



HOUSE OF LORDS

Revised transcript of evidence taken before

The Select Committee on Extradition Law

Inquiry on

EXTRADITION LAW

Evidence Session No. 14

Heard in Public

Questions 230 - 237

WEDNESDAY 17 DECEMBER 2014

10.10 am

Witnesses: Jeremy Johnson QC, Raza Husain QC, Clair Dobbin
and Helen Malcolm QC

USE OF THE TRANSCRIPT

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

Members present

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

Examination of Witnesses

Clair Dobbin, Barrister, 3 Raymond Buildings, **Raza Husain QC**, Barrister, Matrix Chambers, **Jeremy Johnson QC**, Barrister, 5 Essex Court, and **Helen Malcolm QC**, Barrister, 3 Raymond Buildings

Q230 The Chairman: I extend a very warm welcome to our four barrister witnesses today, who are, in the order on my piece of paper that is otherwise of no significance, Clair Dobbin, Raza Husain, Jeremy Johnson and Helen Malcolm. Thank you for coming along and talking to us. As I think I explained outside, we will deal with this as a panel, so anybody who wants to say anything in response to any question, please do so. I will very much leave you to decide between you how you answer the questions which the Committee will put. Please feel free to range widely in your responses. If at any time there is something you think bears on what is being said that is not quite being covered, please feel free to tell us. If you would, please first introduce yourselves, in order, for the purposes of the record. We are being recorded. If anybody has any opening statement of any kind that they would like to make, please feel free to do so, otherwise we will just move straight into the questions. Perhaps we can start on the left hand side as we look, with Jeremy Johnson. Tell us who you are.

Jeremy Johnson QC: Good morning. My name is Jeremy Johnson. I am a barrister in independent practice at 5 Essex Court, specialising in public law and human rights. As part of that, I am on the panel of special advocates and occasionally act as a special advocate.

Raza Husain QC: Good morning. My name is Raza Husain. I am a barrister practising from Matrix Chambers. My expertise is in refugee and immigration law, as well as public and human rights law. I act for the UNHCR.

Clair Dobbin: Good morning, my name is Clair Dobbin. I am a barrister at 3 Raymond Buildings. I am a member of the Attorney-General's panel of counsel. I have a specialisation in public law and extradition law in particular.

Helen Malcolm QC: I am Helen Malcolm QC and am at the same chambers, 3 Raymond Buildings. I also have a specialisation in extradition law and am a special advocate for the purposes of SIAC. I am also a special independent counsel, doing a similar type of work domestically where there is sensitive material.

Q231 The Chairman: Thank you. Would anyone like to make an opening statement? I will open the batting by asking you to what extent you feel there is an issue, when someone is facing extradition and seeking asylum in this country, that material relating to the application for asylum is being used in the extradition hearing. Who would like to start?

Helen Malcolm QC: I am going to duck everything about immigration law, about which I know almost nothing I am afraid, and stick to extradition.

Raza Husain QC: Can I have a go? I have been involved in two cases over the last six months where there has been an issue, and material relevant to the extraneous considerations bar or the human rights bar could not be employed fully owing to fear of reprisals against the witness. In a Russian case, the Secretary of State granted refugee status in the face of an extradition request. Indeed, the request supported the refugee claim, because the claim was that the prosecution and the request were politically motivated. That claim was accepted by the Secretary of State. The other case is pending. In it, efforts are being made to see whether the very high-level witnesses—former prosecutors and former high-ranking members of the Government—who are prepared to give evidence in confidential and closed asylum proceedings would be prepared to do so in open extradition proceedings.

Lord Brown of Eaton-under-Heywood: Which country?

Raza Husain QC: The Czech Republic.

The Chairman: From what you have said, it sounds as if the evidence relating to the asylum case seems to press the buttons of the bars in the process.

Raza Husain QC: Yes. There is obviously a substantial overlap between the extraneous considerations bar and the definition of a refugee under Article 1 of the refugee convention. The bar arises when the request is in fact made for the purpose of prosecuting, inter alia, on account of political opinion or when the individual's position would otherwise be prejudiced for particular reasons that find a mirror in the refugee convention. It is the reasons that find

a mirror, although the standard under the refugee convention is different; it is persecution, as the Committee will well know. Obviously, the human rights bar will block extradition, and will block removal pursuant to immigration powers as well, so there is an overlap but also a very important difference. One of the questions concerns the VB decision, which touches on asylum confidentiality, which is a big and very important difference between the two processes. At some point, if the Committee would find it useful, I would want to say something about that, because the majority appear to have misunderstood some features of asylum confidentiality.

The Chairman: Please do. One general thing is that you flatter us by saying that we have full knowledge and understanding. Please assume that we are sensible, intelligent and well informed, but at the same time keep it as simple as you can. Please explain everything. It is not going to do us any good if we are under any misapprehension about what is being said.

Raza Husain QC: Yes, of course Lord Chairman.

Clair Dobbin: Lord Chairman, can I support what Mr Husain said? There are a number of cases in which it has been publicly reported that during extradition proceedings or close in time to them, an individual has applied for asylum. I can give you one example of a case in which, during the currency of the extradition proceedings, an individual asked for them to be adjourned in order to pursue an appeal in front of SIAC for the very reason that he wanted to be able to rely on anonymous witnesses and he could not do so in the extradition process. I hope you will understand that I have to be careful and can only refer to those cases that have been reported publicly. However, you will probably be aware that Akhmed Zakayev was granted asylum in his case, and I understand that that was after the British courts had rejected a Russian extradition request. In the case of Boris Berezovsky, it has been publicly reported that he was subject to an extradition request and then granted asylum in 2003. There is the publicly reported case of Trushin, a Yukos executive who was granted asylum in August 2005. Then in October 2005, a request was made from Russia for his extradition, which was refused. It was expressly said in the report of that case, although I think it is common sense, that the background of the criminal investigation was central to his being granted asylum. Those cases give you some idea of the close interrelationship in some very sensitive cases between extradition and asylum.

