



HOUSE OF LORDS

Revised transcript of evidence taken before

The Select Committee on Extradition Law

Inquiry on

EXTRADITION LAW

Evidence Session No. 6

Heard in Public

Questions 76 - 105

WEDNESDAY 15 OCTOBER 2014

10 am

Witnesses: Sue Patten and Nick Vamos

Rebecca Niblock and Edward Grange

USE OF THE TRANSCRIPT

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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 Witnesses

Sue Patten, Head of Specialist Fraud Division, Crown Prosecution Service, and **Nick Vamos**, Head of Extradition, Crown Prosecution Service

Q76 The Chairman: I welcome witnesses from the CPS back again: Nick Vamos, head of extradition at the Crown Prosecution Service, who gave us an informal briefing before the summer break, and also Sue Patten, who is head of the specialist fraud division of the CPS. We have had CVs from you. Is there anything you would like to say either individually or separately as a brief opening statement before we go into formal questioning, please?

Sue Patten: We just wanted to say a few words to explain that we are here first as lawyers representing the countries that request extradition from this jurisdiction, and secondly as the domestic prosecutor who may be taking decisions about concurrent jurisdiction during investigation, and therefore whose opinion, or belief or certificate is under consideration at the extradition stage, if extradition is sought. CPS takes all prosecution decisions independently of government and independently of investigators. We have a Code for Crown Prosecutors that guides decisions to prosecute and not to prosecute. You will be

aware of the separate guidelines issued by the DPP, which set out the objective criteria we apply when looking at questions of concurrent jurisdiction; these cases are extremely fact-specific.

The Chairman: Thank you. Nick Vamos, do you want to add anything?

Nick Vamos: No, thank you.

Q77 The Chairman: Perhaps just to get the ball rolling, could you tell us roughly if you can what proportion of cases you investigate involve criminal conduct in more than one jurisdiction?

Sue Patten: I do not think there are any statistics that would give you authoritative or complete data on that question, but we have made some inquiries with colleagues: first, for example, at the UK desk at Eurojust, with colleagues who specialise in organised crime, counterterrorism and so forth. According to Eurojust, since 2004, they have logged 54 joint investigation teams, which is a formal process in EU cases. That is 54 between the UK and other EU member states. About 25% of those were between three or more member states, and about 75% were purely bilateral between the UK and one other jurisdiction. The most common criminality that Eurojust cites is probably relating to people trafficking, drug trafficking, immigration, money laundering, boiler room fraud, murder, robbery, cybercrime including images of child abuse, and corruption. They also tell us that since 2011 Eurojust has hosted between 50 and 60 multijurisdictional meetings between investigators and prosecutors in the UK and other EU member states; although this obviously does not mean there are concurrent investigations in all of those cases. My colleagues specialising in organised crime who prosecute cases investigated by what used to be SOCA and is now the National Crime Agency estimate that about 70% of their case load involves conduct in multiple jurisdictions. I can also tell you that both the organised crime division and my

division—the specialist fraud division—each send between 200 and 300 letters of request every year to other countries. These are obviously evidence-gathering tools, but it just gives you an indication of the extent of the international dimension that can arise in serious casework.

The Chairman: Can we just clarify? When you gave us the figures about the number of cases, is that cases that have ended up in some prosecution? Or was that cases just investigated, some of which would have got no further?

Sue Patten: Probably both. This was just really to give you an estimate of what we can give you.

The Chairman: I know, but I just want to be clear what it was you were saying. This is all the work you have done: the 54 cases.

Sue Patten: That is Eurojust joint investigation teams. That is a formal process where there is almost like a contract between two or more EU member states where there is a joint investigation. That is one element.

The Chairman: Can I just take it further in terms of trying to assess the scale of what is going on? Is there a lot of contact that is informal, rather than formal?

Sue Patten: You could say the letters of request are a formal way of evidence gathering that can be preceded by police-to-police or mutual administrative assistance, Interpol et cetera where there are inquiries as to what can be established in another country by way of evidence.

The Chairman: Forgive me; I am just trying to get an assessment. It is a bit like the tip of the iceberg in the form of statistics. I am trying to assess how much of the iceberg is underwater, in the most general sense.

Sue Patten: Some of it certainly is, but obviously if there is a serious investigation at some point you will need to send letters of request, otherwise you will not be able to use the evidence in this jurisdiction if we bring proceedings. Equally, the UK receives a lot of letters of request, but I am afraid I cannot give you figures on that.

Lord Brown of Eaton-under-Heywood: Is that all Part 1 cases, EU cases? Are Part 2 cases another matter entirely?

Sue Patten: Eurojust figures relate to EU member states. For my colleagues in the organised crime division, it could be anywhere in the world, and letters of request could be anywhere in the world. Although, in the case of my own division, I would say the majority are EU.

Q78 Lord Empey: Good morning. Your guidance on shared jurisdiction states that a prosecution should only really be brought where most of the criminality or most of the loss or harm occurred. What happens when the two factors in this formulation—criminality and harm or loss—occur in different jurisdictions? You did mention cybercrime; obviously internet-related crime could mean damage in multiple jurisdictions. Could you tell the Committee how you would sort that out?

Sue Patten: We thought we might try to address that by telling you about some cases where the forum bar has already been argued. Some of those give you an understanding of the fact that, as you have just said, the conduct and the harm may be in different places or in many places. Obviously there are other factors as well in the DPP's guidelines, and also in the forum bar legislation, which we can also look at.

The first case that you may be interested in the facts of is a Polish extradition case. This was a drug trafficking case, so much of the planning, the intended distribution of the drugs and intended victims were in the UK. I am taking this from the judgment; I was not personally involved in the case. However, the drugs were being transited through other member

states, and most of the intended harm was aimed at the UK. The court took into account the fact that there were no actual victims in the sense that the conspiracy had been disrupted because it had been thwarted, so to speak. The CPS's view was that England was not the right venue, because other co-accused had been arrested and were already awaiting trial in Poland, and the court decided that view was reasonable. Most of the witnesses and the evidence were in Poland; other defendants were in Poland, and the court took it into account that mounting a trial in the UK would involve delay, cost and time taken up in argument, and extradition of others from Poland, if that was possible. The court looked at the fact they could see an economy of effort to try the case in Poland in terms of cost, time and consistency of outcomes between defendants. You can see multiple factors were taken into account in that case by the court itself.

Lord Empey: That sounds eminently sensible, but there are a number of people worried particularly about cyber-based crime, whether it is child abuse or something like that, where it must be exceptionally difficult to assess where that would be available in a host of jurisdictions. Would you focus on where you felt the perpetrators originated? It is almost impossible to measure.

Sue Patten: It may sound like I am not really answering your question, but it probably depends on the facts of the case. One of the other cases I was going to mention was possibly along the lines you might have been thinking about. It was a child pornography case, and the defendant whose extradition was sought from this jurisdiction was the administrator of an e-mail group and was distributing images of children being abused. However, the offences had come to light in the United States, because the person who was making those images was there. That person was identified, so the investigation started in the United States. The person in the UK had been in the UK all along and he was doing the

distribution from the UK. The court did not really know where the abused victims were. It was thought some of the children may well have been in the US, because that is where the main perpetrator was. They looked at the loss or harm that could flow from the abuse, and that could come from distribution but equally it comes from the abuse that has to be suffered in the first place before you can distribute those.

The Chairman: Can I just make an important point? Obviously you abide by the guidelines that arise from various court decisions, but when you are deciding whether or not to prosecute you presumably are applying the same criteria that you have described here. What we are anxious to know is, right at the beginning of the process, how you and your colleagues elsewhere decide where you are going to bring the proceedings?

Sue Patten: Assuming there are parallel investigations, that is one thing. Obviously there are cases where prosecutions are brought in multiple jurisdictions. The DarkMarket case that we were looking at yesterday is an example of that, where there was a website that was facilitating fraud and it was a global matter. Somebody from the FBI apparently infiltrated this website, but the NCA investigated that and we prosecuted it here. Probably some people were prosecuted in the US, some in other countries, so it is a lot of factors that make a difference. Obviously if there is an investigation here we would look at all of the factors of where it is most likely to be prosecuted—the feasibility of bringing trials and so forth—and we look at all of the factors that are relevant as the evidence emerges. It can be a different matter if there has never been an investigation in the UK at all and the issue only arises at the point of extradition.

Nick Vamos: It can arise earlier; occasionally prosecutors from another jurisdiction will come and say they have a prosecution and ask whether we are interested in having a parallel investigation or prosecution. Of course, if there is no investigation at that point within the

UK, the CPS can only prosecute if somebody domestically has investigated it. If there has been no domestic investigation, there is not really anything the CPS can do in that situation.

The Chairman: What you are telling us is that basically you have to treat every one of these on its individual facts.

Sue Patten: You can only do that, and they are very fact-specific. That has also been said in one of these forum bar cases when it got to appeal: that they do not see there is a hierarchy of factors and actually these cases are all very fact-specific. It might depend on the stage at which the issue arises, where the evidence is and who has it, et cetera.

The Chairman: Do you have a culture of trying to go for as many as you can, or of taking a more measured stance about it?

Sue Patten: Any prosecutor wherever they are in the world, if they are advising on an investigation—and that is a good investigation with a good case attached to it—would want to prosecute it. Sometimes you might have to consider whether, if the prosecution can be brought somewhere, the jurisdiction is better to be somewhere else. That might depend on the relative seriousness of the offending in different places, and all kinds of factors, including how far advanced each investigation is, and how quickly a trial could be brought. It genuinely is fact-specific.

Nick Vamos: There are similar cases that can have different outcomes. In the case that Sue was referring to, extradition was requested to the US. There, it was detected in the US, most of the evidence was in the US, co-defendants were in the US, but there is somebody who happens to be here who is a prime player in that conspiracy to manufacture and distribute these images. Nevertheless, the preponderance of the factors that determine current jurisdiction point towards the US. There was another case a few years ago where, in a reverse situation, there was not an extradition because the person was here in the UK, so we

did not need to extradite anybody from the US. However, in that case the CPS prosecuted and the US was providing support, assistance, evidence, witnesses, but we led the prosecution. It really depends on the facts of the specific case: where it was detected, and all the other factors.

