
A REVIEW OF THE UNITED KINGDOM'S EXTRADITION ARRANGEMENTS

**(Following Written Ministerial Statement by the Secretary of State for the
Home Department of 8 September 2010)**

Presented to the Home Secretary on 30 September 2011

The **Rt Hon Sir Scott Baker** was called to the Bar in 1961, and practised in a range of legal areas, including criminal law and professional negligence. He became a Recorder in 1976 and was appointed as a High Court judge in 1988. In 1999, he presided over the trial of Great Western Trains following the Southall rail crash in 1997 and in the same year was the judge who tried Jonathan Aitken.

He was the lead judge of the Administrative Court between 2000 and 2002 when he was appointed a Lord Justice of Appeal, presiding over the inquests into the deaths of Princess Diana and Dodi Al Fayed. He also sat regularly in the Divisional Court hearing appeals and judicial reviews in extradition cases. He retired in 2010 and is currently a Surveillance Commissioner, a member of the Bermuda Court of Appeal and a member of the Independent Parliamentary Standards Authority.

David Perry QC is a barrister and joint head of chambers at 6 King's Bench Walk, Temple. From 1991 to 1997, Mr Perry was one of the Standing Counsel to the Department of Trade and Industry. From 1997 to 2001, he was Junior Treasury Counsel to the Crown at the Central Criminal Court and Senior Treasury Counsel from 2001 until 2006, when he took silk. He prosecutes and defends and has extensive experience of extradition and mutual legal assistance cases. He also acts as a consultant to the Commonwealth Secretariat and has advised overseas governments on the drafting and implementation of legislation. He is a member of the Editorial Board of Blackstone's Criminal Practice and the Criminal Law Review.

Anand Doobay is a partner at solicitors Peters & Peters and has a wealth of experience in the field of judicial co-operation. He has focused in recent years on representing the subject of extradition requests but also advises overseas governments. He has a particular expertise in dealing with politically sensitive or high profile cases. He is the co-author of a well regarded text on extradition and mutual legal assistance and authors the section on extradition in Blackstone's Criminal Practice.

Mr Doobay is a trustee of Fair Trials International, a council Member of the human rights organisation Justice and a former member of the Law Society of England and Wales' Committees for International Human Rights and Criminal Law.

CONTENTS

Part 1 Introduction.....	8
Summary of Conclusions and Recommendations.....	11
Part 2 Extradition.....	20
Summary Overview	20
Summary of the Current Law.....	22
Part 3 Historical Outline.....	26
The Extradition Act 1870: Foreign States.....	32
Double/Dual Criminality.....	35
Specialty.....	37
Offences of a Political Character	37
The <i>Prima Facie</i> Case Requirement	39
<i>Habeas Corpus</i>	40
The Secretary of State's Discretion.....	40
The Admission of Evidence	41
The Fugitive Offenders Legislation: Her Majesty's Dominions and	42
Commonwealth Countries.....	42
The Admission of Evidence	46
The Republic of Ireland	46
The Minimum Levels of Seriousness.....	49
Double Jeopardy	50
Fiscal Offences.....	50
Extraterritorial Offences	51
Scottish Practice.....	51
Northern Ireland, the Isle of Man and the Channel Islands	52
Proposals for Reform	52
The 1985 Green Paper.....	52
The White Paper.....	54
The Criminal Justice Act 1988.....	56
The Extradition Act 1989.....	56
The European Convention on Extradition.....	57
The Procedures Under the 1989 Act	61
The Seriousness Threshold	62
Extraterritorial Offences	63
The Procedure Under Part III.....	63
The Powers of the High Court	66
The Secretary of State's Discretion.....	66
Authentication of Documents	68
Scotland and Northern Ireland and the 1989 Act.....	68
Channel Islands and the Isle of Man and the 1989 Act.....	68
The 2001 Review	69
The Historical Development: Summary.....	71
The United Nations Model Treaty on Extradition	72
Part 4 The European Union and the Framework Decision on the European Arrest	
Warrant.....	73
The European Union	73
The Treaty on European Union: The Maastricht Treaty	74
The Schengen Information System ("SIS")	75
The Treaty of Amsterdam	77
The Treaty of Nice	77
The Hague Programme	78

The Reform Treaty: The Treaty of Lisbon.....	78
The United Kingdom and Protocol No. 21	79
Framework Decisions	80
Other Relevant Framework Decisions	81
<i>Enforcement of Financial Penalties</i>	81
<i>Trials in Absentia</i>	82
<i>The Transfer of Prisoners</i>	82
<i>Pre-Trial Supervision (Bail)</i>	85
<i>Conflicts of Jurisdiction</i>	85
The Status of Framework Decisions Post Lisbon	86
The Stockholm Programme.....	87
The European Investigation Order	88
Article 54 of the Convention Implementing the Schengen Agreement	88
The Purpose of the Framework Decision	92
The Framework Decision and Fundamental Human Rights	94
The Charter of Fundamental Rights of the European Union	96
General Observations on the Framework Decision on the European Arrest Warrant	100
Difficulties with Transposition in Certain Member States.....	102
Commission Reports on the Framework Decision.....	103
The European Council's Evaluation	108
The Roadmap and Procedural Safeguards	108
Organisations Involved in Cooperation	111
<i>Eurojust</i>	111
<i>European Judicial Network</i>	114
<i>Liaison Magistrates</i>	114
<i>European Judicial Training Network</i>	114
<i>Europol</i>	114
Part 5 The Operation of the European Arrest Warrant.....	116
The Criticisms	119
Preliminary Observations.....	121
<i>The European Union</i>	121
Extradition in Common Law Jurisdictions	123
<i>The United States</i>	124
<i>Australia</i>	124
<i>New Zealand</i>	125
<i>Canada</i>	125
The Interests of Victims	128
The Human Rights Threshold	129
<i>The Context</i>	132
<i>Our Views on the Threshold</i>	137
<i>Proposed Amendment to Section 21: Fair Trials International</i>	140
<i>Proposed Amendment to Section 21: Justice</i>	142
<i>Our Analysis</i>	146
<i>Section 21 and Conditions of Detention</i>	149
<i>Conclusions on Section 21</i>	151
Conviction Cases.....	153
<i>The Context</i>	153
<i>Our Analysis</i>	154
Further Information in Cases of Suspected Mistaken Identity	156
<i>The Context</i>	156
<i>Our Analysis</i>	157
The Involvement of Non-Judicial Authorities	159
<i>Our Analysis</i>	159

Proportionality	162
<i>The Context</i>	163
<i>Proportionality Assessment in the Executing Member State</i>	165
<i>Our Analysis: Proportionality in the Executing Member State</i>	167
<i>Proportionality in the Issuing Member State</i>	170
Our Proposals in Relation to Issue of Proportionality.....	171
<i>The Context</i>	175
<i>Our Analysis</i>	177
The Removal of Schengen Alerts	178
<i>The Context</i>	178
<i>Our Analysis</i>	180
Legal Representation.....	182
<i>The Context</i>	183
<i>Our Analysis</i>	183
<i>Incoming Requests</i>	184
<i>Outgoing Requests</i>	185
<i>Our Conclusion</i>	185
Dual Criminality	185
<i>The Context</i>	186
<i>Our Analysis</i>	188
A No Questions Asked System of Surrender	190
<i>The Context</i>	190
<i>Our Analysis</i>	191
Time Limits.....	194
<i>The Context</i>	194
<i>Our Analysis</i>	195
<i>Pre-Trial Detention</i>	197
<i>Our Analysis</i>	197
Part 1 of The 2003 Act and the Framework Decision.....	199
The Optional Bars to Non-Execution Which Are Not Reflected in the 2003 Act	202
Guarantees in Particular Cases	203
Part 6 Forum.....	205
The Context.....	206
The Practical Operation of the Forum Bar	208
Our Observations on the Case Law.....	211
The Present Position on Decisions Concerning Forum.....	213
Exorbitant Jurisdiction	218
Our Analysis of the Forum Issue	221
Criticisms of the Present Procedure and Recommendations.....	228
Our Conclusions.....	230
Part 7 The United States/United Kingdom Treaty	231
The Context.....	231
<i>Relevant Provisions of the 2003 Act</i>	234
<i>Prima facie</i> case.....	238
Probable cause.....	239
Reasonable suspicion	241
Our Analysis of the Tests.....	242
Extradition Between the United States and the United Kingdom in Practice	243
<i>Outgoing requests: from the United Kingdom to the United States</i>	243
<i>Requests to the United Kingdom</i>	247
Our Observations On The Procedures.....	248
How The Treaty was Viewed by the United States	249
Additional Observations	253

Conclusion on Treaty Imbalance	255
Part 8 The <i>Prima Facie</i> Case requirement.....	256
The Context.....	256
<i>The 1868 Select Committee</i>	256
<i>The 1878 Royal Commission on Extradition</i>	257
<i>The 1870 Act</i>	257
<i>The Harvard Research Project</i>	257
<i>Council of Europe Convention on Extradition 1957 (“ECE”)</i>	258
<i>The 1974 Report</i>	259
<i>The 1982 Review</i>	260
<i>The 1985 Green Paper</i>	261
<i>The 1986 White Paper</i>	262
<i>The 1989 Act</i>	262
<i>The 1990 Model Treaty</i>	263
<i>United Kingdom’s Ratification of ECE in 1991</i>	263
The 2001 Review	265
The 2003 Act - Category 1 Territories	266
<i>Territories with prima facie case requirement</i>	267
<i>Territories without prima facie case requirement</i>	270
The 2003 Act - Convention Territories	271
The 2003 Act - Special Extradition Arrangements	272
Criminal Justice Act 2003 and Committal Proceedings.....	273
The Application of the <i>Prima Facie</i> Case Requirement In the Extradition Context	273
Cases under the 2003 Act.....	274
Abuse of Process as a Bar to Extradition	275
The Submissions To The Review	276
The Joint Committee on Human Rights.....	278
Our Analysis	279
Our Conclusions and Recommendations	282
Part 9 The Secretary of State’s Discretion	285
The Context.....	285
The Secretary of State’s Decision Making under the 2003 Act: Competing Extradition Requests and National Security	286
Decision Making Under Part 2.....	287
Our Analysis	291
Time Limits.....	295
The Relationship Between Extradition and Asylum	295
Where an Asylum or Human Rights Claim Has Been Made and Allowed Prior to the Issue of a Certificate Under Section 70 of the 2003 Act.	296
Where an Asylum Claim is Made Following the Commencement of Extradition Proceedings.	299
Other Asylum and Immigration Matters	300
<i>Resolution of Asylum Claims</i>	300
<i>British Citizenship</i>	300
<i>Re-entry into the United Kingdom</i>	301
<i>Acquittals</i>	301
Part 10 Other matters	302
Appeals	302
Time Limits.....	302
Leave To Appeal.....	305
<i>European arrest warrant cases: England and Wales</i>	306
<i>Part 2 cases</i>	306
Appeals on Questions of Fact	307

Other Causes of Delay	308
Delay Before the European Court of Human Rights.....	309
Legal Aid.....	310
Training.....	314
Regional Extradition Courts.....	314
Provisional Arrest	315
Part 11 Detailed Conclusions and Recommendations.....	317
The Operation of the European Arrest Warrant.....	317
<i>The Human Rights Bar (Sections 21 and 87 of the 2003 Act)</i>	318
<i>Conviction Cases</i>	319
<i>Further Information In Case of Suspected Mistaken Identity</i>	320
<i>The Involvement of Non-Judicial Authorities</i>	320
<i>Proportionality</i>	321
<i>The Use of the European Arrest Warrant as an Aid to Investigation</i>	323
<i>The Removal of Schengen Alerts</i>	323
<i>Legal Representation</i>	324
<i>Dual Criminality</i>	325
<i>A No Questions Asked System of Surrender</i>	325
<i>Time Limits</i>	326
<i>Optional Bars to Non-Execution</i>	328
<i>Guarantees In Particular Cases</i>	329
Forum.....	330
The United States/United Kingdom Treaty.....	331
The <i>Prima Facie</i> Case Requirement	331
The Secretary of States' Discretion.....	332
<i>Asylum</i>	333
Other Matters	333
<i>Time Limit For Notice of Appeal</i>	333
<i>Leave to Appeal</i>	334
<i>Appeals on Questions of Fact</i>	334
<i>Other Causes of Delay for Appeals</i>	334
<i>Delay Before the European Court of Human Rights</i>	335
<i>Legal Aid</i>	335
<i>Training</i>	336
<i>Regional Extradition Courts</i>	336
<i>Provisional Arrest</i>	336
Appendix A The Conduct of the Review	337
Appendix B The Framework Decision on the European arrest warrant: Summary of Provisions	344
Appendix C The Extradition Act 2003	363
Appendix D Extradition Figures.....	459
Appendix E: The United Kingdom's extradition arrangements.....	473
Appendix F Ministry of Justice High Level Cost Benefit Analysis of Removing Legal Aid Means Testing in Extradition Case.....	477

Part 1 Introduction

- 1.1 On 14 October 2010, we were appointed by the Secretary of State for the Home Department to conduct a review of the United Kingdom's extradition arrangements.¹
- 1.2 As a Review Panel, we were asked to look, in particular, at the following five areas of extradition law:
- (i) The operation of the European arrest warrant, including the way in which its optional safeguards contained in the European Union Framework Decision on the European arrest warrant have been transposed into the law of the United Kingdom;
 - (ii) Whether the forum bar to extradition should be brought into force;
 - (iii) Whether the United States/United Kingdom Extradition Treaty is unbalanced;
 - (iv) Whether requesting States should be required to provide *prima facie* evidence;
 - (v) The breadth of the Home Secretary's discretion in an extradition case.
- 1.3 In the course of conducting our Review, it became apparent that some of the criticism directed at the Extradition Act 2003 was based on a misunderstanding of how the 2003 Act operates in practice. We were also concerned that many of the criticisms appeared to us to ignore or attach insufficient weight to the public interest that lies in having and operating effective extradition procedures. We also became aware that there was a misconception in some quarters as to the precise effect of a number of judicial decisions, some of which have received a great deal of public attention. In some instances, vigorous campaigns have been pursued through the media,

¹ Our appointment followed an earlier announcement to Parliament, on 8 September 2010, of the Government's plans to review the United Kingdom's extradition arrangements, Hansard, 8 September 2010, column 319. This followed the Secretary of State's earlier announcement, "This government is committed to reviewing those arrangements to ensure they work both efficiently and in the interests of justice." We have described the process we adopted in Appendix A.

suggesting that extradition of a particular individual will be or has been unjust. During the course of the Review we were struck by the fact that out of the hundreds of cases that are dealt with by the courts each year, only a handful is relied upon as support for the contention that the existing law is defective.²

- 1.4 In order to ensure that these misconceptions and misunderstandings do not persist we have examined the historical development of extradition in the United Kingdom and the current law in some detail.³ We felt that this was necessary in order properly to explain our conclusions. In conducting the Review, we have taken into account not only the materials submitted to the panel but also the many important cases decided under the 2003 Act (as well as significant cases under the earlier legislation). We have also relied on our own knowledge and experience of the extradition process. This has come in part from our involvement in extradition cases whether in a judicial capacity or as a barrister or solicitor.
- 1.5 We also considered the evidence given to and the reports of various Parliamentary committees, as well as relevant Hansard reports of proceedings in Parliament. We considered with great care the recent report of the Joint Committee on Human Rights on the Implications of the United Kingdom's Extradition Policy.⁴ We address the Joint Committee's conclusions and recommendations, where relevant, later in this Report.
- 1.6 We recognise that any system of law will have its imperfections and we were mindful that we should be alert to make recommendations to avoid injustice in any individual case. However, we believe that the vital issue arising for our consideration is whether our extradition regime operates fairly and efficiently and whether there are proper safeguards available to deal with any manifest unfairness or oppression.
- 1.7 In considering the issues and concerns raised during our review of the United Kingdom's extradition procedures, a number of principles have guided our approach. First, we believe that the law of extradition should operate with the minimum procedural complexity and without undue delay: this is as much in the interests of

² See Appendix D for the numbers of extradition requests dealt with each year in the United Kingdom.

³ Appendix C contains a detailed summary of the Extradition Act 2003.

⁴ The Human Rights Implications of UK Extradition Policy, HL Paper 156, HC 767, Published on 22 June 2011.

requested person as it is in the public interest. Secondly, it should operate fairly, taking into account the legitimate interests of requested persons, victims of crimes⁵ and requesting States. Thirdly, legislative change should occur only where necessary to remove unfairness or to promote the efficient working of the extradition regime.⁶ We were also conscious that any proposed changes to Part 1 of the Extradition Act 2003 would have to take into account the United Kingdom's obligations as a Member State of the European Union. Part 1 of the 2003 Act was enacted to implement the Council Framework Decision 2002/584/JHA; a measure designed to replace the traditional extradition system within the European Union with an arrest warrant, valid throughout the entire territory of the 27 Member States. We have also had regard to the principle of reciprocity: extradition operates on the basis of mutual benefit and obligations. Given the ease of movement of people throughout the world, the United Kingdom needs the help of the international community to fight serious crime within its borders, just as much as other states need the assistance of the United Kingdom to deal with crime affecting their interests. Put simply, extradition is not a one way street.

- 1.8 In drafting this Report we have focussed our attention on the five issues identified at the time of our appointment although, inevitably, in the course of our Review we have become aware of other matters of concern. We have addressed these other matters in the course of this Report.

⁵ The Joint Committee on Human Rights expressly invited us to consider the interests of victims and we have attempted to satisfy the invitation.

⁶ The designated extradition judges at City of Westminster Magistrates' Court made submissions to the Review in which they asked that changes to the 2003 Act should be made only if "*absolutely genuinely necessary*." They were of the view that any change however small will result in lengthy litigation: inevitably any new law would be tested by litigants and examined by the courts. They also emphasised the importance of simple and efficient procedures, particularly under Part 1 of the Extradition Act 2003, as there is likely to be a significant increase in the number of European arrest warrants when the second generation Schengen Information System (SIS-II) becomes operational. This is expected in 2013. The Scottish Sheriffs expressed a similar view.

Summary of Conclusions and Recommendations

The Operation of the European Arrest Warrant⁷

- 1.9 We have concluded that the European arrest warrant has improved the scheme of surrender between Member States of the European Union and that broadly speaking it operates satisfactorily. The biggest problem arises from the sheer number of arrest warrants issued by certain Member States without any consideration of whether it is appropriate to issue an arrest warrant and if there is a less coercive method of dealing with the requested person. This problem has been recognised by the European Union and the European Commission has accepted that a proportionality requirement is necessary to prevent European arrest warrants being used in cases which do not justify the serious consequences of a European arrest warrant.
- 1.10 The Commission has recommended that uniformity should be achieved by use of the European Council's Handbook on how to issue a European arrest warrant. The Handbook sets out the factors to be taken into account when issuing a European arrest warrant. The Commission will monitor whether this does effectively deal with this problem and will consider whether further action, which could include legislative measures, is required.
- 1.11 Apart from the problem of proportionality, we believe that the European arrest warrant scheme has worked reasonably well.
- 1.12 As with any new system of extradition, it has taken time for practitioners and the courts to become familiar with its operation.
- 1.13 Of course, the scheme has its imperfections and moves are taking place at European Union level to improve its operation. We have made a number of recommendations to improve the operation of Part 1 of the 2003 Act and we have addressed the detailed criticisms which were made to us about the European arrest warrant scheme. Our detailed conclusions and recommendations are in Part 11 and we have set out a list of the topics dealt with below.

⁷ This is considered in Part 5.

- Human Rights Bar⁸
- Conviction Cases⁹
- Further Information In Case of Suspected Mistaken Identity¹⁰
- The Involvement of Non-Judicial Authorities¹¹
- Proportionality¹²
- The Use of the European Arrest Warrant as an Aid to Investigation¹³
- The Removal of Schengen Alerts¹⁴
- Legal Representation¹⁵
- Dual Criminality¹⁶
- A No Questions Asked System of Surrender¹⁷
- Time Limits¹⁸
- Optional Bars to Non-Execution¹⁹
- Guarantees in Particular Cases²⁰

⁸ See paragraphs 11.8-11.12
⁹ See paragraphs 11.13-11.17
¹⁰ See paragraph 11.18
¹¹ See paragraphs 11.19-11.20
¹² See paragraphs 11.21-11.24
¹³ See paragraph 11.25
¹⁴ See paragraphs 11.26-11.29
¹⁵ See paragraphs 11.30-11.33
¹⁶ See paragraphs 11.34-11.36
¹⁷ See paragraphs 11.37-11.38
¹⁸ See paragraphs 11.39-11.46
¹⁹ See paragraphs 11.47-11.51
²⁰ See paragraphs 11.52-11.57

- 1.14 The scheme is premised on the equivalence of the protections and standards in the criminal justice systems in each Member State. However, the Commission recognises that in some aspects (such as the length and conditions of pre-trial detention) action is required to raise standards. We note that the Joint Committee on Human Rights recommended that the United Kingdom Government should “*take the lead in ensuring there is equal protection of rights, in practice as well as in law, across the EU*”. We recommend that the UK Government work with the European Union and other Member States through the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings and other measures to improve standards.
- 1.15 Overall we do not believe that Part 1 of the 2003 Act operates unfairly or oppressively.

The Forum Bars to Extradition²¹

- 1.16 We have concluded that the forum bar provisions should not be implemented. Whilst a small number of high profile cases have highlighted the issue of forum, we have no evidence that any injustice is being caused by the present arrangements.
- 1.17 The extradition judges at City of Westminster Magistrates’ Court could not think of any case already decided under the 2003 Act in which it would have been in the interests of justice for it to have been tried in the United Kingdom rather than in the requesting territory²².
- 1.18 The major disadvantage of introducing the forum bar is that it will create delay and has the potential to generate satellite litigation. This would slow down the extradition process, add to the cost of proceedings and provide no corresponding benefit. Much has been achieved by the 2003 Act in making extradition more sensitive to modern needs; the introduction of the forum bar would be a backward step. Prosecutors are far better equipped to deal with the factors that go into making a decision on forum than the courts. Their decision making should, however, take place as early as possible, be more open and transparent and the factors that they take into account

²¹ See Part 6

²² The 2003 Act speaks of Territories rather than States.

should be incorporated into formal guidance which should specifically address the significance to be accorded to the nationality or residence of a suspect.

- 1.19 Accordingly, we recommend that the forum bars in sections 19B and 83A should not be implemented, but formal guidance should be drawn up, made public and followed by prosecuting authorities when deciding whether or not to prosecute in the United Kingdom a case involving cross-border criminal conduct.

*The United States/United Kingdom Treaty*²³

- 1.20 We have concluded that the United States/United Kingdom Treaty does not operate in an unbalanced manner. The United States and the United Kingdom have similar but different legal systems. In the United States the Fourth Amendment to the Constitution ensures that arrest may only lawfully take place if the probable cause test is satisfied: in the United Kingdom the test is reasonable suspicion. In each case it is necessary to demonstrate to a judge an objective basis for the arrest.
- 1.21 In our opinion, there is no significant difference between the probable cause test and the reasonable suspicion test.
- 1.22 In the case of extradition requests submitted by the United States to the United Kingdom, the information within the request will satisfy both the probable cause and the reasonable suspicion tests.
- 1.23 In the case of extradition requests submitted by the United Kingdom to the United States the request will contain information to satisfy the probable cause test.
- 1.24 There is no practical difference between the information submitted to and from the United States.

²³

See Part 7

The Prima Facie Case Requirement²⁴

- 1.25 We have concluded that the *prima facie* case requirement should not be re-introduced in relation to category 1 territories. Nor should it be reintroduced in relation to designated category 2 territories. It is clear that the United Kingdom could not require European Union Member States to meet the *prima facie* case requirement without withdrawing from the European arrest warrant Framework Decision.
- 1.26 There is no good reason to re-introduce the *prima facie* case requirement for category 1 territories. No evidence was presented to us to suggest that European arrest warrants are being issued in cases where there is insufficient evidence.
- 1.27 In Part 1 cases and Part 2 cases involving designated territories, we consider that the extradition judges are able to subject extradition cases to scrutiny and ensure that any abusive or oppressive request is identified and dealt with appropriately.
- 1.28 The prosecuting authorities have an obligation to disclose material which may undermine an extradition request and we recommend that guidance is issued by the prosecuting authorities confirming that relevant adverse decisions involving the requesting State should be brought to the attention of the Court.
- 1.29 A *prima facie* case requirement would not in any event address the issue of mistaken identity or alibi.
- 1.30 We invite the Government periodically to review designations for Category 2 territories and we set out detailed suggestions in Part 11.

The Secretary of State's Discretion²⁵

- 1.31 We recommend that the discretions relating to competing extradition requests and national security remain as they are.

²⁴ See Part 8

²⁵ See Part 9

- 1.32 We are firmly of the view that the Secretary of State's powers should not be increased. We think the Secretary of State's involvement as regards the death penalty, specialty and the other grounds in section 93 which do not involve the exercise of discretion, are matters with which she is best able to deal.
- 1.33 We think the Secretary of State's involvement should be further limited by removing human rights matters from her consideration as we believe they are more appropriately the concern of the judiciary.
- 1.34 We accordingly recommend that human rights issues arising at the end of the extradition process under Part 2 of the 2003 Act should be dealt with by the courts rather than the Secretary of State.

Asylum

- 1.35 The 2003 Act explicitly caters for asylum claims which are made after extradition proceedings have commenced. However, it does not deal with the position if a claim has been made prior to the commencement of extradition proceedings. In order to comply with the United Kingdom's obligations under the Refugee Convention we recommend legislative amendment. We recommend that the 2003 Act should be amended so that extradition cannot take place until an asylum claim, made in respect of the requesting territory before extradition proceedings have started in respect of the requesting territory has been finally determined.
- 1.36 We have also considered other situations which may arise concerning asylum and our conclusions are at paragraphs 9.58-9.61.

*Other Matters*²⁶

Legal Aid

- 1.37 We received uncontradicted evidence from the extradition judges at the City of Westminster Magistrates' Court and from practitioners of the problems and potential injustice caused by the delay in means testing for legal aid. We recommend that careful but urgent consideration, looking at both the financial implications and the interests of justice, is given by both the Ministry of Justice and the Home Office to reintroducing non means-tested legal aid for extradition proceedings in England, Wales and Scotland. This will bring the position into line with Northern Ireland and ensure that the United Kingdom routinely complies with its obligation under Article 11(2) of the Framework Decision. It will promote fairness, assist in reducing the length of the extradition process and remove the burden currently placed on extradition judges who are frequently required to deal with unrepresented defendants, many of whom do not speak English and who are unfamiliar with court procedures in the United Kingdom.
- 1.38 If the Government decides not to reintroduce non means-tested legal aid for extradition proceedings, then other steps need urgently to be taken to remedy the present unsatisfactory situation; for example, giving the court a discretion to grant legal aid where there is an unreasonable delay in making an assessment.
- 1.39 We believe it is essential that a solution is found to this serious problem.

Time Limit For Notice of Appeal

- 1.40 We believe that the inflexible time limit for the filing and service of a Notice of Appeal for Part 1 cases is operating to cause injustice and in Part 11 we have made detailed recommendations for changes to deal with this.²⁷

²⁶

See Part 10

²⁷

See paragraphs 11.75-11.80

Leave to Appeal

- 1.41 We recommend that appeals under Part 1 and Part 2 of the 2003 Act should only be allowed to proceed with the leave either of the extradition judge or the court which would consider the appeal.²⁸

Delay Before the European Court of Human Rights

- 1.42 There are a number of extradition cases pending before the European Court of Human Rights. Nine of these cases arise from extradition requests submitted to the United Kingdom by the United States. In each of these cases the applicant has sought and obtained Rule 39 relief from the Strasbourg Court; which means that extradition cannot take place while the case is pending before the Court. Some of these cases have been before the Court for over three years. We recommend that the issue of delay before the European Court of Human Rights should be taken up by the Government and that the Court should be encouraged to give priority to those where Rule 39 relief has been granted.

Additional Matters

- 1.43 We deal with the following additional matters and Part 11 contains a detailed summary of our conclusions and recommendations:
- (i) Appeals on Questions of Fact;²⁹
 - (ii) Other Causes of Delay for Appeals;³⁰
 - (iii) Training;³¹
 - (iv) Regional Extradition Courts;³² and

²⁸ See paragraph 10.14

²⁹ See paragraph 11.82

³⁰ See paragraph 11.83

³¹ See paragraph 11.88

³² See paragraph 11.89

- (v) Provisional arrest.³³

³³

See paragraph 11.90

Part 2 Extradition

Summary Overview

- 2.1 Extradition is the name given to the formal legal process by which persons accused or convicted of crime are surrendered from one State to another for trial or punishment.¹
- 2.2 Generally speaking extradition takes place in accordance with bilateral treaties or multilateral conventions entered into by Sovereign States.² These treaties and conventions ordinarily impose an obligation on the requested country to surrender to a requesting country a person charged with or convicted of an offence of a certain specified gravity in that country, subject to conditions and exceptions.
- 2.3 Extradition is based on the principle that it is in the interest of all civilised communities that offenders should not be allowed to escape justice by crossing national borders and that States should facilitate the punishment of criminal conduct. It is a form of international cooperation in criminal matters, based on comity (rather than any overarching obligation under international law), intended to promote justice.³

¹ The word 'extradition' was imported into English from French, where it was first used officially in a décret dated 19 February 1791. It was used for the first time in a French treaty in 1828: Shearer, *Extradition in International Law*, 1971, (page 12); *Harvard Research Project on Extradition* (1935) (page 52).

² Treaties and conventions are legally binding agreements or contracts between States: the terms are sometimes used synonymously. In the United Kingdom, the power to make treaties is an aspect of the royal prerogative; that is the inherent common law powers and privileges of the Crown. There is no requirement for parliamentary approval before a treaty is signed or ratified by the Crown. Since extradition is concerned with the removal of a person suspected or convicted of crime from one sovereign territory to another, it is generally regarded as a transaction between governments. (However, it is a well-established rule of procedure (the "Ponsonby Rule") that the text of an international agreement which is subject to ratification should be laid before Parliament 21 days prior to its ratification and entry into force.)

³ In *R v. Arton (No. 1)* [1896] 1 Q.B. 108, Lord Russell of Killowen C.J. stated (at page 111): "The law of extradition is without doubt founded upon the broad principle that it is to the interest of civilised communities that crimes acknowledged as such should not go unpunished and it is part of the comity of nations that one State should afford to another every assistance towards bringing persons guilty of such crimes to justice."

- 2.4 Extradition proceedings are “*criminal proceedings of a very special kind*”⁴ they do not involve the determination of any criminal charge. The extradition process is designed to provide assistance to criminal proceedings which have taken place or are yet to take place in the territorial jurisdiction of another State. The extradition process does not apply to persons merely under investigation for having committed an offence but against whom no charge has been laid. Nor does it apply to a person whose presence is desired as a witness in civil or criminal proceedings or for obtaining or enforcing a civil judgment. These are matters which are dealt with by other forms of international co-operation.⁵
- 2.5 It is in the public interest that extradition should work promptly and efficiently, particularly among neighbouring States. This is because modern transport, the increasing freedom of movement of persons and communication facilities have contributed to the growth of international crime and made the criminal law more difficult to enforce.⁶ Without effective extradition arrangements criminals would commit crimes without fear of prosecution, and movement abroad by criminals in search of safe havens would be indirectly encouraged. It is also recognised that the law should contain appropriate safeguards for individuals where they would in the event of extradition suffer manifest injustice or oppression. Achieving a balance between these competing considerations is by no means an easy task and the most recent attempt to modernise the law and to strike the appropriate balance was carried out by Parliament in 2003, when it enacted the Extradition Act 2003.
- 2.6 In the following paragraphs we set out an overview summary of the Extradition Act 2003.⁷ This is intended to set the scene for a more detailed consideration of the United Kingdom’s extradition procedures set out later in this Report.

⁴ Per Lord Hoffman in *R v. Governor of Brixton Prison, Ex parte Levin* [1997] A.C. 741 (at paragraph 746).

⁵ Cooperation with other countries in respect of criminal proceedings and investigations is principally governed by the Crime (International Co-operation) Act 2003.

⁶ It is for this reason that extradition treaties and statutes have been accorded a broad and generous construction so far as the texts permit, in order to facilitate extradition: *Reg. v. Governor of Ashford Remand Centre, Ex parte Postlethwaite* [1988] A.C. 924, at pages 946-7, per Lord Bridge of Harwich, speaking of these “*most salutary international arrangements*”.

⁷ The summary focuses on proceedings in England and Wales. The differences in the procedures, as they apply to Scotland and Northern Ireland are dealt with later in this Report.

Summary of the Current Law⁸

- 2.7 As noted above, the law of extradition in the United Kingdom is governed by the Extradition Act 2003. The 2003 Act entered into force on 1 January 2004.⁹ It was passed to modernise and streamline the way in which extradition requests submitted to the United Kingdom are processed. It has been amended by the Police and Justice Act 2006 and by the Policing and Crime Act 2009.
- 2.8 The 2003 Act created a new extradition regime. Part 1 has its origin in the European Council Framework Decision of the European Union made on 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.¹⁰ It contains provisions dealing with extradition from the United Kingdom to what are called category 1 territories. These are designated by the Secretary of State under section 1.¹¹ They are in effect the 26 other Member States of the European Union¹² and Gibraltar.¹³ The Council Framework Decision was intended to allow surrender based on the mutual recognition of arrest warrants issued by Member States. The procedures under Part 1 of the Act provide for the arrest of the requested person pursuant to an arrest warrant certified as a Part 1 warrant by the Serious Organised Crime Agency. Following arrest, an extradition hearing is held at which a judge decides whether extradition is barred for any statutory reason. The judge is also required to decide whether the requested person's extradition would be compatible with the rights under the Convention for the Protection of Human Rights and

⁸ A more detailed analysis is at Appendix C.

⁹ It applies to all extradition requests submitted to the United Kingdom on or after 1st January 2004. Extradition requests submitted to the United Kingdom before that date are dealt with under the Extradition Act 1989: Extradition Act 2003 (Commencement and Savings Order 2003) (SI 2003/3103).

¹⁰ 2005/584/JHA: OJ 2002 L 190 P1.

¹¹ The territories designated under Part 1 are listed in the Extradition Act 2003 (Designation of Part I Territories) Order 2003 (SI 2003/3333), as amended.

¹² Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden. The 2003 Act came into force at a time when there were 15 Member States of the European Union. Ten new Member States joined the Union on 1st May 2004: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia. Bulgaria and Romania became Member States on 1 January 2007.

¹³ The Framework Decision expressly provides that it applies to Gibraltar: Article 33(2) and Gibraltar was designated as a category 1 territory in 2007.

Fundamental Freedoms within the meaning of the Human Rights Act 1998.¹⁴ If none of the statutory bars operates so as to prevent extradition and if extradition would be compatible with the Convention rights, the judge is required to order the person's extradition. Otherwise he must order the person's discharge.

- 2.9 It is significant to note that extradition under Part 1 of the 2003 Act takes place as a result of judicial order. Historically, the extradition process involved a division of responsibility between the courts and the executive with the final decision resting with the Secretary of State. Under Part 1 the Secretary of State has no part (or only a very limited part) to play in the process.¹⁵ This is to be contrasted with the position under Part 2.
- 2.10 Part 2 deals with extradition to category 2 territories. These are also designated by order of the Secretary of State.¹⁶ Territories designated as part 2 territories are divided into two groups: the territories which must provide a *prima facie* evidential case and those which are not required to do so. The procedures under Part 2 involve the submission of an extradition request by a category 2 territory to the United Kingdom. If the request conforms to certain requirements and unless certain conditions apply, it is certified by the Secretary of State and sent to a judge. The judge has power to issue a warrant for the requested person's arrest and following arrest there is an extradition hearing at which the judge decides whether extradition is barred for any statutory reason. The judge is also required to decide whether the requested person's extradition would be compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms within the meaning of the Human Rights Act 1998. If none of the statutory bars operates so as to prevent extradition and if the extradition would be compatible with the Convention rights, the judge is required to send the case to the Secretary of State for her decision as to whether the person is to be extradited. Otherwise he must order the person's discharge. The Secretary of State's functions are conferred by sections 93 to 102. She must decide whether she is prohibited from ordering the person's extradition by

¹⁴ Section 1(1) of the Human Rights Act 1998 defines '*Convention rights*' for the purposes of that Act as the rights and fundamental freedoms set out in the various articles of the European Convention on Human Rights, specified in Schedule 1 to the Act.

¹⁵ The Secretary of State continues to have a role in deciding between competing requests for extradition (section 179). Additionally the Secretary of State may prevent extradition from taking place on the grounds of national security (section 208).

¹⁶ The territories designated under Part 2 are listed in the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 (SI 2003/3334), as amended.

any of the matters set out in section 93(2) (death penalty, speciality, earlier extradition to the United Kingdom from another territory or transfer to the United Kingdom by the International Criminal Court). If she is so prohibited she must order the person's discharge. If not, she is required to order the person's extradition to the territory of the requesting State¹⁷. The Secretary of State has no general discretion to decline to order extradition. However, as the Secretary of State is a public authority for the purposes of the Human Rights Act 1998, it has been recognised by the courts that any order for extradition must be compatible with the Convention rights set out in Schedule 1 to that Act.¹⁸ On this basis the Secretary of State's decision to maintain an order for extradition is amenable to challenge brought in proceedings by way of judicial review (rather than by way of statutory appeal).¹⁹

- 2.11 Under both Part 1 and Part 2 the judge may discharge the person or adjourn the extradition hearing if it appears that the person's physical or mental condition is such that it would be unjust or oppressive to extradite him.
- 2.12 Under both Part 1 and Part 2, an appeal to the High Court on a question of law or fact may be brought by the requesting territory or the person whose extradition is sought. Leave to appeal is not required, although strict time limits apply to the bringing of appeals. In Part 2 cases, an appeal by the requested person cannot be heard until after the Secretary of State has made her decision to order extradition, in which case an appeal lies against that order as well as against a decision of the judge.²⁰
- 2.13 An appeal from a decision of the High Court under Part 1 or Part 2 lies to the Supreme Court, with leave.²¹

¹⁷ Whilst the 2003 Act refers to territories, we have used the term State interchangeably.

¹⁸ Section 6(1) of the Human Rights Act provides that it is normally unlawful for a public authority to act in a manner incompatible with a Convention right. See Part 9 where this is discussed in more detail.

¹⁹ The first case in which this right was recognised was *McKinnon v Government of the United States of America* [2005] EWHC 762 (Admin).

²⁰ This was intended to streamline the appeal process by consolidating the respective appeals.

²¹ The Supreme Court was created by the Constitutional Reform Act 2005. It came into being on 1 October 2009. Before 1 October 2009, the appeal was to the Judicial Committee of the House of Lords. The House of Lords and the Supreme Court have considered the operation of the 2003 Act in ten cases: *Office of the King's Prosecutor, Brussels v. Cando Armas and another* [2006] 2 A.C. 1; *Dabas v. High Court of Justice in Madrid, Spain* [2007] 2 A.C. 31; *Pilecki v. Circuit Court of Legnica, Poland* [2008] 1 WLR 325; *R (Hilali) v. Governor of Whitemoor Prison and another* [2008] 1 A.C. 305; *Calderelli v. Judge for Preliminary Investigations of the Court of Naples, Italy* [2008] 1 WLR 1724; *McKinnon v. Government of the United States of America* [2008] 1 WLR 1739; *Norris v. Government of the United States*

- 2.14 In order to understand the structure and operation of the 2003 Act, we consider it necessary to discuss the historical development of the extradition process; this will enable the 2003 Act to be viewed in context. The historical development, which is dealt with in Part 2, enables us to introduce some of the core concepts and terms which feature in the extradition legislation and case law.

of America [2008] 1 A.C. 920; *Mucelli v. Government of Albania* [2009] 1 WLR 276; *Gomes and Goodyer v. Government of the Republic of Trinidad and Tobago* [2009] 1 WLR 1038; *Norris v. Government of the United States of America (No. 2)* [2010] 2 A.C. 487. In their evidence to the Review, the extradition judges at City of Westminster Magistrates' Court stated that these decisions had been of great practical assistance and that the initial difficulties created by a new legislative scheme had now been resolved to a very great extent. The Scottish Sheriffs expressed the same view and suggested that the procedures had become familiar to practitioners and were now operating satisfactorily.

Part 3 Historical Outline

- 3.1 In this Part we explain the historical development of extradition in the United Kingdom and the proposals for reform which have previously led to legislative change.
- 3.2 The modern history of extradition with foreign States dates back to 1842¹ with the treaty (known as the Webster-Ashburton Treaty) between the United States of America and Great Britain dealing specifically with the surrender of alleged offenders in cases of murder, assault with intent to commit murder, piracy, arson, robbery and forgery.² A similar treaty between Great Britain and France followed in 1843, applying to offences of murder, attempted murder, forgery and fraudulent bankruptcy.³ These treaties were given effect by two statutes, 6 & 7 Vict. C. 75 (France) and 6 & 7 Vict. C.76 (the United States), both enacted in 1843. Neither Act provided for the extradition of those tried and finally convicted (conviction cases) and were confined to individuals accused of the specified criminal offences (accusation cases). In 1862 a treaty was concluded between the United Kingdom and Denmark. This treaty was given effect by 25 & 26 Vict. C. 70, which applied to both accused and convicted persons.
- 3.3 These early extradition statutes reflected the fact that treaties, made by the Crown in the exercise of its prerogative, are not self-executing and require implementing legislation to take effect in the United Kingdom's domestic legal order.⁴

¹ The development of extradition procedures in the nineteenth century is likely to have been the result of new forms of transport and communication: the railway, the steamship, the telegraph and telephone. Only five extradition treaties were concluded by England between 1174 and 1794: E. Clarke: *A Treatise Upon The Law of Extradition* (4th Edition, 1903) pages 18 - 22. For example, a Treaty between England and Scotland in 1533 provided for the return of thieves, robbers and fugitives.

² Extradition between Great Britain and the United States was first provided for by the 1794 Treaty of Amity, Commerce and Navigation (known as the Jay Treaty) which provided (in Article 27) for the return to either government of persons charged with murder or forgery. But only on evidence of criminality that would justify the arrest and prosecution of the defendant in the country where he was located. The Jay Treaty lapsed in 1807.

³ The earlier multipartite (France, Spain, Holland and Great Britain) Treaty of Amiens of 1802 made provision for extradition (Article 20) but lapsed without coming into operation on the outbreak of war in May 1803.

⁴ Before 1815 the view was taken that the royal prerogative extended to the power of surrender of aliens to foreign states and in 1792 Serjeant Hill advised the Government that they had the power to surrender criminals as the power was warranted by the "*practice of nations*". In

- 3.4 Under these treaties and statutes the procedures involved in the extradition process were broadly as follows. The extradition request, containing a foreign arrest warrant and depositions (witness statements), was submitted by the foreign requesting State to the Foreign Office.⁵ This was coupled with a request for the arrest of the wanted person. The Foreign Office then passed the request to the Home Office to judge whether the case fell within the provisions of the relevant extradition treaty and, if so, a letter was then sent to the Chief Metropolitan Magistrate sitting at Bow Street Magistrates' Court informing him of the request and authorising him to proceed with the extradition process. The Magistrate would issue an arrest warrant for the apprehension of the wanted person. Upon arrest, proceedings took place before the Magistrate, who, on being satisfied that there was a case for extradition, would provide a report to the Home Secretary. The Home Secretary would issue a warrant of extradition which would be sent to the Foreign Office and then on to the requesting State. Arrangements would then be made for the surrender of the requested person. The procedure was different where the accused person was resident in Scotland. In such a case the Home Secretary would send a letter to the judiciary in that jurisdiction. In the case of Ireland the process was overseen by the Lord Lieutenant.⁶
- 3.5 During the 1860s the process of extradition came under considerable strain. The United States complained that the list of offences enumerated in the Treaty was too narrow, while the French complained that it was virtually impossible to obtain the return of accused persons from Great Britain.⁷ The French authorities suggested that a mere warrant of arrest should be accepted as a sufficient basis for extradition without the need for any additional documentation.

1815 the Law Officers of the Crown advised that outward extradition was not available without statutory authority.

⁵ Separate arrangements, contained in the Apprehension of Offenders Act 1843, 6 & 7 Vic. C.34, applied in Her Majesty's Dominions.

⁶ In 1922 the Irish Free State came into existence and in 1949 the Irish Free State, then known as Eire, became a republic. On the basis of the rules relating to State succession it continued to be bound by treaties entered into by the United Kingdom of Great Britain and Ireland and the Extradition Act 1870 (see below) continued to apply until it was repealed in 1965.

⁷ A new treaty had been negotiated with France in 1852 but Parliament refused to bring it into effect. It extended the number of extraditable offences; exempted political offenders and nationals from extradition and applied to convicted as well as accused persons. The principal difficulty with the 1843 treaty was that the French were required to satisfy the *prima facie* evidence test (see paragraph 3.18). This involved producing transcripts of evidence taken before the examining magistrate and the transcripts were likely to be excluded from English extradition proceedings as hearsay evidence. Parliament was unhappy with the removal of the *prima facie* evidence test in the 1852 Treaty.

- 3.6 In the twenty-two year period between 1846 and 1868, the total number of extradition requests made by France to England was 96 and by England to France 48. In the same period, the number of requests to England from the United States was 53 and outgoing requests amounted to 36.
- 3.7 In 1865 France denounced the 1843 Treaty and proposed what was called a general extradition law of Europe.⁸
- 3.8 Thus, in the period between 1842 and 1868, Great Britain had concluded and given effect to extradition treaties with only three foreign States (France, the United States of America and Denmark).⁹ In March of that year a Select Committee was appointed to enquire into Great Britain's extradition relations with a view to the adoption of a more permanent and uniform policy on the subject. The Select Committee Report (which consisted of eleven paragraphs) was published in July 1868.¹⁰ Among the Committee's proposals was a recommendation:

“That a general Act of Parliament should be passed enabling Her Majesty by Order in Council to declare that persons accused upon proper and duly authenticated prima facie evidence of the commission of any of the crimes to be enumerated in such Act, should be surrendered to any foreign Government within whose jurisdiction such crime is alleged to have been committed and with which arrangements have been made for the extradition of persons accused of crimes ...”

- 3.9 The Committee also recommended that greater facilities should be provided for making treaty arrangements with foreign States for the surrender of fugitive criminals

⁸ France took the lead in the development of extradition in the 18th and 19th centuries and by 1868 she had 53 extradition treaties; Great Britain had 3 by this time and the United States 13: *Report of the Select Committee on Extradition of the House of Commons* 1868, Command Paper 393.

⁹ In 1864 an extradition treaty was signed with Prussia but an attempt to enact legislation to give effect to the treaty was unsuccessful.

¹⁰ *Report of the Select Committee on Extradition of the House of Commons* 1868, Command Paper 393.

and that copies of such arrangements and of the Order in Council¹¹ which embodied it, should be laid before Parliament.¹²

3.10 Following the recommendations of the Select Committee, extradition law was placed on a more comprehensive statutory footing by the enactment of the Extradition Act 1870.

3.11 In 1877 a Royal Commission on Extradition (chaired by Sir Alexander Cockburn, Lord Chief Justice of England) was established to inquire into and consider the working and effect of the law and treaties relating to the extradition of persons accused of crime.¹³ In its 1878 report¹⁴ the Royal Commission noted that by bringing offenders to justice extradition served the common interest of all civilised nations and it was undesirable that a State should become a place of refuge for the ‘*malefactors*’ of other countries. Among its recommendations were:

- (i) that the proper authorities should be given the statutory power to deliver up fugitive criminals, irrespective of the existence of any treaty between the United Kingdom and the State against whose law the offence has been committed;
- (ii) that extradition should be available whether or not the fugitive criminal is a subject of the State demanding his surrender or a subject of the country from which it is claimed;¹⁵

¹¹ An order made by the Sovereign issued under the royal prerogative by and with the advice of the Privy Council.

¹² The Committee further recommended that the proposed Act should require that future extradition arrangements include exemptions for political offenders (what was later to become the political offence exception, see paragraph 3.29), and that trial after extradition be limited to the offences for which extradition was granted (the so-called specialty rule, see paragraph 3.28).

¹³ The Royal Commission was established after diplomatic correspondence concerning the effect of the 1870 Act on the Webster-Ashburton Treaty with the United States.

¹⁴ Report of the Royal Commission on Extradition, L2039 (1878).