The final example that I can give you is an easier one to talk about, the case of *Khelifa v Algeria*, which was the first ever extradition request that Algeria made to the United

Kingdom. It was pursuant to a memorandum of understanding between the United Kingdom and Algeria, so was a specially negotiated extradition request. In that case, it was publicly reported that Khelifa wished to rely on anonymous evidence. He therefore made an application for asylum during the extradition process, and then made an appeal to SIAC so that the anonymous witnesses could be heard. That will give the Committee some idea of the problems this causes, because it took about three years for the proceedings before SIAC to be finally concluded. Ultimately, the appeal was rejected and the extradition proceedings resumed, having been subject to a very considerable period of delay.

The Chairman: Does this happen a lot? Is this a relatively rare phenomenon or is it frequent?

Clair Dobbin: It is certainly not a widespread problem, but I think that there are a minority of cases in which individuals may have elected to pursue immigration applications on the basis that they wanted to rely on evidence that they could not adduce in extradition proceedings.

The Chairman: Is that the sequence normally—extradition looms, then you go for asylum because you think you can draw into the whole thing evidence that you otherwise might not be able to?

Clair Dobbin: There may be individuals who come to the United Kingdom knowing that they are the subject of a criminal investigation that they believe to be politically inspired and who make an application for asylum quickly. There are others who make it during the currency of the extradition proceedings. I do not think there is any set rule or pattern.

Lord Rowlands: Can I check that I have understood you? Are you suggesting that if these proceedings were available in extradition cases, such a case could have carried on as an extradition case?

Clair Dobbin: Yes.

Lord Rowlands: Is that the simple point of this? Do you therefore support the principle of using this procedure for extradition purposes?

Clair Dobbin: I think, as a matter of principle, that there are probably two points. First, if the ability to have a closed procedure is available in immigration, it is difficult as a matter of principle to see why it should not be available in extradition, given that there are common issues to both extradition and asylum.

Lord Brown of Eaton-under-Heywood: The Supreme Court's answer to that one of course is that there is a very important third party involved in extradition, the requesting state, which

is the other party to the proceedings. That is not a dimension that exists in ordinary deportation or removal cases.

Clair Dobbin: I suppose the issue is whether that is a principled objection to the idea of having the procedure or a practical objection. Looking at it from simply a humanitarian protection point of view—

Lord Brown of Eaton-under-Heywood: Yes, that was Lord Toulson's view.

Clair Dobbin: —it can be quite difficult. I entirely agree that particular difficulties attach to the extradition context that none the less make this a really vexed issue. The Supreme Court might have gone further in some of its analysis about the difficulties that may be caused, but looking at this entirely as a point of principle I think it is difficult to say that there are differences between extradition and asylum.

Q232 Lord Brown of Eaton-under-Heywood: I would just ask something that relates to one of your earlier answers. To what extent does the *W v Algeria* case bear on this? Is that a case that now needs to be relied on in this context?

Clair Dobbin: Do you mean in terms of making the same sort of—

Lord Brown of Eaton-under-Heywood: Disclosing something to a Government, under an irrevocable undertaking not further to disclose it to the state to which it is proposed to deport people, in order to take instructions and gain evidence as to how reliable and trustworthy the evidence is.

Clair Dobbin: To take this in stages, I was just going to mention the second point of principle that arises—for one moment having the luxury of not looking at the practical implications. The second point, which was alluded to in the VB decision of the Supreme Court, is that it is obviously not open to someone who has already been granted British citizenship to make an application for asylum. That is the second issue of principle that arises: as things stand, this unequal protection exists.

The Chairman: Can I just stop you there? When you use the word “unequal” protection, is that about the distinction between British citizens and non-British citizens?

Clair Dobbin: Yes, precisely. Some of the Rwandan defendants could have gone down the route of making an application for asylum and relying on evidence that they did not have to produce in the extradition proceedings—not a course that was open to those who had British citizenship. As regards where one goes after that, for all the reasons that Lord Brown alluded to, it is a really difficult issue.

The Chairman: That is why we asked you to come along.

Baroness Jay of Paddington: Let us take what one might describe as a simple extradition case, say with a British citizen, or someone who has residency or whatever it may be, whose extradition the requesting state is asking for. There are concerns about sensitive material, which may well be political rather than legal. In your experience, what are the proportion of cases in which proceedings in court are inhibited by the fact that there is potentially sensitive information that cannot be used?

Clair Dobbin: It is very difficult to say. I should make it clear that there is often a great deal of sensitivity around the fact that individuals have even applied for asylum. It may not even be clear in the extradition process that that has happened. The defence may be put in the position of asking for a long adjournment to prepare their extradition case, which they can justifiably ask for, but also because they wish to make an asylum application as well. It is very difficult. All I can say is that there have been a significant number of cases where that has been an issue.

Baroness Jay of Paddington: A significant number. Both you and Mr Husain have given interesting individual examples of cases where this has been relevant but, as you said at the beginning, we are talking about a legal or human rights principle, and one that might potentially be altered by statute. One has to have a sense of how really significant it is in terms of the proceedings that you have all dealt with.

Clair Dobbin: I would find it difficult to put a number on it. The best that I could do would be—

Lord Brown of Eaton-under-Heywood: A ballpark figure? A dozen a year?

Clair Dobbin: I am not sure.

Raza Husain QC: Perhaps around that. It is a minority, but not a de minimis minority. There is a concern. There is a problem.

Baroness Jay of Paddington: I think we all understand that it is a problem. It is whether it is a huge problem or something that is an aggravation in a certain number of cases.

Clair Dobbin: It is not a significant number in that sense, in terms of the overall number of extraditions.

The Chairman: It is just significant for the particular individuals involved.

Clair Dobbin: Absolutely.

Raza Husain QC: May I say something just by way of further elaboration of Ms Dobbin's evidence? The fundamental reason why the closed material procedure in VB was rejected was because there was no statutory warrant for it. That is the fundamental difference between the W case, which Lord Brown referred to—

Lord Brown of Eaton-under-Heywood: Well, there were two fundamental differences: that was one but the other was that a third party was involved.

Raza Husain QC: Indeed, but it could be said that there is a sufficient analogy between the W case and the extradition case because both concern coercive removal, consequent upon wrongdoing. It could also be said that the fact that the state is a party makes that case a fortiori—there is an even stronger reason why there should be some protection. One can see why that would not carry the day at common law because the common law protects very strongly the principles of open and transparent justice and fairness. There are very limited exceptions to those principles at common law; they concern child welfare and certain intellectual property proceedings. Lord Brown will remember the Al Rawi case.

