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Inquiry on

EXTRADITION LAW

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Questions 1 – 23

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10.40 am

Witnesses: Rt Hon Sir Scott Baker and Anand Doobay

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
Baroness Hamwee
Lord Hart of Chilton
Lord Henley
Lord Hussain
Baroness Jay of Paddington
Lord Jones
Lord Mackay of Drumadoon
Lord Rowlands
Baroness Wilcox

Examination of Witnesses

Sir Scott Baker, lead author of *A Review of the United Kingdom's Extradition Arrangements*, and **Anand Doobay**, Consultant, Business Crime, Peters & Peters, panellist on *A Review of the United Kingdom's Extradition Arrangements*

Q1 The Chairman: Can I extend a warm welcome to the two of you, Sir Scott Baker and Anand Doobay? We are extremely grateful to you for coming to talk to us this morning. We have been fully briefed on your distinguished backgrounds and credentials to help us, not least because you are two of the three joint authors of *A Review of the United Kingdom's Extradition Arrangements*. Quite a lot of the questioning we shall be giving you will be based on that particular document, which, certainly speaking as an individual, I found very helpful in trying to work out the intricacies of the topic we are looking into.

Before proceeding, it is necessary under the rules of the House of Lords that, before our first oral session, anybody who has any relevant interests should declare them in public. I am told that nobody has declared any relevant interests as far as the rules are concerned, so there is nothing more for anyone to say.

Lord Brown of Eaton-under-Heywood: I have already declared, perhaps not as a relevant interest, that I happen to have known one of the witnesses.

Lord Mackay of Drumadoon: I should also declare I have a recollection of playing one of the witnesses at golf many years ago.

The Chairman: What I would like to do is say to you both that, as far as answering the questioning is concerned, please one or both of you respond as you see fit. Before we get into the formal session of questions and answers, if there is anything either or both of you want to say as an opening statement, we would be very pleased to hear from you.

Sir Scott Baker: The only thing that I would say is that we reported nearly three years ago and I have not kept greatly in touch with what has been going on for the last three years—although obviously I read the newspapers and have a reasonable idea. Anand Doobay, however, is at the coalface and he knows virtually everything about what has been going on. Therefore, if issues arise on that front, I would suggest that he is better qualified to answer than I am.

Q2 The Chairman: That is a very modest way of opening the batting. Unless you want to say anything else, can I move into the first part of the session? Obviously, as you have just said, your review was produced three years ago. On the basis of what you know about the way the world has moved on, would you continue to argue the same general line as in your review? Against that background, are there any particular recommendations you would like the Government to have taken up or taken up more strongly than they did?

Sir Scott Baker: Absolutely, I certainly would stand by everything we said in the report. I cannot see that anything has changed in the last three years that would make me recommend anything differently. As far as the recommendations that the Government might have taken forward go, there are two in particular that I am disappointed have not

gone further. The first is the review of category 2 destinations. The Government are committed to conducting a review but, three years later, as far as I am aware, they have not actually done so. We set out our reasoning at paragraph 8.93 to 8.96¹ in our report and nothing has changed since then.

The second area that I am disappointed about is that non-means-tested legal aid has not come in for extradition cases in the magistrates' court. We were firmly of the view that there would be an overall saving when one looked at how long cases were taking when they were being adjourned, people were being held in custody and so forth.

The Lord Chancellor's department was asked to look into this, promised to do so and eventually did so, but at a very late stage in our deliberations. The Government's view is that the business case is not made out. We can see why it is not very attractive to have automatic legal aid, but we certainly thought then, and I still think, that it would, overall, create a saving, as well as facilitate the administration of justice. We deal with that at paragraph 11.85 of the report, with the suggested possible alternative at paragraph 11.86. Those are, as it were, my views on these points; I do not know what Anand's are.

Anand Doobay: I would certainly agree with Sir Scott's issue: that more could be done on legal aid. The one nuance I would add in terms of what has changed in the last three years is what has been happening at an EU level. When we wrote the report, we were reasonably optimistic about the developments that might take place at the EU level to deal with what were commonly acknowledged to be issues that were significant: for example, the length and conditions of pre-trial detention, the issue of proportionality and the use of European arrest warrants when it was inappropriate for them to be used.

¹ Paragraphs 8.93 to 8.96 of the Review of the UK's Extradition Arrangement

We were entitled to be optimistic at that time, because there was a recent change in the handbook to encourage member states to carry out a proportionality check. The Commission was talking about taking action in terms of detention conditions. However, that optimism has not proved to be well placed, and there is certainly still a lot that needs to be done about those and other issues. You can see that from the European Parliament's resolution and report earlier this year, where they again call for the Commission to take action on these and other issues to reform the European arrest warrant to deal with some of the systemic problems that exist.

I do not resile from what we said at the time, but I do feel that, three years on, some of these issues have not been solved at a European level. Therefore, perhaps, if we were carrying out the review now, we might need to look at taking action on a domestic level. That is what the Government has been trying to do in the recent amendments they have put forward to the Extradition Act.

The Chairman: That is a very helpful starting point. We are going to touch on some of these points later in the session. On one small point as to the question of reviewing the category 2 countries, I gather the Government have said that they will do it, but have not told us either when or how; is that right?

Sir Scott Baker: That is precisely the position as we understand it.

The Chairman: As far as legal aid is concerned, I know Lady Jay wanted to talk about it. She might want to come in now.

Q3 Baroness Jay of Paddington: I am interested that you raised that as one of your points, because, of course, it comes very late in your report. However, you say—I think I quote correctly—the solution to this very serious problem is “essential”. Therefore, you must be disappointed. I am interested that you quoted the Government as saying the business case

had not been made out, because that does seem to be an argument using the suggestion that efficiency, rather than justice, is paramount. I wondered if you could comment further.

Sir Scott Baker: I am afraid that efficiency and cost saving is always a strong argument against taking steps that may save costs elsewhere. I have not seen any real analysis on why they say the business case is not made out. I do not know whether Anand has seen anything on that.

Anand Doobay: No, I am not sure that we were convinced by the way that it was analysed in terms of the savings they looked at, because we certainly foresaw savings in terms of interpreters not being needed for adjourned hearings and shorter periods of detention for people who were in custody. It did appear that insufficient weight was given to the overall aim of securing the interests of justice and having a fair and speedy process for those people who were undergoing extradition. It is an interesting use of words in the Government's response about the business case not being made out. Certainly I feel that insufficient weight was given to the other side of this, which is not the financial aspect.

The Chairman: Are the Government not inferring that it is for someone else to make the business case rather than for them to look into it, work it out for themselves and show the world what the right outcome is?

Sir Scott Baker: I do not think so; we made it pretty clear. There was a problem about this, because certainly we had the impression that the Lord Chancellor's Department produced the annexe to our report, which is their response, at a very late stage, having promised it a long time earlier. They were overtaken, they said, by other commitments. It may be unfair—I do not know—but we certainly formed the view that it had been done in haste and had not really been thought through.

Lord Brown of Eaton-under-Heywood: One of your recommendations, which was actually implemented, was that you should have to have permission to appeal. I do not know whether you know, but that has subsequently attracted a certain amount of criticism, not least on the basis that very often the proceedings will have been conducted without representation. This is linked therefore to the question of legal aid. People cannot fund their initial appearance. That, in turn, is said to call for an automatic right of appeal, so that you can, to some extent, ameliorate the problems caused by non-representation. Is there some linkage between those two recommendations?

Sir Scott Baker: I can see where the point is coming from, but that is, to my mind, not the way to solve the problem. It ought to be sorted out at first instance and they ought to be represented in the magistrates' court. There are very few circumstances these days where there is an automatic right of appeal in criminal cases. It has been reduced gradually over the years. The Government accepted our recommendation, but they did not go further and accept our suggestion that the test should be the same as judicial review: "arguable case". There was originally an issue as to whether it should be "reasonable prospects of success", but this has now been resolved in favour of "arguable case", because there was a change and the criminal procedure rules were applied to extradition. That problem, I think, Anand, has been solved.

Anand Doobay: That is right. The legislation itself did not make plain what the test would be for permission. We had always anticipated it would be the judicial review test of "arguable case".

Lord Brown of Eaton-under-Heywood: The fact is that if legal aid was available at first instance, it would then make these objections to the introduction of the permission stage altogether less tenable.

Sir Scott Baker: We would save a great deal more money at that level as well. That is something new that has happened since the report.

Baroness Jay of Paddington: It all stems from the very firm recommendation you made about sorting out the legal aid situation at the early stages of proceedings.

Sir Scott Baker: Yes. All the evidence we had was one way on this, and we did feel that we needed to make a firm recommendation to have any chance of anything happening.

Lord Mackay of Drumadoon: Can I ask you to elaborate on the consequences of an unrepresented party in proceedings in terms of the management of the court on a day-to-day basis?

Sir Scott Baker: Anand, you are probably more on the coalface on this than I am.

