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The Select Committee on Extradition Law

Inquiry on

EXTRADITION LAW

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Questions 120 - 131

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11.40 am

Witnesses: Professor Rodney Morgan, Dr Kimberley Trapp, Sheriff Kenneth Maciver and
Mark Summers QC

USE OF THE TRANSCRIPT

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Members present

Lord Inglewood (Chairman)
Lord Brown of Eaton-Under-Heywood
Lord Empey
Baroness Hamwee
Lord Hussain
Baroness Jay of Paddington
Lord Jones
Lord Mackay of Drumadoon
Lord Rowlands
Baroness Wilcox

Examination of Witnesses

Professor Rodney Morgan, Human Rights Implementation Centre, Bristol University, **Dr Kimberley Trapp**, Faculty of Laws, University College London, **Sheriff Kenneth Maciver**, and **Mark Summers QC**, Barrister, Matrix Chambers

Q120 The Chairman: Shall we make a start on the second part of the proceedings? A warm welcome to our four witnesses: Professor Rodney Morgan, Dr Kimberley Trapp, Sheriff Kenneth Maciver and Mark Summers, a mixture of judges, academics and practicing barristers. It is jolly good of you to come. I know you have been hearing a lot of what we have already been discussing in the back of the room. We are in a sense going to cover many of the same points, possibly from slightly different perspectives.

Given that we are running a bit behind, could I please urge people to be concise in their responses. Do not allow that to stop you telling us what you think is important. If each of you would just briefly, for the purposes of the record, say who you are, I would appreciate it. Then if anybody has any opening statements please make them and then we will go into the hearing proper. Perhaps if I might start on the left—as I look at it—with Sheriff Maciver.

Sheriff Maciver: Good morning, my Lord. I will very briefly just say who I am, Kenneth Maciver, Sheriff at Edinburgh for the last 20 years or so. Since 2003 I have been one of four sheriffs who deal with all first-instance extradition work. I think for the moment that is all I need to say.

Professor Morgan: I am Rod Morgan. I am not a lawyer; I have no legal qualifications whatsoever. I am the co-author of the two best named guides to the European Convention for the Prevention of Torture, including that published by the Council of Europe. I am frequently commissioned to inspect custodial conditions and police practices overseas in preparation for extradition hearings, particularly where assurances have been given.

Mark Summers: I am Mark Summers, a barrister practising at Matrix. I practise in extradition and I represent both foreign authorities and defendants.

Dr Trapp: I am Kimberley Trapp, a senior lecturer at UCL Faculty of Laws, and I teach human rights and international law.

Q121 The Chairman: Thank you very much. As I said, unless there is a specific question, I will probably go to the panel, so everybody feel free to participate. My general opening question is the same one that I gave to the previous selection of witnesses: to what extent do you think an efficient extradition process allows for the examination of human rights concerned, bearing in mind—as we heard—that perhaps swift and efficient may not be coterminous? Who would like to start?

Sheriff Maciver: If I could just say very briefly—as I have said I think to the Scott Baker Committee and to you in the written submissions—I think it provides as good a measure as you can reasonably expect. There are obviously difficult cases and there are obviously exceptional situations but there is a requirement to be swift and, in general terms, I think that it does meet the needs.

Professor Morgan: I appear regularly in Westminster Magistrates' Court. I have also appeared in the Edinburgh court, the Belfast court and the Dublin court. In all those jurisdictions, human rights issues are taken seriously and I am listened to very attentively, usually in relation to Article 3 issues.

Mark Summers: I agree. There is a necessary and healthy tension between the need for a speedy and expeditious extradition process—and there is a need for such a process—and the need on the other side for proper consideration of human rights concerns. It is one that in my experience is given effect to in a balanced and meaningful way on the ground.

Dr Trapp: I think I will leave that one to the practitioners.

Q122 Lord Jones: Apologies if this is a little lengthy. Arguments based on Article 3 require the requested person to use publicly available material to demonstrate something approaching an international consensus. We are very anxious to obtain examples, so can you give examples of cases where this bar might have been considered too high? Are there examples where cases, funded by legal aid, could not afford to commission the expert work necessary to demonstrate something approaching an international consensus?

Mark Summers: Perhaps I may start here. It is important to understand the limitations of this question and what you are actually looking at. The international consensus test only applies in Part 1 cases to EU member states and it is the function, and the necessary function, of the presumption that operates in those cases of convention compliance, and the concomitant need to show clear and cogent evidence that a fellow EU member state is going to breach the human rights to which it has signed up. In all of those cases, if we get it wrong there is another remedy for the requested person: he or she can access the Strasbourg court

¹ Rather than generalised assertions of possible violation.

directly from that state. Moreover, it does not concern cases where the court is concerned with direct evidence of human rights violation¹.

You are therefore talking about a limited legal test that applies in a limited number of situations and in a limited number of factual situations. You are talking about complaints based on general human rights concerns. Against that, are there examples of cases where it has not worked? No, I do not think so to my knowledge. There are Article 3 issues where the courts can be argued to have struck the balance wrongly but they generally concern non-EU states. So my answer to that question would be: probably not.

Professor Morgan: I am frequently approached by solicitors to find out whether I would be willing to go to a particular jurisdiction to inspect particular establishments, and they apply for legal aid and nothing comes of it. I do not know the detail as to whether it is categorically refused or what happens. But the number of requests for assistance that I get, from which nothing subsequently comes, is significant. On the other hand, quite a few requests result in legal aid being granted and the work I undertake in those circumstances appears to be reasonably well funded.