¹⁵ In *R v. Wilson* (1877) 3 Q.B.D. 42, the High Court discharged a defendant on the basis that the then treaty between the Government of the United Kingdom and the Swiss Confederation provided that “*no subject of the United Kingdom*” shall be delivered up. Cockburn C.J. stated (at page 94): “*I am chairman of the commission on the subject of extradition, and I will take care that, if possible, this blot upon the law shall be removed, so as to prevent an Englishman who commits an offence in a foreign country from escaping with impunity.*”

- (iii) that extradition should embrace all those offences which it is the common interest of all nations to suppress (in the opinion of the Royal Commission, offences against person and property), but not offences of a political or local character, and that the offences in respect of which extradition may be claimed should be specified and enumerated;
- (iv) that the magistrate should be authorised to grant extradition upon *prima facie* proof before him of facts which constitute an extradition offence;
- (v) that a person surrendered in respect of one extradition offence should be liable to be tried for another; and
- (vi) that a person should be entitled to waive his right to apply for a writ of *habeas corpus*.¹⁶

3.12 The recommendation of the Royal Commission that treaties were not an essential component of the extradition process was not accepted and extradition arrangements with foreign States continued to be based on bilateral treaties: this was seen as the most satisfactory means of achieving the reciprocal return of fugitive offenders. By 1903 there were extradition treaties between Great Britain and 34 foreign states.¹⁷

3.13 The 1870 Act remained in force until it was repealed by the Extradition Act 1989 which in turn was repealed by the 2003 Act.¹⁸

3.14 In the case of extradition from the United Kingdom to Her Majesty's Dominions, the position was governed by the Fugitive Offenders Act 1881 (supplemented by the Fugitive Offenders (Protected States) Act 1915) and then by the Fugitive Offenders

¹⁶ The prerogative writ of *habeas corpus ad subjiciendum* - a writ directed to a person who detains another in custody commanding him to produce that person before the court so that the legality of the detention may be determined. A writ of *habeas corpus* will issue where someone is detained without any authority or the purported authority is beyond the powers of the person authorising the detention and so unlawful. This is to be contrasted with the remedy of judicial review, where the decision or action sought to be impugned is ordinarily within the powers of the person taking it but, due to some procedural error, a misapplication of the law, a failure to take account of relevant matters or fundamental unreasonableness it should never have been taken: *R v. Secretary of State for the Home Department, ex parte Cheblak* [1991] 1 WLR 890.

¹⁷ E. Clarke, *A Treatise Upon The Law of Extradition* (4th Edition, 1903).

¹⁸ The Extradition Act 1989 continues in force in the case of Guernsey, the Isle of Man and British Overseas Territories.

Act 1967. Extradition under these enactments was not treaty based: it was purely statutory. The Fugitive Offenders Act 1967 was repealed by the Extradition Act 1989.

- 3.15 Between 1965 and 2004 extradition to (and from) the Republic of Ireland was governed by the Backing of Warrants (Republic of Ireland) Act 1965.¹⁹ Under this scheme an arrest warrant issued in the Republic of Ireland was sent to the authorities in England and Wales, or Scotland or Northern Ireland. It would then be endorsed by a judge and executed as if it were a domestic warrant. The arrested person would then be returned to the court which issued the original warrant.²⁰ From 1 January 2004, extradition between the United Kingdom and the Republic has taken place under Part 1 of the 2003 Act as it is included in the European arrest warrant scheme.
- 3.16 Having summarised the significant historical developments, we now turn to the extradition procedures under these various enactments and the proposals which led to their reform.
- 3.17 A knowledge of these procedures and proposals, which are summarised in the following section, is vital to an understanding of the changes to the extradition regime by the 2003 Act and the criticisms made of the current procedures.

¹⁹ Although the United Kingdom ratified the European Convention on Extradition in 1991, (see paragraphs 3.71-3.78) and Ireland was also a party, Article 28(3) of the Convention permitted the State parties to deal with extradition between them by way of a reciprocal backing of warrants system. See paragraphs 3.43 to 3.48.

²⁰ Originally, magistrates in England only had local jurisdiction and a warrant was only effective in the jurisdiction of the issuing magistrate. This led to the practice of backing warrants: where the accused had left the jurisdiction of the issuing magistrate and gone to another part of England, a justice who had jurisdiction over the area where the accused was known to be, would '*back*' or endorse the warrant so that it could be executed there. The first English statute to authorise the practice of backing warrants as between English counties was 28 Geo. 2, C.26 (1750). A backing of warrants scheme operated between Scotland and England and Wales from 1773 (13 Geo. 3, C.31) and between Great Britain and Ireland under the Indictable Offences Act 1848. The position so far as warrants issued in the United Kingdom are concerned is now governed by sections 136-141 of the Criminal Justice and Public Order Act 1994. The effect of these provisions is that a warrant issued in any part of the United Kingdom may be executed, without any endorsement, in any other part of the United Kingdom. Surrender from England and Wales to the Isle of Man, Guernsey, Jersey, Alderney and Sark is also governed by a backing of warrants system contained in the Indictable Offences Act 1848.

The Extradition Act 1870: Foreign States

- 3.18 The Extradition Act 1870 ('the 1870 Act') was the first modern extradition statute. It provided for the extradition of two classes of what the Act called "*fugitive criminals*":²¹ those accused of an "*extradition crime*" and those convicted of an "*extradition crime*". The term "*extradition crime*" was defined in section 26 as "*a crime which if committed in England or within English jurisdiction would be one of the crimes described in the first Schedule to this Act.*" The First Schedule to the Act contained a list of offences (such as murder, manslaughter, rape, larceny) in respect of which extradition was possible. Thus, extradition was limited by the requirement that the offence should be one of those identified in the First Schedule. This method of identifying specific extraditable offences is known as the "*list*" or "*enumerative*" method. In addition, the extradition crime had to be one of the offences listed in the treaty entered into by Great Britain and the relevant foreign State. So the position under the 1870 Act was that extradition continued to be based on bilateral treaties²² which set out the conditions governing surrender to and from Great Britain. Once an extradition treaty was concluded, an Order in Council could be made, applying the Act to the foreign State.²³ By this innovation it was no longer necessary to enact a statute to deal with each bilateral extradition arrangement: extradition became subject to a single statutory process.
- 3.19 In summary, the process of outward extradition²⁴ under the 1870 Act involved the following steps:

²¹ The use of this expression was inapt and potentially misleading: the person sought may have been innocent and may not in fact have fled from the requesting State. In *R v. Godfrey* [1923] 1 K.B. 24, it was held by the High Court that the requested person need not have been physically present in the requesting State at the time of the alleged offence in order to qualify as a '*fugitive criminal*'.

²² The existence of a treaty was a condition precedent for extradition to take place: *R v. Soblen* [1963] 2 Q.B. 283, at pages 299-300, and where the treaty contained restrictions on surrender those restrictions were additional to those contained in the 1870 Act itself: *Re Nielsen* [1984] 1 A.C. 606, at page 616.

²³ Section 2 of the 1870 Act. The Order was laid before both Houses of Parliament and published in the London Gazette. Once made, the validity of the Order could not be questioned in any legal proceedings: section 5.

²⁴ The 1870 Act did not provide statutory authority for the making of extradition requests from the United Kingdom and they were made under authority of the royal prerogative. This continued to be the position until outgoing requests were put on a (partially) statutory basis by Part 3 of the 2003 Act.

- (i) a request²⁵ by a diplomatic representative of the foreign State sent to the Secretary of State for the return of the fugitive criminal;²⁶
- (ii) an Order of the Secretary of State addressed to a magistrate, informing him of the request and requiring him to issue a warrant for the arrest of the fugitive;²⁷
- (iii) the issue of an arrest warrant by the magistrate;²⁸
- (iv) the arrest and appearance of the fugitive before a magistrate sitting at Bow Street Magistrates' Court;
- (v) committal proceedings, conducted "*as near as may be*"²⁹ in the same way as if the fugitive had been charged with an offence in England, to determine whether the evidence provided by the foreign State was sufficient (in an accusation case) to amount to a *prima facie* case that the fugitive had committed an extradition crime³⁰ or (in a conviction case) to show that the fugitive had been convicted of such a crime, in which case the fugitive was committed to prison to await the decision of the Secretary of State;³¹
- (vi) an Order of the Secretary of State that the fugitive be delivered up to the requesting foreign State.

²⁵ Known formally as a "*requisition*".

²⁶ Section 7

²⁷ The order to proceed provided the magistrate with his jurisdiction and the Secretary of State was required to specify the English offences constituted by the conduct identified in the requisition: *Re Nielsen* [1984] A.C. 606. The Secretary of State's Order was directed at the Chief Magistrate of the Metropolitan Police Courts or one of the other Magistrates of the Metropolitan Police Court in Bow Street: section 26.

²⁸ Section 8. A warrant was issued on the basis of such evidence as would justify the issue of a warrant if the crime had been committed or the criminal convicted in England. In *R v. Weil* (1882) 9 Q.B.D. 701, Lord Jessel M.R. said (at page 706); "*There must be some evidence but very little will do ...*"

²⁹ Section 9

³⁰ As defined in section 26

³¹ In the event of committal, the requested person was informed that he would not be surrendered until after the expiration of 15 days and that he had the right to apply for a writ of *habeas corpus* in order to challenge the decision of the magistrate (section 11). Bail was available from the High Court (on application by summons to a judge in chambers): but was only granted in exceptional cases: *R v. Phillips* (1922) 27 Cox. C.C. 332.

- 3.20 The 1870 Act recognised that there may sometimes be a risk that a fugitive might disappear or move on to another country before the presentation of the formal application for his extradition. To cater for this situation it provided for the issue of a warrant of provisional arrest.³² An application for such a warrant could be made to any police magistrate or justice of the peace.³³ Once arrested on a provisional warrant, the fugitive had to be brought before the magistrate but could then be held in custody for such period as was prescribed in the relevant treaty or for such shorter period as was fixed by the magistrate, pending receipt of the formal application for his extradition. A report, stating that an arrest warrant had been issued, was sent to the Secretary of State who had power to cancel the warrant and discharge the requested person at any time. The maximum period for the maintenance of provisional arrest varied from 14 days in the case of the French treaty, to 90 days in the case of the treaty with Peru.³⁴
- 3.21 The 1870 Act was amended by the Extradition Act 1873 (which dealt with, among other things, the liability to extradition of accessories to criminal conduct, that is aiders and abettors, counsellors and procurers), the Extradition Act 1895 (which permitted arrested fugitives to be brought initially to courts other than Bow Street Magistrates' Court), the Extradition Act 1906 (which added bribery to the list of offences contained in the First Schedule), the Extradition Act 1932 (which added offences relating to dangerous drugs to the list of offences) and the Counterfeit Currency (Convention) Act 1935 (which added forgery and counterfeiting to the list of offences). These enactments were known collectively as the Extradition Acts 1870 to 1935.
- 3.22 Further amendments to the 1870 Act followed on a piecemeal basis, usually by way of an addition to the list of offences set out in the First Schedule.

³² In *Government of the Federal Republic of Germany v. Sotiriadis* [1975] A.C. 1, Lord Diplock explained (at page 25) that a warrant of provisional arrest was so-called for two reasons. First, it could be cancelled by the Secretary of State. Secondly, detention under the warrant was limited in time.

³³ A request for provisional arrest was itself ordinarily submitted through diplomatic channels and the request was then passed on by the Home Office to the police.

³⁴ In *Re Rees* [1986] A.C. 937, evidence was not received within the two month period stipulated within Article XII of the then Treaty with the Federal Republic of Germany. Rees was discharged and immediately re-arrested as the Secretary of State had signed a new order to proceed. The House of Lords held that there was nothing improper in issuing a second order to proceed in these circumstances and that the arrest and subsequent proceedings were lawful.

3.23 Under the arrangements contained in the 1870 Act the principal safeguards for the requested person were:

- (i) the rule of double or dual criminality;
- (ii) the principle of specialty;
- (iii) the rule against the surrender of persons wanted in connection with the commission of offences of a political character;
- (iv) the requirement (in accusation cases) that a *prima facie* case be made out before a magistrate in order to support the application for extradition;
- (v) the ability to challenge the magistrates' order for committal by application for a writ of *habeas corpus*;
- (vi) the Secretary of State's discretion to decline to issue an order to proceed, and his discretion to decline to order the fugitive's return to the foreign State.

3.24 Each of these safeguards is explained in more detail below.

Double/Dual Criminality

3.25 The rule of double or dual criminality³⁵ provides that extradition should only take place in respect of conduct which is not only an offence against the law of the requesting State but also against the law of the requested State.³⁶ It appears that the rule of double criminality developed for two principal reasons. First, it was an aspect of the principle of reciprocity, that is, the principle of international law which denotes that when a State gives cooperation to another State, it does so on the basis that it will

³⁵ The expressions are used interchangeably.

³⁶ An additional requirement which is to be found in some treaties and extradition arrangements is that the offence should also be extraditable under the law of both parties. In order to satisfy the double criminality rule it must be shown that the act for which extradition is sought was punishable as a matter of United Kingdom law at the time of the commission of the offence and not at the time of the decision to extradite: *R v. Metropolitan Stipendiary Magistrate, Ex parte Pinochet (No. 3)* [2000] A.C. 147; *Dabas v. High Court of Justice, Madrid* [2007] 2 A.C. 31.

receive similar cooperation in return. Secondly, it reflected the idea that it was undesirable for a State to assist in the enforcement of criminal laws unknown in its own domestic legal order. Thus, under the 1870 Act, extradition was only available where the facts giving rise to the extradition request amounted to the commission of an offence both in the foreign State and the United Kingdom. In addition, the offence in the United Kingdom had to be an offence falling within the First Schedule to the 1870 Act (and an offence for which extradition was available under the relevant treaty). In order to determine whether the double criminality rule was satisfied it was necessary first to consider the evidence provided by the foreign State as to its own laws and then to look at the conduct disclosed in the evidence supplied by the foreign State to decide whether that conduct amounted to an offence in this jurisdiction. The operation of this test was explained by Lord Diplock in *Re Nielsen*:³⁷

“...in order to determine whether conduct constitutes an ‘extradition crime’ within the 1870 Act ... and thus a potential ground for extradition if that conduct had taken place in a foreign State, one can start by inquiring whether the conduct, if it had taken place in England would have fallen within one of the ... descriptions of crimes [listed in the first Schedule to the 1870 Act].”

3.26 Save in exceptional cases, this “conduct” based test avoided the need to inquire into the ingredients or constituent parts of the foreign offence and was intended to simplify the process of extradition.³⁸ As the Royal Commissioners had noted in 1878:³⁹ *“the English magistrate cannot be expected to know or interpret the foreign law. It is not desirable that he should be required to do more than to see that the facts proved constitute prima facie an offence which would have been within judicial cognizance if done in this country.”*

3.27 It remains a fundamental principle of extradition practice that the courts of the United Kingdom are not required to become tribunals of foreign law.

³⁷ [1984] A.C. 606 (at page 704)

³⁸ The conduct based test under the 1870 Act (which is also used under the 2003 Act: *Norris v. Government of the United States* [2008] 1 A.C. 920) is to be contrasted with the position under the Fugitive Offenders’ legislation which is dealt with below.

³⁹ *Report of the Royal Commission on Extradition* L2039 (1878)

Specialty

- 3.28 The principle of specialty (or speciality as it is known under the 2003 Act)⁴⁰ signifies that, when a person has been extradited, he will only be prosecuted or punished for the offence or offences in respect of which he was surrendered and will not be proceeded against or dealt with for any other alleged offence committed prior to his extradition, unless he is first afforded a reasonable opportunity to leave the requesting State.⁴¹ Specialty protection originally developed out of a concern that a foreign State, having obtained the surrender of an accused person on an ordinary criminal charge might put him on trial for a political offence. The 1870 Act provided that a fugitive criminal was not to be surrendered to a foreign State unless provision was made by the law of that State, or by arrangement, that he would not be detained or tried in that foreign State for any offence other than the extradition crime proved by the facts on which the surrender was grounded.⁴²

Offences of a Political Character

- 3.29 The 1870 Act⁴³ provided that extradition was not available in the case of offences “*of a political character*” nor where “*the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.*”⁴⁴ In

⁴⁰ The term ‘*speciality*’ is also used by some of the commentators. For example, Shearer, *Extradition in International Law* (1971), prefers to use the word speciality in order to avoid confusion with other branches of the law, and in order to approximate more closely to the French and German equivalents *spécialité* and *spezialität*.

⁴¹ The first appearance of a specialty requirement was in the treaty between France and Saxony in 1850: A. Billot, *Traité de l’extradition* (1874), cited in Shearer: *Extradition in International Law* (1971) (at page 18); *Harvard Research Project on Extradition* (1935) (pages 199-204).
⁴² Section 3(2).

⁴³ Section 3(1). Section 7 also gave the Secretary of State a discretion to consider whether or not the offence was of a political character.

⁴⁴ The 1870 Act did not define what was meant by the expression “*an offence of a political character.*” In *Re Castioni* [1891] 1 Q.B. 149 the High Court (Denman, Hawkins and Stephen J.J.) declined to provide an exhaustive definition but stated that political offences were those crimes which were “*incidental to and formed part of political disturbances.*” This was the interpretation advanced by James Fitzjames Stephen in his *History of the Criminal Law of England*, (1883) Vol. II pages 70-71. In *re Meunier* [1894] 2 Q.B. 415, Cave J. suggested that in order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that if the offence is committed by one side or the other in pursuance of that object, it is a political offence. A more permissive approach was adopted in *R v. Governor of Brixton Prison, ex parte Kolczynski* [1955] 1 Q.B. 540, where it was held that *Castioni* and *Meunier* were to be read in the political context of the nineteenth century. The Court discharged seven Polish

broad terms, the idea that lies behind the concept of a political offence is that the requested person is at odds with the State that applies for his extradition on some issue connected with the political control or government of the country and that extradition is sought for reasons other than the enforcement of the ordinary criminal law.⁴⁵ In response to the threat posed by terrorists in the second half of the twentieth century, the ambit of the political offence exception was restricted by the Suppression of Terrorism Act 1978. This restriction was necessary to enable the United Kingdom to ratify the Council of Europe⁴⁶ European Convention on the Suppression of Terrorism 1977. The broad purpose of the Convention was to ensure that the perpetrators of terrorist offences should be brought to justice and that they should not escape prosecution by crossing national frontiers. The State parties to the 1977 Convention agreed on a list of offences, which were not to be regarded as political for the purposes of extradition.⁴⁷ Accordingly, excluded from the scope of the phrase “*offences of a political character*” were those offences listed in Schedule 1 to the 1978 Act (these included murder, kidnapping and offences under the Explosive Substances Act 1883). Section 4 of the 1978 Act extended the extra-territorial scope of offences listed in the Schedule with the result that if a person committed such an offence in the territory of any State party to the Convention it was triable as if it had been committed in the United Kingdom. The Convention on the Suppression of Terrorism did not affect the right of the United Kingdom (or any other State party) to grant political asylum: Article 5 of the Convention expressly provided that the requested State was not obliged to surrender a person if there were substantial grounds for believing that the request for extradition had been made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions or that his position may be prejudiced for any of these reasons. The

sailors who had brought their ship into an English port in order to seek political asylum after first putting the captain and some of the crew under restraint.

⁴⁵ *Reg. v. Governor of Brixton Prison, Ex parte Schtraks* [1964] A.C. 556, *Cheng v. Governor of Pentonville Prison* [1973] A.C. 931

⁴⁶ The Council of Europe was founded in 1949 to promote democracy and protect human rights and the rule of law in Europe. It is based in Strasbourg and its member states are not now restricted to only those who are in the continent of Europe.

⁴⁷ The current State parties to the Convention are: Albania, Austria, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, The Netherlands, Norway, Poland, Portugal, Republic of Ireland, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey and Ukraine. The United States was treated as a convention country for the purposes of extradition by order made under section 5 of the 1978 Act. The Suppression of Terrorism Act 1978 (Application of Provisions) (United States of America) Order 1986 (1986 SI No. 2146). A similar order was made in respect of India (1993 SI No. 2533).

Suppression of Terrorism Act 1978 amended section 3 of the 1870 Act in its application to certain designated States by providing that extradition could be refused if the fugitive's surrender had been sought for extraneous considerations (viz. to try or punish him on account of his race, religion, nationality or political opinions). This was consistent with Article 5, of the Suppression of Terrorism Convention and the United Kingdom's obligations under the 1951 Geneva Convention relating to the Status of Refugees.⁴⁸

The *Prima Facie* Case Requirement

- 3.30 The 1868 Select Committee on Extradition recommended that the requesting State should be required to furnish evidence establishing a *prima facie* case against the accused person.⁴⁹ The Royal Commissioners of 1878 noted that "*It is and always must be necessary that a prima facie case shall be made out before a magistrate in order to support the application for extradition.*"⁵⁰ This was principally to enable the magistrate to determine whether or not the double criminality test was satisfied and to ensure that, before the requested person was put to the trouble and vexation of being sent to an overseas territory, there was a case to answer. It also reflected the fact that the extradition hearing was similar to committal proceedings in domestic criminal proceedings and sought to align the respective procedures.⁵¹ However, whereas in ordinary domestic proceedings the accused would be committed for trial on the basis that he had a case to answer, in extradition proceedings the requested person would

⁴⁸ Convention and Protocol Relating to the Status of Refugees, 1951. Cmd. 9171 (1951) and Cmd. 3906 (1967)

⁴⁹ Evidence establishing a *prima facie* case against the accused person is to be distinguished from proof of the identity of the requested person as the person whose extradition is sought.

⁵⁰ A *prima facie* evidence requirement had been contained in Article 27 of the Jay Treaty of 1794. It was first included as a requirement in extradition to and from the British Dominions in *An Act for the better apprehension of certain offenders* 1843 6 & 7 Vict. C.34 (section 3), although the quantum of evidence had to satisfy a strong or probable presumption of guilt test: *R v. Governor of Brixton Prison, Ex parte Armah* [1966] A.C. 192.

⁵¹ In England and Wales committal proceedings were the usual means by which a person charged in domestic criminal proceedings with an indictable offence was brought for trial. Section 9 of the 1870 Act provided: "*When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England ...*"

be committed to await the Secretary of State's decision as to his return to the requesting State.⁵²

Habeas Corpus

- 3.31 Following committal the magistrate was required to notify the requested person of his right to apply for a writ of *habeas corpus* and that he would not be surrendered for at least 15 days. By this mechanism the High Court had jurisdiction to review the legality of the committal order.⁵³

The Secretary of State's Discretion

- 3.32 Under section 11 of the 1870 Act, the Secretary of State⁵⁴ had a discretion to decline to order the surrender of a fugitive, whether accused or convicted of an extradition crime.⁵⁵ The involvement of the Secretary of State signified that extradition was an act of sovereignty with the final word on surrender being left to the executive. In deciding whether to order the fugitive's surrender the Secretary of State was under a duty to take into account all relevant circumstances, including any fresh information which had not been before the magistrate. This system provided the requested person with the opportunity to contest his extradition before the courts, and, where that failed, with a further opportunity of making representations to the executive. In

⁵² The magistrate was not generally required to consider whether the requested person had a good defence to the charge and even if it emerged that the person would have a good defence there was no provision enabling the magistrate to discharge him on that account. This was generally a matter for the requesting State: *Government of Australia v. Harrod* [1975] 1 WLR 745 (a case decided under the Fugitive Offenders Act 1967).

⁵³ The High Court's decision was final as there was no right of appeal to the House of Lords "*in a criminal cause or matter*": Judicature Act 1873 and Supreme Court of Judicature (Consolidation) Act 1925. The position was changed in 1960 by the Administration of Justice Act 1960: thereafter an appeal lay from the High Court to the House of Lords.

⁵⁴ The 1870 Act originally defined Secretary of State as meaning one of Her Majesty's Principal Secretaries of State (section 26) and this definition is now to be found in the Interpretation Act 1978: section 5 and Schedule 1. In practice it is the Secretary of State for the Home Department.

⁵⁵ The discretion only came to be exercised if the courts had ruled in favour of extradition. Where the courts had discharged the requested person for any reason the Secretary of State was bound by that determination.

Atkinson v. United States of America Government,⁵⁶ Lord Reid explained the role of the Secretary of State in the following way:⁵⁷

“The Secretary of State always has the power not to surrender a man committed to prison by the magistrate. It appears to me that Parliament must have intended the Secretary of State to use that power whenever in his view it would be wrong, unjust or oppressive to surrender the man.”

3.33 In Atkinson, it was held that by providing this safeguard Parliament had excluded the jurisdiction of the courts to dismiss extradition proceedings on the ground that they amounted to an abuse of the court’s process.⁵⁸

3.34 In addition to the discretion vested in the Secretary of State at the end of the extradition process, there was also a discretion to discharge a fugitive arrested on a provisional warrant⁵⁹ and a discretion to decline to issue an Order to proceed.⁶⁰

The Admission of Evidence

3.35 Section 14 of the 1870 Act provided for the admission in evidence of depositions and statements on oath, taken in the foreign State and copies of such depositions and statements. Foreign certificates of or judicial documents stating the fact of conviction were also admissible, if duly authenticated. Section 4 of the Extradition Act 1873 made clear that statements and depositions taken under affirmation were also receivable. By section 15 of the 1870, Act foreign warrants, depositions or

⁵⁶ [1971] A.C. 197

⁵⁷ At page 232g-h

⁵⁸ This is to be contrasted with the position of the 2003 Act where (in England and Wales but not Scotland) in the absence of a general discretion vested in the Secretary of State to refuse extradition, the High Court has recognised the existence of an abuse of process jurisdiction: R (Bermingham) v. Director of the Serious Fraud Office [2007] Q.B. 727 (paras. 91-97); R (The Government of the United States of America) v. Bow Street Magistrates’ Court [2007] 1 WLR 1157 (paragraph 84). These decisions have been followed in Northern Ireland: Re Campbell’s Application [2009] NIQB 82. In Scotland, where there is no abuse of process jurisdiction as such, the High Court of Justiciary exercises a *nobile officium*, an inherent discretion, where no other mode of review appears competent or appropriate. An aggrieved person may petition the *nobile officium* for redress or to prevent injustice or oppression. (We were informed that this was available as a potential remedy in cases of extradition.)

⁵⁹ Section 8

⁶⁰ Section 9

statements were deemed to be duly authenticated if they satisfied certain statutory requirements.

The Fugitive Offenders Legislation: Her Majesty's Dominions and Commonwealth Countries

- 3.36 The Fugitive Offenders Act 1881⁶¹ enabled arrest warrants issued in any part of Her Majesty's dominions (in respect of accused persons) to be endorsed by the Secretary of State or a magistrate sitting at Bow Street Magistrates' Court.⁶² Once endorsed, the warrant provided sufficient authority for the fugitive to be apprehended and brought before a magistrate for committal proceedings to take place. If the magistrate was satisfied that the evidence produced raised "*a strong or probable presumption*"⁶³ that the fugitive had committed the offence and that the offence was one to which the Act applied, he was required to commit the fugitive to prison to await the Secretary of State's decision as to his return.⁶⁴ The magistrate was obliged to inform the fugitive that he would not be surrendered for 15 days, and that he had the right to apply for a writ of *habeas corpus*. At the end of the process the Secretary of State had a discretion whether to order surrender.⁶⁵ The 1881 Act applied to treason and piracy and to every offence punishable in the part of Her Majesty's dominions where it was committed by imprisonment with hard labour for a term of 12 months or more, or by any greater punishment.⁶⁶ The High Court had power to discharge the fugitive by reason of the trivial nature of the case or where it would be unjust or oppressive or too severe a punishment to order his return. However, on the basis that it applied

⁶¹ Which replaced legislation enacted in 1843 ("*An Act for the better apprehension of certain offenders* 6 & 7 Vict. C. 34"). Prior to 1843 surrender took place pursuant to the proviso to section 15 of the Habeas Corpus Act 1679 (the proviso permitting the sending of persons to be tried in Scotland, Ireland or any of the islands or foreign plantations of the King).

⁶² Section 3

⁶³ These words derived from the Criminal Law Act 1826 and reflected the standard of proof required to justify a committal to prison in cases of felony or suspected felony. This test had also been used in the 1843 Act relating to fugitive offenders (6 & 7 Vict. C.34, section 3). There was a division of opinion as to whether this required the same quantum of proof as under the Extradition Act and as in committal for trial in domestic criminal proceedings: *R v Governor of Brixton Prison, Ex parte Bidwell* [1937] 1 K.B. 305; *Re Schtraks* [1964] A.C. 556. In *R v. Governor of Brixton Prison, Ex parte Armah* [1968] A.C. 192, it was held that the words were to be given their ordinary and natural meaning and that a higher standard of evidence for committal was required than in the case of extradition to foreign States or committal for trial in this country.

⁶⁴ Section 5. Bail was available from the High Court.

⁶⁵ Section 6

⁶⁶ Section 9

only to Her Majesty's Dominions, the Act contained no exception for political offences.⁶⁷ Nor did it contain any double criminality requirement or specialty protection.

3.37 Part II of the 1881 Act contained a simplified system of surrender based on the backing of warrants. This simplified scheme of surrender applied to groups of British possessions which by reason of their "*contiguity or otherwise*" made such a scheme "*expedient*". Under Part II there was no requirement to provide *prima facie* evidence of guilt.⁶⁸

3.38 The Fugitive Offenders Act 1881 was repealed by the Fugitive Offenders Act 1967 ('the 1967 Act') which provided for the extradition of persons accused or convicted of certain offences to designated Commonwealth countries and United Kingdom dependencies. The 1967 Act was based on the Scheme for the Rendition of Fugitive Offenders within the Commonwealth, formulated in 1966 by the Commonwealth Law Ministers.⁶⁹ The Law Ministers considered and rejected the proposal of a multilateral treaty, favouring instead a scheme which would form the basis of reciprocating legislation enacted in every Member State of the Commonwealth.⁷⁰ Almost all Commonwealth countries were designated for the purposes of the Act and it was extended by Orders in Council to the United Kingdom dependencies with necessary modifications. Unlike the 1881 Act it contained an exception for political offences. It applied to '*relevant offences*'.⁷¹ These were offences listed in the Schedule to the Act and punishable with at least 12 months' imprisonment. In addition, it was necessary to show that the act or omission constituting the offence would constitute an offence against the law of the United Kingdom.

⁶⁷ The 1881 Act was passed at a time when all "*parts of Her Majesty's Dominions*" owed allegiance to the Crown and, as noted above, treason was one of the offences expressly identified as extraditable. As the former dominions became independent republics, requests were made to secure the return of persons charged with offences which raised concerns as to the political motivation for the prosecutions. The Fugitive Offenders Act 1967 changed the position and extradition in the case of political offences was prohibited.

⁶⁸ Part II of the 1881 Act required the accused to be brought before a magistrate in the place where he was arrested and section 19 allowed the magistrate to take into account the trivial nature of the case or whether it would be unjust or oppressive to put the warrant into operation immediately or at all.

⁶⁹ Cmnd. 3008

⁷⁰ The Commonwealth Law Ministers' meeting took place in London in April-May 1966 and the Scheme is sometimes known as the '*London Scheme*'.

⁷¹ Section 3

3.39 The extradition procedures under the 1967 Act were as follows:

- (i) a request by the representative of the designated Commonwealth country/United Kingdom dependency to the Secretary of State for the return of the fugitive;
- (ii) an authority to proceed issued by the Secretary of State, addressed (in any case where the requested person was believed to be in England, Wales or Northern Ireland) to the magistrate at Bow Street Magistrates' Court informing him of the request and requiring him to issue a warrant for the arrest of the fugitive;⁷²
- (iii) the issue of an arrest warrant by the magistrate;⁷³
- (iv) the arrest and appearance of the fugitive at Bow Street Magistrates' Court (if the arrest took place in England, Wales or Northern Ireland);⁷⁴
- (v) committal proceedings to determine whether the evidence was sufficient (in an accusation case) to amount to a *prima facie* case (not strong and probable cause as under the 1881 Act) that the fugitive had committed a "*relevant offence*" (as defined in section 3 of the Act) or (in a conviction case) to show that the fugitive was unlawfully at large after committing such an offence;⁷⁵
- (vi) in the case of his committal to prison, an Order by the Secretary of State that the fugitive be delivered up to the requesting Commonwealth country/United Kingdom dependency.⁷⁶

3.40 The 1967 Act also provided for arrest on a provisional warrant, pending receipt of a requisition for extradition.⁷⁷ In such a case the magistrate was empowered to fix a reasonable period for the receipt of the Secretary of State's authority to proceed, after

⁷² Section 5

⁷³ Section 6

⁷⁴ The 1967 Act contained an innovation in that committal proceedings might be conducted before the Sheriff or sheriff-substitute of the Lothian and Peebles (now Lothian and Borders) with a right of application for an order of review to the High Court of Justiciary.

⁷⁵ Section 7(3)

⁷⁶ Section 9

⁷⁷ Section 6

which, if the authority was not received, the fugitive had to be discharged from custody.⁷⁸

3.41 As in the case of the 1870 Act, the fugitive had the safeguards provided by the rule of double or dual criminality, the requirement (in accusation cases) that a *prima facie* case be made out, the principle of specialty (which did not appear in the 1881 Act) and the Secretary of State's general discretion to refuse extradition or to launch the extradition proceedings at all. As in the case of the 1881 Act (and the 1870 Act), the committing magistrate was required to inform the fugitive of his right to apply for a writ of *habeas corpus*.⁷⁹ However the 1967 Act differed from the 1870 Act in the following four material respects:

- (i) In addition to the political offence exception, extradition could be refused on the ground either that the request was made with a view to prosecuting or punishing the fugitive on account of his race, religion, nationality or political opinions, or that he might if returned be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.⁸⁰
- (ii) The fugitive was given the right to resist his extradition by applying to the High Court for a writ of *habeas corpus* on the grounds that it would, having regard to all the circumstances, be unjust or oppressive to return him (a) by reason of the trivial nature of the offence; (b) by reason of the passage of time since the commission of the offence or becoming unlawfully at large, as the case may be; (c) because the accusation against him was not made in good faith in the interests of justice.⁸¹
- (iii) The double criminality test differed from the conduct test which was applied under the 1870 Act. It was necessary to show that the elements of the foreign

⁷⁸ Section 7(4)

⁷⁹ Section 8(1). In Scotland the requested person was given the right to apply to the High Court of Justiciary to review the order of committal of the Sheriff: the writ of *habeas corpus* does not run in Scotland.

⁸⁰ Section 4. As noted above a similar ground for refusing extradition was inserted into the 1870 Act by the Suppression of Terrorism Act 1978.

⁸¹ Section 8. The same arguments were available before the High Court of Justiciary.

offence corresponded to the elements of an offence under the relevant law of the United Kingdom and which was listed in the Schedule to the 1967 Act.⁸²

- (iv) The specialty rule was relaxed to the extent that the designated Commonwealth Country could deal with the fugitive for any lesser offence proved by the facts before the court of committal or, with the Secretary of State's consent, for any other offence for which he could have been extradited.⁸³

The Admission of Evidence

- 3.42 As in the case of the 1870 Act, documents were admissible in evidence if duly authenticated.⁸⁴

The Republic of Ireland

- 3.43 Neither the 1870 Act nor the 1967 Act applied in the case of extradition to and from the Republic of Ireland. Instead, the procedure for extradition to and from Ireland was much simpler and involved a process by which warrants issued by a judicial authority in one country were sent to the other country for endorsement and execution by a judicial authority. These procedures were originally contained in the Indictable Offences Act 1848 and the Petty Sessions (Ireland) Act 1851. These two statutes were replaced by the Backing of Warrants (Republic of Ireland) Act 1965 ('the 1965 Act').⁸⁵

⁸² *Canada (Government of) v. Aronson* [1990] 1 A.C. 579. This offence based test of double criminality was held by the House of Lords not to apply to the 2003 Act: *Norris v. Government of the United States* [2008] 1 A.C. 951.

⁸³ Section 4(3)

⁸⁴ Section 11

⁸⁵ Almost identical reciprocating legislation was passed in the Republic of Ireland in Part III of the Extradition Act 1965. The legislation followed the decision of the House of Lords in *Metropolitan Police Commissioner v. Hammond* [1965] A.C. 810 in which it was held that the earlier legislation was incapable of being operated in light of the institutional changes which had taken place in Ireland since 1922. The Irish Supreme Court also found the earlier legislation to be unconstitutional: *State (Quinn) v. Ryan* [1965] I.R. 70.

3.44 Under the 1965 Act, which applied both to accusation and conviction cases, the scheme of surrender from the United Kingdom involved the following steps:

- (i) an arrest warrant issued by a judicial authority in the Republic in respect of a person accused or convicted of an offence against the law of the Republic;⁸⁶
- (ii) an application for the endorsement of that warrant made to a Justice of the Peace in the United Kingdom by a constable who produced the Irish warrant and stated on oath that he had reason to believe that the person named or described in the warrant was within the area for which the Justice acted or on his way to the United Kingdom;⁸⁷
- (iii) endorsement of the warrant by the Justice;⁸⁸
- (iv) the arrest of the fugitive pursuant to the warrant;⁸⁹
- (v) the appearance of the fugitive before a magistrates' court;⁹⁰
- (vi) an order made by the magistrate for the fugitive's removal to the Republic.⁹¹

3.45 Under the 1965 Act no *prima facie* case had to be established against the fugitive at any stage of the extradition process, nor was there any involvement by the Secretary of State. There was however a double criminality requirement and the fugitive could not be delivered up to the Republic unless the offence specified in the warrant corresponded with an offence under the law of the part of the United Kingdom in which the Justice of the Peace acted, which was an indictable offence or punishable on summary conviction with imprisonment for six months.⁹² In addition, extradition could not be ordered:

⁸⁶ Section 1. The Act contained a provisional warrant procedure for urgent cases involving indictable offences only: section 4.

⁸⁷ Section 1

⁸⁸ Section 1

⁸⁹ Section 1

⁹⁰ Section 2(1). The arrested person did not have to be produced at Bow Street Magistrates' Court or the Sheriff's Court at Lothian and Borders.

⁹¹ Section 2(1)

⁹² Section 2(2). In *R v. Governor of Belmarsh Prison, Ex parte Gilligan* [2001] A.C. 84, the House of Lords held that it was not necessary for the juristic elements of the offence to be the same. In order to facilitate surrender, a broad approach was required and some similarity or

- (i) if the offence was an offence of a political character or an offence under military law which was not also an offence under the general criminal law or, in the event of his return, the fugitive would be prosecuted or detained for such an offence;⁹³
- (ii) if the fugitive committed the offence in Northern Ireland and it amounted to an extra-territorial offence under the law of the Republic of Ireland as defined in section 3 of the Criminal Jurisdiction Act 1975 or if the fugitive had been acquitted or convicted in a trial in Northern Ireland for an extra-territorial offence as defined in section 1 of the Criminal Jurisdiction Act 1975 in respect of the same act or omission as that in respect of which the warrant was issued;⁹⁴
- (iii) if the warrant was in fact issued in order to secure the return of the fugitive for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions or he would be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.⁹⁵

3.46 The 1965 Act, as originally enacted, did not contain any specialty protection, although as a matter of practice, where the Republic wished to try the defendant for an offence other than that for which he was returned, it would seek the consent of the United Kingdom government. Specialty protection was later inserted into the 1965 Act⁹⁶ by the Criminal Justice Act 1993.⁹⁷

3.47 The 1965 Act was designed to provide a simple and expeditious procedure between neighbouring countries⁹⁸ and reflected the similarity of the two systems of law and

analogy was sufficient, so long as the criminal conduct was of the required degree of seriousness.

⁹³ Section 2(2)

⁹⁴ Section 2(2). Section 1 of the Criminal Jurisdiction Act 1975 gave the courts in Northern Ireland jurisdiction over certain offences committed in the Republic.

⁹⁵ Section 2(2) (inserted by the Suppression of Terrorism Act 1978).

⁹⁶ Section 6A

⁹⁷ Section 72

⁹⁸ By reason of the Ireland Act 1949 (under which Northern Ireland remains part of the United Kingdom) the Republic of Ireland is not a foreign country for the purposes of any law in force in any part of the United Kingdom (section 2(1)). We were informed by the Crown Solicitor's

the relative ease with which fugitive offenders could travel between the two jurisdictions given their geographical proximity and lack of immigration controls.⁹⁹

- 3.48 Where the court refused to order surrender the police had a right of appeal to the High Court.¹⁰⁰ If an order was made, the person concerned had 15 days in which to apply for a writ of *habeas corpus* (or in Scotland an application for review).¹⁰¹

The Minimum Levels of Seriousness

- 3.49 In the case of each statutory scheme, extradition was only available in respect of offences which satisfied a specified minimum level of seriousness.
- 3.50 Under the 1870 Act extradition was available only in the case of offences listed in the First Schedule to the Act. These were serious offences, such as murder, manslaughter, rape, embezzlement, larceny and obtaining money or goods by false pretences.
- 3.51 Under the 1967 Act to constitute a “*relevant offence*”, the offence¹⁰² had first to fall within a description set out in Schedule 1 to the Act and be punishable under the law of the requesting country or dependency and under the law of the United Kingdom with imprisonment for a term of 12 months or more.
- 3.52 Under the 1965 Act, surrender was only available in respect of indictable offences or an offence punishable on summary conviction with imprisonment for six months.
- 3.53 In the case of convicted offenders, neither the 1870 Act nor the 1967 Act contained any provision requiring that a minimum period of detention must have been imposed

Office in Northern Ireland that in practice requirements were added to the scheme by the Republic of Ireland and that warrants issued in Northern Ireland had to be accompanied by statements of fact and law which were sent to the Irish Attorney General’s Office.

⁹⁹ The 1965 Act applied to both Scotland and Northern Ireland. As noted above, a similar backing of warrants scheme was contained in Part II of the Fugitive Offenders Act 1881 and this scheme applied to bordering territories where a simplified scheme of surrender was ‘*expedient*’.

¹⁰⁰ Section 2A. The High Court of Justiciary in Scotland

¹⁰¹ Section 3

¹⁰² However described in the requesting Commonwealth country or United Kingdom dependency.

as a condition of surrender. In each case the criterion governing return was that the person had been convicted of an extraditable offence (that is an offence for which extradition was available) and was unlawfully at large, with the result that a convicted person could be surrendered irrespective of the length of the sentence actually imposed. However, the burden of preparing an extradition request and the cost and time taken to deal with extradition proceedings meant that as a matter of practice, requests would not ordinarily be made for individuals subject to short custodial sentences.

Double Jeopardy

- 3.54 Under both the 1870 Act and the 1967 Act extradition was barred if the requested person would be entitled to be discharged on the basis that he had previously been acquitted or convicted of the offence for which his return was sought.¹⁰³

Fiscal Offences

- 3.55 Under the 1870 Act and the 1967 Act extradition was not available for any offence in connection with taxes and duties: such offences did not appear in the lists of offences set out in the Schedules. Despite these omissions, extradition was available where the Revenue happened to be the victim of an act which amounted to an offence included in the lists.
- 3.56 Section 2(2) of the 1965 Act as originally enacted specifically excluded surrender for “*an offence under an enactment relating to taxes, duties or exchange control.*” This was repealed by the Criminal Justice and Public Order Act 1994.¹⁰⁴

¹⁰³ Double jeopardy was not an express statutory bar to extradition under the 1870 Act. However, in *Atkinson v. United States Government* [1971] A.C. 197, Lord Reid noted that because the magistrate had the same jurisdiction and powers as if the defendant were brought before him charged with an indictable offence, he had the power to deal with a plea in bar of prosecution: *autrefois acquit* (formerly acquitted) or *autrefois convict* (formerly convicted). Section 4(2) of the 1967 Act contained an express bar based on double jeopardy. There was no such general provision in the 1965 Act.

¹⁰⁴ Section 159(3)

Extraterritorial Offences

- 3.57 The 1870 Act provided for the surrender of fugitives accused or convicted of an extradition crime committed within the jurisdiction of the requesting State (which included every colony, dependency, and constituent part of a foreign State and every maritime vessel of that State). This reflected the idea that the criminal law was local and as a general rule had no extra-territorial ambit.¹⁰⁵
- 3.58 By way of contrast, section 3(1)(c) of the 1967 Act enabled extradition to take place if the conduct constituting the offence would have constituted an offence against the law of the United Kingdom if it had taken place within the United Kingdom, or, in the case of an extra-territorial offence, in corresponding circumstances outside the United Kingdom.

Scottish Practice

- 3.59 Under the 1870 Act Scotland had an extradition jurisdiction separate from England and Wales only in respect of crimes committed on foreign ships which put into Scottish ports.¹⁰⁶ Under the 1967 Act a separate jurisdiction was provided by which warrants could be issued by a sheriff of the Lothian and Borders Sheriff Court in Edinburgh. Committal proceedings took place under Scottish rules of criminal procedure (which does not involve the presentation of documentary or oral evidence

¹⁰⁵ The general rule was expressed by Lord Halsbury L.C. in *Macleod v. Attorney-General for New South Wales* [1891] A.C. 455, 458: “All crime is local.” There are an increasing number of statutory provisions which provide courts in the United Kingdom with jurisdiction over crimes committed abroad even where no part of the offence was committed in the United Kingdom. In *Liangsiriprasert (Somchai) v Government of the United States of America* [1991] AC 225, Lord Griffiths said (at page 251): “Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality.” In *R v. Smith (Wallace Duncan) (No. 4)* [2004] Q.B. 1418, the Court of Appeal held that at common law a crime may be regarded as committed within the jurisdiction if a substantial part of the offence was committed in England and Wales. In *R (Al-Fawwaz) v Governor of Brixton Prison* [2002] 1 AC 556, the House of Lords held that the then treaty between the United Kingdom and United States of America did not require the acts alleged against the requested person to be committed within the territory of the United States: it was sufficient that the offence was triable within the United States and an equivalent offence would be triable in the United Kingdom.

¹⁰⁶ Section 16. The same provision applied to Northern Ireland. The rationale for centralisation of extradition hearings at Bow Street Magistrates’ Court was that extradition cases were often extremely technical, difficult and occasionally sensitive, whether politically or otherwise: by having a relatively small cadre of judges it was possible to develop expertise with the result that cases were dealt with more efficiently and with a consistency of approach.

to establish a *prima facie* case) and an appeal lay to the High Court of Justiciary.¹⁰⁷ The functions performed by the Home Secretary in England and Wales were performed by the Secretary of State for Scotland.

Northern Ireland, the Isle of Man and the Channel Islands

- 3.60 Neither the 1870 Act¹⁰⁸ nor the 1967 Act¹⁰⁹ made provision for a separate jurisdiction in the courts of Northern Ireland (after 1922) or the Isle of Man or the Channel Islands.

Proposals for Reform

- 3.61 As in the nineteenth century, the United Kingdom's extradition procedures caused difficulties with foreign States. In 1978 Spain denounced its extradition treaty with the United Kingdom as a result of problems experienced in satisfying the *prima facie* evidence requirement, while other civil law jurisdictions in Western Europe had difficulty complying with the statutory formalities.

The 1985 Green Paper

- 3.62 In February 1985 the Government published a Green Paper on Extradition.¹¹⁰ This followed a review of the 1870 Act conducted by the Interdepartmental Working Party which reported in 1984.¹¹¹ The Working Party noted the growth of transnational crime associated with increased freedom of movement and in response to these

¹⁰⁷ In Scotland committal practice is based on the presentation of a petition, containing the charge or charges, signed by the procurator fiscal.

¹⁰⁸ Section 22 extended the provisions of the 1870 Act to the Isle of Man and the Channel Islands as if they were part of the United Kingdom.

¹⁰⁹ Section 16 extended the provisions of the 1967 Act to the Isle of Man and the Channel Islands as if they were part of the United Kingdom. This was subject to any Order in Council directing that the Act would apply to the islands with exceptions, adaptations and modifications.

¹¹⁰ (Cmnd. 9421)

¹¹¹ *A Review of the Law and Practice of Extradition in the United Kingdom; the Report of an Interdepartmental Working Party*, published by the Home Office. The Interdepartmental Working Party had originally reported in 1974: Report of the Working Party on the Extradition Act 1870.

developments made a number of recommendations. The Green Paper indicated that a number of proposals made by the Working Party were acceptable in principle to the Government and that legislation would be introduced to bring about change at an appropriate time. It was also indicated that there were “*important areas of the present law where more radical changes than those envisaged by the Working Party need to be considered if we are to develop a more effective system of extradition, thereby helping to check the growth of international crime and the scope for criminals to escape justice.*” The Green Paper invited comments on seven separate issues:

- (i) Whether the *prima facie* case requirement should be retained as a feature of extradition law;¹¹²
- (ii) Whether the evidential requirements should be relaxed so that evidence would be received and admitted in the United Kingdom courts if it would be admitted in criminal proceedings before the courts of the requesting State;¹¹³
- (iii) Whether the list method of defining extradition crimes should be replaced by a method based on a maximum term of imprisonment of at least 12 months and that fiscal offences should not be specifically excluded;¹¹⁴
- (iv) Whether the safeguards provided for in section 4(1) of the Fugitive Offenders Act 1967 (the person shall not be returned if the request is in fact made for the purpose of prosecuting or punishing him on account of his political opinions) should be incorporated in new extradition treaties;
- (v) Whether the specialty rule should be relaxed in order to enable a requesting State, with the consent of the United Kingdom, to try the fugitive for any

¹¹² The Green Paper noted that the *prima facie* evidence requirement was the provision which had aroused most criticism in recent years, particularly from European civil law jurisdictions.

¹¹³ The Green Paper suggested that some relaxation of the evidential requirements was necessary for the United Kingdom more effectively to fulfil its obligations under extradition agreements.

¹¹⁴ As noted above, no offence in connection with taxes and duties was mentioned in the lists of offences contained in the Schedules to the Extradition Act 1870 and the Fugitive Offenders Act 1967. The Backing of Warrants (Republic of Ireland) Act 1965 as originally enacted specifically excluded surrender for an offence under an enactment relating to taxes, duties or exchange control: this was eventually repealed by the Criminal Justice and Public Order Act 1994.

offence committed before his extradition or to re-extradite the fugitive to a third State;

- (vi) Whether there should be a power to enable the United Kingdom to extradite on an *ad hoc* basis;¹¹⁵
- (vii) Whether the Scottish courts should be given a separate jurisdiction to hear ‘foreign states’ extradition cases.¹¹⁶

3.63 In relation to the Secretary of State’s discretion, the Government accepted the Working Party’s recommendation that the Secretary of State’s unfettered discretion to refuse to surrender a fugitive in wholly exceptional circumstances should be retained.