That leaves the question of statutory provision at large, and as far as that is concerned it is interesting to note that in VB the majority did find it appropriate to rule that you could have anonymous evidence by analogy with the statute. Often, that anonymised witness evidence will not give the witness sufficient protection, because the importance of their evidence may rely on or concern who they are. But the considerations that animated allowing in anonymous evidence carry over to controlled closed procedures, with safeguards of the sort which Lord Brown articulated in the W case.

Lord Brown of Eaton-under-Heywood: It is a matter of opinion that there is an overlap in the constitution of the court in those two cases. In VB, nobody from W sat.

Raza Husain QC: Indeed.

Helen Malcolm QC: Lord Chairman, may I make one more point? A lot of these cases proceed upon the basis that the difficulty is of evidence getting back to the requesting state: that is to say, evidence about their internal procedures, their judicial independence or the general fair trial breaches that are a matter of concern. But there are cases in extradition proceedings where a much more individual and domestic concern has caused the parties to want to call anonymous witnesses. An example might be somebody who comes from a small village and wants to say, "I know that my family, which is the only Catholic family in the village, is permanently the butt of false allegations", but I could not call that evidence in an

open fashion in this court because information about it will get back. That has nothing to do with the state apparatus but is none the less an extremely important consideration for that defendant.

Then there are cross-over cases. There was a Bulgarian case that achieved a certain notoriety, where it was being said that one particular person was in a position to do great harm, both physical and other harm, to witnesses and to the defendant. It so happened that that person was also a senior member of the criminal justice system, so that just made the matters even worse. Bulgaria, after all, is a member of the European Community and is now an EAW state. Indeed, it was an EAW state by the time of the second application for the return of that particular defendant. The point I am making is that these concerns do not only arise as in the case of Rwanda, where you are making broad allegations about the system of justice altogether; they can sometimes be enormously particular and domestic, without affecting the state.

The Chairman: Does the suggestion follow from that, given that the requesting state is a party, that even if the understanding of these points gets into the purview of the requesting state, effectively that will lead to damage in the requesting state, albeit that it is not directly a political matter?

Helen Malcolm QC: Yes, either inadvertently or because they simply do not know whether the information is true. They may go back and ask questions of the local mayor—"Is it true about this or that?"—and everyone thinks, "Oh, why are you asking that?", so the damage is done in either case.

Lord Rowlands: But if you do not do that, how do you check the veracity of the evidence?

Helen Malcolm QC: That is always the problem with all closed material procedures. It is a problem within SIAC and in any difficulty. Going back to what someone was saying about points of principle, what we have ended up with in SIAC is, in my view, not a perfect system but the best available option. It is for that reason that I would personally be in favour of extending that into the extradition arena.

The Chairman: Lord Mackay, would you like to come in now? We may have covered quite a lot of this.

Q233 Lord Mackay of Drumadoon: We have covered quite a lot of this, but I think you have been given notice of the questions that you were going to be asked, and I wanted to ask you about question 2. If any one of you wishes to respond, we would be very grateful. To what

extent is there an issue of material relating to political persecution or sensitive material being used in an extradition hearing to support a bar to extradition?

The second part of my question is: do problems arise from how the material can be used or from whether the necessary material can be found? We are looking for anything else that you would wish to say, first, about an issue of material relating to political persecution on the one hand or sensitive material on the other being used in an extradition hearing to support a bar to that extradition. Secondly, on the problems relating to how such material can be used, is that more or less prevalent than the issue of whether the necessary material can be found, about which something has already been said? We are not inviting you to repeat yourselves, but sometimes when you hear a question being asked a second time—

Raza Husain QC: I think problems arise for both reasons. If I can be very quick, it is often difficult to obtain the necessary material because, ex hypothesi, it will often be sensitive so witnesses may be reluctant to come forward and give any kind of statement at all, under whatever conditions. Secondly, if they are prepared to come forward they may often be prepared to do so only under conditions of confidentiality. In the Russian case that I mentioned, the claimant himself was not prepared to give full particulars of his defence to extradition because of fear of reprisals towards his family.

Lord Mackay of Drumadoon: Would I be right in understanding that you are not the only members of your profession who are concerned about these issues and identify with things that may require to be altered?

Raza Husain QC: Certainly. I took the liberty of speaking to a number of practitioners, such as Mr Keith, who I think came to give evidence on a previous occasion, and solicitors such as Mrs Peirce. It is a concern that is shared.

The Chairman: How often do these things crop up in your professional life? Is it the kind of thing that comes in the papers once a week, once a month or just occasionally at an odd time of year? Can you give us a sense of the scale of the thing?

Clair Dobbin: I can say that I have dealt with a handful of cases during my 15 years doing extradition law. I think that other colleagues may have had more experience. I say that because I most often act for the Secretary of State or prosecute in extradition cases. For that reason, I may come across it less than other colleagues do.

Helen Malcolm QC: I would also say that it is relatively rare, but then nowadays I only get the sensitive cases. I no longer get the ones that I was referring to earlier: for instance,

where a particular family may have a particular problem. It is none the less immensely important, from their point of view, but that would probably not involve a Silk and therefore would not come my way. Certainly, the Rwandan case is the starkest example that I have ever dealt with.

Raza Husain QC: I have to say that I have come across it reasonably often in the recent past in the context of eastern Europe and Russia, where there is a practice in some cases—I think the Yukos cases were discussed in October—of politically inspired prosecutions.

The Chairman: As a more general comment, are we talking here about what we might describe as eastern European countries that are using the EAW, or is it essentially outside and in category 2?

Raza Husain QC: It is essentially category 2 but not limited to that. As I said, I have had a couple of cases in the last six months and I am instructed in another two where this may or may not be an issue.

