



HOUSE OF LORDS

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The Select Committee on Extradition Law

Inquiry on

EXTRADITION LAW

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10.40 am

Witnesses: Jago Russell, Jacqueline Minor and Professor John R Spencer

USE OF THE TRANSCRIPT

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Members present

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

Examination of Witnesses

Jago Russell, Chief Executive, Fair Trials International, **Jacqueline Minor**, Head of Representation, London Office of the European Commission, and **Professor John R Spencer**, Cambridge University

Q24 The Chairman: Good morning, and on behalf of the Committee I extend a warm welcome to Jago Russell, from Fair Trials International; Jacqueline Minor, who is head of representation for the European Commission; and Professor John Spencer, from the University of Cambridge. We are very pleased that you are here with us. As I explained earlier, we are trying to identify some of the important themes for our inquiry, so you can respond in that way. You have kindly let us see CVs, so we know who you are. From the point of view of the Committee, I should say, I am advised we do not have any special conflicts of interests or declarations to make in front of this hearing. Before we get into the questioning, could each of you identify yourself for the benefit of the record, and then we will proceed into the hearing proper? Start at whichever end you like.

Jacqueline Minor: My name is Jacqueline Minor; I am the Head of the Commission Representation here in the United Kingdom.

Professor Spencer: My name is John Spencer; I am a professor emeritus, University of Cambridge.

Jago Russell: I am Jago Russell, chief executive of Fair Trials International.

The Chairman: Thank you very much for that. Of course, one of the criticisms we have heard quite widely about the European arrest warrant system is it assumes that, although there are different judicial systems across the European Union, equivalent standards of justice exist across it, yet this does not seem to be the case. What steps do you think either the United Kingdom or the Commission might take to improve things? I do not know which of you would like to start.

Jago Russell: That is a key point—10 years of operation of the arrest warrant has very much served to show up the different standards of criminal justice across Europe, with significant human implications. I know we are tight on time, but I will very happily send you updated case studies of some of the clients we have worked with whose cases demonstrate the different standards of justice across Europe. There are two solutions to that, and Fair Trials International's view is not that the solution is for the UK to withdraw from the European arrest warrant altogether. There are two solutions; one is to create a sound basis for the mutual trust that is required for a mutual recognition measure like the European arrest warrant, so more work by the European Union to create minimum defence rights standards across the EU, and crucially to enforce those standards. We now have three directives on key aspects of the right to a fair trial, but we have a very long way to go before we can be confident that those standards are being met. That is the first thing: build a sound basis.

The Chairman: In other words, amend and extend the existing directives.

Jago Russell: Absolutely, and there are three more directives on the table now. It is disappointing that the UK is not engaging constructively in negotiations on those directives,

because my view as a British lawyer is we have a lot of constructive things we could be offering in those negotiations, so that is very disappointing. However, I also think it needs to go a bit further, so at the moment the EU institutions are not proposing any measures in relation to pre-trial detention. One of the key issues arising as part of the arrest warrant is how long people are being forced to wait in prison pending their trial following extradition. I think we need more minimum defence rights standards across Europe.

Then I think we also need to inject mutual recognition with a bit of realism. The reality is that, even with these minimum standards, there will always be cases where there is a serious risk of human rights violations, or where somebody is being sought for extradition where there is a real risk their rights have already been violated. For that reason, it is absolutely crucial there is a clear back-stop power to refuse extradition where it would result in human rights violations. The UK has that power now. Sadly, for a very long time the UK courts were incredibly restrictive in ever applying that, effectively saying that there needs to be some kind of breakdown in the rule of law in the requesting country before they would step in and stop extradition. However, we need those powers, and all the EU member states should have a power to refuse extradition on human rights grounds. Crucially, the arrest warrant framework decision should be amended, or supplemented, to make it absolutely clear that this concept of mutual recognition does not trump respect for basic human rights.

Jacqueline Minor: I would agree with much of what Mr Russell has just said. The difficulties of applying a measure based on mutual recognition are not unique to the area of justice; it is a common problem in the enforcement of European rules. You need both the carrot and the stick, if I can put it that way. You need an active and vigorous policy of enforcement, which will become easier for the Commission after these measures have been Lisbonised at the end of this year. However, you also need supportive and flanking measures, in terms of

exchange of good practice, training of judges and the circulation of advisory guidelines. The Commission attempts to do all of those things as well to inculcate a kind of common understanding of the rules and common practice in their application.