The White Paper

3.64 The Green Paper was followed by a White Paper published in March 1986.¹¹⁷ The White Paper noted that:¹¹⁸

“The United Kingdom is ... widely regarded as one of the most difficult countries from which to secure extradition. In the Government’s view, the effectiveness of the present law does not match the gravity of the present situation. Some people believe that as a consequence of this we are not meeting our full responsibility for the maintenance of the international rule of law. The changes proposed are intended to end this unsatisfactory state of affairs while preserving adequate safeguards for individuals affected by the extradition procedure. They will bring our extradition law more closely into line with that of other countries in Western Europe and,

¹¹⁵ That is, extradition on the basis of the United Kingdom’s domestic law to a State with which no extradition treaty is in force. Under the 2003 Act there is provision for special extradition arrangements: section 194 which is a provision modelled on section 15 of the Extradition Act 1989. See Appendix C.295.

¹¹⁶ As noted above, the Scottish courts had jurisdiction to deal with requests from designated Commonwealth countries and United Kingdom dependencies under the 1967 Act, but only a limited jurisdiction under the 1870 Act.

¹¹⁷ Criminal Justice; Plans for Legislation (Cmnd. 9658)

¹¹⁸ Paragraph 48

as a result, will enable the UK to become a party to the European Convention on Extradition, thereby affording a uniform basis for our extradition arrangements with those countries.”

3.65 The White Paper suggested that “*the principal obstacle to extradition at present is the requirement that the requesting state must establish in our courts a prima facie case against the fugitive according to English rules of evidence.*”¹¹⁹ It was proposed that this requirement be abolished on the basis that it did not offer a necessary safeguard for the person sought by the requesting State but was a formidable impediment to entirely proper and legitimate extradition requests.¹²⁰

3.66 The Government also announced an intention to implement recommendations made by the Working Party as well as the following further proposals:

- (i) to allow extradited offenders to be dealt with for other offences if the United Kingdom Government consents;
- (ii) to provide for re-extradition with the United Kingdom’s consent;¹²¹
- (iii) to provide for *ad hoc* extradition;¹²²
- (iv) to define extraditable offences as those which attract a penalty of at least twelve months’ imprisonment;¹²³
- (v) to establish a separate Scottish jurisdiction.

¹¹⁹ Paragraph 49. As noted above, in 1978 Spain denounced its extradition treaty with the United Kingdom as a result of difficulties experienced in satisfying the *prima facie* evidence requirement.

¹²⁰ The Working Party which reported in 1982 had noted (at paragraph 4.6) that European States with which our extradition traffic is heaviest, found it difficult to meet the *prima facie* evidence requirement: “*Something like a third of applications made to the United Kingdom under our extradition treaties fail, and the most common cause of failure is undoubtedly the requesting State’s inability to satisfy [this requirement].*” It was also suggested that this requirement deterred extradition requests from being made at all. The balance of opinion within the Working Party was in favour of discarding the requirement.

¹²¹ That is to provide a basis for the requesting State to extradite to a third State.

¹²² That is extradition on the basis of the United Kingdom’s domestic law to a State with which no extradition treaty is in force.

¹²³ Including fiscal offences falling within that category.

The Criminal Justice Act 1988

- 3.67 The White Paper was followed by the Criminal Justice Act 1988, Part I of which was intended to effect a radical reform of the law of extradition. The principal purposes of the reform were to simplify the extradition process and enable the United Kingdom to ratify the European Convention on Extradition concluded on 13th December 1957.¹²⁴
- 3.68 In fact, the extradition provisions of the 1988 Act were never brought into force and the law was the subject of major change affected by the Extradition Act 1989.

The Extradition Act 1989

- 3.69 The Extradition Act 1989 ('the 1989 Act') consolidated the extradition regimes previously contained in the Extradition Acts 1870 to 1935 and the 1967 Act, all of which were repealed.¹²⁵
- 3.70 The aim of the 1989 Act was essentially twofold. First, to provide a uniform procedure for extradition to foreign States and Commonwealth countries which had previously been the subject of two distinct statutory regimes. Secondly, to facilitate adherence by the United Kingdom to the European Convention on Extradition. The 1989 Act provided for extradition to take place under two distinct procedures:
- (i) Under Part III of the Act (which governed extradition to foreign States under extradition arrangements made under that Part, designated Commonwealth countries and colonies);¹²⁶

¹²⁴ See paragraph 3.71- In Lords Committee on the Bill, the Earl of Caithness said that the fact that the United Kingdom was not a party to the European Convention on Extradition was "*a major stumbling block in our negotiations throughout Western Europe to get a more comprehensive agreement on crime where people who are committing crimes can easily hop from one country to another*" (Hansard, Vol. 489 (No. 1369), Col. 22 (20th October 1987).

¹²⁵ As was Part 1 of the Criminal Justice Act 1988. The Backing of Warrants (Republic of Ireland) Act 1965 remained in force until it was repealed by the 2003 Act: section 218(a) and Schedule 3.

¹²⁶ Extradition arrangements under Part III were governed by section 4. These arrangements covered general extradition arrangements such as the arrangements under the European Convention on Extradition Order 1990 SI 1507 as well as special extradition arrangements with other foreign States, such as Brazil.

- (ii) Under Schedule 1 to the Act which gave effect to Orders in Council made under section 2 of the 1870 Act. This meant that extradition treaties to which the 1870 Act had been applied were now given legal force by the 1989 Act. Schedule 1 to the Act applied to the United States of America, Belgium,¹²⁷ Albania as well as some African, Asian and Central and South American countries, with the result that extradition continued on the basis of the earlier treaty arrangements. Thus, under Schedule 1 to the Act treaty arrangements concluded between 1870 and 1989 were preserved and the procedure broadly followed the earlier scheme.

The European Convention on Extradition

- 3.71 As noted above, one of the objects of the 1989 Act was to facilitate adherence by the United Kingdom to the European Convention on Extradition 1957. The European Convention on Extradition was intended to simplify extradition procedures between countries in Western Europe. It was ratified by the United Kingdom in 1991.¹²⁸ The preamble to the Convention states that its object is the acceptance by the parties of uniform rules with regard to extradition, with the aim of achieving greater unity between Member States of the Council of Europe.¹²⁹ Article 1 of the Convention contains an obligation to extradite.¹³⁰ Extraditable offences are defined in Article 2 and these are, in accusation cases, offences punishable in both the requesting and requested States by a custodial sentence for a maximum (viz. possible) period of at least one year, and, in conviction cases, extradition is available in respect of custodial

¹²⁷ Belgium later ratified the European Convention on Extradition with effect from 17 March 1998 and extradition from the United Kingdom to Belgium became subject to Part III of the 1989 Act. Belgium was an original State party to the Convention but operated a simplified extradition scheme with some other Western European States; hence its late ratification of the European Convention.

¹²⁸ The original State parties to the Convention were Austria, Belgium, Denmark, France, Germany, Greece, Iceland, Italy, Luxembourg, Norway, Sweden, Turkey and the United Kingdom.

¹²⁹ Although by reason of Article 30, it is also open by invitation to States who were not members of the Council of Europe. Israel as well as other States joined the Convention on this basis. By the time the Convention was drafted similar multi-national Conventions or treaties had already been operating in South America (for example, the Montevideo Convention 1933).

¹³⁰ Although the Convention does not contain any mechanism for resolving disputes between State parties in relation to this obligation.

sentences of at least four months.¹³¹ This approach, known as the “*eliminative*” or “*no-list*” method is well-suited to such a multilateral agreement as it allows extradition to proceed on a more flexible basis by avoiding the difficulty of defining offences in a way that was satisfactory to all State party signatories. Articles 8 and 9 contain provisions giving effect to the *ne bis in idem* rule.¹³² Under Article 8, a requested State has a discretion to refuse extradition if the requested person is being prosecuted for the same acts, while under Article 9, a final judgment by the competent authorities of the requested State concerning the same act is a mandatory ground for refusal. The formal requirements concerning the contents of the request and supporting documents are governed by Article 12. This Article provides that the request is to be in writing and supported by the conviction and sentence or detention order or the warrant of arrest, a statement of the offences for which extradition is requested and the time and place of their commission and a copy of the relevant enactments or statement of the relevant law. Article 13 enables the requested State to seek any supplementary information which was found to be necessary in order to reach a decision. The Convention is intended to operate against the background of a spirit of mutual confidence between like minded Member States of the Council of Europe; for this reason it does not require requesting States to submit evidence amounting to a *prima facie* case (although Article 26 permitted States to adopt this requirement).¹³³

- 3.72 The European Convention on Extradition was given effect in the United Kingdom by the European Convention on Extradition Order 1990.¹³⁴ Paragraph 3 of the Order dispensed with the *prima facie* evidence requirement in the case of requests by Convention States.¹³⁵

¹³¹ Although the United Kingdom entered a reservation in relation to the four months custodial sentence provision, with the result that extradition was available in both accusation and conviction cases only if the offence for which extradition was sought was punishable with imprisonment for 12 months or any greater punishment.

¹³² “*Not twice for the same.*” More familiar to English lawyers as the rule against double jeopardy which is sometimes expressed in the common law pleas in bar to a prosecution as *autrefois acquit* (formerly acquitted) and *autrefois convict* (formerly convicted).

¹³³ Norway and Denmark, for example, reserved the right to ask for *prima facie* evidence in any particular case, while the Republic of Ireland a common law country made no such reservation.

¹³⁴ SI 1990 No. 1507

¹³⁵ This was authorised by section 9(4) and (8) of the 1989 Act.

- 3.73 There was another feature of the European Convention on Extradition which is relevant to the development of our extradition arrangements. A traditional feature of extradition law among the civil law States of Europe was the nationality exception:¹³⁶ extradition was not available in respect of their own nationals and extradition under the European Convention respected this principle.¹³⁷ The rationale for the nationality exception was essentially twofold. First, it protected citizens from being tried in overseas courts for offences committed against foreign laws, (based on a belief that the citizen of one State would be at a disadvantage in securing justice from the courts of another State, for example, because of difficulties with language or differences in procedure). Secondly, it was intended to facilitate rehabilitation by permitting the offender to serve any custodial sentence in his home State. Article 6(1)(a) of the Convention provides that contracting parties have the right to refuse extradition of their own nationals. However, in order to prevent this exception resulting in total impunity, the requested State is obliged, on the request of the requesting State, to submit the case to its competent authorities for prosecution.¹³⁸ Accordingly, nationals of a State operating the nationality exception were to be dealt with before their national courts for crimes committed abroad, notwithstanding the difficulties encountered in trying such cases particularly in relation to the obtaining of evidence and transporting witnesses to the prosecuting State. The United Kingdom has not generally adopted the nationality exception¹³⁹ and it has been renounced by the

¹³⁶ The non-extradition of nationals was first initiated by France in its treaty with Belgium in 1834: Shearer, *Extradition in International Law* (1971) page 104. Civil law jurisdictions usually assert extensive rights to jurisdiction over their own nationals for crimes wherever committed on the basis of the active personality principle: a State asserts jurisdiction over an offence based on the nationality of the alleged offender. This is to be contrasted with the passive personality principle, by which a State may assert jurisdiction in relation to offences committed against their nationals (jurisdiction is based on the nationality of the victim), and the protection principle by which a State may assert jurisdiction over offences which harm its interests.

¹³⁷ Some of the State parties to the Convention defined the term ‘*nationals*’ to include those individuals lawfully resident in the State. Denmark, Finland, Iceland and Norway entered declarations to include their own and each others’ nationals and residents with the result that Scandinavia became for these purposes a single entity.

¹³⁸ This reflects the principle of *aut dedere aut judicare* (extradite or prosecute): persons accused of certain crimes must either be surrendered for trial, or tried in the country where they are found.

¹³⁹ The 1794 Jay Treaty with the United States applied to all persons irrespective of nationality as did the treaties concluded with the United States and France in 1842 and 1843 respectively. The exemption found its way into a treaty between the United Kingdom and Switzerland concluded in 1874. In *R v. Wilson* (1877) 3 Q.B.D. 42, the fugitive was discharged on the basis that the treaty between Great Britain and Switzerland did not permit the extradition of a British subject to Switzerland, nor a Swiss citizen to Great Britain. Cockburn C.J. described the nationality exception as a “*blot upon the law.*” The Royal Commission of 1877 (chaired by Sir Alexander Cockburn C.J.) recommended that any restriction based on citizenship

European Union on the basis that it is inconsistent with the principle of mutual recognition which underpins the operation of the European arrest warrant.¹⁴⁰

- 3.74 With effect from 6 June 1994, the United Kingdom ratified the Second Additional Protocol to the Convention which concerned requests from Convention States in respect of fiscal offences.¹⁴¹ It provided that extradition for offences in connection with taxes, duties, custom and exchange was to take place in accordance with the Convention and was not to be refused on the ground that the law of the requested Party did not impose the same kind of tax or duty.
- 3.75 The 1957 Convention was followed by the 1995 Convention on Simplified Extradition Procedures between Member States of the European Union¹⁴² and the 1996 Convention on Extradition between Member States of the European Union.¹⁴³ These two Conventions were designed to simplify the European Convention on Extradition as it applied between Member States of the European Union but neither were implemented as they were superseded by the European arrest warrant scheme. Other developments in this area included a bilateral fast track extradition arrangement between Spain and Italy.
- 3.76 The 1995 Convention (signed by the United Kingdom on 10 March 1995) provided for a streamlined procedure for cases where the arrested person and the requested

should not be included in any subsequent treaties and this approach has generally been followed. Some later treaties contained a discretion to decline the surrender of British subjects and some contained an absolute exemption and the difficulty of securing reciprocity. This was usually as a result of other States' insistence on the inclusion of the exemption: see *Harvard Research Project on Extradition* (1935) page 110.

¹⁴⁰ See paragraphs 4.59-4.50. The difficulties created by the nationality exception were recently illustrated by events following the murder by radioactive poisoning of Alexander Litvinenko in London, 2006. The Crown Prosecution Service charged Andrei Lugovi with Litvinenko's murder and sought his extradition from the Russian Federation. This request was refused on the basis that the laws of the Russian Federation do not permit the extradition of Russian nationals. *The Harvard Research Project on extradition* (1935) recommended that States should not refuse extradition because the person claimed is one of its national: it was concluded that there is no valid reason why the system of extradition which is intended to avert a failure of justice should not extend to citizens or subjects: so long as justice is available abroad.

¹⁴¹ The First Additional Protocol included a limitation on the political offence safeguard as it applied to war crimes. The United Kingdom was not a party to the First Additional Protocol.

¹⁴² OJ C78, 30 March 1995

¹⁴³ OJ C313, 13 October 1996

State consented to extradition and allowed for a relaxation of specialty protection for a person who consented to extradition to a Member State of the European Union.¹⁴⁴

- 3.77 The 1996 Convention (signed by the United Kingdom on 27 September 1996) relaxed the procedures for extradition between Member States of the European Union. It amended the definition of what constituted an extradition crime;¹⁴⁵ derogated from the principle of dual criminality¹⁴⁶ and provided that the political offence exception could no longer be claimed by those whose extradition was sought by another Member State of the European Union.¹⁴⁷ It also sought to encourage States to extradite their own nationals¹⁴⁸ and relax the specialty and authentication requirements between Member States.¹⁴⁹
- 3.78 Having introduced the European Convention on Extradition and the attempts to simplify extradition within Western Europe we now turn to the procedures under the 1989 Act.

The Procedures Under the 1989 Act

- 3.79 Under the 1989 Act requests for extradition to the United Kingdom could be made in two ways. First, in cases of urgency by a provisional arrest request. Secondly, by a full order request, where the full papers were submitted through diplomatic channels in advance of arrest. In the case of a provisional arrest the requested person was brought before the magistrate¹⁵⁰ who set an initial period for the receipt of the formal

¹⁴⁴ Article 9

¹⁴⁵ Article 2(1)

¹⁴⁶ Article 3

¹⁴⁷ Article 5(1) provided that “*For the purposes of applying this Convention, no offence may be regarded by the requested Member State as a political offence, as an offence connected with a political offence or an offence inspired by political motives.*”

¹⁴⁸ Article 7(1) provided “*Extradition may not be refused on the ground that the person claimed is a national of the requested Member State within the meaning of Article 6 of the European Convention on Extradition.*”

¹⁴⁹ The European Union Extradition Regulations 2002 (SI 2002 No. 419) made on 25th February 2002 were drafted to give effect to the 1995 and 1996 Conventions but these were rendered obsolete by the 2003 Act. The earlier European Convention on Extradition Order 1990 (Amendment) Order 1996 SI No. 2596 simplified and modernised the method of transmitting extradition requests.

¹⁵⁰ As under the earlier legislation these were the Metropolitan stipendiary magistrates sitting at Bow Street Magistrates’ Court. The Access to Justice Act 1999 introduced a new unified bench of professional judges to sit in the magistrates’ courts and they are now known as

extradition request and for the signing of an authority to proceed or order to proceed by the Secretary of State.¹⁵¹ The magistrate was required to notify the Secretary of State of the existence of the provisional warrant forthwith.¹⁵² If the request or other necessary documents were not received within the period set by the magistrate the arrested person was entitled to be released. In the case of the full order request, the authority to proceed or order to proceed was signed before the requested person was arrested.

The Seriousness Threshold

- 3.80 As in the case of the 1967 Act, extradition under Part III of the 1989 Act was only available in respect of “*extradition crimes*” meaning conduct which if it occurred in the United Kingdom was punishable by imprisonment for a period of 12 months or more. This seriousness threshold applied in both accusation and conviction cases.¹⁵³ Under Schedule 1, the term “*extradition crime*” was to be construed by reference to the relevant Order in Council made under section 2 of the Extradition Act 1870 as it had effect immediately before the coming into force of the 1989 Act. The effect of this provision limited the availability of extradition to those offences listed in the various treaties and Orders in Council as they existed before the 1989 Act came into effect.

District Judges (Magistrates’ Courts). Bow Street Magistrates’ Court closed in July 2006 and extradition work was moved to the City of Westminster Magistrates’ Court. This Court closed on 22 September 2011 and extradition work is now dealt with at the Westminster Magistrates’ Court.

¹⁵¹ The authority to proceed was the formal authorisation issued by the Secretary of State to the magistrate sitting at Bow Street Magistrates’ Court to hear the case against the arrested person in Part III cases. The Order to proceed was the formal authorisation to Bow Street Magistrates’ Court in Schedule 1 cases. The authority to proceed was required to specify the equivalent offence or offences under United Kingdom law, that is as if the conduct in question had occurred in the United Kingdom (section 7(5)).

¹⁵² Section 8(4); Paragraph 5(2) of the Schedule

¹⁵³ The United Kingdom entered a reservation to Article 2 of the European Convention on Extradition which permitted extradition in conviction cases where a custodial sentence of 4 months or more had been imposed.

Extraterritorial Offences

- 3.81 Unlike the 1870 Act, extradition under the 1989 Act was expressly available in respect of extra-territorial offences (offences committed outside the requesting State) in two situations. First, if the United Kingdom would itself have extra-territorial jurisdiction over that offence in corresponding circumstances (as was the position under the 1967 Act) or, secondly, where the offence was committed by a national of the requesting State and that State based its jurisdiction over the offence on the offender's nationality.

The Procedure Under Part III

- 3.82 The procedure for extradition under Part III of the 1989 Act was summarised by Lord Templeman in *In Re Evans*:¹⁵⁴

“... first the foreign court must consider that a charge of serious crime has been properly laid against the suspect on the basis of information which justifies the issue of a warrant for his arrest. Secondly, the administration of the foreign country must consider that the charge, the law of the foreign country and the circumstances justify a request for extradition in accordance with the provisions of the Convention. Thirdly, the foreign State must identify the suspect, authenticate the foreign warrant for his arrest, give particulars of the alleged conduct which constitutes the offence and produce a translation of the relevant foreign law which establishes the offence and makes it punishable by 12 months' imprisonment or more. Fourthly, the Secretary of State must satisfy himself that the request is in order. The Secretary of State must then satisfy himself that equivalent conduct in the United Kingdom would constitute an offence under the law of the United Kingdom punishable with 12 months' imprisonment or more. The Secretary of State may then

¹⁵⁴ [1994] 1 WLR 1006, at page 1010. Lord Templeman had earlier noted that: “*Extradition arrangements have been transformed as a result of the invention of the jet aeroplane and the mutual acceptance by means of extradition treaties by and between countries of the integrity of their different legal systems.*”

issue an authority to proceed and must identify and specify the relevant law of the United Kingdom. Fifthly, the metropolitan magistrate sitting as a court of committal must be satisfied after he has heard representations, that the alleged conduct would constitute a serious offence in the foreign state and in the United Kingdom. In other words the magistrate must be satisfied that a charge of serious crime offensive in the foreign country and offensive in the United Kingdom has been properly laid against the accused. The suspect can then be committed and the magistrate must certify the offence against the law of the United Kingdom which would be constituted by his conduct. Sixthly, subject to any habeas corpus proceedings, the Secretary of State may enforce extradition.”

- 3.83 This summary (which makes no reference to the *prima facie* evidence requirement) was made in the context of a case concerning an extradition request from Sweden, a State party to the European Convention on Extradition. In accusation cases under the 1989 Act there were two levels of evidential requirements for extradition requests made to the United Kingdom.¹⁵⁵ First, in the case of other foreign States (that is those foreign States not parties to the Convention), designated Commonwealth countries, colonies and proceedings under Schedule 1, the magistrate had to be satisfied that the evidence would be sufficient to warrant the fugitive’s trial (a *prima facie* case).¹⁵⁶ Secondly, in the case of requests from State parties to the European Convention there was no *prima facie* evidence requirement; it was sufficient if the request contained identification particulars, particulars of the facts giving rise to the offence and a statement of the relevant law.

¹⁵⁵ In conviction cases under Part III the magistrate had to be satisfied that the requested person had been convicted of an extradition crime and that he was unlawfully at large. It was unnecessary to look behind the conviction at the facts of the offence: section 9(8)(b). In conviction cases under the Schedule the magistrate had to be satisfied that the requested person had been convicted of an extradition crime but there was no additional requirement to show he was unlawfully at large (paragraph 7).

¹⁵⁶ The Criminal Justice and Public Order Act 1994 contained provisions (section 44) designed to abolish committal proceedings in domestic criminal proceedings and, in anticipation of this change, the 1989 Act was amended to provide that the *prima facie* evidence test would be satisfied by evidence sufficient to make a case requiring an answer by that person if the proceedings were the summary trial of an information against him. This change made no practical difference to the operation of the test or the quantum of evidence required to satisfy it.

3.84 In cases under Part III there were a number of general restrictions on return and a person was not to be returned if:

- i. the offence was of a political character;¹⁵⁷
- ii. the offence was an offence under military law (and not also an offence under the general criminal law);¹⁵⁸
- iii. the extradition request had been made for the purpose of prosecuting or punishing the requested person on account of his race, religion, nationality or political opinions or that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions;¹⁵⁹
- iv. in conviction cases, the requested person had been convicted in his absence and it would not be in the interests of justice to return him;¹⁶⁰
- v. in accusation cases, the requested person would be entitled to be discharged under any rule of law relating to previous acquittal or conviction.¹⁶¹

3.85 These safeguards were to be considered by “*an appropriate authority*” which meant that the Bow Street Magistrate, the High Court or the Secretary of State were required to discharge the requested person if any one of them was found to apply at the time of their consideration of the case.¹⁶²

3.86 These safeguards were in addition to the usual protections of double criminality¹⁶³ and specialty.¹⁶⁴

¹⁵⁷ Section 6(1)(a).

¹⁵⁸ Section 6(1)(b). There was no equivalent provision in Schedule 1.

¹⁵⁹ Section 6(1)(c) and (d)

¹⁶⁰ Section 6(2). Where a person had been convicted in his absence in a designated Commonwealth country or colony section 35(2) of the 1989 Act required the request for extradition to be treated as an accusation case.

¹⁶¹ Section 6(3). There was no equivalent provision in Schedule 1.

¹⁶² By way of contrast, in cases under Schedule 1 the only one of these bars to extradition that could be raised before the magistrate was the political offence exception.

¹⁶³ Section 2

¹⁶⁴ Section 6(4) and Paragraph 1(3) of Schedule 1

The Powers of the High Court

3.87 An appeal against the decision of the magistrate to commit an individual was by way of application for a writ of *habeas corpus*, heard by the High Court. Moreover, in proceedings under Part III of the 1989 Act (that is proceedings involving requests from designated Commonwealth countries, colonies and foreign States not falling within Schedule 1 of the 1989 Act) the High Court was given power (in addition to those under section 6) to discharge the requested person if it appeared to the Court that it would, having regard to all the circumstances, be unjust or oppressive to return him:

- i. by reason of the trivial nature of the offence;¹⁶⁵
- ii. by reason of the passage of time since he is alleged to have committed it or to have become unlawfully at large as the case may be;¹⁶⁶ or
- iii. because the accusation against him is not made in good faith or in the interests of justice.¹⁶⁷

3.88 This was the power first enacted in the Fugitive Offenders Act 1967. No similar express power was available in cases under Schedule 1 to the Act (although the Secretary of State had a general discretion which entitled him to refuse extradition and this enabled the Secretary of State to consider issues such as triviality, delay and bad faith).

The Secretary of State's Discretion

3.89 As under the earlier legislation, the Secretary of State had a considerable role to play at the beginning and end of the extradition process. At the beginning of the process through the decision to submit the extradition request to the magistrate, by issuing an authority to proceed¹⁶⁸ or an order to proceed.¹⁶⁹ At the end of the process through

¹⁶⁵ Section 11(3)(a)

¹⁶⁶ Section 11(3)(b)

¹⁶⁷ Section 11(3)(c)

¹⁶⁸ In Part III cases

the decision on surrender. At the beginning of the process the Secretary of State had to be satisfied that the request was properly authenticated and was also required to consider whether he should refuse the request. This involved looking ahead to see whether he would, at the end of the judicial phase of the process, order surrender. The involvement of the Secretary of State meant that there was a large measure of duplication in the decision-making process and an opportunity for challenges to the Secretary of State's decision by way of applications for judicial review.¹⁷⁰

3.90 In Part III cases, section 12(1) of the 1989 Act gave the Secretary of State a general discretion not to order extradition. Although there was no similar provision under Schedule 1 to the Act, it was recognised that the Secretary of State enjoyed such a discretion: *Atkinson*, supra and *In re Schmidt*.¹⁷¹

3.91 Without prejudice to his general discretion in Part III cases, the Secretary of State was required to make no order for the return of a requested person if it would be unjust or oppressive to return him by reason of the trivial nature of the offence, the passage of time, or because the accusation had not been made in good faith in the interests of justice. The Secretary of State also had a discretion not to order return where the offence was punishable with death; where the requested person was the subject of criminal proceedings in the United Kingdom or serving a prison sentence in the United Kingdom or where he decided to give preference to another extradition request. As a matter of principle, cases under Schedule 1 were treated in the same manner.

¹⁶⁹ In Schedule 1 cases

¹⁷⁰ These challenges by way of applications for judicial review were in addition to applications for writs of *habeas corpus* and applications (in Part III cases) under section 11 of the 1989 Act.

¹⁷¹ [1995] A.C. 339. Under section 13 of the 1989 Act the requested person had a right to make representations to the Secretary of State as to why an order for return should not be made in his case. As a matter of practice this right was extended to cases under Schedule 1. The Secretary of State was under a duty to consider the representations fairly and where necessary to provide disclosure to the parties to enable them to make further representations. The Secretary of State was also under a duty to consider any new and relevant information which came to light: *R v. Secretary of State for the Home Department, Ex parte Launder* [1997] 1 WLR 839 at page 852. In the event of ordering extradition, the Secretary of State's decision was amenable to challenge by way of judicial review: an application for a writ of *habeas corpus* does not lie against the Secretary of State as it is directed against the person having control of the individual.

Authentication of Documents

- 3.92 Section 26 (which governed the position in relation to foreign States covered by Part III) provided that documents are authenticated if they purport to be signed by a judge, magistrate or officer of the foreign State where they were issued and if they purport to be certified by being sealed with the official seal of the Minister of Justice or some other Minister of State. Section 27 contained similar requirements for Commonwealth countries while paragraph 12 of Schedule 1 covered documents which were receivable in evidence in cases under that Schedule.

Scotland and Northern Ireland and the 1989 Act

- 3.93 Scotland had its own jurisdiction under the 1989 Act for deciding incoming requests, save for requests under Schedule 1 where Bow Street Magistrates' Court retained jurisdiction. In Scotland the court of committal was the Sheriff of Lothian and Borders.
- 3.94 Under the Scotland Act 1998 extradition became a "*reserved matter*" but the administrative functions of the process have been devolved to Ministers of the Scottish Executive.¹⁷²
- 3.95 Extradition requests to Northern Ireland under the 1989 Act were dealt with by Bow Street Magistrates' Court and the Secretary of State.

Channel Islands and the Isle of Man and the 1989 Act

- 3.96 The 1989 Act applied to the Channel Islands and the Isle of Man which were defined as part of the United Kingdom for the purposes of extradition.¹⁷³ However, as a

¹⁷² Transfer of Functions to the Scottish Ministers etc. Order 1999 (SI 1999/1750). The Scotland Act 1998 provided for the establishment of a Scottish Parliament and Scottish Executive, which is headed by a First Minister. The Scottish Parliament and Government have decision-making and legislative powers over all areas of policy except those that are expressly "*reserved matters*" for the United Kingdom Parliament and central Government under the terms of Schedule 5 to the Scotland Act 1998.

¹⁷³ Section 29. The 1989 Act continues to apply to Crown Dependencies (other than Gibraltar), Guernsey, the Isle of Man and British Overseas Territories. In the case of Jersey, the

matter of constitutional practice the Islands were consulted on whether any extradition arrangements entered into by the United Kingdom should be extended to them.

The 2001 Review

3.97 The Extradition Act 1870 remained in force for over one hundred years. The Extradition Act 1989 (which came into force in November 1989) had been operative for only a short time when, as the number of extradition cases increased, it became apparent that the extradition procedures were cumbersome, beset by technicality and blighted by delay.

3.98 In March 2001 a review of the law on extradition was published by the Home Office.¹⁷⁴ The Review identified a number of the main difficulties with the operation of the 1989 Act. These were:

- (i) The complexity of existing extradition arrangements;
- (ii) Duplication in decision-making with an overlap of functions between the Secretary of State and the courts;
- (iii) Delay caused by the complexity of the extradition process and the number of appeal routes available;¹⁷⁵

Extradition (Jersey) Law 2004 (Appointed Day) Act 2004, in force 28 September 2004, effectively mirrors Part 2 of the 2003 Act for incoming requests.

¹⁷⁴ *The Law on Extradition: A Review*. On 2 March 2000, the then Secretary of State announced that a review of the United Kingdom's extradition legislation was to be carried out (Hansard, HC Vol. 345, cols. 572-575). This was the day on which Senator Augusto Pinochet returned to Chile following an unsuccessful attempt to extradite him to Spain.

¹⁷⁵ There were several routes by which the requested person could challenge the extradition process: by way of an application for a writ of *habeas corpus*; by way of an application to the High Court under section 11 (in Part III cases); by way of application for judicial review of the decision of the Secretary of State to grant an order or authority to proceed, the decision of the magistrate to issue a warrant (whether full or provisional), the decision of the magistrate to commit and the decision of the Secretary of State to order extradition. It appears that the average time for extraditing a requested person from the United Kingdom was 18 months (see the Minister for Policing, Crime Reduction and Community Safety, Mr. John Denham, Hansard, Vol. 396 col. 39, 9 December 2002). In many cases it took much longer. *Al-Fawwaz and Bary v. Secretary of State for the Home Department* [2009] EWHC Admin. 2068, a case under the 1989 Act, was heard by the High Court in February and July 2009. The

- (iv) The *prima facie* requirement which it was said had “*come adrift from operational needs or a realistic assessment of the standards of criminal justice in the requesting state*”;
- (v) The inflexibility of the definition of extradition crime based on the list of crimes in cases under Schedule 1 to the 1989 Act;
- (vi) The increase in and complexity of representations made to the Secretary of State;
- (vii) The authentication requirements governing the admission in evidence of documents submitted in support of the extradition request;
- (viii) The cost of proceedings and the cost of detention in the case of wanted persons not admitted to bail.

3.99 The Review recommended a backing of warrants scheme for extradition requests from European Union and Schengen Member States¹⁷⁶ with only a limited role for the Secretary of State.¹⁷⁷ In the case of other foreign States, the Review recommended a new extradition procedure, simplified authentication requirements, and a relaxation of the *prima facie* evidence requirement. In relation to the role of the Secretary of State, it was recommended that the only issues which she should consider were: (i) competing extradition requests; (ii) the impact of domestic criminal proceedings; (iii) death penalty; (iv) national security; and (v) specialty protection.

3.100 The 2001 Review formed part of the background to the enactment of the 2003 Act.

defendants had been arrested, in 1998, in connection with the bombings of the United States embassies in Nairobi and Dar Es Salaam on 7 August 1998. The case is now awaiting judgment before the European Court of Human Rights. In *Office of the King's Prosecutor, Brussels v. Cando Armas* [2006] 2 A.C. 1, Lord Bingham of Cornhill noted (at paragraph 2): “*the procedures established by bilateral treaty have in the past been characterised by technicality and delay so great as to impede or even frustrate the efficacy of the process.*”

¹⁷⁶

¹⁷⁷

For an explanation of the Schengen Agreement see paragraphs 4.7-4.9.

Limited in the case of Schengen Member States to dealing with competing requests for extradition and the impact on extradition requests of domestic criminal proceedings.

The Historical Development: Summary

3.101 A number of observations arise from this survey of the historical development of extradition:

- (i) Extradition procedures have evolved in response to changing social conditions, particularly changes in relation to improved communications and easier movement of individuals between States. This explains the development of the law in the nineteenth century and the reviews conducted in the last quarter of the twentieth century and early twenty-first century.
- (ii) Neighbouring or contiguous States have tended to adopt simplified procedures (backing of warrant schemes) in recognition of the need for greater cooperation in order to deter crime.¹⁷⁸
- (iii) The European Convention on Extradition brought about a radical change in extradition; driven by the need to introduce faster and simpler procedures in extradition between Western European States.
- (iv) The political offence exception diminished in importance as States recognised the need to address the problem of modern international terrorism, which is very different in scale and character from anything known in the nineteenth century.
- (v) The nationality exception operated by some civil law States was viewed increasingly as an impediment to effective co-operation.
- (vi) The *prima facie* evidence requirement was relaxed in 1991, after it had become apparent that it presented real practical difficulties to a number of States which sought extradition of suspected criminals from the United Kingdom.
- (vii) States have increasingly recognised that effective extradition should operate on the basis of mutual trust and confidence (not suspicion and disrespect).

¹⁷⁸

As illustrated by the Fugitive Offenders Act 1881, the Backing of Warrants (Republic of Ireland) Act 1965 and the European Convention on Extradition.

- (viii) The domestic courts had recognised the important public interest in giving effect to extradition and have approached their decision-making on the basis that international cooperation should be facilitated to the greatest extent possible, consistent with fairness.

The United Nations Model Treaty on Extradition

- 3.102 The United Kingdom was not alone in its attempts to simplify and streamline its extradition procedures. On 14 December 1990 the United Nations General Assembly adopted a Model Treaty on Extradition and invited Member States to take it into account when revising the existing treaty relations.¹⁷⁹ The Preamble to the Model Treaty noted:

“...that the establishment of bilateral and multilateral arrangements for extradition will greatly contribute to the development of more effective international cooperation for the control of crime,”

“...that in many cases existing bilateral extradition arrangements are out-dated and should be replaced by modern arrangements which take into account recent developments in international criminal law.”

- 3.103 The Model Treaty contains an obligation to extradite (Article 1) and defines extraditable offences in accusation cases as offences punishable by at least one (or two) year’s imprisonment or in conviction cases if four (or six) months of the sentence remain to be served (Article 2). It sets out a number of mandatory grounds for refusal (Article 3) as well as optional grounds (Article 4). It does not contain any *prima facie* case requirement.

¹⁷⁹

A/Res/45/116.

Part 4 The European Union and the Framework Decision on the European Arrest Warrant

- 4.1 As noted above, Part 1 of the 2003 Act is concerned with extradition¹ to category 1 territories (currently the other 26 Member States of the European Union and Gibraltar).
- 4.2 Part 1 of the 2003 Act was enacted to fulfil the United Kingdom's duty to transpose the obligations imposed by the European Council Framework Decision of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States into national law.² In order to place the operation of the 2003 Act in context it is necessary to say something about the European Union and the legal foundation of the European arrest warrant. A knowledge of this background is vital to any consideration of the surrender procedures between the Member States of the European Union: it will assist in understanding the operation of the arrest warrant scheme and our conclusions in respect of it.

The European Union

- 4.3 In 1973 the United Kingdom became a member of the European Communities (the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community).³

¹ In the context of Part 1 of the 2003 Act the word '*extradition*' may be something of a misnomer: the procedure bears some resemblance to a system of surrender based on the backing of warrants which is ordinarily designed to take place with the minimum of formality and delay. The Framework Decision on the European arrest warrant deliberately speaks of surrender to emphasise the move away from classical extradition procedures. However, the 2003 Act chooses not to use this terminology as Part 1 could in the future apply more widely than to just Member States.

² 2005/584/JHA: OJ 2002 L 190 P1

³ The original treaties were concluded between France, West Germany, Italy, Belgium, The Netherlands and Luxembourg. Denmark, Ireland and the United Kingdom joined in 1972, Greece in 1981 and Spain and Portugal in 1986. In 1995, Sweden, Finland and Austria became European Union Members. They were followed by Cyprus, the Czech Republic, Estonia,

- 4.4 In 1987, the Single European Act (a treaty, not an Act of Parliament) was concluded between the Member States. It amended the Treaty Establishing the European Community in order to facilitate the processes of harmonisation and creation of a single market.
- 4.5 The Preamble to the Single European Act noted the Member States' commitment to transform their relations into a European Union with increased political co-operation. The representatives of the Member States were to meet regularly for the purpose of drawing up common political objectives through a body known as the European Council.⁴

The Treaty on European Union: The Maastricht Treaty

- 4.6 The next major step in the development of the Communities was the Treaty on European Union ('TEU'), signed at Maastricht on 7 February 1992, which came into force on 1 November 1993.⁵ The TEU created two new '*pillars*' outside the core decision-making processes of the European Communities. The core decision-making processes continued to exist in what was now known as the first pillar. The two new '*pillars*' were:

- (a) Common Foreign and Security Policy (the second pillar); and
- (b) Cooperation in the fields of Justice and Home Affairs ('JHA') (the third pillar).

The provisions on cooperation in JHA were found in Title VI of the TEU.⁶ The third pillar provided for cooperation between Member States in policy areas such as international crime and various forms of judicial co-operation. Action under the third

Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia in 2004. In 2007, Bulgaria and Romania also became Member States. The United Kingdom's relationship to the European Union is principally governed in domestic law by the European Communities Act 1972, as amended and the European Union Act 2011.

⁴ The European Council comprises the Heads of Government of the Member States and the President of the European Commission: Article 15 of the Treaty on European Union (as amended).

⁵ The TEU was largely a response to the changing political landscape in Eastern Europe and the unification of Germany.

⁶ Articles K1 to K9

pillar was taken by the Council of Ministers⁷ voting unanimously⁸ and the Court of Justice was excluded from exercising its powers in relation to matters falling within the third pillar.⁹

The Schengen Information System (“SIS”)

- 4.7 In 1985 and 1990 two agreements were signed at Schengen in Luxembourg between all the then Member States of the European Union apart from the United Kingdom and Ireland. As a result of these agreements the Schengen Convention came into effect in 1995. It abolished the internal borders of the signatory States and created a single external border in what is known as the Schengen area. In order to compensate for this increased freedom of movement, measures were taken to improve cooperation between the law enforcement and judicial authorities in the Schengen States. In order to facilitate this cooperation an information system was established. This information system is known as the SIS. The SIS contains a database used by authorities of the Schengen member countries to exchange data on certain categories of people and objects, including persons wanted for arrest and extradition. Member States supply information (which becomes an “*alert*”)¹⁰ from their national systems to the central system via a common secure network. Searches in SIS produce a “*hit*” when details of a person or object match those of an existing alert. The data on the SIS is managed by a national system known as SIRENE (Supplementary Information Request at National Entry). Information is not forwarded on to the central section of the SIS by the national SIRENE bureau unless it is satisfied that Schengen rules have been applied correctly. It is only when the information is forwarded to the central section of the SIS that the data can be accessed by other SIS Member States. The Schengen area has been extended to include every Member State (other than the United Kingdom and Ireland¹¹). As the SIS lacks the capacity to operate in all Member States it has become necessary to develop a second generation system which is known as SIS-II. This is expected to become operational in around 2013. This is

⁷ The Council of Ministers is now known as the Council. It is concerned with the enactment of legislation. It is comprised of representatives of Member States with national ministerial responsibility for the issue then under discussion: Article 16 of the Treaty on European Union (as amended).

⁸ Article K4

⁹ Article L TEU

¹⁰ Article 92 of the Schengen Convention

¹¹ Protocol 19 of the TFEU

likely to lead to more arrests taking place within the European Union area and an increase in the use of the European arrest warrant.

4.8 In 1999 the United Kingdom asked to take part in some aspects of the Schengen acquis (the name given to the agreements of 1985 and 1990 and the measures taken to implement them), namely police and judicial cooperation in criminal matters and the SIS. A Council Decision approving the United Kingdom's request was adopted on 29 May 2000¹² and, after evaluating the conditions that must precede implementation of the provisions governing police and judicial co-operation, the Council decided on 22 December 2004, that this part of the Schengen acquis could be implemented by the United Kingdom.¹³ Parts of the Schengen acquis were then put into effect by the United Kingdom. When SIS-II becomes operational in around 2013, the United Kingdom will have access to the database which will include alerts for arrest and extradition.¹⁴

4.9 The use of the SIS is a response to the abolition of border controls with the result that nationals may move freely within the Schengen area. This has made Member States collectively responsible for detecting and deterring criminal conduct. According to the European Council it has proved to be useful in locating and facilitating the arrest of persons who are the subject of a European arrest warrant: in 2009 82.5% (10,012) of the 12,111 warrants issued by Schengen participating States were transmitted via the Schengen Information System.¹⁵

¹² Council Decision 2000/365/EC [2000] OJ L 131/43

¹³ Council Decision 2004/926/EC [2004], OJ L 395/70

¹⁴ Section 54A of the Crime (International Co-operation) Act 2003 extends the functions of the Information Commissioner under Part VI of the Data Protection Act 1998 so as to allow the Commissioner to inspect data recorded in the United Kingdom section of the SIS. The Commissioner has a similar power in relation to two other European information systems: the Europol Information System and the Customs Information System. This is to ensure that the processing of personal data takes place in accordance with the requirements of the Data Protection Act 1998.

¹⁵ Council Document 751/4/10 COPEN 64

The Treaty of Amsterdam

- 4.10 In 1997 the then 15 Member States¹⁶ signed the Treaty of Amsterdam, which came into force on 1 May 1999. Under the Treaty of Amsterdam, the third pillar was restructured and renamed Police and Judicial Cooperation in Criminal Matters. In addition the articles of Title VI of the TEU were renumbered.¹⁷ Article 29 stated that the Union's objective "*shall be to provide citizens with a high level of safety within an area of freedom security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.*" This objective was to be achieved by preventing and combating crime (organised or otherwise) by means of increased cooperation between the judicial authorities, and for the approximation, where necessary, of national criminal provisions. Under Article 31(1)(b) common action on judicial cooperation in criminal matters was to include "*facilitating extradition between Member States.*" In recognition of a desire to increase democratic supervision and judicial control, the European Parliament¹⁸ was given an enhanced consultative role in the third pillar decision-making process. In addition the Court of Justice of the European Communities¹⁹ was given jurisdiction to give preliminary rulings on measures adopted under the third pillar, although this was limited in that Member States could refuse to accept the Court's jurisdiction.²⁰

The Treaty of Nice

- 4.11 The Treaty of Nice was signed by the Member States on 26 February 2001 and came into force on 1 February 2003. Among other things, the Treaty of Nice amended

¹⁶ France, Germany, Italy, Belgium, The Netherlands, Luxembourg, Denmark, Ireland, United Kingdom, Greece, Spain, Portugal, Sweden, Finland and Austria.

¹⁷ From K1 to K9 to Articles 29-42

¹⁸ The European Parliament consists (since 1979) of directly elected representatives of the Member States. The number of MEPs cannot exceed 750.

¹⁹ The Court was originally established in 1951. Following the Treaty of Lisbon (see paragraph 4.13) it is made up of three distinct courts: the Court of Justice; the General Court and the Civil Service Tribunal. The Court of Justice comprises 27 judges assisted by 8 Advocates General. There is now an urgent preliminary ruling procedure which applies only to the area of freedom, security and justice: Article 23a of Protocol (No. 3) on the Statute of the Court of Justice of the European Union and Article 104b of the Court's Rules of Procedure.

²⁰ Article 35. The United Kingdom declined to accept the Court's jurisdiction in relation to third pillar matters. This was also the position in Cyprus, Denmark, Estonia, Ireland, Latvia, Lithuania, Poland and the Slovak Republic

Articles 29 and 31 of TEU so as to provide that in the application of the third pillar there would be cooperation with the European Judicial Cooperation Unit (Eurojust)²¹ which was to comprise national prosecutors and magistrates (or police officers of equal competence).

The Hague Programme

- 4.12 In 2004 the European Council initiated a programme to combat terrorism and cross-border and other serious crime. It was noted by the Council that this required more intensive practical cooperation between police and customs authorities of Member States and the better use of existing instruments in this field.²²

The Reform Treaty: The Treaty of Lisbon

- 4.13 Significant changes to the European Union were made by the Reform Treaty, known as the Treaty of Lisbon (where it was signed by the 27 Member States on 13 December 2007). It came into force on 1 December 2009. The Treaty of Lisbon has established a single European Union and the three pillars have disappeared. The Treaty of Lisbon retains and amends the TEU and the EC Treaty, and all references to the “*Community*” and “*European Community*” have been replaced by references to the Union. The EC Treaty has been renamed the Treaty on the Functioning of the European Union (‘TFEU’). The provisions dealing with the “*Area of Freedom, Security and Justice*” are now to be found in Title V of the TFEU.²³ The Court of Justice now has a general jurisdiction to monitor the Union’s activities under Title V although it has no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.²⁴ Decision-making under Title V is within the competence of the European Council.

²¹ See paragraphs 4.97-4.102

²² The Hague Programme: strengthening freedom, security and justice in the European Union (OJ C 53, 3 March 2005 pages 1-14).

²³ Articles 67 to 89

²⁴ Article 276 of the TFEU. Article 10 of the Protocol on Transitional Provisions provides that in the case of legislative acts adopted under the old Title VI, the Court’s jurisdiction (or

The United Kingdom and Protocol No. 21²⁵

- 4.14 The provisions of the TFEU dealing with the area of freedom, security and justice touch upon matters which have traditionally been the exclusive responsibility of national governments. In this politically sensitive area the United Kingdom Government has set out its position in Protocol 21 annexed to the TEU and the Treaty of Lisbon.
- 4.15 Article 1 of Protocol 21 provides that the United Kingdom (and Ireland) will not take part in the adoption by the Council of any proposed measure relating to the area of freedom, security and justice under Title V of the TFEU. Article 2 of the Protocol provides:

“In consequence of Article 1 ... none of the provisions of Title V of Part Three of the Treaty on the Functioning of the European Union, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title and no decision of the Court of Justice interpreting any such provision or measure, shall be binding upon or applicable in the United Kingdom or Ireland; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of those states ...”

- 4.16 Articles 1 and 2 operate as ‘opt out’ provisions whereas Article 3 of the Protocol gives the United Kingdom (and Ireland) an ‘opt in’. It provides that the United Kingdom (or Ireland) may notify the President of the Council in writing if it wishes to take part in the adoption and application of any proposed measure under Title V of the TFEU. If the United Kingdom (or Ireland) notifies the President within three months of the proposal or initiative being presented to the Council, it will be entitled to participate. Article 4 makes it possible for the United Kingdom (or Ireland) to accept a measure after it has been adopted.²⁶

absence of jurisdiction) under Article 35 of the TFEU persists until five years after the entry into force of the Lisbon Treaty.

²⁵ On the Position of the United Kingdom and Ireland In Respect of the Area of Freedom, Security and Justice.

²⁶ Opting in to a proposal will bring it within the jurisdiction of the European Court of Justice.

- 4.17 Under Article 4a, if the United Kingdom (or Ireland) decide not to opt in to an amended version of an existing measure with the result that the measure becomes inoperable for other Member States, the original measure will cease to apply to the United Kingdom (or Ireland).²⁷
- 4.18 Protocol 21 is relevant to the future of the Framework Decision on the European arrest warrant and we explain its significance below. It is first necessary to say something about Framework Decisions and their legal status.

