



HOUSE OF LORDS

Revised transcript of evidence taken before

The Select Committee on Extradition Law

Inquiry on

EXTRADITION LAW

Evidence Session No. 15

Heard in Public

Questions 238 - 254

WEDNESDAY 21 JANUARY 2015

10.10 am

Witness: David Bermingham

USE OF THE TRANSCRIPT

This is a corrected transcript of evidence taken in public and webcast on
www.parliamentlive.tv.

Members present

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

Examination of Witness

David Bermingham

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

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

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

David Bermingham: Yes, Lord Chairman. I am David Bermingham. Thank you very much for inviting me to speak today. As you mentioned, you have a large amount of material from me. My views on the subject of our extradition arrangements are well known and have been for the last 10 years or so. I have not moved one inch from them. I think it is a bad law. I understand that I am here today to talk about my personal experience. The significance of

the article that I sent last night is that it is very easy in situations like this for a committee to say, “His evidence on this, that or the other is entirely self-serving”. I accept that. What was wonderful about what I circulated last night—although obviously the Committee has not yet had the time to read it—is that it supports in almost every material detail what I have said about the workings of the US justice system, which is my bone of contention. It was written by a currently serving district judge in the Southern District of New York, who is genuinely appalled by the way their justice system has evolved over the last 20 years. I would like to leave that out there.

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

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

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

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

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

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

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

David Bermingham: No.

The Chairman: Anything?

David Bermingham: No. The first thing I did, after alerting my wife to the fact that I had just been accused of fraud, was to ring our attorneys in London. We did not have any criminal attorneys; not for one moment had we ever contemplated being involved in any kind of criminal action. We had to hire attorneys because to go to the FSA we needed to be represented. It was a civil matter. I was starting from scratch. The very first thing I knew was that I had been charged with fraud, along with my two compatriots. We had to ring our attorneys in London and say, "What the hell just happened?". By the time I got to London at half past nine that morning, they had found the charging document online, which was an American criminal complaint, and the affidavit in support of that. There never was, and to this day never has been, any sort of proceeding against us in the UK. We were faced with an allegation from the US Government that we had committed fraud against our own bank in London. We sat with a bunch of lawyers in their offices in London who had no criminal expertise at all. Luckily, one of them said, "I need to get hold of an extradition expert, because they could be calling for your extradition this afternoon". They very kindly got hold of Alun Jones QC, who had literally written the book on extradition. He sat down with us the following morning and explained that there was little or no chance of an extradition proceeding any time soon, and moreover that if the Americans wanted to extradite us on these charges they would effectively have to make out a case under the Theft Act.

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

David Bermingham: No.

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

David Bermingham: Correct.

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

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

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

David Bermingham: Correct.

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

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

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

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

The Chairman: The US prosecutors?

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

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

Q240 Baroness Wilcox: My question, which you will have received, flows from that. A lot of what I was going to ask you is already in your written evidence. It is clear that you were utterly confused. I would have been. Lord knows what you and your family would have felt at that time. I am interested in what information you were given as to how you were supposed to proceed. Were you given a piece of paper that said, "You will receive this and then you will do that", from either the United States or the United Kingdom?

David Bermingham: No, neither.

Baroness Wilcox: Nothing?

David Bermingham: No.

Baroness Wilcox: Did you ask for any?

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

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

David Bermingham: At that stage, yes.

Baroness Wilcox: And then going forward from that?

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

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

David Bermingham: Yes. This happened in June 2002.

Lord Rowlands CBE: So it predates the Extradition Act.

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

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

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

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

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

Baroness Wilcox: That is fine, thank you.

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

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

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

David Bermingham: No. Taking half a step back, when we first went to the Financial Services Authority in November 2001 to report our suspicions of a fraud, we were working for an institution called the Royal Bank of Canada. We agreed with them that we would resign at that point. About six months previously they had been on the wrong end of an insider trader scandal in Canada. At this stage, Enron was all over the news on a daily basis—not as a criminal enterprise at that stage, just as a civil case. However, they did not want the reputational risk of being associated with an SEC investigation into Enron with three of their employees. By arrangement with the bank, we resigned. When all this blew up seven or eight months later, we were not working for a bank.