Q79 Lord Brown of Eaton-under-Heywood: Your appendix 1 of your written statement sets out the principles. The one in this question is just the first of them, but there is a host of considerations.

Sue Patten: Yes.

Lord Brown of Eaton-under-Heywood: Do they not more or less duplicate the same considerations when you get to the forum bar?

Sue Patten: The question, though, that the court is looking at is different from the question we would be looking at during an investigation, because what we are looking at is the feasibility: who should lead? Where would we be looking to prosecute, assuming the evidence is gathered during the investigation? What the court is looking at in the forum bar is whether, because of those factors or a combination of those factors, the court should intervene and stop an extradition. Although they are in fact looking at the same factors, they are looking at them for a different purpose and in a different way.

Lord Brown of Eaton-under-Heywood: They are looking at them after you have taken the initial decision, by definition, that you are going to prosecute here. The court is then second-guessing the correctness of that. Is that it?

Sue Patten: It is looking at the same factor, but it is asked to take an independent decision. In the forum bar cases so far, the district judges have said that they would give quite a lot of weight to the view the prosecutor has taken, so unless the prosecutor has taken an irrational approach in some way, they would give considerable weight to the view of the prosecutor.

The Chairman: In a sense, do you feel it is a failure on your part if the court says, “Actually, no, the forum bar comes into play”?

Nick Vamos: Thankfully that has not happened. Well, “thankfully” is not the right word. It has not happened. Obviously, as you said, it is a different test, but if the court did look at the opinion of a prosecutor that the UK was not the correct jurisdiction and said, “Nevertheless, extradition should be barred by reason of forum,” we would have to look carefully at the decision-making we had made earlier in that process to see if we had got that right.

Q80 Lord Rowlands: If there is a disagreement between you and another jurisdiction as to the way it should be pursued, how is it resolved? What is the process of resolving a disagreement?

Sue Patten: You can only use the communication lines that are available. You can have a discussion; it can be a robust discussion. Obviously, there are certain circumstances in which, if you are able to start the prosecution, you could do, but what you try to do is reach an agreement.

Lord Rowlands: You have not had any case where you have not eventually reached an agreement.

Nick Vamos: An example of a kind is Abu Hamza, whose extradition was sought by the Americans for offences back in 2004. The CPS decided about six months after that extradition request came in that, actually, we wanted to prosecute him, not for the offences the Americans wished to prosecute him for but for domestic offences, which we knew full well would delay for a number of years the American extradition request. In fact, it delayed it for up to seven or eight years in the end.

However, the CPS felt it was in the public interest and there was sufficient evidence to prosecute Abu Hamza here, even though that directly prejudiced and delayed the Americans' interest in prosecuting him for separate offences. We make those decisions where, on the facts, it is justified. If there was a case with direct concurrent jurisdiction where there could not be an agreement as to who would prosecute, there is always another option. If the person is here and the CPS or another domestic prosecutor charges, that halts an extradition. It effectively brings the extradition to an end, but I cannot think of examples where that has happened.

Abu Hamza is an example of a slightly different situation, but, nevertheless, the CPS has been perfectly prepared to prejudice US interests to bring a domestic prosecution.

Q81 Baroness Hamwee: This is still about getting the flavour of it. We will come on to political considerations, but your principles refer to cost and resources. Does that mean that there is sometimes competition to pass over a costly case or is it competition to actually plough ahead and show we can do it?

Sue Patten: I think I am right in saying that that paragraph talks about "if all other considerations are finely balanced".

Baroness Hamwee: Yes, it does.

Sue Patten: Obviously we are talking about different situations here, but in a situation where there is no criminal investigation in this jurisdiction, the decision whether to start one and devote resources to it is the police's decision, essentially, but where questions like cost come in it is rather similar to the couple of cases we have cited, where another jurisdiction is trial-ready, in effect, and able to bring the proceedings.

If we were asked to do that here, we would be going to all the effort of, in effect, duplicating the case being put together in the other jurisdiction and then dealing with all the legal

argument here and, possibly, the delay in bringing the case before the courts when another jurisdiction is ready to do that.

The Chairman: We have been in and around forum bar as well as decisions to prosecute, Lord Henley.

Lord Henley: My Lord Chairman, because we have got on to the forum bar, I was just wondering whether it is, at this moment, worth asking the panel to expand a bit on the forum bar. There are criticisms that it has no teeth and that it has been illusory. Is that a fair criticism? Would you like to comment on the fact that it simply provides another avenue for litigation and so on?

Nick Vamos: Yes, I would like to comment on that. The simple answer is that it is far too early to say whether the forum bar is illusory or has no teeth. We have had a handful of cases and only one has gone to appeal. If you look at the legislation, it gives the court the power to bar an extradition based on the specified matters, and it is really up to the court to decide what weight to attach to each of those specified matters in any given case and whether more should attach to some and not others.

Thus far, they have said there is no hierarchy, but that is, like I said, in a very limited number of cases. I honestly do not agree. It will ultimately be up to the court to interpret the bar in a way that gives it the effect that they think it should have. Parliament has given them the opportunity to bar extradition. Whether or not it adds to litigation, any new legislation gives the potential for further argument. It sometimes takes longer to reach a just outcome.

Forum cases have not extended litigation in those cases much beyond what it otherwise would have been. Some of the issues would have been litigated anyway, because under Article 8 there was a forum jurisdiction that many people did argue. In fact, those cases where forum was argued under Article 8 probably took longer, because the jurisdiction was

more complicated and the factual basis upon which the court was being asked to consider those cases was far more complicated. Forum bar now actually makes it simpler to bring those arguments.

Lord Henley: It is a question of waiting to see what the courts do.

Nick Vamos: Absolutely.

Q82 Lord Mackay of Drumadoon: I have a further question. The effect of DPP's certification not to prosecute in the United Kingdom with the current forum bar has been criticised in a number of written submissions. How do you anticipate using the certifications?

Nick Vamos: In our internal guidance on this—which has been disclosed in some of the forum bar cases, and we are very happy to send a copy to the Committee — we have made it clear that we would only issue a certificate once we had applied a Full Code Test. We would need to receive a full file of evidence, just like in any other case. We would advise the police on further evidence they might need to obtain and, once we were satisfied we had a full file, we would reach a decision. Only once we were capable of making that decision, and if the decision was not to prosecute, would we consider issuing a certificate.

It seems to us that the point of a certificate is if, having considered all of the available evidence in this country, the UK is not a forum for that offending—and we have made that decision based on full consideration of all the facts available to us—then the forum bar does not apply anymore, because this is not a realistic forum for that case to proceed. Therefore, you heighten the risk of somebody evading justice altogether if the forum bar then becomes almost a theoretical exercise. Somebody's extradition is barred but there cannot be a prosecution in this jurisdiction because we have considered all the evidence and said that we would not prosecute it.

Sue Patten: Can I add a couple of points to that? First, the certificate in our guidance is issued only after consultation with the Director of Public Prosecutions. There are internal processes that need to be followed. The other thing people have said is it is wrong that, in effect, by issuing a certificate in some way the prosecutor vetoes the court from looking at whether it is feasible for a prosecution to be brought in this jurisdiction, but, in fact, the prosecutor's decision can be looked at on appeal. It is not normal for the magistrates' court to be the forum in which a judicial review of a decision not to prosecute is considered, but the legislation allows it to be looked at under the normal principles and so forth at the appeal stage. Extradition proceedings do not provide any sort of procedure for dealing with that sort of issue and although, obviously, the district judges in Westminster are extremely experienced and august in their own right, they are in the magistrates' court, and that is not normally the forum where such a matter would be considered.

The Chairman: Arising out of that, just to be clear, if a decision not to prosecute is taken, does it automatically follow that certification ensues? From what you have told us it does not, does it?

Nick Vamos: No, it would not. It is an option available to the CPS to issue a certificate. It is a necessary but not sufficient condition.

Lord Brown of Eaton-under-Heywood: I find it rather difficult to see how it all actually works. You take the initial decision in a concurrent jurisdiction case and, by definition, you decide not to prosecute here. The extraditee then says, "Well, I do not like that. I want a forum bar," and applies to the court for a forum bar. At what point does the question of certification arise? If you issue a certificate then, as you rightly say, it is decisive in the district judges' court and it can only be challenged then on appeal under Section 19E. In

relation to the application for a forum bar and district judge's decision whether to give effect to the forum bar, when do you actually decide whether to issue the certificate?

Nick Vamos: Once the extradition request arrives, we would have to look very carefully at the nature of the offending alleged, because the certificate has to relate to the same conduct as alleged in the extradition request—and it may not. We may have made a decision not to prosecute somebody for a certain type of conduct and the extradition request may come in and allege a different type of conduct: different victims, different activity or a different time period. First, you have to be very sure that what we have decided not to prosecute for is the same conduct as alleged in the extradition offence. If, at that stage, it appeared that it was the same conduct, then the process that Sue outlined would be gone through. We have not had to do this yet, so this is theoretical, but we have set out a process of assurance and governance within the CPS to make sure that it has to go up to the Director to decide to issue the certificate.

Sue Patten: I may be wrong about this, but presumably that would happen if the requested person had to raise the forum bar in the first instance, because that is when the operation of this legislation would then arise. We do not issue a certificate because we have taken the decision not to prosecute for an offence.

Lord Brown of Eaton-under-Heywood: No; you wait until there is a challenge.

Nick Vamos: That is correct.

Sue Patten: There may or may never be an extradition request. Only if there is and the issue is crystallised in a forum bar argument would we then need to consider how we, on the domestic side of the fence, would assist the court in that regard and whether it is a belief case or a certificate case.

Lord Brown of Eaton-under-Heywood: If you were going to issue a certificate, you would need to make the decision before the district judge resolves the forum bar issue.

Nick Vamos: Yes. We can ask for time to do that; that is within the legislation.

Lord Brown of Eaton-under-Heywood: I see—or at least I think I see.

