



HOUSE OF LORDS

Select Committee on the European Union

Home Affairs Sub-Committee

Corrected oral evidence: Brexit: the proposed UK-EU security treaty

Wednesday 18 April 2018

10.35 am

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Members present: Lord Jay of Ewelme (The Chairman); Baroness Browning; Lord Crisp; Baroness Janke; Lord Kirkhope of Harrogate; Baroness Massey of Darwen; Lord O'Neill of Clackmannan; Baroness Pinnock; Lord Ribeiro; Lord Ricketts; Lord Soley; Lord Watts.

Evidence Session No. 4

Heard in Public

Questions 30 - 44

Witnesses

I: Nick Vamos, Partner, Peters and Peters Solicitors LLP; Professor John Spencer CBE, Professor Emeritus of Law, University of Cambridge.

Examination of Witnesses

Nick Vamos and Professor John Spencer CBE.

Q30 The Chairman: I welcome you both. Thank you very much for coming and giving evidence to us. We are extremely grateful to you. We are looking at the UK-EU security treaty that the Government have proposed, but, within that, the attention of the Committee is becoming focused on the provision in the draft transition agreement relating to the European arrest warrant that allows member states to refuse to extradite their own nationals. We decided to look into that issue as a specific part of our inquiry, also because it seemed to us to be particularly important as a separate issue. We have it in mind, depending on the evidence we get, to write to the Minister afterwards, identifying it as a particularly important issue.

We are very grateful to you for coming and giving evidence to us on it. Perhaps I could ask you, to start with, to introduce yourselves and the organisations to which you belong—or in some cases have belonged—and to answer the first question that we have proposed: what do you think would be the effect of a halt in current extradition arrangements between the UK and the EU?

Professor John Spencer: I am an emeritus professor at the University of Cambridge, and I have now been retired for three and a half to four years. I taught criminal procedure, criminal law and criminal evidence, and had a strong interest in the EU and criminal justice. I am still the honorary president of an organisation called ECLA UK, the European Criminal Law Association UK. This is an organisation of lawyers—some practitioners and some academics—who are interested in the EU and criminal law, and the relationship between the UK and those matters.

Nick Vamos: Good morning. May I first apologise? I have a bit of a sore throat, which is why I sound slightly hoarse this morning.

The Chairman: Thank you for coming.

Nick Vamos: It is my pleasure. I am currently a partner at Peters and Peters, which is a criminal law practice. In a former life, I was head of extradition for the Crown Prosecution Service for about four years, head of the UK Central Authority for mutual legal assistance at the Home Office for about 12 months, and the UK's liaison prosecutor to the United States for three and a half years. During my time as a public prosecutor, I have spent about 10 years working almost exclusively in the field of international justice and criminal co-operation.

The Chairman: Thank you very much for that. As I should have said at the beginning, this is a public hearing, and we will send you the transcript afterwards to check we have got your remarks correct. Perhaps I could ask you, going back to the first question, what the effect of a halt in current extradition arrangements between the UK and the EU would be.

Professor John Spencer: There would be something of a mess, to put it simply. Necessarily, extradition between the UK and the rest of the EU member states would have to fall back on whatever arrangements they had for dealing with third-party states. I imagine a lot of that would be governed by the Council of Europe extradition convention, which of course is less efficient than the European arrest warrant. That is why the European arrest warrant was created: in order to have something that was more efficient.

Strangely, if you look at Part 1 of our Extradition Act, you will see it is drafted without a mention of Europe or the European arrest warrant in it. Looking at it through the eyes of the English lawyer, it is conceivable that we could go on sending them off and receiving them, because as long as they were Part 1 arrest warrants under our Act our courts would still recognise them. The problem is that I do not think anybody else in the EU has implementing legislation that works the same way. We would be in the position of somebody working at a computer that is still switched on, but unfortunately the internet connection has been cut and there is no response at the other end.

The Chairman: Would you see that as a theoretical possibility rather than a practical one?

Professor John Spencer: Yes. Everybody who wanted to use the European arrest warrant procedure here would immediately know it would not work, even if, when you looked at the text of our implementing legislation, it should work.

Nick Vamos: I agree with everything Professor Spencer has just said. It would be a mess. I do not think anybody knows exactly what the practical implications would be of no longer having any access to the European arrest warrant, despite our domestic law not really changing. The designation of the rest of the EU 27 as category 1 territories would not change, but from their perspective it would not matter, because we would no longer be subject to the framework decision; therefore, they would not have the power to execute our requests or even send requests to us.

It has been relatively well rehearsed as to what the disadvantages of falling back on the 1957 convention would be, compared to the European arrest warrant, but it is just worth spelling out what, in my view and the view of most commentators, are the main four disadvantages. First, there is the own-nationals problem, which we will come on to. The second is the speed and efficiency. It is well established that the EAW is far quicker and more efficient than any previous system of extradition between EU countries. Thirdly, there is more scope for dual criminality objections under the 1957 convention, because you do not have the framework list.

Fourthly, something that has had a little less attention is the way that the European arrest warrant works in connection with the Schengen Information System second generation, with the circulation of alerts on SIS II. They are designed to work together to create a system where the

alerts circulate through the whole of the EU area, without the need for specific requests to be sent to specific countries. It would be a big operational disadvantage of not being in the framework decision, if we were not also in the Schengen Information System.

Professor John Spencer: Could I just add a very brief coda? It would be much more difficult than it is now. The message I would like to put over is that there would be a price to pay. There may be those who think the price is worth paying. I shared a platform at a meeting with a very Brexit-minded MP, who said, "We only get back around 200 people per year under the European arrest warrant. Think of the hundreds of thousands of people who are prosecuted in the UK. Surely we could do without those. That is a small price to pay for Brexit". There will be some who think that the price is worth paying. The world would not end, but it would be a much more difficult place; I think that is the message.