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

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

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

David Bermingham: Yes.

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

David Bermingham: I think it was 12 February 2004.

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

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

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

David Bermingham: Our problem was originally that they were McDermott Will & Emery, which is a big American firm with a large London presence, but they had no criminal expertise in the UK. We had to drop them and we took on a gentleman by the name of Mark Spragg, who worked at the time for a company called Jeffrey Green Russell. He was a specialist in criminal and extradition work.

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

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

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

David Bermingham: Yes, correct.

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

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

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

David Bermingham: It was heard in parallel by the same court that heard the appeal on our extradition proceedings. They dismissed it out of hand. They said that the Serious Fraud Office had no statutory requirement to investigate a case; if they choose not to, it is up to them.

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

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

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

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

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

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

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

David Bermingham: Yes, the extradition squad.

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

David Bermingham: Yes.

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

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

The Chairman: How much warning did you get?

David Bermingham: A couple of days, I believe.

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

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

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

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

David Bermingham: Yes, it was.

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

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

Lord Mackay of Drumadoon: Was he present?

David Bermingham: Yes, he was.

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

David Bermingham: We were constantly discussing them.

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

David Bermingham: Yes.

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

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

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

David Bermingham: A combination of both, but yes. I am a great conspiracy theorist. The key thing with the forum bar as it is currently drafted, quite apart from the fact that it is

about four pages long when four lines would have done, is there is in there the ability for a UK prosecutor to serve a certificate on the court that then becomes determinative. He can essentially say, “I’ve looked at this. We don’t want to prosecute it, and therefore you, the magistrate, should order their extradition”. Almost inevitably that would have happened to us because we had already sued the Serious Fraud Office and said, “We want you to prosecute”. We had been to all the prosecuting authorities. We had written to the DPP, the FSA, the SFO, and everybody just said, “Nothing to do with us”. I am damn sure that a prosecutor in our case would have written that certificate. Of course, under the new law there are no longer automatic appeal rights. That would essentially have become determinative.

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

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

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

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

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

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

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

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

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

David Bermingham: In my view, yes.

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

Q244 Lord Jones: The question I have been asked to put to you, hearing the distressing detail of your struggle, is: as the extradition process in this country moved forward, did you

have any legal representation in the United States, and if you did to what extent was this of benefit to you?

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

Lord Jones: Thank you.

David Bermingham: Might I go back to the last question, as I did not really give a complete answer on forum. You mentioned, my Lord, two statutory forum provisions. There were actually three. The third one is often forgotten, but never by me because I drafted it. I refer to it in my written evidence. Back in 2006, when we were simultaneously trying to avoid extradition and get the law changed, we drafted a forum amendment that was no more than four lines long. The difference between that and what ended up dormant on the statute book was that in ours the presumption was against extradition if the case could be heard in the UK. The philosophy behind that was very straightforward. The whole point about extradition is that the moment you put someone on a plane, you have effectively exercised summary judgment over them. They are going to be thrown into a hellhole prison somewhere. It may be a very long way away. They may have difficulty understanding the language. They are going to have difficulty with a foreign legal system. They are away from their home, their family. It is a terrible thing to happen. My view, and I am not anti extradition, is that extradition should be akin to a last resort. It is absolutely imperative that the interests of justice are served, but do they necessarily have to be served in the first instance by carting people off in chains to the far side of the world? Answer: no. If a case could be heard here, we ought to think very carefully about the fact that, as a first priority, it ought to be. I do not think that is a radical proposition, not least because that is, in terms, the way the whole of the rest of the world behaves. If you are France, for instance, you will never put one of your own citizens on a plane to America, simply because he is French, and if you are Irish you will not put him on a plane to America if the case could be heard in Ireland. This is the point: no one is suggesting for one moment that a forum bar ought to prevent all extraditions. We are saying that it should be incumbent upon a requesting state to make the

case as to why putting someone on a plane in chains to the far side of the world to be locked up in prison is better than the case being dealt with in the UK. I genuinely do not think that is a radical proposition, and the fact that so many parliamentarians over the years have refused point blank to recognise that does a massive disservice to our citizens. I am absolutely ashamed of the legislation that we have enacted, and continue to defend. All the Conservatives and Liberal Democrats, in opposition in 2006, tried jolly hard to put in place exactly the four-line forum bar that I have just set out.