Just on the human rights point—the last point that was made—the Commission’s view is that there is inherent not only in the European arrest warrant framework decision itself but also in European law as a matter of principle a respect for human rights. In cases of breaches of fundamental rights, the executing authority would be entitled to refuse to execute an arrest warrant.

Professor Spencer: I strongly agree with the first point that Jago Russell made. The best way the UK could help to improve matters would be to apply its muscle to push ahead with further EU measures to try to improve defence rights. The UK is in a strong position to do this. We used to make a mess of pre-trial matters in this country, until after the Police and Criminal Evidence Act. With the safeguards of the Police and Criminal Evidence Act, I think we lead Europe in the sane and sensible treatment of suspects during the police investigation stage. We also have a long and creditable history of not detaining people for unreasonable periods pre-trial. We have the high moral ground on these matters, and it is most unlikely that any EU measures would damage our system. I think it is a great shame that the UK, first of all, halted the previous move towards EU defence rights back in 2006, and that we have now gone cool on them, after initially welcoming the Road Map several years ago.

Q25 The Chairman: Jacqueline Minor, is it the Commission’s view that there are significant shortcomings in the way the existing system works that need to be addressed?

Jacqueline Minor: The Commission, I think—looking at this from the perspective of Europe as a whole—believes that on balance the European arrest warrant can be considered a

success. That does not mean to say there are not improvements to be made in it. Up until the end of last year, we think over 100,000 arrest warrants had been issued, which shows that it is now part of the armoury of criminal enforcement and criminal procedural law in the European Union. But we do acknowledge that a lot of work has gone into the scrutiny of its operation in practice; we are particularly paying attention to the report issued by the European Parliament earlier this year, which was drafted under the leadership of Baroness Ludford, the rapporteur. However, the current feeling in the Commission—and of course the Commission is coming to the end of its mandate, so this may change with a new Commission—is that it is not appropriate at present to reopen the legal measure, but to seek to make it more effective by flanking and complementary measures, including the rules on procedural law but also including non-legislative actions.

Lord Brown of Eaton-under-Heywood: Can I follow up on the point about the whether the courts are supposed to be monitoring the Human Rights Act? What would the Commission think if the courts started saying of various member states' legal systems, "We have not got confidence"? The whole scheme is based on mutual trust and confidence. "We are going to examine in detail the position in wherever"—Lithuania, Greece, whatever—"and even though these countries are subject to the Strasbourg jurisdiction, we are going to second guess as to whether we think there would be a violation of Article 6 on trial if we extradite to these countries". Is that something the Commission would tolerate or welcome? How would it feel about that?

Jacqueline Minor: I think the Commission's view would be that the examination had to take account of all the circumstances of the case. It would have to be looked at in the context of the particular demand; the individual's circumstances; the reason why the arrest warrant had been issued; and the likely course of either the investigation or the trial subsequently.

The more general question of a persistent refusal to execute arrest warrants coming from individual member states would certainly attract the attention of the Commission, and, according to the normal rules of European law, might be the basis on which infringement proceedings could be opened. I cannot prejudge the investigation.

Lord Brown of Eaton-under-Heywood: Hitherto, we have not been able to take infringement proceedings. The Commission has not been able to, but if we opt back in, it will be able to. Is that the position?

Jacqueline Minor: Once all of the justice and home affairs measures become part of the normal body of European Law, the Commission will be able to take infringement proceedings against those member states who have participated in those measures, so for measures which the UK opts in to, yes.

Jago Russell: Very briefly to come back on that point, my feeling is that the UK courts have historically been far too concerned about a very strong response to refusing extradition on human rights grounds. You have the Mitting decision back in 2010, when Mr Justice Mitting said, “When prison conditions in a convention category 1 state are raised as an obstacle to extradition, the judge need not, save in wholly extraordinary circumstances, examine the question at all”. The idea was that it was completely beyond the realms of British courts to examine questions where there is another ECHR state involved. That seems to me to be completely inappropriate, particularly because the Commission has itself now recognised that the mutual recognition measures such as the arrest warrant in fact require minimum defence rights standards to be created. By creating these new directives, the Commission has demonstrated its belief that there is a need to raise minimum defence right standards, and I think that really points in the direction that the courts ought to be more robust in questioning human rights, even in other EU member states.

