, both Houses would need to pass a resolution before the amendments could come into force. The Government are not, of course, obliged to bring forward such a resolution, and have no intention of doing so."[82]

91. He argued that if the forum amendment were to come into force, it would require the renegotiation of the UK-US Extradition Treaty and other extradition treaties:

> "[...] forum does not appear in the treaty at all. If we therefore impose a forum requirement on the treaty, that will be outside the existing treaty. That is not to say that it will never be acceptable to the United States or anyone else, but, in strict legal terms, it would require a renegotiation of the treaty. As I said, it would require a renegotiation not just with the United States, but with approximately 20 other countries."[83]

92. Liberty, however, showed us legal advice provided by Edward Fitzgerald QC and Julian Knowles QC which concluded that "there is [...] no basis on which it can be asserted that enactment of the Forum provisions would place in the UK in breach of its international obligations."[84]

Evidence on forum safeguard

93. It has been suggested that the Government should enact the forum provisions contained in the Police and Justice Act 2006. It was argued that it would improve the protection of the rights of those subject to extradition, as it would enable a judge to consider Article 8 rights and in many cases would allow the requested person easier access to legal representation and evidence.

94. Liberty suggested that the forum amendment would "ensure recognition of the serious impact of extradition on a person and their family and allow cases to be prosecuted in the country where most evidence is available."[85] David Bermingham told us that when extradited to the United States:

> "we were 5,000 miles away from everything that we needed to defend our case, the witnesses and the evidence, all of which were in the UK. We had no access to them and no rights of subpoena when we were in America."

82 HC Deb (2006–7) 6 Nov 2007 c662

83 Ibid.

84 Legal advice obtained by Liberty, November 2009, available at: http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-submission-to-jchr-extradition-inquiry-january-2011.pdf

85 EXT 6

He argued that "were you to have a forum clause within the Act that would pretty much do the job, particularly on Article 8."[86]

95. The witnesses referred to in paragraph 84, who asked to remain anonymous, criticised the proposed forum amendment for the impact it would have on the victims of crime. The evidence noted that barring extradition or holding a trial in the United Kingdom "would be an abuse of victims' Human Rights if they and/ or their families [...] had to incur overseas travelling costs to see justice done." The evidence continued that "any proposal to hold trials and allow sentences to be served in UK in export extradition cases is unaffordable, a completely unnecessary burden on the taxpayer and impractical." [87]

96. Jodie Blackstock of JUSTICE argued that the purpose of extradition was to ensure "that criminals do not evade justice. If they can be tried in this country, there is no question of them evading that justice."[88] Charlotte Powell agreed that "I can see why it would be particularly useful for a district judge to be able to exercise his or her discretion on whether the forum conditions should be implemented."[89] The judge would make the decision to apply the bar based on the individual circumstances and so could take the rights of victims into account, as well as the arguments of the requested person.

97. In its submission to the Home Office review, the Law Society agreed that a "forum bar would [...] provide far stronger protection to the person whose extradition is being sought" than defences under the human rights bar on Article 8 grounds. It noted that "Ireland and a number of other European jurisdictions require forum to be considered" and called for the measures in the Police and Criminal Justice Act 2006 to be implemented.[90]

98. We asked the then Minister whether the Government would consider implementing the forum safeguard. She told us that if the Extradition Review Panel recommended a forum safeguard be implemented the Government "would want to look at it positively."[91] She also told us that there may be room to make adjustments to the US-UK Extradition Treaty which were "in the spirit and intention of the Treaty."[92]

99. **A forum safeguard provision would allow a judge to refuse extradition where the alleged offence took place wholly or largely in the UK. Parliament has already agreed this principle and the Government should bring forward the relevant provisions of the Police and Criminal Justice Act 2006, in order for Parliament to agree to commence them. It is difficult to understand why this has not yet happened.**

100. **Government Ministers currently issue an explanatory memorandum to the European Union scrutiny committees of both Houses on each forthcoming EU proposal. However, the legislation transposing these proposals into UK law is not considered by the scrutiny committees. When introducing transposing legislation, the**

86 Qq 61–3

87 EXT 3

88 Q 10

89 Q 155

90 Law Society response to the Home Office Extradition Review, p.12

91 Q 227

92 Q 240

Government should be under an obligation to inform Parliament: how the relevant EU proposal is being transposed into domestic law; whether the transposing legislation would make any additional provisions or omit to transpose any provisions of the EU legislation; any areas where the Government have exercised discretion; and whether any difficulties have arisen during the transposition of the proposal which the Government did not explain to the European scrutiny committees that considered the original proposal.

101. **It is important to respect the rights of victims, who will often be residing in the country in which the offence was committed, when deciding the location of a trial. The forum provisions would allow a judge discretion to determine the appropriate location of trial on a case-by-case basis, taking into account the rights of both the requested person and of any victims of crime, as well as any other circumstances, including access to a legal representative and evidence. There should be a general presumption that trials take place in the state where the offence was committed, in the interests of access to that process by the victims of that offence. On this basis, we wholeheartedly support the introduction of a forum safeguard.**

102. We note the case-law of the Court of Justice of the European Union (ECJ) on the double jeopardy or *non bis in idem* principle.[93] In the case Gaetano Mantello[94] the ECJ held that "a requested person is considered to have been finally judged in respect of the same acts within the meaning of Article [4(3)] of the [EAW] Framework Decision where, following criminal proceedings, further prosecution is definitively barred" (para 45) and in Mario Filimeno Miraglia[95] the ECJ required a determination as to the merits of the case before the double jeopardy/*non bis in idem* principle could apply (para 35). Such a determination can include a decision not to prosecute on the part of the Public Prosecutor.

103. We did not hear evidence on this point, but we are of the view that this case-law strengthens the forum provisions in the Framework Decision and would strengthen a forum provision in the Extradition Act 2003 as it would allow the judge to take into account a decision not to prosecute taken by prosecution authorities which are not judicial in nature (such as the Crown Prosecution Service).[96]

104. **We recommend that the case-law on double jeopardy be codified so that extradition under an EAW is barred where the CPS has decided not to prosecute for the same facts. This would strengthen an eventual forum clause. Such amendment could be done by adding a third paragraph to section 12 of the Extradition Act 2003.**

105. There appears to be some disagreement over whether the forum safeguard would be permitted under the UK-US Treaty and other bilateral extradition treaties without renegotiation. We did not take detailed evidence on this point and so we come to no conclusion. **The Government should look at how such a safeguard could be implemented in practice including, if necessary, through renegotiation of the relevant extradition treaties.**

93 No legal action can be initiated twice for the same alleged action.

94 C-261/09

95 C-469/03

96 We note the Supreme Court of Ireland is currently considering this point in relation to the case of Ian Bailey, who has been requested for extradition to France.

Prima facie case

106. It has been suggested that it be a requirement for a requesting country to present a *prima facie* case when requesting extradition of a person from the United Kingdom. In the context of extradition, a requirement for a *prima facie* case would mean that a court could bar extradition if it was not satisfied that a requesting country had shown that the requested person had a case to answer.

107. Those who gave evidence to us were not agreed on whether requiring a *prima facie* case to be presented in all extradition cases would be a helpful safeguard. Liberty argued that "a *prima facie* case must be established prior to extradition [...]. Before such a significant engagement of a person's human rights it must be determined whether there is a case to answer." The submission went on to argue that this would provide "an essential safeguard" by ensuring there is a genuine case to answer for all extradition requests.[97] Sophie Farthing of Liberty argued that such a safeguard would ensure "that no one is extradited before it is known that there is a case against them." She noted, however, that "the *prima facie* case safeguard will not pick up on all cases where there is a potential injustice."[98]

108. Other witnesses did not agree with Liberty that the extra protection offered by requiring a *prima facie* case to be presented for all extradition requests was enough to justify the difficulty of its implementation. Sally Ireland of JUSTICE argued that "it is important not to attach too much importance to this as a safeguard [...] only in a small number of cases will we say that prima facie would safeguard somebody against wrongful extradition."[99] Jodie Blackstock noted that the European Arrest Warrant had removed the need for a *prima facie* case in order to make the process of extradition more streamlined and argued that "it is just unrealistic to start looking at importing back a *prima facie* case." She continued that "we are not going to be able to convince our EU partners that we ought to start looking with more scrutiny at the level of evidence that is provided."[100]

109. The submission of JUSTICE to the Extradition Review argued that requirement for a *prima facie* case to be presented for European Arrest Warrant requests should not be a priority:

> "We do not believe any of these [problems with the EAW] would be solved by insisting on a *prima facie* evidence requirement. Nor do we believe that it is realistic to attempt to import such a test back into the scheme for requests received by the UK. Should there be doubt about the veracity of a request, the Act allows for dialogue with the issuing state, and indeed many cases have involved lengthy delays whilst further evidence is sought to clarify matters raised on the form, such as identification and types of offence."[101]

110. The Law Society, in its submission to the Extradition Review, did not call for the reinstatement of the *prima facie* case requirement: "the existing exceptions to the

97 EXT 6

98 Qq 4–5

99 Q 5

100 Ibid.

101 JUSTICE Response to the Home Office Extradition Review, p 25

requirement to provide prima facie evidence diminish its status as a general rule [...] the Law Society considers that the robustness and bona fides of a request may be challenged by the alternative avenues provided for under the 2003 Act."[102]

111. There is no optional safeguard in the Framework Decision of the European Arrest Warrant which would allow a requirement for the presentation of a *prima facie* case to be implemented in UK law. As such, it would require renegotiation of the Framework Decision in order to implement this safeguard. In the case of category 2 countries the situation is more complex and adding a *prima facie* case safeguard where one does not already exist may require the renegotiation of some bilateral treaties.

112. **We agree with Liberty that adding a requirement for the requesting country to show a *prima facie* case—or a similarly robust evidential threshold in a civil law state—before a person is extradited will improve the protection of human rights of those subject to extradition. In particular, this will require investigatory authorities to assess the available evidence before issuing a request for extradition, particularly within the EU, thus reducing the likelihood that a person could be extradited on speculative charges or for an alleged offence which they could not have committed.** We consider the issue of the *prima facie* case specifically in relation to the US-UK extradition treaty in Chapter 5.

113. When we heard evidence from people who had been subject to an extradition request, Mr Edmond Arapi explained how an EAW request was issued for his extradition to Italy for an offence he could not have committed, as he was in the United Kingdom at the time. He told us that "the EU warrant [...] is fighting the impossible. If they want you somewhere, whether you have evidence or not, they will send you there regardless."[103] In cases such as this it might be that a *prima facie* test would help prevent wrongful extradition, as it would allow the judge the possibility of considering the evidence presented and barring extradition where there was clearly a case of mistaken identity. Fair Trials International argued that Mr Arapi's case showed the need to amend the Extradition Act to allow the UK to seek more information where there may be a case of mistaken identity.[104] The Police explained to us the process by which the person sought for extradition was identified and it seems likely to us that cases of mistaken identity are most often on the part of the requesting country.[105] A *prima facie* requirement would enable a judge to consider whether enough evidence had been provided to show the requested person had a case to answer. As noted above, JUSTICE argued that the Act allowed for dialogue with the issuing state to receive further information on subjects such as the identity of the requested person.