Lord Henley: Was it your amendment?

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

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

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

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

David Bermingham: They did not.

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

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

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

David Bermingham: Yes, there were a huge help, because they gave us an insight into how the system worked over there. It took us a long time fully to understand it, because being

British we were all very much of the belief that if you had done nothing wrong, everything would be fine. It took a very long time and an awful lot of money for us to understand that that is not how the game is played in America.

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

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

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

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

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

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

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

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

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

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

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

David Bermingham: No, I was not.

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

David Bermingham: Here is the thing. We had probably the most delightful extradition you could ever have to America, and because we had become such political hot potatoes the Attorney-General here, Lord Goldsmith, personally contacted the Attorney-General in the US and said, “Give these guys bail”, which had never been done before. We were delivered to

the US marshals who came to take us on the plane at the elbow prior to the door to the plane at Gatwick Airport. The marshal said, "Under normal circumstances you guys would be in chains at this stage. However, we are not going to do that". Whether that was because someone had told them not to I do not know, but they made it absolutely clear that that would be the normal protocol. As soon as we arrived in the US, we were put in chains.

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

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

Lord Hart of Chilton: Did you travel first class?

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

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

David Bermingham: It was Houston, Texas. It was hotter than hell. When we arrived we were met by a wall of law enforcement. You could not have made this stuff up: there were guys with more badges and guns than you could shake a stick at. We were taken to the Immigration and Customs Enforcement department. We were put in our hand chains, foot chains, belts and everything else, strip-searched and then taken off to what we thought was the Federal Detention Center in downtown Houston. In fact, it turned out to be the federal courthouse. We were processed there. At this stage, we were expecting to be remanded into custody in the Federal Detention Center when a representative of the US Attorney-General turned up in a very smart suit and said, "Guys, don't worry, everything's going to be fine". He took the marshals outside and loud voices ensued. The marshals then said, "We don't really know what's going on". They took us out of our chains, took us downstairs, put us into a couple of cars and drove us to the Marriott hotel, where they put us up in a room for the night prior to a bail hearing the following day.

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

David Bermingham: I have been in several hellhole prisons.

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

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

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

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

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

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

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

David Bermingham: No.

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

David Bermingham: Yes.

The Chairman: Who provided the bail?

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

The Chairman: So he dealt with the surety.

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

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

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

The Chairman: All three of you together?

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

The Chairman: Who put the money up?

David Bermingham: We had to put it up.

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

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

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

David Bermingham: Funnily enough, I am a born optimist, my Lord. It surprised me greatly. The reason for that, very simply, although I am not a lawyer, is that it was put to us by our lawyers that we had a strong case because Article 8 is a qualified right. It is inevitable that there would be an interference with our right to a family life because we were being carted off to the other side of the world. The question is: is it necessary and proportionate? In our case we said that it was not necessary or proportionate because the case could and should be heard in London. I did not think that was a particularly difficult concept. I do not blame the judges—much as I would like to I cannot. They were deciding the case based on the law. Essentially, we were endeavouring to use Article 8 to put a forum provision in place, because it did not exist in the law. To this day I could tell you that it was not necessary, for the interests of justice to be served, to extradite us to America. If the Americans had wanted

that case to be heard in the UK, all they had to do was say to the Serious Fraud Office, “Prosecute it”. It is as simple as that.

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

David Bermingham: Yes.