Helen Malcolm QC: One of the things that may underscore this is something that is not really gone into in the questions. There are of course different categories of countries and they are to an extent ranked in relation to the confidence that we repose in their judicial systems. I say “to an extent” carefully, because this is, presumably, largely a Foreign Office decision; there may be all sorts of other reasons. Rwanda is a case where we not only require prima facie evidence but with whom we do not have any official multilateral arrangements. One solution to all this might be to say that we should simply not be in international treaty relations with countries in which we do not repose enormous confidence. In response to that, I would have to say that it is not necessarily the solution. There are all sorts of difficulties with it. First, it is very difficult to tell at the beginning of the process when you are negotiating a memorandum of understanding to what extent this particular case will cause issues to arise. Secondly, we of course have international treaty obligations under things like the UN convention against corruption, which require us to do everything in our power to assist other countries. It is an issue on which we have different sorts of extradition relations but it is not the full answer. The simple answer might be to say, “We simply won’t entertain any extradition requests”, but that does not seem to me to solve any of the problems.

The Chairman: It certainly creates other ones.

Helen Malcolm QC: Yes, not least the fact, of course, that extradition is reciprocal.

The Chairman: Exactly.

Helen Malcolm QC: That is another issue. One is always having half an eye on whether we are going to get somebody back who we very much want for trial.

Baroness Jay of Paddington: I have asked my question. It was covered by the previous discussion, I think.

Q234 Lord Empey: I was going to ask you a question about the VB case, which we have obviously covered to a very large extent. But as Lord Mackay hinted, and maybe just to put it on the record, first of all, what will the likely consequences be, and, secondly to what extent do you agree with the Supreme Court's view that to allow closed proceedings in extradition hearings would not be in the interests of open justice? Obviously the case has been discussed around the table quite a bit, but maybe we could just put it formally on the record.

Helen Malcolm QC: I probably have the most immediate information as to the likely consequences, because this has been said in open court and we have gone back to the magistrates' court and are in the process of hearing further evidence. Indeed, we were due to be hearing further evidence today in it. The answer as to the consequences is that there are witnesses who will give evidence anonymously and there are others who will not give evidence at all. In relation to the latter, the best we are going to get is information from the investigators in Rwanda as to general problems and why some people might not wish to come forward, some of which has already been given and, indeed, is referred to in the judgment.

In relation to whether that decision could have come to a different conclusion, I am not sure that I really ought to comment.

Lord Empey: We are waiting on every word.

Helen Malcolm QC: I am not sure that I can go very much further on that, but that is the consequence of what is actually happening. Some evidence will be put anonymously, but of course if it is a prima facie case and the witness wants to say something along the lines of, "Well, I was there. I could see from my kitchen window and I know perfectly well that X was not involved", for obvious reasons anonymising them does help and they are not going to give that evidence.

The Chairman: We have heard Clair Dobbin on this, but do the other two have any thoughts on this particular point?

Jeremy Johnson QC: Just on the second part of your question whether the use of closed material processes is compatible with open justice, undoubtedly the majority are correct

that any closed material process by definition involves a departure from public justice principles. Not only that, but more troubling in some ways is that it involves a significant departure from ordinary norms of natural justice, insofar as a party to the proceedings is not given access to material that is being relied on in the proceedings. That is a fundamental and inherent feature of closed material processes. The issue is whether that is a price worth paying to cure the difficulty that is demonstrated by that case.

Lord Empey: Where does the balance lie in your opinion?

Jeremy Johnson QC: I am not an extradition lawyer so I do not purport to comment on the overall correctness of the decision, but my personal view is that Lord Toulson identified some pretty powerful factors in favour of departing from ordinary rules of open and natural justice. However, a closed material process involves a very significant departure from those principles. There are often intermediate stages—less draconian measures—that could be adopted to cure the problem in a less draconian way, such as the anonymisation of witnesses or non-disclosure orders imposed on the existing parties to the proceedings. I can certainly see that in principle one could use closed material processes, but I think it is necessary to explore other options.

Lord Empey: It is fair to say that you could anonymise a witness, but that person could still be identifiable to a third-party regime, for instance.

Jeremy Johnson QC: Yes. Inevitably a facts-specific assessment would have to be made, and in some cases anonymisation may be sufficient but in other cases it may be necessary to redact some of the evidence or to have non-disclosure orders or to gist or summarise the evidence in a way that enables the parties to engage in the process while not giving rise to the risks that are feared by full disclosure.

Lord Empey: Would that be a general view on the panel?

Raza Husain QC: I would certainly agree with everything that Mr Johnson said.

Clair Dobbin: I think there are real difficulties that are particular to extradition that mean that real thought would have to be given to a closed material procedure. At the heart of extradition, of course, is the fact that one is dealing with criminal allegations, as in the Rwanda case. The sorts of allegations that are usually made as regards Part 2 countries are the most grave. There may be a considerable motivating factor in extradition proceedings for individuals to fabricate evidence. It is my experience as someone who acts for requesting states in extradition that there is a particular need to interrogate and test the kind of

evidence that is relied upon. So I think there are real issues about closing a requesting state out from being able to test the evidence in the way that it would be tested in conventional proceedings.

Lord Empey: That is the big dilemma, is it not?

Clair Dobbin: Yes.

Lord Brown of Eaton-under-Heywood: Does it follow that you would agree with the majority in VB and Rwanda?

Clair Dobbin: I still accept that there is a need for some sort of accommodation to be found. I certainly agree that it could not be done without legislation.

Lord Brown of Eaton-under-Heywood: No, but would you legislate? As I read the majority judgment—Lord Mance, I think, in paragraph 29—you would not buy it anyway, would you?

Clair Dobbin: I do not know.

Lord Brown of Eaton-under-Heywood: As I read that paragraph, he thought that it really was not a very good idea. It is on page 13 of our printed copy of the judgment. He said, “It is inevitably only speculation that any material which the appellants might adduce in a closed material procedure would be relevant, truthful or persuasive, and the very nature of a closed material procedure would mean that this could not be tested”, et cetera, et cetera. “The appellants are inviting the Court to create a further exception to the principle of open inter partes justice, without it being possible to say that this would be necessary or fair”.

Baroness Jay of Paddington: I think the difficulty, perhaps for us rather than for you, and practising the law is that we have had enormous legislative struggles, as you will be only too aware, about using closed material proceedings in internal terrorist cases, for example, and changing the law on that has caused huge political and jurisprudential debate, particularly in the House of Lords. What I find difficult is understanding how one could in a sense incorporate a principle that enabled you to do that in extradition in the same way.