Framework Decisions

- 4.19 As we have noted above, Part 1 of the 2003 Act was enacted to give effect to the European Council Framework Decision on the European arrest warrant and the surrender procedures between Member States.
- 4.20 Framework Decisions are legislative instruments promulgated by the European Union; in this section we explain their status and effect.
- 4.21 Prior to the Treaty of Lisbon there were three legislative measures available for use within the third pillar. These measures were contained in Article 34(2) of the TEU as amended by the Treaty of Amsterdam. The European Council, acting unanimously, had authority:
- i. to adopt Framework Decisions (for the purpose of approximation of the laws and regulations of the Member States);
 - ii. to issue decisions (for any other purpose consistent with the objectives of Title VI, excluding any approximation of the laws and regulations of the Member States);
 - iii. to establish Conventions.

²⁷ The effect of this provision is that if a legislative instrument of the Union is amended and the United Kingdom decides not to participate in the amendment, the measure can cease to apply to the United Kingdom. This is an '*ejection mechanism*' with the threshold for ejection being '*inoperability*'.

- 4.22 Of these measures, the Framework Decision was the most important. Framework Decisions are binding upon the Member States as to the result to be achieved, and national law must be interpreted so far as possible in the light of their wording and purpose; the form and method of implementation are left to the national authorities.²⁸

Other Relevant Framework Decisions

- 4.23 Since the implementation of the Framework Decision on the European arrest warrant there have been a number of other instruments which amend or complement the operation of the arrest warrant surrender scheme. These other instruments are relevant to the issues we have to consider and in this section we summarise the effect of these other instruments.

Enforcement of Financial Penalties

- 4.24 Council Framework Decision 2005/214/JHA²⁹ of 24 February 2005 on the application of the principles of mutual recognition of financial penalties makes provision for fines or penalties of €70 or more imposed by the authorities in one Member State to be recognised and enforced in another Member State. The transfer of the financial penalty from one Member State to another is effected by way of a certificate.³⁰ This has been implemented in England, Wales and Northern Ireland by sections 80 to 92 and Schedules 18 and 19 of the Criminal Justice and Immigration Act 2008, which came into force on 1 October 2009. In Scotland the relevant legislation is the Mutual

²⁸ Article 34(2)(b). Case C-105/03 *Pupino* [2005] ECR I-5285; [2006] QB 83. The *Pupino* case concerned Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings. The obligation to interpret national law so far as possible in the light of the wording and purpose of a Framework Decision is subject to two limits. First, the general principles of law, particularly those of legal certainty and non-retroactivity. Secondly, national provisions cannot be interpreted *contra legem* (against the law). Although the United Kingdom had not accepted the ECJ's jurisdiction in respect of third pillar matters, the decision in *Pupino* was treated as authoritative and followed by the House of Lords in *Dabas v. High Court of Justice in Madrid, Spain* [2007] 2 A.C. 31.

²⁹ [2005] OJL L.76/16 22 March 2005

³⁰ The certificate is required to contain details of the penalty, whether the offender appeared personally or was informed of the sentencing hearing. The executing Member State then decides whether to recognise and enforce the penalty having first reviewed whether any of the grounds for refusal apply. We were informed that there have been 114 incoming requests (mainly from The Netherlands) and 17 outgoing requests.

Recognition of Criminal Financial Penalties in the European Union (Scotland) Order 2009.

Trials in Absentia

- 4.25 Council Framework Decision 2009/299/JHA of 26 February 2009³¹ amends the Framework Decision on the European arrest warrant by inserting a new Article 4(a) in relation to decisions rendered in the absence of the requested person. It deletes Article 5(1) of the original arrest warrant Framework Decision and amends the model form of arrest warrant. This Framework Decision is designed to enhance the procedural rights of persons convicted in their absence and provides a clear basis for the non-recognition of decisions rendered following a trial at which the person concerned did appear in person. It entered into force on 28 March 2009 and had an implementation date of 28 March 2011. The 2003 Act required no further amendment to implement this Framework Decision as it already contained sufficient safeguards to deal with *in absentia* trials.³²

The Transfer of Prisoners

- 4.26 Article 5(3) of the Framework Decision on the European arrest warrant enables the execution of a European arrest warrant to take place on condition that the requested person be returned to serve any custodial sentence in the executing Member State. However, the Framework Decision does not contain any mechanism for the return of sentenced persons. After 5 December 2011 the matter of prisoner transfer between Member States will be governed by Council Framework Decision 2008/909/JHA of 27 November 2008,³³ on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

³¹ OJ L.81, 27 March 2009, p.24. The Framework Decision provides that a conviction rendered *in absentia* should be recognised: (a) if the accused was summoned in person and informed of the date and place of trial, or received official information of the scheduled date and place; or (b) gave permission to be represented at the trial by a lawyer who was entitled to defend him; or (c) the person was served with a decision and expressly informed about the right to appeal or retrial and expressly stated that he did not contest the original decision.

³² Section 20.

³³ OJ L.327 5 December 2008 p.27

- 4.27 The legislation in the United Kingdom governing the transfer of prisoners is the Repatriation of Prisoners Act 1984. This Act gave effect to the European Convention on the Transfer of Sentenced Prisoners signed at Strasbourg on 21 March 1983.³⁴ In *R v. Secretary of State for the Home Department, Ex parte Read*,³⁵ Lord Bridge of Harwich said that the primary policy objective of the legislation is “*the obviously humane and desirable one of enabling persons sentenced for crimes committed abroad to serve out their sentences within their own society, which, irrespective of the length of sentence, will almost always mitigate the rigour of the punishment inflicted.*”³⁶
- 4.28 There are over 60 State parties to the Convention which is open to both Member and non-member States of the Council of Europe.³⁷
- 4.29 The preamble to the Convention makes it clear that the fundamental purpose of prisoner transfer is to further the end of justice and the social rehabilitation of sentenced persons. This is done by ensuring that foreigners who are deprived of their liberty as a result of the commission of a criminal offence are given an opportunity to serve their sentences within their own society. Transfer is only available in respect of sentences imposed for offences which satisfy the double criminality requirement and with the consent of the prisoner.³⁸
- 4.30 Where a prisoner is transferred in accordance with its terms, the Convention envisages two possible procedures. The first is known as the “*continued enforcement procedure*”: the receiving State is bound by the legal nature and duration of the sentence imposed by the sentencing State.³⁹ The second procedure is known as the “*conversion procedure*” which involves the conversion of the sentence by the receiving State.⁴⁰ The United Kingdom, when it ratified the Convention, chose to

³⁴ Council of Europe Treaty Series No. 112 (Strasbourg 21 March 1983)

³⁵ [1989] A.C. 1014

³⁶ At page 1048D

³⁷ The United States is a State party to the Convention and prisoner transfers between the United Kingdom and the United States take place in accordance with its terms. The defendants in the case of *R (Birmingham) v Director of Serious Fraud Office* [2007] QB 727 were returned to the United Kingdom under the Convention.

³⁸ Article 3. The Convention is based on the concept of voluntary transfer.

³⁹ Article 10. However, when enforcing the sentence the receiving State applies its own laws including laws which regulate the timing of release on licence.

⁴⁰ Article 11

exclude the “*conversion procedure*” and the return of serving prisoners is governed by the “*continued enforcement procedure*”.

- 4.31 The Repatriation of Prisoners Act 1984 also applies to prisoner transfers under any “*international arrangement*”.⁴¹ This is significant in the context of developments concerning prisoner transfer between Member States of the European Union as the implementation of the Framework Decision will not require primary legislation to give effect to its terms.⁴²
- 4.32 Unlike the European Convention, the transfer of a sentence under the 2008 Framework Decision does not require the consent of the sentenced person in all circumstances⁴³: it does however require the consent of the sentencing Member State.
- 4.33 The 2008 prisoner transfer Framework Decision⁴⁴ contains specific provision for the enforcement of custodial sentences in the executing State in respect of cases falling within Article 4(6) and 5(3)⁴⁵ of the Framework Decision on the European arrest warrant. This Framework Decision, which will replace the arrangements for prisoner transfer contained in the 1983 Council of Europe Convention for the Transfer of sentenced Persons and its additional Protocol, entered into force on 5 December 2008 and, as noted above, has an implementation date of 5 December 2011.⁴⁶

⁴¹ The United Kingdom has international arrangements with 106 countries or territories, some of which are bilateral, some multi-lateral.

⁴² There are however two issues (transit and speciality) which are being transposed into domestic law by the Legal Aid and Sentencing Bill.

⁴³ See Article 6.

⁴⁴ OJ L.327, 5 December 2008, p.27

⁴⁵ Article 4(6) enables the executing Member State to undertake to execute the custodial sentence. Article 5(3) enables the executing Member State to surrender the arrested person subject to the condition that he will be returned to the executing Member State to serve his sentence.

⁴⁶ Poland sought and obtained a three year derogation from the principal clauses of the Framework Decision. Because of the large number of Polish nationals imprisoned throughout the European Union, Poland needed more time to prepare for its implementation. The United Kingdom and Irish governments have agreed that the compulsory transfer arrangements will not be used to transfer prisoners between Ireland and the United Kingdom.

Pre-Trial Supervision (Bail)

- 4.34 Council Framework Decision 2009/829/JHA of 23 October 2009⁴⁷ on the application between Member States of the European Union of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. This Framework Decision (known as the European Supervision Order) introduces the possibility of transferring a pre-trial non-custodial supervision measure (such as release on bail) from the Member State where a non-resident is suspected of having committed an offence, to the Member State where he is normally resident. This will allow a suspected person to be subject to a supervision measure (bail) in his home State until the trial takes place in the requesting Member State. It entered into force on 1 December 2009 and has an implementation date of 1 December 2012.⁴⁸

Conflicts of Jurisdiction

- 4.35 Council Framework Decision 2009/948/JHA of 30 November 2009⁴⁹ on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings. This Framework Decision provides a mechanism for consultation and cooperation between judicial authorities when a person is the subject of parallel criminal proceedings in different Member States in respect of the same conduct. If a Member State has reasonable grounds to believe that parallel proceedings are ongoing in another Member State then it has an obligation to contact the other Member State.⁵⁰ It entered into force on 15 December 2009 and has an implementation date of 15 June 2012.
- 4.36 Article 50 of the Charter of Fundamental Rights provides that no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she

⁴⁷ OJ L.294 11 November 2009, p.20

⁴⁸ The European Supervision Order applies following the surrender of the requested person to the issuing State. In order to provide reassurance to the issuing State that the requested person will return for trial, a person who breaches their bail conditions or is refusing to return to stand trial may be the subject of a further European arrest warrant issued to secure his attendance at the trial.

⁴⁹ OJ L.328, 15 December 2009, p.42

⁵⁰ Article 5

has already been finally acquitted or convicted within the Union in accordance with the law.⁵¹

4.37 Under the TFEU⁵² the European Union is competent acting through the Parliament and the Council to adopt measures to prevent and settle conflicts of jurisdiction between Member States.

4.38 Also relevant to the settlement of conflicts of jurisdiction is the role played by Eurojust and we deal with this at paragraphs 4.97-4.102.

The Status of Framework Decisions Post Lisbon

4.39 The Lisbon Treaty abolished the legislative instruments previously found in Article 34(2) of the Treaty of Amsterdam. In future, legislation in the area of criminal justice will take the form of regulations, directives and opinions.⁵³ The right to initiate legislation in this area is now shared between the European Commission⁵⁴ and Member States. The legal status of Framework Decisions adopted prior to the entry into force of the Treaty of Lisbon is governed by Protocol 36 (Transitional Provisions) annexed to the Treaty of Lisbon. The effect of Protocol 36 is that Framework Decisions adopted on the basis of Title VI of TEU will remain in force until they are repealed, annulled or amended.⁵⁵ At least six months before the expiry of a five year transitional period, the United Kingdom may notify the Council that it does not accept the powers of the Commission and the jurisdiction of the Court of Justice in respect of matters falling within Title V of the TFEU.⁵⁶ In the event of such a notification, measures adopted under the third pillar that have not been repealed, annulled or amended will cease to apply to the United Kingdom at the end of the five year period. Thereafter, the United Kingdom may notify the Council of its wish to participate in measures which have ceased to apply to it by reason of any notification

⁵¹ This principle is also reflected in Article 54 of the Schengen Convention and Articles 3(2) and 4(3) of the Framework Decision on the European arrest warrant.

⁵² Article 82(1)(b)

⁵³ These instruments are defined in Article 288 TFEU.

⁵⁴ The European Commission based in Brussels is the main executive body of the European Union. It acts as the guardian of the Treaties and has responsibility for initiating European Union legislation.

⁵⁵ Articles 9 and 10 of Protocol 36

⁵⁶ Article 10(4)

given in accordance with Protocol 36, but it is not certain that the United Kingdom will be allowed to participate.

- 4.40 The effect of Protocol 36 is that the Framework Decision on the European arrest warrant will continue to have effect after December 2014 but it will be subject to the enforcement powers of the Commission and the jurisdiction of the Court of Justice⁵⁷. If amended, it will automatically be transformed into a directive and be subject to the enforcement powers of the Commission and the jurisdiction of the Court of Justice. If the United Kingdom gives notice that it does not accept the powers of the Commission and the extension of the powers of the Court of Justice, the Framework Decision (and all other JHA measures) will cease to apply to the United Kingdom. Thereafter the United Kingdom may notify the Council of its wish to participate in acts which have ceased to apply to it: Article 9(5). In which case Article 4 of Protocol 21 will apply.⁵⁸
- 4.41 Also relevant to the operation of the Framework decision of the European arrest warrant are two recent initiatives within the European Union (the Stockholm Programme and the European Investigation order) and Article 54 of the Convention Implementing the Schengen Convention.

The Stockholm Programme

- 4.42 The European Union prepares programmes which outline the priorities for the area of justice freedom and security and the Stockholm Programme deals with the period 2010 to 2014.⁵⁹ This focuses on rights in the criminal process for both those who are accused and victims and also a further development in the programme of mutual recognition of court decision in criminal cases with measures to strengthen mutual trust.

⁵⁷ This is unless before then it is amended and adopted in its amended form by the United Kingdom: Article 9 of Protocol 36.

⁵⁸ See paragraphs 4.16-4.17

⁵⁹ The previous two programmes were the Tampere Programme (see paragraph 4.48) and Hague Programme (see paragraph 4.12).

The European Investigation Order

- 4.43 The European Investigation Order ('EIO') is a European legislative proposal aimed at streamlining the process of providing legal assistance in criminal matters between the Member States of the European Union. The United Kingdom opted in to the EIO on 27 July 2010 and the final content of the Directive is the subject of negotiation at Union level. The EIO is intended to replace the current schemes of mutual legal assistance with a single unified instrument covering all types of evidence and introducing standardised request forms. Article 1 of the EIO makes it clear that it is an instrument for '*gathering evidence*' and the objective is to facilitate the fair determination of criminal charges throughout the European Union by ensuring that the trial court has all the relevant available evidence, wherever that evidence might be located.

Article 54 of the Convention Implementing the Schengen Agreement

- 4.44 Article 50 of the Charter of Fundamental Rights and Articles 3(2) and 4(3) of the Framework Decision on the European arrest warrant are intended to ensure that a person is not to be prosecuted or tried more than once in respect to the same acts. This is also the aim of Article 54 of the Convention Implementing the Schengen Convention. The background to and effect of Article 54 is explained in the following paragraphs.
- 4.45 The growth of serious cross-border crime within the European Union has seen an increase in the number of circumstances where more than one Member State will have jurisdiction to prosecute a particular criminal act or course of criminal conduct. In recognition of the fact that it is wrong in principle for any person to be prosecuted more than once for the same act or conduct, even by different States, Article 54 of the Schengen Convention provides:

"A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or

can no longer be enforced under the law of the sentencing Contracting Party.”

4.46 The objective of this double jeopardy principle is to ensure that no one is prosecuted on the same facts in several Member States: successive or multiple prosecutions would impede the right to move freely within the Union.⁶⁰ It has been interpreted by the Court of Justice in a series of cases beginning with *Gozutok and Brugge*.⁶¹ The Court has consistently emphasised the importance of the principle of mutual recognition and held that the application of Article 54 is not subject to the harmonization of Member States’ substantive criminal law: underlying the double jeopardy principle is the necessary implication that Member States have mutual trust in their criminal justice systems. The important principles which emerge from the Court’s case law on the meaning and effect of Article 54 appear to be as follows:

- (i) The double jeopardy rule applies not merely following a judgment of a court but also where a prosecutor decides to discontinue proceedings because a person has admitted guilt and made a payment to expiate it (*Gozutok and Brugge, supra*).
- (ii) The double jeopardy rule applies to acquittals based on a time-bar to further proceedings (*Gasparini*)⁶² and to judgments returned following trials *in absentia* (*Bourquain*).⁶³
- (iii) The double jeopardy rule does not apply to a decision made by investigating police officers to suspend proceedings which did not definitely bar further prosecution (*Turansky*).⁶⁴
- (iv) The double jeopardy rule applies to the ‘same acts’ understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together (*Van Esbroek*).⁶⁵

⁶⁰ In Cases C-187/01 and C-385/01 *Gozutok and Brugge* [2003] ECR I-1345, the Court noted that Article 54 was part of a broader scheme of integration, the objective of which is the maintaining and developing the European Union as an area of freedom, security and justice where the free movement of persons is guaranteed and protected.

⁶¹ Cases C-187/01 and C-385/01 [2003] ECR I-1345

⁶² Case C-467/04 [2006] ECR I-9199

⁶³ Case C-297/07 [2008] ECR I-942

⁶⁴ Case C-491/07 [2008] ECR I-11039

The Framework Decision on the European Arrest Warrant

- 4.47 Having summarised the institutional structure of the European Union and the status of Framework Decisions, in this section we explain the background to the adoption of the Framework Decision on the European arrest warrant and surrender procedures between Member States.
- 4.48 At a meeting of the European Council at Tampere in Finland on 15 and 16 October 1999, it was resolved that the formal extradition procedures should be abolished between Member States (in conviction cases) and replaced by a simple transfer of sentenced persons. In the case of accused persons, they were to be dealt with by a new fast-track surrender procedure.⁶⁶ The Council and the Commission were invited to adopt a programme of measures dealing with, among other things, the transfer of persons intent on fleeing justice after they have been finally sentenced. The published conclusions of the European Council included the following:

“The enjoyment of freedom requires a genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own. Criminals must find no ways of exploiting differences in the judicial systems of Member States. Judgments and decisions should be respected and enforced throughout the Union ...

...

Enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which in its view, should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union.”

Further impetus to these matters was given by the events of 11 September 2001⁶⁷ and on 25 September 2001⁶⁸ the Commission made a detailed proposal for a Council

⁶⁵ Case C-436/04 [2006] ECR I-2333

⁶⁶ European Council Document 200/1/99 of 16 October 1999, paragraphs 33 and 35.

⁶⁷ It is frequently stated that the Framework Decision was a response to the attacks in the United States and that it was designed to deal with the problem of international terrorism. While it is

Framework Decision on a European arrest warrant. This was considered by the European Parliament. It was adopted by the European Council on 13 June 2002.⁶⁹

- 4.49 The Framework Decision implementing the European arrest warrant was the first instrument to implement the principle of mutual recognition of judicial decisions in criminal matters.⁷⁰ This principle, which assumes a high level of confidence and trust⁷¹ between Member States, has been explained by the Commission in the following way:

“... once ... a decision taken by a judge in exercising his or her official powers has been taken, that measure – in so far as it has extranational implications – would automatically be accepted in all other Member States and have the same or at least similar effects there.”⁷²

- 4.50 The principle of mutual recognition has now been given effect by the TFEU.⁷³ According to this principle, as soon as a decision is taken by a judicial authority in one Member State, it takes full and direct effect throughout the European Union, meaning that the competent authorities of all the other Member States are under an obligation to assist its execution as if it had originated from one of their own judicial authorities. The scope of the judicial decision is therefore no longer limited to the

clear that these events facilitated and provided the political will for its adoption, the initial proposal was drafted before these events.

⁶⁸ Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between Member States (COM (2001) 522-C5-0453/2002-2001/0215 (CWS), 25 September 2001).

⁶⁹ European Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA; OJ 2002 L 190, pI).

⁷⁰ The concept of mutual recognition has its origins in common market law; *Dassonville* Case 8-74, 11 July 1974; *Cassis De Dijon* Case 120/78, 20 February 1979. In the context of surrender procedures it was adopted as an alternative to the more politically controversial notion of harmonisation and implied a high degree of mutual trust. In *Dabas v. High Court of Justice, Madrid* [2007] UKHL 6, [2007] 2 A.C. 31, Lord Bingham of Cornhill stated (at paragraph 4): “The important underlying assumption of the Framework Decision is that member states, sharing common values and recognising common rights, can and should trust the integrity and fairness of each others’ judicial institutions.”

⁷¹ See the programme of measures to implement the principle of mutual recognition of decisions in criminal matters: OJ C 12 15 January 2001, pages 10-22.

⁷² *Mutual Recognition of Final Decisions in Criminal Matters*: Com (2000) 495 final, 26 July 2000. See also the *Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States*: Com (2005) 195 final, 19 May 2005.

⁷³ Article 82(1): “Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments ...”

territory of the issuing Member State: it extends to the whole Union and has equivalent value in any other Member State.

- 4.51 The European arrest warrant was designed to make the transfer of accused and convicted persons operate more effectively between Member States and to remove political and intergovernmental involvement in the process. It has been described by Advocate General Colomer as a measure vital to the creation of an area of freedom, security and justice with the objective of abolishing extradition and replacing it with a system of surrender.⁷⁴

The Purpose of the Framework Decision

- 4.52 The purpose of the Framework Decision was to abolish the formal extradition procedure provided for under the various Conventions⁷⁵ to which Member States were parties and to replace it with a system of surrender as between judicial authorities. This purpose is clearly set out in recitals (5), (6), (10) and (11) of the preamble:

“(5) *The objective set out for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters covering both pre-*

⁷⁴ Case C-303/05 *Advocaten Vor de Wereld VZW v. Leden Van de Ministerrad* [2001] ECR I-3633 at paragraph 49.

⁷⁵ The various Conventions are listed in Article 31 of the Framework Decision. They include the European Convention on Extradition 1957 and the Conventions of 1995 and 1996 between Member States of the European Union.

sentence and final decisions within an area of freedom, security and justice.

(6) *The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the ‘cornerstone’ of judicial cooperation.*

(10) *The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.*

(11) *In relations between Member States, the European arrest warrant should replace all the previous instruments concerning extradition ...”*

4.53 The reference, in recital 10, to Articles 6 and 7 of the Treaty on European Union requires explanation and this is as follows.

4.54 Article 6(1) provided (at the time the Framework Decision was adopted):⁷⁶

“The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States.”

⁷⁶ In the Consolidated Version of the TEU Article 6(1) provides: “*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2007, as adapted at Strasbourg on 12 December 2007, which shall have the same legal value as the Treaties.*” Article 6(2) now provides: “*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined the Treaties.*” The previous Article 6(1) is now to be found in an amended form in Article 2 of the TEU.

4.55 Article 6(3) provides that:

“Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”⁷⁷

4.56 Article 7 sets out the procedure to be followed by the European Council where it determines the existence of a serious and persistent breach by a Member State of principles then mentioned in Article 6(1).⁷⁸ Under Article 7(3) the Council may decide to suspend certain of the rights deriving from the Treaty to the Member State in question.⁷⁹

4.57 Thus, the effect of recital 10 is that the implementation of the European arrest warrant may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles of liberty, democracy, respect for human rights and the rule of law.

The Framework Decision and Fundamental Human Rights

4.58 Recitals (12) and (13) of the Preamble to the Framework Decision provide as follows:

“(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of

⁷⁷ Even before the Treaty of European Union, the Court of Justice had held that respect for human rights was a condition of the lawfulness of European Union acts and that the European Convention on Human Rights had special significance: Case 4/73 *Nold v. Commission*; Case C-299/95 [1974] ECR 491, *Kremzor v. Austria* [1997] ECRI-2629. Each of the Member States is, of course, a party to the European Convention on Human Rights: being a signatory to the Convention is a condition of accession to the European Union.

⁷⁸ The procedure under Article 7 now applies to the values identified to in Article 2 of the TEU (as amended). Article 2 provides: “*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*”

⁷⁹ These various provisions (in an amended form) are now to be found in Articles 2, 6 and 7 of the Consolidated Version of The Treaty on European Union.

Fundamental Rights of the European Union in particular Chapter VI thereof.⁸⁰ Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation or that person's position may be prejudiced for any of those reasons. This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.⁸¹

(13) No person should be removed expelled or extradited to a State where there is a risk that he or she would be subject to the death penalty, torture or other inhuman or degrading treatment or punishment.”⁸²

4.59 The reference in recital (12) to the Charter of Fundamental Rights of the European Union requires further explanation. We deal with this in the following section.

⁸⁰ Chapter VI of the Charter of the European Union comprises: Article 47, the right to an effective remedy and to a fair trial; Article 48, the presumption of innocence and rights to defence; Article 49, the principles of legality and proportionality of criminal offences and penalties and Article 50, the right not to be tried or punished twice in criminal proceedings for the same offence. We deal with the Charter of Fundamental Rights at paragraphs 4.60-4.68.

⁸¹ Recital 12 reflects, amongst other things, the ‘*extraneous considerations*’ bar to surrender currently found in section 13 of the 2003 Act, see Appendix C.42 and before that the Extradition Act 1989, the Fugitive Offenders Act 1967 and the Extradition Act 1870 (as amended).

⁸² Recital 13 reflects the established case law concerning Article 3 of the European Convention on Human Rights (prohibition on torture and inhuman and degrading treatment). The European Court of Human Rights has held that no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment: *Soering v. United Kingdom* (1989) 11 EHRR 439; *Chahal v. United Kingdom* (1997) 23 EHRR 413; *Mamatkulov v. Turkey* (2005) 41 EHRR 25; *Saadi v. Italy* (2009) 49 EHRR 30. To like effect is Article 19 of the Charter of Fundamental Rights.

The Charter of Fundamental Rights of the European Union

- 4.60 The Charter of Fundamental Rights of the European Union ('the Charter') was signed by the then 15 Member States⁸³ at the Nice Summit on 7 December 2000. At the time it was signed it had no formal legal status. The Charter combines in a single text certain civil, political, economic and social rights drawn from a variety of international, European and national sources.
- 4.61 The purpose behind the Charter was to provide in a single document the rights already recognised within the European Union which apply to the European Union and Member States when applying European Union law.⁸⁴
- 4.62 The Council Conclusions that led to the Charter's creation made clear that its purpose was not to create new rights but to make existing rights more visible and accessible. This is also stated in the Preamble.
- 4.63 The Charter has now been given legal recognition by the Treaty of Lisbon which amends Article 6(1) of the Treaty on European Union so that it now reads:

"The Union recognises the rights, freedoms and principles set out in the Charter ..."

- 4.64 At the time of the Treaty of Lisbon, the United Kingdom and Poland sought clarification of the Charter's status and reassurance that it did not create new rights or principles whether domestically or otherwise. As a result, Articles 1 and 2 of Protocol 30, annexed to the TEU and the Treaty of Lisbon, provide as follows:

"Article 1

- 1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of*

⁸³ France, Germany, Italy, Belgium, The Netherlands, Luxembourg, Denmark, Ireland, United Kingdom, Greece, Portugal, Spain, Austria, Finland, Sweden.

⁸⁴ The founding treaties of the European Communities made no reference to fundamental rights forming part of the Communities' legal order. However, the European Court of Justice began to incorporate notions of fundamental rights into its decision-making and there are cases decided by the Court of Justice holding that Community legislation was either invalid because it breached fundamental rights or had to be interpreted to ensure its compatibility with such rights.

Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or actions of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

2. *In particular, and for the avoidance of doubt, nothing in Title IV⁸⁵ of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.*

Article 2

To the extent that a provision of the Charter refers to national laws and practices it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.”

- 4.65 The precise effect of Protocol 30 is presently a matter of some uncertainty. The House of Commons European Scrutiny Committee, European Union Intergovernmental Conference follow up report,⁸⁶ concluded that Protocol 30 did not preclude the Charter from having effect in domestic law (on the basis that the courts were bound to comply with decisions of the European Court of Justice even where those decisions were based on the terms of the Charter). However, in *R (on the application of S) v. Secretary of State for the Home Department*,⁸⁷ Cranston J. held that the Charter could not be directly relied on as against the United Kingdom,

⁸⁵ Title IV of the Charter (Articles 27 to 38) is entitled “Solidarity” and deals with workers’ right to information and consultation within their employment; workers’ and employers’ right of collective bargaining and action; workers’ right of access to placement services; workers’ right to protection in the event of unjustified dismissal; workers’ right to fair and just working condition; prohibition of child labour; right to protection from dismissal for a reason connected with maternity; right to social security; right of access to preventive health care; right of access to services of general economic interest; right to a high level of environmental protection; right to a high level of consumer protection.

⁸⁶ HC 16-iii (27 November 2007)

⁸⁷ [2010] EWHC 705 (Admin)

although it could be used as an indirect influence as an aid to interpretation.⁸⁸ On appeal to the Court of Appeal⁸⁹ the Secretary of State accepted in principle, that fundamental rights set out in the Charter could be relied on as against the United Kingdom and that the purpose of Protocol 30 was not to prevent the Charter from applying to the United Kingdom but to explain its effect.⁹⁰ The argument advanced on behalf of the Secretary of State was that the Charter does no more than restate the rights and principles already applied in the European Union before the Lisbon Treaty: it does not alter the content of the rights or the circumstances in which individuals could rely on them. The Court of Appeal has referred the case to the European Court of Justice⁹¹ and invited the Court to rule on whether the duties of the United Kingdom under the so-called Dublin Convention were qualified in any way so as to take into account Protocol 30. The European Court of Justice has yet to rule on the reference.⁹²

4.66 Before the signing of the Treaty of Lisbon and the formal recognition given to the Charter, it had been referred to and used by the domestic courts to elucidate the content of rights generally recognised throughout the European Union: R (Yogathas) v. Home Secretary,⁹³ Bellinger v. Bellinger,⁹⁴ R (Howard League for Penal Reform) v. Secretary of State for the Home Department.⁹⁵

4.67 However, these decisions were given at a time when the status of the Charter was unclear. As Lord Bingham of Cornhill noted in Sepet v. Secretary of State for the Home Department:⁹⁶ “... the Treaty of Nice expressly acknowledged that the status of the Charter of Fundamental Rights was a matter to be addressed thereafter”.

⁸⁸ At paragraph 155. Cranston J. held that a transfer to Greece, of an applicant for asylum, under the so-called Dublin Convention, Council Regulation (EC) No. 343/2003, could not be challenged on the basis that it was not compatible with the right to human dignity. The Dublin Convention is an agreement between European Union Member States which provides a system for allocating responsibility for determining an asylum claim by a third country national who has entered the European Union. The aim of the Convention is to avoid multiple asylum claims being made by the same person throughout the European Union.

⁸⁹ [2010] EWCA Civ. 990

⁹⁰ At paragraph 7 of the Court of Appeal’s judgment. The sixth preamble to Protocol 30 TEU states that “the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles.”

⁹¹ Under the preliminary reference procedure under Article 267 of the TFEU.

⁹² Case C-411/10 NS v. Secretary of State for the Home Department, preliminary reference from the Court of Appeal (England & Wales) (Civil Division) OJ C274/21.

⁹³ [2003] 1 A.C. 930 (Lord Hope of Craighead at paragraph 36)

⁹⁴ [2003] 2 A.C. 467 (Lord Hope of Craighead at paragraph 69)

⁹⁵ [2003] 1 FLR 484 (Munby J. at paragraph 51)

⁹⁶ [2003] 1 WLR 856 (paragraph 15)

4.68 We address the potential impact of the Charter on the operation of the Framework Decision later in this Report when we deal with certain criticisms directed at the operation of the European arrest warrant. At this stage we merely make four observations.

- i. First, it appears that Protocol 30 was not intended to operate as an opt-out for the United Kingdom (or Poland): it is a restatement of the United Kingdom's understanding of the Charter's effect, based on the terms of the Charter itself.
- ii. Secondly, Article 1(1) of Protocol 30 to the TEU states that the Charter does not extend the ability of the Court of Justice (or any other court) judicially to review national laws on the basis that they are inconsistent with the fundamental rights, freedoms and principles affirmed in the Charter. This reflects the fact that judicial review within the field of European law is not conferred by the Charter, it exists by reason of the Court of Justice's established case law and the respective competences of the Member State and the Union's institutions.
- iii. Thirdly, Article 1(2) of Protocol 30 states that Title IV of the Charter does not create justiciable rights applicable in the United Kingdom (or in Poland) except insofar as the United Kingdom (or Poland) has provided for such rights in its national law. However, in any case where the Court of Justice enforces the provisions of the Charter against Union institutions and individual Member States it will not be creating or enforcing those rights within national territories: the rights will be enforced as an aspect of European Union law. This was the position even prior to the Charter.⁹⁷
- iv. Finally, Article 2 of Protocol 30 states that to the extent that a provision of the Charter refers to national laws and practices, it shall only apply to the extent that the rights and principles it contains are recognised in the United Kingdom. This will not in itself prevent the Charter from having effect in the United Kingdom and the essential question is likely to be whether the Charter adds anything to the content of the rights which currently exist in the United

⁹⁷

The decision of the House of Lords in *Dabas* [2007] 2 AC 31 to follow the decision of the European Court of Justice in *Pupino* C105/03 is a good example, of the influence of the Court of Justice in an area where the United Kingdom did not accept the Court's jurisdiction.

Kingdom's domestic law and, if so, whether this will have an impact on the operation of European Union legislative instruments such as the Framework Decision on the European arrest warrant. The point of these observations is to note that Protocol 30 merely states what appears to be obvious. It does not provide any answer to the question of whether the Charter alters the substance of the rights currently recognised in the United Kingdom. We address this issue later.

General Observations on the Framework Decision on the European Arrest Warrant⁹⁸

- 4.69 The Framework Decision on the European arrest warrant was designed to change the mechanism by which individuals sought for trial or punishment are surrendered by one Member State to another. The key characteristics of the Framework Decision are five in number:
- (i) It requires the acceptance of a foreign warrant by national judicial authorities without an inquiry into the facts or circumstances giving rise to the warrant (the principle of mutual recognition);
 - (ii) It removes executive decision-making from the surrender process, which is now an exclusively judicial procedure between the issuing and executing Member States;
 - (iii) It dispenses with the double criminality requirement in the case of the 32 categories of offences so long as the offence in question is punishable with at least three years' imprisonment and in conviction cases a sentence of four months' custody has actually been imposed;
 - (iv) It applies equally to nationals and residents of the executing Member State and thus provides for no exception on the grounds of citizenship;

⁹⁸ See Appendix B for a summary of the provisions of the Framework Decision.

- (v) It simplifies the procedure for extradition and by imposing time limits tries to ensure the process is speedier.

4.70 Although the Framework Decision provides a number of grounds for non-execution (more than the European Convention on extradition), it contains no political offence,⁹⁹ fiscal offence or military offence exceptions. The rationale for these omissions is based on a number of factors.

- (i) the cornerstone of the scheme of surrender is the high degree of trust between Member States;
- (ii) It is highly unlikely that Member States would institute criminal proceedings for offences of a political nature (and the political offence exception as a bar to extradition had in any event been progressively narrowed during the course of the twentieth century);
- (iii) the fiscal offence exception had been progressively narrowed during the course of the twentieth century and it is now generally acknowledged that States should cooperate to ensure that such offences are deterred;
- (iv) the military offence exception had little or no practical impact on extradition and in light of the conditions which must be satisfied before surrender takes place, its inclusion is unnecessary.

4.71 According to Advocate General Colomer in *Advocaten Vor de Wereld VZW v. Leden Van de Ministerrad*,¹⁰⁰ the arrest and surrender procedure involved in the execution of a European arrest warrant is not punitive in nature. The court responsible for executing the warrant must establish that the conditions for handing over an individual have been satisfied, but the executing court is not required to hear the

⁹⁹ Recital 12 does however provide that “Nothing in this Framework Decision may be interpreted in prohibiting refusal to surrender a person for whom an EAW has been issued when there are reasons to believe, on the basis of objective elements, that the said warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinion .. or that that person’s position may be prejudiced for any of these reasons.” This is reflected in section 13 of the 2003 Act.

¹⁰⁰ Case C-303/05, [2001] ECR I-3633.

substance of the case, except for the purposes of the surrender proceedings and must refrain from assessing the evidence and delivering a judgment as to guilt.¹⁰¹

Difficulties with Transposition in Certain Member States

- 4.72 The Framework Decision on the European arrest warrant was in many respects a controversial measure. In four Member States it was challenged on constitutional grounds. We summarise these challenges in the following paragraphs.
- 4.73 In Poland the implementing of domestic law authorised the surrender of its nationals. This was held to be unconstitutional.¹⁰² However, the Constitutional Court allowed the Government time to bring the constitution into line with its obligations as a Member State of the European Union. Following a revision of the Constitution, the Polish Code of Criminal Procedure was amended with effect from 7 November 2006 so as to permit the surrender of Polish nationals.¹⁰³ In the period between the Court's decision and the amendment to domestic law, it appears that Poland continued to surrender its nationals.
- 4.74 In Germany, the Federal Constitutional Court held that the domestic law (EuHbG) governing the execution of the European arrest warrant was in conflict with the Basic Law in that it permitted the surrender of German citizens and excluded the right to judicial review.¹⁰⁴ The effect of this decision was that between 18 July 2005 and 2 August 2006 (the date on which the new German implementing law took effect), Germany did not surrender its own nationals and agreed to surrender non-citizens only under existing extradition arrangements. It continued to issue European arrest warrants for other Member States. As a result of this situation, two Member States (Spain and Hungary) invoked the principle of reciprocity and refused to recognise

¹⁰¹ This also reflects the approach adopted in a number of common law jurisdictions to extradition: Canada, New Zealand and the United States.

¹⁰² Decision of the Constitutional Court, P 1/05 of 27 April 2005

¹⁰³ Where the offence was committed outside the territory of the Republic of Poland and where the double criminality principle is satisfied.

¹⁰⁴ Decision of the Constitutional Court, 18 July 2005, BvR 2236/04. The case concerned a European arrest warrant issued by a judicial authority in Spain for the surrender of an individual, believed to be a member of Al-Qaida.

European arrest warrants issued in Germany.¹⁰⁵ These difficulties came to an end with the implementation of the new law (2 August 2006).

4.75 In Cyprus, the Supreme Court held that the surrender of Cypriots was unconstitutional.¹⁰⁶ This led to a revision of the Constitution which came into force on 28 July 2006.

4.76 The position in these three Member States is to be contrasted with the position in the Czech Republic where the Constitutional Court upheld the legality of the domestic law which gave effect to the Framework Decision on the basis that the Member States were required to have mutual trust in each other's legal systems, including in criminal matters, and that Czech citizens had to assume the obligations as well as enjoy the rights of being citizens of the European Union.¹⁰⁷

Commission Reports on the Framework Decision

4.77 Since 1 January 2004, that is the date on which the European arrest warrant came into effect, there have been three reports prepared by the Commission on the operation of the Framework Decision.

4.78 The first of these three reports, dated 24 January 2006,¹⁰⁸ noted that, consistent with the aim of the Framework Decision, the surrender of requested persons between Member States, had become entirely judicial. In the first nine months of its operation (January 2004 to September 2004) the figures available to the Commission showed 2,603 warrants were issued, 653 persons arrested and 104 surrendered, with the average time taken to execute a warrant falling from more than nine months to 43

¹⁰⁵ The decision of the Federal Constitutional Court prompted a challenge to the Secretary of State's refusal to remove Germany from the list of designated category 1 territories. This challenge was rejected by the High Court in England and Wales: *R (Oliver) v. Secretary of State for the Home Department* [2006] EWHC 1847 (Admin).

¹⁰⁶ *Attorney General v. Konstantinou*: Decision of the Supreme Court 7 November 2005, Ap. No. 294/2005 (the case concerned an application by the authorities in the United Kingdom for the surrender of a person with dual British and Cypriot nationality accused of conspiracy to defraud).

¹⁰⁷ Decision 3 May 2006, 434/2006 Sb. Slovenia also amended its constitution to give effect to the Framework Decision.

¹⁰⁸ Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (revised version), European Commission, 24 January 2006, COM (2006) 8 and SEC (2006) 79. (The first evaluation report was actually produced in 2005 but revised to include findings in relation to Italy, which implemented the Framework Decision on 14th May 2005.)

days. The Commission concluded that the overall impact of the European arrest warrant had been positive in that surrender between Member States was now taking place expeditiously, subject to judicial control and in accordance with the fundamental rights of the individual. The Commission emphasised six positive features of the new surrender scheme and the Framework Decision:

- (i) It is more precise as regards the *ne bis in idem* principle¹⁰⁹;
- (ii) It has strengthened the right to the assistance of a lawyer;
- (iii) It has strengthened the right to examine the appropriateness of keeping a person in detention;
- (iv) It expressly provides for the deduction from the term of any sentence, the period of time spent in detention in the requested State;
- (v) It facilitates compliance with the requirement that criminal proceedings be concluded within a reasonable time;¹¹⁰
- (vi) Through its effectiveness in obtaining the surrender of nationals of other Member States, it facilitates the release of individuals on bail pending trial, irrespective of where they reside in the European Union.

4.79 In relation to the right to refuse surrender on human rights grounds the Commission noted:¹¹¹

“Although more efficient and faster than the extradition procedure, the arrest warrant is still subject to full compliance with the guarantees for the individual. Contrary to what certain Member States have done, the Council did not intend to make the general

¹⁰⁹ “*Not twice for the same.*” More familiar to English lawyers as the rule against double jeopardy which is sometimes expressed in the common law pleas in bar to a prosecution as *autrefois acquit* (formerly acquitted) and *autrefois convict* (formerly convicted).

¹¹⁰ The reasonable time requirement is contained in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which in material part provides: “*In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time ...*”

¹¹¹ At page 6

condition of respect for fundamental rights an explicit ground for refusal in event of infringement. A judicial authority is, of course, always entitled to refuse to execute an arrest warrant, if it finds that the proceedings have been vitiated by infringement of Article 6 of the Treaty on European Union and the constitutional principles common to the Member States: in a system based on mutual trust, such a situation should remain exceptional.”

4.80 The second Commission report, dated 11 July 2007, followed the entry of Romania and Bulgaria into the European Union on 1 January 2007. The report noted that the use of the European arrest warrant had grown year by year, with 6,900 warrants issued by 23 Member States in 2005 with 1,770 arrests (figures from Belgium and Germany were not available). Of those arrested some 1,532 were surrendered to the issuing Member States, with an average surrender time of 43 days although surrender from the United Kingdom was much longer. The Commission concluded that, overall, the implementation of the Framework Decision had been a success and that its positive impact was demonstrated by judicial control, efficiency and speed with full respect for fundamental rights. In relation to the United Kingdom’s efforts to give effect to the Framework Decision the Commission criticised:

- (i) The modification of the required minimum sentence thresholds;
- (ii) The double criminality requirement in respect of the Framework List offence where part of the offence is committed in the United Kingdom;¹¹²
- (iii) The additional grounds for mandatory non-execution;¹¹³
- (iv) The imposition of additional conditions in the application of Article 5(1);¹¹⁴
- (v) The absence of a maximum time limit for the higher courts’ decision.

¹¹² A reference to sections 64 and 65 of the 2003 Act.

¹¹³ A reference to the statutory bars which are not found in the Framework Decision: sections 13, 14, 16, 18, 19 and 21- see Appendix C.

¹¹⁴ A reference to section 20 (although the Framework Decision on *in absentia* judgments deleted Article 5(1) of the Framework Decision and the requirements in section 20 reflect the amendments).

- 4.81 The Commission further noted that the United Kingdom (and Ireland) systematically requested additional information or insisted on the arrest warrant being re-issued and that this not only posed problems for other Member States, it contributed to delay.¹¹⁵
- 4.82 The third Commission report, dated 13 April 2011, noted that between 2005 and 2009, some 54,689 arrest warrants had been issued and 11,630 executed. The average surrender time (for those who did not consent) was 48 days. The Commission expressed the view the European arrest warrant has undoubtedly reinforced the free movement of persons with the European Union by providing a more efficient mechanism to ensure that open borders are not exploited by those seeking to evade justice. It was, however, “*far from perfect*” noting that Member States, European and national parliamentarians, groups from civil society and individual citizens had all expressed concerns in relation to the operation of the European arrest warrant and in particular its effect on fundamental rights.

“From the issues raised in relation to the operation of the EAW it would seem that, despite the fact that the law and criminal procedures of all Member States are subject to the standards of the European Court of Human Rights, there are often some doubts about standards being similar across the EU. While an individual can have recourse to the European Court of Human Rights to assert rights arising from the European Convention on Human Rights, this can only be done after an alleged breach has occurred and all domestic legal avenues have been exhausted. This has not proved to be an effective means of ensuring that signatories comply with the Convention’s standards.”

These concerns had led to the Commission’s Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings which is discussed below.¹¹⁶

- 4.83 The Commission report noted that confidence in the application of the European arrest warrant had been undermined by the systematic use of European arrest warrants

¹¹⁵ The difficulty created by the 2003 Act is that a European arrest warrant must comply with the requirements of section 2 in order to be valid. The Framework Decision envisages that defects in the warrant would be remedied by communication between judicial authorities and the provision of additional information where this proved to be necessary.

¹¹⁶ See paragraphs 4.87-4.95.

for the surrender of persons sought in respect of minor offences. It noted a general agreement among Member States that a proportionality requirement is necessary to prevent European arrest warrants from being issued for offences which are not serious enough to justify the cooperation which the European arrest warrant requires.¹¹⁷ In order to address this problem, the Commission recommended that judicial authorities should use the European arrest warrant system only when a surrender request is proportionate in all the circumstances of the case. The Commission recommended that uniformity would be achieved by use of the Council's Handbook on how to issue a European arrest warrant¹¹⁸ which sets out the factors to be taken into account when issuing a European arrest warrant and the possible alternative measures to be considered before taking such a step.¹¹⁹ The Handbook states that the issuing judicial authorities should consider proportionality by weighing the usefulness of issuing a European arrest warrant in the specific case. The factors to be taken into account include:

- (i) The seriousness of the offence;
- (ii) The possibility of the suspect being detained;
- (iii) The length of the sentence or expected sentence if the person sought is found guilty of the alleged offence;
- (iv) The existence of an alternative approach that would be less onerous for both the person sought and the executing authority (such as using a summons, and the Council Framework Decision on the mutual recognition of financial penalties);
- (v) A cost benefit analysis of the execution of the European arrest warrant.

¹¹⁷ A similar conclusion had been reached by the Council in its Follow-up to the recommendations in the final report on the fourth round of mutual evaluations, concerning the European arrest warrant and by a Commission experts' meeting: Implementation of the Council Framework Decision of 13 June 2002 on the European arrest warrants: The issue of proportionality (Brussels 5 November 2009).

¹¹⁸ Amended in June 2010

¹¹⁹ Council 8436/2/10 COPEN p.3

- 4.84 Other factors to be taken into account include ensuring the effective protection of the public and taking into account the interests of the victim or victims of the offence or offences.

The European Council's Evaluation

- 4.85 In 1997 the European Council established a mechanism for evaluating the application and implementation at national level of international measures designed to deal with organised crime. The fourth round of mutual evaluations, 18 May 2009, addressed the application in practice of the European arrest warrant.¹²⁰
- 4.86 The Council noted: *“In general terms, the practitioners who were interviewed in the different Member States had a very positive view of the EAW and its application ... National authorities have assumed the innovative nature of the EAW and are aware of the need to introduce a new judicial culture based on mutual trust ... Their willingness to see that the EAW system is effectively enforced is remarkable. No small number, however, stressed the need to take further steps to approximate legislation and identify common procedural standards as a means of enhancing mutual trust.”*

The Roadmap and Procedural Safeguards

- 4.87 Following the implementation of the Framework Decision on the European arrest warrant, efforts were made within the European Union to address concerns arising from different standards of protection afforded to criminal defendants in Member States. In 2003 the European Commission produced a Green Paper on *Minimum Standards in Procedural Safeguards in Criminal Proceedings*.¹²¹ This was followed in 2004 by a proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union.¹²²

¹²⁰ Final Report of the fourth round of mutual evaluations – The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States, 8302/2/09, Brussels 18 May 2009.

¹²¹ Com (2003) 75 final, 19 February 2003

¹²² Com (2004) 328 final, 28 April 2004

4.88 Negotiations concerning these matters were protracted and attempts to enact a Framework Decision were eventually abandoned. On 30 November 2009, the Council adopted what was known as '*The Roadmap*' for strengthening the procedural rights of suspected or accused persons in criminal proceedings.¹²³

4.89 Recital 10 of the Roadmap recognises that considerable progress has been made in the area of judicial and police cooperation on measures that facilitate prosecution and that it is now time to take action to improve the balance between these measures and the protection of procedural rights of the individual.