Anand Doobay: There are a number of practical consequences of this. First, there are defendants who wish to be represented, but there is a delay in the legal aid process of simply having them apply and be granted legal aid. That would cause repeated hearings that were ineffective. If they did not speak English, that would require the attendance of interpreters at each of those hearings. It would lengthen the process and if they were in detention it would increase the detention cost.

There is also an issue about defendants who, because of all these difficulties, were unrepresented. Extradition is a very technical process. Many of the defendants are not English and do not speak English as a first language. They would struggle to understand what was going on. Therefore, there are all sorts of difficulties about having unrepresented defendants going through the magistrates' court process. As we have heard, that may lead to issues being raised for the first time on appeal that in fact could have been dealt with at the magistrates' court if the defendant had been represented.

Lord Mackay of Drumadoon: It creates practical difficulties, whoever is on the Bench, irrespective of what level the proceedings are at.

Anand Doobay: Yes, absolutely. That is why the evidence was all one way. We were hearing this from the judges, the prosecutors, the defence lawyers and the people who were subject to proceedings. There was nobody who was saying this was not creating an issue, because every participant in the process was feeling the effects, both in cost terms and practical terms.

The Chairman: We must move on to Lord Jones, so please be quick.

Q4 Baroness Hamwee: My question then moves on a bit to effectiveness, so can I combine them? On the legal aid point, you gave one example of a step that could remedy the situation. I wondered, reading that, whether you were concerned not to give any other get-out to the Government or whether you had a selection of other ideas.

Sir Scott Baker: It is hard to remember three years ago. We floated various thoughts, but we did not think they were really practical, except for the one that we put in the second paragraph.

Anand Doobay: That is right. We did believe there was an issue of principle here. Therefore, while you can suggest practical ameliorations of the problem, it is not really solving the problem. There were some practical issues about the way in which you applied, filling out forms and language issues, but essentially we did not feel those were going to deal with the root cause of the problem.

Baroness Hamwee: There is a second part to my question. Mr Doobay, you mentioned detention conditions, if I heard you correctly. I know there are all sorts of issues around the conditions of detention, but, on the narrow point of causing problems to the extradition

proceedings, is there anything we ought to know about how somebody being in detention makes the proceedings more problematic?

Anand Doobay: I was talking about detention conditions in other states, i.e. the countries that were making the requests. The impact of detention conditions on domestic proceedings here is simply the cost. If the process takes longer because there are lots of ineffective hearings, we are obviously paying for that person to be kept in custody during that period.

Q5 Lord Jones: In the Baker review, you wrote that extradition is a form of international co-operation in criminal matters based on comity intended to promote justice. Do you still subscribe to this view and, since you wrote that sentence, do you feel the Government have focused too much on achieving efficient international co-operation on extradition and focused too little on ensuring that the UK's extradition arrangements are just?

Sir Scott Baker: I certainly still do subscribe to that view, and very strongly subscribe to it. The question that you pose is a very, very general one. In my judgment, it is a matter of balance between international co-operation and just extradition arrangements. We made our recommendations on the basis of trying to maintain that balance. I am not aware that the position has changed significantly since then.

There are a number of points that need to be made here. First, it is terribly important to remember that extradition is not a one-way street. We obviously are interested in getting our criminals back from abroad, just as other people are keen to extradite people they say have committed crimes here. We heard some quite compelling evidence about how advantageous the arrival of the EAW was in 2003 in getting back criminals from Spain, in particular, where there had been all sorts of problems before. Those were largely overcome by the EAW.

The next point is that modern travel and modern communications have made crimes increasingly international. Often crimes are committed in not one, two or three countries but a whole variety of different countries by different individuals playing different parts, moving around in different places or simply staying behind a computer in one country and not moving at all. One has to cope with that situation.

There is another point here that is perhaps worth making. We did touch on this in the report in paragraph 3.73. Many members of the media and readers of articles in the media have an often not expressed view that British citizens ought to be treated differently in extradition cases from people who are not British citizens. That is not the case and has not been the case for a very long time. It would require a dramatic putting back of the clock to change the situation.

We come back to this when we get to the forum bar; perhaps that is the appropriate time to expand.

Anand Doobay: I would add a couple of things. When we are talking about the promotion of justice, as Sir Scott was saying, there are two aspects. One is to ensure that people who are accused of offences are tried and, if necessary, convicted. If you do not have effective extradition arrangements, essentially you risk your country becoming a haven for those who want to escape prosecution and can come to your country and simply rest there, safe in the knowledge that they will not be tried. However, it is a difficult balance to maintain to ensure that you are not sending people by extradition to face an unfair trial or an improper process or conditions of detention that are in breach of the European Convention on Human Rights.

I would strongly echo what Sir Scott said about nationality, because this is actually one of the issues that lies at the heart of many people's misgivings about the extradition system. There is a sense that if you are a British national or resident and it is possible for you to be

prosecuted in the United Kingdom, you should be prosecuted here because that gives you certain advantages in terms of a familiarity with the system, an understanding of the law and a support system of your family and friends. That is an understandable position to hold, but it is not the case in our law as it stands.

One of the things we tried to recommend in the review was that the Government give some thought to clarifying what weight should be given to the fact that somebody is a UK national or resident when making a decision on whether or not to prosecute them. Often in these cases, as Sir Scott says, many countries have the ability to prosecute and the question is: should the UK step in and prosecute? That may involve questions of resources, politics and all sorts of other issues.

Unfortunately, in the Government's response, the Crown Prosecution Service's guidance does not give you any clarity. It simply says it is a factor to be taken into account where the suspect has connections with the UK, but it does not really help us as to what weight it should be given or how you should balance it against the other factors.

Lord Jones: Briefly, Lord Chairman, and for the record, do existing provisions adequately prevent efficiency from superseding justice?

Sir Scott Baker: Again, that is a very general question. They do, but it is difficult to answer the question on such a broad basis.

Anand Doobay: We should also bear in mind that there are a number of amendments to the Act that are not yet in force, which will introduce quite significant changes, certainly in terms of the European arrest warrant system, in the UK. The whole aim of those amendments is to introduce more attention to the individual's situation and the proportionality of the request, et cetera. Certainly, we felt the legislation was capable of being operated by the Courts to

avoid injustice. Obviously, that does not mean that will be the case in every instance, but we also now have these additional protections, which have yet to come into force.

The Chairman: Is there an inherent robustness in the system that you feel is focused on protecting liberty, for want of a better way of putting it?

Anand Doobay: That is right, but the court is struggling with same problem we were, which is balancing these twin aims. In any one individual case, you can have a different view as to whether they have achieved that outcome.

Q6 Lord Rowlands: Can I ask about the other party to this: the victim? You mention in paragraph 5.26 that you had regard to the interests of the victims when you were preparing your report. I wonder if you could elaborate on that a little. Should we go further and establish rights for victims in the process?

Sir Scott Baker: We probably do not need to establish rights for victims as long as their interests are taken into account properly at key points. One key point where I notice victims do not get a mention is the new proportionality test for the EAW. Section 157 of the Anti-Social Behaviour Crime and Policing Act 2014, which is yet to be brought into force, requires the court to have regard to the seriousness of the conduct, the likely penalty and the possibility of less coercive measures. However, we recommended, in relation to the proportionality test that we thought should be introduced, that consideration should be given to whether there was a reasonable chance of conviction, the level of harm caused, previous convictions of the person sought, the age of the person sought and the views of the victims. I am not clear myself why these have not figured in Section 157.

However, while I am on the subject of proportionality, there is another deficiency in the proportionality test. We recommended that it should be dealt with at the issuing end by the issuing state, because it is much easier for questions of proportionality to be properly dealt

with by the person who is making the request, rather than the person who is receiving the request, but that has not been done. How it will work in a country like Poland I do not know. To what extent it would reduce the number of requests is again problematic. What the Government are introducing is at least going some way down the road that we were suggesting.

Anand Doobay: I certainly agree we have to bear in mind the interests of victims. The way you do that is to ensure that people cannot simply evade justice by being in the UK and not be extradited. That is part of the balance you have to put in place. Their interests are represented normally by the issuing country that has made the extradition request, because they are obviously putting forward the case for the prosecution.

Coming on to the issue of proportionality, there is a difficulty in that the measures that have been taken at EU level have not been that robust. They are essentially encouragements to countries to apply a proportionality test and it is not clear that that has succeeded at all. There are some steps being taken in Poland to try to deal with this specific problem, but these steps are very gradual and do not seem to be having much of an impact. Certainly, the European Parliament is still calling for an amendment to the framework decision to allow for a mandatory proportionality test by the issuing member state.

There remains much to be done and what the UK Government are trying to do is simply to ameliorate the position. However, as Sir Scott says, the better solution would be to ensure that these requests are not made at all.

Lord Rowlands: Are you suggesting that we should amend the section to include the views of victims?