Clair Dobbin: I think the fundamental difficulty is that you are shutting out a party to the litigation—

Baroness Jay of Paddington: Exactly.

Clair Dobbin: —in extradition, and that is the thing that has to be put.

Lord Rowlands: Earlier on I got the impression that you two were in favour of having these procedures for extradition. Now you seem to be making a very good case against them.

Clair Dobbin: I understand why there might need to be such a procedure, but equally I understand the very real difficulties that there would be for it. I entirely agree that the issue is how one reconciles those two things.

Lord Rowlands: Are you going to tell us which way you are going to balance this up and which way you are going to fall?

Clair Dobbin: I think there is a difficulty with the status quo as it stands and with the fact that there is this possibility for some defendants in extradition cases to pursue an asylum application and to have protection in that way. I am not sure whether or not that is necessarily good and in the interests of our extradition procedures in general, because of the delay that it causes to the extradition process. There is that issue of unequal protection, where British citizens do not have that route.

Helen Malcolm QC: I would come off the fence a bit more than that and say, in my view, that we do need some sort of procedure.

The Chairman: That means some sort of closed procedure.

Helen Malcolm QC: Yes, some sort of closed procedure.

Baroness Jay of Paddington: Would that be achieved by legislation?

Helen Malcolm QC: Certainly, yes. I think that is clear as a result of the Supreme Court's judgment. We have already gone down this route, certainly in the SIAC proceedings. There, you are balancing national interests against an individual's right to stay in the country and we have fallen on to the side of protecting the national interest perhaps more than the individual's right to put his case. Having been on the receiving end, as an advocate I know that it is quite difficult to do one's job as fully as you would like as a special advocate in the SIAC proceedings. May I raise one small point? There is a suggestion that a special advocate only deals with disclosure, but they do not of course. You deal, in the first place, with questions of disclosure—you try to persuade the Home Secretary to disclose more or to gist or something—but if you fail you remain engaged in the process and then go on to deal with the substantive evidence that is provided, to the limited extent that you are able. You cannot take instructions and you obviously cannot guess or put things that might be completely off the wall for very obvious reasons; you are really limited to testing and probing the evidence and probing inconsistencies between different witnesses. There are difficulties with it but, with good reason it seems to me, we have decided that there should be that statutory process.

In the case of extradition, you are balancing the prosecution of crime—sometimes very serious crime—against an individual's right to a fair trial, which is an equally important balance. I do not see why we should not come down on the side of giving that individual the possibility of putting as much before the court as he can in the absence of the party that wants him back for a trial. That does not mean to say that the court is going to accept it, but I do not see the difficulty. It seems to me to be an equally important balance, and to shut it out altogether from calling that evidence is very troubling.

That leads on to one other thing, which I think Mr Johnson mentioned, which is the possibility of non-disclosure. I have real difficulties with the idea that you can call the evidence in front of counsel for the requesting state and order that lawyer not to disclose to his own client what has been said. I am not sure that this is a three-party issue, it is very significantly just a two-party question in an extradition. In the old days, prior to the CPS coming into being, you used to have individual sets of solicitors who would be instructed to act for France, Russia, Germany or whoever. Perhaps the CPS is better qualified to talk about this, but the process now is simply that the CPS are the lawyers for the requesting state. I do not see any way in which they can be privy to information without disclosing it on to their client. There are real problems because of inadvertent disclosure. In the case of SIAC, once you are privy to the information you never speak to your client again, except in tiny circumstances relating to purely administrative issues with the leave of the court and usually having written out the question in advance and having shown it to the Secretary of State. In essence, you do not take any further instructions. In an extradition process, you may be privy to information and then have another two or three years' worth of daily or weekly communication with the investigator from the requesting state—who, in the case of Rwanda, is sitting in court every day. He is actually there. The dangers of inadvertent disclosure, quite apart from the matter of principle, would concern me there.

The other matter that matters is that if you constitute the CPS lawyer or counsel as some form of lawyer who is not simply appearing on behalf of a client, you bring back into play all the issues that are current about European arrest warrants and what discretion there is within the CPS to stop a case for reasons of de minimis or forum, or all the other matters that this Committee will be aware of and other Committees next door will be even more aware of that have caused problems for the EAW. The whole point is that the CPS is just the solicitor for the requesting state, so I have problems with non-disclosure orders.

Q235 Lord Brown of Eaton-under-Heywood: So how do you do it? Assuming that you legislate, you cannot legislate to put in place the position we arrived at with *W v Algeria* whereby, if you make a disclosure to Government, the Government are under an irrevocable undertaking not to disclose the information to the state to which they are proposing to return somebody. You cannot do that, so how would you legislate? Would you simply say that there would be a closed proceeding and nobody at all to oppose whatever evidence is then adduced on behalf of the proposed extradite, or would you have a special advocate?

Helen Malcolm QC: The latter.

Lord Brown of Eaton-under-Heywood: You would have a special advocate?

Helen Malcolm QC: Yes. My proposal is that instead of constituting the CPS lawyer as the special advocate on behalf of the requesting state, you have, exactly as in SIAC, a separate special advocate who comes in for that purpose and then plays no further part in the extradition proceedings.

The Chairman: Who places the special advocate? The court?

Helen Malcolm QC: That would depend on exactly how the statutory procedure sets it out. What happens at the moment is that the Treasury Solicitor has a special advocates' department and they are instructed—

Raza Husain QC: I think it is the Solicitor-General who appoints special advocates in SIAC cases.

Lord Henley: Would the other three members of the panel like to comment on Helen Malcolm's views? Would you go down the line of legislation?

Raza Husain QC: I think there is a need for legislation. The precise contours of that are difficult, and I can certainly see the force in Ms Malcolm's observations. As to why I think there is a need for legislation, I want to just address Lord Brown's point that Lord Mance, in paragraph 29, thought there was no problem. To my mind, with great respect, that is compellingly answered by Lord Toulson in paragraphs—

Lord Brown of Eaton-under-Heywood: I am not saying there is not an argument, but that was the view of the majority.