114. Witnesses reported that European Arrest Warrant requests were made for investigative purposes.[106] In relation to the case of Michael Turner, who was extradited and released without being charged, Jodie Blackstock of JUSTICE expressed concern that requests for extradition would still be successful even with a *prima facie* safeguard since "if

102 Law Society response to the Home Office Extradition Review, p 15

103 Q 52

104 EXT 1

105 Q 92

106 See the case of Michael Turner, Qq 32–42 and EXT 1.

they were in a position to be able to seek extradition in the case [...] they are going to be able to provide and support their request with evidence which will satisfy the prima facie test."[107]

115. We note, however, that the Article 15(2) of the Framework Decision provides the possibility for further information to be requested from the requesting state. **We recommend that, in cases where identity is disputed or where there are doubts as to the stage of proceedings reached in the requesting state, this facility to request further information be used. We recommend that the UK devote negotiating efforts to securing longer time limits for cases where an information request has been made. Where identity is disputed, as in the case of Mr Arapi, the requesting state should be asked to provide a copy of the national identity card or passport or other photo ID. Where there are doubts as to the proper use of the EAW, the requesting state should be asked to provide information on the indictment process under their national law, the stage of proceedings reached, the date set for the first hearing and an assurance that the individual will not be interrogated on arrival.**

Legal representation in extradition cases

116. In Chapter 2, we set out comments from witnesses on the effectiveness of the human rights bar to extradition. One of the three main reasons given for the ineffectiveness of the bar in protecting human rights of those subject to extradition requests was the difficulty for the defence to provide evidence in support of a case against extradition. Witnesses discussed with us two issues: the importance of legal representation in the requesting country and the adequacy of legal representation in the United Kingdom.

117. In order to make a successful defence against extradition on human rights grounds we were told that it was important to have legal representation in both the requesting and the requested country. Catherine Heard of Fair Trials International argued that legal representation in both countries was "absolutely crucial for a number of reasons" including quickly gathering evidence showing a risk of a breach of rights if extradited. She explained that a legal representative in the requesting country would be able to contact the prosecutor's office to overcome difficulties such as cases of mistaken identity and the possibility of the requested person paying a fine rather than receiving a custodial sentence, which would lessen the Article 8 implications of extradition. She concluded that "it could reduce the cost and the time as well as the human impact of an extradition request to make sure that legal representation is in place in both countries."[108]

118. Jodie Blackstock, representing JUSTICE, said she would "absolutely agree" with this argument.[109] A lawyer in the requesting, as well as the requested, country would be able to challenge the issuing of a warrant in the requesting country, provide information about the nuances of the legal system in the requesting state and help provide evidence to meet the level of proof required to bar extradition on human rights grounds. She noted that "we are

107 Q 7

108 Q 23

109 Q 24

fortunate in this country that legal aid is provided [...] where it is possible to show that expert evidence from the other country is required, but it is very ad hoc."[110]

119. Charlotte Powell agreed that it was important for a requested person to have the assistance of a lawyer in the requesting country. She told us that "if legal aid were automatic in extradition hearings, both for the provision of funding of services by defence lawyers in the United Kingdom and of a lawyer to represent them in a foreign state once returned, that would smooth the process for the requested person." She argued that courts had been reluctant to provide the certificate for counsel required to obtain expert evidence from abroad, further increasing the difficulties for defending a client on human rights grounds.[111]

120. We wrote to the Secretary of State for Justice, Rt Hon Kenneth Clarke MP, to ask what legal aid was available for a requested person to pay for a lawyer in the requesting country. He explained in his reply that if a defendant wished to apply for legal aid in the requesting country, the defendant would need to apply for legal aid in accordance with the procedures in that country.[112]

121. Charlotte Powell also raised concerns about the level of legal representation in the United Kingdom provided to people requested for extradition. She told us that the majority of people subject to extradition would be seen by a duty solicitor for only around half an hour before their trial, most of which will be spent completing the legal aid form. This may leave only five or so minutes to discuss "the intricacies of the Extradition Act and the personal circumstances of the requested person." In some cases, people from abroad will not have the requisite information to complete the legal aid forms and may be unrepresented at their extradition hearings.[113]

122. Charlotte Powell explained further that as a large number of people involved in extradition proceedings are foreign nationals, they often have difficulty in supplying the evidence required (tax returns, hours worked, bank balances, rent and partner's income) to secure legal assistance. This means that "even though a requested person's low earnings might qualify them for legal aid, for many it is impossible to provide the necessary documentation." She suggested that a holistic approach to legal aid, where it was granted to all involved in extradition proceedings automatically, would help in this respect.[114]

123. In its submission to the Extradition Review, the Law Society noted that "anecdotal evidence suggests that the introduction of means testing in the Magistrates' Courts effectively denies access to legal aid for defendants in extradition proceedings, where the time taken to process applications exceeds the length of those proceedings."[115]

124. The Secretary of State for Justice explained that any individual subject to extradition proceedings could apply for legal advice subject to a financial means assessment and an "Interests of Justice" test. He continued that given the adverse impact of extradition on the

110 Q 3

111 Qq 146–52

112 EXT 26

113 Qq 145–7

114 EXT 30

115 Law Society response to the Home Office Extradition Review, p 2

liberty and livelihood of an individual "it is likely that in most cases the "Interests of Justice" test will be met." He expressed confidence that the level of service provision met the legal obligations of the UK under the ECHR.[116]

125. When asked whether defendants have sufficient time with a duty solicitor, the Secretary of State noted that the Extradition Review Panel had met with Ministry of Justice officials "to explore the interaction between the provision of legal aid services and the overall processes for handling extradition cases." He continued that it was likely that "MoJ will undertake further analysis of the legal aid arrangements to help inform the Review Panel's recommendations." Other witnesses also commented on the strict time limits in the European Arrest Warrant which can also create problems for legal representation.

126. **We have heard compelling evidence on the importance of dual representation for a requested person in order to ensure that their rights are safeguarded. We do not believe that the present provision of legal representation meets these needs. We recognise, however, the current climate of reduced funding for legal aid. We urge the Government to examine the provision of legal representation in extradition proceedings in order to ensure that people subject to extradition are properly represented both in the requesting and requested country. We welcome the Extradition Review Panel's consideration of this issue. Legal representation in both countries for persons requested for extradition would make the human rights bar and other safeguards in the extradition process more effective in protecting rights.**

Securing adequate protection of rights

127. **When our predecessor Committee considered the draft Extradition Bill in the 2001–02 Session, it was satisfied that the requirement for a judge to consider the impact of extradition on a suspect's Convention rights would provide adequate protection for those rights. Our inquiry, and specifically this and the previous Chapter, has considered whether that judgment has been borne out in practice and has revealed that the mere presence of such a "human rights bar" in the statutory framework is not enough to secure effective protection for human rights. For such protection to be practical and effective it is necessary to go beyond such generalised provisions and to spell out in detail in the statutory framework some specific and detailed safeguards of the rights in question.**

4 The European Arrest Warrant

128. In this chapter, we consider the human rights implications of the EAW and the suggestions that have been made to improve the practical protection of rights in the EAW process.

Advantages of the European Arrest Warrant

129. Although much of the evidence we received was critical of the European Arrest Warrant, several witnesses praised some aspects of the system. Commander Gibson, representing the Association of Chief of Police Officers (ACPO) said that "when you need to have someone arrested abroad, it is a simpler, faster and more certain process of getting a person before your courts. The police service benefits from that. It is much easier than what went before."[117] The Director of Public Prosecutions agreed that the advantage of the European Arrest Warrant was that it was much quicker than the previous system and that it removed the executive from the process. It also dealt with the previous problem of several countries not surrendering their own nationals.[118]

130. The Minister noted that "the chances of getting someone back are greatly increased by the existence of the system, for all its imperfections [...] the interests of justice are certainly served by both extraditing and facilitating the process under the rules."[119] The EAW therefore facilitates the process of justice and helps ensure that the victims of crime see justice done on a more regular basis. **We recognise the importance of extradition and the benefits the EAW has brought in terms of a quicker, more streamlined process for surrender within the European Union.**

The system of mutual recognition

131. The operation of the European Arrest Warrant is based on the principle of mutual recognition of judicial decisions. This principle is based on the mutual trust of one Member State in the criminal justice procedures of another Member State.

132. Some of our witnesses criticised mutual recognition. Fair Trials International argued that "standards of justice vary greatly from one EU country to another and human rights do not receive the same respect in every Member State", concluding that "blind faith in the criminal justice systems of our EU neighbours has led to many cases of injustice."[120] Liberty agreed that there was a "wide disparity in the treatment of criminal suspects, with the prison conditions and criminal justice processes afforded in various Member States repeatedly falling foul of the Convention."[121] The Freedom Association made a similar point: "there are simply too many differences between all the different member states when it comes to justice systems and legal traditions, which are impossible to overcome. Thus

117 Q 129

118 Q 184

119 Q 216

120 EXT 1

121 EXT 24

there can never be the mutual trust and recognition which is needed for the European Arrest Warrant system to be able to work."[122]

133. The evidence we received from people who had been subject to extradition in the UK appeared to demonstrate the differing levels of respect for basic rights across the EU. For example, Frank Symeou described the poor conditions his son Andrew had encountered while imprisoned in Greece.[123] We note that it is difficult to draw a wide conclusion on the standards of justice in the EU from this very small sample.

134. The recent European Commission report on the operation of the Framework Decision noted that "despite the fact that the law and criminal procedures of all Member States are subject to the standards of the European Court of Human Rights, there are often some doubts about standards being similar across the EU." The report continued that "a number of judgments [...] have highlighted deficiencies in some prisons within the EU."[124]

135. The solutions proposed by witnesses differed. The Freedom Association argued that "the Extradition Review should ask the Government to push for the suspension of the European Arrest Warrant due to a lack of mutual trust."[125] Fair Trials International argued that the lack of equality of legal protections meant that enhanced safeguards in the Extradition Act were "even more important." [126] Witnesses noted the importance of the EU Roadmap on procedural rights, which may help enhance procedural protections across the EU.