Sir Scott Baker: It is not in yet. That is really a matter for Parliament, as to whether it should or not. We would like to have seen all the factors that we mentioned in the report,

obviously, otherwise we would not have mentioned them. Whether it is too late to amend Section 157, I do not know.

Anand Doobay: What we cannot tell is how the court will consider the seriousness of the conduct, because the court may well decide that the seriousness of the conduct includes an assessment of the impact on victims and assessing exactly what has happened to the victims in the offence.

The Chairman: On the proportionality point, there would seem to be two slightly different issues. One is whether it is appropriate and legal—not least of all if we opt back in—under the directive. Secondly, there is the point you made, which is important: if it really works properly, the number of requests will simply decline and therefore there will be less burden on the courts and fewer people in trouble.

Sir Scott Baker: We certainly felt—and I am sure the judges in the magistrates' court felt this—that there are far too many cases coming through that are not really justified. The primary object of the proportionality test is to stop that up.

Lord Henley: If a lot of issuing countries are not observing proportionality at the moment, does it not have to be for this country to do?

Sir Scott Baker: It is a start, but what is going to happen when this country starts rejecting cases hand over fist? There are going to be issues about it. We had hoped that work could be done behind the scenes to get everybody to agree on a sensible way ahead, but that has unfortunately not arisen.

Lord Henley: That is your complaint: that that has not been happening in Europe and at the European Commission.

Sir Scott Baker: Yes.

Q7 Lord Rowlands: There is quite a bit of evidence to suggest that in fact these new tests you would like introduced could fall foul of the decision itself. On EU Sub Committee E, we heard from The Bar Council and we heard it from the Scottish Lord Advocate. Is that a real prospect?

Sir Scott Baker: I cannot second-guess what courts will do on this; we will have to wait and see.

Anand Doobay: There is an issue about whether it is compliant with the framework decision, but essentially if the European Commission is not going to act to deal with this problem by including this legislative obligation on the issuing states to look at it, it is understandable that individual member states are having to take action to try to deal with it themselves.

The other thing I would add is that, while I would agree it is something that should be done by the issuing member state, there is one issue that it does not deal with, which is a change in circumstance. If you have had a prosecution in another member state some years ago and the person's circumstances have completely changed in the intervening period—they have had have children, they have led a blameless life, whatever it is—the proportionality assessment by the issuing member state will not necessarily take that into account, because they will not be aware of those changes. There is some call for an assessment again in the executing member state. That could be done by looking at the Article 8² issues of their private and family life in some situations, but there are two aspects to it: one is an assessment at the time the request is made, but that does not necessarily take into account a change in circumstances.

Q8 Lord Brown of Eaton-under-Heywood: Should the courts be ready under Article 8 to look at those sorts of changed circumstances? You know we had a group of cases a couple

² Article 8 of the European Convention of Human Rights

of years ago in the Supreme Court that involved extraditing caring parents. We were pretty strict in those cases: only one of them was allowed to remain, a Polish case, because it was a very old allegation, not terribly serious and there would be children over here who would be left uncared for. Ought the courts be readier to allow Article 8—to which they have been very resistant—to come to the aid of people who are being sought? I know your views generally on not giving preferential treatment to nationals, but there is additional Article 8 relevance to a case when you are trying to extradite nationals from one country to a foreign country.

Sir Scott Baker: That is a good point, if I may say so. The problem with Article 8 is that it has been misapplied in a variety of different situations—often nothing to do with extradition—and the courts are increasingly cautious about using it. However, there are plainly cases where it is important that it should be used.

Anand Doobay: The other problem with Article 8 is that, again, it is a balancing exercise. The courts do use it in appropriate situations. Very recently, the courts refused a request to the US on Article 8 grounds. However, the problem is, again, the court is struck with weighing up the necessity of having this international co-operation and ensuring that people do not avoid prosecution where they should be prosecuted. I do not know that anything is going to avoid having to deal with the difficult issue of balancing the two factors.

Lord Brown of Eaton-under-Heywood: There still are countries that will not extradite their nationals. France and Germany used not to; now they have to under the European arrest warrant, but that is only within the EU.

Sir Scott Baker: France does not extradite to the United States.

Lord Brown of Eaton-under-Heywood: Exactly. They are not required to in respect of non-EU extraditions and probably still do not. Russia, we were told, also does not.

Anand Doobay: That is the bigger question. If you want to have that system where your nationals are entitled to be tried in the UK and not be extradited, that is a very large political decision to take; you have to be willing to prosecute them in situations where you would not otherwise bother, because it is not of interest to you or it is not a policing priority. You also have to be willing to deal with the diplomatic fallout that goes with that. If you look at Russia, when they said they were willing to try the Litvinenko suspect, but they would not extradite him, the UK said, “This is a vital national interest for us to deal with somebody who has been murdered in London”. You have to be willing to deal with both the political issues and also the practical issues if you have that system where you refuse extradition of your own nationals and you instead agree to prosecute them.

The Chairman: I have one point before we move on. If, as appears more likely, the country opts back in to the EAW, will the new “Lisbonised”—I know it is a horrid word—procedure that will pertain make any difference to the actual workings of this?

Anand Doobay: It certainly will mean that there will be the possibility of going to the European Court of Justice. There will be more case law, potentially, dealing with cases emanating from the UK. It does also mean that the Commission will have the ability to bring enforcement proceedings. If they do believe that the proportionality bar we are introducing here is not compliant with the framework decision, that will be tested.

The Chairman: From our point of view, that seems to be quite a crucial matter.

Anand Doobay: Yes. That is the hesitation in terms of allowing the “Lisbonisation”. The two significant changes it will make to us are the European Court having jurisdiction and the Commission having the ability to bring enforcement proceedings. That will be a significant thing that will change the way in which the system operates, yes.

The Chairman: You may not wish to act as a soothsayer, but are these things likely to stand up?

Anand Doobay: I do not know. I do not know whether the proportionality bar will stand up. There is a complex argument about EU law, which has within it an essential element that you have to consider proportionality when taking actions under EU law. It is going to be a more complicated argument than simply whether the framework decision allows you to do it on its face, because plainly it does not. It is going to be an argument about the underlying fundamental concepts of EU law and whether you can read into it this requirement that it has to be proportionate, because that is a fundamental concept of EU law.

Q9 Lord Rowlands: If you look down at the figures, there are 880 cases from Poland in the last year, which is way above any other country. If you could sort the Polish issue out, would the issue of proportionality at least be less relevant?

Sir Scott Baker: When we looked at this three years ago, it was the Polish issue that was the primary one. In terms of numbers of requests, they were miles ahead of any other country. There were one or two that had a significant number, but nothing remotely like Poland's. If there had not been the Polish problem, I suspect we would never have been looking at this question of proportionality at all.

Anand Doobay: There are some attempts to deal with the Polish problem. There was evidence given before the European Parliament earlier this year by a Polish representative and they were explaining the particular problems they face. They have a principle of legality, which they believe means that in every case they have to prosecute and in every case they have to make a European arrest warrant. They also do not tend to use fines. Instead, they have suspended sentences, but that means that as soon as somebody leaves Poland their sentence is put into effect and there is a huge issue of emigration from Poland. They are

trying to deal with the issues, they say. They are trying to bring in legislative amendments to take effect in 2015; they are trying to bring in training. So far, however, there is little sign this has had a real effect in terms of how it is working in the UK.

Sir Scott Baker: This does illustrate an even more general problem, which is that no two countries have identical criminal justice systems. The framework decision is really designed to draw together all 27 or however many member states to have a procedure that accommodates everybody. However, perhaps it is natural that we in this country think our system is the best and, therefore, anybody who does anything differently has got it wrong. There will have to be some accommodation to achieve an answer to these problems. For example, we heard of a case, I think in Poland, that chicken-stealing, in the country rather than the towns, is regarded as a very serious matter; they see it differently from us.

The Chairman: Can we move on to talk about forum bar issues, which are obviously not far away from the topic?

Q10 Lord Mackay of Drumadoon: In your report, you advise, on balance, against the introduction of a forum bar. Are you in a position to give views on the consequences of the forum bar that was, in the event, introduced in 2013?

Sir Scott Baker: We were against it for reasons that we set out in the report, and I will not go through all those again. The option that we have I would describe as the least bad option. After we had reported, I did spend a number of sessions with the Home Office when they floated drafts of what the forum bar might contain. I looked at these and tried to point out the pitfalls there might be if they were introduced in that form. We are asked what the effect of the forum bar that has been introduced will be. I can only answer by saying that that depends on how the courts interpret it, but I would be very surprised if this forum bar results in many cases where extradition will not take place where it would otherwise have

taken place. The forum bar creates an additional bar to extradition. One needs to ask: what void is it there to fill? It was interesting that the magistrates dealing with extradition cases said that they could not think of any single case where the result would have been different if the original forum bar had been introduced. I certainly wonder how many cases there will be where this will result in a different solution.