Q83 Baroness Wilcox: Good morning. I am going to ask you two linked questions, if I may. Discussions between prosecuting authorities inevitably take place in private. This has given rise to suspicions that inappropriate politically motivated or unjust decisions on where to prosecute have taken place. What, if anything, should be done to improve this situation and bring decisions on forum out into the light? In two recent and well publicised cases, that of Ashya King's parents and that of the chief suspect in the murder of Alice Gross, apparently very different approaches were taken to the use of the EAW. Why might this have been the case?

Sue Patten: Perhaps we can take the second question first. Do you want to take that, Nick?

Nick Vamos: Yes, thank you. The difference in outcome in Ashya King's parents' case and the Latvian suspect in the murder of Alice Gross flows directly from the purpose and the reason for which an EAW can be issued. The CPS's position, and in fact the law, is that you have to charge somebody before you can ask the court to issue an EAW. In the case of Ashya King's parents, the Hampshire Constabulary asked the CPS to consider a charging decision based on the evidence that they had at the time. That charging decision was made on what is called the Threshold Test, which is only exceptionally used in extradition cases, and it is where we do not have all the evidence, but for exceptional reasons—for example, where there is a flight risk or there is another reason to act quickly—we will charge on the assumption, not a guess but having thought about it, that we will have the necessary evidence in a short space

of time. Hampshire police asked us; we charged on the Threshold Test; and at that point you can ask for an EAW, because there is a charge.

In Alice Gross's case, first of all the Metropolitan Police never asked the CPS to consider a charge—presumably because they never felt they had enough evidence to ask us to make that decision. As a matter of practice, we could not have asked for an EAW, because we were never asked to make a charging decision. My understanding is there was never sufficient evidence to have charged that Latvian suspect even under the Threshold Test. That explains the different outcomes.

Sue Patten: In relation to where there are considerations of concurrent jurisdiction with another country, where this results in an extradition request and an application for the extradition of an individual who has been the subject of such a decision, we provide the defence with a copy of our decision on concurrent jurisdiction and it becomes part of the facts before the court when forum bar is raised. In that sense, if the CPS were to have applied improper or irrelevant considerations, obviously the court would be in a position to see that at the time a forum bar is raised.

Lord Brown of Eaton-under-Heywood: You issue a reasoned decision letter, do you?

Sue Patten: It is not a decision letter, but it is a record of the decision that we have taken and the factors that we have taken into account.

Lord Brown of Eaton-under-Heywood: We have not seen one. We would be helped if you could send us the sort of thing you would dish out.

The Chairman: This is made available to the defence?

Nick Vamos: Yes, it is served. It is specified factor (b) or (d); I always get them out of order.

Baroness Wilcox: It is (c).

Nick Vamos: It is (c). Thank you. Under the specified factors, one of them is the belief of a prosecutor that the UK is not the appropriate jurisdiction. Where we have not made a Full Code Test decision—so there is no option to issue a certificate—but nevertheless we have decided under our concurrent jurisdiction guidelines that this is not a case we would prosecute, we will put forward the basis for that decision on a form, which we call a record of a concurrent jurisdiction decision, and disclose that to the defence and the court.

Sue Patten: We found it quite hard to see at what point you could make such a decision public before that, because, obviously, frequently it is during an investigation. You may not know who the suspects are or, if you do, you may be disclosing to them that they are suspects etc. I do not need to spell that out. Obviously, it would not encourage other countries to talk to us during investigations if they knew we could not keep the discussions confidential.

Nick Vamos: Can I add one more thing about the Ashya King case that I should have made clear? One of the key points about the Threshold Test is that it has to be kept under constant review, because you have charged somebody without having all the evidence. Obviously, what happened in that case is that very quickly further evidence emerged, after the parents were apprehended, which changed the evidential picture—and on that basis the case was then discharged.

The Chairman: It is a slightly silly way of putting the question, but if you are going to apply the Threshold Test, how high is the threshold?

Nick Vamos: It is set out in the *Code for Crown Prosecutors*.

The Chairman: In practice, however, are you looking to apply it or are you reluctant to apply it?

Nick Vamos: In the extradition context, we only apply it very exceptionally, because, by definition, applying the Threshold Test means that you do not have all the evidence.

The Chairman: In a sense, you start with a presumption that this is not going to be the way you proceed.

Nick Vamos: No, not in an extradition case, because, when you extradite somebody, the presumption is that when they arrive back in the country you start straightaway with the criminal prosecution. Therefore, there is another governance mechanism within the CPS for issuing extradition requests based on the Threshold Test. It has to be approved at very high level and it is considered exceptional.

The Chairman: Does it happen frequently on the EAW?

Nick Vamos: No.

The Chairman: That is what I thought.

Q84 Lord Hart of Chilton: The evidence we have had so far seems to indicate that there is really no difference in the tests applied in America and here. Although there has been a lot of froth around it, in substance it seems from the evidence we have been given that there is really no difference. However, where there does seem to be a difference, on some of the evidence, is that those who are in command of the situation in America are alpha males and females bursting with testosterone, who have emerged out of leading law firms to go into the prosecution service and then, with badges of honour, go back again to earn their fortunes. Is that a cultural difference that you notice in terms of discussions as to which forum should win? If there is arm-wrestling over who should get the case, I am interested in knowing whether that is something you recognise in terms of dealing with your American colleagues.

Sue Patten: I admit that I am not bursting with testosterone, but that does not mean to say that, if a CPS prosecutor, the Crown Office and Procurator Fiscal Service or the DPP Northern Ireland had a good case that they thought it was in the public interest to bring in this jurisdiction, they would not have a robust conversation with a US counterpart. Really, that is all I can say on that subject. We are all there to try to bring people to justice. That is what we are there to do, and we all have the same view. Whether somebody shouts louder than somebody else or what have you is not really the issue.

Lord Hart of Chilton: You do not recognise this.

Sue Patten: I saw the evidence that the gentleman you are quoting gave you, and I also saw the response of Isabella Sankey from Liberty, who rather resented the picture that was being painted there.

Lord Hart of Chilton: Nobody could describe her as not being an alpha female. However, do they have more resources than you?

Sue Patten: They are a much larger country than we are, but I do not know how many resources they have. I am sure they have limited resources, in the same way all public services do not have infinite resources to do what they need to do. Sometimes there are circumstances where it has come to public attention that there is a difference of approach. Although this has changed since the Bribery Act, there was a time when the US policy of pursuing international bribery and their ability to pursue corporate offending was different from the UK law on that subject. That is different now and the Director of the Serious Fraud Office has made very clear his position on the matter. You will find that, if there ever was a difference, it has been addressed.

Lord Hart of Chilton: I am sorry, Mr Vamos; I will come back to you in a minute. Do you ever get the feeling that if only you had more resource you could do a better job? Has there been

a time when you have thought, “We just cannot do this, because we have not got enough resource to deal with it”?

Sue Patten: No, the investigative resource is the key resource here. It is the resource to investigate the offending, particularly in multiple jurisdictions. I do not know if you are going to hear evidence from the National Crime Agency or the Metropolitan Police or others who investigate in this area, but that is a critical area of resources. I am resourced to prosecute serious fraud cases; that is what my division is there to do and that is what I do.

Lord Hart of Chilton: Mr Vamos, you wanted to come in.

Nick Vamos: I wanted to draw out one distinction between US and UK prosecutors that I think is important here. A US prosecutor—certainly a US federal prosecutor—has the ability to conduct an investigation himself or herself through a grand jury. They can set up a grand jury and they can ask that grand jury to issue subpoenas to obtain evidence. In that sense, the US prosecutor can drive the investigation. It is very different from the UK prosecutor. We are referred cases by the police, who conduct the investigation, and we can advise or suggest. We do not direct it; we do not drive it. It is not our investigation.

The other point I wanted to make is that I was based in Washington for three and a half years. I did a similar job to the one that Amy Jeffress did over here, so I was the CPS liaison in Washington. I do not recognise that universal alpha male/alpha female characterisation that was given to this Committee. Certainly it was true of some people, but I do not think there is any less commitment to prosecuting on this side of the Atlantic.

Lord Brown of Eaton-under-Heywood: I have a very short question. Ms Patten, you mentioned bribery and the change in the law, but I do not understand how that works, because you have to have dual criminality anyway in order to exercise the jurisdiction—

Sue Patten: Yes, maybe it was not a great point, but it may have appeared in the public domain at one time that the Americans were bringing more corporate bribery cases, certainly, than the UK. That might be what some people were referring to. Maybe it is not the best point, but, obviously, the law brought in by Parliament in 2010 does change the law of corporate criminal liability so far as bribery is concerned.

The Chairman: I have two thoughts arising from this. The first thing is that one of the concerns we have heard expressed to us is that the US is being rather imperialist, if I can put it that way, jurisdictionally in terms of going out and grabbing people wherever it can. Is there any sense that the US prosecution system is actually looking to extend right to the limits its jurisdictional capabilities and claim things? Secondly, when you have been dealing with them, there is this idea that there is a great tussle between two stags as to where the proceedings might be held. Is that a reality or is what happens in practice that the obvious way to proceed becomes apparent to the parties?

Nick Vamos: Can I approach that question from a slightly different angle? There are many examples—and we can give you some and we have explained some—where the US are very happy to support a UK prosecution, even though they would theoretically have jurisdiction. There is the DarkMarket case that Sue referred to and the indecent images of children case that I referred to; there are the Anonymous hacking cases from a few years ago where some of the targets were in the US. Certainly, evidence and witnesses were in the US, but they were prosecuted here with great support from the Americans. Certainly, it did not seem like there was any desire by the Americans to just override UK prosecution and extradite those people and prosecute them themselves.

It is also instructive to look at mutual legal assistance, which sometimes gets forgotten in this debate. The UK sends three times as many mutual legal assistance requests to the US as

vice versa. That indicates there is a lot of evidence in the US that is relevant to prosecutions taking place here. Over half those requests are normally for e-mail and communications data. I have heard this argument that just because one e-mail passes through a US server that gives the US technical jurisdiction over something, which they will then choose to assert. That is not borne out by the facts. There is lots of evidence on US servers that we request from them that they happily give us, and we prosecute those cases without any indication from them that they want to take those cases over.