Raza Husain QC: Lord Mance thought that you could not assume the truth of the evidence. Of course you cannot, but equally you cannot assume that it is untrue. The point is that it is potentially important and the question is whether it should be admitted. As regards the need to interrogate the evidence, of course that also arises in the SIAC context, where the

Secretary of State is very significantly inhibited from interrogating evidence because she cannot contact the home state. There are other circumstances where the home state would have an interest in securing the return of the individual. It is not the same interest as an extradition of course, but when you have a memorandum of understanding in the national security context, it is in the interests of the home state to have its good faith, efficacy and propriety upheld by a foreign court. That is very much the case in Algeria, which was very keen—

Lord Brown of Eaton-under-Heywood: You are talking about the W situation, which was not an extradition case but a deportation.

Raza Husain QC: Indeed.

Lord Brown of Eaton-under-Heywood: In that case, there was a disclosure to the Government and the Government were going to be in a position—true, without consulting Algeria—to deal as best they could with whatever material there was.

Raza Husain QC: I was trying to draw analogies, very unclearly, between the two processes. I would say that the special advocate solution articulated by Ms Malcolm gives you a further analogy there. It is the special advocate who is able to test the material.

Lord Brown of Eaton-under-Heywood: Right. The special advocate comes in, in place of Government in the W scenario.

Raza Husain QC: It is very, very far from perfect.

Lord Brown of Eaton-under-Heywood: But you come down on her side of the fence?

Raza Husain QC: Indeed.

Baroness Jay of Paddington: That is a majority on the panel.

Lord Brown of Eaton-under-Heywood: Well, what about the other two?

The Chairman: Ms Dobbin, I was not so sure that you had a chance to say—

Baroness Jay of Paddington: Sorry, I thought that Ms Dobbin had answered.

The Chairman: Mr Johnson, you have been very patient.

Jeremy Johnson QC: Yes. Ms Malcolm has given some pretty compelling objections to the CPS lawyer effectively fulfilling a dual function and having to compartmentalise information. As I say, I recognise the force in those objections. I think that every solution is imperfect and I will come to some of the difficulties with the closed material process in a moment. I am not utterly convinced, though, that one should rule that out as an option—i.e., a CPS lawyer, by statute, fulfilling a slightly different purpose and being under a non-disclosure obligation. It

would be less cumbersome and costly, would involve less delay and would be less of a departure from rules of open and natural justice than a closed material process. That said, there are some pretty powerful objections.

Some of the problems with the closed material process that have not been fully drawn out yet are, first, that experience shows that it involves significant delay and extra cost because of the extra dynamic that a closed material procedure brings. There is an extra team of lawyers, separate hearings and an iterative process between the special advocate and the Secretary of State. SIAC proceedings generally take a very long time compared to more conventional immigration appeals. So there is the delay and the cost factor. Another feature, though, is that in a SIAC appeal the Secretary of State remains in control at all times of the closed material. The Secretary of State seeks permission not to disclose it; that will generally be opposed by the special advocate and there is a hearing. If the court is persuaded that the material is sensitive and cannot be disclosed, the hearing takes place in the ordinary way, with the special advocate representing the interests of the appellant, and there is no question of disclosure. If, on the other hand, the court takes the view that the Secretary of State's objections to disclosure are not sufficient to justify non-disclosure, the court will refuse to allow the Secretary of State to rely on the information in those proceedings.

The Secretary of State then has an election to make. She can elect either not to rely on the information any more—that is why she remains in control of the material—or to disclose. The point is that at all times the Secretary of State remains in control of the security of the information. She can also change the underlying immigration decision to bring proceedings to an end. By contrast, in extradition proceedings - in the sort of procedure that is being contemplated - the person who is seeking to rely on the closed material will not have the same level of control. They cannot disengage from the process in the same way as the Secretary of State can and they would not know in advance what view the court is going to take about disclosure. So the risk is that a person would be disinclined to give the evidence, in witness statement form or whatever it is, because they would not remain in control of it and could not guarantee that it would not be disclosed, for example, to the requesting state. That would depend on a court decision and they would not be able to elect in the same way that the Secretary of State can. That is an additional problem which would have to be grappled with.

The Chairman: Now the way in which I provisionally thought we were going to conduct the business has gone slightly awry, which is probably my fault, but Lady Hamwee had something that she wanted to say.

Baroness Hamwee: Yes, it is one thing that arises from what Mr Johnson has been saying. Are you suggesting that a distinction from the other uses of special advocates, which we have been referring to, is that the CPS's relationship to the requesting state is the same as that of a solicitor to a client?

Jeremy Johnson QC: Yes.

Baroness Hamwee: I actually wanted to ask a rather practical question. There is no ethical judgment in my question, but it comes from the experience of the briefings that we had on the terrorism legislation. Are there enough members of the Bar who are prepared to act as special advocates? Is there any difficulty there, because there were certainly a lot of protests at the time of the terrorism legislation? I remember Dinah Rose being very clear about her own colleagues' views.

Jeremy Johnson QC: It does raise ethical questions, and different members of the Bar take different views about it. Some members of the Bar will refuse to contemplate acting as a special advocate. Some have acted and then resigned from their posts. Others continue to act; I fall within the latter category. I do not understand there to be any difficulty with recruitment. There is a large panel appointed, as Mr Husain said, by the Solicitor-General and, as I understand it, that is sufficient to fulfil the need and there is a competitive recruitment process.

The Chairman: As by definition none of us knows what goes on in the special advocacy procedures, just from the perspective of those who have done it, did anything turn out to be very different from what you could have supposed, had you been a reasonably well informed layman looking at the system from the outside?

Jeremy Johnson QC: From my point of view, until you do it you do not realise how reliant an advocate is on their instructions. Before one gets engaged in a closed material or special advocate process, there might be a temptation to think that it will be wonderfully liberating to be involved in a case where you can do what you like; you do not have instructions and can just attack the case that is mounted against you. In fact, it is terribly disorientating and terribly frustrating. People apply epithets such as Kafkaesque to it because without instructions, you have no framework within which to operate. That is the practical difficulty.