Q26 Lord Rowlands: Much has been made of the European Parliament's report. What do you think of those recommendations? Would you support them? Do you think they answer the problem?

Jago Russell: We support them very much. They do not go quite as far as we would like in some regards. The one particular thing I would point out is that Baroness Ludford's report suggested there should be a proportionality test, but only in the issuing country. In my view there also needs to be a back-stop proportionality test in the executing country, because individual circumstances can change and you could have a problem where countries are rubber-stamping or ticking the proportionality box, but cases are nevertheless coming through to the British courts, where extradition would in fact be disproportionate. We would have liked her to go slightly further on that, but in general we are very supportive.

Jacqueline Minor: I think the Commission, as I said, acknowledges the expertise and all the work that went into that report. I think we accept some of its arguments, but not all of them. On proportionality, for example, the Commission does not feel the proportionality test either in the issuing state or in the executing state would be a desirable amendment to the framework position at this stage. That is not to say we do not think proportionality in the application of the European arrest warrant is a good thing; we would encourage the use of a proportionality test by the authority in the issuing state at all times. However, as I have said, the feeling in the Commission is that this is a relatively new measure; it is yet to have reached the stage of maturity when it would be desirable to reopen it and to amend it.

Lord Rowlands: I wondered also whether we should remind ourselves where we were before the European arrest warrant: enormous delays in justice took place, and I do not see any emphasis on concerns of that kind. Would any of these proposals in fact increase the

length of time and lead to the kind of lengthening of periods when no decisions were made, like we had before the arrest warrant was introduced?

Jago Russell: We are very mindful of those concerns at Fair Trials, so we certainly do not think it is realistic or appropriate to try to return to decades-old rules, where you used to have prima facie test cases, et cetera. We are a very long way from that. Some additional safeguards are needed. In some cases, that will require a little bit of additional judicial scrutiny, which may take some more time. However, all of the reform proposals we have been pushing for are designed to be operable within a fast and effective extradition system. They are not at all designed to slow down the process.

Lord Henley: Going back to what you said, Mr Russell, in your opening remarks, you offered an update on case studies. I note that in the pamphlet that you provided for the Committee—Fair Trials International, *Justice in Europe: the Arrest Warrant*—you provide two cases but you do not give a date to either. Will you be able to give dates to any further case studies that you put before us? It is very important to see how it has changed over the years. The Committee would find that rather useful.

Jago Russell: Yes, of course.

Q27 Baroness Jay of Paddington: This really goes back to the discussion with Lord Rowlands about Baroness Ludford's report and the wider implications of that. In general, do people who are requested in the United Kingdom have sufficient access under the European arrest warrant to diplomatic assistance and, in obvious cases, translation services et cetera?

Jacqueline Minor: Do you mean those who are requested where the United Kingdom is an executing state?

Baroness Jay of Paddington: Yes, I am sorry; I mean those requested from the United Kingdom.

Jacqueline Minor: Yes. On balance, the rights and facilities made available to requested persons are adequate in the United Kingdom.

Baroness Jay of Paddington: Are there any other comments on that?

Jago Russell: In terms of people being extradited from the United Kingdom to other countries, do they get treated fairly at the other end?

Baroness Jay of Paddington: No, it is at both ends. For example, we heard from Sir Scott Baker last week that he was concerned that some of his suggestions, of some years ago now, about extending free legal aid, et cetera, had not been adopted. I wondered if this had any relevance to the area we are talking about this morning.