The Chairman: You do not think that, on the legal aid front, setting aside eligibility, there is a particular or extreme problem?

Professor Morgan: This is quite tricky because I do not know how my services compare to those of others and thus what is allowed and what is not. All I can tell you is that I have quite a bit of work, most of which is funded on legal aid.

Sheriff Maciver: From my perspective, I learn in court that legal aid is sometimes refused. But it is very difficult for me sitting there to be clear whether or not it was fair or proper for legal aid to be refused, because usually these cases are fact-specific. Let us say it is a prison conditions case under Article 3, and it is a particular prison or a particular state or a

particular type of prisoner who is being dealt with and who has made the complaint under Article 3. There is a vast amount of material potentially available to his defence.

In my experience, the Legal Aid Board never refuses to allow any line of inquiry. It is the extent of inquiry and the number of experts that can sometimes cause a problem and lead to legal aid being refused. They will usually not refuse legal aid for one expert, depending on the extent of the inquiry and the estimate, because they ask for an estimate of the cost. But they may well refuse legal aid for a second or a third or a fourth expert.

Mark Summers: Often rightly so. I do not think there is a real issue here. There is obviously a problem with getting legal aid in the first place, which the courts have addressed² but once you have it, and you identify a tenable and arguable human rights argument, in my experience I have never had any difficulty either identifying appropriate experts or obtaining authority to instruct them. It may be that the telephone calls that Rod receives that come to nothing may be because the court has shut out inquiry on proper, reasonable, robust case management grounds.

Q123 The Chairman: I think you have answered my question. Clearly there are two separate issues: one is whether legal aid is available and, secondly, if it is available does it meet the case?

Dr Trapp: In speaking to the first part of the question, whether the bar is too high, I cannot think of any examples where it has been too high. The worry is that it could be too high, particularly because of the very unique factual matrix within which that test seems to have been developed. The European Court's case law was in regard to returns to Greece, and it was the change between the approach it took to the UK's return to Greece, which it found to be compliant with Article 3³, and Belgium's return to Greece⁴, which it found to be non-

² See *Stopyra v District Court of Lublin, Poland* [2012] EWHC 1787 (Admin)

³ *K.R.S. v. the United Kingdom*, [32733/08](#), 2 December 2008

compliant with Article 3. In those circumstances, where the European Court was reversing itself effectively because of information that had become available in the interim, it suggested that it needed a very high level of evidence, which Justice Mitting then characterises as an international consensus because of the types of evidence that the European Court is relying on.

But I think we need to restrict that decision to the very particular facts that the court was addressing. Where you do not have either the European Court reversing themselves on a position they have taken in regard to a specific state, I would worry that the international consensus bar could be too high, particularly where there is compelling evidence from NGOs on the ground in the receiving state where that has not yet fed into the reporting cycles of international monitoring bodies, and so on. I cannot think of an example where it is too high, but it strikes me that it could very easily be too high and was only framed in reference to a very particular factual circumstance, which is not likely to apply often.

Lord Brown of Eaton-under-Heywood: May I just ask a brief supplementary? Mr Summers, you spoke about this principle being confined to Part 1 cases because they have to resort to Strasbourg. Is that right?

Mark Summers: That is one of the reasons why this higher test applies, yes.

Lord Brown of Eaton-under-Heywood: But a number of Part 2 countries also have to resort to Strasbourg?

Mark Summers: Indeed.

Lord Brown of Eaton-under-Heywood: So it is a slight spectrum.

Mark Summers: The international consensus test applies within the EU for a number of reasons; one is that Strasbourg is ultimately a safety valve for human rights protection. But it

⁴*M.S.S. v. Belgium and Greece*, [30696/09](#), 21 January 2011

is also because of the presumption of convention compliance and the need for clear and cogent evidence to displace that presumption. It is a shorthand test that wraps up all of those things. In Part 2 cases—which include some Council of Europe countries and some non-Council of Europe countries—the standard of proof required to establish an Article 3 breach is generally regarded as lower. There is debate as to how low it is but it is generally—

Lord Brown of Eaton-under-Heywood: It is a spectrum and that makes sense.

Mark Summers: Indeed.

Sheriff Maciver: Perhaps I can just add, in case there is any misapprehension about the position in Scotland vis-à-vis legal aid, which I know you are interested in. In Scotland there is an independent body, the Scottish Legal Aid Board, and they make the decisions in the grant for refusal of legal aid. The court has no input whatever into whether legal aid is to be made available for any particular line of inquiry. It is entirely a decision of the Scottish Legal Aid Board. I am not sure if that is precisely the position here.

Mark Summers: It is.

Q124 Lord Rowlands: Rather than repeat the question, I trust you all were here when we rehearsed the evidence. Have you anything to add or change in the kind of line that was taken by our previous witnesses on the issue of assurances?⁵

Sheriff Maciver: I would disagree slightly. I think there was an inference that that panel thought that assurances did not play a part in a large percentage of cases. I do not take that view. Perhaps it is a Scottish thing, I do not know, but we look for assurances quite often. Perhaps because we have a smaller number of cases we feel able, as judges, to go back and ask for assurances.

The Chairman: You put it positively—requesting countries, if they want assurances.

⁵ See Q114-115, evidence session 7, 22 October 2014

Sheriff Maciver: The Scottish ask for assurances, yes, and use them and rely on them quite a lot. I know that the High Court also does. I have a selection of cases here that I was reading this morning—and Lord Mackay was in at least two of them—where assurances were used as important levers in the decision-making process.