136. Baroness Neville-Jones, the then Minister, commented that "it is probably a matter of observation that human rights are not interpreted in all member states in the same way." She noted the criticism that "although in theory you get equal justice, in fact you do not." She told us that the Government were committed to the system and committed to raising standards elsewhere.[127]

137. Liberty commented on the link between the mutual recognition of judicial decisions and the reluctance of judges to refuse extradition on human rights grounds.[128] It is crucial that it is possible to rebut the presumption that rights are respected equally in all EU Member States. **We agree with this evidence and recommend that the Government should take the lead in seeking to ensure that there is equal protection of rights, in practice as well as in law, across the EU.**

138. In November 2009, the European Council adopted a "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings."[129] The Minister noted the importance of this Roadmap in ensuring equal protection of rights across the EU. The Roadmap invited the European Commission to bring forward

122 EXT 2

123 Q 54

124 COM (2011) 175

125 EXT 2

126 EXT 1

127 QQ 214–7

128 EXT 6

129 OJ C295 (30 November 2009)

proposals designed to implement a single standard of procedural rights across the EU. The proposals in the Roadmap are set out in Box 3. So far, only a proposal to provide access to a translator had been adopted. A proposal to ensure the right to information on criminal proceedings is currently under negotiation in the EU.[130] The Commission report on the implementation of the EAW notes that "preparatory work is underway by the Commission regarding the remaining measures."[131]

139. We wrote to the Secretary of State for Justice for more information on the Roadmap. The Minister told the Committee that the Roadmap aimed to take EU level action in a "focused, evidence based and targeted way that builds on the foundation of the European Convention on Human Rights." He noted that the Directive on Interpretation and Translation in Criminal Proceedings had been agreed in October 2010 and the draft Directive on the Right to Information in Criminal Proceedings was under negotiation with the European Parliament. A draft Directive on access to legal aid was expected to be tabled by the European Commission in the summer. The Government had opted-in to the first two Directives as they were "necessary and helpful measures [...] to improve procedural rights across the EU and support instruments of mutual recognition." The Government would examine the case to opt-in to each subject proposal on a case-by-case basis, with a view to "maximising our country's security, protecting Britain's civil liberties and preserving the integrity of our criminal justice system."[132]

140. Fair Trials International agreed that the Roadmap would strengthen procedural protections for those subject to extradition.[133] Baroness Neville-Jones told us that the Roadmap "ought to even up the standards that are observed in practice between member states" and that the proposals were "important practical safeguards, which should improve the real-life experience of people who get caught up in the legal systems of other countries."[134] Charlotte Powell broadly agreed.[135] While the Freedom Association noted the aims of the Roadmap, it argued that it did not go far enough.[136]

141. The recent Commission report on the operation of the EAW argued that there "must be adoption of the measures in the roadmap on procedural rights [...] to ensure that fundamental rights and freedoms are protected."[137]

142. The Roadmap is an EU proposal that aims to strengthen protections for people in legal systems across the EU, of which persons subject to extradition are just one category. The EU Committee of the House of Lords and the European Scrutiny Committee in the House of Commons scrutinise all EU proposals, including those set out in the Roadmap, and for this reason we do not comment on the merits or otherwise of the proposal in this Report.

130 COM (2010) 392

131 COM (2011) 175

132 EXT 26

133 EXT 1

134 Qq 213, 237

135 Q 162

136 EXT 3

137 COM (2011) 175

Box 3—the EU Roadmap

The EU Roadmap on procedural rights included six separate measures designed to increase procedural protections in the EU. The Roadmap proposed measures to implement the following rights for defendants in criminal proceedings:

- *Translation and Interpretation*
- *Information on Rights and Information about the Charges*
- *Legal Aid and Legal Advice*
- *Communication with Relatives, Employers and Consular Authorities*
- *Special Safeguards for Vulnerable Persons*
- *A Green Paper on the Right to Review of the Grounds for Detention*

Proportionality and imbalance

Box 4—EAW figures[138]

Year	EAW requests received by UK	Surrenders from UK	EAW requests issued by UK	Surrenders to UK
2006–7	3515	178	146	84
2007–8	2483	415	182	107
2008–9	3526	516	257	88
2009–10	4100	699	203	71

143. An EAW may be issued by any EU country for any offence which has a maximum sentence of longer than one year. Although there is no proportionality test in the Framework Decision, some countries, including the United Kingdom, apply such a test before issuing a request. The lack of a proportionality test in the Framework Decision has been criticised by witnesses because of the large number of requests received by the UK in comparison to requests issued and the human rights implications of the large number of requests for extradition for minor offences.

Existing proportionality tests

144. When an EAW request is received by the UK, it is certified by the Serious Organised Crime Agency (SOCA). The police locate and arrest the subject of the warrant. Detective Superintendent Murray Duffin of the Metropolitan Police Extradition Unit explained that

138 See EXT 032 for a full breakdown of figures

"no proportionality test is written into the framework or the legislation, so if we receive a request and it is certified and meets all the requirements, it is to be executed."[139] The Director of Public Prosecutions explained that the Crown Prosecution Service also has no discretion to choose whether to execute an EAW request.[140]

145. We heard from witnesses that when the UK issues an EAW, proportionality is a relevant consideration. Commander Allan Gibson, representing the Association of Chief of Police Officers, told us that when considering whether to proceed with an investigation "we are quite conscious of cost and have to bear in mind what the likely penalty might be at the end of the process. So cost and end product or outcome are relevant considerations."[141] The Crown Prosecution Service explained that the standard public interest test is applied before issuing a request:

> "a prosecution will only follow if the Full Code Test is met: namely that there is sufficient evidence for a realistic prospect of conviction; and it is in the public interest. The CPS applies the Full Code Test when deciding if an extradition request for a person should be prepared and submitted for a person who has yet to be charged with the offence."[142]

146. We asked the non-governmental organisations what assessment they had made of the UK's use of the EAW for requesting extradition. Catherine Heard told us that Fair Trials International was prepared to help any person who wanted to complain of unfair trial or extradition, but it had not received any cases from people facing an EAW request to return them to the UK. She told us that in the UK "there is a process of deciding if it is in the interests of justice to issue an arrest warrant to another country" and concluded that this filter should be imposed on all other countries.[143] Jodie Blackstock of JUSTICE agreed that the UK had issued a much smaller number of requests than many other Member States showing the UK was considering in greater detail whether to issue a European Arrest Warrant.[144]

147. Commander Gibson told us that some other EU countries "appear to" operate a proportionality test.[145] Catherine Heard agreed that "many countries in practice seem to have a public interest test before they go as far as issuing a warrant."[146]

Problems caused by the lack of a proportionality principle

148. Several witnesses noted the human rights implications of the lack of a proportionality test in the Framework Decision. Jodie Blackstock of JUSTICE told us that "from a perspective of someone's private and family life and the upheaval it causes in them having to go and face trial in another country, it comes back to the proportionality test as well.

139 Q 105

140 Qq 167–70

141 Q 99

142 EXT 12

143 Q 18

144 Ibid.

145 Q 102

146 Q 25

There is an element, a question of whether it is necessary to extradite someone to another country."[147] Fair Trials International also noted the disproportionate impact of an EAW request in comparison to the alleged crime.[148]

149. The recent report from the European Commission on the implementation of the EAW, noted that "confidence in the application of the EAW has been undermined by the systematic issue of EAWs for the surrender of persons sought in respect of often very minor offences." The report concluded that "it is essential that all Member States apply a proportionality test, including those jurisdictions where prosecution is mandatory."[149] The Commission report also noted that it would issue a Communication in September 2011 aimed at introducing training for legal practitioners and judicial authorities on the implementation of the EAW and on strengthening procedural rights.

150. One of the issues raised by witnesses was the number of requests received from Poland: surrenders from the UK to Poland accounted for 61% of all surrenders from the UK in 2009–10. The CPS noted that the large number of requests were because "their prosecutors operate under an obligation to prosecute principle."[150] Similarly, John Hardy noted in his submission that "a number of the new Member States' domestic law systems conferred no discretion upon prosecutors and investigating magistrates as to when it might not be in the public interest to pursue an extradition request."[151] Fair Trials International provided an example of extradition for a minor offence: Patrick Connor was extradited to Spain for possession of two forged €50 notes which were found in his hotel room, of which he claimed to have no knowledge. Four years after initially being arrested, he was extradited to Spain, where he pleaded guilty and spent 9 weeks in prison.[152]

151. The Director of Public Prosecutions said that a requested person could argue against extradition on Article 8 grounds under the Section 21 human rights bar to extradition. He explained that "an individual accused of stealing a loaf of bread in another country would be able to argue that to remove him or her would be such a disproportionate interference with their Article 8 right that it should not happen", although he added the caveat "if the regime works properly."[153] The Law Society noted in their submission to the Extradition Review that "the UK courts have suggested that the triviality of an offence can be taken into account in assessing the proportionality of interference with qualified convention rights as a result of extradition [...] the lack of an express proportionality requirement may, therefore, be remedied where extradition is found to be a disproportionate interference with qualified Convention rights."[154]

152. Witnesses also commented on the apparent "imbalance" between the tests the CPS applies before applying for extradition, compared to the tests applied by other countries in the context of the rights of victims. The witnesses referred to in paragraph 84, who

147 Q 10

148 EXT 1

149 COM (2011) 175

150 EXT 17

151 EXT 28

152 EXT 1

153 Q 177

154 Law Society response to the Home Office Extradition Review, p 5

preferred to remain anonymous, argued that the "rights for victims are prejudiced unnecessarily by the high evidential standard" applied by the CPS before making an EAW request. The evidence argued that UK law enforcement agencies are reluctant to use the EAW.[155] When we put this question to the Director of Public Prosecutions, he argued that the difference came from the differences in legal systems in the EU. In civil law jurisdictions, the court is involved in proceedings earlier in the criminal justice process, meaning that "some of those countries may make requests for the purpose of prosecution at an earlier stage than we would recognise as being the start point of criminal proceedings."[156]

Solutions

153. There are several ways of reducing the number of trivial EAW requests. Many witnesses supported the introduction of a proportionality test beyond the current 12 month maximum sentence test. Commander Gibson of ACPO told us that the Police "would like a proportionality test [to be] brought in."[157] He noted, however, that such a test should be operated by the requesting country before a request is made: "it is more difficult if we try to exercise it at the other end and try to second guess what is right in any individual case."[158] The Director of Public Prosecutions told us that "if someone suggests that the prosecutor should be given a role to be able to say early on that this is clearly a case that is disproportionate and should never come into the system, I would not argue against that."[159] He noted that such a test could be applied by either the court in the requested country or the prosecutor, although "the CPS could deal with it earlier." He did not, however, think that such a test should take the form of a public interest test as it would be "quite a headache" to "gauge whether it is in the public interest for an offence to be prosecuted in another country."[160] Several other groups also agreed a proportionality test should be implemented.[161]

154. John Hardy agreed that a proportionality test would reduce the number of requests, the hardship caused to individuals and make judicial authorities consider "whether issuing an EAW is really necessary and proportionate in each case." He argued, however, that it was difficult to envisage "how such a [proportionality] test could be devised which was in keeping with both the absolute spirit of judicial co-operation which underpins the Framework Decision, and the time-limits which are central to its operation." He concluded that "a system which renders extradition less of a bureaucratic exercise and more an exercise in the administration of justice is to be welcomed."[162]

155. The Law Society, in its submission to the Extradition Review, also noted that the suggestion of a proportionality test "raises complex legal and practical issues; not least the