Jago Russell: Absolutely. On the free legal aid point, we were entirely in agreement with Sir Scott Baker's recommendations there. We have seen numerous cases—and see them week in, week out at Fair Trials—where people have been represented by duty solicitors or had very poor representation at first hearings, and where the substantive arguments are really only raised at appeal. That is a real concern for us, because many of these people are very vulnerable. Many of them find it incredibly difficult to get the information together to satisfy a means test. Lots of these people have not lived in the United Kingdom for many years; they do not have bank accounts they can easily access; a lot of them have relatively disordered lives. The requirement for a means test in legal aid is a real problem. It is disappointing that the Government have not implemented that.

Baroness Jay of Paddington: Is that specifically a concern under the EAW, as well as more generally?

Jago Russell: It is specifically a concern under the EAW because of the timeframes. Because these things happen so very quickly, it is even more important to make sure people have

proper, expert representation at the magistrates' court to try to reduce the number of cases that end up having to go to appeal.

Q28 Lord Hart of Chilton: Have the real problems over the lack of interpreters a year or so back been remedied now?

Jago Russell: I do not have an updated view on that. I was aware of cases a year or so back where there were adjournments as a result of a lack of interpreting in magistrates' courts hearings in extradition cases, but I do not know what the current situation is.

The Chairman: Professor Spencer, you have been very quiet; is there anything you would like to say, having heard the discussion?

Professor Spencer: Your advice was to be succinct, so I will not talk when I have nothing to say, Lord Chairman.

The Chairman: I wish everybody felt like that. We will now move on. One of the characteristics of the discussion we have had so far, which has been extremely helpful, seems to be that the order of the questions that we have has gone completely all over the place, which shows a shortcoming on the part of the Chairman. What I propose is to try to edit the questions as we go along. I hope you will forgive me, members of the Committee. I would like now to have Lord Brown.

Q29 Lord Brown of Eaton-under-Heywood: This is a group of questions on proportionality, which we have touched on already. As I understand it, there are now two new sections¹ not yet in force but passed in the Christmas tree Bill² that became the Anti-social Behaviour, Crime and Policing Act of this year. Those do introduce, do they not, a measure of domestic rights to decline to extradite on requests from other EU countries because of

¹ New sections of the Extradition Act 2003

² A "Christmas tree Bill" is a term used to describe a large multi-topic Bill for which a wide range of provisions can be attached, like baubles hung on a Christmas tree.

proportionality? Do you welcome those provisions? Will they meet the problems? I do not know who might wish to start by having a look at that.

Jacqueline Minor: As I said, the Commission's view is that a proportionality test in the executing state is inappropriate and not compassed by the framework decision, because it would dilute the principle of mutual recognition on which the framework decision is based. Having said that, we recognise that criticisms in relation to practice in the past certainly related to the disproportionate use of requests for arrest. That has been addressed, the Commission feels, by better training, advice and guidance on when it is appropriate to issue an arrest warrant. We know that member states other than the United Kingdom have made considerable efforts to pass that message to their judiciary and to their issuing authorities. We feel that the problem is much less significant than it was a few years ago.

The other answer might well be that the decision makes provision for consultations between the issuing authority and the executing authority. If the executing authority in this country felt that a warrant had been issued where it was disproportionate to the facts of the case, it could make that argument back to the issuing authority, which might then choose to withdraw the warrant. There is provision for a degree of iteration between the two authorities.

Lord Brown of Eaton-under-Heywood: I should perhaps have identified the two sections. It is 21A, which is the primary obligation on the court to take it into account before making the order. The supplementary is Subsection 2(7A), which for the first time introduces the power in the National Crime Agency, formerly SOCA, in effect not even to take it to court if it is in their view likely to be eventually thrown out on proportionality grounds. That is how the scheme is now suggested. You say, however, that the Commission would not like that.

Jacqueline Minor: I do not want to answer a hypothetical question. The provision is not yet in force and at present, of course, the Commission does not have infringement powers in relation to the framework decision. It would certainly be a provision the Commission would look at with interest, I would say.

The Chairman: Can I follow up on this one? Once this legislation is Lisbonised, the provisions of the EU Charter of Fundamental Rights will cut in, so the capacity of the court—forget about the administration—to exercise its judgment over matters of proportionality would seem to me to be legitimate at both ends of the process. Looking at that as a matter of principle, would you accept that that would be right?

Jacqueline Minor: By “the court”, what do you mean?