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

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

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

David Bermingham: We would obviously be running a different or perhaps no Article 8 argument. Today you would be trying to run that argument under the forum provision. As I said earlier, I think we would fail on that. I honestly believe that the courts’ interpretation of Article 8 is pretty draconian. Underpinning it very clearly in both Norris and HH is a very strong presumption that we must honour our extradition arrangements and that those take priority over an individual’s case or circumstances in all but the most exceptional cases. I genuinely do not take that view because, as I say, I think the whole framework that we have is flawed. It is completely out of kilter with all other countries, including America, most notably—they look after their own and will try cases locally before considering putting people on a plane. I think that is where we fail. While our analysis of Article 8 may be correct in terms of meshing it with European precedent, the whole framework is flawed. Within that, therefore, the Article 8 test is the wrong one.

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

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

Lord Rowlands CBE: It was \$7 million.

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

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

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

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

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

That was one thing. The other was that we tried desperately hard to get access to all the written materials that we wanted to conduct our defence, but also, more importantly, to witnesses from the UK. We had flagged this in the extradition proceedings. Because there were no proceedings against us in the UK when we were still here, we had no rights to subpoena. We could not get any preparatory work done: we could not interview witnesses or get documents. It is only when you get to America that you can start to engage processes. To give you an analogy, someone once said—

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

David Bermingham: Yes, it is the law.

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

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

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

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

The Chairman: Of what?

David Bermingham: Of the conspiracy that was charged.

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

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

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

David Bermingham: Yes, essentially.

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

David Bermingham: Thirty-six.

Lord Hart of Chilton: And they were all rejected?

David Bermingham: Yes. It is not quite that simple. The vast majority of them were former or current employees of the Royal Bank of Scotland and had fallen under the umbrella of the Royal Bank of Scotland's legal advisers, who put themselves between us and those people and said, "They don't want to talk to you". Of course, that is determinative. If the US judge had given the order that we sought, we could, through the mutual legal assistance treaty, have forced them to give evidence, which is what we were seeking to do.

The Chairman: Why did that not happen?

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

The Chairman: So he just ignored what you requested.

David Bermingham: Yes.

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

David Bermingham: When I said no, they moved on to Gary, and Gary subsequently said no. At that stage, Gary's lawyer, who, as I say, had been the former prosecutor, said, "Right, if there is ever a good time, now is the time to go back to the prosecutors and say, 'We will entertain the prospect of a deal, but it is a deal for all three or a deal for none'". This was

when the trial had been put back yet again, so we were facing a further six-month delay. That was a relatively short conversation, because they said, “Of course. If all three plead guilty, happiness, no trial, lovely jubbly”. We then entered into a rather extraordinary series of negotiations, where for about two weeks we decided what the punishment would be, and after we had agreed on what it would be we then had to agree on what we had done that would support that level of punishment under US sentencing guidelines.

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

David Bermingham: Correct. The judge was presented, ultimately, with a take-it-or-leave-it piece of paper that said, “This is the sentence, this is what they’ve done, and we the prosecutors agree that by signing this piece of paper we will agree (a) to drop the rest of these charges and (b) to expedite their repatriation”. That was the key thing: the prosecutors made it clear to us that if we signed a piece of paper saying that we had done something wrong, not only would they not oppose but they would support and expedite a transfer home to the UK so that we could spend the majority of our sentence here.

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

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

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

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

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

David Bermingham: Supposedly, yes.

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

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

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

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

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

David Bermingham: There was a Mr Fastow.

The Chairman: What happened to him?

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

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

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

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

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

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

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

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

The Chairman: Or to disagree with it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Chairman: What was the Californian one like?

David Bermingham: From my perspective it was marvellous. I had never been to California before and the weather was very nice. They build prisons over there in complexes. They build a high-security, a medium and a low, and they might have a prison camp, which is the minimum. If you are a foreigner you cannot go into an open prison: the Bureau of Prisons will not allow it. The best you will do is a low, which will typically have wire around the outside, but you get a fair degree of freedom during the day to walk around and exercise. Once you get into a medium or a high you get prison walls, so you cannot see the outside, and you are incarcerated in a cell a lot of the time. From my perspective, being incarcerated in a room where there were 250 inmates in bunk beds two feet apart was not a bad place to be, oddly enough—I was in the army; to me it was a bit like basic training on steroids. It did not faze me greatly. The fact that I could move around and the weather was nice bear upon the time you will have there. It was low security.