155 EXT 3, 3A

156 Q 206

157 Q 101

158 Q 114

159 Q 178

160 Q 204

161 Fair Trials International, EXT 1, Freedom Association, EXT 2, Liberty, EXT 6

162 EXT 28

impact thereof on the principle of mutual trust." The Law Society felt that practical rather than legislative solutions would be more appropriate to "to address the problems caused by differing Member State practices in relation to *de minimis* thresholds for prosecutions and requests."[163]

156. The then Minister told us that the Government was working bilaterally with Polish authorities to attempt to reduce the number of requests from that country.[164] The CPS[165] and the Police also noted this work with Poland. Detective Superintendent Murray Duffin noted that "anecdotally, I would say that those types of requests are reducing".[166]

157. We also asked Baroness Neville-Jones whether a stronger principle of proportionality should be incorporated into the Framework Decision. She argued that "if you try to fix a definition of what constitutes proportionality in any given area, that would give rise to its own anomalies [...] I am not sure how much further forward enshrining a proportionality principle in law and then interpreting it would get us than we already are." She advocated further guidelines on the use of the EAW.[167]

158. **We note the increasing number of European Arrest Warrant requests received by the UK. We have serious concerns about the disproportionate impact of extradition where it is requested for a relatively minor offence. We urge the Government to work with the European Commission and other Member States to implement a proportionality principle in the Framework Decision, both for operational reasons and to ensure that the human rights implications of extradition are not disproportionate to the alleged crime.**

159. **Such a proportionality principle should be contained within the Framework Decision of the European Arrest Warrant and operate in a similar way to the tests applied by the Police and the CPS before issuing a request. We are not convinced that informal guidelines, bilateral discussions with the authorities of other Member States or a public interest test operated by the authorities in the requested country would be operationally practical or successful in the long-term. Proportionality is a well-established EU legal principle which the Extradition Review Panel may wish to take into account in considering the safeguards around an EAW request.**

160. We were pleased to hear of the proportionality tests applied by the CPS and the Police when the UK makes an extradition request and the positive comments that we heard about the UK's use of the EAW.

Double criminality

161. Most extradition treaties have a double or dual criminality requirement which requires an extradition offence to be a criminal offence in both the requested and requesting territory. The EAW Framework Decision removes this requirement for 32

163 Law Society response to the Home Office Extradition Review, pp 9–11

164 Q 219

165 Q 178

166 Q 104

167 Qq 220–23

serious offences, including murder, drugs trafficking and terrorism.[168] The purpose of this change was to simplify the decision on what is an extraditable offence by the judge in an extradition case; for the 32 offences listed, there is no need to consider whether this is an extraditable offence.

162. Some witnesses have raised concerns about the removal of the double criminality requirement. The Freedom Association argued that it had "created a situation where laws voted in by elected officials in the UK Parliament have become null and void, due to the fact that UK citizens can be extradited for something that is not a crime in the UK." It concluded that "the European Arrest Warrant either needs to change so that double criminality requirements and the requirement for prima facie evidence are re-introduced or that the UK needs to remove itself from the European Arrest Warrant system."[169]

163. Liberty and JUSTICE also raised concerns in relation to the definition of the offences, which Liberty described as "extremely broad to the point of being meaningless."[170] This increased the risk of a person being extradited for an act which was not an offence in the UK. Jodie Blackstock noted the case of *Toben*, where an EAW request had been made for holocaust denial, which is not a crime in the UK. This case was dismissed on procedural grounds, leaving open the question of whether a person could be extradited for holocaust denial.[171]

164. Other EU Member States had addressed this issue. Belgium introduced legislation which excluded abortion and euthanasia from the category of "murder and grievous bodily harm". Consequently, Belgium would not extradite a person for the act of abortion under the definition of the offence of murder. This was, however, criticised by the European Commission in its review of the implementation of the European Arrest Warrant.[172] Liberty commented that the Extradition Act could be amended to ensure that the UK "would reserve the right whether or not to recognise an extradition warrant on the basis that a warrant will only be issued both where there is a clear offence [...] and that this conduct would also constitute an offence under British law."[173]

165. The exclusion of the 32 offences from the double criminality requirement raises some difficult questions. **The Government and the Extradition Review may wish to review the list of 32 offences for which double criminality is not considered, with a view to whether certain conduct should be excluded from the definitions of these offences. We recognise, however, that the Framework Decision expressly excludes double criminality**

168 Participation in a criminal organisation; Terrorism; Trafficking in human beings; Sexual exploitation of children and child pornography; Illicit trafficking in narcotic drugs and psychotropic substances; Illicit trafficking in weapons, munitions and explosives; Corruption; Fraud; Laundering of the proceeds of crime; Counterfeiting currency; Computer-related crime; Environmental crime; Facilitation of unauthorised entry and residence; Murder; Grievous bodily injury; Illicit trade in human organs and tissue; Kidnapping, illegal restraint and hostage-taking; Racism and xenophobia; Organised or armed robbery; Illicit trafficking in cultural goods; Swindling; Racketeering and extortion; Counterfeiting and piracy of products; Forgery of administrative documents; Forgery of means of payment; Illicit trafficking in hormonal substances and other growth promoters; Illicit trafficking in nuclear or radioactive materials; Trafficking in stolen vehicles; Rape; Arson; Crimes within the jurisdiction of the International Criminal Court; Unlawful seizure of aircraft/ships; Sabotage.

169 EXT 2

170 EXT 6

171 Q 11

172 COM (2011) 175

173 EXT 6

as a reason for denying the execution of an EAW. We recommend that this principle be dealt with as part of the renegotiation of the Framework Decision.

Other concerns relating to the European arrest warrant

166. Several other concerns about the operation of the European Arrest Warrant in practice were raised including using the Warrant for the purpose of investigation, the non-removal of EAW requests and cases of mistaken identity.

Use of the European arrest warrant for purposes of investigation

167. Mr Michael Turner reported that he had been extradited to Hungary and not charged: "after spending some time in prison, I was interviewed once with the police."[174] Mr Turner was later released with no charge being brought.[175] Mr Frank Symeou, father of Mr Andrew Symeou, argued that in many cases "the EAW is used as a summons for questioning."[176] Even where a request is for prosecution and not investigation, those surrendered under the EAW can spend several months in jail before their trial.

168. The then Minister confirmed that an EAW should not be used for the purposes of investigation. She told us that a Member State "cannot just have a fishing expedition."[177] As it does appear that requests are being made merely for the purposes of investigation, **we urge the Government to ensure that other Member States do not use the European Arrest Warrant for purposes of investigation, if necessary by amendment to the Framework Decision. We recommend that, where there are doubts as to the stage of proceedings reached in the requesting state, the facility for further information provided by the Framework Decision and the Extradition Act 2003 should be used. The requesting state should be asked to provide information on the indictment process under their national law, the stage of proceedings reached, the date set for the first hearing and an assurance that the individual will not be interrogated on arrival.**

169. The Commission report on the operation of the EAW explained that the "Directive on the application of the principle of mutual recognition to the decisions on supervision as an alternative to provisional detention" would make it possible for a suspected person "to be subject to a supervision measure in his or her normal environment pending trial in the foreign Member State."[178] **It may be that, if applied, the Directive on the application of the principle of mutual recognition to the decisions on supervision could ensure that a person extradited to another EU state could await trial in the UK, reducing problems in relation to long times spent in prison before trial.**

Removal of European arrest warrant requests

170. Ms Deborah Dark described to us how she was arrested on several occasions on the basis of an EAW request and, despite courts in Spain and the UK refusing extradition on

174 Q 33

175 EXT 1

176 Q 57

177 Qq 230–1

178 COM (2011) 175

grounds of passage of time since the alleged offence, the issuing country "refused to remove the warrant."[179]

171. Mr Duffin of the Metropolitan Police explained that the procedure for removing an extradition request was simple and did not pose any difficulties.[180] When we discussed this issue with the Director of Public Prosecutions he told us that "the fact that the person has been arrested and discharged in country A does not stop country B picking them up." He told us that he "completely" understood the difficulties that this poses.[181]

172. Fair Trials International argued that "if a court in one European country decides extradition would be unjust, that decision should be respected across the EU and the EAW should be withdrawn immediately."[182]

173. In their submission to the Home Office Extradition Review, JUSTICE noted that Article 111 of the Schengen Convention would enable a person to apply to a court to review an alert issued on the Schengen Information System. It concluded that "the UK could implement the article by way of domestic legislation which would at least enable the UK to begin to attempt to control alerts in relation to warrants refused here."[183]

174. **The system for removal of EAW requests should be improved or formalised to prevent repeat arrests where a court elsewhere in the EU has already refused to execute an extradition request. The Government should examine whether adopting Article 111 of the Schengen Information System would help avoid this problem. The Government should also negotiate membership of the SIRENE system which can be used to enter information on the execution of EAWs.** This would allow a decision rejecting an EAW to appear whenever an individual crosses the Schengen borders. The individual would then be able to point towards the judgment denying extradition and would aid him or her to fight the execution of the EAW.

Time limits in the European Arrest Warrant

175. The European Arrest Warrant contains strict deadlines for the execution of a request once it has been certified. Where the requested person consents to their extradition, the final decision on the execution of the warrant must be taken within 10 days. Where the person does not consent, the final decision must be taken within 60 days of the arrest of the person. When it is not possible to meet this deadline, it can be further extended by 30 days. Witnesses argued that the tight time limits make it difficult for the requested person to make an effective argument against extradition on human rights grounds.