The Chairman: On the assumption that this country opts back in, it then becomes justiciable.

Jacqueline Minor: Yes.

The Chairman: The treaty provisions on proportionality apply generally. In addition, it seems to me that the provisions in the EU Charter of Fundamental Rights come into play. It seems to me that the consequence of that, from the perspective of the defendant, is that it is likely that UK courts—or, for that matter, any other member state’s courts—dealing with a European arrest warrant in fact have more wriggle room to deal with these matters within the framework of the law as it currently would be.

Jacqueline Minor: I would follow you on the point of fundamental rights, because fundamental rights are a principle of law common to the legal traditions of the member states. As I said earlier, the Commission accepts that an abuse or infringement of fundamental rights would be a reason, in exceptional cases, to refuse execution of an arrest warrant. On the other hand, in my view, proportionality—and this is a personal view—is inculcated into the measure itself. Proportionality is something legislators have to consider

before they adopt a regulation, a directive or, in this case, a framework decision. Although it would be a principle used by the European Court in the interpretation of a measure, it would not as such be an additional element to be applied by national authorities in their application of the measure. That would normally be taken into account in the formulation of the rules themselves.

The Chairman: Professor Spencer, do you have any thoughts on that? It sounds like a “University of Cambridge” question.

Professor Spencer: As a matter of high principle, I am in favour in there being a power in the executing state to stop it on grounds of disproportionality. As an aside, a German court managed to say that the German courts could do exactly that. We published the decision in the *Criminal Law Review*. I could send the Committee a copy of it, if the members would be interested. As a matter of practice, I am slightly worried, because I have heard mutterings from friends in the judiciary about how, when this comes in, cases will slow down and they will have even more to do, and we will have delays. There will be unwanted side effects.

A third thought I have about this is: is it really compatible with European law and the framework decision under which this operates? Different views can be taken on this matter. I foresee that it could eventually result in the European Court of Justice in Luxembourg having to make a ruling on the matter.

Q30 Lord Rowlands: Is the problem not really a Polish one? When one looks at the figures, there are around 800 Polish cases; the next is Lithuania on about 120 cases. Could we not address the Polish question and thereby the proportionality issue would actually find its own feet?

Professor Spencer: I discussed this once with a Polish magistrate, who said, “Part of the trouble is we do not have any other means of getting co-operation out of other member

states in order to enforce justice in relatively minor matters. We once tried to get summonses from our courts served by the UK authorities on Poles who migrated to this country. They said, 'No, we are sorry. We have too much to do. We will only intervene if there is a European arrest warrant.'" What we badly need, as I have said in other contexts, is a system for dealing across borders not only with grave and organised crime but with disorganised crime on a small scale. There do exist some EU measures—although they are not much respected and not much implemented in practice—for the trans-border enforcement of fines, which tend to be the sort of thing involved in small cases and so forth.

The Chairman: I can speak to that from personal experience, having received a parking fine in Italy.

Professor Spencer: I am sorry to embarrass you, Lord Chairman.

The Chairman: No, it was fine; I managed to get off.

Professor Spencer: The Polish problem is partly that Poland and some other countries have a principle of mandatory prosecution, and prosecutors think they have no alternative but to proceed in a case where they have the elements of an offence before them. However, it is also partly because they are faced with the difficulty of a failure of justice or using a disproportionate measure to enforce justice. A lot of these problems could be resolved by having further, lower-level European measures to deal with trans-border, small-scale crime.

Lord Mackay of Drumadoon: I have a small point. There was a suggestion made that, whoever was representing the country seeking the extradition of an individual, if they had concerns about proportionality, they could raise it. Have I understood what was said correctly?

Jacqueline Minor: What I said was that the issuing country should consider proportionality before it issues an arrest warrant.

Lord Mackay of Drumadoon: Yes. However, having issued an arrest warrant and it being received by the people who have to seek to enforce it before the courts, the latter could raise it with the issuing authority.

Jacqueline Minor: Exactly, yes.