Q85 Baroness Jay of Paddington: Good morning. I wonder if we could turn to another new test, a new bar. It is the issue of proportionality. Now, you may feel this has been in operation for such a short time that you do not really have the ability to assess it very much at this stage, but the Committee is interested in two areas, one of which is the question why this at the moment only applies in Part 1 cases and whether there is a case to be made to extend it to Section 2 - Part 2 - cases. For example, it has been suggested that a judge in the case might make the assessment on that. The other one relates to the always controversial question of the operation of the ECHR and whether proportionality has added anything to the Article 8 provisions. I wonder if I could ask you to deal with the first part.

Nick Vamos: Yes. If I could deal with whether it has added anything first, that is quite simple. Under the proportionality bar, the requested person does not have to have any right to private or family life in the UK under Article 8 for their extradition to be barred by reason of proportionality. The Lord Chief Justice has issued guidelines on the types of cases that are so trivial in and of themselves that, without any right to private or family life here in the UK, and without consideration of any further facts, that is disproportionate.

Baroness Jay of Paddington: In fact, the evidence that we have been given that there is a relevance of the ECHR in these cases is not the case.

Nick Vamos: No, in some cases where the offence is so trivial the proportionality bar gives the court the power to say, “We do not need to hear any more. We do not need to consider Article 8; it is just so trivial that we stop here”. There will be a great many cases, the vast majority, where Article 8 considerations and proportionality considerations will overlap, because the same factors are relevant to both.

Baroness Jay of Paddington: You do not feel, however, that one is necessarily adding to the other, as it were. It is not getting out of balance in so far as you can judge it.

Nick Vamos: I was going to say it is too early to say, because we have had very few cases on proportionality and no appeals as yet. The other important thing about the proportionality bar is that without that the NCA would not be able to operate their proportionality filter, which, in our view, is much more important. If somebody is discharged at court on the basis of proportionality, they have already been arrested; they have been detained in custody; they have been taken to court. Cost resource has been used. That person’s human rights have already been interfered with, one might say. It is much better if those cases can be filtered out by the NCA, and the way their filter works is that they have to be clear that this case would be discharged at court, so you need to have a statutory proportionality bar to allow the NCA to operate their filter.

Baroness Jay of Paddington: What I asked as the first question, but which you have chosen to take as the second one, which is perfectly all right, was the question about Part 1 and Part 2 operation of this.

Nick Vamos: We cannot think of a single case—and it may be the next witnesses can—under Part 2 that we think was disproportionate in the way that Part 1 cases are that led the Government to legislate as it did. We think that would be a solution to a problem that does not exist. Part 1 is about mutual recognition and, obviously, one of the consequences of

mutual recognition has been a flood of allegedly disproportionate or trivial extradition requests—or not a flood, but a large number. That just does not seem to happen in Part 2 cases.

Q86 Lord Rowlands: Is not the problem of proportionality really a Polish problem? Essentially, if you could solve that problem, the whole issue of proportionality would sort itself out.

Nick Vamos: Statistically, that is true. That does mean that there are not disproportionate requests, potentially, from other countries. However, the NCA released some statistics just last week on their website where they break down all the requests by country. Poland still makes up two-thirds of all those people arrested on European arrest warrants in England and Wales.

Lord Rowlands: Did you say two-thirds?

Nick Vamos: Yes, two-thirds—or maybe just under.

Lord Rowlands: May I just ask one other question? I am under the impression a large number of warrants are issued but never executed. What is the proportion of European arrest warrants that are issued and then not executed?

Nick Vamos: Again, the NCA statistics show that they receive—I would urge the Committee to check, because I do not want to mislead you accidentally—around 7,000 or so requests a year, but they have a discretion at the moment whether to certify those requests, and it is only once they are certified that somebody is arrestable. The last year for those statistics, which was 2013-14, about 1,700 people were ultimately arrested, but, of course, they may not be in the country.

Lord Rowlands: It is only 1,700 out of 7,000.

Nick Vamos: Those are 7,000 requests that the NCA receives, but EAWs are issued across the European area. They are not geographically targeted as such, so the NCA then has to sift through them to decide which ones should be certified.

Lord Brown of Eaton-under-Heywood: Chairman, I am terribly sorry. I will try to ask it very quickly, but I just had a question on the designated authority's approach to proportionality. As you say, if they expedite it, then you get rid of all the hassle of extradition and so on. This is under the new Section 2(7A). Are there yet any statistics as to that?

Nick Vamos: We understand—and you may wish to ask the NCA directly—they have used that filter to knock out about 14 cases since it has been in effect.

Lord Brown of Eaton-under-Heywood: The other aspect I want to look at is this: when they are looking exclusively at proportionality, do you happen to know if they look at the Article 8 aspects of that in deciding whether it is disproportionate?

Nick Vamos: They almost certainly could not, because there is simply not enough information on the warrant. It does not tell you anything about that person's private and family life in the UK; it tells you what they are accused of in the requesting country and some other information about them. It would not tell you whether they had a family here, whether they had children here or how long they had been residing here. They just simply could not do that in practice.

Q87 Lord Hussain: Good morning. A number of submissions referenced cases where prosecutions were not pursued in the UK and the individual was subsequently extradited. If the CPS has judged there to be insufficient evidence or it not to be in the public interest to prosecute in the UK, how can it be proportionate for extradition to a different jurisdiction to be sought?

Nick Vamos: The answer in most cases, in practice, is that there is a difference in availability of evidence in each jurisdiction. We may not have evidence here to prosecute; that evidence may be in other country. Where we have said there is insufficient evidence under our Full Code Test, that does not necessarily mean that there is not the evidence elsewhere in the country that is requesting extradition. The offence for which we could prosecute may be far less serious than the one that is revealed by the totality of the evidence that is not available to us. We may not be able to fulfil disclosure obligations in relation to that prosecution if, for example, there is an informant or a co-operating witness or undercover officers were engaged in that other country. We simply would find it very difficult to have access to that information to make sure that a fair trial was being held here, but the same considerations for access to that information would not apply in the country that is requesting extradition. It would be very much fact-specific.

Lord Hussain: Could I just ask one further question? If the courts discharge the request for extradition in a case that could arguably have been prosecuted in the UK, what steps are taken to ensure that justice is done?

Nick Vamos: The Director of Public Prosecutions could always invite the appropriate Chief Constable to consider an investigation, but she certainly could not direct or commence one herself. It is just not something the CPS has the power to do. It would be a case-by-case assessment. Again, it would depend on the availability of evidence, witnesses and all kinds of very case-specific factors. Ultimately, however, it would be for the police or another enforcement agency to make their independent decision as to whether that offence should be investigated in this jurisdiction.

Q88 The Chairman: Thank you. We are getting near to the end of our time. I will ask you if there is anything you want to say to us that you think is relevant to what we are doing that

we have not touched on, but I might just raise one point about something you said in your written evidence, which is that you think that the court, perhaps, ought to be proactive in monitoring assurances on which extradition has occurred. We are just really interested to know how you envisage this could be done.

Nick Vamos: I am really grateful for the opportunity to clarify what we said in that written evidence, because, in hindsight, it may not have been as clear or as detailed as we intended. Assurances are a vital part of extradition practice. The courts have said so on a number of occasions. The European Court in the case of Abu Qatada—that was not an extradition but a deportation case, of course—set out a list of factors that they said a court should look at when considering the quality and reliability of an assurance. One of those factors is the track record of the requesting country or the country to which the deportation is being made in abiding by previous assurances. That is a factor that is always open to the court to ask about. In the normal course of extradition proceedings, if the requesting country is a friendly state with whom we have friendly, diplomatic relations, which is pretty much most of them who request extradition, there is a presumption that that country will abide by its assurances, so the CPS and the requesting state itself would not spontaneously choose to research and provide information about their track record in abiding by previous assurances unless it was a live issue in the case. The first point is that we say the onus is on the court to identify if that is a live issue in those particular proceedings under the Othman criteria and, in that case, of course we would work together with the requesting state to produce evidence to suggest they do have a good track record.

If we are talking about a monitoring process outside the specific proceedings, that is much more complicated. I cannot see a role for the CPS outside specific extradition proceedings in monitoring compliance with assurances in other states. It is difficult to see what order a

court could make within the extradition proceedings after they have concluded to require information about what had happened in relation to assurance that had been given to that court. If the judiciary felt that there should be a more general monitoring system so they can have up-to-date information about assurances, then that is something the judiciary would probably want to take up with the FCO.

The third point to make is that if assurances are breached, there is no clawback. You cannot bring the person back again with fresh extradition proceedings. There have been cases where the assurance has contained such provisions. Mr Dewani is a good example: the assurance itself contained a provision that if he was not fit to stand trial within a particular period, he would be returned to the UK. Otherwise, with this sort of ex post facto monitoring, it is very hard to know what you could do about that.

The Chairman: That is why we are interested in the question.

Nick Vamos: It would be very difficult for the CPS to play a role in that proceeding, outside a specific case where the court said they wanted more information.

The Chairman: That is helpful. Thank you. Is there anything else you would like to draw to our attention? We would be delighted to hear it, if there is.

Nick Vamos: No, thank you.

The Chairman: Thank you both very much indeed. That was very helpful.

Examination of Witnesses

Rebecca Niblock, Associate, Kingsley Napley LLP, and **Edward Grange**, Associate, Hodge Jones & Allen LLP

Q89 The Chairman: Can I extend a formal welcome to Edward Grange and Rebecca Niblock, respectively Associates of Hodge Jones & Allen and Kingsley Napley? We are very grateful to you for coming. You have circulated CVs, which we have seen, and you are the co-authors of *Extradition law: a practitioner's guide*. You will have obviously seen the way the proceedings went with the previous witnesses and heard their responses to similar questions to the ones that we are going to ask you, but first of all would each or both of you like to make any kind of brief introductory statement?

Rebecca Niblock: We do have an opening statement. First of all, we would like to thank you for inviting us to give evidence. We are here as defence practitioners. We represent requested persons. We see the problems that extradition presents and, in particular, the impact it has on our clients and our clients' families. Having said that, however, we do understand the importance of extradition. We know that people who are accused of offences must be tried and they must be appropriately sentenced, if convicted. However, that does come into conflict, in the context of extradition, with the requirement that those people are not sent back to face an unfair trial or to face conditions of detention that might be inhuman or degrading.