For example, if a prisoner has a Section 25 point, a suicide risk point, or a risk of assault from other prisoners because he is a police informant and because the other members of his gang, against whom he is giving evidence, are in prison, we will ask for assurances that he will be protected specifically. They play a very important part in the decision-making process that I have to make then in deciding whether he will be returned. We have absolutely no difficulty in getting such assurances. We have had assurances from several European countries in respect of how they will deal with a specific prisoner on his return, and I have accepted them without question because they come at an appropriate level.

In the eastern European system they usually come under the signature of a judge, usually the judge who signed the European Arrest Warrant in the first place, and they are very important to me in the decision-making process.

Professor Morgan: I think in the previous session Paul Garlick indicated that he thought that a smaller proportion of cases involve assurances. I think that is possibly true but it is certainly not true in relation to certain jurisdictions. For example, almost every case currently being heard anywhere in the United Kingdom, in relation to Lithuania, is subject to a general assurance that a particular establishment will be used. Most of the African cases that I hear of involve assurances now. I have recently been to South Africa, where quite specific assurances were given.

I think the degree to which assurances will be asked for or given is increasing. For example, I recently gave evidence in the High Court in Copenhagen. The Danish courts had been

routinely extraditing people to Lithuania but had learnt on the grapevine that we were not or that we were getting specific assurances. A process has now started there of seeking assurances on the same lines as have been given in the British courts.

I have just come back from Peru and I learnt from a conversation with a senior prosecutor that a German prosecutor had recently been to Peru and had said to the prosecution service there, "If you were to give a specific assurance that a particular establishment were used then we feel pretty certain that our courts would extradite the person". So there is some international learning and encouragement going on here. I anticipate that specific assurances will be used more and more as a tactic, particularly where extraditions have been refused on the basis of what I will call general consensus evidence, whether it is inhuman and degrading treatment found by the Committee for the Prevention of Torture or the European Court.

Q125 Baroness Jay of Paddington: It is interesting that you have both mentioned the breadth of this application because it was not just Mr Garlick—his colleagues accepted that. They said that it was a minority of cases. So it is very interesting that we have different evidence here.

Mark Summers: I think you do have different evidence. We are now a long way from the discussion that was going on 20 or 30 years ago about whether we should be looking at assurances at all. That is very interesting and it is one that we could talk about for a long time. But we are now in the position where assurances are internationally recognised as a legitimate means of curing human rights violations. They are also built into the Act. Aside from human rights assurances that deal with specific problems, under the Act, if a country wishes to retry somebody after a conviction in absence, it has to give an assurance to that effect under Section 20. There have to be speciality and other assurances that the Act talks

about, such as death penalty assurances and temporary surrender assurances. It is part of everyday practice and it occurs frequently.

Baroness Jay of Paddington: The Sheriff raised an issue that I had wanted to take up but we rather ran out of time. We have talked a great deal about what I would call material assurances about prison conditions, and some of the other matters you have mentioned, but you also raised the question of mental health and potential suicide. I think you mentioned, Professor Morgan, that you have just been in South Africa. There has been a lot of concern about monitoring in relation to the Dewani case, that you get an assurance that this person will be properly treated in the way that he needs to be from the point of view of his mental health; but then an assurance that that will be judged to be appropriately satisfactory for him to be on trial.

My question is about these more complicated monitoring and assessment levels that go on, whatever the assurance you are given at the time of the proceedings.

Sheriff Maciver: Can I just say it is not just assurances in relation to things such as prison conditions. In answer to the question that you had for the previous panel, yes, guarantees and letters of comfort. We call them all sorts of things but they are all assurances. In one case, we had an assurance from Slovakia in the case of a woman who had 12 children in Scotland. There was a guarantee that the trial would take place within two months of her extradition, that an application could be made for bail and that, if bail was refused, she would be allowed contact by telephone and writing. So they are not just about conditions. We have sought assurances in a number of specific areas to deal with a point that is raised at the extradition hearing. That is not to make it go away but to deal with the point, so that it can be decided by the court whether that assurance meets the human rights argument that is being made.

As to monitoring, that of course is very difficult. I think I agree with what the last panel said about that. I think that there will be continuing concerns about whether or not assurances can be relied upon. As I say, we just have to deal with that as we get it, whether or not it can be relied upon. We have not had an occasion yet where an assurance has come back on us. We have not had an occasion where an assurance given in a previous case is cited in a subsequent case as not having been met. That will be a difficulty.

Lord Empey: Was there a Spanish case where you brought that up?

Sheriff Maciver: I talked about a Spanish case and I spoke to my brother sheriff who dealt with it. Spain is a continuing concern for us because of the length of time it takes to deal with its cases. It is purely an issue of length. In that case, I looked at the assurance carefully and I do not think the assurance was broken. I think what has happened was that we did not have the full perception of quite how long it would take for this case to be dealt with in Spain. Again, it was a case involving a child. We had delayed extradition until the child was about three months old for the benefit of the child. Extradition then took place and we had some information from Spain about how they would deal with the issue of bail and what would happen to him. But it was a very serious charge. It was the murder of another child and, in fact, we were disappointed—I think that is the strongest I could put it—by the length of the time it took for the case to reach trial. But we knew about it because in our civil court we had the child welfare issues for the child who was remaining under our care with her grandparent in Scotland, so we knew exactly how long the Spanish case was taking.

All that we have done is to factor into our subsequent decisions on Spain the fact that they take up to four years, pre-trial, to deal with cases. We have not refused to send anybody back but we take account of the fact that we were disappointed in that case.

Lord Rowlands: How do you take account if you do send them back?