Lord Mackay of Drumadoon: I raise that because—you may have worked this out from my accent—I am Scottish, and in Scotland the party that represents the extraditing country is the Lord Advocate, who is in charge of public prosecutions in Scotland. If he has authority to raise it with the issuing country, it is very difficult to understand how the judges who are sitting and listening to him or whoever is appearing on his behalf are in some ways inhibited from doing so. I can speak to having heard, when the court has been expressing some concerns about the management of the case and a judge or judges saying, “Mr So-and-so, we wish this be raised at the highest possible level before the next hearing.” That then falls to the Lord Advocate.

Jago Russell: In practice we see that happen; in practice it does sometimes happen. If you are lucky enough to be able to access a local lawyer in a very controversial case where it seems to be very disproportionate, where the British courts are raising concerns, it does happen that the issuing country is persuaded to withdraw the warrant. From time to time, that does happen. The question for me is how many hours are spent in court and how much is incurred in terms of legal bills before that pragmatic solution is reached. However, it does sometimes happen.

I would hope that is what would happen with the National Crime Agency decision not to authorise a disproportionate warrant would mean that they would revert to the country concerned and say, “What about trying something less serious than a European arrest warrant for this minor case?”

On the amendments, the impact of them should not be overestimated. Most of these minor crimes are actually conviction warrants rather than accusation warrants but the proportionality test only applies to accusation warrants. Most of these cases are suspended sentences that are reinvigorated after somebody leaves the country. It is not going to have an enormous impact. The other thing is that the British police already exercise a lot of sensible discretion when deciding whether or not to seek out and arrest people for these very minor European arrest warrants. They do not go and look for people for every arrest warrant they ever hear of. Most of these minor cases purely come up because somebody gets stopped for speeding or something. There is already a degree of discretion, albeit that it happens at the police level rather than at National Crime Agency level.

The key point for me on the proportionality issue is that we need to see good references to the EU Court. It would be really helpful to get some EU Court guidance on this: does the arrest warrant allow refusal of extraditions where it is disproportionate, or does the arrest warrant require countries to question proportionality before issuing warrants? One of the really sad things about the fact that UK courts have not had the opportunity to refer these kinds of questions to the EU Court is that these questions remain unanswered. There was one opportunity where the Court could have addressed this in a case called Radu. The Commission did not seem that opposed to some consideration of proportionality in its intervention in that case, but the EU Court ducked the question and did not address it. That is what we really need: some guidance from the EU institutions on what is required on proportionality.

Lord Brown of Eaton-under-Heywood: We are not going to get an answer out of the European Court for a couple of years at best, even if it assumes a jurisdiction.

Jago Russell: I do not think that is true. Because there is an urgent procedure where somebody is in detention, it is quite possible for the EU Court to turn around a reference decision very quickly—in a matter of weeks, where somebody is in detention. If you get the right British court referring the right question after 1 December, you could get a really useful decision on this quite quickly.

Q31 Lord Brown of Eaton-under-Heywood: Can I just ask a short supplementary? Should the proportionality test take into account any harm done to the victim? It does not sound to me like a particularly mighty consideration, but is it something that we should have regard to? Under our scheme, only certain matters should be taken into account, as stipulated by the legislation, and not victim harm. Should it be included?

Jago Russell: I would have thought the “seriousness of the offence” criteria would include the level of harm to the victim.

Lord Brown of Eaton-under-Heywood: Yes, exactly.

Lord Empey: I have a quick supplementary. Do you have—perhaps I have missed them somewhere—statistics for the point that Mr Russell made his opening remarks about on-remand situations? Are there statistics that compare equivalent cases here with cases in other jurisdictions, as to how long people will be on remand before their cases are actually heard?

Jago Russell: There is information on what the maximum legal amount is in different EU countries. It varies very significantly in terms of pre-trial—

Lord Empey: I was thinking of the practical outcomes.

Jago Russell: No, we do not have statistics for the practical outcomes. There is the EU Justice Scoreboard. I know it is politically very unpopular in the United Kingdom, but it

already covers civil matters; we would also like to see that kind of EU-level data gathering on criminal justice matters to try to answer questions like how long people are waiting for trial.

Jacqueline Minor: I do not think we have that information, but I will ask my authorities back in Brussels and if we do, I will make it available to you.

Lord Rowlands: There was a figure in the 2006 report that the average was five and a half months.