Our view is that it is absolutely fundamental to the rule of law that the rights of a requested person should develop alongside the rights of the requesting state and those that, of course, represent the rights of the victim. The Framework Decision of 2002 introduced the concept of mutual recognition of criminal decisions—and that was, of course, an enhancement of the powers of the state against the individual. It was not until the Stockholm Programme of 2009 that we saw a movement towards an attempt to bring forward the rights of the individual at the same time. The Commission has done a great job in proposing Directives for, for example, the right to interpretation and translation and the right to access to a lawyer.

It is with dismay, as we said in our written evidence, that we note that the UK has opted out of, in particular, the last three of those, which are the guarantee to the right to legal aid, the presumption of innocence, and procedural safeguards for children. This, to us, signals a lack of interest in the parallel development of the rights of the individual and we see the failure to engage in the development of these procedural safeguards as a real missed opportunity on the part of the UK Government to contribute at an early and formative stage.

Edward Grange: I certainly adopt those views expressed by Ms Niblock.

Q90 The Chairman: Perhaps I will start with a general question, which is the same one I put to the previous witnesses. In terms of your experience—and, obviously, you are not seeing this in the same way the CPS is—how many of the cases seem to involve criminal conduct in multiple jurisdictions?

Rebecca Niblock: Our answer is anecdotal. We see a very large number of enquiries coming into Kingsley Napley involving multiple jurisdictions, although not necessarily criminal conduct in multiple jurisdictions. Other examples might be that a person is a national of a second country or some element of business involves a second or a third country. There are also cases involving Interpol red notices. Sanctions cases often involve many jurisdictions. There are also mutual legal assistance requests that the Committee has already heard about. Our perception is certainly that there are a number of cases involving cross-jurisdictional elements and that these are on the rise.

The Chairman: Again, in your personal experience, in terms of anecdote, do you feel there are many cases in which really serious questions arise about in which jurisdiction something might be dealt with, or is it in fact something that comes out in the wash?

Rebecca Niblock: There is a significant minority of cases in which that is an issue, yes.

Edward Grange: In anticipation of this answer, I looked at my own caseload. I have 34 extradition contested cases either at the Magistrates' Court, Court of First Instance, or at the High Court. Of those 34, four of those cases involved multi-jurisdictional issues, one of which was referred to by Mr Vamos in his evidence: a US extradition request for a British national. Two involved European arrest warrant cases where the alleged conduct had taken place in other member states but not any part of it in the United Kingdom, so the countries that had issued the European arrest warrant had already determined through Eurojust, I believe, which member state was to take priority. Then the final one of the four is another US request for extradition in relation to a Ghanaian national where the relevant activity could be said to have been carried out in Ghana, albeit that the intended effect, according to the extradition request, was in the United States. Four of 34 current cases that I have involve multi-jurisdictional issues.

Lord Henley: Mr Grange referred to his 34 cases. I just want to know who is paying for those 34 cases.

Edward Grange: Out of the 34 cases, the majority are funded by the state—that is, they qualify for legal aid, so they have qualified through the means test. In all cases that originate in the magistrates' court, the requested persons are entitled at that very first hearing to representation by the duty solicitor, so that is a free service that is provided. After that hearing, if the matter progresses to a contested hearing, they will either have to apply for legal aid, in which case they have to satisfy the means requirement—for example, if their income is greater than £22,500 they will not qualify for legal aid and they will have to fund their case privately—or will have to represent themselves in court, which frequently does happen still in contested extradition cases.

Q91 Lord Empey: I just wanted to ask something following up on that. You use the criteria of the particular jurisdiction where the criminality or most of the loss or harm will occur, but, where we have multiple ones, and quite frequently with the internet and cyberspace and so on, it must be extremely difficult to allocate, because it is very hard to tell, particularly in that example, where most of the harm may come. Indeed, quite a lot of the cases that are coming up are global, not confined to the EU or any of our partners. How do you see that aspect of things developing? Whether it is fraud or abuse, it does appear that there is a whole range of issues that are now entirely focused on this sort of medium. How do you see that developing?

Edward Grange: As defence practitioners, we do not play any role. As has been identified in some of the questions, a lot of decisions on concurrent jurisdictions take place in private, without any submissions being advanced either by the suspect or by the suspect's representatives. The only way we can interpret that is by looking at the forum bar that has been enacted—and it has now been on the statute books for one year and one day as we speak—and the guidance that has been provided in the only case to have been determined by the High Court. When they look at the factors to be applied and when they look at the location of the criminality compared with the location of the loss or harm, what weight is to be attached to those factors in determining what the correct forum is for the prosecution to be brought?

The case that I am referring to is a case called *Dibden*, where it was stated that, obviously, the place where the majority of the loss or harm occurred is plainly an important consideration, but they then go on to say in that case, which involved a conspiracy to import Class A drugs into the United Kingdom through France, originating from Holland, "Although I

accept that most of the harm occurred in the United Kingdom, I do not accept that this is necessarily the most important consideration.”

Obviously, within the forum bar there are primary considerations the court must take into account. I do not think any one has been identified as being the primary consideration where the most weight should be attached.

Lord Empey: What you are really saying is this is obviously a case-by-case issue. “Arbitrary” is really not the right word; it is very hard to determine rules. However, where you have more crime committed through the internet, it is very often global. It must be extremely difficult to assess. If, for instance, you have improper images and things like that, it must be almost impossible to determine.

Edward Grange: It is. The courts are struggling to grapple with it, looking to guidance perhaps from the High Court in the cases that are likely to be determined by the end of this year. I am aware of at least four cases that are awaiting determination on appeal at the High Court. The lower court is certainly looking for guidance from them as to how they are to apply each of the factors and the weight to be applied to each.

Q92 Baroness Wilcox: I will just ask you a quick question if I can. If we can go back to all these cases that you are taking through the courts, those who got legal aid are okay. They are away and going. In terms of those who did not get legal aid, and who cannot find the money for a lawyer and are representing themselves, how are they faring? This is a very complicated area for them to be standing there on their own.

Edward Grange: It is—and courts do appreciate that. The view of the courts, certainly expressed in the Baker Review, is that they would prefer if everybody was represented. Extradition law is a difficult and complex area. As to how they are faring, I am aware of a few

who have managed to succeed with the assistance of the court and the requesting state assisting them to some extent with the evidence that can be adduced on their behalf.

Some slip through the net and their extradition has been ordered. Previously there was an automatic right to appeal to the High Court. Any issues that had not been raised could have been raised on appeal, subject to certain criteria being met. That was a safety net for them. Of course now the situation has changed, albeit it has not quite yet come into force. The automatic right to appeal a decision of the district judge to order somebody's extradition is no longer there. That safety net is gone.

Baroness Wilcox: I did some work in this area quite some years ago about people representing themselves in court. We discovered that it was useful to have a clerk just for them in the court to help them through. In those days we also eventually did a video. I wonder if there is a DVD of what the process will be, so that they have something they can look at and study themselves—so that they do not go in quite so naked.

Edward Grange: That would assist, certainly if it could be made available in each of the languages the requested persons speak. Of course, the majority will require the services of an interpreter, and an interpreter is provided for them to help them to understand the proceedings. The Committee may well be aware of certain problems with interpreters and the availability of certain languages, but, certainly, a video would assist.

Q93 Baroness Jay of Paddington: Can I just ask a bit more about the Dibden case that you raised? We were given a very helpful note about that in which it seemed to be that one of the major objections to this person not being extradited was the simple fact that the French authorities had already advanced the case and the practical administration of dealing with it all under one legal jurisdiction was obviously a practical advantage for those who wished the court proceedings all to take place in France. The note we had said that this kind of

administrative issue was going to, in practical terms, pose a significant barrier to the whole issue of forum. Would you agree with that?

Edward Grange: Certainly, in relation to location of co-accused, if a trial procedure is well under way in a requesting state, there are two or three co-accused awaiting trial and perhaps their trial cannot proceed until all co-defendants are brought to the state in order for the trial to be heard, that certainly would be a factor that would weigh heavily against extradition being barred by reason of forum.

Baroness Jay of Paddington: The question about the co-defendants was not necessarily the one that was the most evident—at least in the note we were given. It was the question about the proceedings actually developing and it being somewhat administratively inconvenient, not to say resource-heavy, to try to establish another proceeding in the UK.

Edward Grange: That goes to the issue of costs and the associated costs of bringing proceedings in this jurisdiction if they are already under way in another jurisdiction.

Rebecca Niblock: That leads on to one of your further questions about what can be done about the fact that discussions between prosecuting authorities take place in private, which is that it is expected and understandable, where investigations are at an early stage, that they would take place in private. Ideally we would like to be involved at that early stage, but we understand why we cannot be. The problem for us is that once those decisions have been made, it appears that they are set in stone. It is difficult for us to find out the reasons for the decision in order to analyse them and test them and, in appropriate circumstances, invite a review of that decision.

The Chairman: We heard from I think Mr Vamos that a statement is produced. Is that too late?

Rebecca Niblock: It points to a fundamental problem with the forum bar, which is that so much weight is placed on the prosecutor, whether that is by way of the prosecutor's certificate or by way of the prosecutor's belief, under subsection (c). In the case of *Dibden*, the court said that was enough for them to receive the record and they did not need to go any further into the reasons why the prosecutor believed that the UK was not the appropriate jurisdiction.

The Chairman: That is fine. Probably the right thing is if we can move on to Lord Henley, talking about—

Q94 Lord Henley: I am not sure I really need to ask anything more about the forum bar, and you heard what the CPS had to say. I do not know whether you want to expand on anything you have just said now, either of you, because you have both been touching on it, as to whether it has no teeth.

Edward Grange: On the forum bar, the Baker Review panel recommended that a forum bar is not introduced into the legislation and, of course, it now has been, and it has been in force, as I say, for just over a year now, so it seems a little strange for me to say it is a little too early to tell as to whether it has no teeth or it was illusory in that effect. However, it certainly has not opened the floodgates. We are not seeing a huge amount of cases where forum is being raised.