Sheriff Maciver: We will ask for some indication of what is going to happen when a person is returned, which we always get. We do not have any experience of a Part 1 country refusing to give us an answer to the question that we ask.

Baroness Jay of Paddington: Part 1 countries, not Part 2. One of the most interesting—

The Chairman: Do you try Part 2 countries?

Baroness Jay of Paddington: Yes, I was going to ask that.

Sheriff Maciver: Yes, we have cases in America where assurances have been given about treatment. We have Albanian cases that have gone before the Appeal Court, and a Taiwanese case that is currently before the Appeal Court in which the assurance given by Taiwan, in relation to treatment of a prisoner, is disputed on the basis that it is said they have broken previous international assurances. So it is coming back.

Lord Hussain: How are these breaches reported?

Sheriff Maciver: In the case in which the breach has been reported, it came back to me from the extraditee's counsel as a statement from the Foreign and Commonwealth Office that the Foreign and Commonwealth Office was disappointed at the breach of an international agreement, which Taiwan had reached in relation to the use of the death penalty. The death penalty did not play any part in the case in which the extradition was being heard, but it was an example of an international agreement that Taiwan was said to have breached and, therefore, it was said Taiwan could not be trusted to stick by its guarantee in the instant case, which was about how a prisoner would be treated upon return.

So I had to look at whether or not they had in fact broken the guarantee over the death penalty and took the view that they had not. Then I had to decide whether or not that was, in any event, relevant to the issue in hand about the treatment of the prisoner who was to be returned. There were two questions that had to be dealt with.

The Chairman: Professor Morgan, I think you want to come in.

Professor Morgan: My South African example was not Dewani.

Baroness Jay of Paddington: No, I did not mean that. I just meant it was based in South Africa.

Professor Morgan: There is an interesting issue that may or may not be within your scope. My South African example involves three white men in separate cases that have been joined together. The specific undertaking there was not just that they be held in a particular establishment but that they would enjoy particular conditions within that establishment: that they would be kept in separate cells which they would not have to share with any other prisoners. This is a very overcrowded prison where most prisoners are black and where most black prisoners are being packed into grotesquely overcrowded dormitories. So here we have specific undertakings that these three white extradited persons will be kept in separate cells. At some point, I assume that the issue of fairness and whether or not that is constitutional might be raised in South Africa, but not being a lawyer it may be impertinent for me to raise that issue.

The second point is your question 6, which asks: if assurances are given, may the same assurances in the future not be acceptable fairly routinely? My answer to that is no. If the assurances are that people will be kept in a particular establishment and that they will enjoy particular conditions then, by definition, if those assurances are acceded to, in many cases the conditions within that establishment will change. So if everyone in Lithuania—as is currently the case—is being told that they will go to an establishment that is not currently overcrowded and that the CPT has not found to be inhuman and degrading, it will soon become very similar to the establishment that has been condemned. So these conditions and assurances have constantly to be updated and monitored.

Q126 The Chairman: On this subject, what can or should we do if, for example, we know that a prisoner—possibly a British citizen but not necessarily—has been extradited to somewhere and it subsequently turns out that the conditions in that place are such that it falls foul, shall we say, of Article 3? They may have gone in good faith. What responsibilities do we have and, if we have responsibilities, what mechanisms do we have to do anything about it?

Dr Trapp: There are a couple of parts to the answer to that question. One of them depends on the citizenship of the person. So if we are dealing with a British citizen, any injury to a British citizen, as a matter of international law, is an injury to the UK and the UK is entitled to exercise diplomatic protection on behalf of that citizen. So they can invoke the responsibility of the wrongdoing state—which is to say the receiving state that is acting inconsistently with its obligations not to subject an individual to torture, for instance—and there are some options, as a matter of international law, for the UK. It can adopt countermeasures, and so on.

If the individual whom we have extradited is a non-British citizen, the options are significantly more limited. We cannot diplomatically protect non-citizens, even those to whom we have granted refugee status. As a matter of international law, we have no entitlement to do so, and so we are not invoking the responsibility of a wrongdoing state as an injured state; we are invoking the responsibility of a wrongdoing state as a broader member of the international community, which is a significantly less powerful invocation of state responsibility. The extent to which we can engage in countermeasures, for instance, is incredibly controversial as a matter of international law. So whether or not we can adopt conduct, vis-à-vis the wrongdoing state, that is itself in breach of our own international obligations to that state in order to pressure it to comply with its international obligations. It

is very controversial in respect of non-citizens, when we are doing so in the community interest.

Our options are rather limited and assurances do not increase our options because, of course, assurances are non-binding and they do not add anything to the multilateral treaty framework that already exists for the protection of international human rights.

The Chairman: But then is it foolish of us to rely on assurances if they are non-binding?

Dr Trapp: Yes.

The Chairman: That is the question I am throwing out.

Sheriff Maciver: I think we are mainly talking about Part 2 countries here.

The Chairman: Mainly, yes.

Sheriff Maciver: Perhaps I can address them very briefly and say something that, as a judge, I should not say at all because it might be a political point. But I think we have to be more careful about the countries with whom we enter into extradition agreements and be prepared to take countries off the Part 2 list.

The Chairman: Would you advocate a regular kind of survey or should it just be ad hoc?

Sheriff Maciver: I certainly would. If you look at the Part 2 list—I shall not name the countries—there are countries on the list that any of us would be very reluctant to send our worst enemy back to. I think that it is because at the time that the extradition agreement was entered into that country may have been in a very different situation. But something has happened there over the last decade that has made it a place that is very difficult to envisage sending people to—

Lord Rowlands: Is there a mechanism to do it, to actually remove—

Sheriff Maciver: There must be because, since the Extradition Act came in, we have added countries to Parts 1 and 2. I do not see why we cannot take them off.