4.90 To this end the Roadmap has identified six priority measures:

- (i) the right to interpretation and translation;
- (ii) the right to information about rights (known as the Letter of Rights);
- (iii) the right to pre-trial legal advice and at-trial legal aid;
- (iv) the right of a detainee to communicate with family members, employers and consular authorities;
- (v) greater protection for vulnerable suspects;
- (vi) the publication of a green paper on pre-trial detention.

4.91 In relation to the first measure (interpretation and translation), a Directive on the right to interpretation and translation in criminal proceedings was adopted by the European Parliament and Council in October 2010.¹²⁴ It provides that a person subject to criminal proceedings who does not speak or understand the language of those proceedings, shall be provided with interpretation during the proceedings, including during police questioning, all court hearings and any necessary interim hearings. Interpretation should be of sufficient quality to safeguard the fairness of the

¹²³ Resolution of the Council of 30 November 2009 OJ C 295, 4 December 2009, p.1

¹²⁴ Directive 2010/64/EU- OJ L 2890 26 October 2010. The United Kingdom Government has decided to examine each Road map proposal on a case by case basis. It has agreed to participate in the interpretation and translation Directive which is scheduled to come into force in October 2013.

proceedings by ensuring the person has knowledge of the case against them. The Directive also includes a requirement for the written translation of “*essential documents*” which includes a decision depriving the defendant of his liberty, any charge or indictment, any written judgment and other documents which the Member State concerned deems essential in order to safeguard the fairness of the proceedings.

- 4.92 In relation to the second measure (the Letter of Rights), this is currently the subject of discussion in the European Parliament and Council and a draft Directive has been produced which requires basic information to be given to a suspect or accused as they apply under national law.¹²⁵
- 4.93 In relation to the third measure (legal advice and legal aid), the Commission adopted on 8 June 2011 a Proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate with a lawyer on arrest.¹²⁶ The draft Directive was published in July 2011.¹²⁷
- 4.94 So far as the remaining measures are concerned, preparatory work in respect of each of them is being conducted by the Commission.
- 4.95 Further developments in this area are expected to take place particularly as Article 82(2) of the TFEU now empowers the Council and the European Parliament to establish minimum rules concerning the rights of individuals in criminal procedure “*to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension.*”

¹²⁵ The United Kingdom has opted into the second measure dealing with the Letter of Rights.

¹²⁶ The draft Directive provides for access to a lawyer prior to and during police interview in accordance with the decision of the Strasbourg Court in *Salduz v. Turkey* (2008) 49 EHRR 421.

¹²⁷ The United Kingdom Government has indicated that it is not minded to opt into the Directive at this time: it has concerns about the text of the Draft Directive. Instead, it intends to work to influence the negotiations for the final text before taking a decision.

Organisations Involved in Cooperation

- 4.96 In this section we identify a number of bodies and institutions which are used to facilitate cooperation between Member States and which play a part in the operation of the Framework Decision on the European arrest warrant.

Eurojust

- 4.97 Eurojust is a body of the European Union with legal personality. It was formally established in 2002¹²⁸ and sits in the Hague. The activities of Eurojust are essentially threefold. First, to coordinate national investigations and prosecutions. Secondly, to improve cooperation between national authorities, in particular by facilitating judicial cooperation and mutual recognition. Thirdly, to support the effectiveness of national investigations and prosecutions.¹²⁹ It deals with large and complex cross-border cases, usually involving more than two European Union Member States.
- 4.98 By reason of Article 83(1) of the TFEU the European Council and the Parliament are given the power to determine Eurojust's structure, operation, field of action and tasks. The tasks may include requesting Member States' authorities to begin investigations or prosecutions, the coordination of investigations and prosecutions and the strengthening of judicial cooperation including by resolution of conflicts of jurisdiction.
- 4.99 In its 2003 Annual Report, Eurojust published guidelines entitled "*Which Jurisdiction Should Prosecute?*" These guidelines begin with the presumption that, if possible a prosecution should take place in the jurisdiction where the majority of the criminality occurred or where the majority of the loss was sustained.¹³⁰ The guidelines state that when reaching a decision, prosecutors should balance carefully and fairly all the

¹²⁸ Council Decision 2002/187/JHA of 28 February 2002 (OJ L 63 6 March 2002) (the Eurojust Decision) subsequently amended by Council Decision 2003/659/JHA of 18 June 2002 (OJ L 245 29 September 2003 pages 44-5).

¹²⁹ Article 31(2) of the Treaty of Amsterdam; Article 3 of the Eurojust Decision and Article 85 of the TFEU.

¹³⁰ We were informed by the Crown Prosecution Service that these guidelines are widely known and taken into account by prosecutors throughout the European Union. They are available to prosecutors in England and Wales as part of the Crown Prosecution Service online guidance service. http://www.cps.gov.uk/legal/h_to_k/jurisdiction/

factors both for and against commencing a prosecution in each jurisdiction where it is possible to do so. The factors to be considered include:

- (i) the location of the accused;
- (ii) the availability of extradition or surrender from one jurisdiction to another;
- (iii) the desirability of prosecuting all the defendants in one jurisdiction;
- (iv) the availability of witnesses and their willingness to travel and give evidence in another jurisdiction;
- (v) the protection of witnesses including, for example, the possibility of one jurisdiction being able to offer a witness protection programme when another has no such possibility;
- (vi) the desirability of avoiding delay;
- (vii) the interests of victims and whether they would be prejudiced if any prosecution were to take place in one jurisdiction rather than another;
- (viii) the availability of reliable, credible and admissible evidence;
- (ix) the effects of a decision to prosecute in one jurisdiction rather than another;
- (x) the relative sentencing powers of courts in the different potential jurisdictions and while this must not be a primary factor, prosecutors should ensure that the penalties available reflect the seriousness of the conduct which is the subject of the prosecution;
- (xi) the powers available to restrain, recover, seize and confiscate the proceeds of crime;

- (xii) the costs of prosecuting a case or its impact on the resources of a prosecution office (although this should only be a factor in deciding whether a case should be prosecuted in one jurisdiction rather than in another).

4.100 The Eurojust guidelines on allocating jurisdiction have been given greater prominence by the Council Framework Decision on conflicts of jurisdiction adopted in 2009.¹³¹ The Framework Decision¹³² requires Member States to inform and consult each other in cases where there are reasonable grounds to believe that parallel proceedings are being conducted in another Member State. If parallel proceedings are underway the relevant authorities are required to enter into a consultation process with a view to reaching a solution aimed at avoiding the adverse consequences arising from multiple proceedings. An indication of the criteria which may be taken into account during the consultation process is set in the preamble to the Framework Decision which makes express reference to the Eurojust guidelines and requires consideration of *“the place where the major part of the criminality occurred, the place where the majority of the loss was sustained, the location of the suspected or accused person and possibilities for securing surrender or extradition to other jurisdictions, the nationality or residence of the suspected or accused person, significant interests of the suspected or accused person, significant interests of victims and witnesses, the admissibility of evidence or any delays that may occur.”*

4.101 If agreement cannot be reached the issue of which Member State should prosecute, the matter *“shall where appropriate”* be referred to Eurojust.

4.102 The importance of cooperation between Member States in relation to cross-border offending is recognised by Article 82 of the TFEU which (as noted above) provides (amongst other things) that the European Parliament and the Council acting in accordance with the ordinary legislative procedure shall adopt measures to prevent and settle conflicts of jurisdiction between Member States.

¹³¹ The Framework Decision (summarised at paragraphs 4.35-4.38) was preceded by a Commission Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings: Com (2005) 696 final, 23 December 2005.

¹³² [2009] OJ L 328/42) (which Member States are required to apply by 15 June 2011).

European Judicial Network

- 4.103 The European Judicial Network was established by a Council Joint Action in 1998.¹³³ It comprises national experts who provide judicial and practical cooperation to national authorities in relation to cross-border issues.

Liaison Magistrates

- 4.104 The formal creation of liaison magistrates was the result of a Council Joint Act of 22 April 1996.¹³⁴ National liaison ‘magistrates’ are posted to other Member States in order to improve judicial cooperation. This is now provided for by Article 27a of the Council Decision on the strengthening of Eurojust 5347/3/09, Brussels 15 July 2009.

European Judicial Training Network

- 4.105 The European Judicial Training Network is a non-profit international association founded in 2000. It aims to promote training of the professional judiciary in matters connected to the European Union.

Europol

- 4.106 Europol is the European Union law enforcement organisation that handles criminal intelligence. It has legal personality and is based in The Hague. It came into operation on 1 July 1999.¹³⁵ By reason of Article 88 of the TFEU, Europol’s mission is to support and strengthen action by Member States’ police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by Union policy. The European Parliament and Council have the role of determining Europol’s structure, operation, field of

¹³³ Joint Action on the creation of a European Judicial Network of 29 June 1998 (OJ L 19, 7 June 1998 page 4)

¹³⁴ OJ L 105 27 April 1996, page 1

¹³⁵ Convention based on Article K.3 of the Treaty on European Union on the establishment of a European Police Office (OJ C 316, 27 November 1995 page 2)

action.¹³⁶ Europol staff have no operational or coercive police powers although they may be invited by Member States' law enforcement authorities to assist and support investigations into serious and organised international crime.

¹³⁶ Regulations adopted for this purpose are required to lay down the procedures for scrutiny of Europol's activities by the European Parliament and National Parliament.

Part 5 The Operation of the European Arrest Warrant

- 5.1 In this section we begin our consideration of the operation of the European arrest warrant section and the criticisms levelled against it.¹
- 5.2 The need for effective judicial cooperation in the field of criminal matters is not controversial.² The historical developments in extradition law have shown that the need for cooperation is all the more important between neighbouring countries or countries closely related economically and politically.³ The difficulty for the legislature lies in ensuring that cooperation takes place in a manner which is effective and which fairly respects the rights of the individual. The Framework Decision on the European arrest warrant marked an attempt to replace extradition in the traditional sense with a system of surrender without the involvement of the executive and with the minimum of formality. This departure from old-style extradition is reflected in the language of the Framework Decision (with expressions such as issuing judicial authority (not requesting State), executing judicial authority (not requested State)) and the emphasis on communication and liaison between judicial authorities throughout the European Union.
- 5.3 The 2003 Act has now been in force for almost seven years and the number of surrenders to and from the United Kingdom under Part 1 are as follows:⁴

¹ A summary of the provisions of the Framework Decision on the European arrest warrant is set out in Appendix B.

² A point accepted by all those who submitted representations to our Review.

³ Part II of the Fugitive Offenders Act 1881 provided for a simplified form of extradition between contiguous British possessions. Extradition to and from the Republic of Ireland was based on a backing of warrants system. The European Convention on Extradition was designed to facilitate extradition between Western European States and was subsequently extended to other States in other regions.

⁴ Figures from Hansard, H.C. Col. 190H 9 November 2010. In the year 2009/10 the surrenders from the United Kingdom were: Poland, 425; Lithuania, 55; Czech Republic, 34; Germany, 21; France, 19; Ireland, 19; The Netherlands, 18; Romania, 18; Spain, 16; Latvia, 15; Italy, 10; Hungary, 8; Estonia, 7; Slovakia, 7; Belgium, 6; Sweden, 6; Cyprus, 4; Portugal, 3; Malta, 2; Austria, 1; Bulgaria, 1; Finland, 1; Greece, 1; Luxembourg, 1; Slovenia, 1. These figures may be contrasted with the figures for domestic prosecutions. The Crown Prosecution Service prosecutes approximately 1 million defendants a year in England and Wales. Out of a total budget of £650 million per annum, the Crown Prosecution Service spends approximately £2 million per annum on extradition cases.

Year	Surrenders to the U.K.	Surrenders from the U.K.
2004 (calendar year)	19	24
2005 (calendar year)	63	77
2006-7 (business year)	84	178
2007-8 (business year)	107	415
2008-9 (business year)	88	516
2009-10 (business year)	71	699

5.4 In the case of outgoing requests, we were informed by the Metropolitan Police Service that the United Kingdom had benefited from being a member of the European arrest warrant scheme and that it had provided a simpler, faster and more certain process for obtaining the appearance of wanted persons before our courts.⁵

5.5 In the course of our Review we received a good deal of evidence concerning the operation of the provisions of Part 1 of the 2003 Act. It is clear that the European arrest warrant scheme has many critics as well as admirers. To many, the adoption of the Framework Decision was seen as the logical outcome of the creation of the single European area and of European citizenship.⁶ Since each Member State has the obligation to allow the nationals of other Member States to live and work in its territory under the same conditions as its own nationals, it is right that a person who commits an offence against the laws of a Member State should be prosecuted and tried before the courts of that State in just the same way as its nationals. There is a body of opinion that the introduction of the European arrest warrant had been successful (to a greater or lesser degree) and, after some initial uncertainty in relation to its operation many of the problems had been resolved by decisions of the higher

⁵ The European arrest warrant has been used to secure the return of a number of high profile defendants, including Hussein Osman who was returned for trial in respect of the July 2005 bombings in London; Jakub Tomczak who assaulted and raped a 48 year old woman and was sentenced to life imprisonment; Clifford Hobbs who was sentenced to 12 years' imprisonment for robbery and Andrew Alderman who absconded from the United Kingdom after being accused of rape.

⁶ The concept of citizenship of the European Union was created by the Maastricht Treaty (1993). It is now to be found in Article 20 of the TFEU. *"Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."* There are over 500 million European Union citizens, approximately 8 million of whom live in a State other than that of their nationality.

courts.⁷ Its supporters claim it has become an effective, streamlined and fair mechanism for dealing with the surrender of requested persons to other Member States of the European Union. It is right to point out that many of those who are in favour of the European arrest warrant acknowledge that it is overused by certain Member States in what might be considered to be less serious, or even trivial cases: the criticism is not always that the European arrest warrant operates unfairly, rather it is that it sometimes is used too frequently and that this places a burden on the courts and is costly in terms of time and resources.⁸ In particular, there is a complaint that some Member States do not have any system to filter cases and so European arrest warrants are issued automatically with no consideration of whether there is a less coercive method of dealing with the requested person. There is also a body of opinion that the operation of the European arrest warrant is fundamentally flawed and that, while it has no doubt been instrumental in improving the fight against crime and bringing offenders to justice, it operates unfairly and to the disadvantage of requested persons by favouring the free movement of warrants, over the rights of suspects and defendants. Its detractors claim that the European arrest warrant scheme reflects the bias in favour of the prosecuting authorities which permeates the European Union's area of freedom, security and justice. There are also critics who express acute misgivings of the move (as they see it) towards a European super State.

- 5.6 In the following paragraphs we identify the principal criticisms made of the European arrest warrant scheme and express our views on the merits or otherwise of those criticisms. When considering the criticisms we have felt it important to consider the European arrest warrant scheme as it operates in practice. We are also of the view that the criticisms must be assessed in the context of how Part 1 of the 2003 Act operates as a whole.⁹

⁷ The High Court, the House of Lords and the Supreme Court in England and Wales, the High Court of Justiciary in Scotland and the High Court in Northern Ireland.

⁸ The concepts of '*seriousness*' and '*triviality*' need to be approached with care in this context: in *Sandru v Government of Romania* [2009] EWHC 2879, a conviction case arising from the theft and destruction of ten chickens which led to the position of a 3 year custodial sentence, Elias L.J. said that the appropriate sentence for an offence is, in part, a function of culture and the courts in Romania may treat theft of livestock more seriously than English courts would typically do.

⁹ We have explained the operation of Part 1 of the 2003 Act in Appendix C. A summary of the Act's operation appears at paragraphs 2.7-2.14.

The Criticisms

- 5.7 The criticisms of the operation of the European arrest warrant come from a number of different sources. The most detailed and comprehensive criticisms were helpfully provided to the Review by Fair Trials International (a United Kingdom NGO that works for fair trials according to internationally recognised standards), Justice (the British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law) and Liberty (a United Kingdom based civil liberties and human rights organisation).¹⁰
- 5.8 The principal criticisms of the European arrest warrant may be summarised as follows:
- (i) The courts in England and Wales have adhered too closely to the principle of mutual recognition, with the result that the threshold for resisting extradition on human rights grounds has been set at a level which deprives the requested person of any effective human rights protection.
 - (ii) In conviction cases, surrender cannot be refused where the person is a United Kingdom national or resident who could serve their sentence in the United Kingdom.
 - (iii) The executing judicial authority cannot request further information where there is a suspicion that the person subject to the European arrest warrant is a victim of mistaken identity.
 - (iv) In a number of Member States it is possible for a European arrest warrant to be issued by non-judicial authorities, for example public prosecutors (or in the case of Denmark, the Minister of Justice). The result is that there is no judicial scrutiny of the decision to issue such a warrant in the issuing State.
 - (v) The Framework Decision does not provide a proportionality test with the result that there is no requirement for the judicial authority in the issuing

¹⁰

We have, of course, considered all the submissions made to the Panel and refer expressly to these three organisations only because their submissions, when read as a whole, identified the criticisms of the European arrest warrant scheme in a comprehensive manner.

Member State to consider the necessity and suitability of an extradition request.

- (vi) The European arrest warrant is being used by some Member States as an aid to investigation rather than prosecution.
- (vii) European arrest warrants are often transmitted through the Schengen Information System ('the SIS') and while the SIS allows the issuing Member State to update or remove an alert when appropriate it is not possible for the executing court to remove an alert even where it has decided to refuse surrender. The result is that suspects can remain the subject of SIS alerts and are liable to arrest if they travel to other Member States.
- (viii) While the Framework Decision requires legal representation of the requested person in the executing Member State, there is no requirement for legal representation of the requested person in the issuing Member State.
- (ix) The Framework Decision has effectively abolished the dual criminality requirement for a broadly defined range of offences, some of which may not be criminal offences in the United Kingdom.
- (x) Extradition under the European arrest warrant scheme has become almost automatic and takes place on a "*no questions asked*" basis.
- (xi) The short time limits within which surrender is to take place means that a requested person may not be allowed a proper opportunity to contest their surrender and may be returned to the issuing Member State at an early stage of the proceedings, with the result that they are detained in custody for longer than necessary.
- (xii) A requested person can be extradited at a very early stage of a criminal investigation, with no prospect of being admitted to bail in the issuing Member State and held in a prison establishment with standards which fall far short of what would be deemed acceptable in the United Kingdom.

(xiii) The European arrest warrant permits surrender to take place without the need on the part of the issuing Member State to provide evidence to demonstrate a *prima facie* case, with the result that the United Kingdom courts do not consider the substance of the allegations made against the requested person.¹¹

(xiv) Part 1 of the 2003 Act does not include a forum bar.¹²

5.9 It appeared to us that underlying these criticisms is a more general point: the Framework Decision was enacted by the Council without any prior harmonisation of the criminal law and without having set minimum standards of criminal procedure so as to guarantee the rights of requested persons. However, the general view of the European Union institutions is that mutual recognition of judicial decisions is an alternative to the more politically sensitive issue of harmonisation or approximation of national criminal laws, although greater harmonisation or approximation is a long term objective.¹³

Preliminary Observations

5.10 Before addressing the criticisms which have been made of the operation of the European arrest warrant, we feel it appropriate to make a number of preliminary observations concerning the European Union and extradition generally.

The European Union

5.11 As is well-known, one objective of the European Union is to create a single area of freedom, security and justice or, as it is sometimes expressed, a single European judicial area. It is this concept (the single area) which has provided the impetus for developments in the extradition arrangements between Member States and the

¹¹ We deal with the *prima facie* evidence requirement in Part 8.

¹² We deal with the forum bar issue in Part 6.

¹³ This is made clear by the provisions of the TFEU which refer to harmonisation/approximation of criminal laws. See for example Articles 67 and 81. See also the framework decisions and directives in relation to terrorism (2002/475/JHA [2002] OJ L164/3); people trafficking (2002/629/JHA [2002] OJ L203/1); sexual exploitation of children (2004/68/JHA [2004] OJ L13/44); cybercrime (2005/222/JHA [2005] OJ L69/67); environmental law (Directive 2008/99/EC [2008] OJ L328/28); racism and xenophobia (2008/913/JHA [2008] OJ L328/55); employment of illegal immigrants (Directive 2009/52/EC [2009] OJ L168/24).

principle of mutual recognition. These developments are the inevitable consequence of creating an area of free movement of persons, goods, services and capital. In an area of freedom of movement there are compelling reasons to encourage cooperation between law enforcement and judicial authorities in Member States: an area without frontiers increases the possibilities for cross-border crime and the problem of crime within the European Union is one properly to be addressed at a supra-national level. The future trend is likely to be towards even greater cooperation and the need for an uncomplicated and workable regime for the surrender of accused and convicted persons appears to us to be beyond argument.

- 5.12 Our second preliminary observation concerns, the principle of mutual recognition (that is the principle the courts of each Member State are required to accept the decisions of the courts of other Member States as equivalent to the decisions they would themselves have given). This principle is now the cornerstone of the European Union's action to promote cooperation in matters of criminal justice. This has brought about a fundamental change in cooperation between Member States.¹⁴
- 5.13 Thirdly, the Framework Decision is an important legislative instrument of the European Union and national courts are under an obligation to interpret national law in light of its wording and purpose.¹⁵ The Framework Decision will remain in force until it is repealed, annulled or amended.¹⁶ It follows from this that the scope for legislative change within Part 1 of the 2003 Act is limited.
- 5.14 The fact that the surrender procedure is now effected almost entirely through judicial authorities¹⁷ appears to us to be an entirely positive development. So too is the fact

¹⁴ Of course, we are aware of the criticism that the principle of mutual recognition was developed in the context of the common market and is ill-suited to the surrender of individuals. But the practical reality is that the movement of persons within the European Union increases the difficulty of combating and prosecuting crime: in the absence of harmonisation of criminal procedures mutual recognition is the most suitable mechanism available.

¹⁵ Case C-105/03 *Pupino* [2005] ECR I-5285 [2006] QB 83.

¹⁶ In accordance with the transitional provisions of the TFEU. In the event of amendment, it will then operate as a Directive. By June 2014 at the latest it will be necessary for the United Kingdom to decide whether to accept the powers of the Court of Justice of the European Union and opt into measures adopted prior to the Treaty of Lisbon.

¹⁷ Although, in some Member States responsibility for issuing European arrest warrants rests with the office of the public prosecutor.

that each Member State now surrenders its own nationals¹⁸ and that surrender is now effected far more quickly than was previously the case.

- 5.15 We agree with those who made submissions to the Review asserting that mutual trust can only be enhanced if fundamental rights and procedural safeguards for arrested persons are consistently and adequately protected throughout the European Union. We have approached our Review on the basis that it is necessary to look at the actual operation of our own extradition laws in order to assess whether they do in fact operate unfairly or oppressively. We have taken into account the fact Member States are capable of violating rights guaranteed by the Human Rights Convention and that surrender should not take place where this is incompatible with those guaranteed rights.

Extradition in Common Law Jurisdictions

- 5.16 So far as extradition is concerned, it is important to bear in mind that its object is to return a person who is properly accused or has been convicted of an extradition offence in a foreign country to face trial or to serve his sentence there.¹⁹ There is a strong public interest in respecting treaty obligations which provide for extradition and international cooperation is all the more important at a time when cross-border crime is becoming ever more common.²⁰ The strong public interest in giving effect to extradition arrangements has been a recurrent theme of the decided cases both under the 1989 Act²¹ and the 2003 Act.²² It is also important to bear in mind that extradition

¹⁸ And several States have amended their constitutions in order to enable them to take place (Germany, Poland, Cyprus are examples). In the case of Member States who now surrender their own nationals, most apply Article 5(3) so that a sentence handed down in another Member State will be executed on their territory. This involves surrender to the issuing State on condition that the individual will be returned to the home State to serve the sentence. The amendment to the Polish constitution enabled the United Kingdom to secure the return of Jakub Tomczak, a Polish national, who assaulted and raped a 48 year old woman. He was found guilty and sentenced to life imprisonment. Prior to the Framework Decision on the European arrest warrant it is unlikely that he would have been returned to the United Kingdom.

¹⁹ Subject to arrangements which permit a sentence to be served in the person's home State.

²⁰ We have accepted that cross-border crime is increasing although we received no evidence on the point. Our own experience and general knowledge of the changing nature of serious organised criminal activity supports this claim: the case law also proceeds on this basis.

²¹ See, for example, *In re Evans* [1994] 1 WLR 1006.

²² See, for example, *Gomes v. Government of the Republic of Trinidad and Tobago* [2009] 1 WLR 1038.

proceeds on the fundamental assumption (which of course may be displaced by evidence) that the requesting State is acting in good faith.²³ In these respects the approach of the courts in the United Kingdom is entirely in keeping with the approach in other common law jurisdictions.

The United States

- 5.17 In Glucksman v. Henkel,²⁴ Mr. Justice Holmes speaking on behalf of the United States Supreme Court stated:

“For while a man is not to be sent from the country merely upon demand or surmise, yet if there is presented, even in somewhat untechnical form according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender ... we are bound by the existence of an extradition treaty to assume the trial will be fair.”

Australia

- 5.18 The leading extradition case in Australia is Barton v. The Commonwealth.²⁵ In that case the High Court held that it was within the prerogative power of the Australian Government to request a foreign State to surrender a person alleged to have committed an offence against the law of Australia. In the course of his judgment Barwick C.J. stated:

“The cooperation of nations in the surrender of fugitives from justice is a most important aspect of international life. With ease of travel and greater facility in communication, offenders against the law of a

²³ See for example, Serbeh v. Governor of Her Majesty’s Prison Brixton 31 October 2002, CO/2853/2002, paragraph 40; Ahmad and Aswat v. The Government of the United States of America [2006] EWHC 2927 (Admin), paragraph 74.

²⁴ 221 US 508, 512 (1911)

²⁵ (1974) 48 ALJR.

country can readily remove themselves from that country and not only escape the consequences of their own wrongdoing but, by that escape, weaken the administration of justice in that place.”

- 5.19 Since 1988 Australia has adopted a ‘*no evidence*’ standard approach to extradition with the result that extradition requests are not generally required to satisfy the *prima facie* evidence requirement.²⁶

New Zealand

- 5.20 In *Edwards v. United States of America*,²⁷ the New Zealand Court of Appeal held that the extradition treaty between New Zealand and the United States of America was to be interpreted liberally so as not to hinder the working and narrow the operation of international extradition arrangements.²⁸
- 5.21 Extradition to and from New Zealand is governed by the Extradition Act 1999, Part IV of which provides for a fast track extradition procedure in respect of requests for extradition received from ‘*designated countries*’.

Canada

- 5.22 In *United States of America v. Cotroni*,²⁹ the Supreme Court of Canada held that the investigation, prosecution and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organised societies. In the course of giving the judgment of the majority, La Forest J. stated:

²⁶ The Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 which is currently before the Australian Parliament does not make any amendment to the ‘*no evidence*’ standard. The extradition parts of the Bill are aimed at reducing delays by streamlining the extradition process. However, Australia does require *prima facie* evidence in the case of requests from the United States.

²⁷ [2002] 3 NZLR 222.

²⁸ The judgment of the Court was given by Keith J. who cited with approval the statements made by Lord Russell of Killowen in *Re Arton (No. 2)* [1896] 1 Q.B. 509 and by Lord Bridge of Harwich in *R v. Governor of Ashford Remand Centre, Ex parte Postlethwaite* [1988] A.C. 924.

²⁹ [1989] 1 SCR 1469.

“Modern communications have shrunk the world and made McLuhan’s global village a reality.”³⁰ The only respect paid by the international criminal community to national boundaries is when these can serve as a means to frustrate the efforts of law enforcement and judicial authorities. The trafficking in drugs, with which we are here concerned, is an international enterprise and requires effective tools of international cooperation for its investigation, prosecution and suppression. Extradition is an important and well-established tool for effecting this cooperation.

*The importance of extradition for the protection of the Canadian public against crime can scarcely be exaggerated. To afford that protection, there must be arrangements that ensure prosecution not only of those who commit crimes while they are physically in Canada and escape abroad, but also of those whose acts abroad have criminal effects in this country. This requires reciprocal arrangements with other states seeking similar objectives. As I noted in *Libman v. The Queen*, [1985] 2 S.C.R. 178, at p.212, it would be a sad commentary on our law if it was limited to the prosecution of minor offenders while permitting more seasoned criminals to operate on a world-wide scale.*

*What is more, I do not think that the free and democratic society that is Canada, any more than any other modern society, should today confine itself to parochial and nationalistic concepts of community. Canadians today form part of an emerging world community from which not only benefits but responsibilities flow. This is consistent with the approach taken by this Court in *Libman v. The Queen*, supra, at p.214, where after stating that we should not be indifferent to the protection of the public in other countries, I added, at p.214:*

‘In a shrinking world, we are all our brother’s keepers. In the criminal arena this is underlined by the international

³⁰

A reference to Marshall McLuhan who coined this notion in *“The Gutenberg Galaxy: The Making of Typographic Man”* (1962) and *“Understanding Media”* (1964).

cooperative schemes that have been developed among national law enforcement bodies.”

5.23 In Kindler v. Canada (Minister of Justice),³¹ McLachlin J. stated:³²

“While the extradition process is an important part of our system of criminal justice, it would be wrong to equate it to the criminal trial process. It differs from the criminal process and procedure and, most importantly, in the factors which render it fair. Extradition procedure unlike the criminal procedure, is founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions.”

5.24 In Minister of Justice v. Burns,³³ the Supreme Court of Canada noted that extradition is based on the principles of comity and fairness to other cooperating States in rendering mutual assistance in bringing fugitives to justice. The Court held that extradition should take place unless its effect is to “*shock the conscience*” of Canadians.³⁴

5.25 In Ferras v. United States of America,³⁵ the Supreme Court of Canada upheld the legality of returning alleged offenders to the United States where they faced the possibility of being sentenced to life imprisonment without parole. The Court stated:

“As in Burns... several factors favour surrendering the appellants to the United States: bringing the appellants to trial to determine the truth of the charges; the principle that justice is best served by a trial in the jurisdiction where the crime occurred; the principle that Canadians most generally accept the laws and procedures of the countries they visit; and comity, reciprocity and respect for differences among

³¹ (1991) 84 D.L.R. (4th) 438.

³² At page 488.

³³ [2001] 1 RCS 283.

³⁴ This expression is not to be equated with popular opinion evidenced by surveys or polls. The words are intended to underline the very exceptional nature of circumstances that would limit the Minister’s decision to order extradition.

³⁵ [2006] 2 RCS 77.

states. The factors militating against surrender include: the harsher sentences that the appellants might receive if convicted in the United States; and the possibility that evidence used in the United States might include wiretap evidence that would not be admissible in Canada.”

The Court concluded that the surrender to an extradition partner whose criminal justice system does not have all the procedural safeguards of the Canadian criminal justice system would not in itself violate the principles of fundamental justice and found that the factors favouring surrender far outweighed those that did not.

The Interests of Victims

- 5.26 When considering our recommendations, we have also had regard to the interests of victims of crime. The interests of victims now have greater prominence in the United Kingdom criminal justice system. In *Attorney General’s Reference No. 3 of 1999*³⁶ Lord Steyn said:

“The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interest, it involves taking into account the position of the accused, the victim and his or her family and the public.”

- 5.27 The interests of victims of crimes are expressly recognised within the European Union by two legislative measures: the Council Framework Decision 2001/220/JHA³⁷ on the standing of victims in criminal proceedings and the

³⁶ [2001] 2 AC 91.

³⁷ [2001] OJ L82/1. Member States are exhorted to approximate their laws to the extent necessary to attain the objective of affording victims a high level of protection.

Compensation for Crime Victims Directive 2004/80/EC.³⁸ The Framework Decision is part of a programme intended to enhance the protections afforded to crime victims irrespective of the Member State in which they are present. The Compensation Directive requires each Member State to have in place a national scheme that guarantees fair and appropriate compensation to victims of crime.

- 5.28 More recently, a proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime has been published by the European Commission. The United Kingdom has indicated its intention to opt-in to this Directive.³⁹

The Human Rights Threshold

- 5.29 As noted above, section 21 of the 2003 Act provides that if the extradition judge decides that the defendant's extradition would be incompatible with the Convention rights within the meaning of the Human Rights Act 1998 he must order the defendant's discharge.⁴⁰ There are two points to make at the outset of our consideration of section 21. First, the inclusion of the section is premised on a recognition of the fact that serious breaches of human rights may be possible even by Member States of the European Union.⁴¹ Secondly, the section does not provide any guide as to the circumstances in which extradition would be incompatible with the Convention rights; this is to be decided by the independent and impartial judiciary.
- 5.30 The operation of the European arrest warrant and section 21 of the 2003 Act have been the subject of criticisms arising from concerns over perceived inadequate human rights protection. The criticisms fall under two main headings. First, mutual trust

³⁸ [2004] OJ L261/15. The Directive also requires Member States to cooperate so as to ensure that victims of violent crime receive compensation wherever the crime occurred. Victims are permitted to make claims in their home state but the compensation is to be paid by the Member State in which the crime occurred. The Directive was implemented into United Kingdom law by the Victims of Violent Intentional Crime (Arrangements for Compensation) (European Communities) Regulations 2005 SI 2005/3396.

³⁹ 2011/0129 (COD) Brussels 18 May 2011.

⁴⁰ We have summarised the operation of the 2003 Act at paragraphs 2.7-2.14. A more detailed summary appears in Appendix C where we explain the operation of the human rights bar and summarise the important case-law.

⁴¹ This is also apparent from the many decisions of the European Court of Human Rights: Members States (including the United Kingdom) are frequently found to have violated Convention Rights.

among Member States can only properly exist if a common standard of human rights protection is available throughout the European Union, and this is not the case.⁴² Secondly, the act of surrender itself is capable of violating the requested person's rights under the Convention and the threshold of engaging human rights protection is set at too high a level.⁴³

- 5.31 Fair Trials International have submitted that although the 2003 Act contains a human rights bar to extradition, the courts in the United Kingdom are not, in practice, willing to exercise it for fear that, if they were to do so, the concept of extradition based on mutual recognition would fail. They propose an amendment to section 21 of the 2003 Act which would clarify the factors that the judge at the extradition hearing should consider in relation to human rights. The effect of the amendment would be to strengthen section 21 as a ground for refusing to execute a European arrest warrant. The amendment proposed would involve adding two new sub-sections ((6) and (7)) to section 21:

“(6) *The person's extradition would not be compatible with the Convention rights if*

a. there is a real risk that the person, if surrendered, would be subject to treatment in the category 1 territory, that if taking place in the United Kingdom, would be an act or omission made unlawful by section 6 of the [Human Rights Act 1998];⁴⁴

⁴² Each of the Member States is, of course, a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and individuals within those States have a right to petition the European Court of Human Rights.

⁴³ There is no complaint that extradition proceedings are themselves conducted unfairly. The concern is with potential prospective human rights violations in the category 1 (or category 2) territory.

⁴⁴ Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a manner incompatible with a Convention right. This is subject to section 6(2) which provides an exception if: (a) as a result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read and given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

b. in relation to the matters giving rise to the Part 1 warrant, the person has been subject to such treatment in that territory; or

c. the person's removal would be incompatible with the Convention rights;

(7) The judge shall not treat the matter set out in subsection 6(a) or (b) as established unless there is material before him on which a court might reasonably so conclude; but if there is such material before him, he shall treat that matter as established unless satisfied to the contrary.”

5.32 It is apparent that subsection 6(a) involves a transposition exercise: it requires the hypothetical substitution of the United Kingdom for the category 1 territory: the bar would operate on the basis that prospective treatment in that category 1 territory would prevent extradition, where the same treatment, if carried out in the United Kingdom, is unlawful by reason of section 6 of the Human Rights Act 1998. Subsection 6(b) operates in the same way, but whereas subsection 6(a) looks to the future, this subsection looks to the past.

5.33 By way of contrast, Justice suggested that section 21 should be amended to require a judge to decide whether the European arrest warrant request is compatible not only with the Human Rights Convention but also with the Charter of Fundamental Rights.

5.34 Liberty did not propose any amendment to section 21 and instead argued that a generalised bar on human rights grounds is not an adequate substitute for other procedural and legislative protections (such as the reintroduction of a *prima facie* evidence requirement).⁴⁵

⁴⁵ By way of contrast to these representations, the Law Society's submission to the Review was that the courts have the necessary powers under section 21 to prevent injustice. On this basis the Law Society do not believe that the courts' powers need to be strengthened. As a residual safeguard it was suggested that open and transparent ministerial representations could be made to the requesting State to withdraw a request in appropriate circumstances.

- 5.35 Before addressing these points it may be helpful to summarise the approach of the European Court of Human Rights and the domestic courts to human rights protections in the extradition context.

The Context

- 5.36 Extradition is barred under section 21:⁴⁶
- (i) Under Article 2 (the right to life), if the loss of life is shown to be a near certainty (or a real risk);
 - (ii) Under Article 3 (prohibition against torture, inhuman or degrading treatment), if there are strong grounds for believing that the person if returned faces a real risk of being subjected to torture or to inhuman or degrading treatment;
 - (iii) Under Article 5 (right to liberty), if the person risks suffering a flagrant denial of his right to liberty;
 - (iv) Under Article 6 (right to a fair trial), if the person risks suffering a flagrant denial of his right to a fair trial;
 - (v) Under Article 8 (right to respect for family life), where the consequences of the interference with the rights guaranteed are exceptionally serious so as to outweigh the importance of extradition.
- 5.37 These thresholds have been established by the European Court of Human Rights (and the European Commission on Human Rights before it was abolished on 1st November 1999)⁴⁷ and by the domestic courts after taking into account the Strasbourg case

⁴⁶ The same applies under Part 2 of the 2003 Act (Section 87). We have explained the operation of the human rights bar in our summary of the 2003 Act set out in Appendix C.

⁴⁷ By protocol 11 to the European Convention on Human Rights. Before 1 November 1999 three Council of Europe bodies had decision-making powers in respect of alleged violations of Convention rights. The European Commission, the European Court of Human Rights and the Committee of Ministers. The Commission received applications from victims of alleged violations and decided on the admissibility of the complaint by reporting on the merits of the case.

law.⁴⁸ The thresholds take into account not only the interests of the individual but also the desirability of extradition; the Strasbourg Court itself noted in *Drozdz and Janousek v. France and Spain*,⁴⁹ if each of the contracting parties were to impose its own standards on third States or territories, this would “*thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the person concerned.*”

- 5.38 It is also significant that other common law jurisdictions apply their domestic constitutions and laws in an attenuated form in the context of extradition proceedings for much the same reason as the Strasbourg Court.⁵⁰
- 5.39 A particular issue which has arisen for consideration by the domestic courts in this context, is the extent to which our extradition partners should be assumed capable of protecting an individual against human rights violations. The leading case is the decision of the House of Lords in *Gomes v. Government of Trinidad and Tobago*.⁵¹ In that case it was held that since the extradition process is only available for returning suspects to friendly foreign States under treaty obligations founded on mutual trust and respect and, having regard to the strong public interest in giving effect to such obligations, the presumption should be that justice will be done in all category 2 territories despite the passage of time. In the case of those category 2 territories who are also members of the Council of Europe, it was said that fairness is to be more readily assumed. The reasoning of the House of Lords applies with even greater force in the case of category 1 territories who are Member States of the Council of Europe and the European Union.
- 5.40 Of course, the assumption of fairness is only a starting point and the extent to which it can be displaced in the case of category 1 territories has been considered by the High

⁴⁸ Section 2 of the Human Rights Act 1998 provides that the domestic courts and tribunals must take into account any relevant decision of the Commission and the Court when interpreting a Convention Right. Lord Bingham of Cornhill in *Ullah* [2004] 2 A.C. 323 summarised the effect of the Strasbourg case law in this area and stated (at paragraph 20): “*The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.*”. In *R (Al Skeini) v Secretary of State for Defence* [2008] AC 153 Lord Brown of Eaton-under-Heywood suggested (at paragraph 106) that Lord Bingham’s last sentence could well have ended: “*no less, but certainly no more*”.

⁴⁹ (1992) 14 EHRR 745, paragraph 110.

⁵⁰ For example, the United States of America, Canada, Australia and New Zealand.

⁵¹ [2009] 1 WLR 1038, a case concerned with Part 2 of the 2003 Act and in particular the passage of time bar in section 82.

Court in two cases decided in 2010: R (Jan Rot) v. District Court of Lublin, Poland⁵² and R (Arvdas Klimas) v. Prosecutor's General Office of Lithuania.⁵³

- 5.41 In Jan Rot, the appellant fled to the United Kingdom after being convicted of people trafficking in Poland. He was arrested on a European arrest warrant and appeared before City of Westminster Magistrates' Court. He sought to contest extradition on human rights grounds and also on the basis that by reason of his mental condition it would be oppressive to extradite him under section 25 of the 2003 Act. Before the extradition judge Mr. Rot claimed that while in prison in Poland he had been ill-treated and had attempted to commit suicide. The District Judge heard evidence on these points. He concluded that Mr. Rot's claim of mistreatment in prison was untrue and that his evidence was "*a not very elaborate story invented to defeat the extradition request.*" Accordingly, an extradition order was made under section 21 of the 2003 Act. On appeal to the High Court, it was submitted that the District Judge's findings of fact were "*clearly wrong*". This was rejected by Mitting J. who, having reviewed all the material before the lower court, stated: "*I find it difficult to conceive how [the District Judge] could have arrived at a different conclusion once he had formed the view, as he did about the poor manner in which Mr. Rot gave evidence before him.*"⁵⁴ Later, having found that the District Judge was correct to reject the human rights arguments, Mitting J. stated (*obiter*).⁵⁵

"I would hold that, save in circumstances in which the constitutional order of a Convention State was overthrown, by for example military coup or violent revolution, a District Judge considering the risk to an extradited person in the hands of such a State is not required to undertake an examination of conditions in its prison estate of the management of psychiatric illness in that State. I find it difficult to conceive that evidence about such matters would be relevant and so admissible in extradition proceedings for the purpose of determining whether an individual should be discharged under section 21."

⁵² [2010] EWHC 1820 (Admin).

⁵³ [2010] EWHC 2076 (Admin).

⁵⁴ Paragraph 7.

⁵⁵ Paragraph 12. This paragraph was not a necessary part of the judgment and therefore not binding as a precedent.

In support of these observations Mitting J. relied on a decision of the Strasbourg Court, *KRS v. United Kingdom*,⁵⁶ an immigration removal case, in which the Court stated: “*In the absence of any proof to the contrary it must be presumed that Greece will comply with [obligations under Article 3 of the Convention].*”

5.42 In *Klimas*,⁵⁷ the requested person resisted his surrender to Lithuania on the basis that prison conditions there were such that if he were to be detained his rights under Article 3 would be breached, even though Lithuania is a signatory to the Convention. The only evidence put before the High Court in an attempt to prevent surrender was a United States of America State Department report to the effect that prison conditions in Lithuania are in some instances below international standards. Mitting J. found that this fell “*far short of the threshold which is required to be crossed before the United Kingdom would be in breach of its obligations under Article 3*” by surrendering the appellant to Lithuania.⁵⁸

5.43 In the course of his judgment, Mitting J. stated,⁵⁹ as he had in *Jan Rot*, that when “*prison conditions in a Convention category 1 state are raised as an obstacle to extradition, the district judge need not, save in wholly extraordinary circumstances in which the Constitutional order of the requesting state has been upset – for example by a military coup or violent revolution – examine the question at all.*” He went on to say: “*If that proposition goes too far, then it would be necessary to look at the facts in this case to which I now turn.*”

5.44 The decisions in *Jan Rot* and *Klimas* were considered by the High Court (Toulson L.J.) in *Targosinski v. Judicial Authority of Poland*.⁶⁰ Targosinski had been convicted in Poland of robbery, assault, possession of drugs and attempted burglary. He resisted his surrender as a convicted person on the basis that it would infringe his rights under Article 3 of the Convention. He relied on a number of complaints concerning prison conditions in Poland. In dismissing the appeal Toulson L.J. found that there was no cogent or satisfactory evidence to demonstrate that the appellant’s extradition would involve a contravention of his rights.

⁵⁶ Application No. 32733/08, 2 December 2008.

⁵⁷ [2010] EWHC 2076 (Admin).

⁵⁸ Paragraph 18.

⁵⁹ Paragraph 13. This also appears to have been an *obiter dictum* as the case was one in which there was simply no evidential basis for the Article 3 complaint.

⁶⁰ [2011] EWHC 312 (Admin), 2 February 2011.

- 5.45 In the course of his judgment, Toulson L.J. considered the decision of Mitting J. in Jan Rot and went on to say:⁶¹ “*I respectfully consider that he put the matter too high.*”
- 5.46 On the basis of these and other authorities, the current position may be summarised as follows:
- (i) In the absence of any proof to the contrary it must be assumed that a category 1 territory will comply with its obligations under the Convention.
 - (ii) A defendant is entitled to adduce evidence to displace the assumption.
 - (iii) This evidence may include reports prepared by respected organisations or bodies concerning the risk of human rights violations occurring in the category 1 territory.⁶²
 - (iv) It will require clear and cogent evidence to establish that in a particular case the defendant’s extradition involves a contravention of his rights.⁶³

⁶¹ Paragraph 8.

⁶² The Joint Committee on Human Rights was suggested that the human rights bar would be more effective if material such as the Committee on the Prevention of Torture was regarded as relevant evidence. We would suggest that it is now clear that this is the case.

⁶³ This approach is not novel, nor is it the result of any provision in the 2003 Act. Extradition has always been conducted on the assumption that the requesting Territory will provide justice to the requested person. The Report of the Royal Commission on Extradition 1878 noted:

“Extradition is based on mutual confidence in the administration of justice by the courts of both nations. It proceeds on the assumption that impartial justice will be done to the party surrendered. We should be unwilling to surrender even a foreigner on any other assumption. It would be an affront to any nation to assume that when a foreigner is charged with an offence against its laws its tribunals would not do justice to such foreigner as equally and impartially as would be done in the case of one of its own subjects. We know that in our own courts a foreigner charged with an offence receives the same measure of justice as a natural-born subject. When the surrender of one of our subjects is asked for, we are not entitled to assume that he will not be dealt with fairly when surrendered. The alternative being, as should not be forgotten, that a criminal may otherwise escape with impunity, we must assume in all confidence that one of our subjects will find the same impartiality at the hands of a foreign tribunal as a foreigner would find in one of ours, and must act on that assumption in the belief that our expectation will be not disappointed.”

- 5.47 There have been instances in which surrender to a category 1 territory has been barred on human rights grounds but only in a limited number of cases. This is not surprising having regard to the climate of mutual confidence among the like-minded Member States of the European Union, and given their democratic institutions and their expressed commitment to uphold the rights and freedoms contained in the European Convention on Human Rights.⁶⁴ It is also possible for Member States in individual cases to provide assurances to deal with concerns, for example, in respect of prison conditions which would allow the court to be content that surrender would not involve a violation of a Convention Right.

Our Views on the Threshold

- 5.48 We are of the view that the human rights bar to extradition does not require amendment and that it provides appropriate protection against prospective human rights violations in the issuing Member State. We are satisfied that section 21, in part 1, coupled with the other safeguards contained in the 2003 Act, provides a fair and transparent mechanism for contesting requests for surrender and we do not believe that it operates so as to cause or permit manifest injustice or oppression.
- 5.49 In order to explain our conclusion it is first necessary to consider section 21 of the 2003 Act in its context.
- 5.50 As noted above, the 2003 Act provides a step by step procedure to be followed by the extradition judge.⁶⁵ At the initial stage of the extradition hearing the extradition judge is required to determine whether the offence is an extradition offence within the meaning of sections 63 and 64. If the judge is so satisfied, he must proceed under section 11 of the Act and consider the bars to extradition. If the judge finds that any one of the bars applies, he must discharge the person. If not, then he must proceed under section 20 (in conviction cases) and section 21 (in both conviction and

⁶⁴ The view of the European Commission is that surrender between European Union Member States is only likely to be barred on human rights grounds in exceptional cases: we see force in this view but it will depend on the facts of the particular case.

⁶⁵ The Joint Committee on Human Rights suggested that judges in extradition cases should take an active role to ensure human rights protection. We would suggest that on analysis the 2003 Act obliges them to do this as they must consider the bars to extradition if raised by a requested person and the person's Convention rights.

accusation cases). The requested person will also be discharged if the judge concludes that the request for surrender amounts to an abuse of the process of the court. Moreover, under section 25, if at any time during the course of the proceedings the judge is of the view that the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him then he must order his discharge or adjourn the hearing until it appears to him that the person has recovered and it would no longer be unjust or oppressive to extradite him.

- 5.51 The significant point is that section 21 is one of several bars to extradition. It operates only once it has been decided that the person is wanted in respect of an extradition offence and, for example, that the extradition request does not amount to an abuse of the court's process, that extradition would not otherwise be unjust or oppressive because of the passage of time or on grounds of physical or mental health and that extradition is not barred by reason of any extraneous considerations (that the requested person will not be detained, prosecuted, punished, prejudiced or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation, or political opinion).
- 5.52 The domestic law threshold at which surrender is barred on human rights grounds is entirely consistent with the threshold set by the Strasbourg Court, the case law of which reflects the significant public interest in giving effect to extradition arrangements.⁶⁶
- 5.53 We are also of the view that as a starting point it is not inappropriate to begin with an assumption that surrender to another Member State of the European Union will not involve a violation of human rights. This was the approach adopted in relation to Council of Europe countries by the House of Lords in *Gomes v. Government of Trinidad and Tobago*⁶⁷ and also reflects the approach adopted by the Strasbourg Court in the expulsion case of *KRS v. United Kingdom*.⁶⁸ There are other instances in which the status of a Contracting State has been given weight by the Strasbourg Court. For example, in *Tomic v. United Kingdom*⁶⁹ the Court rejected a complaint

⁶⁶ In applying the Strasbourg Court's case law the domestic courts are following the obligation in section 2 of the Human Rights Act 1998. The Strasbourg case-law is summarised at Appendix C.56-C.90.