The Chairman: I was ambassador in Paris at a time before the European arrest warrant came in, when we were trying to extradite Rachid Ramda to Paris. At that stage, it became the most important issue for a while in Franco-British relations. Could you see the same sort of problem arising in relations with other EU states, if we were outside of the European arrest warrant and that sort of high-profile issue arose?

Professor John Spencer: Potentially, yes.

Nick Vamos: Absolutely. It is hard to predict which cases are suddenly going to take on a very high public profile and become extremely important to the respective Governments. They come out of nowhere; all of a sudden there is a huge amount of media attention on these cases, and Governments are criticised for failing to ensure that extradition is taking place. It can create a huge amount of tension at the political and operational levels.

Professor John Spencer: We have a much better procedure for extradition with third-party countries now than we did in the days of Rachid Ramda, so I do not think the complications would be as bad, the delay as long, or the expense so great. However, the European arrest warrant takes the political element out of it, and of course that is still there if we go back to the previous arrangements. Politics gets involved, where otherwise it would not.

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

Q31 **Lord Watts:** Given your wide experience in this area, which, if any, member states do you believe are likely to or could refuse to extradite their own nationals during the transitional period?

Professor John Spencer: We have looked into this as best we can, in the rather short time we have had to do it. A lot of member states made a firm principle of not extraditing their nationals before the European arrest warrant. Some of them had constitutional provisions banning it. Most of them simply had provisions of their national extradition Act that banned it. When the European arrest warrant came along, everybody

ultimately had to accept the extradition of their own nationals. It was no problem with countries that simply had a provision in the extradition Act to say, as the Dutch one still does, "No Dutchman will be extradited". It was a bigger problem with the countries that had constitutional objections. As far as I can discover, most of them amended their constitutions to say "no extradition of our nationals, except in pursuit of national legislation, in the interests of carrying out obligations under an international treaty". Where countries amended their constitutions like that, it would probably not be a problem during the transition period.

The country where it would unquestionably be a problem is Germany, because they made a minimal amendment to their constitution to say, "We will not hand over our own nationals, although we will to other member states of the EU". I looked around yesterday and I could not find any other countries whose constitutions were as bleak, from our point of view, as that. They may exist. People told me Poland and Slovenia might be a problem. I managed to find the relevant provisions of both their constitutions, and in each case I think there would not be a problem. There may be some others, but I could only find Germany as a certain problem.

Nick Vamos: We had a chance to discuss this before we came in. If one asks the question, "Who is likely to wish to continue not extraditing their own nationals to a third country?", rather than simply, "Who might be constitutionally obliged not to?", one can look at the examples of the countries that have expressed reservations to the Norway and Iceland treaty. You have two countries there that, one would assume, do not have criminal justice systems that the rest of Europe thinks are suspect, defective or substandard in any way. Therefore, if that is right, it is presumably a question of principle for those countries that they would not extradite their own nationals outside of the single area of security, freedom and justice created by the EU, rather than a question of pragmatism that they just do not like Norway and Iceland and do not trust their criminal justice systems.

If it is correct that this is an issue of principle being applied to Norway and Iceland, one assumes it could also apply to the UK. I am not sure what additional leverage or bargaining power we would have to suggest that they would take a different view with us. I think we have more than Norway and Iceland, clearly, but is it enough to overcome what is clearly an issue of principle for these countries?

Professor John Spencer: The question is actually about what member states would give us grief during the transition period. That means the countries that have constitutional bars against doing it. As far as I know that is only Germany, although there may be others.

There is another question further down the list here: "What is the picture for the future?" The picture for the future is as sketched out by Mr Vamos. We managed to get hold of a list of the member states that have made reservations to the Norway-Iceland convention, refusing to hand over their nationals when that eventually comes into force. Out of

the member states that have made the necessary notifications so far, the awkward squad, if I may use that term, consists of five and a half at the moment. There are six countries that say, "We will never hand over to Norway or Iceland": the Czech Republic, Germany, France, Slovenia, Slovakia. Then there is Romania, whose position is this: "We will hand them over if they are domiciled in the country that wants them back, but not if they are domiciled with us". I imagine, longer term, the UK could expect any post-transition arrangement to have the same countries lining up against us.

The Chairman: We may come back to some of those issues a little later on. That is very helpful. Lord Watts had another question, I think.

Lord Watts: Yes, I was not going to step on the toes of my colleagues, who are going to come back to the issue later. I do not know if you are in a position to say, but what sort of changes would have to be made, and how would they be made, to the German constitution to accept some form of new arrangements?

Professor John Spencer: The German constitution is much easier to amend than many other countries' constitutions, I am told. I do not know exactly what the procedure is, but it does not need a referendum as is needed in some countries. Germany could conceivably modify its constitution again, to say, "We will not hand over German citizens, except to EU member states or the UK". Whether the political will to do that would be present, at any rate during the transition period, is another matter.

Q32 **Lord Crisp:** Sticking with just the transition for this moment, what are the alternatives during the transition period, with Germany and indeed any other state that takes the same view, for sentenced persons or persons sought for prosecution?

Nick Vamos: For sentence, there is a fairly well-established mechanism, at least on paper, for asking a country within the EU to enforce a sentence in post here against either a national or somebody ordinarily resident in the requested country. The Netherlands, for example, normally requires that. If we had convicted and sentenced somebody here, they were in the Netherlands, and they were either Dutch or ordinarily resident in the Netherlands, the Dutch would say, "Send us the paperwork, and we will impose the sentence". The framework decision that allows that to happen is within the withdrawal agreement. I cannot remember its exact name; I think it is 2008/909. That provides a mechanism where you can oblige the country where that person is a national or residing to accept the sentence.