Baroness Jay of Paddington: One of our witnesses at the previous session said the problem was that international law depended on international good will, and where there is not that, presumably we can act.

Q127 Lord Brown of Eaton-under-Heywood: Does your answer take into account this: that if you take somebody off Part 2—say it was Turkey—the result is that every sensible murderer in Turkey comes over here and gets sanctuary because there is no way we can return them. Does one's response not have to be a bit more sophisticated than that?

Sheriff Maciver: I understand that, and that is why I do not say that this is a blanket provision in any sense. But if you reach a situation where there is a country with whom there is a specific problem and breach of undertakings, and through political and diplomatic channels it becomes clear that there is an issue about extradition to that country then that country has to be looked at.

Lord Brown of Eaton-under-Heywood: I entirely accept that, but surely the foreign country that wants to get people back to try them has an interest in honouring these assurances. Therefore, so long as you can and do monitor, and try to do your best to ensure them, generally speaking, there will be a satisfactory scheme for assurances. What about the suggestion, which I think was made by Paul Garlick in the earlier session, of four individual assurances? You can get within them assurances that they will allow monitoring. So this is not the consular service; this is allowing our diplomats abroad, on an ad hoc individual case basis, to make sure that cases are being heard if they have been assured that they are going to be heard in time, that people are being incarcerated in the appropriate way and so on.

Sheriff Maciver: Yes. I think that is why the Abu Qatada case is so important. There are 11 strict categories and that is a very useful step.

Lord Brown of Eaton-under-Heywood: Absolutely, and those assurances were ultimately met of course.

Baroness Wilcox: Chairman, will we be seeing witnesses who will be doing this monitoring?

Professor Morgan: It seems to me that there are two broad possibilities for monitoring assurances, which, I think most of us agree, are becoming more common. The first is that most of the Council of Europe member states have ratified the OPCAT, the United Nation's mechanism. One of your obligations once you have ratified the OPCAT is that you must establish a national preventive mechanism with the capacity to monitor conditions.

It is not an easy solution because, frankly, if you talk to people in the United Nations I think they will observe that some of the mechanisms that have been cited as fulfilling this obligation are probably not up to the task or do not have the funds to do it. It is usually an ombudsperson who may not have the resources, frankly, to attend to police station conditions, prisons, secure mental hospitals and so on. But that is a mechanism that we should rely on probably to an increasing extent in the future.

The other example that was cited in the first session is whether the Foreign and Commonwealth Office personnel could have a role here. It is worth noting that we have in this country an organisation called Prisoners Abroad. Prisoners Abroad provide grants for all British nationals held in certain jurisdictions where, frankly, nothing is provided for prisoners. So I will come back to Peru. In Peru, the food is pretty dreadful; nothing is provided by way of toiletries; clothing is not provided; even decent drinking water is not provided. So Prisoners Abroad provides, through the British Embassy in Lima, so much money per quarter for every British national in Peru. Someone from the embassy literally goes to the prison and distributes these moneys. There is a mechanism in some countries already—through charitable giving and co-operation with the Foreign and Commonwealth

Office—to monitor what is happening and, to some extent, to look after the welfare of prisoners in certain jurisdictions. Where that already exists, it might not be too great a burden to add to it monitoring the assurances that might have been given when the person—

Lord Brown of Eaton-under-Heywood: That only avails British citizens.

Professor Morgan: Yes, that is true.

Lord Brown of Eaton-under-Heywood: We have been given statistics and, certainly in Part 1 cases, less than 5% of those who are extradited are in fact British citizens. The great bulk—and presumably this is even more obvious in Part 2 cases—are not British citizens.

Professor Morgan: Yes.

Lord Brown of Eaton-under-Heywood: Do you know what the proportion is of British citizens under Part 2 who are extradited?

Professor Morgan: I do not know. I imagine it is low.

Lord Brown of Eaton-under-Heywood: Lower even than EAWs?

Professor Morgan: It is difficult to assess.

Sheriff Maciver: I would think it might be higher than EAWs.

Lord Brown of Eaton-under-Heywood: But we are talking about roughly 5%.

Professor Morgan: Yes.

Q128 The Chairman: What is the British Government's attitude to being subject to these kind of monitoring arrangements? After all, extradition is a two-way street. Does anyone know?

Professor Morgan: We have to recognise that in this country we have a prisons inspectorate, which is generally recognised as being robust and independent. Very few jurisdictions have robust, independent prison inspectorates. It is usually—as I have already indicated—a

function of the ombudsperson, who has a global responsibility in relation to a whole range of institutions. Their capacity normally to monitor what is happening is very small.

The Chairman: In short, you are telling us that what we do in this country firmly meets the general principles you have described, regardless of the legal framework within which they are set.

Professor Morgan: I would say yes.

The Chairman: We are doing pretty well and we accept this is a proper thing to be done in our regime.

Professor Morgan: Yes. My big problem, when I am commissioned to go abroad, is getting access to the prison that the lawyers wish to have inspected. In many jurisdictions there is just no tradition of allowing someone from outside to come in, to walk around the establishment, to talk out of sight and out of hearing to prisoners to find out what is going on. There is no precedent for that sort of inspection so monitoring assurances is extremely difficult.

Lord Brown of Eaton-under-Heywood: As a matter of interest, do you know any case where we—the UK—have had to give assurances to secure extradition to this country?