⁶⁷ [2009] 1 WLR 1038.

⁶⁸ Application No. 32733/08, 2 December 2008

⁶⁹ Application No. 17837/03, 14 October 2003

that the applicant's proposed expulsion to Croatia would involve a violation of his rights under Articles 3, 5, 6 and 8 of the Convention. In rejecting the complaint under Article 6 the Court stated: "*Nor can it be regarded as insignificant in the circumstances of this case that Croatia is a Contracting State which has accepted obligations to provide procedural guarantees and effective remedies in respect of breaches of the European Convention on Human Rights.*"

5.54 We should emphasise that the starting point assumption is simply that: it is not and should not be irrefutable; the Courts entertain arguments and evidence on the existence of past and the risk of future human rights violations. The existence of domestic law protections and accession to international treaties guaranteeing respect for fundamental rights are not treated as conclusive in themselves to ensure adequate protection against the risk of ill-treatment. This is also consistent with the approach of the Strasbourg Court.⁷⁰

5.55 We should also point out that the human rights bar operated in the same way under the Extradition Act 1989.⁷¹ In *R v Secretary of State for the Home Department, Ex parte Rachid Ramda* [2002] EWHC 1278 (Admin) the High Court stated (at paragraph 10):

"It is not however to be readily assumed or inferred that another state, particularly a fellow member of the Council of Europe represented on the European Court of Human Rights, will deny an accused person a fair trial. In the case of an extant conviction it is necessary to establish that it was the result of a flagrant denial of justice...In the case of anticipated proceedings it seems that what has to be established is a real risk of a flagrant denial of justice..."

5.56 Having set out our views in relation to the operation of section 21 of the 2003 Act it is now necessary to consider the amendments to section 21, proposed by Fair Trials International and Justice and explain why we do not accept the proposals.

⁷⁰ *M.S.S. v Belgium and Greece* [2011] ECHR 108.

⁷¹ In the period between 2 October 2000 when the central provisions of the Human Rights Act 1998 came into effect and 1 January 2004 when the 2003 Act came into effect.

Proposed Amendment to Section 21: Fair Trials International

5.57 As we have explained, Fair Trials International suggest an amendment to section 21 of the 2003 Act, with the result that the extradition judge would be required to consider whether, in the event of surrender, there is a real risk that a requested person would be subject to treatment that if taking place in the United Kingdom would be an act or omission made unlawful by section 6 of the Human Rights Act 1998 (or the person has been subject to such treatment in the requesting territory). As we have explained, Section 6 of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way which is incompatible with a Convention right.

5.58 Quite apart from our clear view that section 21 of the 2003 Act does not require amendment,⁷² we see two principal difficulties with this proposal. First, although section 6(1) provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right, section 6(2) provides that section 6(1) does not apply to an act if: (a) as the result of one or more provisions of primary legislation, the public authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the public authority was acting so as to give effect to, or enforce those provisions. The purpose of section 6(2) is to prevent section 6(1) being used to undermine one of the Human Rights Act's basic principles, namely, that in the final analysis if primary legislation cannot be interpreted in a way that is compatible with them, Parliamentary sovereignty takes precedence over the Convention rights. It is difficult to envisage how the amendment proposed by Fair Trials International would work in practice: it would presumably require consideration of the requesting territory's domestic law in order to determine whether, if the act or omission took place in the United Kingdom, it would fall within section 6(2). Also, it is not clear how a provision designed to preserve the sovereignty of the United Kingdom Parliament could operate in relation to legislation enacted by an overseas legislature.

5.59 Secondly, the proposed amendment requires the extradition judge to engage in a hypothetical exercise which involves the transposition of the act or omission to the

⁷² On the basis that it is one of several protections available to the arrested person and there is no basis for concluding that it is operating so as to cause or permit manifest injustice or oppression.

United Kingdom. But, such a transposition exercise necessarily involves transplanting into the United Kingdom every relevant circumstance connected with the requesting territory. These circumstances would (presumably) include the local institutions, the laws effecting the legal powers and rights, and the legal character of the acts or omissions of the public authority in the requesting territory. Any other approach would be artificial: a trial in another Member State may not conform to the requirements imposed by the criminal procedures applicable in England and Wales but nevertheless conform to laws in the issuing Member State which satisfy the requirements of Article 6 of the Convention. It would therefore be necessary to investigate the law of the overseas territory in order to evaluate the significance of the particular act or omission in its appropriate legal context. In *United States of America v. McVey*,⁷³ La Forest J. sitting in the Supreme Court of Canada stated that to require evidence of foreign law beyond the documents ordinarily supplied with an extradition request “*could cripple the operation*” of extradition proceedings. He went on to state:⁷⁴

“... to engage in abstruse debates about legal issues arising in a legal system with which the judge is unfamiliar is a certain recipe for delay and confusion to no useful purpose, particularly if one contemplates the joys of translation and the entirely different structure of foreign systems of law.”

- 5.60 These observations are apposite when considering the proposed amendments. For the reasons set out above we believe that the effect of the proposed amendments (or any amendment in similar terms) would inject uncertainty and delay into the extradition process. We can see no good reason for adopting an approach that would cause great practical difficulties and which is contrary to the principle established by the Strasbourg Court in *Drozdz and Janousek v. France and Spain*, *supra*⁷⁵.

⁷³ [1992] 3 SCR 475.

⁷⁴ At page 528.

⁷⁵ That the extraditing territory is not obliged to verify whether the proceedings in the requesting territory are compatible with all the requirements of the Convention.

- 5.61 We should also note that the representations made to the Review by Fair Trials International were prepared before the decision of the High Court in *Targosinski v Poland*.⁷⁶

Proposed Amendment to Section 21: Justice

- 5.62 Justice suggest that section 21 of the 2003 Act should be amended to require a judge to decide whether the European arrest warrant request is compatible not only with the Convention but also with the Charter of Fundamental Rights.⁷⁷
- 5.63 We have already explained why, in our clear view, it is not necessary to amend section 21, but we should also make clear why we do not accept this proposal.
- 5.64 The background to the Charter of Fundamental Rights is set out above.⁷⁸ At this point it is necessary to explain the structure and content of the Charter. This will help to place our analysis in context.
- 5.65 The Charter contains 54 Articles which appear under seven Titles: Title 1 (Articles 1-5) is concerned with ‘*Dignity*’;⁷⁹ Title II (Articles 6-19) is concerned with ‘*Freedoms*’;⁸⁰ Title III (Articles 20-26) is concerned with ‘*Equality*’;⁸¹ Title IV

⁷⁶ [2011] EWHC 312 (Admin).

⁷⁷ This suggestion was also made by the European Criminal Bar Association.

⁷⁸ See paragraphs 4.60-4.68.

⁷⁹ Article 1, respect for human dignity; Article 2, right to life; Article 3, right to the integrity of the person; Article 4, prohibition of torture and inhuman or degrading treatment or punishment; Article 5, prohibition of slavery.

⁸⁰ Article 6, right to liberty and security; Article 7, respect for private and family life; Article 8, protection of personal data; Article 9, right to marry and found a family; Article 10, freedom of thought, conscience and religion; Article 11, freedom of expression; Article 12, freedom of assembly/association; Article 13, academic freedom; Article 14, right to education; Article 15, freedom of occupation and right to seek work in any European Union State; Article 16, freedom to conduct a business; Article 17, right to property; Article 18, right to asylum; Article 19, protection against collective expulsions or individual removal, expulsion or extradition where there is a serious risk of the individual being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

⁸¹ Article 20, equality before the law; Article 21, prohibition against discrimination; Article 22, respect for cultural, religious and linguistic diversity; Article 23, employment equality between men and women; Article 24, rights of the child to protection and care; Article 25, right of the elderly to live life of dignity and independence; Article 26, right of persons with disabilities.

(Articles 27-38) is concerned with ‘Solidarity’;⁸² Title V (Articles 39-46) is concerned with citizens’ rights;⁸³ Title VI (Articles 47-50) is concerned with ‘Justice’;⁸⁴ Title VII (Articles 51-54) contains general provisions governing the interpretation and application of the Charter.⁸⁵

- 5.66 The Preamble to the Charter contains a number of recitals which explain its purpose. Included in the Preamble are the following:

“The Peoples of Europe in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public

⁸² Article 27, workers’ right to information and consultation; Article 28, workers’ and employers’ right of collective bargaining; Article 29, workers’ right of access to placement services; Article 30, workers’ right to protection in the event of unjustified dismissal; Article 31, right to fair and just working conditions; Article 32, prohibition of child labour; Article 33, right to social security and assistance; Article 34, Social security and social assistance; Article 35, right of access to preventive health care; Article 36, right of access to services of general economic interest; Article 37, right to a high level of environmental protection; Article 38, right to a high level of consumer protection.

⁸³ Article 39, right to vote (European elections); Article 40, right to vote (municipal elections); Article 41, right to impartial treatment in the European Union; Article 42, right of access to European Union documentation; Article 43, right of access to European Ombudsmen; Article 44, right to petition European Union Parliament; Article 45, right to freedom of movement; Article 46, right to diplomatic and consular protection.

⁸⁴ Article 47, right to an effective remedy and a fair trial; Article 48, presumption of innocence and right of defence; Article 49, principles of legality and proportionality of criminal offences and penalties; Article 50, right not to be tried or punished twice in criminal proceedings for the same criminal offence.

⁸⁵ Article 51, the field of application; Article 52, scope and interpretation; Article 53, level of protection; Article 54, prohibition of abuse of rights.

authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological development by making those rights more visible.

The Charter reaffirms with due regard for the powers and tasks of the Union and for the principle of subsidiarity,⁸⁶ the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights ...

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and other generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

5.67 Article 1 of the Charter provides:

“Human dignity is inviolable. It must be respected and protected.”

5.68 For the purposes of our Review, it is necessary to take note of three points. First, the Preamble refers to the creation of an area of freedom, justice and security; the significance of this point is that the European arrest warrant is viewed by the

⁸⁶ Subsidiarity is the principle of European Union law that action should be taken at domestic level within Member States unless action at Union level is justified.

European Court of Justice as an essential part of the single judicial space. Secondly, the Preamble makes it clear that the purpose of the Charter is to make the rights contained within it more visible. Thirdly, Article 19 makes express reference to extradition (although not surrender). Article 19(1) prohibits collective expulsions, while Article 19(2) provides:

“No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”

- 5.69 It is also relevant to note the general provisions governing the interpretation and application of the Charter (Title VII) Article 51(1) provides:

“The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard to the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.”

- 5.70 Justice contend that, by requiring extradition judges to have regard to the Charter, when deciding whether or not to order extradition, an additional bar to surrender, based on human dignity, would be incorporated into the 2003 Act. The steps in the argument appear to us to be as follows. First, Article 1 of the Charter provides that human dignity must be respected and protected. Secondly, the Charter’s field of application extends to Member States when they are implementing Union law. Thirdly, the Framework Decision is an instrument implementing Union law. Accordingly, surrender must be compatible with the respect and protection afforded to human dignity; where it is not, surrender cannot take place.

Our Analysis

- 5.71 The starting point in our analysis is that as a matter of domestic law the precise meaning and effect of the Charter is unclear. It appears from the Preamble that the purpose of the Charter was not to create a new and distinct body of rights: it was intended to make the fundamental rights already protected within the European Union ‘*more visible*’. If this view is correct, the Charter does not alter the nature of the obligations already imposed on Member States under European Union law. This certainly appears to have been the view of the Government of the United Kingdom and Poland when they adopted Protocol No. 30.
- 5.72 So far as Article 1 of the Charter is concerned, the Explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter identifies the source of Article 1 as preamble to the 1948 Universal Declaration of Human Rights; “*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.*” The Explanations also refer to the decision of the Court of Justice in *Netherlands v. European Parliament and Council*⁸⁷ where it was held that a fundamental right to human dignity is a part of European Union law. On this analysis it is arguable that Article 1 of the Charter merely confirms the pre-existing domestic law position and adds nothing to the content of the rights already available in the European Union (or for that matter in domestic law).
- 5.73 Even if this analysis is incorrect, it appears to us to be significant that the Charter itself expressly caters for extradition⁸⁸ and incorporates the test found in the relevant case law from the European Court of Human Rights regarding Article 3 of the Human Rights Convention. This suggests that the Charter was intended to operate, so far as extradition is concerned, consistently with the operation of the Convention. This point is reinforced by Article 52(3): “*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention... the meaning and scope of those rights shall be the same as those laid down by the said Convention.*” Although it is right to note that the final sentence of Article 52(3) provides: “*This provision shall not prevent Union law providing more extensive protection.*”

⁸⁷ Case C-377/98 [2001] ECR I-7079
⁸⁸ Article 19.

5.74 It appears to us inconceivable that Article 1 of the Charter would be interpreted at domestic level or before the European Court of Justice, so as to require an investigation in each case of whether surrender to another Member State was compatible with the requested person's dignity. We have reached this conclusion for a number of reasons:

- (i) The Framework Decision operates on the basis of the mutual recognition principle. An inquiry into the legality of surrender based on the provisions of Article 1 of the Charter would be contrary to this principle and undermine the operation of the Framework Decision. It would involve the investigation of potentially wide-ranging and complex allegations concerning the laws and institutions of the requesting territory and deprive the European arrest warrant of its efficacy.
- (ii) To deprive the European arrest warrant of its efficiency would undermine the European Union's attempts to create an area of freedom, justice and security and express reference is made to the area of freedom, justice and security by the Charter itself.
- (iii) Each of the Member States of the European Union is a signatory to the Human Rights Convention and is duty bound to comply with its terms and Member States are entitled to proceed on that assumption (as a starting point) that other Member States will in fact comply with its terms.
- (iv) Each of the Member States of the European Union is bound by European Union law which includes the Charter and Member States are entitled to proceed on the assumption that other Member States will comply with the Charter when this is required.
- (v) The European arrest warrant operates on the basis of mutual trust and the starting assumption is that Member States will respect fundamental rights and freedoms.
- (vi) To the extent that there is a credible issue concerning the likely treatment of the requested person in the requesting territory, this can properly be dealt

with under Article 3 of the Human Rights Convention as reflected in Article 19 of the Charter which is the *lex specialis*⁸⁹ or alternatively under Article 8 of the Human Rights Convention. Had the Charter been intended to operate so as to prevent surrender on the basis of some prospective violation of the requested person's dignity, Article 19 would not have been drafted as it is.

5.75 We consider that even if an extradition judge were required to take into account the terms of Article 1 of the Charter when deciding whether or not to order surrender, the Charter would not operate to prevent a surrender otherwise compatible with the Human Rights Convention.

5.76 We have also considered the possibility of introducing a '*dignity bar*' into Part 1 of the 2003 Act which would not depend upon the terms of the Charter: such a bar could be introduced through the ordinary legislative process. We have rejected this possibility for three principle reasons:

- (i) Such a bar would in our opinion be unworkable in practice. It would require the extradition judge to decide what '*dignity*' means in this context (in particular what it adds, if anything, to the Human Rights Convention) and how it would operate to prevent surrender.
- (ii) It would be contrary to the principle of mutual recognition and undermine the workings of the Framework Decision.
- (iii) It would undermine judicial cooperation and if applied by our extradition partners would be likely to make surrender to the United Kingdom more difficult to achieve.

5.77 Finally on this aspect, we are of the view that a '*dignity*' bar would in any event add nothing to the protection provided by Articles 3 and 8 of the Human Rights Convention, which have been interpreted to include notions of dignity and personal autonomy.⁹⁰ The submissions from Justice proceed on the assumption that the

⁸⁹ *Lex specialis derogat legi generali*, the principle of construction that a specialized rule or law takes precedence over a general rule of law.

⁹⁰ See for example, *Cyprus v Turkey* (Application no 25781/94, Judgment 10 May 2001), *Botta v Italy* (1998) 26 EHRR 241 and *Pretty v United Kingdom* (2002) 35 EHRR 1.

European Court of Justice is likely to interpret the Charter right to dignity in a way which provides additional protection to that currently available under Articles 3 and 8. We believe that any argument in relation to dignity would be covered by Articles 3 and 8 and the outcome in any particular case would be no different. Even if we are wrong, then we are sure that the courts will take heed of developing jurisprudence of the European Court of Justice which considers the meaning of “dignity” in this context.

Section 21 and Conditions of Detention

- 5.78 Another issue raised in the course of our Review concerned possible violations of the Human Rights Convention as a result of prison conditions in the issuing Member States.
- 5.79 Section 21 enables the domestic courts to investigate a claim that the execution of a warrant will expose an individual to ill-treatment by reason of the conditions in which he is likely to be detained. Arguments to this effect have been considered by the High Court on a number of occasions.⁹¹
- 5.80 The important point to note is that the High Court has emphasised that it is necessary to concentrate on the effect of surrender to the individual in question. Where the evidence or material satisfies the human rights bar threshold, surrender will not take place. In our experience, there is a tendency for requested persons to adduce material of a general nature in support of an assertion that to give effect to the European arrest warrant in their particular case will involve an infringement of the right not to be subjected to inhuman or degrading treatment, as guaranteed by Article 3 of the Human Rights Convention. The cases in which this point has been raised have failed on their facts and it appears that the difficulty lies not with the application of the

⁹¹ This is consistent with Recital 13 of the Preamble to the Framework Decision which provides that: “No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.” This reflects the text of Article 3 of the Convention. *Jaso, Lopez Hernandez v. Central Criminal Court No. 2 Madrid* [2007] EWHC 2983 (Admin); *Hilali v. Central Court of Criminal Proceedings Number 5 of the National Court of Madrid* [2006] EWHC 1239 (Admin); *Boudhiba v. Central Examining Court Number 5 of the National Court of Justice Madrid* [2006] EWHC 167 (Admin); *Miklis v. The Deputy Prosecutor General of Lithuania* [2006] EWHC 1032.

Article 3 threshold, but with the inability of defendants to demonstrate that they will in reality suffer a violation of their human rights.⁹²

- 5.81 When considering the operation of section 21 in this context, we also think it important to point out that setting up additional hurdles to surrender may have an adverse effect on the United Kingdom's ability to secure cooperation from other Member States in the future. This was a point made by the Supreme Court of Canada in *United States v. Burns*⁹³:

“A state seeking Canadian cooperation today may be asked to yield up a fugitive tomorrow. The extradition treaty is part of an international network of mutual assistance that enables states to deal both with crimes in their own jurisdiction and transnational crimes with elements that occur in more than one jurisdiction. Given the ease of movement of people and things from state to state, Canada needs the help of the international community to fight serious crime within our own borders.”

- 5.82 We do not seek in any way to minimise the fact that prison conditions in many Member States are poor (including in some instances the United Kingdom).⁹⁴ This is largely the result of a lack of investment and overcrowding in prison establishments. In June 2011, as part of the procedural rights project, the Commission published Green Paper on the action necessary for resolving problems of both pre and post-trial detention including sub-standard conditions of detention. The Green Paper does not make any recommendations for legislation or any other course of action. Instead, it seeks information from Member States about domestic practices and invites

⁹² Nor do we accept that this inability to establish prospective violations has anything to do with the difficulties of obtaining evidence from overseas territories. For example, in *Goodyear and Gomes* [2009] 1 W.L.R. 1038, legal aid was extended to permit an expert to travel from the United Kingdom to Trinidad and Tobago and provide a written report on prison conditions for the purposes of the Magistrates' Court and High Court proceedings. In each of the cases in which the 'prison conditions' point was taken before the High Court, the appellant relied on either an expert's report or country reports from reputable sources or both.

⁹³ [2001] 1 SCR 283 at page 328.

⁹⁴ In the recent case of *Orchowski v Poland*, Application 17885/04, 22 January 2010, the Strasbourg Court found a violation of Article 3 of the Convention in relation to overcrowded and insanitary prison conditions. In *Napier v Scottish Ministers* 2005 SC 299, the Court of Session decided that the practice of "slopping out", that is requiring a prisoner to use a chamber pot in his cell and empty it in the morning, may amount to an infringement of Article 3.

suggestions about what measures could be taken at Union level to assist concerns about pre and post trial detention. In this connection, the Council Framework Decision⁹⁵ on the application between Member States of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention should go some way to address the issue of lengthy pre-trial detention of non-resident aliens within the European Union.

- 5.83 Also of relevance in this area are the European Prison Rules 2006. These Rules are recommendations of the Committee of Ministers to Member States of the Council of Europe as to the minimum standards to be applied in prisons. Council of Europe states are encouraged to be guided in legislation and policies by these rules and to ensure their wide dissemination to judicial authorities, prison staff and inmates. The Rules, which apply to all those detained in custody (whether convicted or not) contain a number of basic principles (such as all persons deprived of their liberty shall be treated with respect for their human rights) and a number of provisions relating to conditions of detention (Rules 14 – 38). We consider that proper observance of these Rules will serve to enhance international cooperation in the operation of the European arrest warrant.
- 5.84 In summary, we support the moves to improve conditions of detention throughout the European Union and these moves will operate to improve confidence in the European arrest warrant.

Conclusions on Section 21

- 5.85 We agree with those submissions to the Review to the effect that the mere fact that other Member States are signatories to the Human Rights Convention is not itself a justification for ordering surrender: section 21 requires the judiciary to ensure that extradition is compatible with the rights contained in the Schedule to the Human Rights Act 1998. Similarly, we agree that the potential availability of a remedy for human rights violations in the issuing Member State does not absolve the courts of the United Kingdom from providing a remedy in appropriate circumstances.

⁹⁵ 2009/829/JHA, OJ L.294 11 November 2009, p.20.

- 5.86 Having recognised these points, we are of the clear view that section 21 does not require amendment and we do not believe that it operates so as to cause or permit manifest injustice or oppression. Moreover, there is no basis for concluding that the Courts in the United Kingdom will apply the Strasbourg Courts' jurisprudence incorrectly or in such a way as to create unfairness.
- 5.87 In connection with the operation of Part 1 of the 2003 Act, we also consider that effective operation of the European arrest warrant system is likely to bring in its wake improvements in the administration of justice in the single European area. This is a point sometimes overlooked by critics of the European arrest warrant scheme. The effectiveness of the scheme will make it easier to release individuals on bail irrespective of where they normally reside in the European Union. The arrest warrant should also contribute to more effective compliance with the reasonable time requirement contained in Article 6 of the Human Rights Convention.⁹⁶ We believe that the judicialisation of the surrender process is an improvement on the position as it was before the 2003 Act and the determination of human rights issues by the independent and impartial judiciary is clearly appropriate.
- 5.88 In conclusion, we are of the view that the domestic courts have interpreted section 21 in accordance with the principles developed by the Strasbourg Court. It is unsurprising that among Member States of the European Union, refusal of surrender on human rights grounds is rare: this is not the result of close adherence to the principle of mutual recognition; it is a reflection of how human rights apply in this context. It is of course the case that complaints against Member States of the European Union have been considered by the Strasbourg Court and the Court has found violations of the Convention, but this does not in itself provide a basis for refusing to surrender.⁹⁷ It is necessary to focus on the facts of the individual case and it must be shown that the act of surrender will involve a violation of the requested person's Convention rights.

⁹⁶ Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which in material part provides: "*In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time ...*"

⁹⁷ The United Kingdom frequently appears as a respondent to cases before the Strasbourg Court and it would be a cause of great public disquiet if this fact alone acted as an impediment to incoming extradition.

- 5.89 Finally, on this aspect of our Review we would wish merely to note that the operation of the human rights threshold is not the result of any provision contained in the 2003 Act. It has been the result of judicial decisions, reached after taking into account the case-law of the Strasbourg Court (as required by section 2 of the Human Rights Act 1998), and the position would have been no different had the 1989 Act remained in force.

Conviction Cases

- 5.90 One of the points made to the Review was that under Part 1 of the 2003 Act surrender cannot be refused where the person sought is a United Kingdom national or resident who could serve their sentence in the United Kingdom. It is said that this results in surrender to the issuing State followed by transfer back to the United Kingdom under the European Convention on the Transfer of Sentenced Prisoners (1983) and the Repatriation of Prisoners Act 1984.⁹⁸ The essential complaint is that the procedure is unfair, slow and bureaucratic.
- 5.91 We address this point in the following paragraphs. We first explain the context.

The Context

- 5.92 Article 4(6) of the Framework Decision provides an optional ground of non-surrender “*if the European arrest warrant has been issued for the purposes of execution of custodial sentence or detention order, where the requested person is staying in or is a national or resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law.*”
- 5.93 Article 4(6) has not been implemented into the law of the United Kingdom.
- 5.94 As things stand, surrender takes place in conviction cases and this is frequently followed by repatriation of prisoners to the United Kingdom, in accordance with the 1983 European Convention and the 1984 Act. These instruments will be

⁹⁸ See paragraphs 4.26-4.33

supplemented by the Council Framework Decision 2008/9090/JHA of 27 November 2008, which is designed to facilitate the transfer of prisoners to their home State. As Lord Bridge of Harwich made clear in R v Secretary of State for the Home Department, Ex parte Read,⁹⁹ it is obviously humane and desirable to enable persons sentenced for crimes committed abroad to serve out their sentences within their own society. This humane and desirable objective and the benefit it may have for rehabilitation of an offender is recognised by the European Union.

Our Analysis

- 5.95 We see a good deal of force in the point that where the requested convicted person is a national or a resident of or staying in the United Kingdom, the domestic courts should have the option to decline to give effect to a European arrest warrant on the basis that the sentence is more appropriately served in the United Kingdom. We note that the Joint Committee on Human Rights also take this view.¹⁰⁰ Introducing such a basis for refusing to surrender is not only humane, it would avoid the expense and inconvenience of resorting to the prisoner transfer process. We consider that it would bring considerable benefits in those cases where short custodial sentences have been imposed and where the requested person, in the event of surrender, would be required to serve only a short period of time in detention.
- 5.96 On this basis, we recommend that Part 1 of the 2003 Act be amended so as to allow the judge at the extradition hearing to refuse to surrender a convicted person if the person is a British resident or national or staying in the United Kingdom¹⁰¹, and the custodial sentence actually imposed is 12 months or less. We have chosen 12 months as the threshold for three principal reasons. First, it appears to us that this optional ground for surrender would operate most appropriately in cases where short sentences had been imposed and where release is likely to take place in the not too distant future. Secondly, in those cases in which the requested person is in custody in the

⁹⁹ [1989] AC 1014 at page 1048D.

¹⁰⁰ Paragraphs 180-181, “*The Human Rights Implications of UK Extradition Policy*”, HL Paper 156, HC 767, published on 22 June 2011.

¹⁰¹ The term ‘*staying in*’ has an autonomous meaning and has been interpreted by the European Court of Justice in Kozłowski Case C-66/08 as signifying a stable period of presence during which the person in question has acquired connections with the Member State which are to a similar degree to those resulting from residence. See also Recital 17 of Framework Decision 2008/9090/JHA which provides a definition for “lives”.

United Kingdom, time served on remand will count towards the period of time to be served in consequence of the sentence imposed in the issuing State;¹⁰² making it more likely that any remaining period of time to be served will be extremely short and to order surrender less efficient. Thirdly, we consider there is a less compelling case for the operation of this optional ground for surrender in cases with longer sentences which may be more serious and in these cases it will be for the sentencing state to decide whether it wishes to ask the United Kingdom to enforce the sentence according to the Framework Decision. On this aspect we are conscious of the need to avoid the possibility of arguments being raised in every conviction case involving requested persons who are British citizens or residents or staying in the United Kingdom. In more serious cases, the operation of the new Framework Decision on the mutual recognition of post-trial measures will address the complaint that the prisoner transfer process is both lengthy and bureaucratic. Once the Framework Decision has been implemented, there should be fewer European arrest warrants issued in conviction cases: Member States can apply for the transfer of sentences for persons who are nationals of or resident in another Member State without the consent of the sentenced person in certain circumstances.¹⁰³

5.97 Our recommendation, if accepted, would also ensure (in those cases falling within the recommendation), that in the event of a successful challenge to surrender under section 14 of the 2002 Act (passage of time) or under section 21 (human rights), the extradition judge would be in a position to order the foreign sentence to be served in the United Kingdom. As things currently stand, some convicted offenders may avoid serving their sentences by moving to the United Kingdom and taking advantage of these bars to surrender.¹⁰⁴

5.98 We envisage that the procedure we recommend would involve the following:

- (i) The extradition judge would have a discretion not to order the surrender where the requested convicted person is a British national or resident or staying in the United Kingdom and subject to a custodial sentence of not more than 12 months in the issuing Member State;

¹⁰² This is required by the Framework Decision (Article 26), but was already a part of the law of England and Wales in respect of incoming extradition.

¹⁰³ See Article 6(2) Framework Decision 2008/909/JHA.

¹⁰⁴ A point made to us by the Crown Office and Procurator Fiscal Service.

- (ii) Where the extradition judge declines to make an order for surrender he will be required to order the person to serve the sentence (or any remaining portion of the sentence) in the United Kingdom and issue a warrant authorising the person's detention in the United Kingdom;
- (iii) The sentence will become subject to the early release provisions which govern release from custodial sentences in the relevant part of the United Kingdom where the sentence is to be served.

5.99 We envisage that the discretion would most obviously fall to be exercised in those cases where the sentence in the issuing Member State had been virtually extinguished by any period spent in custody in connection with the extradition proceedings in the United Kingdom.

Further Information in Cases of Suspected Mistaken Identity

5.100 A point made to the Review was that the executing Member State cannot request further information from the issuing Member State where there is a suspicion that the person subject to the European arrest warrant is a victim of mistaken identity.¹⁰⁵

5.101 We address this point in the following paragraphs.¹⁰⁶ We first explain the context.

The Context

5.102 Under section 7 of the 2003 Act, the extradition judge is required to decide at the initial hearing whether the arrested person is the person in respect of whom the warrant has been issued.¹⁰⁷ The judge is required to decide this question on a balance

¹⁰⁵ In this context mistaken identity means that the person arrested is not the person named in the warrant or where the person named in the warrant has been the victim of identity theft. It is to be contrasted with the issue of identity in the trial proceedings (that is whether it was the accused who committed the offence), which is a matter for the trial process to determine.

¹⁰⁶ The Joint Committee on Human Rights was concerned to ensure that further information is requested in cases where identity is disputed (paragraph 115).

¹⁰⁷ We were told by the police and the extradition judges that in the vast majority of cases identity is not the issue. Arresting police officers usually establish identity at the time of the arrest (by

of probabilities. If the judge decides the question in the negative, he must order the person's discharge. If the judge decides the question in the affirmative, he must then proceed to fix the date on which the extradition hearing is to begin and remand the person in custody or on bail.

Our Analysis

- 5.103 We received conflicting information on this point. According to Fair Trials International there have been several cases where the person subject to a European arrest warrant has had their identity stolen by the real perpetrator or where that perpetrator has falsely identified someone else as the person who committed the offence: *"This means that extradition may be ordered even where there is clear evidence that the person sought could not have committed the crime for which they are wanted."* We were not informed of any case where surrender had actually taken place in these circumstances, although we are aware of one case in which surrender was due to take place, only for the European arrest warrant to be withdrawn. By way of contrast, the extradition judges were of the view that the issue of identity is considered with great care and that if any question arises as to whether the arrested person is the person in respect of whom the warrant was issued, inquiries are made of the issuing judicial authority.¹⁰⁸ The Metropolitan Police Service were not aware of any problems in relation to mistaken identity and informed us that if the point is raised by the arrested person, it is included in the statement of arrest which is placed before the extradition judge and provided to the arrested person's legal representatives. The Crown Prosecution Service confirmed that where issues of identity arise they seek further information from the issuing judicial authority and place that information before the extradition judge. We were not informed of any difficulties concerning identity in Scotland or Northern Ireland.

asking questions to elicit the suspect's name, date of birth etc). Any conversation with the arrested person is ordinarily admissible as evidence in the extradition proceedings. Where identity is in issue the police carry out further checks and, where possible, will conduct biometric testing.

¹⁰⁸ The procedure at the initial hearing is governed by section 7 of the Act. In *Jeziorski v. Poland* [2010] EWHC 2112 (Admin) the High Court held that there may be reasonable cause to postpone the initial hearing where the postponement is granted to permit the requested person to obtain legal aid and representation.

- 5.104 In our opinion, we see no need to amend the 2003 Act so as to enable the extradition judge to request further information concerning the requested person's identity. This is already happening in practice and this is consistent with Article 15(2) of the Framework Decision.¹⁰⁹ It follows that any amendment would add nothing to the procedures already in place. It is of course possible that even where further information is forthcoming, this will not deal with those cases where the person subject to the European arrest warrant has had their identity 'stolen' by the perpetrator of the offence or some other person. In such a case the proposed amendment would serve no useful purpose.¹¹⁰ In our opinion, in those cases where a credible case is made out the person appearing before the court is not the person named in the warrant, the remedy lies in subjecting the case to careful scrutiny: the extradition judges informed us that this is what they do, with the assistance of the issuing judicial authority and the Crown Prosecution Service.¹¹¹ We should also point out that this issue is likely to arise in only a limited number of cases: in our experience the vast majority of European arrest warrants correctly identify the person sought and are accompanied by details of the person's description with photographs, fingerprints and DNA profiles where these are available.
- 5.105 Finally on this point, we should point out that although the issue of identity is determined at the initial hearing (which may be adjourned where this is in the interests of justice), it can be raised again on appeal.¹¹² This means that there is ample time for the accused person to obtain the information necessary to advance his claim.¹¹³

¹⁰⁹ In our experience issuing judicial authorities are only too anxious to assist in establishing the identity of the requested person: it is not in the issuing state's interest to go through the trouble and expense of securing the surrender of a person who is of no concern of theirs.

¹¹⁰ The issuing judicial authority is unlikely to be in a position to resolve the issue and it may be capable of resolution only at trial.

¹¹¹ The Crown Prosecution Service, in its role as prosecutor on behalf of the issuing judicial authority has a duty to act fairly. *R (Raissi) v Home Secretary* [2008] EWCA Civ 72

¹¹² Although not at the extradition hearing. In *Stanczk v Circuit Court in Katowice* [2010] EWHC 3651 (Admin) the High Court held that the issue of identity could not be reopened at the extradition hearing.

¹¹³ We should also note at this point that the *prima facie* case requirement would not address the issue of mistaken or stolen identity. We deal with the issue of whether a *prima facie* case requirement is necessary or desirable in an extradition case in Part 8.

The Involvement of Non-Judicial Authorities

- 5.106 One of the points raised by Justice in its comprehensive submission to the Review is that in a number of Member States it is possible for a European arrest warrant to be issued by non-judicial authorities, most often by public prosecutors. The criticism arising from this point is that the European arrest warrant is designed to be subjected to judicial scrutiny in both the issuing and executing Member States and, because this is not happening in all instances, the justification of limited review of the request in the executing Member State (based on the principle of mutual recognition) is undermined.
- 5.107 Relying on recent decisions of the European Court of Human Rights in relation to the role of the prosecutor in the French criminal justice system¹¹⁴ it is suggested that the United Kingdom could amend the 2003 Act to ensure that warrants are only issued following an impartial and objective decision in the issuing category 1 territory.
- 5.108 We address this point in the following paragraphs.

Our Analysis

- 5.109 The starting point in our consideration of this criticism is Article 6 of the Framework Decision, which deals with the designation of ‘*competent judicial authorities*’. This Article makes it clear that it is for each individual Member State to designate the issuing authority “*competent to issue a European arrest warrant by virtue of the law of that State.*” The same applies to the executing judicial authorities by virtue of Article 6(2).
- 5.110 As a matter of domestic law, section 2 of the 2003 Act sets out the circumstances in which the procedures under Part 1 are initiated. As we have explained, section 2 applies if the designated authority (the Serious Organised Crime Agency) in England and Wales¹¹⁵ receives a warrant issued by a “*judicial authority*” of a category 1

¹¹⁴ *Moulin v. France* (App. 37104/06) and *Medvedyev v. France* (App. 3394/03).

¹¹⁵ The Serious Organised Crime Agency also acts as the designated authority in respect of European arrest warrants directed at individuals in Northern Ireland. The Crown Office and Procurator Fiscal Service is the designated authority in Scotland.

territory. If the warrant conforms to the requirements of the section, the Serious Organised Crime Agency may issue a certificate which triggers the extradition procedure. Despite the reference to “*judicial authority*” in section 2(2), section 2(7) provides:

“The designated authority may issue a certificate under this section if it believes that the authority which issued the Part 1 warrant has the function of issuing arrest warrants in the category 1 territory.”

- 5.111 This provision appears to us to be consistent with Article 6 of the Framework Decision: it links the validity of the warrants to a belief that it has been issued by an authority competent to do so by virtue of the law of the issuing Member State.
- 5.112 The rationale which underpins both Article 6 and section 2(7) is the obvious need for an internationalist or cosmopolitan approach to the interpretation of the term ‘*judicial authority*’: it is for the domestic law of each Member State to decide which body or authority is responsible for issuing warrants and it is not for other Member States to question the competence of the body in question, or the institutional arrangements for the issuing of warrants.
- 5.113 We are not in favour of any amendment to section 2 of the 2003 Act on the lines proposed by Justice for four principal reasons.
- 5.114 First, the decisions of the Strasbourg Court in Moulin v. France and Medvedyev v. France were concerned with Article 5 of the Human Rights Convention, in particular the detention of individuals either in France or by the French authorities, without supervision by a judicial authority.¹¹⁶ There is no authority of which we are aware which calls into question the ability of prosecutors in some Member States to issue

¹¹⁶ In Moulin, a lawyer was arrested on suspicion of breaching the confidentiality of a drug trafficking investigation. She was detained in custody for a period of six days before her appearance before an investigating judge. The Court found that there had been a violation of Article 5(3) of the Human Rights Convention (the right of an arrested person to be brought promptly before a judge or other officer authorised by law to exercise judicial power). The Court held that her appearance before the deputy public prosecutor of the Toulouse tribunal de grande instance two days after her arrest could not be regarded as a presentation before a competent legal authority for the purposes of Article 5(3). In Medvedyev, the applicants were crew-members of a cargo vessel. They were arrested when the vessel was intercepted by the French authorities who suspected it was involved in drug trafficking. They complained that they had not been brought before the investigating judges until their arrest on the high seas.

European arrest warrants and the Framework Decision was designed to accommodate institutional differences between the various Member States' legal systems: such an internationalist approach is necessary in any effective system of extradition.

5.115 Secondly, adding a statutory requirement to the effect that a warrant issued by a prosecutor in another Member State would only be recognised in the United Kingdom if it had been issued as a result of an impartial and objective decision in the category 1 territory would, in our opinion, be unworkable. We assume that for such a requirement to serve any useful purpose it would be necessary for the impartiality and objectivity of the prosecutor to be investigated in the United Kingdom. Irrespective of whether this investigation was carried out by the Serious Organised Crime Agency, the Crown Office and Procurator Fiscal Service or the extradition judge, it would occasion delay to the surrender process.¹¹⁷ An additional practical difficulty would arise if the requested person sought to challenge a finding (made by the Serious Organised Crime Agency, the Crown Office and Procurator Fiscal Service or the extradition judge) that the prosecutor had acted impartially and objectively when deciding to issue the warrant. It is not clear to us how such a challenge could be resolved without hearing or receiving evidence from the prosecutor in question: this would be an additional cause of delay.

5.116 Thirdly, to amend the 2003 Act in the terms suggested by Justice would contradict the express wording of the Framework Decision¹¹⁸ and undermine the principle of mutual recognition. This would be contrary to the United Kingdom's obligation to give effect to the wording and purpose of the Framework Decision, an obligation which has been emphasised by the domestic courts: *Dabas v. High Court of Justice in Madrid*.¹¹⁹

5.117 Finally, we are not aware of any cases in which European arrest warrants issued by designated prosecuting authorities has led to oppression or injustice. It follows that

¹¹⁷ In *Enander v. Governor of Her Majesty's Prison Brixton* [2005] EWHC 3036 (Admin) the High Court dismissed an application for a writ of *habeas corpus* brought on the basis that Sweden had appointed the Swedish National Police Board as the judicial authority to issue warrants in respect of persons convicted of crime. It was held that an inquiry into the arrangements adopted in other category 1 territories would be attached with considerable practical difficulty, fraught with uncertainty and deprive the 2003 Act of its efficacy (paragraph 30).

¹¹⁸ Article 6.

¹¹⁹ [2007] 2 A.C. 31.

an additional requirement of the type proposed would impede the process of surrender while doing little to provide effective and practical protection for requested persons.

5.118 In conclusion we do not recommend that section 2 of the 2003 Act be amended so that warrants issued by public prosecutors would only be recognised if they have been issued as a result of impartial and objective decision-making.

5.119 Before leaving the topic of competent judicial authorities we wish to make one additional point. We understand that Denmark (and possibly other Member States) has designated their Minister of Justice as a judicial authority for the purposes of Article 6 of the Framework decision. Whilst the text of the Framework Decision does not specifically preclude this, it does appear to be contrary to the spirit of the Framework Decision which was intended to remove the involvement of the executive from the surrender process. Any future negotiation of the terms on which the European arrest warrant is to operate should bear this point in mind.¹²⁰

Proportionality

5.120 A consistent and persistent criticism of the European arrest warrant scheme is that it does not include a proportionality test. To put this another way, and in simple terms, there is no requirement for the issuing judicial authority to balance the seriousness of the offence against the consequences for the arrested person of the execution of the warrant.¹²¹

¹²⁰ The Council of the European Union Final Report on the fourth round of mutual evaluations, 8302/2/09, Brussels 18 May 2009, called on Member States to restrict the role of non-judicial central authorities and we agree with this statement.

¹²¹ In some Member States, prosecutors are governed by the principle of legality. This means that they are required to prosecute any crime, regardless of its gravity, seriousness or consequences. For example, according to the European Commission meeting of experts on 5 November 2009, Poland's law enforcement authorities are obliged to take all measures to bring someone to justice and the European arrest warrant is a tool that makes that possible: European Commission Meeting of Experts: Implementation of the Council Framework Decision 13 June 2002 on the European arrest warrant – The issue of proportionality 5 November 2009. In some other Member States (including the United Kingdom) prosecutors exercise discretionary powers to prosecute which leads to a more pragmatic approach to the enforcement of the criminal law. In England and Wales, the Code for Crown Prosecutors (issued by the Director of Public Prosecutions using powers under the Prosecution of Offences Act 1985) makes it clear that a prosecution will only be instituted if there is a realistic prospect of conviction and a prosecution is in the public interest. In Northern Ireland, the public interest test operates together with a reasonable prospect of conviction evidential test.

- 5.121 Most Member States and commentators agree that a proportionality test should be undertaken by the issuing judicial authority. In recognition of this point the Council Handbook on *How to Issue a European Arrest Warrant* has recently been amended.
- 5.122 The possibility of allowing the executing Member State to decide whether the execution of a European arrest warrant would be disproportionate was raised in several of the submissions made to the Review Panel.
- 5.123 An alternative approach, suggested by Justice, would be for the United Kingdom to read into the Framework Decision a requirement of proportionality, to be demonstrated by the issuing authority upon request and that Part 1 of the 2003 Act could be amended to give effect to this requirement.
- 5.124 Before addressing these proposals we think it helpful to put the issue of proportionality in context.

The Context

- 5.125 The Framework Decision permits the use of a European arrest warrant where, in an accusation case, the offence in question carries a maximum penalty of at least 3 years' imprisonment in the issuing State if it falls within the list of 32 "*Framework List Offences*", or 12 months if the conduct is a crime in the requested State as well. In conviction cases, surrender is available if the custodial sentence to be served is 4 months or more.¹²²
- 5.126 The 2003 Act gives effect to the Framework Decision on this aspect (sections 64 and 65), with the additional requirement that in a conviction case, involving conduct falling within the European framework list, it is necessary for the European arrest

In Scotland, prosecutions in the district court and sheriff court are brought by the public prosecutor, namely the procurator fiscal and in the High Court of Justiciary the law officers of the Crown and Crown Counsel. The public prosecutor as master of the instance has an absolute right to decide who should be prosecuted and, subject to a limited number of exceptions, in which court the case should be tried.

¹²² Article 2.

warrant to show that a custodial sentence for a term of 12 months or a greater punishment has been imposed in the category 1 territory in respect of the conduct.¹²³

5.127 It follows that surrender is not available in respect of every criminal offence: it is only available in respect of offences which satisfy a minimum level of seriousness. Having said that, there is no restriction on the use of the European arrest warrant in cases which satisfy the minimum level of seriousness but which are relatively minor cases of their type.¹²⁴ For example, theft, which as a matter of English law carries a maximum penalty of 7 years' imprisonment,¹²⁵ is an extradition offence and in principle surrender would be available for a single offence involving the dishonest appropriation of property with a low or nominal value.

5.128 The objective of the Framework Decision was to facilitate the prosecution of crime, on the basis of the principle of mutual recognition, as if the European Union constituted a single judicial area. The corollary is that a wanted person is liable to criminal prosecution irrespective of his whereabouts within the European Union and the fact that the offence is relatively minor should not operate to confer immunity.¹²⁶ If it were otherwise, the ability to move freely between Member States would have the effect of creating havens safe from prosecution for minor offenders.

5.129 The principle of proportionality is a principle of European Union law and is now found in Article 5 of the TEU, which obliges Member States to observe the principle when applying the European Union law.¹²⁷

¹²³ In this respect the 2003 Act is not in conformity with the Framework Decision.

¹²⁴ This is to be contrasted with Part III of the Extradition Act 1989 which contained a triviality bar: section 11(3)(a). In cases under the First Schedule to the 1989 Act, extradition was only available in relation to the offences listed in the Schedule and these tended to be serious offences.

¹²⁵ Theft Act 1968, section 7.

¹²⁶ It was also pointed out to us that we in the United Kingdom should be careful of judging the seriousness of offences committed in other jurisdictions by our own standards. This was a point forcefully made by the High Court in *Sandru v Government of Romania* [2009] EWHC 2879 (Admin), a conviction case involving the theft of ten chickens and a sentence of three years' imprisonment. Elias J. noted (at paragraph 14) that the appropriate sentence for an offence is in part a function of culture and offences which may not appear to be serious seen through English eyes may be serious in the place of their commission.

¹²⁷ Proportionality is also a familiar concept in the case law relating to the European Convention on Human Rights: it is used as a vehicle for conducting a balancing exercise. Broadly speaking when considering proportionality under the Human Rights Convention, the domestic courts approach the question by asking a series of questions. First, is the legislative measure in question sufficiently important to justify limiting a fundamental right? Secondly, is the interference with the right rationally connected to the legislative objective no more than

- 5.130 As noted above, the amended European arrest warrant handbook has emphasised the role of proportionality in deciding whether or not to apply for a European arrest warrant.¹²⁸

Proportionality Assessment in the Executing Member State

- 5.131 In at least one Member State, it appears that an attempt has been made to introduce a proportionality assessment at the time of executing European arrest warrants. In Germany, the Higher Regional Court in Stuttgart has held that Article 49(3) of the Charter of Fundamental Rights of the European Union¹²⁹ is a ground for the non-execution of a European arrest warrant if the penalty sought by the issuing Member State would be intolerably severe. This is on the basis that a German court's decision, to issue a domestic arrest warrant in execution of a European arrest warrant, must fully respect the principle of proportionality, which is a principle of German constitutional law. The same Regional Court has declined to give effect to a European arrest warrant where the offence was relatively minor. The effect of these two cases is summarised in the following paragraphs.
- 5.132 In its Decision of 18 November 2009,¹³⁰ the Stuttgart Court refused on proportionality grounds to issue a domestic arrest warrant against a person of good character who was wanted in Lithuania to stand trial for possession of 1.435 grams of methamphetamine.
- 5.133 Subsequently, in its Decision of 25 February 2010,¹³¹ the Stuttgart Court held that as an arrest under German law must conform to the requirements of German constitutional law and, since the principle of proportionality forms part of that law,

necessary to accomplish the objective: *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 99; *Huang v Secretary of State for the Home Department* [2009] 2 AC 167.

¹²⁸ The Council of Ministers agreed Council conclusions which amended the European Arrest warrant handbook also referred to the need to reach a coherent solution to the problem of proportionality at European Union rather than Member State level.

¹²⁹ Article 49(3) of the Charter provides: “*The severity of penalties must not be disproportionate to the criminal offence.*” This provision is identified in the European arrest warrant handbook as a matter to be taken into account by the issuing judicial authority.

¹³⁰ 1 Ausl. 1302/99.

¹³¹ 1 Ausl. (24) 1246/09.

any arrest order must comply with that principle. The case in question concerned a European arrest warrant issued in Spain for an alleged offence of drug trafficking. It was alleged that the accused person had tried to sell 0.199 grams of cocaine to an undercover police officer. For an offence of drug trafficking, the Spanish Criminal Code stipulates a prison sentence of 3 to 9 years, regardless of the quantity of the drug involved. In this particular case, the Spanish Public Prosecutor was seeking a sentence of 4 years' imprisonment. The German Court held that the proposed sentence would not constitute an intolerably severe sentence and held that a decision to issue a domestic arrest warrant would not be disproportionate.