The Chairman: Do you want to ask anything about parallel measures?

Q32 Lord Mackay of Drumadoon: It is probably a question of seeking factual information and no more than that. There are alternative measures available, such as surrendering for interview or transfer of sentences. Is there any statistical evidence as to how often these are used?

Jacqueline Minor: I am sure there is, but I do not have it in front of me. Again, I will ask.

Lord Mackay of Drumadoon: Do any of you have any practical experience of it being used other than occasionally?

Jago Russell: In terms of alternative measures, one of the alternatives is the European supervision order. Given the casework we do, we would expect to see a lot of use of the European supervision order, but with a network of 150 criminal lawyers in all EU countries, we are not aware of a single example of the European supervision order being used to transfer somebody back to their home country pending trial.

Just last week we had a case of a British lady facing extradition to France, who was tried in absentia. She had actually already co-operated via mutual legal assistance to give evidence to the French police, but instead of issuing a summons through the British Home Office to try to get her to attend her trial, the French authorities decided to go straight ahead, try her in her absence and issue a European arrest warrant. We see this kind of thing quite often. It is

because it is the first tool in the box that judges and prosecutors reach for. It is the easiest thing for them to use. In fact, it would have been much better for her and for the French to have issued a summons so she could have turned up at court in France and defended herself. It is the kind of practical example we see quite often, but I am afraid we do not have any statistics.

Professor Spencer: There is the Green Paper from the Commission, now three or four years old, on pre-trial detention, which I imagine the Committee is well aware of.

Q33 Lord Brown of Eaton-under-Heywood: There are new provisions, not yet in force, under the 2014 Act that touch on this, too, are there not? There are Sections 12A and 21B—one of which, under the heading “absence of prosecution decision”, tries to some extent to combat the risk that people are at a fairly early investigative stage, rather than quite having reached the point of prosecution. Under 21B you can be transferred for questioning only—or something like that. Are they going to address this problem?

Jago Russell: Section 21B(3)(b), if you have it in front of you, is probably the most significant provision in these amendments. It basically allows the court to adjourn hearings while it looks at whether there is another way of advancing the investigation and the prosecution short of extradition. That is the kind of thing we would like to see used in practice much more. This is a very practical question of, “Why have you not tried interviewing this person via video link?” Those kinds of really practical things could avoid some of those cases of people being extradited long before trial.

Jacqueline Minor: The Commission would entirely support that approach. It would encourage every issuing authority to consider alternatives that would be less onerous to the person requested than a European arrest warrant. There is the recently agreed European investigation order, which precisely allows for the taking of evidence by videoconference, for

example, which would enable the person to remain in their country of residence. There is also the European supervision order, because many of the arrest warrants, as you said, Lord Chairman, are issued when a suspended sentence has been passed and the person is not in the country. Therefore they cannot fulfil the conditions of supervision, and consequently an arrest warrant is issued.

The framework decision on probation would enable the supervision of a sentence issued in member state A to take place in this country and, therefore, might avoid the issue of a number of arrest warrants. So there are a number of provisions coming along that are less advanced in their use and their application, with which the judiciary are probably less familiar and which might in some respects alleviate the instinct to reach for the arrest warrant as the first tool in the box.

The Chairman: We are getting towards the end of the time we have. I would like, if I may, to switch the way we are questioning slightly. I will ask Lord Hart if he would put the question about appeals that he wanted to.

Q34 Lord Hart of Chilton: I would like to know how significant the removal of the automatic right of appeal against extradition decisions under the arrest warrant regime is.

Jacqueline Minor: Looked at from certain perspectives, one of the advantages of the European arrest warrant is the speed with which it can be executed. It is a much more rapid and efficient tool of judicial co-operation than, for example, the Council of Europe convention. However, in terms of the right of appeal, you also have to look at the other changes that have been made and are being made to the Extradition Act. The more grounds for resisting the execution of a warrant that are placed into the Act, the more significant the existence or the absence of a right of appeal becomes. The combination of the two is that one offsets the other, to some extent. More grounds are being put into the Act for resisting

the execution of a warrant—but, on the other hand, the automatic right of appeal is being withdrawn.