The ultimate point is that there are seven aspects the court has to take into account on the interests-of-justice test, which is the second of the two limbs that get to first base. The first limb is that there has to be substantial measure of relevant activity in the United Kingdom, and then it also has to be in the interests of justice. The interests of justice require the court to look at where most of the harm or loss occurred, the interests of the victims, the belief of the prosecutor that the United Kingdom is not the most appropriate place for trial, the availability of evidence in the United Kingdom, delay, desirability of all prosecutions taking place in one place and the individual's connections with the United Kingdom. The critical question is how much weight, in assessing the interests-of-justice test, is going to be given to the person's connections with the United Kingdom. It will be difficult to give a great deal of weight to that in most cases.

Why, fundamentally, I do not like the idea of a forum bar is that the question of forum, as Lord Lloyd of Berwick said in one of the debates, is essentially a prosecutorial decision. It is very difficult for the courts to get into the kind of issues that prosecutors would be considering perhaps on a cross-Atlantic basis with issues of confidential information and so forth to be assessed. All I can answer to the question is that it is a matter of "wait and see".

Anand Doobay: I would add two things, Lord Chairman. The first is that it does not address the issue of where prosecution should take place. The forum bar is simply looking at where it should not take place. The court may be presented with quite a stark choice, which is to

refuse extradition in the knowledge the person may never be prosecuted, even if there appears to be significant evidence that an offence has been committed, or to allow extradition even though the person is British, with ties here and there would be significant effects on them if they had to leave the UK.

I share Sir Scott's view that we will have to see how the court deals with it. What we have not had so far is any appeals that have been heard that deal with this issue. When the first of those comes through, which will probably be in the next month or two, we will see how the High Court is going to lay down the principles of how it will approach this and, particularly, how it will deal with the weight to be given to a person's connections with the UK.

The problem I have with the bar as drafted is actually the prosecutor's certificate. It is not appropriate for a prosecutor to have the right of veto. That is essentially what is given here, because if the prosecutor issues a certificate the court cannot consider the forum bar. The prosecutor, in issuing a certificate, is looking at specific things. One of them is not the interests of justice. If the idea of this bar is that you are supposed to weigh up the interests of justice as to whether or not it is appropriate to extradite, I do not understand how a prosecutor can have the right of veto to stop the court from doing that. That would be a personal reservation I have in terms of the way in which the bar is drafted, but we will have to see how the court approaches the interpretation.

Q11 The Chairman: I am interested that you say that, because it struck me that there is an interesting question as to whether or not the proper way for a prosecutor to determine whether or not to bring a prosecution takes into account precisely the same things as a court or any judicial process should, in deciding what the just outcome to the facts are. You tend

to think they are in fact different, and hence we should be clear they are different, and processes and systems should recognise that difference.

Sir Scott Baker: We would like to have seen a set of guidelines published so that it was transparent as to the factors the prosecutor takes into account in these cases. A set of guidelines has been issued, but it is very much along the lines of the Eurojust guidelines and does not really add very much to telling us what really goes on.

Anand Doobay: No. What we had really hoped was that there would be some detailed explanation of how you assess the weight to be given to the residence and links of the suspect with the UK. When the CPS is taking their decision, should they be prepared to spend more money to prosecute here? Should they be prepared to put a lot of effort into getting evidence from overseas to prosecute here? All of these are quite significant practical issues and they are unanswered by the guidance that has been issued, which simply lists the location of the accused as one of the factors.

However, I certainly would agree, my Lord Chairman, with your analysis: they are not the same things. If you look at the test to be applied under the forum bar in assessing whether the interests of justice are engaged, that is not the same thing a prosecutor will do when deciding whether or not to issue a certificate.

Baroness Jay of Paddington: Can I ask a factual question? Have the Director of Public Prosecution's (DPP) guidelines been challenged legally?

Sir Scott Baker: I do not think they have.

Lord Mackay of Drumadoon: Have the Crown Prosecution Service (CPS) made public their views on this?

Sir Scott Baker: They produced the guidelines.

Lord Mackay of Drumadoon: I appreciate that.

Sir Scott Baker: They have not gone any further than that.

Lord Mackay of Drumadoon: I would like to know whether they are enthusiastic or they think it is a useful role they are being asked to play, or whether they are just having to put up with it.

Sir Scott Baker: My recollection is that the then DPP, Keir Starmer, was not enthusiastic about the forum bar or any forum bar, and was enthusiastic about some guidelines but the guidelines have not gone as far as we perhaps hoped.

Anand Doobay: Obviously, they were consulted as part of the process of formulating the forum bar. One of the things that is not yet clear, because we have not had very many cases, is in how many situations they will in fact issue a certificate, because my fear had been that they would do it simply based upon looking at the extradition request and saying, "Actually, there does not appear to be enough here to warrant a prosecution in the UK". However, it appears they may not do that. In fact, what they will do is say, "In order for us to issue a certificate, there has to have been an investigation in the United Kingdom. The police actually have to have investigated, gathered evidence and sent us a file before we will issue a certificate." If that is the case, I would have fewer concerns about how it will operate in practice. However, it is too early to say for sure how it will operate in practice.

Q12 Lord Mackay of Drumadoon: Is there any evidence to suggest that any foreign country has taken account of the existence of a forum bar and not proceeded with a request for extradition?

Sir Scott Baker: We did not hear of anybody who has a forum bar anywhere.

Anand Doobay: I imagine that most countries will be waiting to see how it is dealt with at the appeal stage, because all of us are guessing how the court will lay down the principles on how it should be dealt with.

Lord Rowlands: Does this raise the question of whether Parliament should have been more explicit anyway? Should the legislation have been more explicit, rather than just waiting for the courts to define our legislation for us.

Sir Scott Baker: I belong to the school that says, if you have a knotty problem, let the judges work it out.

Anand Doobay: However specific you are, because there will be a number of factors that are going to be weighed together, it is going to require, first, some interpretation of the actual words they use, but also some indication of how the courts are going to weigh the different factors. I am not sure. It would have been possible to say, for example, "Greater weight should be given to the individual's connections with the UK". That was an option, but it is not the one that the Government have taken.

The Chairman: Can I ask you to clarify that? In particular, what you are saying, Mr Doobay, is that if you are going to have a forum bar—if—you actually need enhanced and improved guidelines to make it work as well as it ought to. Is that right?

Anand Doobay: Actually, what I am trying to say is that the forum bar is a longstop. It is there to avoid the problem at the end of the process. What is better is to make the right prosecution decision at the start. Where there are cases where a number of countries should prosecute and it is appropriate for the UK to prosecute, that should be what happens, because then you will never have a successful extradition request, because if the UK does prosecute then it will stop any extradition proceedings. If the UK prosecutes and there is a conviction or an acquittal, double jeopardy will stop any extradition proceedings.

The better way to deal with this problem is to deal with it at the beginning of the process and make the right decision prosecution decision, because the forum bar otherwise simply presents the court at the end of the process with a very unattractive choice, which is stop

extradition and potentially the person does not get prosecuted anywhere or allow extradition despite the fact that it is going to have a significant impact on the person being taken from the UK.

Sir Scott Baker: Going back a step, I was quite impressed by evidence that we received from prosecuting authorities, which was that with cross-border crime very often there is an early meeting between the prosecutors of the various countries who may be involved and then a decision is taken as to who is going to investigate it. In one sense, the die is cast pretty early on as to where the prosecution is going to take place and the courts have to live with that later, which illustrates the difference between the prosecutorial decision about where the case should be heard and the forum bar, which leaves it to the court.

Q13 Lord Brown of Eaton-under-Heywood: What sort of appeals are anticipated here? Are these appeals against the court's decision on striking the balance in the interests of justice, or are these appeals against the prosecutor's certificate, which is, as you say, when it is in being, going to operate as a veto?

Sir Scott Baker: I tried to find out yesterday what the position was and the Lord Chief Justice was not aware whether there were any immediate cases for hearing in the High Court, but he would not necessarily know that. Mr Doobay thinks that there is a little group of cases raising various points to be heard together probably sometime later this month, but we do not know in any detail what the cases involve or what the issues are; at least I do not.

Anand Doobay: I do not think they involve a prosecutor's certificate. That is why I understand the CPS are adopting, at least at this stage, that approach of not issuing a certificate unless there has been an effective police investigation. My understanding is that these initial cases do not involve a prosecutor's certificate. They are about the way in which the court has balanced its factors.

Lord Brown of Eaton-under-Heywood: They are Section 19(b) appeals, not 19(c) or 19(e) appeals?³

Anand Doobay: Yes.

Lord Brown of Eaton-under-Heywood: The suggestion that the legislation should be yet more explicit seems to me difficult to reconcile with these convoluted and endless pages, which I find very difficult to track my way through.

Anand Doobay: It is interesting that the legislation prescribes what the judge can look at. It is not the normal situation where it is simply the interests of justice and it is determined by the court what the interests of justice are. It is a prescriptive and exhaustive list of factors the court can take into account when assessing the interests of justice.