176. Catherine Heard of Fair Trials International told us that "insufficient time is built into the system. The deadlines are too tight in many cases for an individual to obtain evidence— often expert—on the situation of human rights protection on the ground in the country concerned."[184] Jodie Blackstock of JUSTICE agreed that even though the time

179 Q 45, EXT 1

180 Q 134

181 Q 188

182 EXT 1

183 JUSTICE Response to the Home Office Extradition Review, p 15

184 Q 23

limits are flouted "in many cases", this posed difficulties for getting evidence to support arguments that extradition should be barred on human rights grounds.[185]

177. John Hardy QC also commented on the problems created by time-limits, arguing in his submission that "with the UK court system over-loaded and under increasing strain, devices are routinely employed to circumvent the fixed periods, alternatively they are routinely extended so often as to render them meaningless." He continued that

> "time-limits for giving notice of appeal are capable of producing real injustice [...] recent examples of the High Court holding it has no jurisdiction to hear an appeal have concerned persons remanded in custody and representing themselves, or who, if represented, are let down by their representatives in terms of filing and serving notices of appeal in time."[186]

178. We asked the Director of Public Prosecutions whether the existing time-limits posed problems for the Crown Prosecution Service. He told us that they did not generally pose a problem, as although the Framework Decision requires the completion of the process in 90 days, UK domestic law does not: "there is no domestic law consequence of going beyond the 90 days." He told us that the UK had not met the time-limit in 112 cases "which is quite high across Europe" and the average completion time of the process was 93 days. The reason for this was the UK's "elaborate appeal system." When we put to him the arguments of Fair Trials International, the Director of Public Prosecutions told us it was not right for him to comment, but noted that the district judge had the power to adjourn proceedings "in the interests of justice."[187] Detective Superintendent Murray Duffin of the Metropolitan Police Service told us that operationally, the Police were able to meet the time limits set out in the Framework Decision.[188]

179. John Hardy QC agreed that it was the UK appeal system that made the time limits unworkable and argued that "unless the right of appeal is to be fettered, or altogether curtailed, which would be unconscionable, these timetables are unworkable." He proposed that the time limits be replaced with a requirement that the processing of an EAW request be completed "as soon as reasonably practicable."[189]

180. We have heard that the time limits set out in the EAW for the execution of a request are regularly missed and often restrict the ability of the defence to successfully argue against extradition for human rights reasons. However, the DPP explained that there is currently no domestic penalty for exceeding the time limits and that the district judge has the power to adjourn proceedings in the interests of justice. In chapter 3, we concluded that longer time-limits should be allowed when a request for further information has been made. **The Extradition Review Panel or the Government should consider whether the current time-limits provide adequate opportunity for the defence to postpone a hearing if necessary as long as the court considers the reasons for the request for adjournment on its merits on a case-by-case basis. The Government should also investigate the**

185 Q 24

186 EXT 28

187 Qq 189–92

188 Qq 106–11

189 EXT 28

possibility of replacing time limits with another, less strict, formulation such as "as soon as reasonably practical", although we note that this would require renegotiation of the Framework Decision.

Other possible safeguards

181. **We note that Article 4(6) of the Framework Decision allows the requested state to deny execution of the EAW issued for the purposes of serving a sentence where the requested state undertakes that the sentence will be served in that state. We recommend that this safeguard be transposed into the Extradition Act 2003 as this would significantly reduce the impact of such execution EAWs on Article 8 rights.**

182. We also note that Article 5(3) of the Framework Decision creates the same possibility for those requested for prosecution under an EAW, that is, that the requested state may execute the EAW subject to a condition that the individual be returned to the requested member state to serve his or her sentence. This would reduce the impact on Article 8 rights of prosecution EAWs by ensuring that those for whom the UK has responsibility serve their sentences in the UK. This could be subject to the discretion of the judge with UK nationality or length of residence in the UK being a factor which was given much weight in the decision. **We recommend that the safeguard in Article 5 (3) of the Framework Decision be transposed into the Extradition Act 2003.**

183. We note the entrance into force of the Lisbon Treaty and with it, the enforceability of the Charter on the Fundamental Rights of the European Union.[190] We heard little evidence on the implications of the Charter for the EAW regime although several witnesses did refer to a case pending before the Court of Justice of the European Union which will decide the applicability of the Charter in the UK and the significance of the UK's protocol on the Charter (Protocol No 30). We note that the Charter is intended to provide higher protection than the ECHR.

184. The Charter includes a guarantee that the severity of the penalty is not disproportionate (Article 49(3)). However, the Charter is only applicable where EU is being implemented. In relation to the EAW, it is at least arguable that the whole regime comes within the scope of application of the Charter, even though the Framework Decision has been transposed into UK law by the Extradition Act 2003. This could be used as an argument to bolster any proportionality principle included in the Framework Decision since an extradited person would be able to argue that it was not proportionate for them to be extradited to serve a sentence of, for example, two weeks and that, thus, the severity of the penalty contravenes Article 49(3).

185. However, the EAW applies only to national law offences. Since the offence is one created in national law and the penalty is one set out in national law, there is no implementation or application of EU law. It is therefore not certain that the Charter and Article 49(3) would apply and is not by itself a sufficient safeguard to ensure the proportionate use of the EAW. **We recommend that the Extradition Review Panel**

190 The House of Lords Select Committee on the European Union considered the application of the Charter to EU law in 2000: Select Committee on the European Union, 8th Report (Session 1999–2000): *EU Charter on Fundamental Rights* (HL Paper 67)

carefully assess the applicability of the EU Charter on Fundamental Rights to the EAW as applied by the UK.

5 The UK's bilateral extradition treaties

US-UK Extradition Treaty 2003

Box 5—The US-UK Extradition Treaty 2003

The UK-US extradition treaty was signed on 31 March 2003 and came into force in April 2007, following the US Senate's ratification of the Treaty. The UK's arrangements for extradition to the US set out in the Treaty came into force in advance of this date as they were included within the Extradition Act 2003. As with the European Arrest Warrant, a person can be extradited under the Treaty for any offence with a minimum sentence of one year.

The Treaty provides for the UK to refuse extradition where the offence for which extradition is sought is punishable by the death penalty except where "the Requesting State provides an assurance that the death penalty will not be imposed or, if imposed, will not be carried out."

Extradition figures between the UK and US[191]:

Year	UK arrests for extradition to US	UK surrenders to US	US surrenders to UK
2006	15	16	4
2007	8	8	7
2008	9	6	10
2009	19	16	7
2010	14	10	5

186. The evidence we received on bilateral treaties with category 2 territories referred largely to the US-UK Extradition Treaty. In particular, two issues arose in relation to the Treaty: the perceived lack of balance or reciprocity in the Treaty and whether a person extradited to the United States from the United Kingdom would receive a fair trial.

Balance of the US-UK Extradition Treaty

187. The perceived lack of reciprocity in the Treaty relates largely to whether each party is required to present a *prima facie* case before extradition takes place. When the United Kingdom requests extradition from the United States, the Treaty requires that the UK

191 See EXT 032 for a full breakdown of figures. Figures were not provided for US arrests for extradition to UK.

provide "such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is requested." There is no such requirement for the US when requesting extradition of a person from the UK. When debating the Draft Extradition Act 2003 (Designation of Part 2 Territories) Order 2003, which brought the Extradition Act into force, the then Home Office Minister, Baroness Scotland of Asthall QC, said that:

> "If this order is approved, the United States will no longer be required to supply *prima facie* evidence to accompany extradition requests that it makes to the United Kingdom. This is in line with the new bilateral extradition treaty signed by my right honourable friend the Home Secretary earlier this year.
>
> By contrast, when we make extradition requests to the United States we shall need to submit sufficient evidence to establish "probable cause". That is a lower test than *prima facie* but a higher threshold than we ask of the United States, and I make no secret of that. The fact is that under the terms of its constitution the United States of America cannot set its evidential standard any lower than "probable cause"."[192]

188. We asked our witnesses to comment on the controversy over the lack of reciprocity in the Treaty. Sally Ireland of JUSTICE told us that the "issue of disparity is not really one that primarily concerns us" and instead JUSTICE was focused on ensuring that the Extradition Act 2003 provided sufficient protection for UK citizens. She noted that the level of proof required for the extradition of a person from the US to the UK would "probably be slightly higher than what we have here but not as high as a prima facie case."[193] Liberty noted that the UK should "be seeking to incorporate the sensible constitutional safeguards that benefit US residents" rather than focusing on the lack of balance in the Treaty.[194]

189. Mr David Bermingham, argued that:

> "if you are a United States citizen who is wanted for extradition by the United Kingdom, you have an absolute right to a hearing in a United States court where you can challenge the evidence that has been put in front of the court and present evidence of your own. If, by contrast, you are a United Kingdom citizen or somebody ordinarily resident here who is wanted by the United States, you have no such right."[195]

190. In Mr Bermingham's opinion, the UK extradited people to the US "without so much as a scrap of evidence being put in front of a UK court" which was "a grave disservice to our citizens and other people who may be the subject of extradition."[196]

191. We asked the then Minister whether there was room for manoeuvre in adjusting the terms of the Treaty. She told us that the US and the UK were "two friendly Governments"

192 HL Deb (2003-4) 644 col. 1062

193 Qq 8–9

194 EXT 6

195 Q 70

196 Q 66

and that "if an adjustment can be made which is in the spirit and intention of the treaty and which improves its operation, I would expect us to be able to do that."[197]

192. **The Government should increase the proof required for the extradition of British citizens to the US so as to require sufficient evidence to establish probable cause, as is required for the extradition of a US citizen to the UK. This will require renegotiation of the UK-US Extradition Treaty.**

193. The Law Society in its submission to the Extradition Review Panel said that the disparity in the number of charges in relation to the UK-US treaty had also led to claims of imbalance, but noted that "the frequency of requests is not of course governed by the UK-US Treaty." They concluded that perceptions of imbalance "may well be a reflection of the nature of the particular overseas jurisdiction and may perhaps, for this reason, be unavoidable."[198]

194. We heard evidence from David Bermingham that in some cases of extradition to the US, the evidence used was gathered by UK police in the UK about acts committed on UK soil and where the CPS had decided not to prosecute. [199] We note that Article 5(3) of the US-UK treaty specifically allows extradition where the "competent authorities of the Requested State" have decided not to prosecute, discontinue prosecution or are still investigating. It is this Article 5(3) which enabled the extradition of the David Bermingham.

195. Article 5(3) creates a two-fold problem because it allows the extradition of individuals on the basis of evidence which the CPS has deemed insufficient to prosecute in this country and the extradition of individuals where the CPS has decided there is no public interest in prosecuting. We received a submission from the family of Babar Ahmed, whose extradition to the United States is under consideration by the courts, on Mr Ahmed's experience of the extradition process. We thank the family of Mr Ahmed for this submission. In the case of Mr Ahmed, the use by the US authorities of evidence obtained in this country in a UK investigation has led to his incarceration since 5 August 2004.

196. **We recommend that the Government urgently renegotiate this article of the US-UK extradition treaty to exclude the possibility that extradition is requested and granted in cases such as that of Mr Bermingham and Mr Ahmed, where the UK police and prosecution authorities have already made a decision not to charge or prosecute an individual on the same evidence adduced by the US authorities to request extradition.**

Fair Trial in the United States

197. We received a number of submissions referring to the US legal system and whether a UK citizen extradited to the United States would receive a fair trial, including from David Birmingham, Harvey Silvergate[200] and Michael Hann.[201] It is not within the remit of this

197 Q 240

198 Law Society response to the Home Office Extradition Review, pp13–4

199 Q 62

200 EXT 13

201 EXT 22

inquiry, or the competence of this Committee, to comment on the legal systems of other countries. In Chapter 2 we considered the effectiveness of the human rights bar to extradition. If such a bar were effective, a requested person could argue that extradition would breach their Article 6 rights to a fair trial and it would be up to the court to consider whether extradition to the US would be in compliance with this right. The witnesses referred to in paragraph 84, who preferred that we do not use their name, noted "it is immaterial if, on the face of it, bilateral treaties override any human rights concerns—there are sufficient safeguards available once extradition proceedings commence."[202] This of course only applies if these safeguards work effectively.