That, in practice, in my experience, did not work very well because everybody applied the framework decision slightly differently. They had different requirements within their domestic law as to what would trigger an obligation to accept the sentence. However, it does work and it is possible. Within the EAW framework decision, many countries would refuse to extradite, relying on the bar under article 4(6), which says

effectively the same thing: "If you request the surrender of somebody to serve a sentence in your country, and they are our national or ordinarily a resident in our country, rather than extraditing we will simply enforce the sentence here". Again, it happens, but it is clunky and we will have to get better at it, if it is to provide a solution to being unable to extradite those people ourselves.

Baroness Browning: Sorry, I must have missed something there. Could you just clarify something for me? When you talk about extraditing somebody to serve a specific sentence, is that in cases where they have attended a trial and been found guilty, but the sentencing decision has been deferred? They are not being sentenced in absentia, are they?

Nick Vamos: It can be both. We can convict and sentence people in absentia.

Baroness Browning: How often does that happen?

Nick Vamos: It has happened more often in recent years than before. The courts have become more open to convicting and sentencing in absentia. Prosecuting authorities have become keener to do it, so you have a sentence that is enforceable and then you can seek to extradite somebody. The more common scenario is somebody who has been convicted and has either absconded prior to their sentence or been released part way through, on a day release from an open prison, for example, and simply failed to return, so they have part of their sentence remaining to serve.

Lord Crisp: What about the other category: people sought for prosecution?

Nick Vamos: People sought for prosecution are much more problematic. In theory, we can simply say to the Netherlands, to use it as an example, "You are not going to send that chap back, but you are willing to prosecute him yourself. Here is all the evidence". In practice, that is very difficult to do. The rules of admissibility are going to be different in each country. Practically, witnesses in the UK may not want to travel even as far as the Netherlands. They may be infirm; they may simply not be able to make that journey. The procedural requirements in the country to which we are giving our evidence may be very different, so the form of our evidence is not what it wants. There are a number of steps that we have to take here to get the evidence into the form that is needed. It is not simply a question of saying, "Here is the case; you do it". It does not work that way. In practice, sometimes cases just cannot proceed, because you cannot fix these procedural gaps; you cannot bridge them, so that person is not prosecuted.

Professor John Spencer: Before the protocol 36 "hokey cokey", as people called it, I was involved with a number of other people—

The Chairman: That is a technical term, is it?

Professor John Spencer: Yes, it is what we lawyers call it. I had a meeting with members of the Metropolitan Police. The Metropolitan Police and the national police generally were, at that point, really making the case to keep the European arrest warrant. The people in the Metropolitan Police who dealt with this told us that it is a real problem to get countries to try their nationals for crimes they have committed here. In principle, they are willing to do it, but practically we just cannot do it and it means there is a failure of justice. There is a principle of international law that all these countries will in theory obey: *aut dedere aut judicare*. Either you hand them over, or you try them. However, as Mr Vamos said, and as I was told by the Metropolitan Police, often it just does not work.

Lord Crisp: You were implying that, with the transition, it was probably only Germany that would be a real problem. I assume that what you have talked about there applies to Germany. Germany is no different from anywhere else.

Nick Vamos: Yes, that is correct. The point about it being only Germany is true, but article 168 says that any country may exercise that discretion. We do not know if it is only going to be Germany.

Professor John Spencer: We must admit we are busking with our answers saying it is only Germany. That is what we could find out on minimal research. It would be a substantial research job involving contacting people in the Ministries of Justice of all the other member states to get a definitive answer.

Lord Crisp: You are making the point that it is pretty definitely Germany; that is how I am hearing it. Germany is very likely.

Professor John Spencer: Yes.

Q33 **Lord O'Neill of Clackmannan:** Is there anything we could do to reciprocate? Is there any tit-for-tat response, or would that be counterproductive? There is always an element of vengeance behind some of the enthusiastic Brexiteers; they want to mark off old scores and things like that. Setting that aside, would it be possible to exercise any influence over other matters by way of reciprocation?

Professor John Spencer: Refusing to hand back our nationals that they wanted would be a piece of useless gesture politics. People in this country do not understand how important a constitutional objection is in those countries that have written constitutions. They are not just being awkward when they say, "Sorry, we cannot do it". They respect the rule of law, and that means that they cannot do it unless they change the law in a fundamental way. We could, but I cannot imagine it would do anything to change the situation during the transition period.

Nick Vamos: I agree. It would be a gesture in practice, as well, because the number of UK nationals surrendered to other EU countries is relatively small. I am not saying those are not serious cases; I am not going down the line of the Brexit-supporting MP John sat next to and saying that it does not matter. But it is a small number of cases, so it

would not be much of a bargaining chip, in that sense, and it would be wholly counterproductive, because what everybody wants at the end of the negotiation is something that resembles what we have now. Therefore, playing that kind of game seems to be pointless.

- Q34 **Baroness Massey of Darwen:** Thank you for your spirited answers. I find all this really interesting. Can I just throw in another complication? Where there is a refusal to extradite one's own nationals, what arrangements should apply where the arrest warrant for whoever it is was issued before Brexit day, but not yet executed?

Professor John Spencer: In the corner of my list of questions, I scribbled "pass". I was talking about it with Mr Vamos just before we came in. We think that, if it is a constitutional objection in that country, the country will say that applies as of the date when we would be putting him or her on a boat or plane, rather than the date on which the warrant was issued. If the constitution says, "We cannot hand over anyone who is one of our nationals", we imagine that means as of the date of handover. We have not really been able to think out the answer to that. Maybe Professor Steve Peers could tell you the answer.

Nick Vamos: I do not have anything to add. It is too difficult.

Baroness Massey of Darwen: Thank you for your honesty.

The Chairman: We have touched a little already on the longer term beyond the transition period, but we have one or two questions that focus specifically on the longer term.