Sir Scott Baker: It is a rather dangerous line of legislation, because it is always possible that something quite important has been overlooked.

Baroness Jay of Paddington: Does it not underline a point made by the Chairman: that the guidelines should be looked at again and made more precise?

Sir Scott Baker: Yes.

The Chairman: Are the Eurojust guidelines a bit generalised? If we are going to focus on certain aspects of this, I am trying to work out where we should be looking.

Sir Scott Baker: The Eurojust guidelines have been picked up and adopted by the Crown Prosecution Service. I am trying to remember what they contain, but they cover pretty wide territory. However, the area they do not really touch on is the person's connections with the United Kingdom.

The Chairman: Or any other country, for that matter.

Sir Scott Baker: Yes, or any other country.

³ Sections 19(b), 19(c) and 19(e) of the Extradition Act 2003.

Anand Doobay: The problem with the guidelines is that each of the factors is very sensible to take into account, but they often point in opposite directions. For example, the first and main factor is that you should bring the prosecution where most of the criminality occurred or most of the loss or harm occurred. What if those are two completely different countries? What if you sat in the UK and carried out all of your acts in the UK, but, in fact, the harm you caused was entirely in France? The problem with the list is not that the list is not sensible; it is how you apply it to the facts of a given case where each of the factors may point in a different direction or each of the factors may require you to spend more money to bring the prosecution. How do you reconcile these things when you are making your overall decision?

Sir Scott Baker: There can be issues about admissibility of evidence, where evidence that is not admissible in one country is admissible in another: phone-tapping, for example.

The Chairman: One point on this more generally is that, obviously, we have had the introduction of the forum bar here. Do we know whether there has been any impact on US prosecutors, in whether or not they try to bring a case and seek the extradition of people from here? It is a question of fact.

Sir Scott Baker: I think we would hear about it. I would imagine the American authorities would simply press on and wait and see what happened. They would not take any different course because of our forum bar, at least until the courts had interpreted it. However, I cannot really second-guess what the Americans would do.

Anand Doobay: I am sorry: I do not know.

Q14 Lord Hart of Chilton: For some of us who have had no experience of this subject before, there is a steep learning curve involved here. One of the things, however, that appeared to be reasonably clear early on is that the equivalence of the two tests “probable cause” and “reasonable suspicion” do seem to be roughly equivalent. There does not

appear to be any major dispute about that. What is, however, emerging from all the papers we have is that there are other things surrounding circumstances where there are differences between the two countries. There are 50 different states with different legislatures. In respect of judges in America, some are elected and some see their election programme as being enhanced by stiff sentencing. There is plea-bargaining and the longer sentences that induce plea-bargaining. America is far more enthusiastic and zealous about extending their extraterritorial claims.

In those circumstances, one is left with impression that while the two tests may be similar, the surrounding circumstances may produce a situation that is slightly unbalanced. I would like your views on that.

Sir Scott Baker: There are certainly features of the American criminal justice system that are unattractive to UK residents. Their plea-bargaining is a great deal more vigorous, if I can use that word, than ours is, although we do have plea-bargaining in this country to a degree. It is very unsatisfactory to see people who have been extradited for white-collar crime being led off in chains from the aircraft by US marshals. The prison conditions, in some instances, leave a great deal to be desired.

However, the bottom line on all of this is: are we satisfied that individuals can have a fair trial in the United States or whatever other country it may be? That is a value judgment that has to be made and looked at in individual cases. To my mind, I cannot recollect any individual case where the courts have said they will not extradite on the basis that the individual would not have a fair trial. By fair trial, I am looking at the whole of the surrounding circumstances. One has to be a little bit careful, because, in some instances, in the media the focus has been on very narrow aspects of particular cases, which have been built up to present a picture that is not, perhaps, entirely the fair one. I seem to recollect

that Lord Brown, in one of these cases in the House of Lords—not the Supreme Court—had something to say about plea-bargaining in the United States not being quite as vigorous in some instances as was being portrayed. That was in the McKinnon case. Yes, there certainly is a point here, but the bottom line is: when does one, as it were, pull the plug on extradition arrangements with a friendly country?

Lord Hart of Chilton: There is also the point that it appears to be the case that if you have challenged extradition you get an extra whack. Is that fair?

Sir Scott Baker: I am not specifically aware of that having been the case, but it may be my memory is wrong.

Anand Doobay: There is certainly an impact in terms of getting bail: if you have challenged extradition here, it is very unlikely that you will get bail, but that is not specific to the US. My sense is that there are very significant differences between the US and the UK systems of justice. However, the problem is that the way we assess all other countries' systems when we are looking at extradition is whether they are compliant with the European Convention on Human Rights. That is our baseline. If the countries we are extraditing to do comply with the ECHR, we will extradite. All these issues and aspects we are talking about have been considered by the courts and have been found to be compliant with the ECHR. That leaves us in a difficult position where, if we want to say they are unacceptable, we would have to do it on the basis not that they are not compliant with the ECHR, but that they are aspects that we just do not like and we do not think people should be exposed to.

That brings us back around in a circle to the prosecution decision in the UK. We have to be careful about our use of the word "extraterritorial", because that would imply the US is claiming jurisdiction for things that happen entirely outside of the US. To my mind and my knowledge, that has not been the case in any of these situations. There has been some

conduct in the US and some conduct outside of the US. The US may certainly take a more robust view than we would in the UK as to which situations it will prosecute in if there is only 10% of the conduct in the US, but that is not extraterritorial; that is simply that they are taking a decision that we would not take ourselves. We have to work out on what basis we are going to complain about these aspects of their system if it is not that they are not compliant with the European Convention on Human Rights.

Q15 Baroness Jay of Paddington: We have failed so far to get a clear position on—or at least I have; that may well be my lack of understanding—the relationship between the federal courts and the federal authorities and the state authorities on this. One of the papers which Lord Hart referred to, which we have had circulated in the last two weeks, has referred to the state Supreme Court judges increasingly resembling ordinary politicians in partisan mud-fights. We have seen some background about the programmes on which these judges have been elected in individual states. It is unclear to me still the extent to which the individual states have complete jurisdiction over some of these matters and the extent to which this is federally organised. It is the state situation that I find more immediately concerning.

Sir Scott Baker: A lot of extradition operates across the board in the same way in all the—

Baroness Jay of Paddington: And is interpreted in the same way? Is there any latitude for a state supreme court?

Sir Scott Baker: There may be some different nuances, but the principles are the same.

Baroness Jay of Paddington: The principles may be same, but is the actual practice and legal constraint on an individual state's supreme court the same, or indeed a state's legal system?

Anand Doobay: There are two separate systems within the US. My understanding of the system is that there are particular offences that the federal system prosecutes and then there are state offences that the state prosecutes. Either can lead to an extradition request.

Baroness Jay of Paddington: Yes, exactly.

Anand Doobay: In many cases, they are federal prosecutions that lead to requests to the UK, but that is not to say that they cannot be state prosecutions. There may be more concerns over the treatment that an individual received if they are subject to a state prosecution, because, as you say, there may be a perception that there are less robust checks in terms of what happens at a state level.

Baroness Jay of Paddington: In general, my concern is that, obviously, a very authoritative survey and report like yours, in terms of the balance between the UK and the US on this matter, said that it was imbalanced for the reasons Lord Hart expressed. However, there is a much more general—one would call it “diplomatic”, as you said before, Mr Doobay—or political context to this about the way the systems operate, which actually does make it possible to say that it is not imbalanced.

Anand Doobay: Yes, it is possible to say it is different. It is certainly true that there are significant differences between the two systems and it is whether those differences are unacceptable. If they are, what do you do about them? As I say, the problem is that ordinarily under extradition law all you are looking for is compliance with the European Convention on Human Rights.

Lord Rowlands: Are there any figures on the numbers of requests coming from state or federal authorities?

Anand Doobay: I am sorry; I do not know.

Sir Scott Baker: We got some figures on requests from the United States in an annexe to the report and I did ask for those to be updated before today's hearing. They present a broadly similar picture, but they do not distinguish between one state and another, and between federal and state requests. I imagine that it would be possible to obtain such figures.

Lord Brown of Eaton-under-Heywood: You point out at paragraph 7.85 of your report that, actually, in proportionate terms, in proportion to the overall population of both the United States and the UK, we get back from them significantly more than we extradite to them.

Sir Scott Baker: Per head of population, yes.

Baroness Hamwee: Lord Hart mentioned issues like plea-bargaining. One would add delay, prison conditions and so on. I saw somewhere in the reading that the Netherlands imposes conditions before it will agree to extradition in some cases. I wondered whether that was something that you had considered.

Sir Scott Baker: We certainly considered assurances, and I am not sure if assurances and conditions are terribly different. You ask us later on in one of the questions, or may be asking us, about assurances and whether they are effective or not. With a country like the United States, if one assurance is not maintained there will not be any more. There is a big interest in making sure they are maintained. With other countries, the real difficulty is in policing what actually happens and whether the assurance has actually been maintained afterwards, or whether, if you call it a condition, the condition has been met.