Role of Secretary of State

198. Although the executive no longer plays a role in extradition to Category 1 territories, the Secretary of State retains a role in the extradition of persons to Category 2 territories. The Secretary of State can refuse extradition to a Category 2 country after a court has assented to the extradition on a limited number of grounds. The Law Society noted that "the Secretary of State plays a formal role at two stages" but "neither of which entails any real exercise of discretion."[203]

199. It has been suggested that this role should be increased to provide more grounds for the Secretary of State to bar extradition. The role of the executive has been completely removed under the European Arrest Warrant and so the role of the Secretary of State applies only to Part 2 of the Act.

200. Liberty said that there should be a role for the Secretary of State: "in particular, that he or she should be able to refuse an extradition request in certain circumstances even where extradition has been approved by the court." The evidence noted that a judge is best placed to consider the facts of an extradition case, but discretion of the Secretary of State "is important to ensure that any extradition which would be unjust is stopped notwithstanding earlier court findings."[204]

201. On the other hand, Catherine Heard of Fair Trials International considered that it would be practically difficult to add back in a level of executive discretion, which was not a transparent process: "I think judges are in a better position to deal in a transparent fashion, in open court, in an accountable way with difficult extradition cases."[205] Sally Ireland of JUSTICE noted that a role for the Secretary of State in the extradition process can politicise individual cases: "we have seen media reports of basically political diplomatic negotiations going on between Ministers of different countries about the fate of individual extradites [...] hence the importance of the primary decision-maker being the judicial decision-maker in all cases."[206] This issue was noted by Liberty, who argued that the system in practice had led

202 EXT 3

203 Law Society response to the Home Office Extradition Review, p 3

204 EXT 6

205 Q 16

206 Q 20

to individuals becoming "political pawns." Liberty argued, therefore, that any restoration of the power of the Secretary of State should be "limited and narrowly defined."[207]

202. **We note the arguments for increasing the role of the Secretary of State in the surrender of persons to countries under Part 2 of the Extradition Act. We are not convinced that changes should be made and, in any event, any additional powers would need to be carefully circumscribed to avoid those subject to extradition requests becoming "political pawns".**

207 EXT 6

6 European Investigation Order

203. Our inquiry also considered the human rights implications of the European Investigation Order. The proposed European Investigation Order (EIO) is currently under negotiation in the EU. It is intended to simplify and replace mutual legal assistance agreements by which states can obtain evidence from other Member States. The Home Secretary announced the Government's decision to opt-in to this measure on 27 July 2010. The right to a fair trial (Article 6) and the right to privacy and family life (Article 8) could potentially be engaged by the EIO.

204. The EIO Directive would enable a judicial authority or public prosecutor in one Member State (the issuing authority) to issue a European Investigation Order seeking assistance from the competent authority of another (the executing authority). The executing authority would be bound to comply with the request in the same way as it deals with national investigations (subject to limited grounds for refusal), although flexibility is provided where equivalent measures would produce the desired result.

205. Existing legislation on the European Evidence Warrant would be repealed, and the EIO would replace the corresponding provisions of the other existing mutual assistance measures. Baroness Neville-Jones explained that negotiations on the EIO were proceeding slowly in the European Council and that the instrument "if finally agreed" would enter force in 2014 or 2015.[208]

206. The House of Lords European Union Sub-Committee on Law and Institutions and the European Scrutiny Committee of the House of Commons have both carried out significant scrutiny work on the EIO.[209] For this reason, we restrict our comments in this Chapter to the possible human rights implications of the EIO and the lessons that can be drawn from the experience of the European Arrest Warrant in practice.

Human rights implications of the European Investigation Order

207. Several witnesses raised human rights concerns about the proposed EIO instrument. Fair Trials International, JUSTICE and Liberty all voiced concerns to us about the lack of fundamental rights safeguards in the instrument. Fair Trials International noted that there was no express refusal built into the instrument where its use would breach fundamental rights. Further criticisms made by Fair Trials International included the absence of a dual criminality requirement, the lack of safeguards in relation to questions and the lack of adequate data protection controls.[210]

208. Liberty also raised concerns about the limited grounds for the non-execution of an EIO, including on human rights grounds. Liberty pointed out that the draft Directive only makes one reference to human rights where it states that the Directive will respect the fundamental rights and principles in the ECHR. Liberty argued that as the EIO is based on

208 Q 210

209 See Hwww.parliament.uk/hleuH and http://www.parliament.uk/business/committees/committees-archive/european-scrutiny/

210 EXT 1

mutual recognition of legal systems "this assumption does not withstand scrutiny" as in the case of the EAW "even where human rights are an explicit consideration under the EA, British judges have been reluctant to enforce this protection in extradition cases."[211]

209. Several witnesses also argued that use of the EIO should be available to the defence as well as the prosecution. Catherine Heard of Fair Trials International told us that "it is often extremely difficult for defendants in proceedings in another country to obtain evidence from overseas [...] so making an equality-of-arms-friendly instrument is important."[212] Charlotte Powell agreed that "the European Investigation Order would not necessarily be available for defence representatives to use in order to secure evidence abroad [...] there is an equality of arms disparity which might put the requested person at a disadvantage if he cannot also."[213] Many defendants in extradition cases struggle to provide evidence to support their arguments. The EIO may go some way to rectify this problem.

210. We raised these matters with the then Minister. She told us that "every one of the issues that you have described has been raised in the negotiation." She noted that inserting more safeguards in the instrument, or including a role for the judge in the process, may make the instrument unworkable in practice. She concluded, however, that there were "areas where some guidance and safeguards would be a good idea."[214]

211. Lord Roper, Chairman of the House of Lords European Union Committee, wrote to James Brokenshire MP, Parliamentary Under Secretary for Crime Prevention, on 20 January in relation to the EIO. In his letter, Lord Roper set out the points which his Committee felt should be reflected in the final form of the Directive, including "an express ground for refusing an EIO if its execution would involve a breach of fundamental rights", the possibility of the EIO procedure being capable of use by defence lawyers and a provision for dual criminality.[215] That Committee also called for a proportionality safeguard. These concerns reflect those raised by our witnesses.

212. **We fully endorse the points made about the EIO by the House of Lords EU Committee. We urge the Government to ensure the inclusion of a provision to allow the refusal of an EIO on human rights grounds and a provision for dual criminality. We also agree that the EIO should be available for the use of defence lawyers, given the difficulties that defence lawyers face in providing evidence to support their arguments.**

Proportionality

213. Many witnesses raised concerns about proportionality. Liberty argued that without a test to ensure that the investigative measure is in proportion to the crime being investigated, "there is no barrier to a similar impact [as with the EAW] being imposed by the EIO, with the associated implications for the public purse and individual fairness."[216]

211 EXT 6

212 Q 27

213 Q 154

214 Q 225

215 Letter from Lord Roper to James Brokenshire MP, dated 20 January 2011. Available at: http://www.parliament.uk/documents/lords-committees/eu-sub-com-e/cwm/CwMSubEDec2010onwards.pdf

216 EXT 6

214. We discussed the issue of the EIO with the Police. Commander Gibson, representing ACPO, told us that they "broadly" supported the EIO, but with a caveat around proportionality: "we would not wish to have that same lack of control and not be able to say that we do not think that that is a proportionate use of our resources."[217]

215. In his letter to the Government in reply to the consultation on the European Investigation Order, Commander Gibson said that "the EIO is likely to become an inefficient instrument should it go ahead without a proportionality clause and, on projected volumes, we are likely to miss the deadline in a significant proportion of lower level requests."[218] This appears to us to be a more critical assessment of the benefits of the EIO than expressed by the Secretary of State for the Home Department during her statement to the House of Commons on the decision to opt-in to the EIO when she said that,

> "We wrote to every Association of Chief Police Officers force about the EIO, and not one said that we should not opt in. ACPO itself replied that "the EIO is a simpler instrument than those already in existence and, provided it is used sensibly and for appropriate offences, we welcome attempts to simplify and expedite mutual legal assistance.""[219]

216. Ms Fenella Tayler, Head of Judicial Cooperation Unit, Home Office, told us that the Government was "working hard to try to ensure that proportionality is included in the instrument." She explained that a key safeguard the Government were pushing for was to "ensure that an EIO cannot be sent or executed in this country for something that would not be possible under our own domestic law." She described this measure as "perhaps the most basic form of proportionality."[220]

217. In Chapter 4 we noted the difficulties caused by the lack of a proportionality principle in the EAW; **the lessons from the EAW must be learned when negotiating the form of the EIO. The Government must ensure that there is an effective proportionality safeguard in the Directive, in order to ensure that the EIO operates effectively and that there are not numerous requests for information in minor cases.**

217 Q131

218 Available in the Library of the House of Commons

219 HC Deb, 27 July 2010, c 881

220 Qq 219–26

7 Other Issues

Provision of information

218. A theme which emerged from the evidence provided by those with personal experience of extradition proceedings was the lack of information provided on the process. Michael Turner told us that when he asked what would happen when he was returned to Hungary "nobody would answer the question; whether they didn't know or whether they didn't want to tell us, I'm not sure." Once in Hungary, Mr Turner told us that his rights in prison were only explained "very vaguely."[221] Deborah Dark also told us that the British authorities were unable to provide her with information on the EAW request that had been issued against her as "they were not party to the Schengen Information System, so therefore they did not have the information."[222]

219. The Police outlined the information required to be provided by the Extradition Act 2003. When a person is arrested in an extradition case they are provided with a copy of the warrant and a notice of their rights and entitlements.[223] Commander Gibson acknowledged that the Police did have a role in explaining to the arrested person what would happen to them next: "that is done either by the arresting officer or, if not, it should certainly be done by the custody officer when someone is booked in; they will then be told what court they are going to and what will happen next." The responsibility also fell on their legal representatives, who should explain the process of extradition.[224] We also discussed the provision of information with the Director of Public Prosecutions who told us that he was not against the Crown Prosecution Service providing any further information as necessary, but suggested that "it is probably right that this is the function of the police."[225]

220. The Director of Public Prosecutions noted that there were initiatives to standardise the information provided to individuals across the EU involved in criminal proceedings, which is one of the initiatives set out in the EU Roadmap on procedural rights.[226] The second measure set out in the Roadmap would place on the statute book the information on rights and charges that a defendant would be entitled to receive:

> "The suspect or defendant is likely to know very little about his/her rights. A person that is suspected of a crime should get information on his/her basic rights in writing, ideally by way of a letter of rights. Furthermore, that person should also be entitled to receive information about the nature and cause of the accusation against him or her. The right to information should also include access to the file for the individual concerned."[227]

221 Q 41

222 Q 44

223 Q 89

224 Q 94

225 Q 193

226 Ibid.

227 OJ C295 (30 November 2009)

221. The information we received from the Police on the information provided to people subject to extradition proceedings has shown that enough information is provided on proceedings within the UK, particularly given that the requirements mirror those in a domestic case. However, little information is provided about the legal process in other EU states. **The Government should standardise the information received by those subject to extradition to ensure they receive sufficient, accurate information on the extradition process and their rights in the country to which they will be extradited.**