We do have concerns as to how the forum bar has been enacted, because of course one of the criteria in the forum bar is that extradition can be barred by reason of forum if it is not in the interests of justice. Of course, it is for a judge to determine whether it is in the interests of justice or not, but it then seems to curtail the discretion that the judge has by only allowing him to refer to specified matters that are in the Act. Of course, one of the problems could be—and again it may be too early to tell—that if there is a scenario that was not in

contemplation of the draftsmen when they drafted the forum bar, the judge would be precluded from considering it. Whereas if it was just left for forum to be considered in the interests of justice to be barred, I think that would allow greater scope perhaps for the arguments to develop and the interests of the requested person to be fully protected.

Q95 Lord Brown of Eaton-under-Heywood: The point you have just made I think is made by Liberty in their particular submission to the court: that the list of factors under the section 19B(3) is constrained, limited. We did not explore this with the other witnesses, but are there any differences between those considerations and the principles to be applied—appendix 1 to the CPS’s written argument—as to what considerations are in play when you are deciding which of two concurrent jurisdictions should assume it?

Edward Grange: We have not had sight of the CPS’s response or the appendix.

Lord Brown of Eaton-under-Heywood: “Principles to be applied ... In deciding where a case with concurrent jurisdiction should be prosecuted”. You do not have that.

Edward Grange: Sorry, is their appendix the DPP’s guidelines?

The Chairman: It is an appendix to our evidence.

Edward Grange: To your evidence?

Lord Brown of Eaton-under-Heywood: I am surprised it is not a published document. Is it not?

The Chairman: It has to be approved by the Committee before it is published.

Lord Brown of Eaton-under-Heywood: Oh.

The Chairman: I am slightly surprised. If they are using it as guidelines and it is being put in front of the court, you would have thought—

Edward Grange: Sorry, is it their actual guidelines as to concurrent jurisdiction that they refer to as their exhibit?

The Chairman: Yes.

Edward Grange: It is a public document, so I am sure we can refer to it.

Lord Brown of Eaton-under-Heywood: It seems to set out all the things that might be logically relevant to where you would prosecute, and I am just wondering if there is any apparent difference between those and those set out in the statute. What is missing from the statute? Liberty suggests the ability of the requested person to mount a defence from the requesting state, but would that not come into play under the statutory guidelines?

Rebecca Niblock: Perhaps one of the issues that is not covered there is the requested person's health: for example, in the case of McKinnon, whether, if a prosecution had taken place in this country, it would have been easier for him to have the family and health support there.

Edward Grange: At the moment, in the forum bar it just simply refers to the defendant's or requested person's connections within the United Kingdom. For example, in relation to the McKinnon case, the judges were asked, as part of the Baker Review, if they could think of any case that they had dealt with or had come through their courts where, if the forum bar had been on the statute books, they would have barred extradition. They said, "We could not think of a case." It would be interesting to know now it is on the statute books whether it would have changed their minds. If it would not change their minds and the forum bar now still would not have prevented the extradition of Gary McKinnon or Richard O'Dwyer—if it does not apply to those cases—whose cases will it apply to? I think that is the difficulty with the forum bar as it is enacted.

Rebecca Niblock: One of the great things about an interest of justice test generally is that it allows for the multitude of different things that can arise in criminal cases. To then limit it to specified matters seems to circumscribe it.

Q96 The Chairman: Two things seem, to me, to arise from this. The first is that the forum bar is just one of a series of mechanisms to stop the extradition process in the interests of justice more widely. Am I right that health is a ground on which the court would be able to intervene, so that probably the McKinnon-type subject would be saved by that provision even if it was not under this provision?

Rebecca Niblock: Well, yes, and the reason, in the end, that it was decided that he would not be extradited was because of Article 3. However, the unjust or oppressive test, which is the health test, is whether it is unjust or oppressive by reason of their mental or physical health, and that is a very difficult test to satisfy, but it might be one of the considerations that you would like to consider as part of the forum bar.

The Chairman: The other thing I wondered about the forum bar and your comments about it is the argument that we have heard is that the forum bar poses a potential further way of delaying the whole process on every occasion. Do you think that if the forum bar had been drawn as widely as Liberty suggests it should, there would in fact have been a kind of tsunami of hopeless cases using this simply to slow the whole thing down? We know that one of the things that requested people would rather is, if they know they are going to go at the end, to spend time serving sentences here than in other countries. Would that have had a great impact or do you think that is just a bad argument?

Rebecca Niblock: Is that in relation to the forum bar as it is currently enacted?

The Chairman: Yes, as opposed to the alternative model.

Rebecca Niblock: We agree with the evidence of the CPS that the forum bar now will not significantly add to the time spent on cases.

The Chairman: Were it to be expanded, as Liberty suggests it should be, would it have that effect, do you think?

Edward Grange: To have to include a prima facie search of evidence, do you mean?

The Chairman: Yes. Would it clog up the courts?

Edward Grange: Yes. A prima facie determination of a case, as the Committee are aware, only applies to certain undesignated category 2 territories. Certainly in those cases the court will have to take more time to consider the evidence that is presented by the requesting state in order to determine whether or not there is a prima facie case and, of course, the defence are able to present evidence in order to try to rebut the prima facie case that may be made out. Therefore, if a prima facie case were to be considered to be brought in applying across the board, then in my view, yes, it would.

Lord Brown of Eaton-under-Heywood: A prima facie case is one thing, but that is not quite the same thing as widening the scope of consideration under a forum bar. However, there does seem to be a sort of overlap between the forum bar and proportionality, as there is between proportionality and Article 8. It is quite difficult to disentangle them. At the end of the day, the courts just say, "Is it a bit rich to send this guy abroad?"

Q97 Lord Hart of Chilton: Again, this is a question that was, I thought, more relevant to Mr Vamos and Ms Patten, but I do not know whether you heard the answers on this cultural difference identified, based on the evidence that we have been given, between a messianic approach from the American prosecutors, who are determined to win at all costs, so it was portrayed, as against a rather meek and mild approach from the British, in true traditional form. The evidence that they gave was that this was an illusion. They were not arm-wrestled into submission when they had their discussions. They were up to the task and argued their case and it was all a rather sensible outcome when they did that. I just wondered whether you had any comments to make about that. There is an additional point that there seemed to be more resource available in America, which encouraged people to Hoover on, as it

were, as distinct from a lack of resource here. There again, they denied that and said that they had adequate resources to fulfil their tasks.

Rebecca Niblock: Our view is obviously a view from the outside, but we do think it is probably a bit of both. It is probably a different interpretation of jurisdiction alongside a better resourced prosecution and a more zealous approach by the US prosecutors, and we think all of those factors have an impact.

On the question of resource, our view, in particular in relation to domestic criminal cases is that the CPS is under-resourced and it does face a huge amount of pressure. These multi-jurisdictional cases are very expensive for the taxpayer and so it is just logical that resource would be a consideration.

Edward Grange: In relation to the bullish nature of US prosecutors, there was perhaps an apt and quite timely quote in *The Economist* last week, where it referred to the US dominating the criminal justice system, not just within the United States but also globally. The Attorney General to the United States in 1940, a gentleman called Robert Jackson, was quoted as saying, “The prosecutor has more control over life, liberty and reputation than any other person in America.” That quote came in the 1940s, over 70 years ago, and it is their view that the power given to the prosecutors in the United States has extended and, of course, one of the reasons why they have been empowered is plea bargaining. That is a system that is not really known to our jurisdiction whereby I think the quote is 95% of cases in the United States end up being plea bargained with the person pleading guilty or entering into a plea agreement to lesser charges. That does not necessarily mean that 95% of those who have entered into those agreements are guilty of those offences. However, faced with mandatory minimum sentences if you go to trial and take the risk of being convicted—where the prosecutor has made it very clear that if you are convicted you will face the maximum

sentences that are applicable on statute—if you enter into a plea agreement, a lesser sentence can be passed and there may well then be the possibility of repatriation in an extradition context. Of course when somebody has been taken away from their family in this jurisdiction, that is going to be at the forefront of their mind when perhaps deciding what to do at trial.

Lord Hart of Chilton: Do you have personal experience of this?

Edward Grange: Of prosecutors being bullish? As cases are dealt with by the CPS on behalf of the requesting state, we do not have any contact at all with the prosecution, whether it be the Department of Justice or state attorneys, so any communication that comes from them will be in written format. There is no requirement for them to give live evidence in extradition proceedings. Therefore, to answer your question, I do not have personal experience of dealing directly with US prosecutors; they would be dealing with the representatives from the CPS who act on their behalf.

Q98 Baroness Jay of Paddington: I think this is a moment when it might be useful for the Committee if you could give your comments on the point that Lord Brown made a few minutes ago about the overlap between proportionality, the human rights issues, ECHR issues and forum. I wanted specifically to ask you about proportionality, but I think that is a very pertinent point that it would be very helpful to have your comments on, because it must be difficult, as practitioners, as defenders, to distinguish between those different aspects of a case.

On the specific proportionality question, you probably again heard the CPS saying that they felt that it was not a useful point to make that there was a difference between Part 1 and Part 2 cases, because in Part 2 cases it would probably, in practice, never arise. Indeed, Lord Rowlands made the legitimate point about the volume of Polish cases that came under

Part 1, which could be discharged in a way if you addressed proportionality. So, in a way, I am asking for a very general comment, but also on that specific point, if you could.

Rebecca Niblock: On that specific point, we disagree with the evidence of the CPS. It is right that, as Mr Vamos said, we cannot think between us of any Part 2 cases that have involved trivial offences, and we understand that that is the rationale for not extending it to Part 2. However, we do think that it would make sense for it to be extended to Part 2 for a couple of reasons. Firstly, generally, the bars mirror each other in Part 1 and Part 2, but more importantly there is nothing to prevent Part 2 countries making trivial requests. There is a requirement that the offence must carry a sentence of 12 months at least, but there are minor offences that do carry that sentence. Looking at the Lord Chief Justice's guidance, for example, which Mr Vamos referred to—I do not know if the Committee has seen that guidance, but I would be happy to provide it—there are a couple of offences in there that should be considered as disproportionate, in his view, and would carry a 12-month sentence at least in this country. They are low-value fraud and possession of a small amount of a controlled drug.