5.134 In reaching its conclusion, the Court held that the principle of proportionality of criminal offences and penalties forms part of the constitutional traditions common to Member States and is a general principle of the Union's law under Article 49(3) of the Charter of Fundamental Rights.¹³²

5.135 In its consideration of the proportionality of the German arrest warrant the Court held the following matters to be relevant:

- (i) the wanted person's right to liberty and safety;
- (ii) the cost and effort of formal extradition proceedings;
- (iii) the interest of the issuing Member State to prosecute;
- (iv) any reasonable alternative options for the issuing Member State such as proceeding by way of summons or *in absentia* proceedings.

5.136 It is significant to note that the proportionality exercise conducted by the Court was carried out in relation to the German arrest warrant and not the underlying European arrest warrant. It was held that this was permissible on the basis of Article 12 of the Framework Decision which provides:

¹³² Article 49(3) of the Charter provides: "*The severity of penalties must not be disproportionate to the criminal offence.*" This provision is identified in the European arrest warrant handbook as a matter to be taken into account by the issuing judicial authority.

“When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention in accordance with the law of the executing Member State.”

Our Analysis: Proportionality in the Executing Member State

- 5.137 In the following paragraphs we consider three issues. First, whether the approach adopted by the Stuttgart Court would be available to the courts in the United Kingdom. Secondly, whether it would lead to a different outcome in particular cases. Thirdly, whether such an approach is consistent with the Framework decision and, if so, whether it is desirable.
- 5.138 In relation to the first point, it appears that the decisions of the Stuttgart Regional Court were to some extent based on provisions of the German constitution, which have no equivalent in the United Kingdom, and the Charter of Fundamental Rights which, according to Protocol No.30 to the Lisbon Treaty “*does not create new rights or principles*” as far as the United Kingdom and Poland are concerned. On this basis it is not entirely clear that the courts in the United Kingdom could adopt a similar approach.¹³³
- 5.139 On the other hand, the principle of proportionality is a well-known principle of the European Union and domestic human rights law. Moreover, if the Charter only makes more visible those rights already available in the European Union, the same argument could be deployed in connection with the Framework Decision on the European arrest warrant, which as a matter of European Union law, is a legislative instrument to which the Charter applies.
- 5.140 On balance we believe that the arguments based on the Charter could be deployed in the United Kingdom courts. However, we should point out that any argument based

¹³³ Professor John Spencer, expressed the view that the same argument not be available in the United Kingdom: [2010] Crim.L.R. 474. An alternative view (discussed in the text) is that because the Charter only makes more visible those rights already available in the European Union, the same argument could be deployed in connection with the European arrest warrant, which is a matter of European Union law to which the Charter applies.

on Article 49(3) is likely to fall within a very narrow focus: that Article is concerned only with the severity of penalties, not with proportionality generally.

5.141 In relation to the second issue (whether it would lead to any different outcome in particular cases), we believe that the approach would be unlikely to lead to different outcomes in particular cases. We have reached this conclusion for four principal reasons. First, any balancing exercise would have to take into account the critical importance attached to the prevention of disorder and crime and the need to ensure that those reasonably suspected of crime are prosecuted and, if found guilty, duly sentenced. Secondly, the importance attached to the effective working of extradition arrangements. Thirdly, the domestic courts already apply a proportionality assessment under Article 8 of the Convention and it had been authoritatively decided that it is only if some quite exceptionally compelling features or combination of features is present that interference with family life consequent upon extradition will be other than proportionate to the objective that extradition serves. Finally, the proportionality assessment required by Article 49(3) of the Charter is limited to the severity of penalties: “*the severity of penalties must not be disproportionate to the criminal offence.*” In the vast majority of cases no issue of disproportionate penalty will arise.

5.142 It remains to be considered whether the approach adopted by the Stuttgart Regional Court would be consistent with the Framework Decision or desirable: these are entirely different matters. The number of European arrest warrants issued in respect of relatively minor offences (that is, where the penalty is unlikely to be disproportionate and where Article 49(3) of the Charter is unlikely to apply) is a matter of concern throughout the European Union.¹³⁴ We consider that the solution to this issue must come from the European Union itself. The main difficulty of attempting to find a solution within each Member State is that it will undermine the effectiveness of the current surrender system (by affording a further ground of refusal) and involve a less uniform application of the European arrest warrant scheme. At a practical level, a consideration in the executing State of the factors identified by the Stuttgart Higher Regional Court would be likely to lead to undesirable and excessive delay in the surrender process. For example, it appears to

¹³⁴ We should note that the concern has arisen not because the European arrest warrant operates unfairly or oppressively; it is more to do with the number of cases which have to be dealt with by the courts.

us that it would be difficult for the extradition judge to evaluate the interest of the issuing Member State to prosecute, without hearing or receiving evidence and argument on the point both from a representative of the issuing Member State and from the requested person, or a suitably qualified expert instructed on his behalf. Any decision would (presumably) then be subject to appeal or potential challenge by way of an application for judicial review. Such an approach could also mean that a person could escape arrest and prosecution merely by exercising his or her right to move from one Member State to another. This, in our opinion, would be inconsistent with the Framework Decision.

5.143 An alternative to the approach adopted by the Stuttgart Court (which was concerned with the proportionality of the German arrest warrant), would be for the courts of the United Kingdom to conduct a proportionality check on the underlying European arrest warrant. In our opinion, there are several principled objections to this approach. First, it is difficult to see how the courts in the United Kingdom could properly decide that the decision to issue a European arrest warrant in another Member State was disproportionate. Such an exercise would require an assessment of whether the decision to issue the warrant had properly taken into account the public interest in that other Member State as well as all the other relevant circumstances of the case (such as the harm caused to the victim and the community). This would in turn require the extradition judge to hear or receive evidence and argument on the issue. Any decision would (presumably) then be subject to appeal or challenge by way of judicial review. This would inject excessive and undesirable delay into the extradition process. Secondly, this would undermine the principle of mutual recognition and reduce the effectiveness of the European arrest warrant scheme. Thirdly, it would be likely to lead to a less uniform application of the surrender process. Finally, such an approach would be contrary to the spirit of mutual cooperation on which the Framework Decision is based and which is all the more important in an area where free movement of persons is guaranteed.

5.144 In this connection, we would also make the following point: if Member States decline to execute European arrest warrants issued in good faith by the issuing judicial authorities, then other Member States might well feel justified in doing likewise.

Were such practices to become widespread then the whole regime could break down and its benefits would be lost.¹³⁵

- 5.145 Linked to this point, there is in our view another difficulty. Sentences in the United Kingdom tend to be more severe than in other Member States, particularly for offences of violence and drug trafficking. The unilateral adoption of a proportionality requirement in the United Kingdom might well be counter-productive in the sense that it may provoke similar responses from other Member States when dealing with requests from the United Kingdom. It would be unfortunate, to say the least, if the United Kingdom becoming unable to obtain the surrender of requested persons as a result of taking action designed to address difficulties created by other Member States.

Proportionality in the Issuing Member State

- 5.146 While we believe that (as the European arrest warrant Handbook now suggests) issuing judicial authorities should apply a proportionality test before issuing a European arrest warrant and that the issue of proportionality is a matter that should be addressed at Union level, it is necessary to address the suggestion made by Justice, namely that the 2003 Act could be amended so as to read in a requirement of proportionality to be demonstrated by the issuing authority upon request.
- 5.147 While this suggestion has some attraction, we believe that it would create difficulties in practice and have concluded that it should not be adopted. We have reached this conclusion for the following reasons. As we made clear at the outset of our report, we have approached any legislative proposal on the basis that, if adopted, it should provide a workable and effective solution to the problem it seeks to address. The proposal made by Justice is that the issuing authority should be required to demonstrate proportionality upon request. We are unconvinced that this would be either workable or effective. At a practical level, this requirement would involve requests for further information being submitted by the extradition judge to the issuing judicial authority. This would introduce delay into the extradition process and is contrary to the principle of mutual recognition, which, as we have noted, is a

¹³⁵ A point made by the House of Lords European Union Committee: 30th Report, Session 2005-2006, 4 April 2006, paragraph 29.

fundamental aspect of the Framework Decision. In order to be effective, the legislative amendment would need to be enacted together with a mechanism for challenging the decision of the District Judge (whether adverse to or in favour of the arrested person). As we have already noted, this would add a layer of complexity to a surrender process designed to operate with the minimum of delay. It would also be very difficult for the District Judge to assess the information provided by the requesting authority as many of these factors may require a detailed knowledge of the domestic law and also the social and economic conditions in the country. Furthermore it seems to us, on analysis, that the true complaint is in reality that no assessment is undertaken at all in the issuing member state rather than that there is a proportionality assessment which is not operating as it should.

Our Proposals in Relation to Issue of Proportionality

- 5.148 Our proposals in relation to issue of proportionality are set out in the following paragraphs. In making these we have borne in mind the recommendations of the Joint Committee on Human Rights on this issue.¹³⁶
- 5.149 First, we consider that the United Kingdom Government should use their best endeavours at Union level to impress upon other Member States the importance of adhering to the recommendation contained in the European arrest warrant Handbook.¹³⁷
- 5.150 Secondly, we consider that any future amendment to the Framework Decision, or any future legislative instrument enacted to deal with surrender between Member States

¹³⁶ Paragraphs 158-159, “*The Human Rights Implications of UK Extradition Policy*”, HL Paper 156, HC 767, published on 22 June 2011.

¹³⁷ The Council of Ministers agreed Council Conclusions which amended the European arrest warrant handbook and emphasised the need for a coherent solution at European Union level. We are aware that discussions have taken place between representatives of the United Kingdom, the European Commission and Poland on the issue of proportionality and the European arrest warrant. We were also informed that the Polish Ministry of Justice has indicated that the number of European arrest warrants issued in respect of individuals in the United Kingdom is expected to reduce significantly in the near future as the backlog of cases for which European arrest warrants are issued is diminishing. The Polish authorities are anxious to ensure that European arrest warrants are used only in appropriate cases and communications between the United Kingdom and Poland on this issue are continuing. We note that the Handbook states that the Commission will assess how effective the action that has been taken has been and the most recent evaluation report from the Commission makes it clear that the situation will be monitored with the possibility of legislation in the future.

of the European Union should include a proportionality test, to be applied in the issuing Member State. Among the factors to be taken into account when assessing the proportionality of a European arrest warrant (or any equivalent instrument) are:

- (i) the seriousness of the offence;
- (ii) whether there is a reasonable chance of conviction
- (iii) the harm caused to the victim or the community;
- (iv) the likely sentence (in an accusation case);
- (v) the previous convictions of the requested person;
- (vi) the age of the requested person;
- (vii) the views of the victim;
- (viii) any reasonably alternative options for the issuing Member States such as proceeding by way of summons.

5.151 In the meantime, we suggest that consideration should be given to encouraging Member States to consider using measures of cooperation other than the European arrest warrant where appropriate.¹³⁸ These measures include:

- (i) Framework Decision 2005/214/JHA¹³⁹ of 24 February 2005 on the application of the principles of mutual recognition to financial penalties. This Framework Decision makes provision for fines or penalties of €70 or more imposed by the authorities in one Member State to be recognised and

¹³⁸ We were informed by Professor John Spencer that Polish judges were keen to use other methods of cooperation and that in some cases European arrest warrants had been issued in Poland only because they had not received cooperation from the United Kingdom in serving summonses.

¹³⁹ [2005] OJ L 76/16. See paragraph 4.24. This Framework Decision has been implemented in England, Wales and Northern Ireland by sections 80 to 92 and Schedules 18 and 19 of the Criminal Justice and Immigration Act 2008. The provisions came into force on 1 October 2009: Criminal Justice and Immigration Act 2008 (Commencement No 11) Order 2009, SI 2009 no 2606. In Scotland the relevant legislation is the Mutual Recognition of Criminal Financial Penalties in the European Union (Scotland) Order 2009.

enforced in another Member State. In England and Wales enforcement is carried out by the magistrates' court in the area where the individual subject to the penalty resides or has property. The magistrates' court is required to treat the outstanding penalty as if it were a sum payable on summary conviction and it may be enforced under Part 3 of the Magistrates' Court Act 1980 and Schedules 5 and 6 to the Courts Act 2003.¹⁴⁰

- (ii) The Framework Decision 2009/829/JHA¹⁴¹ concerning pre-trial supervision orders which is designed to promote the use of non-custodial supervision measures such as release on bail from the Member State where a non-resident is suspected of having committed an offence to the Member State where he is normally resident.
- (iii) Serving a summons pursuant to Part 1 of the Crime (International Co-operation) Act 2003.
- (iv) Transferring probation or non-custodial measures to the United Kingdom for execution rather than issuing a European arrest warrant for a sentence imposed in default.¹⁴²
- (v) Applying to the United Kingdom to transfer sentences where appropriate.¹⁴³
- (vi) Using the European Investigation Order, once it is in effect, to allow for efficient and effective investigation measures to take place before deciding if and when a European arrest warrant is to be issued.

5.152 In relation to the financial penalties, the evidence provided to the Review suggested that in some cases European arrest warrants are used to enforce custodial sentences imposed as a result of a failure to pay financial penalties in the issuing Member State. We were informed that a number of individuals had been surrendered and then

¹⁴⁰ In *Hoffman v Circuit Court of Zielona Gora* [2010] EWHC 3314 (Admin), the High Court invited the issuing judicial authority to consider whether it would impose some penalty other than a custodial penalty and thereby avoid surrender.

¹⁴¹ [2009] OJ L 294/20. See paragraph 4.34

¹⁴² Council Framework Decision 2008/947/JHA of 27 November 2008, on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions- to be implemented by 6 December 2011.

¹⁴³ Framework Decision 2008/909/JHA- see paragraphs 4.26-4.33.

released from custody on payment of the outstanding financial penalty. This situation could be avoided if greater is to be made of the Framework Decision on the recognition of financial penalties.¹⁴⁴

- 5.153 In relation to the Framework Decision on pre-trial supervision, we believe that more effective use of the European arrest warrant is likely to lead to grants bail in an increasing number of cases. Under the terms of the Framework Decision on pre-trial supervision, it is still necessary for the requested person to be surrendered to the category 1 territory but, following surrender, the courts in the category 1 territory should proceed in appropriate cases to grant bail confident in the knowledge that the individual will return voluntarily for the trial proceeding, or if not, another European arrest warrant could be executed speedily so as to ensure their return. However, this will require trust between Member States that conditions will be enforced and we would recommend that the Government take steps to build this both bilaterally and through European Union mechanisms.
- 5.154 As a more long term proposal, we believe that steps should be taken to improve the cooperation between Member States in the initial stages of a prosecution. We envisage a procedure whereby an accused person is summoned to court; charged by video-link and then placed on bail in the United Kingdom before surrendering for trial.
- 5.155 We also believe that criticisms of the use of European arrest warrants, in cases which are perceived to be of a relatively minor nature, are likely to dissipate if efforts are made at Union level to improve the rights of the defence throughout the Member States. Improvements in defence rights are likely to increase public confidence in the principle of mutual recognition and this in turn will improve the effective working of the European arrest warrant scheme of surrender. This is not something that can be achieved by an amendment to the 2003 Act and will require efforts at Union level and within Member States as part of a Union wide scheme.¹⁴⁵

¹⁴⁴ Poland implemented this Framework Decision on 18 December 2008. Greater use of this mechanism may go some way to reducing the number of European extradition warrants issued to enforce custodial sentences imposed in respect of unpaid fines.

¹⁴⁵ The Law Society's submissions to the Review supported the United Kingdom's participation in the European arrest warrant scheme and noted the significant achievements made to date in speeding up the extradition process. The Law Society suggested that "*to the extent that legislative amendments to the scheme are considered necessary, these should as a matter of principle be adopted at EU level and not by individual Member States.*"

The Use of the European Arrest Warrant as an Aid to Investigation

5.156 One of the concerns raised in the submissions made to the Review is that the European arrest warrant is being used as an aid to investigation. Justice suggested that the European arrest warrant should be required to state unequivocally on its face that it has been issued solely for the purposes of prosecution.

5.157 We address this issue in the following paragraphs. We first place the issue in context.

The Context

5.158 Article 1(1) of the Framework Decision makes clear that the European arrest warrant is a judicial decision issued by a Member State “*for the purpose of conducting a criminal prosecution or executing a custodial sentence or detention order.*” In Office of the King’s Prosecutor, Brussels v. Cando Armas,¹⁴⁶ Lord Scott of Foscote noted:¹⁴⁷

“Extradition for the purpose of interrogation with a view to obtaining evidence for a prosecution, whether of the extradited individual or of anyone else, is not a legitimate purpose of an arrest warrant. But the judicial authority in that requested state cannot inquire into the purpose of the extradition. It is therefore necessary for there to be an unequivocal statement of that purpose in the warrant itself.”

5.159 Section 2 of the 2003 Act gives effect to Article 1(1) and provides that a Part 1 warrant is (in an accusation case) one that has been issued for the purposes of prosecution or (in a conviction case) for the purposes of sentencing or executing a custodial sentence.

5.160 The United Kingdom will not surrender individuals for investigation. However, the question of when a prosecution commences can be complicated in a civil law jurisdiction, with the result it is not always easy for a United Kingdom court to decide

¹⁴⁶ [2006] 2 A.C. 1.
¹⁴⁷ At paragraph 54.

when a suspect under investigation in a category 1 territory becomes an accused person subject to prosecution.

- 5.161 This problem is not one created by the Framework Decision on the European arrest warrant or the 2003 Act. A similar difficulty arose under the 1989 Act and it was considered by the House of Lords in *In re Ismail*.¹⁴⁸ In that case, a warrant of arrest was issued by a German judge alleging that the defendant, a British citizen, was involved in offences connected with a fraud perpetrated on German investors. The Government of the Federal Republic of Germany requested the defendant's extradition and a Metropolitan stipendiary magistrate committed the defendant on bail to await the Secretary of State's decision as to his return to Germany. The defendant sought a writ of *habeas corpus* on the ground that he was not a person who was "accused" of an extradition offence within section 1(1) of the 1989 Act because no criminal charge had been made against him in Germany; he was merely a suspect, wanted for pre-trial investigation. The application was refused by the High Court and an appeal to the House of Lords was dismissed. It was held that the word "accused" in section 1 of the 1989 Act was not a term of art but should be accorded a broad, generous and purposive construction in order to facilitate extradition. In the course of his opinion, Lord Steyn suggested it would be wrong to approach the problem of construction solely from the perspective of English criminal procedure, and in particular from the point of view of the formal acts of the laying of an information or the preferring of an indictment.¹⁴⁹ He stated:¹⁵⁰

"... it is necessary for our courts to adopt a cosmopolitan approach to the question of whether as a matter of substance rather than form, the requirement of there being an accused person is satisfied ... the Divisional Court in this case posed the right test by addressing the broad question whether the competent authorities in the foreign jurisdiction had taken a step which can fairly be described as the commencement of a prosecution. But in the light of the diversity of

¹⁴⁸ [1999] 1 A.C. 320

¹⁴⁹ In England and Wales a criminal case will ordinarily commence with the laying of an information or written charge. The information describes the offence in ordinary language: Magistrates' Court Act 1980 section 1. The indictment is the formal document containing the list of charges against an accused person in proceedings in the Crown Court: Indictment Acts 1915.

¹⁵⁰ At page 327E-G.

cases which may come before the courts it is right to emphasise that ultimately the question whether a person is ‘accused’ within the meaning of section 1 of the Act of 1989 will require an intense focus on the particular facts of each case.”

5.162 The approach in *Ismail* has been followed by the High Court under the 2003 Act.¹⁵¹

Our Analysis

5.163 We do not consider that any amendment to the 2003 Act is necessary so as to require European arrest warrants to state unequivocally on their face that they have been issued for the purpose of prosecution. We have reached this conclusion for a number of reasons. First, the Framework Decision is clear in its effect: European arrest warrants are only available for the purposes of conducting a criminal prosecution or executing a custodial sentence. Secondly, sections 2(3)(b) and 2(5)(b) are also clear in their effect: they require the warrant to state that it has been issued for the purposes of prosecution or for executing a sentence. Thirdly, to require an issuing judicial authority to state the purpose of the European arrest warrant is unnecessary, given the terms of Article 1 of the Framework Decision and section 2 of the 2003 Act which in effect requires this. Fourthly, so far as we are aware there is no widespread evidence that the European arrest warrant is being used as an investigative tool by issuing judicial authorities.¹⁵² Fifthly, a requested person is entitled to challenge the warrant on the basis that he or she is merely a suspect and wanted for pre-trial investigations. In cases where this issue is raised it will be considered on the facts of the particular case. Finally, any requirement imposed on the issuing judicial authority to state the purpose of the European arrest warrant, over and above what is required by the Framework Decision itself, would be contrary to the principle of mutual recognition, impede the process of surrender and do nothing to provide any additional protection for the requested person.¹⁵³

¹⁵¹ *Court of First Instance of Hasselt v. Bartlett* [2010] EWHC 1390, *Asztalos v. Szekszard City Court* [2010] EWHC 237.

¹⁵² Where this point has arisen for consideration it has been investigated and determined by the courts.

¹⁵³ We note the recommendation by the Joint Committee on Human Rights that further information can be requested from the requesting State if there is any doubt. Paragraph 168, “*The Human Rights Implications of UK Extradition Policy*”, HL Paper 156, HC 767, published on 22 June 2011.

5.164 In conclusion, we do not see any basis to amend the 2003 Act.

The Removal of Schengen Alerts

5.165 Both Fair Trials International and Justice submitted that, while the Schengen Information System allows issuing Member States to update or remove an alert from the System when appropriate, it is not possible for the executing court to remove an alert when it declines to give effect to a surrender request. Article 111 of the Schengen Convention (which is not part of the United Kingdom's domestic law) provides for the possibility of applying to a court in the territory of each Contracting Party to amend or review an alert. Justice has suggested that the United Kingdom could implement Article 111 by way of legislative enactment. This would enable the United Kingdom to exercise control over alerts in relation to warrants which the courts here have declined to execute.

5.166 We address these issues in the following paragraphs. We first put them in context.

The Context

5.167 As we have already explained, the Schengen Information System (SIS) is an element of the Schengen border control system established by the 1990 Schengen Convention.¹⁵⁴ The SIS exists for the use of national police, customs, immigration and border control officers when making checks on persons at external borders or within Schengen states. Member States can enter information concerning individuals onto the SIS and this information includes an '*alert*' that a person is wanted for arrest for extradition purposes.¹⁵⁵

5.168 Article 9.2 of the Framework Decision on the European arrest warrant provides:

¹⁵⁴ Articles 92-119

¹⁵⁵ Article 95 of the Schengen Convention- See paragraphs 4.7-4.9

“The issuing judicial authority may, in any event, decide to issue an alert for the requested person in the Schengen Information System (SIS).”

5.169 Article 9.3 provides:

“Such an alert shall be effected in accordance with the provisions of Article 95 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of controls at common borders. An alert in the Schengen Information System shall be equivalent to a European arrest warrant accompanied by the information set out in Article 8(1). For a transitional period until the SIS is capable of transmitting all the information described in Article 8, the alert shall be equivalent to a European arrest warrant pending the receipt of the original in due and proper form by the executing judicial authority.”

5.170 Article 95(1) of the Schengen Convention provides:

“Data on persons wanted for arrest for extradition purposes shall be entered at the request of the judicial authority of the requesting contracting party.”¹⁵⁶

5.171 Article 111 of the Schengen Convention provides:

“1. Any person may, in the territory of each contracting party, bring before the courts or the authority competent under national law an action to correct, delete or obtain information or to obtain compensation in connection with an alert involving them.

¹⁵⁶ An alert entered under Article 95 is the equivalent of a formal application for arrest (in accordance with Article 9(3) of the Framework Decision). An alert in this category is not placed on the SIS unless the issuing territory has sufficient information to issue a domestic arrest warrant or a European arrest warrant for the purpose of requesting the individual's surrender.

2. *The contacting parties undertake mutually to enforce final decisions taken by the courts or authorities referred to in paragraph 1 ..”*

5.172 The Final Report on the Fourth Round of Mutual Evaluations¹⁵⁷ noted that the question of how Article 111 should be implemented and its impact on an underlying European arrest warrant was the subject of differing views. The Council recommended that the matter should be the subject of further discussion and evaluation at European Union level.

Our Analysis

5.173 We see a number of difficulties in seeking to give unilateral effect to Article 111 by way of legislation enacted in the United Kingdom.

5.174 First, an ‘*alert*’ is placed on the SIS by a requesting Member State. Accordingly, any procedure for removing the alert would need to involve that State or at least require a mechanism whereby its legitimate interests could be taken into account. Devising such a procedure or mechanism is fraught with complication and likely to be difficult to apply in practice.¹⁵⁸

5.175 Secondly, the 2003 Act provides a number of grounds not recognised in the Framework Decision itself on which a requested person may or must be discharged.¹⁵⁹ Any procedure for the removal of an ‘*alert*’ would need to be limited in its application so as to ensure that the ground for removal was based on a ground

¹⁵⁷ 8302/2/09 (Brussels 18 May 2009)

¹⁵⁸ For example, we assume that the State in question would have to be notified of the possible removal of the alert and the grounds for the removal. The State would then have to be provided with an opportunity to respond to the notification. There would then have to be an assessment of the circumstances followed by a decision (which we assume would be amenable to judicial review).

¹⁵⁹ For example, section 4 (mandatory discharge on the basis that the arrested person is not brought before the appropriate judge as soon as practicable after his arrest); section 6 (discretionary discharge on the basis that the arrested person was not given a copy of the arrest warrant as soon as practicable after his arrest); section 7 (mandatory discharge on the basis that it has not been shown on the balance of probabilities that the person appearing before the appropriate judge is not the person named in the warrant); section 8 (mandatory discharge on the basis that the extradition hearing has been unreasonably delayed); section 13 (extraneous considerations); section 14 (passage of time); and section 16 (hostage-taking considerations).

for non-execution of the warrant falling within the Framework Decision. Even this limitation would cause difficulties in practice, for example, if non-execution was based on the evidence or information then available to the extradition judge, it is not necessarily the case that the same decision would be reached by a court in another Member State confronted with the same or additional evidence or information.

- 5.176 Thirdly, a solely domestic procedure would be of no practical effect: another Member State may decline to remove the alert or, the alert having been removed, may decide to issue another European arrest warrant leading to a new alert.¹⁶⁰
- 5.177 Finally, unilateral action on the part of the United Kingdom is likely to undermine rather than promote judicial cooperation in criminal matters. Domestic legislation would risk the possibility of conflicting decisions between courts in the United Kingdom and courts in other category 1 territories.
- 5.178 For these reasons, we have concluded that the implementation of Article 111 of the Schengen Convention is a matter to be addressed at Union level, as was recognised in the Final Report on the fourth round of mutual evaluations.¹⁶¹ In this connection, we also note that Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System provides for a system of “*flagging alerts*”. This is governed by Article 25 which provides:

“1. Where Framework Decision 2002/584/JHA¹⁶² applies, a flag preventing arrest shall only be added to an alert for arrest for surrender purposes where the competent judicial authority under national law for the execution of a European Arrest Warrant has refused its execution on the basis of a ground for non-execution and where the addition of the flag has been required.

¹⁶⁰ Once extradition has been refused proceedings may be reinstituted in respect of the same conduct: *Re Rees* [1986] A.C. 937; *R (Central Examining Court, Criminal Court of the National Court, Madrid) v Bow Street Magistrates’ Court* [2007] 1 WLR 1157: a case in which the first two attempts at extradition failed because the relevant documentation was so poorly drafted.

¹⁶¹ The Joint Committee on Human Rights has suggested the Government consider this issue. Paragraph 174, “*The Human Rights Implications of UK Extradition Policy*”, HL Paper 156, HC 767, published on 22 June 2011.

¹⁶² That is the European arrest warrant Framework Decision.

2. *However, at the behest of a competent judicial authority under national law, either on the basis of a general instruction or in a specific case, a flag may also be required to be added to an alert for arrest for surrender purposes if it is obvious that the execution of the European Arrest Warrant will have to be refused.”*

- 5.179 The Final Report on the fourth round of mutual evaluations recommended Member States to apply the practice of flagging European arrest warrant SIS alerts according to the criteria provided in the Council Decision.
- 5.180 It appears to us that the practice of flagging provides a more practical and effective way of dealing with alerts on the SIS and we recommend the Government follows the Council recommendation, when SIS-II becomes operational in 2013, or thereabouts.
- 5.181 Another issue, drawn to our attention by the Police Service for Northern Ireland, concerns the mechanism for communicating either that a person sought in connection with a European arrest warrant has been arrested or that the warrant has been withdrawn. We were informed that on a number of occasions the Police Service has made inquiries to discover the whereabouts of a person believed to be in Northern Ireland, only to discover that the person the subject of the warrant has already been arrested in another Member State.
- 5.182 We believe that this particular problem will be addressed when SIS-II becomes operational: in the interim we would encourage more effective communication between judicial and investigating authorities, as the Framework Decision on the European arrest warrant itself envisages.

Legal Representation

- 5.183 Justice (and others) suggested in their submissions to the Review that many of the concerns raised in relation to the perceived flaws in the European arrest warrant process could be resolved through representation by lawyers in both the issuing and

executing Member States.¹⁶³ The Joint Committee on Human Rights also asked to consider this issue¹⁶⁴.

5.184 We address this issue in the following paragraphs. We first put the issue in context.

The Context

5.185 Article 11.2 of the Framework Decision provides:

“A requested person who is arrested for the purpose of the execution of a European arrest warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.”

5.186 There is no requirement in the Framework Decision for the requested person to be represented in the issuing Member State.

5.187 The right to legal representation is an issue which has been considered at Union level and (as noted above) the Commission has adopted a Proposal for a Directive on the right of access to a lawyer. We note that the United Kingdom has indicated that it may opt into the final Directive.

Our Analysis

5.188 We are in broad agreement with the view that accused and convicted persons should be legally represented in both the issuing and executing Member States: this is likely to ensure that surrender takes place with the minimum of delay as the courts in the United Kingdom (and other Member States) will be confident that the requested

¹⁶³ The European Criminal Bar Association suggested that legal representation in the issuing State would enable the requested person to gain access to “*the factual arena and legal processes in the Requesting State, so that inquiries and investigations can be carried out, whose results can be used to challenge the factual or legal arguments that are being used to persuade the requested court to extradite.*” There are obvious difficulties with this suggestion.

¹⁶⁴ Paragraph 126, “*The Human Rights Implications of UK Extradition Policy*”, HL Paper 156, HC 767, published on 22 June 2011.

person's interests will be safeguarded through legal representation in the issuing Member State. Our concern is that dual representation should not be used as a device to impede the surrender process as was attempted in *R v. Bow Street Magistrates' Court, Ex parte Shayler*.¹⁶⁵ In that case, the United Kingdom government sought the assistance of the French authorities under the European Convention on Extradition, 1957, for the return to this jurisdiction of the applicant who was wanted to face trial on offences contrary to the Official Secrets Act 1989. The applicant, while in France, sought legal aid to prevent the criminal proceedings from coming before the Bow Street Magistrates' Court. His application was unsuccessful and, following extradition from France, he was convicted of the offences following a trial.

Incoming Requests

- 5.189 In the case of incoming requests, legal representation in the United Kingdom is expressly provided for by section 182,¹⁶⁶ section 183,¹⁶⁷ and section 184¹⁶⁸ of the 2003 Act.
- 5.190 As for legal representation in the issuing Member State, this is not something that can be achieved by unilateral action within the United Kingdom. We should make clear that we would not favour legal representation in the issuing state for the purposes of conducting inquiries and investigations into the merits of the prosecution case: the merits or otherwise of the prosecution case are a matter for the court at trial. Nor do we favour legal representation as a mere device to delay the surrender process by challenges to the issuing judicial authority's arrest warrant. Any other approach would lead to confusion and delay in the executing Member State. It is in the interests of suspects to be returned speedily and this is more likely to operate in their favour than delay: the speedier the process of surrender throughout the European Union the more likely it is that accused persons will be admitted to bail and that trials will take place within a reasonable time.

¹⁶⁵ [1999] 1 All E.R. 98

¹⁶⁶ Legal advice, assistance and representation in England and Wales.

¹⁶⁷ Legal aid: Scotland.

¹⁶⁸ Grant of free legal aid: Northern Ireland.

Outgoing Requests

- 5.191 In the case of outgoing requests, that is requests sent from the United Kingdom to other category 1 territories, the position is that for the purposes of the Legal Aid Act 1988, the jurisdiction to grant legal aid usually only arises when a summons is issued or a warrant is executed: *R v. Bow Street Magistrates' Court, ex parte Shayler*.¹⁶⁹ The provision of legal aid for the benefit of a person whose return is sought to the United Kingdom would require an amendment to the legislative scheme. While we are not against such an amendment, we appreciate that the allocation of funds from a limited budget to provide legal aid for a person overseas who is properly the subject of a request from the United Kingdom, is likely to be controversial.

Our Conclusion

- 5.192 In our view, any move toward dual representation would have to proceed on the basis that it should be a Union-wide initiative. It would be unacceptable for the United Kingdom to expect dual representation in the case of incoming requests, but not in the case of outgoing requests. While we favour the notion of dual representation, we see its principal value to be the strengthening of mutual recognition: it should not be used as a means of introducing delay into the surrender process. On this basis we consider that this is another aspect of the operation of the European arrest warrant scheme which has to be addressed at supra-national level.¹⁷⁰

Dual Criminality

- 5.193 In their submissions to the Panel, Liberty argued that the Framework Decision on the European arrest warrant has effectively abolished the dual criminality requirement for extradition within the European Union. This argument proceeds on the basis that the Framework Decision allows surrender to take place for a broadly defined range of offences which can include numerous offences which are not considered criminal acts

¹⁶⁹ [1999] 1 All E.R. 99.

¹⁷⁰ The draft Directive on the right of access to a lawyer and the right to communicate upon arrest contains rules on access to a lawyer in European arrest warrant proceedings including a new right of access to a lawyer in the issuing state.

in the United Kingdom. This argument is linked to the undoubted fact that even within the European Union there are variations in the criminal laws relating to such matters as abortion, euthanasia, assisted suicide and dangerous drugs.¹⁷¹

5.194 We address this issue in the following paragraphs. We first put the matter in context.

The Context

5.195 Article 2 of the Framework Decision distinguishes two kinds of cases.

5.196 Under Article 2(1), surrender is possible in relation to an act or conduct punishable by the law of the issuing State by a custodial sentence of at least 12 months or, in a conviction case, if the surrender is requested for the execution of a prison sentence or detention order of at least 4 months. As far as the law of the requested State is concerned, by reason of Article 2(4) the execution of the European arrest warrant may be subject to the condition that the act constitutes an offence under the law of that State (irrespective of the maximum penalty for that offence). The absence of dual criminality provides an optional ground for non-execution of the warrant under Article 4(1).

5.197 Under Article 2(2), acts or conduct falling within the 32 categories mentioned in that paragraph give rise to surrender without verification of the act or conduct's double criminality, provided that the act or conduct in question is punishable by the issuing State by a deprivation of liberty of at least 3 years. It is relevant to note that Article 2(2) does not contain or create new criminal offences. It requires punishability to be established according to the laws of the issuing Member State.¹⁷²

5.198 The double criminality requirements of Part 1 of the 2003 Act are contained in sections 64 and 65, which define extradition offence in accusation cases (section 64) and conviction cases (section 65). Double criminality is required in all cases, save for

¹⁷¹ Abortion in nearly all circumstances is a criminal offence in some Member States (for example, Ireland) but not others. Euthanasia and assisted suicide are criminal offences in some Member States but not others (The Netherlands). In The Netherlands certain activities in relation to dangerous drugs are not criminalised.

¹⁷² The list contains the areas of criminal offending which are a priority for harmonisation within the European Union

those involving conduct which falls within the European framework list: section 64(2) and section 65(2).

5.199 Section 64(2) applies only where the conduct occurs in the category 1 territory and no part of it occurs in the United Kingdom. In addition, it must be shown that the conduct falls within the list of 32 categories of offences and that it is punishable with imprisonment or another form of detention for a term of 3 years or more.

5.200 Section 65(2) applies only where the conduct occurs in the category 1 territory and no part of it occurs in the United Kingdom. In addition, it must be shown that the conduct falls within the list of 32 categories of offences and that a custodial sentence of 12 months or more has been imposed in the category 1 territory in respect of the conduct.

5.201 In *Office of the King's Prosecutor, Brussels v. Cando Armas*,¹⁷³ Lord Bingham of Cornhill explained the framework list offences in the following way:

“These are not so much specific offences as kinds of criminal conduct, described in very general terms. Some of these, such as murder and armed robbery, are likely to feature, expressed in rather similar terms, in any developed criminal code. Others such as corruption, racism, xenophobia, swindling and extortion, may find different expression in different codes ... Underlying the list is an unstated assumption that offences of this character will feature in the criminal codes of all member states. Article 2(2) accordingly provides that these framework offences, if punishable in the member state issuing the European arrest warrant by a custodial sentence or detention order for a maximum period of at least three years, and as defined by the law of that state, shall give rise to surrender pursuant to the warrant ‘without verification of the double criminality of the act’. This dispensation with the requirement of double criminality is the feature which distinguishes these framework list offences from others. The assumption is that double criminality need not be

¹⁷³

[2006] 2 A.C. 9 at paragraph 9

established in relation to these offences because it can, in effect, be taken for granted.”

Our Analysis

- 5.202 The removal of the double criminality requirement was one of the most controversial aspects of the Framework Decision and we are aware that criticism has been levelled at the dispensation of the double-criminality from a number of quarters. The essential point made by the critics is that a person present in the United Kingdom is at risk of being surrendered to a category 1 territory to face prosecution for conduct which Parliament has not considered it necessary to criminalise (such as holocaust denial which is an offence in Germany and Austria but not an offence in the United Kingdom), or which Parliament has legalised such as abortion under strictly defined conditions (which could, it is argued, fall within the European framework list under the rubric of ‘*murder*’). An additional concern is that the conduct is described in generic terms, such as ‘*racism and xenophobia*’ and ‘*computer related crime*’, and this creates difficulty in terms of legal certainty.
- 5.203 Despite these concerns we are not aware of difficulties arising in practice from the abolition of the double criminality rule. Moreover, the structure of sections 64(2) and 65(2) of the 2003 Act make it clear that surrender from the United Kingdom is only possible, in respect of a European framework list offence, if the conduct occurred in the category 1 territory and none of it occurred in the United Kingdom. In our opinion, this is an important safeguard. Where the conduct does occur in the category 1 territory, we can see no reason why the requested person should not be answerable for it in that territory. It is a fundamental principle of English criminal law that it applies to all persons present within the jurisdiction of the Crown Court whether or not they are British citizens.¹⁷⁴ We would expect a person who committed an offence in the United Kingdom, falling within the European framework list, to be returned from a category 1 territory whether or not the conduct amounted to an offence in that

¹⁷⁴

See for example *The Queen v. Jameson and Others* [1896] 2 Q.B., Lord Russell of Killowen C.J., at page 430

other territory: we consider that the same should apply if the offence has been committed abroad and the person is then found in the United Kingdom.¹⁷⁵

5.204 This approach serves a fundamental aim of the extradition process: to avoid the creation of safe havens through the misuse of international boundaries by those who have left the scene of their crime. The safe haven argument has another dimension: the surrendering territory is made a safer place by returning individuals to face trial for serious offences.

5.205 While we accept that harmonisation of the criminal law within the European Union has not taken place, and that significant differences exist in the Member States' substantive criminal law, the trend should be towards even greater cooperation in the suppression of crime. This is in the public interest and reinforces the rule of law: it is not in the interests of good order both within a State and internationally for crime to go unpunished as a result of movement across borders. Where foreign criminal law has been violated, and an overseas territory has suffered harm to its interests and citizens, it is no longer possible to view this with indifference on the basis that no interest of the executing territory has been affected. Wherever serious crime is committed it should not go unpunished.¹⁷⁶ Significantly, the double criminality requirement is an optional ground for non-execution of a European arrest warrant and as the need for cooperation becomes greater in an area of freedom, security and justice made up of like-minded Member States, we envisage that the double criminality requirement may be relaxed to an even greater extent where the conduct takes place wholly in the requesting territory.¹⁷⁷

¹⁷⁵ In *United States of America v. Cotroni* [1989] 1 S.C.R. 500, Wilson J. (dissenting in the result) stated (at page 1510): "A Canadian citizen who leaves Canada for another state must expect that he will be answerable to the justice system of that state in respect of his conduct there."

¹⁷⁶ The members of the 1878 Royal Commission were of the view that a surrender to a requesting State should be available even in the absence of a treaty: "It is as much to our advantage that such criminals should be punished and that we should get rid of them, as it is to that of the foreign state that they should be brought within the reach of its law" Report of the Royal Commission on Extradition C.2039 (1878).

¹⁷⁷ We note that the double criminality rule does not apply in the case of surrender either to the International Criminal Tribunal for Former Yugoslavia or to the International Criminal Tribunal for Rwanda. These Tribunals were created following Resolutions of the United Nations Security Council. The Tribunal statutes do not permit surrender to be declined on the basis of nationality. Nor do they contain any exception for politically motivated crimes. While these Tribunals were concerned with enforcing international humanitarian law, the emphasis was placed on international cooperation.

- 5.206 Also relevant in this connection is the obligation on Member States to take into account the interests of the victims of criminal offending. Council Framework Decision 2001/220/JHA¹⁷⁸ on the status of victims in criminal proceedings is part of a wider programme designed to enhance the protection of the victim of crimes by improving their access to justice and right to compensation. Member States are exhorted to attain the objective of affording victims a high level of protection, irrespective of the Member State in which they are present. The surrender of accused and convicted persons between Member States is an important aspect of this programme.
- 5.207 Finally, it is relevant to note that the European Court of Justice has rejected a challenge to the framework list of offences (brought on the basis that the list offended the principle of legal certainty). The Court held that the definition of offences and applicable penalties were matters to be determined by the law of the issuing State, and the issuing Member State, like all Member States, is obliged to ensure compliance with fundamental rights and freedoms.¹⁷⁹

A No Questions Asked System of Surrender

- 5.208 Among the submissions made to the Review were criticisms of the European arrest warrant on the ground that it is a no questions asked scheme of surrender which involves courts in the United Kingdom ‘*rubber stamping*’ requests received from other Member States of the European Union.
- 5.209 We address this criticism in the following paragraphs. We first explain the context.

The Context

- 5.210 As already noted, at the Tampere summit in October 1999, the European Council declared the principle of mutual recognition as the cornerstone of the European Union’s action to promote cooperation in matters of criminal justice.

¹⁷⁸ [2001] OJ L 82/1.

¹⁷⁹ Case C-303/05 *Advocaten Vor de Wereld* [2007] ECR I-3633.

- 5.211 As we have explained, the essence of mutual recognition is that the judicial authorities of each Member State accept the decisions of the judicial authorities of other Member States as equivalent to the decisions they would themselves have given. Thus, while one Member State may not deal with a certain matter in the same or even similar way as another Member State, the result will be such decisions have equivalent effect throughout the Union.
- 5.212 The Framework Decision operates on the basis of the principle of mutual recognition.
- 5.213 Part 1 of the 2003 Act was designed to give effect to the Framework Decision and replace traditional extradition procedures with a simpler more expeditious procedure for surrender based on the mutual recognition principle.
- 5.214 Notwithstanding the simplified procedure, the surrender process in the United Kingdom is overseen by the independent and impartial judiciary (both at first instance and on appeal), who have the power to discharge the requested person on a number of grounds (either because the procedures under the 2003 Act have not been followed, or because one of the statutory bars to extradition has been made out). The courts in England and Wales have also developed an abuse of process jurisdiction as an additional safeguard against improperly motivated requests for surrender.

Our Analysis

- 5.215 We do not think it accurate to characterise the surrender process under Part 1 of the 2003 Act as a '*no questions asked procedure*', that is a procedure involving the automatic execution of the foreign warrant. The legislation is based on mutual trust, not blind faith. As we have noted in our description of the relevant statutory provisions, the process requires a warrant conforming to the requirements of section 2, and if the warrant does not comply with those requirements the arrested person is entitled to be discharged. Thereafter, there are a number of safeguards within the statutory process which operate in the requested person's favour. The extradition judge is obliged or has a discretion to discharge the requested person in any of the following circumstances:

- (i) If the arrested person is not provided with a copy of the European arrest warrant as soon as practicable after his arrest (section 4(4));
- (ii) If the arrested person is not brought as soon as practicable before the appropriate judge (section 4(5));
- (iii) If the arrested person is not provided with a copy of the European arrest warrant as soon as practicable after his provisional arrest (section 6(7));
- (iv) If the arrested person is not brought as soon as practicable before the appropriate judge, following provisional arrest (section 6(6));
- (v) If, following provisional arrest, the warrant and certificate are not provided to the appropriate judge within the time specified (section 6(6));
- (vi) If it is not proved on a balance of probabilities that the arrested person is the person in respect of whom the warrant was issued (section 7);
- (vii) If the extradition hearing does not begin within the permitted period (section 8);
- (viii) If the offence specified within the warrant is not an extradition offence (section 10);
- (ix) If the person's extradition to a category 1 territory is barred by reason of any of the statutory bars to extradition (section 11);
- (x) If , in a case where the person was convicted in his absence, the trial took place without his knowledge and, in the event of surrender to the category 1 territory he would not be entitled to retrial with certain minimum guarantees (section 20);
- (xi) If extradition would not be compatible with the Convention rights contained in Schedule 1 to the Human Rights Act 1998.

- 5.216 Each of these issues, once decided by the extradition judge, may be the subject of either review or appeal and the matter will be considered again by the High Court.
- 5.217 In addition, the requested person may seek to challenge the European arrest warrant on the grounds that it is technically deficient, or that the extradition proceedings amount to an abuse of process on the ground that they have been brought for an illegitimate purpose.
- 5.218 In a scheme designed to combine speed with fairness, we consider that the protections available to an accused person under Part 1 of the 2003 Act are formidable. The protections, which are scrutinised carefully by the court, go some way to explaining why surrender from the United Kingdom (in contested cases) is not generally achieved within the timescales set out in the Framework Decision.¹⁸⁰
- 5.219 Clearly, the principle of mutual recognition does not involve the eradication of judicial oversight of the surrender process and the 2003 Act provides for judicial oversight throughout the process. However, we believe that at the heart of the principle is the idea that Member States should not fear the differences between their legal systems, and that these differences are not a sufficient basis to justify a refusal to cooperate. True it is, that the trust between Member States enables the courts in the United Kingdom to proceed without inquiring into the merits of the case or questioning what appears on the face of the warrant, but the inclusion in the 2003 Act of the various bars to extradition, and the other numerous bases upon which a person may be discharged, demonstrates that the system of surrender is by no means automatic. It is also clear that where surrender would be in violation of Convention rights, or result in some other form of injustice or oppression, then courts can and do intervene to discharge defendants. The European arrest warrant has not been implemented in the United Kingdom in a way which does not protect requested persons.
- 5.220 Finally, in respect of this criticism, we note the following observation. Trust and public confidence in overseas legal systems is not to be taken for granted. For this reason, we also believe that the judiciary should take the opportunity so far as

¹⁸⁰ The Crown Prosecution Service informed us that based on their experience of outgoing and incoming surrender the United Kingdom is among the slowest State within the scheme to process warrants from arrest to surrender.

possible, to develop an awareness of other Member States' systems of criminal justice and that this can be done not only through the European Judicial Network but also as a result of direct communication between judicial authorities (as envisaged by Article 15(2) of the Framework Decision).¹⁸¹ Increased understanding is likely to secure closer institutional cooperation, to the benefit of all those concerned in the surrender process.¹⁸²

Time Limits

- 5.221 Another criticism of the operation of the European arrest warrant is that the short time limits within which surrender is to take place. It is claimed that the speed of the proceedings dealing with a European arrest warrant may be a source of injustice. We were also invited to consider this issue by the Joint Committee on Human Rights.¹⁸³ We address this criticism below.
- 5.222 We first place the criticism in context.

The Context

- 5.223 Article 17 of the Framework Decision contains time limits for the decision to execute a European arrest warrant. The general rule is that a European arrest warrant is to be dealt with and executed as a matter of urgency. In cases where the requested person

¹⁸¹ The Commission has issued a Communication on judicial training in the European Union: Com (2006) 356 final, 29th June 2006. This Communication advocates better training for judges and lawyers and workshops to promote cooperation between Member States and establish best practices. We welcome initiatives of this nature and believe that they can only enhance mutual trust. Similarly, we welcome the creation of a network of judicial experts for the European arrest warrant and we are aware that meetings of judges from across the European Union have taken place on a number of occasions.

¹⁸² The Council of the European Union Final Report on the fourth round of mutual evaluations, 8302/2/09, Brussels, 18 May 2009, urged Member States to take measures to promote direct communication between national judicial authorities dealing with European arrest warrant cases and their counterparts abroad. The Council called upon Member States to provide judges, prosecution and judicial staff with appropriate training on the European arrest warrant and foreign languages and suggested that the European Judicial Training Network could examine the training of defence lawyers, with financial support from the European Union JHA financial programmes.