Extradition and asylum

222. The submission of the Immigration Law Practitioners Association (ILPA) raised a number of issues in relation to the human rights of those persons who are subject to extradition proceedings who are also subject to immigration control.[228] In particular, ILPA raised concerns that a number of persons have had their refugee status cancelled while outside the United Kingdom, "where deprivation appears based on charges that founded the extradition, of which they have been acquitted." This can leave the person stranded outside the UK, unable to return to appeal against the revocation of their refugee status. ILPA argued that this raised issues in relation to the right to family life (Article 8 EHCR), particularly where that person has family remaining in the UK. ILPA also raised concerns that a person subject to extradition who is also subject to immigration control may be at risk of refoulement[229] to a country where their human rights could be at risk. ILPA concluded that "extradition procedures fail to provide protection against breaches of human rights that arise when persons subject to extradition orders are, or become persons subject to immigration control."[230]

223. We raised these concerns with other witnesses. Liberty also expressed concern over these issue, both in relation to the possibility of unfair extradition and that the UK's obligations under the Refugee Convention may be bypassed when a claimants refugee status is reversed while they are out of the country. It argued that the "legal root of the problem" lay in the Extradition Act, which had a statutory loophole which "effectively allows the UK Government to defer its determination of a refugee claim under the Refugee Convention."[231] JUSTICE agreed that "immigration powers of deportation and removal should not be used in order to circumvent the procedural guarantees available in extradition proceedings."[232]

224. We did not explore the issue of immigration control and extradition in detail during this inquiry, and we may wish to follow-up this issue in more detail in future. **It would be helpful if the Government were to provide details of their procedures in relation to extradition of persons subject to immigration control and the precautions they take to ensure that these persons' rights are not infringed through either revoking their refugee status while they are outside the UK, or through their refoulement to another country.**

228 EXT 5

229 The principle of nonrefoulement concerns the protection of refugees from return to a country in which their human rights would be at risk.

230 EXT 5

231 EXT 24

232 EXT 20

Universal Jurisdiction

225. The Committee received a submission from REDRESS on the issue of the location of trials in relation to international crimes allegedly committed abroad.[233] REDRESS argued that where suspects of crimes such as genocide or crimes against humanity reside in the UK, trials should be held in the United Kingdom: "to rely solely on extradition is wrong both in principle and practice, and can lead to serious anomalies where known suspects live here for years without being held accountable anywhere, even when the UK has jurisdiction over the alleged offence(s)." REDRESS argued that despite the UK improving legislation to make it possible to prosecute such crimes, "the policy appears to be to place excessive reliance on extradition". The submission concluded that the Government should look to prosecute cases in the United Kingdom, particularly where extradition has already failed and in order to ensure that the UK does not become "a de facto safe haven where suspects can continue living here for years without being brought to trial." The submission refers to the example of four Rwandan men accused of genocide. Following the barring of extradition on human rights grounds with the defendants arguing they would not receive a fair trial in Rwanda, the UK has not proceeded with prosecution.[234]

226. We wrote to the Secretary of State for Justice on this issue. He noted that the "over-riding consideration" was that there was no impunity for the most serious international crimes. However, this did not mean that the UK should prosecute in the first instance as "it would be counter-productive for the UK to seek to be the policeman of the world." He noted that there may be instances where extradition was preferable to ensure the person stood trial in the country where the alleged offence took place. Evidence could be located in this country and extradition may mean that the victims and relatives of victims were able to see "justice being done first hand."

227. He noted that the International Criminal Court Act 2001 provided the UK with the power to prosecute nationals and residents for war crimes and crimes against humanity, subject to a two-stage test exercised by the CPS for all prosecution decisions: whether there was sufficient evidence for a reasonable prospect of a successful prosecution and whether prosecution would be in the public interest.[235]

228. **Extradition should not be the only method for dealing with suspects of crimes against humanity: we urge the CPS to consider carefully whether such suspects can be tried in the United Kingdom before extradition proceedings are initiated.**

233 EXT 8

234 EXT 8

235 EXT 26

Conclusions and recommendations

1 Introduction

1. We welcome the Government's stance on possible renegotiation of the Framework Decision of the European Arrest Warrant if necessary. (Paragraph 27)

2 Human rights and extradition

2. We have heard evidence that Sections 21 and 87 of the Extradition Act 2003 do not, in practice, offer adequate human rights protection for those subject to proceedings and that the courts have set their interpretation of the threshold too high. We welcome recent developments that have seen UK courts apply an apparently lower threshold, as demonstrated in the case of Targosinski v Judicial Authority of Poland. The defendant should have a realistic opportunity to rebut the presumption that their human rights will be respected if extradited to a country which is a signatory to the ECHR or with which the UK has good relations. (Paragraph 71)

3. Several witnesses have suggested that defence lawyers should be able to call upon a wider range of evidence, including reports of the Committee on the Prevention of Torture, to illustrate human rights concerns in the requesting country. The human rights bar would be more effective if material such as reports of the Committee on the Prevention of Torture were regarded as relevant evidence. We find the concerns about the effectiveness of the bar persuasive. (Paragraph 72)

4. The effectiveness of human rights protection would be improved if judges in extradition cases took a more active role in the extradition process, through the implementation of safeguards and the use of the human rights bar to ensure that the role of a judge in an extradition case is more than only "rubber stamping" extradition requests. (Paragraph 78)

5. We urge the Government and the Extradition Review Panel, when considering changes to the extradition process, to take into account the rights of victims of crime, both in the UK and other countries, as well as the rights of those subject to extradition. The process of extradition is important in ensuring that criminals are brought to justice and there is a need to ensure balance between this and protecting rights of those subject to extradition. (Paragraph 85)

3 Improving the protection of Human Rights in the Extradition Act 2003

6. A forum safeguard provision would allow a judge to refuse extradition where the alleged offence took place wholly or largely in the UK. Parliament has already agreed this principle and the Government should bring forward the relevant provisions of the Police and Criminal Justice Act 2006, in order for Parliament to agree to commence them. It is difficult to understand why this has not yet happened. (Paragraph 99)

7. Government Ministers currently issue an explanatory memorandum to the European Union scrutiny committees of both Houses on each forthcoming EU proposal. However, the legislation transposing these proposals into UK law is not considered by the scrutiny committees. When introducing transposing legislation, the Government should be under an obligation to inform Parliament: how the relevant EU proposal is being transposed into domestic law; whether the transposing legislation would make any additional provisions or omit to transpose any provisions of the EU legislation; any areas where the Government have exercised discretion; and whether any difficulties have arisen during the transposition of the proposal which the Government did not explain to the European scrutiny committees that considered the original proposal. (Paragraph 100)

8. It is important to respect the rights of victims, who will often be residing in the country in which the offence was committed, when deciding the location of a trial. The forum provisions would allow a judge discretion to determine the appropriate location of trial on a case-by-case basis, taking into account the rights of both the requested person and of any victims of crime, as well as any other circumstances, including access to a legal representative and evidence. There should be a general presumption that trials take place in the state where the offence was committed, in the interests of access to that process by the victims of that offence. On this basis, we wholeheartedly support the introduction of a forum safeguard. (Paragraph 101)

9. We recommend that the case-law on double jeopardy be codified so that extradition under an European Arrest Warrant is barred where the Crown Prosecution Service has decided not to prosecute for the same facts. This would strengthen an eventual forum clause. Such amendment could be done by adding a third paragraph to section 12 of the Extradition Act 2003. (Paragraph 104)

10. The Government should look at how such a safeguard could be implemented in practice including, if necessary, through renegotiation of the relevant extradition treaties. (Paragraph 105)

11. We agree with Liberty that adding a requirement for the requesting country to show a *prima facie* case—or a similarly robust evidential threshold in a civil law state—before a person is extradited will improve the protection of human rights of those subject to extradition. In particular, this will require investigatory authorities to assess the available evidence before issuing a request for extradition, particularly within the EU, thus reducing the likelihood that a person could be extradited on speculative charges or for an alleged offence which they could not have committed. (Paragraph 112)

12. We recommend that, in cases where identity is disputed or where there are doubts as to the stage of proceedings reached in the requesting state, this facility to request further information be used. We recommend that the UK devote negotiating efforts to securing longer time limits for cases where an information request has been made. Where identity is disputed, as in the case of Mr Arapi, the requesting state should be asked to provide a copy of the national identity card or passport or other photo ID. Where there are doubts as to the proper use of the European Arrest Warrant, the requesting state should be asked to provide information on the indictment process

under their national law, the stage of proceedings reached, the date set for the first hearing and an assurance that the individual will not be interrogated on arrival. (Paragraph 115)

13. We have heard compelling evidence on the importance of dual representation for a requested person in order to ensure that their rights are safeguarded. We do not believe that the present provision of legal representation meets these needs. We recognise, however, the current climate of reduced funding for legal aid. We urge the Government to examine the provision of legal representation in extradition proceedings in order to ensure that people subject to extradition are properly represented both in the requesting and requested country. We welcome the Extradition Review Panel's consideration of this issue. Legal representation in both countries for persons requested for extradition would make the human rights bar and other safeguards in the extradition process more effective in protecting rights. (Paragraph 126)

14. When our predecessor Committee considered the draft Extradition Bill in the 2001–02 Session, it was satisfied that the requirement for a judge to consider the impact of extradition on a suspect's Convention rights would provide adequate protection for those rights. Our inquiry, and specifically this and the previous Chapter, has considered whether that judgment has been borne out in practice and has revealed that the mere presence of such a "human rights bar" in the statutory framework is not enough to secure effective protection for human rights. For such protection to be practical and effective it is necessary to go beyond such generalised provisions and to spell out in detail in the statutory framework some specific and detailed safeguards of the rights in question. (Paragraph 127)

4 The European Arrest Warrant

15. We recognise the importance of extradition and the benefits the European Arrest Warrant has brought in terms of a quicker, more streamlined process for surrender within the European Union. (Paragraph 130)

16. We agree with this evidence and recommend that the Government should take the lead in seeking to ensure that there is equal protection of rights, in practice as well as in law, across the EU. (Paragraph 137)

17. We note the increasing number of European Arrest Warrant requests received by the UK. We have serious concerns about the disproportionate impact of extradition where it is requested for a relatively minor offence. We urge the Government to work with the European Commission and other Member States to implement a proportionality principle in the Framework Decision, both for operational reasons and to ensure that the human rights implications of extradition are not disproportionate to the alleged crime. (Paragraph 158)

18. Such a proportionality principle should be contained within the Framework Decision of the European Arrest Warrant and operate in a similar way to the tests applied by the Police and the CPS before issuing a request. We are not convinced that informal guidelines, bilateral discussions with the authorities of other Member

States or a public interest test operated by the authorities in the requested country would be operationally practical or successful in the long-term. (Paragraph 159)