- Q35 **Lord Kirkhope of Harrogate:** I do not know whether I was a "hokey" or a "cokey", but I was one of those involved in the preparation of the European arrest warrant in Europe. I was also involved with protocol 36, which initially, when I saw its title, I thought was a new James Bond film. I woke up this morning to take a look at the CVs of the two distinguished witnesses we have in front of us. Professor, I noticed in particular one of your publications was *Implementing the European Arrest Warrant: A Tale of How Not to Do It*. I was slightly relieved when I saw the first word, "implementing", and reread that. I assumed you meant not those who were involved with it in Europe, but those who were involved in this country and in other countries in the practical deployment.

My question, really, goes back to Germany and perhaps other countries, because we mentioned the particular situation with Germany. As I understood it, the Germans do not have a *Verfassung*, a constitution. They have *Grundgesetz*, which are the basic laws, which have some slight impact on the way in which they look at matters such as these. I do not know, but you probably have a comment on that.

What I am interested in, though, is this. The Government are talking about a major security treaty, in future, to cover this and a whole lot of other areas of justice and home affairs. This is my concern. Whatever the problems might be in the initial period, and the Lord Chairman has just referred to moving on a bit, is it really conceivable, in your eyes—and

how would you design it—that we can deal with all this within a broad security treaty? Does it have a place? If so, how would we be sure that we could have more or less the same provisions as the current EAW provides within that treaty?

Professor John Spencer: You are quite right to say that there are strong security interests on both sides here. In the end, the other member states will wish to try to make some kind of arrangement with us to ensure their security as well as ours. The question is whether they feel that strongly enough to not merely pass implementing legislation at the level of laws, but where necessary to change their constitutions.

Germany, certainly, thought it was worth doing that in order to have the European arrest warrant. Given the size of the UK and the extent to which it is still likely to have a lot of practical dealings and goings to and fro with the rest of Europe, it may be that Germany and other countries with constitutional objections would be prepared to do it. That is really a political question rather than a legal question. I am sure that any legal question is ultimately soluble if there is the political will to do it, but it is harder if you have a written constitution or Grundgesetz.

The Chairman: In that case, all 27 others would need to do it individually, would they? They would need to change their constitution, change their laws or do whatever was needed in terms of their own political systems?

Professor John Spencer: If there were a single treaty between the UK and the EU, as could happen, I suppose it could not simply have some pale shadow of the European arrest warrant, like the Norway-Iceland agreement. It could have that, “and, and, and”. That would first of all have to be agreed by the mechanism at EU level under article 216 of the treaty. Then, if it were agreed, all the member states would be bound by EU law to implement it. The objections would be upstream, in what went into the draft of the treaty, before the Council agreed it and the Parliament signed it off, rather than at the level of carrying it out when it had been agreed.

Q36 **Lord Kirkhope of Harrogate:** Can I just follow up on this? I am sorry; my colleague has not yet spoken. We are talking now about a period that comes at the end of the transition period, which is a short one. From my experience and, I am sure, the experience of others here, for a treaty of such magnitude as the Government are speculating, which is a security treaty to avoid all the bilateral and multilateral deals that would have otherwise to be done, I would assume that it would be most unlikely to be ready or agreed and conceded by the other member states at the end of the transition period. I wonder, therefore, whether we would have to enter another phase following transition, to avoid all this bilateral mess.

Professor John Spencer: The Norway-Iceland-EU treaty took about five years to negotiate. The date of it was 2005 or 2006. It is still not in force now, because it is necessary under it for each of the member states to make notifications about whether they have reservations as to this, that

or the other part of it. Two have not got around to doing it. Simply to do one treaty on one bit of it with two countries has taken a huge time, so yes.

The other side of it is that, not wanting to denigrate either Norway or Iceland, there will not be so much political interest with them as there is in sorting something out with the UK. I suspect there are not many criminals who run away to Iceland, and it may be that the other member states think that, if they end up there, it serves them right. It may be that not many people run away to Norway, and if they do they will soon run out of money. It is going to be different with the UK, because it is large and populous, and there is likely to be a lot more continuing to and fro, however hard-line Brexit turns out to be. I imagine there will be a lot more political will. That said, it would still be a major task to agree, within the transition period, a comprehensive treaty on all this. I quite agree.

Nick Vamos: I agree with everything Professor Spencer says. I approach this primarily from an operational perspective, because that is my background. In my former position as head of extradition, I used to have to meet with my counterparts on many occasions. Two things were very clear. First, they valued the UK being in the club. We were a huge supplier of intelligence, of people, contributing hugely to criminal justice across the EU. We extradite far more people than we bring in, and we provide much more information than we use. The political will to keep us in the club, or in something that looks like what the club looked like, is huge.

The other thing they always spoke about was how annoyed they were that we always had to do things in our own special and awkward way. Of course, I would always say, "That is the law. I do not make the law; I just have to apply it. I will do my best to work through this with you". My fear—and it is not just mine; this has been said by others as well—is for that tolerance to our awkwardness, our special needs and the ways that we want to diverge.

Just within the European arrest warrant we have section 12(a) on charge and try, the proportionality bar, the forum bar, things that do not exist anywhere in the framework decision, yet we have implemented them and we say, "That is the way we are going to do it, and you will just have to put up with it". Outside the EU, why should they put up with it? That is the question. The irony may be that we will be asked to tie ourselves more closely to the EU's way of doing things in criminal justice and home affairs than we currently are, because there will be no incentive for them to tolerate our special requirements.

This is the fundamental difficulty with any new arrangement. Our three objectives are something that looks like what we have now, not just for the European arrest warrant but across the piece, including the European investigation order, Europol, Eurojust, transfer of prisoners, et cetera; something that allows us the level of divergence that we have and is specially bespoke for the UK; and something that is outside the

jurisdiction of the CJEU. Those three objectives seem to me not impossible in principle, but in practice very, very difficult.