We think that the proportionality bar is unlikely to have a significant effect, first, because it only applies to accusation cases, but, secondly, because of the criterion of seriousness that the court has to consider, it is not clear whether the courts will do that in a relativist or absolutist way. However, looking at the guidance that I referred to, it seems that it will be an absolutist way and there are six offences listed, which are: minor theft, minor fraud, minor driving offences, minor public order offences, minor criminal damage and possession of a controlled drug. The guidance says that in relation to those cases extradition will be generally disproportionate, except where there are exceptional circumstances. The exceptional circumstances set out are, with respect, not all that exceptional and include a

vulnerable victim and significant premeditation. However, it also includes the example of where there are multiple counts, where extradition is sought for another offence or where there is previous offending history. You can imagine a circumstance in which somebody is wanted for possession of a small amount of cannabis in Greece, they have received a warning for possession of cannabis in this country and their extradition would still be proportionate because of those exceptional circumstances.

Edward Grange: As Rebecca mentioned, there is the fact that the proportionality bar only applies to Part 1 and also the fact that it only applies to those accused of offences—it specifically refers to, in the title of it, persons not convicted. Well, of course, just because somebody is convicted does not mean that they are unlawfully at large. For example, you could have somebody who has been convicted in their absence and who has not deliberately absented themselves from the trial process; they literally knew nothing about it—no summonses or anything at all. As they have used the word “conviction” as opposed to “unlawfully at large” in the statute, it would prevent that type of person from relying on the proportionality bar, which cannot be right.

Q99 Baroness Jay of Paddington: On the broader point about the ECHR and Article 8 and the overlap with proportionality, it has been suggested by some witnesses in written evidence that this will lead to a vast number of extra cases being included under that heading, but also that really there is such a degree of overlap, as Lord Brown was suggesting, that very little is added to the cases by adding proportionality.

Edward Grange: I think it was mentioned in the evidence by Mr Vamos that one thing that the proportionality bar does bring in is the amendment to Section 2 of the Extradition Act, which deals with the National Crime Agency’s ability to certify European arrest warrants. They now have the ability to not certify a warrant where it is clear to them that it would be

disproportionate in the eyes of a judge exercising his discretion under the proportionality bar. Therefore, in effect, if exercised correctly, it would prevent warrants being certified and people being arrested, detained and processed through the courts—if exercised correctly and diligently. I think Mr Vamos referred to 14, so far, having been filtered out. However, the National Crime Agency is already supposed to provide a similar type of service under Section 2, because it can only certify a valid Part 1 warrant. A valid Part 1 warrant is one that meets the requirements of Section 2 of the Extradition Act. So, for example, a warrant must contain the place where the conduct took place, the time the conduct took place, and the maximum sentence applicable. We still see warrants coming through the courts that have been certified by the National Crime Agency and its predecessor, the Serious Organised Crime Agency, where the location of the offence is missing from the warrant, so it should not have been certified in the first place and it is then discharged at the first hearing by the judge. However, by then, the person has been arrested and potentially detained overnight; there is the cost of transport to court, the interpreter's costs and the court costs for something that should have been filtered out in an earlier process. Therefore, I hope that the proportionality bar, in bringing in this filtering process on certification, will be effective and active.

In terms of how it interacts with Article 8, it did appear that there was a conflation of proportionality and Article 8, because already in the Article 8 context a proportionality exercise is carried out—albeit that other factors are taken into account, not just the ones contained within the proportionality bar. However, as of only last week, in a case heard at Westminster Magistrates' Court, the judge was of the opinion that following Parliament's decision to include the proportionality bar into the Act, there was no longer any room for the argument that extradition would be disproportionate under Article 8 solely because of

the nature of the offence, that High Court cases that had included a proportionality bar by the back door should no longer be followed, and that the courts should now proceed under Article 8 by ordering extradition unless there were exceptionally compelling circumstances. It is going back to the old regime before proportionality was considered in an Article 8 context, taking into account various factors, one of them being the nature and seriousness of the offence committed.

Lord Brown of Eaton-under-Heywood: Could you send us that case?

Edward Grange: It was comments made in court. It is not a judgment yet. Judgment has been reserved on that. I cannot recall who it was by, but certainly the judgment, when it is handed down, if it goes that far, can be provided to the Committee.

Baroness Jay of Paddington: It would be very useful, because if that becomes the case law that is then followed—

The Chairman: I have a feeling that a lot of what we are going to think about when we conclude our work is going to hinge on relatively recent judgments, so we have to follow those sorts of things up.

Q100 Lord Rowlands: I wonder if I could slightly broaden that question. Reading your evidence and listening to you again this morning and reading the evidence in 4(1) that the European arrest warrant is not an improvement—you have stated that to be so—do you support the Government’s decision to opt back into the framework decision as it stands?¹

Rebecca Niblock: Yes, we do think that the Government should opt back into the framework decision, but also, at the same time, it should ensure that the rights of the individual are protected. There has to be a parallel development of those things.

Lord Rowlands: You believe that we should stay in the system?

¹ See written Submission from Edward Grange and Rebecca Niblock: [\[hyperlink\]](#)

Rebecca Niblock: Yes.

Lord Rowlands: Is that irrespective of the fact that there is not a great probability that there is going to be any fundamental change to the warrant and to the decision at a European level?

Rebecca Niblock: We think that the only way that we will be able to make any changes is if we are part of the decision. One of the problems, for example, with Norway is that it is subject to the rules but does not have any influence over what happens, and we may well end up in that position. There are very good reasons why we should have good extradition arrangements with our neighbours. We do not want to become a haven for everyone to come and escape justice in the UK, but there needs to be, at the same time, sufficient protection for individuals.

Lord Rowlands: You do recommend certain changes. How are they going to be promoted?

Rebecca Niblock: By going a different way from the way that the Government are going at the moment in terms of the directives. It seems to us very much that the Government are only looking at opting into those measures that detract from the rights of the individual rather than the parallel development of the procedural safeguards.

Lord Brown of Eaton-under-Heywood: Back to the Stockholm Programme.

Rebecca Niblock: Back to the Stockholm Programme, yes.

The Chairman: I wanted to make a similar point about this, because I understood from your opening remarks that the European arrest warrant is obviously only part of a wider process and you were criticising the suggestion that you can opt back into the European arrest warrant and one or two other things on a kind of cherry-picking basis. If you leave the other things, the coherence of the system as a whole is put out of kilter.

Rebecca Niblock: Exactly, yes.

Q101 Lord Brown of Eaton-under-Heywood: This is question nine under the heading of “Political angle”. Rather than read out the question, it relates to your paragraph 8.1 and, I confess, when I read it I did not understand it. Can I just read it again? “Our view is that decisions about where to prosecute are very frequently influenced by broader political, diplomatic or security considerations. We are aware of recent cases in which directly contradictory decisions were made by the CPS as to potential immunity, which can only be explained by the relative political import of the cases”. What is this idea of “potential immunity”? What is that paragraph directed at?

Rebecca Niblock: I can elaborate. It was very useful that we were told not to refer to specific cases, but on the political point—by “political” we do not mean party-political, of course, but political with a small “p”—to some extent, we think it is expected and inevitable and, in some cases, it will be perfectly proper. We can see that there is a spectrum. In domestic cases, you have heard Mr Vamos talking about the public interest test. If we look at the Code for Crown Prosecutors, in particular the public interest test and the range of factors that will be considered, they are, for example, seriousness of offence and culpability of suspect, but also three of the factors are: impact on the community, where the prosecution is a proportionate response and where the sources of information need protection. Those are proper considerations, but you can see that when you start looking, for example, at the impact on the community, you start off down a road that could lead to a point where the public interest becomes the public will or the public mood. The example of McKinnon is a very pertinent one; there was a very strong public feeling that he should not be extradited. There were striking similarities, as we said in our submission, with the case of Talha Ahsan just a few weeks earlier, whose extradition was ordered. We know and we agree that it was the right thing to do to take away the Secretary of State’s decision in that

case, but it was a legal decision that she was supposed to be making. Another example is that there is, at the moment, a very strong political will to prosecute bankers, and you can see that as well in the media. That requires huge, massive resources, and the decision on the allocation of those resources must be taken at a political level.

Lord Brown of Eaton-under-Heywood: The reference to potential immunity is if they decide not to extradite or prosecute they go free; is that the point?

Rebecca Niblock: Yes.

Lord Brown of Eaton-under-Heywood: I see. I feel rather defensive about McKinnon because, as I am sure you appreciate, his health was not an issue when the matter came before this House in an appellate capacity. The whole question of Asperger's and all the rest of it, on which the Secretary of State eventually acted, which would now go before a court at a later stage in the proceedings, was simply not before us.

Rebecca Niblock: Yes.

The Chairman: Is your concern about these things really not inherent in any system of any kind where there is a degree of discretion on whether or not to prosecute?

Rebecca Niblock: Yes.

The Chairman: What one has to make sure is that the people who are responsible for that are impervious to that sort of populist or political pressure.

Rebecca Niblock: Yes.

Q102 Lord Rowlands: You defend your defendants. Do you have any thoughts about the rights and interests of victims?

Rebecca Niblock: Yes, and that is why we think that we should remain within the EAW scheme.

Edward Grange: There is also the fact that victims are represented, in essence, throughout the extradition process by, of course, the judicial authority and the CPS, who act as their agents. They are putting forward to the court, as arguments as to why somebody should be extradited, certainly in a proportionality context, the harm caused and the rights of victims.

Lord Rowlands: Before the European arrest warrant and before 2003, though, the delays on some of these cases were enormous. You would not want to go back to where that situation could arise again, would you?

Edward Grange: I do not think we advocate a system whereby there are delays, because delays not only interfere with justice and the rights of victims but also the rights of those who are subject to the extradition proceedings. For example, with some of our clients we see great stress placed upon not only them but their family members as well, who are also innocent parties to the whole extradition process, and delays in the system benefit nobody.