Sheriff MacIver: I know that in Scotland we have been asked about the jury system, which is obviously strange to some countries. They have asked us how that operates. I know that we have been asked about a common law as opposed to having a criminal code—

Lord Brown of Eaton-under-Heywood: I have no doubt that you have been asked about it but have you ever had to give an assurance?

Sheriff MacIver: I sign outgoing warrants under Part 3 of the Act but generally the assurance will be signed by the Lord Advocate, the head of the prosecution service. I have never been asked to sign an assurance but I know that he has.

Lord Brown of Eaton-under-Heywood: What about?

Sheriff MacIver: Usually about procedural matters: how long it will be for the trial to take place and what the form of the trial is. I know that in relation to murder and life imprisonment we have been asked questions about how the Parole Board system works and technical things. I do not think we have ever had to give assurances—as far as I know—about the conditions in which someone will be kept.

Mark Summers: Although it is fair to say that the latest CPT report on British prisons does not make pleasant reading, and if the message gets out that the UK is refusing to extradite based on prison conditions it may be a problem that comes back to haunt us.

I know this discussion has been fairly wide-ranging but I think there are four separate issues here: the first is whether in the pre-surrender stage—while the requested person is engaged in extradition proceedings in the UK—there exists a sufficiently robust procedure for assessing assurances. On that, I think probably the evidence you have heard indicates that there is and that the Othman criteria are sufficiently robust. There are numerous examples at Strasbourg level of the European court refusing to sanction extradition based on concerns about assurances. The UK court has refused to sanction extradition based on human rights concerns, for example in relation to Russian prison conditions, and in the face of inadequate assurances. Personally, I think my view on the first issue would be that there is a sufficiently robust system. The Othman criteria are there and the discussions you have heard indicate that they are taken seriously.

Secondly, whether there is sufficient monitoring post-surrender? In relation to that, acknowledging all of the concerns that the Committee has heard, I would like to add two things: first that these assurances are in reality self-monitoring. The requesting state understands that breaches will have serious consequences; that if it breaches it will have

difficulty the next time it has a rapist it wants to have serve a 25-year sentence. So there is a real incentive for requesting states to abide by their assurances. Secondly, each of these requested persons were legally represented in this jurisdiction. Responsible defence lawyers keep in contact with their clients. I know exactly what happens to my clients post-surrender and I know when there are issues. So far as extradited defendants are concerned, there is that mechanism on a practical level for reporting problems. It is ultimately only the surrendered person who knows whether his or her assurance has been breached, whether he is in the wrong prison, and it is the focus on that mechanism for reporting back to somebody who can do something about it that needs to exist. Of course this feeds back into the Othman criteria. Monitoring is one of the Othman criteria; it is incumbent on the court to be sure before it surrenders that there will be an adequate monitoring system in place, whether it is OPCAT or whether it is an individual system that is reflected in the individual assurance.

The third issue—I am not stopping for breath; forgive me—is what to do if there is a breach? If it has all gone wrong and there is a problem. Extradition cannot be unwound. There is no provision in domestic or international law for getting somebody back in that circumstance, but what does exist is the ability for UK lawyers to go before a UK court and obtain a declaration that the assurance has been breached. That can then feed into diplomatic efforts to put the situation right, or legal remedies in the foreign state concerned.

The Chairman: Is that frequent?

Mark Summers: I have certainly been involved in one case that was mentioned by Mr Garlick. I was for the Trinidad Government in Goodyer and Gomes where we were in court on an application for a declaration. In that case, the breach was innocent and all was, in the result, put right. But Lithuania has had problems with monitoring or enforcing assurances in

the right way. To my knowledge, there has not been a case that has come to that yet because, on proper analysis, breaches are often found to be innocent or administrative and capable of being put right, but in theory that exists.

The fourth issue is if that all goes wrong and you are faced with a country that has given assurances, has breached them, and is at risk of doing so again, what to do about those territories? The first answer is that you would not extradite because, on the Othman criteria, the next person who came along would have a decent argument based on the prior breaches of assurance. The second is that there is the mechanism for de-designation in extreme cases. But it is a power that needs to be exercised responsibly and, if exercised, could have really serious consequences; Lord Brown identified them. If Turkey was suddenly a country to which extradition were no longer possible, or at least not readily possible—there always exists the possibility of ad hoc extradition arrangements—you enter into discussions or problems with safe havens. We do not extradite to Japan at the moment; it is not a problem we are unfamiliar with.

Q129 The Chairman: As a matter of interest, is there any kind of correlation between systemic breaches of human rights and breaching assurances?

Mark Summers: Absolutely there is. The Strasbourg case law on this is absolutely clear. The fact that you have an assurance does not absolve the court of the necessity to examine the reality on the ground, and cannot trump evidence of systemic general problems. The case law on that is absolutely clear so, yes, there is a real—

The Chairman: The evidence is quite clear, too, that those who have run the worst systems in general tend to be those who breached the assurances most frequently.

Mark Summers: I imagine that that would necessarily follow.

Dr Trapp: I think part of the difficulty—and this is less so in the extradition context and more so in the deportation context where we have national security concerns to which we are trying to respond—is that states where torture is practised, systemically and routinely, are precisely the states that are not willing to accept monitoring mechanisms.