Professor John Spencer: At the level of practitioners who have to work the system, there is huge will to keep things going with the UK.

The Chairman: Is that throughout the EU?

Professor John Spencer: Throughout the whole EU, the people who deal with these things, the public prosecutors and the judges, value what we have done and want to keep it going. At ECLA UK, we had a meeting addressed by a national representative from Europol, who was from one of the other member states, who said, "We so much value what the UK has done that it is almost inconceivable to us to have a Europol without it". Of course, we have a UK director, and shall have until he retires sometime in May.

But the decisions, finally, will not be made by the people who run Europol, the judges, the public prosecutors in Germany or the Serious Fraud Office. They will be made by the Council and by the Parliament, which will probably not see this in quite the same way.

Nick Vamos: Lord Chairman, if you will indulge me, Professor Spencer and I did not deliberately work this out as a double act beforehand, but it fits quite nicely. On the question of who will ultimately make the decision about what kind of deal we have and what equities they might see, this is a quote—and I apologise; I promise I will not do this again—from a European Parliament Committee on Civil Liberties, Justice and Home Affairs publication from December of last year.

It says, "A fundamental question for the EU 27 around future agreements with the UK will be whether it is in the EU's interests to continue with the status quo, where the UK can pick and choose which elements of the criminal justice acquis it opts into, or if the EU should push for all or nothing. While it may be politically difficult for the UK to sign up to the full criminal justice acquis, precisely at a time when it is leaving the EU to 'take back control', the way the EU deals with the UK as a third country in this field may have implications for its dealings with other third countries in the future. From the perspective of the EU, as opposed to the perspective of individual member states, decisions on the future of the UK's relationship with the EU criminal justice acquis need to take into account broader considerations than immediate practical and political expediency".

That is a very telling quote. There are lots of voices in the debate on both sides; there is not a single position on the EU side. From their perspective there are all these operational pressures to say, "Let us just do a deal and keep things working", but it is not as simple as that.

The Chairman: Thank you. That is very helpful.

Q37 **Baroness Browning:** Supposing the UK-EU security treaty does not emerge for some reason, although I have to say my instinct is that it will,

do we have any bilateral agreements at the moment with other countries outside the EU that would be a good model for new bilateral treaties?

I had some involvement with the Gary McKinnon case, concerning our extradition of a UK national with Asperger's to the USA a while back. Fortunately the Home Secretary at the time did not send him to America, but it was said that the agreement we have with USA rather favours the USA rather than the UK. We have a past history of perhaps not having negotiated very good bilaterals. Can you point to exemplars where we have got it right with third countries, which might form the basis of where we start bilateral negotiations, if we have to?

Nick Vamos: I am very familiar with that case as well. The criticisms of the UK-US treaty were ultimately, in my view, unjustified and put to bed by Lord Justice Scott Baker's review. Anyway, that is a bit of a digression. I am not sure that even the UK-US treaty or a UK-third country treaty that everyone could point to and say, "That is a good one" is necessarily a solution, because the main issue, practically, is that we do not extradite very many people to those countries. The problems are not identified until the cases come along. Each case that comes along throws up a new one, and you just deal with it. Then another six, 12 or 18 months goes by and you say, "It is fine, because we have not had to extradite anybody".

We are talking about 2,000 people a year or more being surrendered from the UK to the EU, and 200 to 300 coming back, so you have to have something that can deal with that efficiently, where all the potential problems are addressed beforehand and dealt with. I do not think we have any existing extradition treaty that would allow us to do that. Anything other than the framework decision or an equivalent document is going to generate a huge number of legal arguments. The courts here are very generous to the defence extradition bar and allow it to run all these arguments, quite rightly, I would say. I think it would just slow everything down, because the existing treaties do not provide for anything like what the framework decision does.

Baroness Browning: Could I just add something not directly associated with that? In recent years, unfortunately, we have seen many EU countries be subject to terrorist attacks, which previously was outwith their experience. How much has that, do you think, changed their approach in terms of working with the UK? As a nation, we have had a long history of having to deal with terrorism from one source or another in our criminal justice system. But it is becoming more global, and it is now particularly centred on the EU in terms of attacks. Is that going to make any difference to the way that EU countries address this need, perhaps overriding their political feeling about Brexit? Is there more of a national imperative for them to work, regardless of whether it is with an EU member state?

Nick Vamos: I am absolutely positive that that would be a major factor in the practical incentives to reach a deal. In combatting terrorism and other serious crime, the surrender of people at the end to face prosecution is just the tip of the process. As you are saying, a huge

amount of information and data exchange happens before that, to help track people and disrupt their activities. If you can prosecute them at the end of it, that is all well and good.

As I have said before, the European arrest warrant is just one piece of a justice and home affairs acquis that the rest of the EU is signed up to. We are participating in large chunks of it. Our data, as everybody says, is absolutely crucial, and our participation in Europol and other data-sharing organisations is absolutely crucial, in the joint fight against terrorism and other serious crime.

Professor John Spencer: The twin towers atrocity very much concentrated everybody's minds in Europe. Discussions about a European arrest warrant had been proceeding at a leisurely pace for a long time before, and they very quickly reached a conclusion. I agree entirely.

Q38 **Lord Soley:** On extradition arrangements between countries, it is very complicated, not least because the EU is not a nation state but a collection of nation states; it has aspects of both. You can look at other arrangements around the world. I think particularly of that between the US and Canada. Canada also has a province, Quebec, with aspects of French continental law. Do they have extradition arrangements which could be a useful model? Maybe you are not familiar with those systems, but it seems to me that the problem we have, although complex, cannot be unique in the world. In the US and Canada situation, they must have extradition arrangements of that type.