Lord Hart of Chilton: Do you see that as a quid pro quo?

Jacqueline Minor: In some respects, yes.

Professor Spencer: A real problem with Part 1 of the Extradition Act, as originally enacted, was the strict time limits for exercising such rights of appeal as there are, and there being no possibility for the court to waive non-compliance with them. That was one of the things that was at the root of the Gary Mann case, with which I am sure the Members of this Committee are familiar. Part 1 of the Extradition Act is being amended, as I understand it, to give the court the power to override a non-compliance with a strict time limit. That is to be welcomed—and it should have been in the Act as originally drafted.

Jago Russell: The only thing I would add is that perhaps the impact of the leave to appeal requirement is perhaps not as significant as it might have been, because the Criminal Procedure Rules Committee has decided that it will be applied in a way that means there is an arguable-case test rather than a much more difficult test that we had feared might be applied. It is also not as significant because it has made it clear that there will be the right to an oral hearing if your leave to appeal is refused on the papers. We opposed the introduction of a leave requirement, but the way it is going to be applied in practice seems to suggest that it is not going to be as considerable an issue as we had feared.

Lord Brown of Eaton-under-Heywood: However, it does link to a degree with the other issue as to whether there should be legal aid, because if there is no legal aid, that creates its own difficulties in terms of exercising this new requirement to get leave.

Jago Russell: Yes, there are numerous cases that demonstrate that. There is the case of a Polish man whose extradition was refused on Article 8 grounds on appeal, because it was

discovered that he was the sole carer for a very severely disabled daughter. Actually, the duty solicitor, who was not an expert in extradition, had not even noted that fact. That really important issue had not been raised in the first instance hearing. If you fix the legal aid point and make sure that people get good representation up front, hopefully those kinds of cases would not need to be resolved on appeal.

Q35 Lord Henley: Since you used the word “lisbonised” earlier, I think I can use it. I would very quickly ask, post-lisbonification, as it were, once the EAW system has been brought in, what scope will there be for the UK Parliament to make any changes or improvements to Part 1 of the Act, or, after that moment, will we not have much scope?

Professor Spencer: At present, the UK is obliged to conform to the directive and other parts of EU law in this area, but, if it does not, nothing much can happen except naming and shaming, because infringement proceedings cannot be brought in the Luxembourg Court against a member state that fails to carry out its obligations under Third Pillar instruments. Formally, the position will not change after the Court acquires jurisdiction; it is just that if the legal position is not respected, something can be done about it.

Jago Russell: The only addition is the greater ease of making references to get these questions resolved, which will be a significant and welcome change post 1 December.

The Chairman: With some regret I feel we have to draw this session to a close. However, I want to ask each of you, for the transcript, to distil what you have been telling us. First of all, would you agree that the system of extradition across Europe as it is currently constituted is essentially a bit incoherent and that the effect of opting in—the lisbonisation of the process, which will bring the entire process under the umbrella of European law—should help to make it more coherent? Secondly, and in parallel with that, the existing EAW arrangements, as part of a wider system of criminal justice across Europe, are in themselves

incomplete. In order to further the needs of justice and law and order, there is still a need for a number of the smaller measures we have heard discussed to be put in place to make the thing more user-friendly for everybody. Can I ask each of you whether that is a fair analysis of what you are telling us?

Professor Spencer: I would agree with all of that.

Jacqueline Minor: I would agree and I have nothing to add except that it is a process—and it is not necessarily via legislation that this incoherence will be reduced. It can be reduced by other measures.

Jago Russell: The only thing I would add is that the process of Lisbonisation could raise the issue of whether or not the EU law, the framework decision itself, needs to be amended to clarify points such as human rights and proportionality. It is the lack of explicit provisions on those that might mean the EU Court making decisions that prevent countries refusing extradition on human rights grounds or on proportionality grounds. It might just push the political issue of whether or not the framework decision itself needs to be amended.

The Chairman: The focus of political attention, then, should be on the European legislation and not the domestic legislation.

Jago Russell: Yes, that is very much my view—not just for the UK, but also because other countries across Europe are suffering from the same kinds of issues in terms of implementation.

The Chairman: Thank you very much to each of you. We are very grateful.