Anand Doobay: One of the things we did look at was repatriation, because that is often a significant issue for people who are facing extradition to the US: their desire to serve any sentence that is imposed in the UK. We did try to explore whether it would be possible to make certain of that in advance so that they could know before they went to the US that

that is what would happen and also to make it speedier. The difficulty we found, when speaking to the US authorities, was that their system did not really allow for that, because it is a bureaucratic and administrative process that involves the consent of a number of different federal entities. It involves the prison, the DOJ and also lots of other actors. What they were saying was, “It is not possible for us to say in advance, ‘You will be able to be repatriated to the UK to serve a sentence’, or to say, ‘You will be able to have this happen quickly’”. I know that is often an issue for people who are undergoing extradition to the US.

Sir Scott Baker: We had quite a lengthy session in Washington with the US prosecutors. This was one of the issues we talked about at some length. They were not unco-operative at all; they were anxious to try to help. However, they did explain to us the difficulties. For example, after the case, there may be issues of reparation for victims and so forth, which have to be sorted out, or confiscation. These all take time. It has certainly not escaped our notice that there have been quite a number of cases, or at least a handful, where there have been arrangements made before extradition that would result in a significant part of the sentence being served in the UK. It is certainly our view that this is a pretty important quid pro quo to extraditing somebody from this country who has done little or nothing to facilitate the offence out of this country. Yes, there are good reasons why they should be extradited, but there are pretty compelling reasons why any sentence should be served in the home state. It is going to need quite a bit of work to get to that point, however.

The Chairman: While you have been debating this, a question has come into my mind. In conceptual terms, we extradite where the person who is being extradited can get a fair trial. Is there a conceptual difference that one ought to think about between the trial and the process of determining guilt and what happens subsequently?

Sir Scott Baker: It is not only subsequently but beforehand as well. We just picked up the point that it may be more difficult to get bail if you have resisted extradition. There are also prison conditions and so forth. It is a fair point, but it is really a political one.

The Chairman: I do not disagree about that. It is what we are here for, is it not?

Sir Scott Baker: That means we are not much help.

The Chairman: I would not say that.

Anand Doobay: From a legal point of view, though, there is a great deal of acceptance that it is better for a person to be imprisoned, if they are going to be imprisoned, in their home state, where they have much greater prospects of being rehabilitated and reintegrated into their community. That has certainly been accepted at an EU level. There is a great deal of emphasis being placed on that, so it is something which most people agree is desirable. It is the practicalities of ensuring that it happens quickly and reliably that is really the problem.

Q16 Lord Henley: On the whole process of looking for assurances and assurances from the Americans, could I take this opportunity to go just a bit wider? Should there be a process of some sort of systematic monitoring of all assurances? As you say, one failure by the States and that would be it. What would happen, however, with other countries?

Sir Scott Baker: In a perfect world, that would be ideal, but it is very, very difficult to achieve. Anand, you probably have more experience of this in the cases you have run.

Anand Doobay: Yes, the problem with assurances is that you have to guard against them becoming a panacea for all ills. In any case where there is any risk that is raised, the answer is, "That is okay. We will give you an assurance." We have to bear in mind, if there is a risk raised, why that is. If there is a risk of torture, that is because the requesting state allows torture to occur. When we are looking at assurances, the European Court has laid down a very good list of factors that have to be taken into account in weighing assurances up in

terms of whether they are effective and practically going to be a safeguard. The courts in the UK have to rigidly apply those and be very careful not to allow assurances to be accepted in every instances where there is a risk raised.

It is especially important that they are monitored, otherwise it will become a vicious circle. A country will give an assurance that does not have any monitoring; the next time that country makes a request, the court will say, "They gave an assurance last time and nobody has complained about it." If the reason nobody has complained is because there has been no monitoring of what has happened, you steadily get to the position where any assurance given is given a great deal of weight, despite the fact that, actually, none of the assurances is being honoured.

The Chairman: Lord Brown, I know you want to talk about prima facie evidence. You might move us in that direction.

Q17 Lord Brown of Eaton-under-Heywood: Not everybody would agree that there is no significant difference between probable cause and reasonable suspicion, but assume, for this purpose, that that is indeed the case and that in practical terms there is difference between them. There is a plain difference between probable cause and a prima facie case. Regarding the designation process in respect of part 2, as I understand it, there are two lots of designation. There is designation, so to speak, within the general scope of part 2, and then there is a further designation. It is the further designation of those countries that are already designated within part 2 that determines whether they have to produce a prima facie case or merely probable cause. Is that right?

Anand Doobay: That is correct.

Lord Brown of Eaton-under-Heywood: Is there a different Home Office process for deciding who in the first place is prima facie designated for part 2 purposes and, separately, one for

those within that designation that are further designated as being sufficiently reliable that you only need from them probable cause?

Anand Doobay: The way you become designated as a category 2 territory is that you have either a bilateral or multilateral extradition treaty with the UK. That is the default position. Countries that have become further designated to remove this prima facie evidence requirement fall into two groups. The first are parties to the European Convention on Extradition—the Council of Europe convention. There are about 20 of those. We have no choice, under international law, because by becoming a party to that convention we agreed that all the other parties would have this requirement removed from them.

Then there are the others, which are essentially the Commonwealth countries—Australia, Canada, New Zealand—and the US. The UK took the position that, given that we had all of these parties to the Council of Europe convention that did not have to provide prima facie evidence, there was no reason why we should require Australia, New Zealand and Canada to provide it, given that they were longstanding trusted Commonwealth partners. For the US, the designation came as result of the 2003 treaty that we signed with the US. Those are the two groups that have had the requirement removed.

Lord Brown of Eaton-under-Heywood: The further designated group, which does not have to produce a prima facie case, includes some rather unlikely-looking countries, such as the Republic of Korea, Ukraine and Azerbaijan. They only have to produce a probable-cause basis for extradition, not a prima facie case.

Anand Doobay: All the countries you listed there are parties to the European Convention on Extradition. The Republic of Korea is a non-state party. Obviously, it is not within the Council of Europe's geographic scope, but it has been allowed to become a party to this convention. Each time a country becomes a party to that convention, the UK has no choice

but to designate them to remove the prima facie requirement. It does have a choice if a non-state party wants to join. If somebody outside the Council of Europe wants to become a party to that convention, the UK has a right of veto, essentially. Each new member state of the Council of Europe has the opportunity to join the convention and, if it does, the UK has to remove the prima facie requirement.

The Chairman: Can I just clarify? The Republic of Korea, first of all, is South Korea, is it not, and not North Korea?

Sir Scott Baker: Yes.

The Chairman: Secondly, it has signed the European convention as a non-state party and, as a result, we have an option as to whether or not to designate them for the purposes of this part of the act; is that right?

Sir Scott Baker: No.

The Chairman: Is it our choice or is it automatic?

Anand Doobay: It is our choice whether they become a non-state party.

The Chairman: If you wanted to stop it, the way to do that would be veto them becoming a non-state party.

Anand Doobay: Yes, exactly.

Sir Scott Baker: The challenge has to be at that point.

Lord Brown of Eaton-under-Heywood: Has anybody ever challenged a country that wished to join that convention?

Anand Doobay: I am not sure. That would happen very privately. If countries want to express an interest to become a non-state party, they would have a private discussion with all of the other members before making in public. They would only really make it public once everybody else was agreed that they were happy for them to join.

Lord Brown of Eaton-under-Heywood: Having become a party, there is no possibility of subsequent review as to whether, after all, they ought to be allowed to continue to extradite without the requirement for a prima facie case.

Anand Doobay: There is an ability for review, but not at a UK level. There would be an ability for review at the Council of Europe level of how state parties are behaving in terms of their obligations under the convention. The difficulty the UK has is that if it wants to reimpose the prima facie evidence requirement for any of these convention parties, it has to withdraw from the convention. That leaves it without treaty arrangements with about 20 countries. It would have to negotiate bilateral treaties to replace the multilateral convention. It is quite a difficult thing to reimpose the prima facie obligation for any one of these Council of Europe parties.

Lord Rowlands: What is the situation with Russia?

Anand Doobay: Russia is a party to the Council of Europe convention, and that is why it has had its prima facie evidence requirement removed.

Lord Brown of Eaton-under-Heywood: There is nothing we can do unless, in the Council of Europe, a sufficient number of states are prepared to block Russia's future participation in the treaty.

Anand Doobay: Yes, that is right. The way the courts have tried to deal with this issue is to use the abuse-of-process jurisdiction, because even though there is no requirement to provide prima facie evidence, if the court is concerned that its process might be being abused, it can call for evidence. If it does not receive that evidence, it can draw an adverse inference that it has not received the evidence. For example, in Russian cases, where there has been a concern that the prosecutions are politically motivated and without merit, the courts have been able to consider the evidence about the allegations through the

abuse-of-process jurisdiction, rather than because the country has to provide prima facie evidence.