Professor John Spencer: Most countries these days, I think, have some extradition arrangements with most other countries. There are better ones and worse ones. By way of background, in Europe, as we agreed at the beginning, there is the Council of Europe extradition convention, which is the framework by which extradition used to take place between the EU member states, and the framework within which it still operates between the EU member states and other countries in Europe that are not member states. Something along those lines can be done. The trouble is that there are 57 Heinz varieties. The Council of Europe convention allows a lot of notifications to say, "We will not have this" or "We must have that".

Again, to quote my informants in the Metropolitan Police, before the European arrest warrant, it required a large amount of expert knowledge to know exactly what the rules were in respect of each of the other EU member states. A huge advantage with the European arrest warrant is that it is virtually uniform everywhere. There is a single form of arrest warrant that you issue, and a basic standard procedure followed everywhere afterwards.

Certainly, we could set up other arrangements. It is a little more complicated than it seems the Brexiteer MP I shared a platform with thought, who said, "The solution is to have bilateral agreements with other countries, in which we dictate the terms". That was possible when we had gunboats and they only had bows and arrows, but is not quite on

these days. The resulting picture is much more complicated, and that is one of the problems.

Lord Soley: Can I just follow that up, very briefly? I understand I may be taking you into other geographical areas, but both Canada and the US have a common law system, which presumably makes it easier for them. However, they also have the Quebec province. There must be some complications about their arrangements on extradition, yet extradition between the two countries never seems to cause a problem, as I understand it. Is that correct? Maybe it is outside your knowledge.

Professor John Spencer: I had better not answer that, because I do not know the answer.

Lord Soley: Thank you very much. That is all right. Nor do I, unfortunately.

Nick Vamos: First, I do not know the answer. That is not all I am going to add, because that would be pointless. To come back to something I was trying to explain earlier, the European arrest warrant is meant to be one part of a comprehensive suite of complementary measures, with common standards, definitions and ways of working right across them, mutual recognition being the golden thread that runs through them all. To take the European arrest warrant out and try to do something very different there will inevitably produce an operational deficit across the other measures.

Q39 **Lord Ribeiro:** One of the problems of becoming a bit like the United States and having an EU-UK treaty that means we are a third country, as opposed to the situation as it is at the moment, is that we will have no impact or influence at all on the European Court of Justice, like the Americans. However, in the Prime Minister's Mansion House speech, she made a suggestion that, in areas such as the chemical, medical and aerospace agencies, we might be able to have some input through the European Court of Justice. You have expressed your concern about the European arrest warrant. Could a similar approach be used in how we relate to the European Court of Justice and the arrest warrant?

Professor John Spencer: If you have an extradition treaty with a lot of business, points of doubt will arise, on which different sides of the extradition process will have different views. I am not going to say disputes, because they may be perfectly friendly, but they are nevertheless differences of view. It is highly desirable to have some kind of mechanism for resolving them.

The Norway-Iceland-EU treaty does not want to involve the Court of Justice, and it has a special mechanism set up. On dispute settlement, it says, "Any dispute between either Iceland or Norway and a member state of the European Union regarding the interpretation or the application of this agreement may be referred by a party to the dispute to a meeting of representatives of the Governments of the member states of the European Union and of Iceland and Norway, with a view to its settlement

within six months". That is an attempt to have some kind of dispute resolution mechanism other than the Court of Justice.

I find it very strange that the Government's present position is so opposed to the CJEU. I have heard it said that the CJEU could not possibly regulate disputes here, because it would be the court of one of the parties. But it would not, because disagreements that arise will be between the UK and individual states, which some third-party organisation would have to resolve. The obvious one, it seems to me, is the Court of Justice. Brussels is only a party to the dispute that might arise if it is Brussels qua the national Government of Belgium, rather than Brussels qua the EU. I have to say, I lose patience with the apparent extreme position of the UK in respect of the CJEU. Will we eventually have to take notice of CJEU rulings even if we manage to set up a scheme that is completely outside it? I imagine we will, because there will be aspects of extradition for which the member states have to pay respect to bits of EU law.

Lord Ribeiro: The point is that, if we pay to remain part of the European agencies I mentioned, medicine, health and aerospace, we will be bound by the ECJ's rulings on those areas.

Professor John Spencer: Yes.

Nick Vamos: I do not know if there is a distinction in terms of the way that we would be bound in those areas, which may have less of an impact on people asserting their individual rights as EU citizens than the way that the CJEU's jurisdiction over the correct interpretation of the European arrest warrant directly impacts on somebody's individual rights. That would probably be a distinction in practice.

We have extradition arrangements with many other countries all over the world where there is no supranational court required to adjudicate. But the specific features of our relationship with the EU in extradition mean that we will need one, because of, first, the sheer volume of cases and the issues that come up, as John has alluded to, and, secondly, our tendency in the UK to say, "We want to do it differently. We are going put a bell here and a whistle here, and we are going to diverge. Then we will end up on separate paths". I think the EU will see that as a great risk, and will want to put measures in place to mitigate it.

Q40 **Lord Ricketts:** Continuing to probe along the lines of Baroness Browning as to what the alternatives might be, you have spoken very convincingly about treating the whole toolkit of EU criminal justice measures together, and that is probably our strongest argument for having an overall security treaty. If that is not going to work because of the constitutional bars and others that you have explained there, you did not find that there were any very convincing models of existing UK-third party agreements, I understand. The EU-Iceland-Norway arrangement has made a bit of a walk-on appearance in our discussion so far. It might be interesting to hear to what extent, if at all, that could be a model in terms of what it provides for in the extradition area.

The 1957 Council of Europe convention may land up being the stop-gap between the current situation and some future treaty, if indeed it is going to take a long time. It might be worth going a bit further than you did, Mr Vamos, on the impracticalities of it. From my experience in Paris, I recall that a lot of EAW business tends to be done not with central authorities but with prosecuting authorities in regions of the countries. They may well not be familiar with the 1957 provisions now, and it may be even more difficult than it was before to start using an instrument that has fallen out of use.