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

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

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

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

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

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

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

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

David Bermingham: That took two weeks.

The Chairman: Two weeks to go on this journey?

David Bermingham: Yes.

The Chairman: Then you were in New York.

David Bermingham: Then I was in New York. I was there for a month, because we had to wait for a magistrates' hearing. The transfer process has three stages. First, you have to apply for a transfer from within prison. You have to be in prison to make the transfer application. It goes through various desks on its way up to an office in Washington called the OEO, which is part of the International Prisoner Transfer Unit. They have absolute discretion over whether to say yea or nay. If they say no, there is no right of appeal and you must wait two years before you can submit another request. In our case, because it was written into the plea agreement that the prosecutor would support and expedite a transfer, we were relatively confident, although you can never be 100% sure, that they would say yes. They said yes. Once that has happened, then and only then are papers sent by the Office of International Affairs in Washington to what was the Home Office and is now the justice department here. The UK end of that process then clicks into gear. Really, that is all about: first, whether there was dual criminality in the thing of which he was convicted or pleaded guilty to; secondly, whether he has a minimum six months left to serve once he is repatriated; and, thirdly, whether he is a UK citizen. It ought to take about five minutes. It regularly takes 10 to 12 weeks. Once that process has been gone through, then and only then will they move you to New York. Then you have to have a magistrates' hearing in which you put up your hand and say, "Yes, I understand all that I am giving up by leaving America and going back to the UK, and I want to do that".

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

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

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

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

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

David Bermingham: None.

Lord Hart of Chilton: And after the plea bargain?

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

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

David Bermingham: Yes.

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

David Bermingham: Yes.

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

David Bermingham: In practice, that is correct.

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

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

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

David Bermingham: It is a specific formula. Under the Convention on the Transfer of Sentenced Persons, the UK has the ability to say, "If somebody is transferred back to serve a prison sentence in the UK, we can determine how much time they will spend". The other default position to which the UK has signed up is, "We will essentially enforce the sentence that has been mandated abroad". A calculation is done on the date of your departure from America. A piece of paper is given to the UK marshal by the US saying, "The original sentence was"—in our case, 37 months—"This man has physically served X number of months, and he

also gets what is called good time credit". While there is no parole in the federal system, there is potentially 15% good time credit. You are credited for days that you have not served. In our case, I had physically spent just over six months in prison. I was credited with seven months. Therefore 30 months of my sentence were unserved. What then happens is that those 30 months effectively become a new UK sentence of 30 months. It is as if you have been sentenced in the UK to 30 months' imprisonment. You get automatic release at the halfway point, at 15 months, and then the potential to be released early on a home detention curfew, as they call it—electronic tagging—135 days prior to that. That is exactly what happened with us. We came back, had 30 months to serve, actually spent ten and a half months in prison and a further four and a half months on a home detention curfew.

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

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

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

Baroness Jay of Paddington: You ask it.

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

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

two men were put on a plane. I feel sick to my stomach about what happened to them, I really do.

The Chairman: Unless anybody else has any questions—

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

David Bermingham: Absolutely.

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

David Bermingham: Yes.

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

David Bermingham: That is a hypothetical question. I do not know. We were enormously well and very expensively advised, and we ended up paying an enormous amount of money back to the US Government. It was a horribly expensive adventure all round and not one that I would ever wish to repeat. Arguably, it was entirely our own fault, so I do not demur from that. However, it is undoubtedly the case that if you do not have significant financial resources, in America you get what you pay for. The public defenders' offices over there have very varying standards of people, many of whom are incredibly hardworking and very well meaning but are absolutely overburdened. God bless the public defender who Babar Ahmad and Talha Ahsan found. It is a very rare public defender who will not just say, "Too difficult. Here's the piece of paper. Just sign it now".

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

David Bermingham: You are welcome.