Lord Brown of Eaton-under-Heywood: That is only if there is a possibility of political thinking behind the prosecution. You cannot ask for evidence just because you are extremely concerned about way trials are proceeding in a particular country.

Anand Doobay: No. You would have to be asking for evidence about the way the trials are proceeding. If your concern is that there is not sufficient evidence or it is improperly motivated or it has been improperly gathered, you can investigate that through the abuse-of-process jurisdiction.

The Chairman: We are all a bit unclear up here. Going back to your recommendation that the category 2 designation should be looked at, it would seem to follow—this is just so that we are all clear—from what has been said that any country that is a signatory to the European Convention on Extradition could only be reviewed in the context of the convention as a whole and the country's membership of the Council of Europe. However, there are certain bilateral individual agreements, some of which are long-standing. They could be reviewed on a case-by-case basis.

Sir Scott Baker: Yes.

The Chairman: There is also the London agreement? Is it called that? It is a multilateral Commonwealth agreement. You would then have to review that, would you not?

Sir Scott Baker: Basically, it is the treaties underlying the arrangements that are not as transparent as they might be.

Anand Doobay: The problem is that, when you review the designations, there is a limit to what you can do when you are reviewing the designations.

The Chairman: You mean once you have reviewed them.

Anand Doobay: You are reviewing the designation of a country like Russia, which is a party to the Council of Europe convention. What you cannot do is say, “We are going to impose a prima facie evidence requirement on you, because you have behaved badly”, because we do not have the ability to do that without withdrawing from the convention. What you can do as a result of your review is probably only say, “Diplomatically, this is unacceptable. We need you to stop doing it.” There is, practically, a limit to what you can do.

The Chairman: The wiggle room we have is that under other aspects, such as abuse-of-process procedures and things, there is both an inherent power in the court and, possibly, a forum bar provision that would enable you to mitigate the process, even if you cannot deal with the evidential requirements. Is that right?

Sir Scott Baker: I am less sure it would be the forum bar that would be used than the European Convention on Human Rights.

Q18 The Chairman: Can I ask a question that has puzzled me about all this? We tend to talk about the United States, Canada, Australia, New Zealand and South Africa in one breath, yet nobody ever talks about the last four. They just come in, because they are thought to be “good countries”.

Sir Scott Baker: Okay people.

The Chairman: Is that right?

Anand Doobay: When the 2003 act was coming in, the US was added because the treaty had already been signed and that is what the treaty says. Australia, Canada and New Zealand were proposed by the UK Government at the time on the basis of, “We allow all these other people who are parties to the European convention not to have to do this. Look at them: surely we trust Australia, Canada and New Zealand.”

The Chairman: They are not non-state members. They are just—

Anand Doobay: They are countries we have had long-standing close extradition arrangements with, which are members of the Commonwealth. We have the same level of trust in them as we do in all of these Council of Europe convention party members.

Baroness Wilcox: I assume we are talking about common law. That is what we are talking about, is it not, or have I got lost along the way?

Anand Doobay: No, it is common law.

Baroness Wilcox: That seems to me to be the underlying point.

The Chairman: It may make us more confident in what they are doing. We may or may not be right in thinking that.

Lord Brown of Eaton-under-Heywood: Not all commonlaw countries have a designation that allows them to escape the prima facie case requirement.

Anand Doobay: That is right. I cannot remember the exact wording, but in the review it was proposed on the basis that they were long-standing Commonwealth partners. Essentially, the rationale was, "If we do not require it from Azerbaijan, why do we require it from Canada?"

Baroness Jay of Paddington: Could I make the general observation that this precisely illustrates the political and diplomatic context for all this, which is what we are concerned about with the United States?

Sir Scott Baker: The treaty with the United States was negotiated without the public having any real idea of what was going on. That is the complaint, in a sense: a lack of transparency, which leads to the designation.

The Chairman: I have just been told by those who advise me that in the case of Canada we do not demand prima facie evidence from them, but they demand prima facie evidence from us. Is that right?

Sir Scott Baker: It is news to me.

Anand Doobay: The UK does not insist on reciprocity as a policy position, so it does not require the same from other countries as we give to them.

The Chairman: There is one final point, if I might, on this general topic. When there are special extradition arrangements, in general did the way it all worked work in a way that safeguarded those requested properly? It is cases outside the general scheme.

Sir Scott Baker: These are cases where there is a memorandum of understanding reached with the requesting country.

The Chairman: Yes, or some other convention.

Sir Scott Baker: The Secretary of State then certifies that the case is dealt with under part 2. We have the fallback of the European Convention on Human Rights, however, and all of the other bars to extradition. I do not have any real problem here.

Anand Doobay: The significant stage is the Secretary of State deciding which countries to enter into discussions with about this, because there is no obligation to do it for the ad hoc arrangements. It is a decision for a particular individual in a particular case whether to have this discussion. The UK is probably quite circumspect as to whom it speaks to about these cases, because there has only been one so far, in Rwanda, and in that case, in fact, the request did not succeed. There has been another request now brought, but the first request did not succeed.

The focus has to be on the Government's decision to engage in a discussion to draw up a memorandum of understanding to make sure it only does so in appropriate cases and also to make sure the memorandum of understanding has sufficient protections within it. Once that has happened, you go into a normal extradition process, where the person concerned

has the ability to raise all the ordinary challenges and there is a prime facie evidence requirement for those countries that have these special extradition arrangements.

The only part we should really focus on and be concerned about is the bit at the beginning: who do we talk to about these and what exactly does the memorandum of understanding have in it?

The Chairman: That is helpful. Thank you very much.

Q19 Lord Henley: Over the years, it seems that the Home Secretary—as Secretary of State—has given up a lot of his or her discretion on a great deal of matters. I am grateful for the “history” section in your report, which was very enlightening on that. However, more importantly, in very recent years, particularly after she used it in McKinnon, she has now given up her discretion on making a decision on human rights as a bar to extradition. I would interested to know what you think the long-term effects of that will be and whether it might not be more appropriate that matters of this sort were decided by a politician, rather than by the courts.

Sir Scott Baker: This was a recommendation that was, to my mind, a very important one. It was critical in improving the extradition arrangements. What will it do? It will simply take out one layer from the extradition process, because whereas the previous position was that the Secretary of State had human-rights issues to consider right at the end of the case, when it had been through the courts, she made a decision that X, Y or Z should be extradited and should go and then it goes back to the courts and the decision is reviewed by the courts, which is, to my mind, totally unsatisfactory. The courts deal with the situation. They have to look at the human rights bar. They deal with it up to the moment that the judge gives judgment. This is simply to deal with situations that arise after the matter has been through the courts for hopefully the final time. The courts have a way of dealing with these

situations in civil cases where, for example, some completely unforeseen event occurs after the court has given judgment. There is the case of Taylor and Lawrence, which gives an opportunity, in very restricted circumstances, to go back to the court for it to reconsider the position.

Whatever one's views about the McKinnon case, the one point nobody could really disagree about is that it took far, far, far too long before a final decision was made. This recommendation is designed to speed up the process. It is also consistent with the way that extradition has been moving over past years. Whereas it started by being an entirely political decision, it has now moved much more into the courts. These are matters that can really be dealt with judicially with relevant provisions in the appropriate statute. In this recommendation, we are moving matters one stage down further down a line that has already been moving quite a way in that direction.

Lord Henley: It speeds up the process, but the Home Secretary is left in an almost Pontius Pilate-like position where she can only wash her hands.

Sir Scott Baker: That is probably a very good thing from her point of view, because she then does not have a desperately difficult decision to make. "What on earth do I do?" She does not have to be guided by political considerations; it is trying to take the politics out of it at that stage.

Anand Doobay: I wonder if I can also focus on what the Home Secretary is doing, because she does not have discretion. She is looking at whether there is a risk a person's human rights will be violated. She is essentially making a judicial decision as to whether or not there is sufficient evidence presented to her to suggest that the person's human rights will be violated and, therefore, she should not order extradition. The problem has always been that, even though that is the process she is supposed to be undertaking, many people

assume that she actually takes into account political considerations, and that they form part of that decision-making process. That, however, is not what is supposed to be happening.

Either we have to change the process explicitly to allow for what we used to have, which is that the Home Secretary can make any decision they want to and take into account any factors they want to, including political factors, or we have to have a process that is simply about assessing whether or not there is a risk of human rights being violated. We tried to make the system we have, looking just at human rights, go back to its original purpose, which is that the courts assess whether or not there is a risk of that happening.

Lord Rowlands: Organisations like Liberty want the Home Secretary back into the process.

Sir Scott Baker: Liberty were out on a limb on quite a few of their representations to us, not least on prima facie evidence, which they wanted back across the board. This was very largely driven by Shami Chakrabarti, who feels very strongly about it. However, we had an awful lot of evidence the other way. The evidence was overwhelmingly in favour of taking away the Secretary of State's discretion on human rights matters, in so far as it can be described as a discretion.