Q103 Baroness Hamwee: Can I ask a linked question about assurances? You said in your evidence that it is extremely difficult to displace the presumption of compliance, and you were particularly talking about Article 3, particularly where the requested person is publicly funded. Would you like to expand on that?

Rebecca Niblock: Yes. In order to displace those assumptions, one will have to obtain expert evidence, and obtaining expert evidence at the rate of £90 an hour from a lawyer or another expert in another jurisdiction is very difficult.

Baroness Hamwee: Who do you think should monitor assurances or monitor compliance with assurances when they have been given?

Edward Grange: That is a very good question, because of course once, for example, a client is extradited, funding stops at that moment. We are reliant upon clients reporting back to us—and they may be incarcerated and it may be very difficult for them to do so—on the

effectiveness of the assurances that are being provided. We are seeing more and more assurances being provided in order to get around the difficulties, certainly in relation to prison conditions, not only in category 2 territories but also within member states. We have had decisions from the High Court in relation to Italy, where their detention facilities are being held to violate Article 3, but it is not only Italy. There have been decisions at the lower court that were not appealed by the judicial authority in relation to Greece, Hungary and Romania. All of those countries, at the moment, have difficulties and problems with their prison systems that would mean that anybody detained in them was at real risk of an Article 3 violation. In order to circumvent that, if we can put it that way, assurances are being provided and we need an effective monitoring system to ensure that the assurances that are being given can be carried out.

Baroness Hamwee: It is very difficult to see how an assurance given about an individual not being subject to particular conditions in a prison could possibly be complied with if that is the way the prisons operate. I have seen a reference somewhere to one prison being fingered, as it were, but I do not quite see how the assurances can apply generally.

Edward Grange: I think that was the difficulty in the case that we refer to in our written submission, the Lithuanian case, whereby the evidence pointed to the fact that one prison in Vilnius fell far short of the requirements in Article 3. However, the Lithuanians gave an assurance regarding requested persons if extradited from the United Kingdom—and it was specific to the United Kingdom, so if you were extradited from another state all bets were off as to where you would go—and then, on being returned, the person who gave the assurance did not effectively oversee where the prisoners were being sent. It was a different body that was responsible for that and the old system operated, whereby there

were those who were then sent to the prison where the assurance specifically said they should not be sent.

Baroness Hamwee: If the prisoner is a British national, does the embassy, the consulate, have a role in this locally? I might be taking you beyond your experience.

Edward Grange: Slightly, but I do have experience of where British nationals have been extradited; they do have access to the British embassy. There is very little that can be done if there is an assurance of the breach as to how it can be remedied once the person has left the jurisdiction of the court.

The Chairman: We are going to look into this in a bit more detail later.

Baroness Hamwee: Sorry.

Q104 The Chairman: No, no, it is entirely relevant and proper, because of the very issues that you have thrown up in your responses.

We are just about at the end of the hearing. There are one or two questions, if I might, of a rather random nature, and reply as you would like. The first thing is that you talked about the requirement for assurances, which might have been helpful in a particular case, but then there was no funding for the defence to get any expertise; you talked about £90 an hour. Are there any concrete instances you can think of where that has happened? That is my first point.

The second point I would like to ask you about is in terms of thinking about proportionality. Proportionality is focused on the nature of the offence that has occurred. Is there any argument for saying that the destination to which the person might be sent could have a bearing on it?

Finally—and this is something that we will come back to in a different hearing—you say that you think it is important that a requested person should have a lawyer in the requesting

state, because you may thereby be able to completely obviate the entire proceedings. Can you just elaborate a bit on that? I think that is important.

Rebecca Niblock: The first question about funding—

The Chairman: Funding and experts: is it a hypothetical question or is it a real-world question?

Rebecca Niblock: It is definitely a real-world problem. I cannot think of any specific cases where we have not been able to instruct an expert at all, but I can think of numerous cases where we have not been able to instruct the expert that we would have instructed had we been privately funded.

The Chairman: I suppose, following on from that—and this is a question you can only answer in the most general terms—do you think the outcome has been affected by that?

Rebecca Niblock: Yes. A lot of the time a case will turn on expert evidence.

Edward Grange: In relation to that specific question, it is not my own case but I am aware of a case that is currently going through the courts involving an extradition request from Peru, where the defence, who are all legally aided, applied for funding in order to instruct an expert to consider the prison conditions within Peru. It is a country that has not successfully requested extradition before, so of course the issue was live and there was objective material to suggest that prison conditions fell short. I believe in that case the defence found it difficult to persuade the Legal Aid Agency to grant funding in order for somebody to physically go and look at the prison conditions, because they were of the view that there was objective material available that was not up to date and did not relate to the specific prison, and therefore that it would not be in the public interest to issue the funding. That resulted in delays in the proceedings and adjournment requests until funding was granted to allow an expert to go and visit the facilities where the requested persons would be held if extradited.

The Chairman: The next one was the question about proportionality relating to the possible destination of the requested person.

Edward Grange: If it is taken as a strict interpretation of the proportionality bar and whether it could be taken into account, then obviously it could not, because the proportionality bar considers only three issues: the seriousness of the offence, the likely sentence and whether there are any less draconian measures that could be adopted. Generally, of course, where somebody is expected to be extradited to should be taken into account, because other considerations come into play as to human rights records and whether extradition is likely to be secured by that jurisdiction.

The Chairman: Therefore, you think it is covered?

Edward Grange: I think so, yes

Lord Rowlands: Do you think that with these changes there will be fewer Poles?

Edward Grange: Fewer requests for extradition?

Lord Rowlands: Yes.

Edward Grange: There are certainly requests for extradition from Poland for offences that would fall within the Lord Chief Justice's guidelines as clearly being disproportionate to extradite on, but there are also a lot of requests from Poland for offences of robbery or other serious offences where obviously the proportionality bar would not apply. The problem with the Polish requests is that the majority we see coming through are conviction cases whereby they have been given a suspended sentence and that sentence has later been activated, for no other reason than that they have left the jurisdiction to resettle in the United Kingdom. Then, several years later, the sentence has been activated unbeknown to the person it relates to and then their extradition is sought. That then leads to the next point about the need for a lawyer in the requesting state to perhaps stop the extradition

request, so to speak, before it progresses and costs escalate in order to compromise the warrant.

Rebecca Niblock: We advise all our clients to get a lawyer in the requesting state as soon as possible. The most effective way of stopping an extradition is stopping it in the requesting state and it is so effective and it saves cost.

The Chairman: This is the point: the UK Government, I understand, have set their face against extending legal aid into funding this aspect of what we are talking about. Would it be your view that this is likely, if it were to be introduced, to save public money in the round?

Rebecca Niblock: Yes. The directive on legal aid suggests that it should be the issuing member state that should provide legal aid for requested persons. That is why it is such a terrible tragedy that we have opted out of that.

The Chairman: It would follow, would it not, therefore, that presumably the Polish Government would be the principal bill picker-upper of this?

Rebecca Niblock: Exactly.

Edward Grange: The examples that we could give are of two different scenarios. There is an accusation warrant where somebody is accused. If the requested person had a lawyer, they could get in touch with the court or the prosecutor directly. We cannot do that, but they can and we have seen scenarios whereby they have made communication with the court and said, "Look, we are living a life in the United Kingdom. We are willing to come back, but we do not necessarily want to come back in handcuffs and in custody. If we were to put a bail security with the court and the court set a date for us to return to Poland,"—giving the example—"then we are willing to come of our own volition back to Poland." Sometimes the Polish courts will say, "Fine. We will then withdraw the domestic warrant. We will withdraw

the European arrest warrant. Please come to court on this date,” and the requested person will do that. That stops the extradition request.

In the conviction scenario, as I said, one of the reasons why a suspended sentence may have been activated is because they have not kept in touch with the court or their probation officer. If they had a lawyer to suddenly say to the probation officer, “Look, we have not been in touch with you, but here is evidence of the blameless life they are living in the United Kingdom: they are paying their taxes; they have a young family there,” very often the courts will then re-suspend the sentence once they have possession of the up-to-date facts, and that very often leads to a request being withdrawn.

One example I can give is that of a client who could not afford, in the extradition proceedings, to pay for a lawyer in Poland. He was working, so he had to save in order to fund a lawyer in Poland, and the reason his sentence had been activated was because he had failed to pay damages—a very limited amount of no more than £1,000. He had gone through the extradition process. His Article 8 rights had been considered and rejected by the magistrates at Westminster Magistrates’ Court and on appeal, and on the day that he was to be extradited, which was two weeks ago to the day, the Polish courts, having received the damages money and confirmation from the victim that they had received that, decided to re-suspend the sentence and withdraw the domestic warrant. Luckily, in that case, communication was made to the National Crime Agency to say, “Do not put him on the plane this afternoon,” and he was not extradited. However, had that process started at the beginning as opposed to six months later, we would not have had the need to go through the whole procedure.

The Chairman: Therefore, it is your view that you could save a lot of money and trouble and energy and unhappiness and potential disturbance to people by the European system

working more effectively within itself across the entire area of jurisdiction of the European common security area or whatever it is now called. Is that right?

Rebecca Niblock: Yes, that is right, and that also goes back to the evidence of one of your other witnesses. I am afraid I cannot remember who it was who talked about the European supervision order and Eurobail and so on being very good alternatives. Instead, we are now in the position where the EAW is the first resort rather than the last resort.

Q105 Lord Hussain: If an accused or an important witness resides in a territory where the UK Government do not have any agreement for them to be extradited, what do you do with those? How do you bring them to the court?

Rebecca Niblock: There will often be ad hoc arrangements made between the states.

Lord Hussain: Even if the territory is not recognised?

Edward Grange: Yes. For example, at the moment there is a case going through the courts involving an extradition request from Rwanda. They had made a previous request for extradition. There was no extradition treaty, at the time, with Rwanda, so ad hoc arrangements were set up specific to that case for those requested persons. Therefore, just because there is not a treaty it does not mean that extradition cannot be secured if special arrangements are entered into between the two Governments of the countries.

The Chairman: Thank you very much. Unless there is anything else you think it is important that we hear from you, I will say we are very grateful. Thank you both.