We do have cases before SIAC where assurances were accepted despite the receiving State's refusal to accept a monitoring mechanism. We then have a paradox because the basis of accepting the assurance is that this country is going to be susceptible to UK pressure, diplomatic pressure, which will force it to comply with its assurances but, of course, it is precisely the fact that it is not interested in foreign intervention—for instance, Algeria's post-colonial sensitivity to intervention—which results in its not accepting monitoring. For the cases where we are accepting assurances without any monitoring mechanism, in states where torture is practised routinely, that is a serious problem. What might these monitoring mechanisms do? At the very least they can feed back into the system, as my colleague, Mr Summers, has suggested. The difficulty there, of course, is that there is no facility for making their reports public. So part of what would be a relevant consideration in evaluating the extent to which monitoring mechanisms are going to be effective is obviously the extent to which the monitoring body is independent, and that is something that the UK courts consider quite well. The other is the extent to which the reports are going to be transparent because of course, both the sending state and the receiving state have—and without intending to suggest that there is bad faith here—an interest in not having breaches of assurances made public, particularly where we are relying on assurances so that we can deport individuals for national security reasons. That transparency is, in fact, crucial if the monitoring mechanism is going to add anything to assurances. When I said, "Should we rely on assurances? No", what I meant is should not rely on assurances alone without

independent monitoring because I do not think they add anything to the system. In fact, they only give us an opportunity to exercise diplomatic pressure on a foreign state, which we already have the opportunity to exercise.

The Chairman: Any thoughts on that?

Mark Summers: On that, no. May I just add one more thing though? I understand we are stretched for time. Question 7 occurred to me to be one that might not be entirely well placed. It is not the function of extradition law to bring about regime change. The function of extradition law is to ensure that a specific defendant is returned in accordance with the interests of justice and is accorded his own particular human rights, which is why we have assurances; the individual's case-specific assurances. An approach to extradition law that set about trying to force general human rights reform in other countries would be one that was fraught with real danger. I say this only because I would not want my silence to have been taken as an acceptance of the premise of question 7.

Dr Trapp: May I just say something in respect of that? With all due respect, taking the international law perspective, it strikes me that one thing that might be relevant is states' obligations to co-operate to bring to an end serious breaches of peremptory norms; for instance, the prohibition against torture. States have actively to co-operate to bring to an end these types of breaches. It occurs to me that seeking assurances in respect of individuals from states where torture is otherwise systemic is contrary to at least the spirit of that obligation, which is to co-operate to bring to an end the general practice of torture. While I appreciate that there are concerns about having extradition law shoulder this burden, at the same time we do need to think about the way in which we develop domestic law in a way that is compliant with our international legal obligations. I do think it is a question we should

be asking. Whether extradition law can answer the question alone is an entirely different matter.

Mark Summers: I agree entirely. It is a real question to be answered; I am just not sure that extradition law is the appropriate mechanism to answer it.

The Chairman: I understand the point that you are making. You are obviously not condoning any of the malpractices; it just is about mechanisms and systems to bring about the kind of things I think we all probably—

Mark Summers: Personally, I should like the system to be otherwise but it is not the proper focus of extradition.

The Chairman: No, I understand that. Does Professor Morgan have any thoughts on that?

Professor Morgan: No, except what I said earlier about specific assurances: that X will be treated well; X will be kept in a place that is superior to that where many of our other prisoners are kept. There are many difficulties about monitoring but, on the other hand, it represents—or potentially represents—to some extent progress in raising standards generally. It acknowledges, for example, that if a country says, “We are going to use a particular establishment and not most of our establishments”, that is a tacit admission that the standards in most of their establishments are not acceptable. That increases the pressure to make sure that there is equity in the provision for all persons detained in the establishment. That possibly sounds naive but I think it has the potential to improve matters more generally.

Q130 The Chairman: We are getting to the end of our allocated time and I would like to turn briefly to Sheriff Maciver—I apologise for not pronouncing your name properly earlier on in the proceedings—to say that one of the differences between extradition law in England and extradition law in Scotland is that the forum bar does not apply in Scotland. You

told us you did not think this made a substantive difference. I would just be interested whether you have any thoughts that would elaborate on that.

Sheriff Maciver: We have been advised that it is unlikely to take effect in the near future. It is not likely to be something that happens in Scotland. No, I do not think so. I think that there are certain types of cases in which there will always be a claim that the prosecution should be undertaken in this country, in any event. We have had some of those, particularly with Italy with Mafia-type cases where the operation has been run from the UK or from Scotland but the prosecution is taking place in Italy, usually because it is phone tapping evidence that they have. The argument is always that that kind of case, where there is a cross-jurisdictional issue, could be prosecuted in Scotland. It has to be said there is a reluctance to prosecute unless there is both an accused and a victim who are Scottish citizens, or there is a substantial Scottish interest within the facts of the case. So there have been very few cases where we have entered into any form of discussion about taking over the prosecution from the requesting state. It has not really been an issue; it has not been a great problem in any case thus raised. It may be out of turn—because I know you are short of time—but there is one point I do have to make. You will probably be speaking to the Westminster judges at some stage and I had their submissions after I had sent in my own. There is a divergence in practice and procedure that has not happened hitherto. We have kept very closely in contact with what each other are doing and followed each other's cases. But in paragraph 3 of their second submission, they list about 10 countries, six of which are EU countries, in which they say they do not now order extradition. They say this means, "In effect that we have extradition arrangements with many countries to whom in practice we will not order extradition". That is not the position for Scotland. There are no countries to which we will not order extradition because we look at every situation on a case-specific

basis. If a Lithuanian case comes before me, and there is no issue raised on prisoner conditions, I do not *ex proprio motu* raise it. If it is raised, we will deal with it in the same way as any other case and examine it and look at the prison and the conditions. I know that the main case that brought all this about is an Italy case. But again, even if it were Italy, we would look at the prison and the situation and we would not automatically decline to order extradition. I regret to say, although we have regular contact with them, we do depart from our Westminster colleagues in paragraph 3 of their submissions 2.