Anand Doobay: I cannot think of anyone other than Liberty who wanted to bring back in a political element in the decision-making, because many people thought that that had been a wholly improper way to carry out the extradition process, and that, actually, political considerations should not come into it. I appreciate that that is a point of view, but it was not one that was strongly heard when we were carrying out the review.

Lord Brown of Eaton-under-Heywood: Liberty's witness sought to rationalise the desire to reintroduce the Secretary of State's final say on the basis that there would be cases where there was a lot of confidential, secret knowledge about what is going on in some particular

country that would be impossible or, at any rate, extremely difficult to get before a court on a final human rights challenge.

Anand Doobay: We considered that, because we assumed that the courts deal with these situations ordinarily all the time in terms of confidential—

Lord Brown of Eaton-under-Heywood: I am not saying I agree with it, but that is the way they put it. That is something you did actually have regard to.

Anand Doobay: Yes.

Q20 Baroness Hamwee: You mention the training of lawyers and international communication between judges towards the end of your report. Listening to you comment about the very different systems, particularly in Poland, I wonder if this is desirable but unachievable. Did you have any specific ideas that you felt perhaps were beyond the brief?

Sir Scott Baker: The Government's view on this was that this was a matter for the legal profession and the judiciary.

Baroness Hamwee: Which you said yourselves.

Sir Scott Baker: Any talking is better than no talking in this territory. One only has to look at the degree of communication that goes on between the legal systems of England, Scotland, Northern Ireland and, indeed, southern Ireland. If one could only achieve something like that on a Europe-wide basis, a lot of these problems might go away. There are obvious difficulties such as culture, language and cost. However, I was wondering what steps might be taken now. I see there is a new chairwoman of what used to be called the Judicial Studies Board. Lady Justice Rafferty has just been appointed to that. I do not see why this is not something they could take on board and see what can be arranged. The European Commission also ought to be pushed to do something in this direction.

Baroness Hamwee: Did you take evidence on this area? I should have looked to check.

Sir Scott Baker: Do you know?

Anand Doobay: Yes, we took evidence on the training issue. Most people agreed that it would be a sensible thing to do. The judges certainly thought it would be useful to have practitioners who were expert in the area, who were able to help them more and who would help cases be dealt with more efficiently. We were recommending that legal aid not be means-tested. As a quid pro quo, we thought it was fair enough that lawyers who wanted to engage in that type of work should therefore be adequately trained so that they were experts in the area.

At a European level, the Parliament earlier this year was still calling for the Commission to set up a European arrest warrant judicial network and a network of defence lawyers, and to fund it adequately at Commission level. That is probably the level at which we need to do it, because, while the UK has made bilateral efforts to bring some Polish judges to the UK, it requires more of a co-ordinated and systematic approach to have regular communication and communication channels to have any real impact.

Q21 Lord Rowlands: I read the interesting exchange the panel had with Lord Justice Thomas. He seemed to be very pessimistic in the context of the European arrest warrant. He said at one point, “This all presupposes a kind of mutual confidence and common standards that actually do not exist”. Later on he said, “We have mechanisms put in place without unfortunately having brought the judges up to speed”. You did not share that pessimism at that time, I gather.

Sir Scott Baker: He is still very keen to achieve the greater degree of co-operation, but he foresaw the difficulties, because he had quite a lot of dealings with various individuals in different parts of Europe.

Anand Doobay: Building trust is still an issue we are facing. We are talking about training in communication, which is one thing, but engendering trust so that judges in one member state believe that another member state has the same standards and the same processes and the same fair-trial procedures is a very different thing. We still have a long way to go to achieve that at EU level. In terms of conditions of detention, for example, there are findings before the European Convention on Human Rights that Italy is in systemic violation of its prison conditions, which means that extraditions are being refused to Italy from the UK. That is unlikely to engender trust between the UK judges and Italy. There are significant issues about the systems within individual member states that would need to be dealt with.

Lord Rowlands: In finding 7, you said an effective European arrest warrant system “is likely to bring in its wake improvements in the administration of justice in the single European area”. Are there any signs of this happening?

Sir Scott Baker: Not enough.

Anand Doobay: There are some very concerning things that are not happening. As well as the European arrest warrant framework decision, there were a number of other mutual recognition measures that were supposed to go with it. For example, they would make the system of transferring fines easier between member states; they would make the system of transferring probation sentences easier between member states; and, really significantly, there was the system of Eurobail, which would mean you could be bailed from one country to your home country, subject to conditions.

The problem is, while the EAW has been implemented effectively and with a great deal of zeal in most member states and is being very well used, many of these other measures have either not been implemented at all or, if they have been implemented, are simply not being used, which is partly about lack of familiarity—i.e. the people at the coalface, dealing with

it—and is partly about a lack of willpower. If you look at the European supervision order, for example, there are still 16 member states that have not implemented it even though the deadline for implementation was the end of 2012, and the UK is one of them.

It is fine to talk about the European arrest warrant, but if you do not have these other measures that are supposed to complement it, you end up with a system where everyone resorts, as a measure of first resort, to the European arrest warrant, rather than trying other alternatives that are less coercive. You have somebody who is sentenced to probation, but their probation sentence cannot be transferred, so they fail to do it; they then have a sentence of custody imposed and then they have a European arrest warrant imposed. There is still a great deal to be achieved at EU level in terms of ensuring that these other measures are actually implemented effectively and used.

Q22 The Chairman: Are there any measures that we are not proposing to opt back in to? As I gather, we are likely, according to the newspapers, to opt back in to the 35 measures or whatever it is. Are there any measures that we have declined to opt back in to that you think are crucial to the working of this general area of the law?

Anand Doobay: Yes, there is the framework decision on probation and alternative sanctions, which we have indicated we are not minded to opt back in to. There has been a lot of criticism of that decision by the House of Commons Justice Committee and lots of other committees have reported that this is not a sensible thing to do. My understanding, however, is that the Government's current position is that they are not minded to opt back into that.

The example I have just given you explains why that is difficult: because the idea is to make these things transportable. If someone is prosecuted in Italy but they do not live in Italy and they are sentenced to probation, ordinarily they would want to go back to the UK, where

they live, to carry out their probation sentence. Otherwise, how do they have somewhere to live? How do they have a job? If you do not have this working effectively, they will not be able to do that. If they do not perform their probation, they will have a sentence of custody imposed and a European arrest warrant issued.

The Chairman: The other thought that occurred to me—we were talking about this in the context of European/UK relationships—was that we have also spent a lot of time talking about US/UK problems. Are you happy that this kind of dialogue that is going on between ourselves and the various elements involved in the US is moving in the right direction, as it were?

Sir Scott Baker: It is difficult to know precisely what has been happening since the McKinnon case. I do not know, Anand, if you have any more knowledge than I have, but the American authorities were certainly receptive, helpful and keen to make things work

Anand Doobay: There is a great deal of dialogue between the UK and the US, not least because there are many cases that involve both countries: for example, the LIBOR cases and the foreign-currency trading cases. There are all sorts of cases that involve co-operation between the two countries. I am not sure at what level the communication rises above the case. There are obviously very specific communications about these cases. I am not sure whether there is a broader discussion going on about the overall extradition relationship.

The Chairman: We are getting to the end of the questions we had prepared for you, but I would like to ask the Members of the Committee if there is anything anybody else would like to ask. Are there any points you would like to raise?

Q23 Lord Brown of Eaton-under-Heywood: I just wondered about the new provisions 12(a) and 21(b), the provisions about an absence of a prosecution decision and a request for

temporary transfer. In practice, are they having any impact? I take it they are now in force.

Are they in force?

Anand Doobay: They are not in force.

Lord Brown of Eaton-under-Heywood: They are not yet in force. Forgive me. Are they promising advantages for the future or not?

Anand Doobay: I certainly think about the temporary transfer that it will depend on how much it is used in practice. It is a very good idea. We thought in the report that the ideal scenario would be that in the pre-trial phase you would remain on bail in your home country, making your appearances by video link and then only attending the trial when you needed to in person. This mechanism of temporary transfer would give you that ability, albeit within the European arrest warrant framework. However, again, my concern is whether, in reality, it will be used in practice. It requires the consent of the issuing member state. It is whether, in practice, people will actually make use of it. I am sure many defendants would wish to use it, but it is whether the other country will agree to it.

Sir Scott Baker: Again, it is a question of education, if we can achieve it. The bottom line with the EAW is that it would be a great pity if the baby was flushed out with the bathwater. a lot of progress could be made.

The Chairman: Finally, before formally thanking you both, is there anything either of you would like to say to us that you think it is important we hear that we have not touched on?

Sir Scott Baker: We have covered most things.

The Chairman: All I can say to both of you is thank you very, very much indeed. It has been, so to speak, personally very helpful indeed. Thank you.

Sir Scott Baker: We look forward to reading your report; we hope it is not as long as ours.

The Chairman: So do I.