Nick Vamos: I am very happy to pick up on that last point first, and then I will defer to John on the way that the Norway-Iceland treaty is supposed to function, because I think he has had a closer look at it than I have.

Operationally, the people who deal with extradition requests around Europe will have completely forgotten how the 1957 convention is supposed to work. It is not that complicated. I do not want to overstate that the 1957 convention is a byzantine book of extradition law that nobody understands. It is relatively straightforward, but that lack of familiarity is clearly going to slow things down. It adds an extra layer of legal and practical complexity to any individual request.

A huge amount, as you rightly say, of justice and home affairs co-operation is done at prosecutor-to-prosecutor level. The legal instruments are designed to be simple, but they are still required to be done in a particular way. If you do not tick the right box in the right way, certainly under the UK approach to the framework decision, somebody cannot be surrendered. You first have to get it right, but provided you get it right, if you really want to make things happen quickly and efficiently, you have to have experienced people who know what they are doing, can pick up the phone to each other and can use those instruments confidently.

We could get back to that, but it would take some time. That is not even touching on the question of whether any of those countries that are still, in theory, signatories to the 1957 convention even have existing domestic legislation that would allow them to use it vis-à-vis the UK. Obviously they would have to implement that. They probably got rid of it or allowed it to wither on the vine when the framework decision came in.

Professor John Spencer: You wanted me to tell you a little more about the contents of the Norway-Iceland agreement.

Lord Ricketts: Could it serve, in a sense, as a model for our own future EU-UK arrangements?

Professor John Spencer: First, maybe, but for only one bit of it, which is the arrest warrant. As we have been discussing, the arrest warrant is one element in a much bigger security package. Secondly, as a replacement for the European arrest warrant, it is rather a pale copy. Nobody looked at it until Brexit, and I must confess I only looked at it carefully on the train this morning. I have probably missed some things,

but the two key differences are that it keeps the political offences exception, which used to exist pre the European arrest warrant, which would be capable of creating all sorts of difficulties later.

More crucial is the nationality exception. Article 7 says, "Execution may not be refused on the ground that the person claimed is a national of the executing state", but "Norway and Iceland, on the one hand, and the European Union, on behalf of any of its member states, on the other hand, may make a declaration to the effect that nationals will not be surrendered or that surrender will be authorised only under certain specified conditions". As I said earlier, five and a half of them have already said, "We will not hand them over", and a lot more have said, "We will, but only if".

Lord Ricketts: I will add one more sentence: article 168, as drafted, of the draft transition agreement, which I had not focused on previously, more or less invites member states to make declarations that they will not be surrendering nationals pursuant to the framework decision. It is drafted in a way that almost seems to encourage member states to make declarations to avoid having to transfer their nationals.

Nick Vamos: I agree it definitely reads that way. There is no steer in the opposite direction. I would hope that, because the framework decision remains in force during the transitional period, practically, most countries would not see the point in expressing that reservation other than when they had to, as with Germany.

To return to your previous question, something occurred to me that might be helpful, and I can deal with it briefly, on knowledge and use of the 1957 convention. Within the Crown Prosecution Service there is an extradition unit, which I used to be the head of. When the framework decision came in, the responsibility for drafting requests was delegated down to the prosecutors in the areas, because it was considered to be such a straightforward task, eventually, that it did not need central expertise to handle. If we reverted to the 1957 convention, that whole process would need to be reversed. There are probably only one or two people left in the CPS extradition unit who even remember using the 1957 convention. We need to wrap those people in cotton wool; they are not allowed to travel on the same trains, because otherwise nobody will know and remember how it was done.

Professor Spencer: If I may deal with the question finally asked, article 68 talks about a member state raising "reasons related to its fundamental structures". I assume that means because it has a constitutional objection. A lot of member states much love the principle about not handing over their nationals, but a minority of them have it in their constitutions. Most of those that do have it in their constitutions subject to the possibility of overriding it if Parliament says so. I assume "related to its fundamental structures" means Germany because of the Grundgesetz, rather than saying, "Everybody who does not like handing over their nationals, please have a go".

Baroness Pinnock: My questions have been very fully answered, so we will pass on to the next one, I would suggest.

Q41 **Lord Soley:** Whether or not there is a new treaty, do you see a need for any new institutions to make future extraditions between EU countries and the UK work?

Professor Spencer: When I looked at this question, I wondered what “new institutions” meant. Of course it will be necessary to have a new treaty, because all the EU treaties will simply cease to apply to the UK when the UK finally leaves. At the moment, I suppose, we have institutions in the form of Europol and Eurojust. Is that what my Lord has in mind?

Lord Soley: It is things like Europol and the European Court of Justice.

Professor Spencer: As regards Europol and Eurojust, they are able to make association agreements with third-party countries. I imagine that they would make those with the UK, so we could continue to take some advantage of what those organisations provided even after Brexit, without having any special treaty for it. We would not need to replicate a special Europol or a special Eurojust. The problem is, however, that we would not really be members of the club. We would be like the Gibeonites, whom you remember in the Old Testament, whom the Israelites took on board but made them hewers of wood and drawers of water. We would not be members of the management committee and in no way would be able to have a British subject as president of Eurojust or director of Europol.

As regards the CJEU, for the reasons that Mr Vamos and I have expressed, there will be a practical need for some dispute resolution body. If it cannot be the CJEU for political reasons, it has to be something else, and somebody else will have to think up what that might be.

Nick Vamos: There would have to be a forum for practitioners to get together every six or 12 months to review how the operation of this new treaty is working, because there will undoubtedly be a huge number of practical problems that will need to be ironed out. The sooner you tackle them, the better, so there would have to be a forum for those people to come together, but it would not need to have any special legal footing.