19. The Government and the Extradition Review may wish to review the list of 32 offences for which double criminality is not considered, with a view to whether certain conduct should be excluded from the definitions of these offences. We recognise, however, that the Framework Decision expressly excludes double criminality as a reason for denying the execution of an EAW. We recommend that this principle be dealt with as part of the renegotiation of the Framework Decision. (Paragraph 165)

20. We urge the Government to ensure that other Member States do not use the European Arrest Warrant for purposes of investigation, if necessary by amendment to the Framework Decision. We recommend that, where there are doubts as to the stage of proceedings reached in the requesting state, the facility for further information provided by the Framework Decision and the Extradition Act 2003 should be used. The requesting state should be asked to provide information on the indictment process under their national law, the stage of proceedings reached, the date set for the first hearing and an assurance that the individual will not be interrogated on arrival. (Paragraph 168)

21. It may be that, if applied, the Directive on the application of the principle of mutual recognition to the decisions on supervision could ensure that a person extradited to another EU state could await trial in the UK, reducing problems in relation to long times spent in prison before trial. (Paragraph 169)

22. The system for removal of EAW requests should be improved or formalised to prevent repeat arrests where a court elsewhere in the EU has already refused to execute an extradition request. The Government should examine whether adopting Article 111 of the Schengen Information System would help avoid this problem. The Government should also negotiate membership of the SIRENE system which can be used to enter information on the execution of EAWs. (Paragraph 174)

23. The Extradition Review Panel or the Government should consider whether the current time-limits provide adequate opportunity for the defence to postpone a hearing if necessary as long as the court considers the reasons for the request for adjournment on its merits on a case-by-case basis. The Government should also investigate the possibility of replacing time limits with another, less strict, formulation such as "as soon as reasonably practical", although we note that this would require renegotiation of the Framework Decision. (Paragraph 180)

24. We note that Article 4(6) of the Framework Decision allows the requested state to deny execution of the European Arrest Warrant issued for the purposes of serving a sentence where the requested state undertakes that the sentence will be served in that state. We recommend that this safeguard be transposed into the Extradition Act 2003 as this would significantly reduce the impact of such execution European Arrest Warrants on Article 8 rights. (Paragraph 181)

25. We recommend that the safeguard in Article 5 (3) of the Framework Decision be transposed into the Extradition Act 2003. (Paragraph 182)

26. We recommend that the Extradition Review Panel carefully assess the applicability of the EU Charter on Fundamental Rights to the European Arrest Warrant as applied by the UK. (Paragraph 185)

5 The UK's bilateral extradition treaties

27. The Government should increase the proof required for the extradition of British citizens to the US so as to require sufficient evidence to establish probable cause, as is required for the extradition of a US citizen to the UK. This will require renegotiation of the UK-US Extradition Treaty. (Paragraph 192)

28. We recommend that the Government urgently renegotiate this article of the US-UK extradition treaty to exclude the possibility that extradition is requested and granted in cases such as that of Mr Bermingham and Mr Ahmed, where the UK police and prosecution authorities have already made a decision not to charge or prosecute an individual on the same evidence adduced by the US authorities to request extradition. (Paragraph 196)

29. We note the arguments for increasing the role of the Secretary of State in the surrender of persons to countries under Part 2 of the Extradition Act. We are not convinced that changes should be made and, in any event, any additional powers would need to be carefully circumscribed to avoid those subject to extradition requests becoming "political pawns". (Paragraph 202)

6 European Investigation Order

30. We fully endorse the points made about the European Investigation Order by the House of Lords EU Committee. We urge the Government to ensure the inclusion of a provision to allow the refusal of an European Investigation Order on human rights grounds and a provision for dual criminality. We also agree that the European Investigation Order should be available for the use of defence lawyers, given the difficulties that defence lawyers face in providing evidence to support their arguments. (Paragraph 212)

31. The lessons from the European Arrest Warrant must be learned when negotiating the form of the European Investigation Order. The Government must ensure that there is an effective proportionality safeguard in the Directive, in order to ensure that the European Investigation Order operates effectively and that there are not numerous requests for information in minor cases. (Paragraph 217)

7 Other issues

32. The Government should standardise the information received by those subject to extradition to ensure they receive sufficient, accurate information on the extradition process and their rights in the country to which they will be extradited. (Paragraph 221)

33. It would be helpful if the Government were to provide details of their procedures in relation to extradition of persons subject to immigration control and the precautions

they take to ensure that these persons' rights are not infringed through either revoking their refugee status while they are outside the UK, or through their refoulement to another country. (Paragraph 224)

34. Extradition should not be the only method for dealing with suspects of crimes against humanity: we urge the Crown Prosecution Service to consider carefully whether such suspects can be tried in the United Kingdom before extradition proceedings are initiated. (Paragraph 228)

Formal Minutes

Tuesday 7 June 2011

Members present:

Dr Hywel Francis MP, in the Chair

Lord Bowness	Mike Crockart
Baroness Campbell of Surbiton	Mr Dominic Raab
Lord Dubs	Mr Virendra Sharma
Lord Morris of Handsworth	
Baroness Stowell of Beeston	

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Draft Report, *The human rights implications of UK Extradition Policy*, proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 228 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Fifteenth Report of the Committee to each House.

Ordered, That the Chair make the Report to the House of Commons and that Lord Bowness make the Report to the House of Lords.

Ordered, That embargoed copies of the Report be made available in accordance with the provisions of Standing Order No. 134.

Written evidence reported and ordered to be published on 25 January, 1 February, 1 March, 8 March, 22 March, 29 March, 5 April, 28 April, and 24 May was ordered to be reported to the House.

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[Adjourned till Tuesday 14 June at 2.00 pm

Declaration of Lords Interests

Lord Dubs

Former chair of Liberty

Lord Lester of Herne Hill

Category 10: Non-financial interests (e)
Member, Expert Counsel Panel, Liberty
Member of Council, JUSTICE

A full list of members' interests can be found in the Register of Lords' Interests:
http://www.publications.parliament.uk/pa/ld/ldreg/reg01.htm

Witnesses

Tuesday 1 February 2011

Catherine Heard, Fair Trials International**, Jodie Blackstock** and **Sally Ireland,** Justice, and **Sophie Farthing,** Liberty

Michael Turner, Frank Symeou, Deborah Dark and **Edmond Arapi**

Tuesday 15 February 2011

David Bermingham,

Tuesday 8 March 2011

Commander Allan Gibson and **Detective Superintendent Murray Duffin**, Metropolitan Police Service

Charlotte Powell, Extradition Lawyers Association

Tuesday 29 March 2011

Keir Starmer QC, Crown Prosecution Service

Baroness Neville-Jones, and **Fenella Taylor**, Home Office

List of written evidence

1	Written Evidence submitted by Fair Trials International	EXT 1
2	Written Evidence submitted by The Freedom Association	EXT 2
3	Written Evidence submitted by an individual who wishes to remain anonymous	EXT 3
4	Additional Written Evidence submitted by an individual who wishes to remain anonymous	EXT 3A
5	Further Additional Written Evidence submitted by an individual who wishes to remain anonymous	EXT 15
6	Written Evidence submitted by Professor Monica Lugato, Faculty of Law, LUMSA University of Rome	EXT 4
7	Written Evidence submitted by the Immigration Law Practitioners' Association	EXT 5
8	Written Evidence submitted by Liberty	EXT 6
9	Letter submitted to the Chair of the Committee by David Bermingham	EXT 7
10	Written Evidence submitted by the Redress Trust (REDRESS)	EXT 8
11	Letter submitted to the Joint Committee on Human Rights from the Law Society	EXT 9
12	Statement submitted by Mr Mark Turner, father of Michael Turner	EXT 10

List of Reports from the Committee during the current Parliament

Session 2010–12

First Report	Work of the Committee in 2009–10	HL Paper 32/HC 459
Second Report	Legislative Scrutiny: Identity Documents Bill	HL Paper 36/HC 515
Third Report	Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report)	HL Paper 41/HC 535
Fourth Report	Terrorist Asset-Freezing etc Bill (Second Report); and other Bills	HL Paper 53/HC 598
Fifth Report	Proposal for the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010	HL Paper 54/HC 599
Sixth Report	Legislative Scrutiny: (1) Superannuation Bill; (2) Parliamentary Voting System and Constituencies Bill	HL Paper 64/HC 640
Seventh Report	Legislative Scrutiny: Public Bodies Bill; other Bills	HL Paper 86/HC 725
Eighth Report	Renewal of Control Orders Legislation	HL Paper 106/HC 838
Ninth Report	Draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010—second Report	HL Paper 111/HC 859
Tenth Report	Facilitating Peaceful Protest	HL Paper 123/HC 684
Eleventh Report	Legislative Scrutiny: Police Reform and Social Responsibility Bill	HL Paper 138/HC 1020
Twelfth Report	Legislative Scrutiny: Armed Forces Bill	HL Paper 145/HC 1037
Thirteenth Report	Legislative Scrutiny: Education Bill	HL Paper 154/HC 1140
Fourteenth Report	Terrorism Act 2000 (Remedial) Order 2011	HL Paper 155/HC 1141
Fifteenth Report	The Human Rights Implications of UK Extradition Policy	HL Paper 156/HC 767

List of Reports from the Committee during the last Session of Parliament

Session 2009–10

First Report	Any of our business? Human rights and the UK private sector	HL Paper 5/HC 64
Second Report	Work of the Committee in 2008–09	HL Paper 20/HC 185
Third Report	Legislative Scrutiny: Financial Services Bill and the Pre-Budget Report	HL Paper 184/HC 184

Fourth Report	Legislative Scrutiny: Constitutional Reform and Governance Bill; Video Recordings Bill	HL Paper 33/HC 249
Fifth Report	Legislative Scrutiny: Digital Economy Bill	HL Paper 44/HC 327
Sixth Report	Demonstrating Respect for Rights? Follow Up: Government Response to the Committee's Twenty-second Report of Session 2008–09	HL Paper 45/ HC 328
Seventh Report	Allegation of Contempt: Mr Trevor Phillips	HL Paper 56/HC 371
Eighth Report	Legislative Scrutiny: Children, Schools and Families Bill; Other Bills	HL Paper 57/HC 369
Ninth Report	Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010	HL Paper 64/HC 395
Tenth Report	Children's Rights: Government Response to the Committee's Twenty-fifth Report of Session 2008–09	HL Paper 65/HC 400
Eleventh Report	Any of our business? Government Response to the Committee's First Report of Session 2009–10	HL Paper 66/HC 401
Twelfth Report	Legislative Scrutiny: Crime and Security Bill; Personal Care at Home Bill; Children, Schools and Families Bill	HL Paper 67/HC 402
Thirteenth Report	Equality and Human Rights Commission	HL Paper 72/HC 183
Fourteenth Report	Legislative Scrutiny: Equality Bill (second report); Digital Economy Bill	HL Paper 73/HC 425
Fifteenth Report	Enhancing Parliament's Role in Relation to Human Rights Judgments	HL Paper 85/HC 455
Sixteenth Report	Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In	HL Paper 86/HC 111