Q131 The Chairman: Thank you very much for pointing that out. That is interesting and helpful to know.

I think time has probably come when we must draw the hearing to an end. We have had a wide-ranging discussion which is, I think, good because we are interested in extradition, the law and the practice, and its implications. If any of you have anything you would like to say covering that broad area, and we have not covered it, I would be delighted if you were to do so now.

Professor Morgan: I would just like to add: I noticed in some of the written evidence that you have received that particular countries are marked out—this is the proportionality issue—as saying that prosecutors have no discretion. They must seek a European arrest warrant for anyone who has been sentenced, even where it is quite minor, and I think Poland is cited. That applies to several countries. I have the understanding from prosecutors in Lithuania that they routinely apply for the extradition of anyone who is in breach of a sentence or has fled the country, having been charged with even quite minor offences.

Lord Brown: So 90% of your cases are Polish. Have you had any discussions with Polish authorities about how to try to change this?

Sheriff Maciver: Yes we have. We met with Polish judges on an informal but professional basis about three or four years ago. They were anxious as well to deal with the triviality issue but they cannot. It would have required a change of domestic law and there was no will to change it, so they feel very much the same way as we do about sending the trivial cases to us. But of course the Extradition Act, following the terms of the framework decision, allows for it in any case where the sentence is more than four months and so they operate that.

The Chairman: It could be a case for saying that perhaps the successor of the framework decision—the directive or whatever it is going to be—ought to be reworded at European level and then you could cut it out right across the piece, could you not?

Sheriff Maciver: I think that is right, yes. We could certainly encourage that.

Lord Rowlands: There was an amendment, was there not, to 21(a) and there is—

The Chairman: There is 21(b).

Lord Rowlands: You could look for alternative methods. Could that not be explored in the Polish context?

Sheriff Maciver: It could. The proportionality bar newly imposed only takes effect for a request to return for trial and not for sentence. So in these cases the test is slightly higher in any event. But, yes, it could be explored but we have a more generous interpretation of the words, “Unjust and oppressive” in section 14 than they do in Westminster. We have occasionally refused to extradite someone to Poland, for example, if the case is very old and he has started and is pursuing a new life here and if he argues undue delay in the execution of the warrant. We have taken a favourable attitude towards these cases where they are both old and trivial, but we are using section 14 and the interpretation of “harsh” and “oppressive”.

Lord Brown of Eaton-Under-Heywood: Why do you not use Article 8?

Sheriff Maciver: For Part 1? We have never used Article 8 for Part 1, for that. There is a view that we should not even be using section 14 because the Act sets its own bar at four months. That is the bar that the Act sets, not that a sentence imposed has more than four months remaining on it. In fact on one view—and we have had to deal with this as well—if you read the Act literally, if the original sentence was four months, even if he served three months of it, they can ask for him to go back for the remaining month. We have refused to do that; we have interpreted it as being four months remaining, minimum. That is the way that the framework decision was originally set out.

Lord Rowlands: Of all these Polish cases, how many are refused?

Sheriff Maciver: Very few, because we can only properly refuse them, in terms of the legislation, if the warrant had been existing for a long time in Poland and we can be clear that there has been an undue delay in the enforcement of it. We operated a seven or eight-year—

Lord Rowlands: Seven or eight years?

Sheriff Maciver: Some of them are older than that. They sit for a long time on warrants before they come here very often. Schengen might make a difference to this, I may say. But until that comes in there are still some old cases that come to us, and if the chap has been here for half a dozen years, has started a new life, has been in no trouble in this country and it is a fairly minor matter and a short sentence, on the basis of section 14 we have declined to return. It has not been appealed by Poland thus far.

The Chairman: Anyone else?

Mark Summers: At risk of trespassing on the Committee's time, we have not dealt with Articles 5 and 6. You heard evidence about that this morning. I am not entirely sure I agree with the tenor of that evidence.

The Chairman: Thank you for telling us that.

Mark Summers: The evidence, as I understood it, was that they were provisions of very little utility because they attract the flagrancy threshold that the Strasbourg Court has held to apply to Articles 5, 6, 7. I am not entirely sure I agree with that. I can think off-hand of three Article 5 cases where flagrant breaches have been upheld: the practice of civil commitment of sex offenders in America⁶; Dewani⁷ is an Article 5 case, on preventative detention of mentally ill persons; Shankaran⁸ is an Indian case where the length of prospective pre-trial detention was such that it engaged Article 5. Each of them was capable of being remedied by assurances; some were, some were not, but it is something that at least does play into my everyday practice.

I think Article 6 is slightly behind in that respect. I can think of a number of examples where the courts have found no flagrant denial, where personally I think it should have done, where the Strasbourg Court has spoken strongly on the topic and the court has acknowledged an Article 6 breach but not found that it is flagrant. I think that is still a workable and evolving area of extradition law that should not be consigned entirely to add-ons to other arguments. It does have utility in specific cases and extreme cases, but specific ones.

The Chairman: As you say, time has moved on. Thank you very much, each of you. We are very grateful to you. It has been of considerable help to us I am sure.

⁶ *Sullivan v The Government of the United States of America & Anor* [2012] EWHC 1680 (Admin)

⁷ *Government of the Republic of South Africa v Dewani* [2014] EWHC 153 (Admin)

⁸ *Shankaran v The Government of the State of India & Anor* [2014] EWHC 957 (Admin)