Helen Malcolm QC: I would like to add to that. After all, as I said at the beginning, we use this process in domestic proceedings as well where there is very sensitive material. The Attorney-General will appoint what I think are known as special independent counsel. I have done that as well. What is most disconcerting is the feeling that you may be missing something and if only the defendant had access to it he could say “Ah, Margaret. Of course the name Margaret means something to me”, and the following is relevant and her evidence will never be reliable, for the following 16 immensely cogent reasons. The fact is that you are normally swung in at about 24 hours’ notice. It is often not in London. You are dealing with advocates who you have never met before. You get two or three feet of papers and a huge amount of instructions, which by definition are immensely general because it is before you have seen the information. So the defence are trying to cover every possible base, you have a 24 hour-period where you panic and then you do your best in court. That is a very slangy way of describing it, but that tends to be what happens on the ground—entirely in my own case, I should say. There is a constant fear that you are missing a really good point.

Lord Rowlands: But would you not change the system and abolish the role of the special advocate?

Helen Malcolm QC: I certainly would not. It is certainly much better than nothing, which is the alternative.

Lord Brown of Eaton-under-Heywood: It is the least bad option.

Helen Malcolm QC: Yes.

Lord Brown of Eaton-under-Heywood: Roughly, how many times has W been used in SIAC?

Raza Husain QC: As I understand it, very rarely. The order was made in the W case itself, but other than that I am not aware of cases where an order has been made. The fears that may have been articulated—that this will encourage people to fabricate evidence—have not borne fruit. There is a principled answer as well to that kind of fear that this will encourage fabricated testimony, which was given by Lord Toulson in the VB case when he said that the same objection could have been made to the Criminal Evidence Act 1898.

Helen Malcolm QC: You also have to trust the courts to have a level of expertise in dealing with evidence that is fabricated. It is not that easy to fabricate extensive evidence that really stands up consistently, even to cross-examination without instructions. The courts are very capable of seeing the wood for the trees, it seems to me.

The Chairman: Does that go right through the whole court system?

Helen Malcolm QC: Of course, yes, because the magistrates who are hearing this kind of application are the most experienced and the most senior magistrates, at Westminster.

The Chairman: Yes, absolutely.

Helen Malcolm QC: They have masses of experience.

Lord Brown of Eaton-under-Heywood: Somebody suggested—I cannot remember which one of you—that it was only going to be used to ensure, so to speak, a fair trial on extradition. I thought it was intended rather to secure people against a return to barbarism of one sort or another: imprisonment, ill treatment or that sort of thing.

Helen Malcolm QC: That might have been my wording, but that is not what I meant. I merely meant that you were doing a similar balancing act: national interests against deportation on the one side or criminal trial against the individual's rights. I should have put it more broadly, not just as fair trial rights.

Raza Husain QC: I think, Lord Brown, that in the W case you said that the irrevocable non-disclosure order was essential to safeguard the rights of the appellant not to be returned to Article 3 ill treatment.

Lord Brown of Eaton-under-Heywood: That is right.

Raza Husain QC: You said that that was the least worst option, despite the diplomatic issues that arose. I think there is a parallel.

Lord Brown of Eaton-under-Heywood: Does the fact that it has not been needed very often, if indeed at all, except for that case not make one wonder how far it is actually necessary in the extradition context?

Baroness Jay of Paddington: That goes back to my question about proportion.

Helen Malcolm QC: For the individuals in any one case, it is absolutely vital.

Baroness Jay of Paddington: We understand that.

The Chairman: If you were to take this general view and have some sort of—let us be a bit more generic—independent counsel involved, are there any aspects of the existing arrangements where this sort of thing happens that you should either definitely do or definitely not do, if you were to have some rather nebulous system introduced into the extradition system? Are there any dos or don'ts that you feel strongly about?

Helen Malcolm QC: I can see that I might be making my case weaker by saying this, but from my experience it is hugely helpful to have two special advocates engaged in any one case. I realise that there is a cost implication to that and, of course, ultimately it would be up to

whichever department funds it and whether they are prepared to do that, but these cases not only have the practical difficulties that I have already raised about just getting through the material and not missing points but can raise really difficult ethical questions. Just having one person in the loop to whom you can talk makes a huge difference. I have only done one case where I was given a junior—in fact, she was a Silk at the time and has gone on to be a judge, so it is quite wrong really to describe her as a junior—but it made the most enormous difference, and I think we were much more effective as a pair than I ever would have been on my own. But that is the only practical issue that I would raise.

Jeremy Johnson QC: Yes, I agree with that. The special advocate system has evolved over a number of years. From time to time, special advocates as a body have asked for adjustments to the rules; some have been accommodated and others have not. I think the system now is about as good as you can get, consistent with the need to preserve the confidentiality of the material that is being protected, so I would not invite any radical changes to the existing system, whether in SIAC or the current Civil Procedure Rules. I think they provide quite a good template, if that is what is going to be used.

The Chairman: We have dodged around in the way that we have approached this hearing. Lord Brown, is there anything else you want to raise? We have covered a lot of the stuff that you were going to talk about.

Lord Brown of Eaton-under-Heywood: Lord Chairman, one way or another I have asked everything I wanted.

The Chairman: Lord Henley, are you happy? So really we move on to the final question, which is Lady Hamwee's, although we have already covered quite a lot of that.

Baroness Hamwee: This may be self-fulfilling, I do not know. Essentially, is there anything else that you would like to say?

Raza Husain QC: May I say something about Lord Brown's point about numbers and Baroness Jay's point as well? The fact that the W order has been rarely used may indicate that the safeguards that the Supreme Court put in place are very effective and may be taken as an indication that this is a very proper development in the law, which has not been open to abuse. So the fact that it seems to be a rare case where that kind of order is made could be said to be a good thing. If the Committee was interested—it may not be—I also wanted to say something about what VB said about asylum confidentiality.

The Chairman: Please tell us what you would like to tell us.

Raza Husain QC: It may be that confidentiality considerations in asylum are not of interest to the Committee. If they are not, I will not say anything about them.

The Chairman: It is not directly germane to what we are looking into, but it may have tangential relevance, so if you would like to briefly tell us.