Lord Soley: My thinking on this goes back to something you have both said about the importance of the UK to the EU on a whole range of these issues. It is, in a way, in the interests of both parties to make a system work, whatever it is. When I talk about this to Europol and, indeed, to others in Europe, they say, “We will need new institutions, not just a treaty”. I suspect they are right, and I do not quite know what they would be either, but perhaps we ought to be thinking about it. Europol was very clear to me: “You will need new institutions”. It might be about talking through how we could make it work, given that it is so important to both the EU and the UK.

Professor Spencer: That is interesting. I have not had that perspective from the one conversation I had with somebody in Europol, but plainly that is something to be considered and I am afraid I cannot add anything of use.

Nick Vamos: The need for new institutions would probably only arise because of the government red line over the jurisdiction of the CJEU. I cannot see, although perhaps your interlocutor could explain it, where the need for new institutions would otherwise come from. Ultimately, though, I am an optimist. I think that everybody thinks that the current system works very well and should be continued if possible. Ultimately, I think we will achieve that. It is just very hard to sketch out what the final solution looks like.

Q42 **Baroness Pinnock:** I am wondering if you are willing to reflect on this. We have explored alternatives to the use of the CJEU. How willing do you think the EU member states would be to create an additional institution when they already have one that works very well?

Professor Spencer: By "institution", what do you mean?

Baroness Pinnock: I mean an alternative to the CJEU as a sort of in-between, to moderate any future treaty between the UK and EU.

Professor Spencer: I do not have any sense of how they would react to that. All I can say is that they agreed to something different as the regulatory body with the Norway and Iceland treaty.

Baroness Pinnock: Yes, but from what you have said that has hardly been implemented.

Professor Spencer: No, it has not, so it is not a very good model and everybody is talking about it.

Baroness Pinnock: That is why I asked the question.

Professor Spencer: I am afraid that is a political question that I cannot help with. As Nick Vamos has said, they would very much want some kind of deal with us. It may be that, if the price of it is having a substitute CJEU, CJEU-lite or something, they would accept it. I am not really in a position to tell you any more about that than you know, so I have to pass again, I am afraid.

Nick Vamos: I agree that they will eventually accept some kind of alternative. If I was on other side, as the price for that, I would demand that the UK conformed more closely with the way that these justice and home affairs measures were supposed to work, so we will be asked to align ourselves much more with the way that the rest of the EU 27 do business with each other's home affairs than we currently do now. That would be a hugely ironic but quite likely result.

Q43 **Lord Crisp:** This is an observation really. This reminds me a bit of the time when we had the head of Europol in front of us. He stressed the point about the importance of relationships and about maintaining those

relationships that have developed over the years. It is the sort of point you have been making, Mr Vamos, two or three times. Whether or not an institution is needed, it is about meetings, regular contact and understanding the people you are dealing with. It seems to me that, while the law sets the framework, it is important to make sure that the people who do that still have as many opportunities to be in contact with each other and understand each other. Is that fair?

Nick Vamos: It is massively important and I do not think its importance can be overstated. The only rider I would put on that is this: if you have a framework that allows for those relationships to grow, flourish and really become effective, that is fantastic. If you have a framework that you have to fight against or work around, it becomes problematic, because eventually you will run into a legal problem that you simply cannot solve through relationships.

Lord Soley: It is, in fact, a political desire at a senior level for many European countries to make this work. The British, sadly, have come to it rather late in the day. It is the problem of holding a referendum without working out what happens if you lose it. It is a political desire to get it, so there is a need for thinking on this, is there not?

Nick Vamos: Yes.

Professor Spencer: That is certainly so. The conversation I had with an official in the Ministry of Justice about the other member states went like this: "You used up all your good will messing us about over the protocol 36 business, but we have to look to the future and devise something that is going to work. It is in everybody's interest to work together to do that and suppress the irritation we may feel".

Q44 **Lord O'Neill of Clackmannan:** In the discussions we had with Europol, I raised the question of the good relations that seem to prevail with the United States and that something along the lines of the US-EU model could be paralleled. When one looks at the presence of the United States within Europe, the precedence for close co-operation and understanding does not seem to have spilled over into the arrest warrant experience in one or two high-profile cases involving the UK and the US.

Do you think that it would be possible to have some relationship of a non-institutional kind based upon the good working relationship that we have had? As I said, looking for places outside of Norway and Iceland, the United States would be the most obvious, yet the experience there has not been that happy of late. Do we have to go with a degree of caution in trying to develop these new relationships or institutions, if we have to formalise it to that extent?

Nick Vamos: We do. Coming back to the answer I gave to Lord Crisp's question about the importance of communication and relationships, with the US we have extremely good relations. Officials talk to each other at all levels constantly on all issues. Extradition was high profile with the US and continues to be, for various reasons. It is a good example to show that, however good your relationship is, you still run into problems.

Arising out of the Gary McKinnon case, the forum bar was introduced in domestic UK extradition law, which does not feature in the UK-US treaty at all; there is no basis for inserting it into the treaty. Of course, the US was quite upset that the UK chose to do that. No amount of communication between officials could get around the political need, it was felt, to implement the forum bar. We have had a series of cases, where the legal implications of that have worked out. It is a low volume of cases, so each one develops the law a bit further, and we still have not really got to the end of how the forum bar will ultimately affect extradition between the US and the UK. If you transpose that to a system where we are extraditing 2,000 people a year, you run into problems almost immediately, however good your channels of communication are.

Professor Spencer: Good will can solve many problems, but not all, particularly when a country has a Grundgesetz, which carves things in stone that cannot be got around.

The Chairman: We are extremely grateful to both of you. You have made a dry and technical subject extremely lively and interesting, and we are extremely grateful for that. It is the first time that the Gibeonites have appeared in this room while I have been here, certainly, and we are grateful for that. Thank you very much indeed, both of you. You have been extremely helpful to us.