Raza Husain QC: The first point to make, as the Supreme Court acknowledged, is that it received very limited argument on the point. The arguments apparently appeared “late” and had “incomplete content”—those are Lord Hughes’s words at paragraph 56. He said that “further full consideration will be essential”. The majority appear to have suggested that an indication in extradition proceedings that asylum might be claimed was sufficient to waive asylum confidentiality and that even then a subsequent asylum claim may be seen as an abuse of or a “collateral attack” on the extradition proceedings. With very great respect I would say that that is unsound, essentially for the reasons which Lord Toulson gave. First, the questions of refugee status and extradition are related but are distinct. Indeed, they are not just distinct but refugee status has primacy, and domestic law—the Act—and international law—Soering—recognise that. So extradition yields to human rights and refugee status protection concerns. As Lord Toulson said in his dissent, at paragraph 90, the UK has a responsibility to consider a refugee claim properly, and that will not be discharged if a claim is considered on necessarily incomplete evidence in the extradition proceedings. Confidentiality is not simply an incidental windfall that the asylum claim gets, it is absolutely basic to the system. That is demonstrated by the EU material which the court cited, which enshrines confidentiality. The majority, with respect, misunderstood the reason why confidentiality is given. They said that it was given to protect the claimant or his family, and said that it had nothing to do with procuring evidence. But those two concerns—protection of the individual and their family, and obtaining evidence—are obviously not mutually exclusive. The international material supports that: the EU material says that you have to have an interview that ensures confidentiality and the UNHCR says that. The Secretary of State’s own asylum form assures claimants of confidentiality. At the risk of turning this session into a debate on moral philosophy, the EU requirements are deontological not teleological—the telos is irrelevant. You have to comply with this very strong requirement of confidentiality as a matter of directly effectively EU law. That is not overridden by an implied waiver because you have raised the possibility that you may claim asylum in extradition

proceedings. There are some very serious concerns about what is said in the majority judgment. I am sorry if I have unnecessarily troubled the Committee.

The Chairman: I shall read the transcript with care. I have to concede that I was not 100% with you all the way.

Raza Husain QC: I am sorry, my Lord

Q236 The Chairman: No, it is my fault, not yours. I shall look at it with care, because I can see the gist of the concerns you articulate. We have gone on longer than originally planned, but I have just a couple of points. First, have there been any instances that you know of where a requesting state would want to admit sensitive material? It has been suggested to me, for example, that there might be some threat to the potential extradited party or something—there might be stuff that they did not know about that the requesting state might want to admit. Has that ever cropped up?

Helen Malcolm QC: It has never cropped up in my experience.

The Chairman: I assume that we have just approached this debate solely from the perspective that the defence are the people who have the sensitive material. I just wondered whether there are any instances of it the other way around.

Helen Malcolm QC: The first base of course is that the requesting state by definition either has a full trial in contemplation or has already had a full and open trial and passed sentence, otherwise they would not be making the request. It would arise only if they wanted to put evidence in answer to some extraneous consideration of evidence, perhaps in answer to human rights or political issues.

The Chairman: I just wondered whether that issue had cropped up with any of you, that is all.

Helen Malcolm QC: I have not had experience of that.

Lord Brown of Eaton-under-Heywood: I suppose that theoretically they might want the person extradited for trial on some terrorist offence and were proposing at trial, in part at least, to adduce closed material themselves. This postulates that they have to make a sufficient prima facie case to justify the extradition, but it is a pretty theoretical prospect.

Helen Malcolm QC: There are so few states now from which we require prima facie evidence—

Lord Brown of Eaton-under-Heywood: Well I know, but—

Helen Malcolm QC: —and with the ones who would be most likely to try terrorists, we do not. Maybe that is the practical answer as to why I have not come across it.

Clair Dobbin: I have acted for requesting states in a number of terrorist cases and it has not arisen.

Raza Husain QC: In VB, the majority discussed the case of Tollman, which apparently is such a case, at paragraphs 24 to 26.

Clair Dobbin: But it did not actually happen.

Raza Husain QC: It did not happen. I defer to Ms Dobbin.

Clair Dobbin: I think that they were referring to the possibility that a requesting state might be able to rely on evidence in secret to rebut a prima facie case of abuse of process, but I do not understand that eventuality to have arisen.

The Chairman: Fine, thank you. Mr Johnson, do you have any thoughts on that?

Jeremy Johnson QC: No, I cannot add to that, save to say that in deportation proceedings in SIAC the Secretary of State will sometimes seek to rely on closed evidence about the conditions in the country to which they are being returned, so one could see the theoretical possibility of that in extradition, too.

Q237 The Chairman: Thank you all very much. Perhaps my Christmas present to you, since we seem to all agree that there is a problem and some sort of legislation is probably required at some time to deal with it—and every suggested and proposed solution is imperfect and has flaws—is to ask: what do you suggest we ought to recommend about this?

Helen Malcolm QC: So, our Christmas present is to draft the legislation.

The Chairman: Is there any kind of fundamental principle? A couple of you seem to think that some kind of closed hearing procedure might be an important bolt-on to what we have already.

Lord Rowlands: With the use of a special advocate in extradition cases.

The Chairman: Yes. Is that the gist of why you think that?

Helen Malcolm QC: My solution would be the use of closed material procedure with a special advocate appointed just for that purpose and not the CPS member, although I should say that I do not speak for the CPS here. It may be of immense use to you to get their view on whether it would be possible for them to have a special statutory role in extradition proceedings, but that would be my solution.

The Chairman: Is that the gist of what sort of approach you would all recommend to us in thinking about this, based on your experience, a lot of which has been in secret?

Raza Husain QC: I think that, as in Lord Brown's phrase in the W case, it is the least worst option.

Clair Dobbin: I think as well that it would be helpful for you to hear from the CPS. The suggestion that there should be a closed procedure very much hinges on the CPS's relationship with the requesting state and the extent to which there would be an incursion into that relationship if a non-disclosure order was made. In many respects, a non-disclosure order would allow the CPS to play a fuller role in any hearing in which evidence is being tested. Ultimately that consideration may trump the consideration about the changing nature of the relationship between the CPS and the requesting state.

Jeremy Johnson QC: I am with Ms Dobbin. I would accept that a closed material procedure could be used as a last resort, but before going down that route, with all the difficulties that it involves, I would want to look rigorously at the possibility of a non-disclosure order and the CPS having a slightly different role. You would obviously need to hear from them in relation to that.

The Chairman: Thank you all very much indeed. We are extremely grateful to you and I wish you a happy Christmas.