¹⁸³ Paragraph 180, "*The Human Rights Implications of UK Extradition Policy*", HL Paper 156, HC 767, published on 22 June 2011.

consents to surrender, the final decision on execution should be taken within a period of 10 days after consent has been given. In other cases, the final decision on execution should be taken within a period of 60 days after the arrest of the requested person, although this period may be extended by a further 30 days.

5.224 Article 23 provides that the arrested person shall be surrendered no later than 10 days after the final decision on the execution of the warrant.

5.225 Part 1 of the 2003 Act contains a number of time limits:

- (i) The date fixed for the start of the extradition hearing must be within 21 days of the date of arrest, (but may be postponed upon application in exceptional circumstances) (section 8(4) and (5));
- (ii) Any appeal from the decision of the extradition judge (whether brought by the requested person or by the issuing judicial authority), must be brought within 7 days of the day on which the decision is made (sections 26 and 28);
- (iii) An appeal to the High Court must be heard within 40 days of arrest, (but this period may be extended and as a matter of practice this is almost invariably the case);
- (iv) An appeal to the Supreme Court must be brought within 14 days starting with the day on which the High Court refuses leave to appeal (section 32);
- (v) As a general rule surrender must take place within 10 days of the conclusion of the domestic proceedings (sections 35 and 36).

Our Analysis

5.226 The time limits contained within the 2003 Act were designed to ensure that European arrest warrants were executed with minimum delay. The time limits are consistent with the Framework Decision and also with the interests of justice generally:

complexity and delay are inimical to extradition procedures.¹⁸⁴ It is clearly in the interests of justice for surrender to take place as soon as is reasonably possible. In accusation cases the requested person should be surrendered as soon as possible to the requesting State so that he/she can challenge the basis of his or her detention and so that the trial can take place in accordance with the reasonable time guarantee contained in Article 6 of the Human Rights Convention.¹⁸⁵

5.227 It is necessary to consider whether these time limits are observed in practice and, if so, whether they cause injustice either in the domestic extradition proceedings or, following surrender, in the issuing Member State.

5.228 It appears from the Commission's evaluation reports, that (in contested cases) the United Kingdom is failing to meet the 90 day time limit in a proportion of its cases. From our own experience, we are aware that contested proceedings before the extradition judge can take several months to be brought to a conclusion and it is frequently the case that extradition hearings are postponed beyond the 21 day period, in the interests of justice. We are also aware that so great is the volume of appeals that hearings before the High Court are rarely heard within the 40 day period: in reality it takes several months for a case to proceed through the court process.¹⁸⁶

5.229 We have received no evidence to suggest that compliance with the time limits set out in Part 1 of the 2003 Act (other than the time limit within which an appeal to the High Court must be brought)¹⁸⁷ is a source of injustice or oppression. The extradition judges invariably grant adjournments where there is good reason and the period of time between the conclusion of the first instance proceedings and the hearing of any appeal provides ample time for the evidence and arguments to be marshalled.¹⁸⁸

¹⁸⁴ *Pilecki v. Circuit Court of Legnica, Poland* [2008] 1 WLR 325, per Lord Hope of Craighead at paragraph 26.

¹⁸⁵ Article 6 provides: "*In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time ...*"

¹⁸⁶ The designated extradition judges at City of Westminster Magistrates' Court informed us that any appeal delays the extradition process for an average of four months. They also expressed concern over what they perceived to be delaying tactics and attempts to frustrate surrender. The Scottish Sheriffs also informed us of problems of delay at almost every stage of the court process.

¹⁸⁷ We have recommendations to make in relation to the strict time limit for appealing to the High Court and these recommendations are addressed in the section dealing with other matters.

¹⁸⁸ The designated extradition judges at City of Westminster Magistrates' Court were of the firm view that the system under Part 1 of the 2003 Act was plagued by delay and argued strongly for the time from arrest to the final hearing and length of hearings to be shortened. They were

Pre-Trial Detention

- 5.230 Linked to the time limit issue is the issue of lengthy pre-trial detention. It has been suggested that early surrender leads to lengthy periods of pre-trial detention and that once surrendered, defendants are held in prison establishments with standards which fall far short of what would be deemed to be acceptable in the United Kingdom.

Our Analysis

- 5.231 So far as the first matter is concerned, it is of course for the issuing judicial authority to decide when to issue a European arrest warrant. That said, we agree that it is undesirable in any system of criminal justice for an accused person to be kept in custody awaiting trial for any unreasonable period of time.¹⁸⁹ It seems to us that the problem of lengthy periods of pre-trial detention can be addressed in a number of ways:

- (i) At European Union level Member States should be encouraged to ensure that proceedings are brought to trial without unreasonable delay, as is required by Article 6 of the Human Rights Convention in any event.
- (ii) Wherever possible Member States should issue European arrest warrants so as to limit the period of time an accused person spends in custody. For example, where the whereabouts of the requested person are known, and where he or she has a settled residence, it may be possible to issue a warrant at a point when the case is ready for trial or almost ready for trial.
- (iii) Greater use should be made of the so-called European Supervision Order.¹⁹⁰

particularly critical of the number of experts' reports, dealing with human rights arguments, obtained at considerable public expense which in the final analysis demonstrated that the point at issue was irrelevant or without merit.

¹⁸⁹ We were informed by the Foreign and Commonwealth Office that consular staff have provided assistance to over 120 British nationals extradited to 17 different European Union Member States in the three year period to January 2011. Approaches are made to the local authorities if it seems that a trial has not taken place within a reasonable time.

¹⁹⁰ As noted above, Council Framework Decision 2009/829/JHA of 23 October 2009, on the application between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. Following the decision of the High Court in *Herdman v City of Westminster Magistrates'*

- 5.232 We hope that judicial authorities in all Member States will adopt a more flexible approach to the question of bail (in advance of the trial) and the transfer of prisoners (in the event of conviction and following the trial).
- 5.233 A more radical solution, which would require amendment to the Framework Decision or incorporation in any surrender arrangements which amend or replace the Framework Decision, is to include a system of postponed surrender with the requested person remanded on bail in the executing State until his or her appearance is required in the issuing State. It appears to us that such a system would meet the concerns of lengthy pre-trial custody and would be consistent with the concept of a single European area in which free movement of persons is guaranteed and where there is mutual recognition of judicial decisions.¹⁹¹
- 5.234 So far the conditions of detention are concerned, we agree that the goal of creating an area of genuine freedom, security and justice requires (so far as possible) comparable treatment of individuals throughout the European Union. This is a matter that requires coordination at European Union level. We recommend that the Government respond to the invitation issued by the Commission in the Green Paper on the action necessary for resolving problems of both pre and post-trial detention including sub-standard conditions of detention to suggest ways to achieve this.
- 5.235 In order to promote a culture of mutual confidence and trust we recommend:
- (i) the promotion of communication between judges throughout the European Union;
 - (ii) the promotion of communication between lawyers throughout the European Union;

Court [2010] EWHC 1533 (Admin) and the surrender of the requested persons, they were admitted to bail by the Greek court and permitted to return to the United Kingdom with sureties for their return to Greece.

¹⁹¹ The designated extradition judges at City of Westminster Magistrates' Court suggested that such a scheme would very substantially reduce the number of extradition hearings and save a great deal of time and money.

- (iii) greater efforts should be made to improve the conditions of detention for persons detained both pre and post-trial.

5.236 We expect that the trust necessary to improve the working of the European arrest warrant will develop through dialogue and experience and that effective efforts will be made to improve prison conditions. It will be for the independent and neutral judiciary to decide whether surrender should take place, having regard to the requirements of Articles 3 and 8 of the Convention.

Part 1 of The 2003 Act and the Framework Decision¹⁹²

5.237 As part of our review we were asked to consider the operation of the European arrest warrant and in this section we explain the differences between the 2003 Act and the Framework Decision: in particular, we consider whether any of the optional bars for non-execution or guarantees in particular cases not already reflected in the 2003 Act should be brought into effect.

5.238 As is apparent from a comparison between the 2003 Act and the Framework Decision on the European Arrest warrant, the 2003 Act did not effect a simple and straightforward transposition of the Framework Decision into the law of the United Kingdom.

5.239 The principal differences between the 2003 Act and the Framework Decision may be summarised as follows:

- (i) Incoming requests are dealt with by a designated authority (the Serious Organised Crime Agency in England, Wales and Northern Ireland and the Crown Office and Procurator Fiscal Service in Scotland).
- (ii) The 2003 Act introduced additional grounds for refusal based on the passage of time¹⁹³ and extraneous considerations.¹⁹⁴

¹⁹² See Appendices B and C for a summary of the Framework Decision and the 2003 Act respectively.

¹⁹³ Section 14.

¹⁹⁴ Section 13 (although this reflects Recital 12 to the Framework Decision).

- (iii) The 2003 Act introduced an additional ground of refusal such as where the International Convention against the Taking of Hostages applies.¹⁹⁵
- (iv) The 2003 Act introduced a specific human rights provision which requires the extradition judge to decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.¹⁹⁶
- (v) The 2003 Act permits the Secretary of State, for reasons of national security, to prevent extradition if she believes that the requested person was acting in the interests of the United Kingdom by carrying out actions conferred or imposed by or under an enactment or is not liable as a result of an authorisation given by the Secretary of State for his or her action.¹⁹⁷

5.240 In relation to each of the optional grounds for non-execution of a European arrest warrant, the position under the 2003 Act is as follows:

- (i) Article 4(1) deals with double criminality. Double criminality is required under the 2003 Act, save in respect of the categories of offences listed in Article 2(2) of the Framework Decision.¹⁹⁸ It follows that Article 4(1) is reflected in the 2003 Act.
- (ii) Article 4(2) enables the executing Member State to give precedence to domestic prosecutions. This is reflected in the 2003 Act.¹⁹⁹
- (iii) Article 4(3) is an aspect of the *ne bis in idem* rule. It is partly reflected in the 2003 Act.²⁰⁰ The difference between the 2003 Act and Article 4(3) is that there is no specific statutory bar which operates solely on the basis that the

¹⁹⁵ Section 16.

¹⁹⁶ Section 21.

¹⁹⁷ Section 208

¹⁹⁸ However, in the case of those offences the double criminality rule is relaxed only to the extent that double criminality is not necessary if all the conduct occurred outside the United Kingdom.

¹⁹⁹ Sections 8A and 22

²⁰⁰ Section 12

United Kingdom has decided not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings.²⁰¹

- (iv) Article 4(4) deals with statutory time-bars operating in the executing Member State. There is no precise equivalent of this optional ground for refusal in the 2003 Act.²⁰²
- (v) Article 4(5) deals with another aspect of the *non bis in idem* principle (conviction and sentence in a non-European Union Member State). This is reflected in the 2003 Act.²⁰³
- (vi) Article 4(6) deals with the position where the executing Member State assumes responsibility for executing the sentence imposed on a national or resident in accordance with its own domestic law. There is no precise equivalent in the 2003 Act, although the Repatriation of Prisoners Act 1984 (as amended by the Police and Justice Act 2006 and the Criminal Justice and Immigration Act 2008) does provide a mechanism for the return of serving prisoners to the United Kingdom following conviction in another Member State. The Framework Decision on the transfer of prisoners is likely to lead to an increase in the number of sentenced persons, where the '*optimum social rehabilitation*' can be achieved in the prisoner's home Member State.²⁰⁴
- (vii) Article 4(7)(a) governs the situation where the offence or offences for which surrender is sought are committed in whole or in part in the territory of the executing Member State. This bar is reflected (in part) in sections 64 and 65 which provide that surrender in respect the categories of offences in the European framework list is not available if part of the conduct took place in the United Kingdom. The more general forum bar provisions are summarised below.

²⁰¹ See paragraphs 4.44-4.46

²⁰² As a general rule criminal offences in the United Kingdom are not subject to limitation period. In any case where this point is raised we assume it would fall to be considered as an aspect of the double-criminality rule.

²⁰³ Section 12

²⁰⁴ [2008] OJ L327/27. See above paragraphs 4.26-4.33.

- (viii) Article 4(7)(b) deals with extra-territorial offences. This is an aspect of the double-criminality principle and is reflected in the 2003 Act (sections 64 and 65).

The Optional Bars to Non-Execution Which Are Not Reflected in the 2003 Act

- 5.241 Apart from the forum bar, which we address below, the only optional bars to non-execution which do not appear in the 2003 Act are Articles 4(3) (in part), (4) and (6).
- 5.242 So far as Article 4(3) is concerned, we see no need to legislate so as to provide a statutory bar to surrender in circumstances where the United Kingdom has decided not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings. We have reached this conclusion for three principal reasons. First, the situation envisaged by Article 4(3) can be dealt with by the human rights bar and no further protection is necessary. Secondly, Article 54 of the Schengen Convention would operate to prevent prosecution in the issuing Member State that is if a decision not to prosecute had been taken on the merits in any other Member State, including the United Kingdom. Thirdly, we would not expect the United Kingdom courts to surrender a requested person who had been provided with an assurance that he would not be prosecuted domestically for the offence on which the European arrest warrant is based, and the courts' abuse of process jurisdiction is broad enough in scope to provide the necessary protection against oppression.²⁰⁵
- 5.243 So far as Article 4(4) is concerned we see no reason to implement any statutory time-bar; as a general rule criminal offences in the United Kingdom are not subject to limitation periods and in any case where the point is raised we assume that it would fall to be considered as an aspect of the double criminality rule.
- 5.244 In the case of Article 4(6), we have made recommendations for assuming responsibility for executing custodial sentences of up to 12 months, imposed on nationals or residents at paragraphs 5.95-5.99.

²⁰⁵

The Joint Committee on Human Rights recommended that extradition should be barred where the Crown Prosecution has decided not to prosecute for the same facts (paragraph 104). See also paragraphs 4.26-4.33 and footnote 10 to paragraph 6.15.

Guarantees in Particular Cases

- 5.245 We think it helpful at this stage to summarise the effect of Articles of the Framework Decision, which sets out the guarantees which may be required by the executing Member State, and its relationship with the 2003 Act.
- 5.246 Article 5 of the Framework Decision deals with guarantees which may be required before the executing Member State consent to surrender.
- 5.247 Article 5(1) dealt with trials *in absentia* and was deleted by the Council Framework Decision 2009/299/JHA of 26th February 2009. The position of *in absentia* trials is governed by section 20 of the 2003 Act, which is compliant with the requirements of the Framework Decision (as amended).
- 5.248 Article 5(2) deals with life sentences. It provides that if the offence on the basis of which the European arrest warrant has been issued is punishable by a custodial life sentence, the execution of the warrant may be subject to the condition that the issuing Member State has provision in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency. There is no equivalent to Article 5(2) in the 2003 Act. This omission is perhaps not surprising, given that sentences of imprisonment for life which involve custodial terms in excess of 20 years are frequently imposed in the United Kingdom.²⁰⁶ This provision has not, as yet, caused any difficulty in respect of any United Kingdom outgoing requests for surrender.
- 5.249 Article 5(3) deals with the return of nationals and residents to the executing Member State for the purpose for serving any custodial sentence passed in the issuing Member State. It provides that surrender may be subject to the condition that the person is returned to the executing Member State in order to serve his or her sentence. There is no equivalent to this provision in the 2003 Act so far as incoming requests are

²⁰⁶ As we have noted above, in England and Wales, sentences of imprisonment for life are governed by criteria contained in the Criminal Justice Act 2003. Sections 269 to 277 and Schedules 21 and 22 provide a statutory scheme for the setting of minimum terms in cases of murder. In *R v. Bieber* [2009] 1 WLR 223, the Court of Appeal considered whether a whole life sentence imposed under section 269(4) of the Criminal Justice Act 2003 was compatible with Article 3 of the Convention. Lord Phillips of Worth Matravers C.J., who gave the judgment of the Court, said that an irreducible life sentence, if imposed to reflect the requirements of punishment and deterrence for a particularly heinous crime, was not in potential conflict with Article 3.

concerned. In the case of outgoing requests the Secretary of State may give such an undertaking to a person acting on behalf of the requesting territory as to the person's return to the territory in order to serve his or her sentence.²⁰⁷ We see no reason to enact a specific provision to cater for the return of nationals and residents to the United Kingdom for the purpose of serving any custodial sentence passed in the issuing Member State. We have concluded that this is adequately catered for by the Repatriation of Prisoners Act 1984 and the recent Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. However, if the Framework Decision does not result in more nationals and residents serving then their sentence in the United Kingdom rather than being subject to European arrest warrants, then the Government may wish to consider introducing a provision to reflect this guarantee

²⁰⁷ Section 153C. We are aware that individuals have been surrendered to the United Kingdom subject to such undertakings.

Part 6 Forum

6.1 One of the issues we were asked to consider was whether the so-called forum bar to extradition should be brought into force.

6.2 In this context, ‘*forum*’ is used as meaning the most convenient or appropriate place for a legal proceeding to be heard and determined. In civil proceedings the Latin term ‘*forum conveniens*’ is used: this is in contrast to ‘*forum non conveniens*’ which is a doctrine which gives a court power to refuse to hear a case where there is a more appropriate forum. In *Spiliada Maritime v Cansulex*,¹ Lord Diplock stated:

“The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum for the trial of the action, i.e. in which the case may be heard more suitably for the interest of all the parties and the ends of justice.”

6.3 There is no similar principle in criminal proceedings: decisions to prosecute are generally for the prosecuting authorities in each particular jurisdiction. The protection for the accused person is the *ne bis in idem* principle², which is reflected in the Framework Decision and is also given effect by Article 54 of the Schengen Convention. The *ne bis in idem* principle in the 2003 Act is found in section 12 (Part 1) and section 80 (Part 2).³

6.4 We address the forum bar issue in the following paragraphs. We first put the issue in context.

¹ [1987] AC 460, at page 476.

² “*Not twice for the same.*” More familiar to English lawyers as the rule against double jeopardy which is sometimes expressed in the common law pleas in bar to a prosecution as *autrefois acquit* (formerly acquitted) and *autrefois convict* (formerly convicted).

³ The decision as to which jurisdiction prosecutes for an offence is also not necessarily the same as to the State which enforces a sentence which has been imposed following the trial. We understand from the evidence we have received that the issue of where a sentence is served can cause considerable concern. Part of the criticism can be met by ensuring that a person is extradited for the purpose of trial and sentence and that following sentence he or she should be returned to the United Kingdom to serve the sentence imposed in the overseas territory. This will best serve the purposes of rehabilitation and we have discussed this at greater length at paragraphs 4.26-4.33.

The Context

- 6.5 Forum is not currently an express bar to extradition, although it may operate as such indirectly, for example on the basis that extradition is barred by reason of Article 8 of the Human Rights Convention. This was the conclusion reached by the High Court in *R (Bermingham) v Director of the Serious Fraud Office*.⁴ In that case, Laws L.J. explained that under the 2003 Act, neither the court nor minister possesses any discretion to further the extradition process or not to do so. If certain conditions are satisfied the court must send the case to the Secretary of State; if not, he must not. This is in contrast to the predecessor legislation. Under the Extradition Act 1870, the Fugitive Offenders Acts of 1881 and 1967 and the Extradition Act 1989, the Secretary of State possessed a general discretion whether or not to surrender the fugitive to the requesting State. Accordingly, he was on the face of it in a position to consider issues of *forum conveniens* as he thought fit, subject to judicial review. However, we are not aware of any instance in which the Secretary of State did exercise his discretion to decide which jurisdiction should take priority.⁵
- 6.6 The *Bermingham* case concerned a fraud involving three British citizens and a request for extradition by the United States. The defendants claimed they should have been investigated and prosecuted, if at all, in England and Wales.⁶ Laws L.J. acknowledged that the possibility of a trial in the United Kingdom was not “*legally irrelevant in a case like this.*” He added, “*There might be an instance in which such a possibility could tip the balance of judgment in favour of a conclusion that the defendants’ extradition would amount to a disproportionate interference with his Article 8 rights.*”⁷

⁴ [2007] QB 727

⁵ It is of course the case that sections 8A, 22, 88 and 97 of the 2003 Act require postponement of the extradition process where the person sought is charged with an offence in the United Kingdom, but these provisions do not confer any power of discretionary judgment. These sections operate on the basis that the question of prosecution is a matter for the prosecuting authorities and not for the courts or the Secretary of State.

⁶ [2007] QB 727. The extradition judge and the High Court rejected this claim. The courts found that there were substantial links between the alleged offending and the United States. The defendants were extradited to the United States on 13 July 2006. They were released on bail (subject to being electronically monitored) on 14 July 2006. On 22 February 2008 they pleaded guilty and were sentenced to 37 months’ imprisonment. They were subsequently repatriated to the United Kingdom (in January 2009) to serve the outstanding portion of their sentence. They were released from custody in August 2010. This illustrates that the State which enforces the sentence need not be the State which imposes it.

⁷ At paragraph 121.

6.7 The decision of the High Court created a good deal of media comment. Subsequently, a forum bar was inserted into the 2003 Act by paragraph 5 of Schedule 13 to the Police and Justice Act 2006, section 19B (in Part 1) and section 83A (in part 2) . These sections have not been brought into force.⁸

6.8 Section 19B, which bears the marginal note ‘*Forum*’, provides as follows:

“(1) *A person's extradition to a category 1 territory ("the requesting territory") is barred by reason of forum if (and only if) it appears that-*

(a) a significant part of the conduct alleged to constitute the extradition offence is conduct in the United Kingdom, and

(b) in view of that and all the other circumstances, it would not be in the interests of justice for the person to be tried for the offence in the requesting territory.

(2) For the purposes of subsection (1)(b) the judge must take into account whether the relevant prosecution authorities in the United Kingdom have decided not to take proceedings against the person in respect of the conduct in question.

(3) This section does not apply if the person is alleged to be unlawfully at large after conviction of the extradition offence.”

6.9 Section 83A is in identical terms in relation to part 2 territories.

6.10 There are a number of points to note in relation to sections 19B and 83A:

⁸ Paragraph 6 of Schedule 13 to the Police and Justice Act 2006 provides that an order bringing the provisions into force is not to be made within the period of 12 months beginning with the day on which the Act was passed (8 November 2006). If after the end of that period a resolution is made by each House of Parliament that the provisions should come into force, the Secretary of State shall make an order under section 53 bringing the sections (or one of them) into force.

- (i) The sections do not provide the extradition judge with the power to order a prosecution to take place in the United Kingdom: the sections operate as a bar to extradition not as mandatory orders to domestic prosecutors.
 - (ii) The sections require a factual investigation into whether a ‘*significant part*’ of the conduct alleged to constitute the extradition offence took place in the United Kingdom.
 - (iii) The sections require the extradition judge to take into account whether the relevant prosecution authorities in the United Kingdom⁹ have decided not to take proceedings against the person in respect of the conduct in question.
- 6.11 The thinking which underlies the two sections is that where a person has committed an offence largely or partly in the United Kingdom, indeed perhaps without ever having left these shores, the extradition judge should have the power to prevent extradition and that the requested person should be prosecuted in the United Kingdom rather than in the requesting overseas territory, particularly if his extradition would cause disruption to his life, his work or his family.

The Practical Operation of the Forum Bar

- 6.12 In the paragraphs that follow we consider how the forum bars would be likely to operate in practice.
- 6.13 Sections 19B and 33A require two conditions to be satisfied for the forum bar to prevent extradition:
- (i) that a significant part of the conduct constituting the offence occurred in the United Kingdom; and
 - (ii) that in all the circumstances it is not in the interests of justice for the person to be tried in the requesting State.

⁹ These include in England and Wales the Crown Prosecution Service, in Northern Ireland the Public Prosecution Service for Northern Ireland and in Scotland the Lord Advocate.

- 6.14 Subsection (2) requires the judge, when applying the interests of justice test, to take into account whether the United Kingdom prosecuting authorities have decided not to take proceedings in respect of the conduct in question.
- 6.15 We assume a decision not to prosecute in the United Kingdom is a factor in favour of extradition, otherwise the subsection might operate so as to prevent the individual being prosecuted at all.¹⁰
- 6.16 On their face, sections 19B and 83A make two things clear. First, the courts would have to decide the meaning of the phrase “*a significant part of the conduct*”. It could mean an “*important*” part or a “*relevant*” part or a “*more than minimal*” part of the conduct. Secondly, the courts would be required to consider in each case “*all the other circumstances*”.
- 6.17 In our view, in any case where the forum was raised, there would be no alternative to the judge conducting a detailed analysis of all relevant circumstances. The expression ‘*all the other circumstances*’ is a broad one and the extradition judge would be required to investigate whether a prosecution in the United Kingdom was viable and if so, whether there was good reason for not instituting such a prosecution. It would require the judge to consider the evidence available to the requesting State and the evidence available to the domestic prosecution authorities. It would also require scrutiny of the prosecution decision making process.
- 6.18 Whilst, over time, the courts would no doubt work out the appropriate way in which to approach these sections, each case would require separate consideration. This will be time consuming, costly and undermine the efficient and effective operation of the procedures under the 2003 Act.

¹⁰ We note however that the Joint Committee on Human Rights recommends that extradition under an EAW should be barred where the CPS has decided not to prosecute for the same facts (paragraph 104). If the prosecuting authorities decided not to prosecute in a Part 1 case, the accused person may seek to rely on the *ne bis in idem* rule as interpreted by the European Court of Justice in its case law on Article 54 of the Schengen Convention. The *ne bis in idem* rule is also reflected in Articles 3(2), 4(3) and 4(5) of the Framework Decision on the European Arrest Warrant. The double jeopardy bar in Part 1 of the 2003 Act is contained in section 12. The requested person would also be able to rely on the abuse of process jurisdiction of the court; that is, if a decision not to prosecute was taken by the Crown Prosecution Service applying the Code for Crown Prosecutors on the basis of evidential sufficiency (with no indication that the requesting State had any further evidence) or that there was no public interest in prosecuting. See paragraphs 4.26-4.33 and 5.242.

The Domestic Case Law

- 6.19 Following the decision of the High Court in Bermingham,¹¹ the issue of forum was raised in a number of appeals involving extradition requests submitted to the United Kingdom by the United States.
- 6.20 In Ahsan v Government of the United States of America,¹² the defendant's extradition was sought by the United States for the purpose of his standing trial for terrorist offences. He sought judicial review of the Director of Public Prosecution's decision not to consider prosecution in England. The application for judicial review was dismissed.
- 6.21 In R (McKinnon) v Director of Public Prosecutions,¹³ the claimant sought judicial review of the Director of Public Prosecution's decision not to prosecute him in England. The claim was dismissed on the basis that it was "unarguable".
- 6.22 In both Bermingham and McKinnon, the High Court cited with approval observations made by the Lord Ordinary¹⁴ in Wright v Scottish Ministers:¹⁵

"Extradition does not and should not depend upon the ability or otherwise of the requested state to undertake its own investigations with a view to prosecuting the case within its own jurisdiction. Such an approach would involve unnecessary duplications of effort, would result in additional delays in the prosecution of suspected criminals and would have an adverse effect upon international relations and international cooperation in the prosecution of serious crime. In most, if not all, extradition cases the requested state would depend upon the cooperation from the request state if the requested state were to embark upon its own investigation and ultimate prosecution of the case."

- 6.23 In Mustafa (Abu Hamza) v Government of the United States of America,¹⁶ a claim that the appellant should be tried in England was rejected on the basis that a trial in this

¹¹ [2007] QB 727.

¹² [2008] EWHC 66.

¹³ [2009] EWHC 2021.

¹⁴ A single judge of the Court of Session in Scotland.

¹⁵ 2004 SLT 823

jurisdiction was likely to be met with abuse of process arguments and there was a prospect that a trial which ought to take place might never do so.

6.24 In R (Bary) v Secretary of State for the Home Department,¹⁷ the claimants argued that they should be tried in England for their alleged participation in a conspiracy to murder United States citizens, United States diplomats and other internationally protected persons. Their claim was rejected on the basis that a trial in this country was neither viable nor appropriate.

6.25 The Supreme Court also considered the issue of forum in the context of a claim that extradition to the United States would be disproportionate and thus violate Article 8 of the Human Rights Convention: Norris v Government of the United States (No. 2).¹⁸ In that case, Lord Phillips of Worth Matravers PSC stated:¹⁹

“Extradition proceedings should not become the occasion for a debate about the most convenient forum for criminal proceedings. Rarely, if ever, on an issue of proportionality, could the possibility of bringing criminal proceedings in this jurisdiction be capable of tipping the scales against extradition in accordance with this country’s treaty obligations. Unless the judge reaches the conclusion that the scales are finely balanced he should not enter into an inquiry as to the possibility of prosecution in this country.”

Our Observations on the Case Law

6.26 We feel it right to point out that in each of the High Court cases in which forum was raised as an issue, the result would have been no different if section 19B and 83A had been in force. We say this for the following reasons:

- (i) In Bermingham, the District Judge and the High Court found that the case had very substantial connections with the United States and was perfectly properly triable there: the prosecution witnesses were in the United States and

¹⁶ [2007] QB 659, [2006] EWCA Crim 2918.

¹⁷ [2009] EWHC 2068 (Admin).

¹⁸ [2010] 2 AC 487.

¹⁹ At paragraph 67.

there was a “significant US dimension to the whole case”. Laws L.J. stated, “It would be unduly simplistic to treat the case as a domestic English affair.”²⁰

- (ii) In Ahsan, the claimant was alleged amongst other things to have conspired to provide material support to terrorists in furtherance of a conspiracy to murder United States nationals. There had been no investigation in this jurisdiction and the court concluded there was no proper basis for asserting he should be tried here.
- (iii) In Mustafa (Abu Hamza), the High Court concluded that a trial in England might never take place and that the appropriate venue for the prosecution was the United States.
- (iv) In McKinnon, the District Judge said: “*The Crown Prosecution Service did consider whether to launch a prosecution in the United Kingdom and for good reason decide against it. The defendant intentionally targeted computers in the United States; his actions resulted in criminal damage being suffered there, as well as causing very considerable disruption to the workings of those computers resulting in interference and disruption to military activities in the United States...My view is, unquestionably, if the defendant is to face prosecution it should be in the US*”. The High Court agreed with this conclusion.
- (iv) In Abdul Bary, the claimants were sought for prosecution in the United States for their alleged participation in the bombing of the United States embassies

²⁰

Paragraph 129, which reads as follows, “*The facts which I have described disclose a significant US dimension to the whole case; there is a Cayman Islands dimension as well, in addition to the English dimension. In relation to such transactions it is unnecessary, and probably unwise, to canvass the question which is the dominant country in terms of the acts allegedly done or the defendants' alleged “target”. The US dimension does not arise from the contingency that a telephone call or an e-mail happened to be received in that jurisdiction. It arises from the close and critical involvement of two senior Enron figures, not least at the meeting in Houston and in particular in persuading Enron to part with its money. That was essential to the alleged fraud by the defendants on the bank. They were also instrumental in setting up the corporate arrangements whereby money was ultimately transferred to the defendants. It would be unduly simplistic to treat the case as a domestic English affair. The fact that the defendants could be prosecuted here (and that there would be consequential advantages and disadvantages from the prosecution and defence perspectives) does not amount to an exceptional circumstance.*”

in Nairobi and Dar Es Salaam. There was no proper basis for a prosecution in England.

The Present Position on Decisions Concerning Forum

6.27 Recent years have seen a steady growth in both cybercrime and international organised crime. Many criminal offences now cross national boundaries, for example, computer hacking, computer related fraud, drug trafficking and other criminal conspiracies involving conspirators operating in several jurisdictions. The question of where someone should be tried for crime with a transnational or international dimension is arising for consideration in an increasing number of cases.

²¹

6.28 How are such issues presently decided in the United Kingdom? Such issues are presently resolved as a result of discussions between prosecutors. Sometimes the issue will be straightforward, for example in a conspiracy involving the majority of the conspirators in the requesting State where most of the overt acts occurred and one conspirator in this country. It is likely that a prosecutor in the United Kingdom would cede jurisdiction to the requesting State.

6.29 But the arguments might be evenly balanced; what then? The United Kingdom prosecutor meets or speaks to their foreign counterparts, consider a set of criteria and try to reach agreement where the case should be tried.

6.30 In Part 1 cases, prosecutors are assisted by the Eurojust guidelines and in the unlikely event that they cannot agree, will meet at Eurojust in The Hague where the issue will be resolved.²²

²¹ Sometimes there will be concurrent investigations in the requesting State and in the United Kingdom and, indeed, perhaps in a third or other State. In November 2009 the then Attorney General mentioned the possibility of, say 10 different countries, being involved in one case.

²² As noted above, Eurojust's role is to stimulate and facilitate cooperation in the investigation of serious cross-border crime, particularly organised crime. As such, it deals with large and complex cross-border cases, usually involving more than two EU Member States. In cases where prosecutors cannot reach agreement, Eurojust acts as a final arbiter.

- 6.31 As noted above,²³ the Eurojust Guidelines provide that there should be a preliminary presumption that, if possible, a prosecution should take place in the place where the majority of the criminality took place or the majority of the loss was sustained. When reaching a decision, prosecutors should balance carefully and fairly all the factors, both for and against, commencing a prosecution in each jurisdiction where it is possible to do so. Sometimes these two presumptions may conflict as the conduct which amounts to the criminality may have primarily taken place in one country with the loss or harm being felt in another. There are a number of factors that should be considered and which may affect the final decision.²⁴ These factors should be considered at a meeting of prosecutors from the relevant States affected by the criminal conduct. The ultimate decision on forum will depend on the circumstances of each case: the guidance is intended to bring consistency to the decision-making process.
- 6.32 The Eurojust Guidelines are referred to in the recitals to the Framework Decision on Conflicts of Jurisdiction²⁵ which provides that the competent authorities within the European Union Member States should consider the Eurojust criteria.
- 6.33 Adherence to the Eurojust Guidelines is not mandatory, although it is obviously good practice to observe them.
- 6.34 The Crown Prosecution Service informed us that the Guidelines are widely known and respected throughout Member States and domestic prosecutors rely on the Guidelines when dealing with their counterparts in other European Union States.

²³ See paragraphs 4.99-4.102

²⁴ The guidelines identify the factors as: (i) the location of the accused; (ii) the availability of extradition or surrender from one jurisdiction to another; (iii) the desirability of prosecuting all the defendants in one jurisdiction; (iv) the availability of witnesses and their willingness to travel and give evidence in another jurisdiction; (v) the protection of witnesses including, for example, the possibility of one jurisdiction being able to offer a witness protection programme when another has no such possibility; (vi) the desirability of avoiding delay; (vii) the interests of victims and whether they would be prejudiced if any prosecution were to take place in one jurisdiction rather than another; (viii) the availability of reliable, credible and admissible evidence; (ix) the effects of a decision to prosecute in one jurisdiction rather than another; (x) the relative sentencing powers of courts in the different potential jurisdictions and while this must not be a primary factor, prosecutors should ensure that the penalties available reflect the seriousness of the conduct which is the subject of the prosecution; (xi) the powers available to restrain, recover, seize and confiscate the proceeds of crime; (xii) the costs of prosecuting a case or its impact on the resources of a prosecution office (although this should only be a factor in deciding whether a case should be prosecuted in one jurisdiction rather than in another). http://www.cps.gov.uk/legal/h_to_k/jurisdiction/
²⁵ [2009] OJ L 328/42) (which Member States are required to apply by 15 June 2011).

- 6.35 The Serious Fraud Office told us they found the Eurojust Guidelines very helpful because they identify the issues to be taken into account: they do not, of course, point to one solution rather than another.
- 6.36 The Office of Fair Trading was aware of them but did not consider they were of much relevance, possibly because they had not thus far been faced with issues in this area.
- 6.37 In cases under Part 2 of the 2003 Act, there are broadly similar guidelines for dealing with cases where the United Kingdom and the United States have concurrent jurisdiction.²⁶ This guidance was signed on 18 January 2007 by Her Majesty's Attorney General, the Lord Advocate (for its application to Scotland) and the Attorney General of the United States of America. The purpose of the Guidance is apparent from its opening paragraphs:

"1. Investigation and prosecution agencies in the United Kingdom and the United States of America are committed to working together to combat crime. It is appreciated that there is a need to enhance the exchange of information in criminal cases involving concurrent jurisdiction. Early contact between prosecutors, after discussing the cases with investigators, is intended to enable them to agree on strategies for the handling of criminal investigations and proceedings in particular cases. Such liaison will help to avoid potential difficulties later in the case. In particular, early contact will be valuable in cases which are already the subject of proceedings in the other jurisdiction.

2. This document provides guidance for addressing the most serious, sensitive or complex criminal cases where it is apparent to prosecutors that there are issues to be decided that arise from concurrent jurisdiction. In deciding whether contact should be made with the other country regarding such a case, the prosecutor should apply the following test: does it appear that there is a real possibility that a prosecutor in the other country may have an interest in prosecuting the case? Such a case would usually have significant links with the other country.

²⁶ Guidance for handling criminal cases with concurrent jurisdiction between the United Kingdom and the United States of America.
<http://www.publications.parliament.uk/pa/ld200607/ldlwa/70125ws1.pdf>

3. As a matter of fundamental principle any decision on issues arising from concurrent jurisdiction should be and be seen to be fair and objective. Each case is unique and should be considered on its own facts and merits.

4. This guidance follows a step-by-step approach to determining issues arising in cases with concurrent jurisdiction. Firstly, there should be early sharing of information between prosecutors in the jurisdictions with an interest in the case. Second, prosecutors should consult on cases and the issues arising from concurrent jurisdiction. Third, where prosecutors in the jurisdictions with an interest in the case have been unable to reach agreement on issues arising from concurrent jurisdiction, the offices of their Attorneys General or Lord Advocate, as appropriate, should take the lead with the aim of resolving those issues.”

6.38 The next section of the guidance deals more fully with the sharing of information. It states, for example, that in the most serious, sensitive or complex cases where issues of concurrent jurisdiction arise, investigators and prosecutors in the two countries “*should consult closely together from the outset of investigations, consistent with the procedures established by their agencies*” (paragraph 5); and that discussions between prosecutors in the two countries should take place “*with the aim of developing a case strategy on issues arising from concurrent jurisdiction*” and that the information shared should include “*the facts of the case, key evidence, representations on jurisdictional issues, and, as appropriate, any other consideration which will enable the prosecutors to develop a case strategy and resolve issues arising from concurrent jurisdiction*” (paragraph 10).

6.39 That is followed by a section on consultation, in which it is stated first that the procedure set out in the guidance is intended to preserve and strengthen existing channels of communication between prosecutors in the two countries (paragraph 12).

6.40 The remainder of the document deals with the role of the offices of the Attorneys General and Lord Advocate and notes finally that they intend to review the implementation of the guidance on an annual basis.

- 6.41 A separate document of the same date (18 January 2007), entitled “*Attorney General's domestic guidance for handling criminal cases affecting both England, Wales or Northern Ireland and the United States of America*”, gives effect on the domestic plane to the guidance agreed at the international level by the Attorneys General and the Lord Advocate.
- 6.42 In a written Parliamentary statement on 25 January 2007, the then Solicitor General, Mike O’Brien, informed Members of Parliament of the agreement and said:

“I believe the guidance will improve communication by facilitating the early sharing of case information and consultation between prosecutors in those jurisdictions. International cooperation in fighting transnational crime is essential. Further, this guidance should assist prosecutors to have the earliest notice of cases that could be of interest to them for possible investigation and prosecution in the UK. The guidance retains the UK prosecutor's powers to decide that a case should be tried in the UK when this is possible and in accordance with the law and public interest.”

Whilst the Attorney General’s guidance requires decisions to be made in a structured manner, it does not descend into the detail of the Eurojust guidelines as to the factors to take into account in deciding where a case should be prosecuted.

- 6.43 It is plain from the evidence that we received, that the prosecuting authorities do ordinarily give careful consideration to all the circumstances in deciding whether to prosecute a case in the United Kingdom or to cede jurisdiction to an overseas prosecutor. They do not, however, do so in a formalised way against nationally agreed criteria, nor is the process transparent. Moreover, prosecutors are not necessarily aware in every case of an investigation being conducted in another country, which could result in a prosecution in the United Kingdom. We would hope that the Guidance relating to the United States of America and the Framework Decision on Conflicts of Jurisdiction²⁷ will help to ensure that there is early discussion about the most appropriate territory to assume jurisdiction. If the United Kingdom is consulted after another country has commenced an investigation, or in some extreme cases when an extradition request is made, then it is likely that the

²⁷ See paragraphs 4.35-4.38

factors in the Eurojust Guidelines will inevitably point towards prosecution in the other country.

Exorbitant Jurisdiction

- 6.44 Limited to the issue of forum is the concern which has been expressed about the exercise of what is characterised as “*exorbitant jurisdiction*” by requesting countries including, in particular, the United States of America,.
- 6.45 In common law countries, jurisdiction has historically been exercised on the basis that conduct amounting to a criminal offence occurred within the territory of the country. However, if the conduct has occurred in more than one country, then the question arises: how much of the conduct needs to have occurred in the country which initiates the prosecution? In England, the general rule is that “*a substantial measure of the activities constituting the crime*” must have occurred here.²⁸ However, Part 1 of the Criminal Justice Act 1993 allows for much less of a connection for certain criminal offences.²⁹ The United States of America has offences which are colloquially known as wire fraud³⁰ and mail fraud³¹. These allow for a prosecution to take place if, in any

²⁸ *R v Sheppard and Whittle* [2010] EWCA Crim 65. See paragraphs 3.57-3.58

²⁹ These include theft (and other offences under the Theft Act 1968), fraud, offences under the Forgery and Counterfeiting Act 1981 and conspiracy to defraud.

³⁰ § 1343. Fraud by wire, radio, or television

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.”

³¹ § 1341. Frauds and swindles

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited

fraudulent scheme, communications systems in the United States are used³². This has given rise to a concern that it would be possible for the United States of America to prosecute, and seek extradition, for an offence which was only peripherally connected to the United States (perhaps because a simple email had been routed through a server in the United States).

- 6.46 In one case, concerning an extradition request from the United States of America made under the 1989 Act, the House of Lords held that if there was any attempt by a country to exercise an exorbitant jurisdiction, then this could be dealt with by the Secretary of State when exercising her discretion.³³ It has been accepted by the High Court, in a case concerning a Spanish European arrest warrant that, now the Secretary of State cannot take these matters into account, it is for the courts to consider this issue under the human rights bar:

*“..I would accept that it is possible that a request might range so widely and have so tenuous a connection with the requesting state as to amount to the exercise of exorbitant jurisdiction. It might then be appropriate for the court to consider the situation under the rubric of s21 [the human rights bar].”*³⁴

- 6.47 The High Court considered this issue again in the context of a request from the United States and agreed that:

“the concept of exorbitant jurisdiction is one which, so it seems to me, has been largely if not wholly subsumed within human rights considerations. The only place where it is likely to have any relevance is on an issue of

any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.”

³² *United States v R Roach* [2002] USCA7 291

³³ *Re Al-Fawwaz, Re Eiderous and another* [2001] UKHL 69 at paragraph 39

³⁴ *Boudhiba v Central Examining Court No 5 of the National Court of Justice Madrid* [2006] EWHC 167 (Admin) at paragraph 44

proportionality for the purposes of art. 8. Exorbitant jurisdiction is not a separate bar.”³⁵

- 6.48 In a number of subsequent cases, the High Court has assessed the connection with the requesting State to consider if it is so tenuous as to make extradition a disproportionate interference with the right to private and family life provided for by Article 8 of the Human Rights Convention.³⁶
- 6.49 Nowadays, there is a growing acceptance that countries may properly assert jurisdiction over and prosecute criminal offences which have occurred completely outside their territory. This may be justified on the basis that the offender is a national of the prosecuting country, or because a multinational convention requires countries to prosecute certain offences (such as war crimes, genocide and crimes against humanity) and these offences may have occurred extra-territorially.
- 6.50 The definition of an extradition offence in the 2003 Act caters for these situations³⁷. It allows extradition to take place if the conduct takes place outside the requesting country, but partly in the United Kingdom, only if the United Kingdom would exercise extra territorial jurisdiction in equivalent circumstances. It also allows for extradition to take place if the conduct takes place outside the requesting country and none of it occurs in the United Kingdom but only if the conduct would have amounted to a criminal offence if it had occurred in the United Kingdom (i.e. if it satisfies the double criminality test). Finally it allows for extradition if the conduct takes place outside of the requesting country and none of it occurs in the United Kingdom and it is for specified offences under the International Criminal Courts Act 2001 which deals with genocide, crimes against humanity and war crimes.
- 6.51 It follows from the definition of “*extradition offences*” in Parts 1 and 2 of the 2003 Act, that, if an extradition request is made for conduct which only partly occurs in the requesting country and some of it occurs in the United Kingdom then extradition can only take place if the United Kingdom would have jurisdiction in similar

³⁵ *Hashmi v Government of the United States of America* [2007] EWHC 564 (Admin) at paragraph 26.

³⁶ In *R v Birmingham and others* [2006] EWHC 200 (Admin) the court commented “*The United States dimension does not arise from the contingency that a telephone call or an e-mail happened to be received in that jurisdiction.*”

³⁷ Sections 64 and 65 (Part 1) and sections 137 and 138 (Part 2).

circumstances. If the request relates to conduct which does not occur in the United Kingdom and also takes place outside the requesting country, then it must satisfy the double criminality requirement, that is unless the prosecution is for genocide, crimes against humanity, war crimes or a related offence. In any case where it appears that the request has such a tenuous connection to the requesting State, so that it amounts to the exercise of exorbitant jurisdiction, the court is able to take this into account under the human rights bars in considering Article 8 of the Human Rights Convention and can refuse the request on this basis.

Our Analysis of the Forum Issue

- 6.52 The submissions we received were divided on whether or not the forum bar should be implemented.
- 6.53 The arguments put to our review in favour of introducing the forum bar may be summarised in the following way:
- (i) Any decision on forum should be made by a judge in open court rather than by the prosecutor behind closed doors;
 - (ii) There needs to be more rigorous scrutiny of the question whether it is possible to prosecute in the United Kingdom: this is best done by a judge who is better placed than the prosecuting authority to do so;
 - (iii) The current arrangements do not provide for the requested person to be heard or give him any opportunity to influence the decision;
 - (iv) The Framework Decision expressly provides in Article 4(7)(a) for a forum bar as an optional ground for not executing a European arrest warrant and some countries have implemented this optional ground for non-execution;
 - (v) Interference with the right to respect for family life guaranteed by Article 8 of the Human Rights Convention must be exceptionally serious before this can

outweigh the importance of extradition and the forum bar would add an extra layer of protection to the extradition process;

- (vi) It would be a safeguard against over-zealous prosecutors in overseas jurisdictions.

6.54 During our Review, we detected a sentiment in some of the submissions, often not specifically articulated, that a British citizen or a permanent resident should be tried in the United Kingdom rather than elsewhere, if this is possible. To this there are two responses. First, the United Kingdom (as well as other common law countries) extradites its own nationals and only a diminishing number of countries now operates a bar to extradition based on nationality.³⁸ Second, transnational and international crime has grown significantly in recent years and the importance of effective extradition procedures, operating in the public interest, is all the more obvious. However, we recognise that this is partly a political question. Some countries do refuse to extradite their own nationals or residents and agree instead to prosecute them so that they do not gain impunity. In many instances, the United Kingdom jurisdiction would allow it to prosecute. However, to impose an obligation to do this would first affect the principle of prosecutorial discretion and secondly have significant resource implications for the country leading to increased prosecutions and the associated costs including enforcing any sentence imposed.

6.55 The arguments against introducing a forum bar can be summarised as follows:

- (i) Effective and fair arrangements already exist to decide where a person should be tried.
- (ii) Requiring forum to be decided by a judge would unnecessarily complicate and impede the extradition process and undermine international cooperation.

³⁸ As long ago as 1891 it was stated by one commentator: “*The refusal to surrender citizens must, therefore, be regarded as resting upon sentimental considerations and an exaggerated notion of the protection which is due by a state to its subjects...there appears to be no valid reason why the system of extradition, which is intended to avert a failure of justice should not be extended to citizens or subjects. As long as the citizens of a country are accorded justice abroad, no right of intervention of their government on their behalf accrues and there is no occasion for the assertion of its protective power...*”: Moore, Extradition (1891) Vol 1: cited in *The Harvard Research Project 1935* (Page 119). This reasoning, written towards the end of the nineteenth century, has even greater force in the age of the jet aeroplane.

- (iii) It would generate satellite litigation; in particular applications for judicial review directed at prosecutors seeking to compel a prosecution in the United Kingdom.³⁹
- (iv) The prosecuting authorities are better placed than the courts to decide the question of forum. The answer depends on a complex range of factors other than the defendant's interests. The court would be less able to make an informed decision.⁴⁰
- (v) The prosecutor's independence would be undermined.
- (vi) The forum bar is unnecessary: where someone is prosecuted in the United Kingdom, the domestic proceedings always take precedence.
- (vii) The forum bars would have a negative impact on the ability of the United Kingdom to fight serious and organised crime.
- (viii) When prosecutors decide a case should not be prosecuted in the United Kingdom, that decision is already open to challenge by judicial review.⁴¹
- (ix) Where the impact of a crime is in another jurisdiction, it makes sense for the offence to be tried in the place where it can most effectively be prosecuted.⁴²

³⁹ As was argued in *R (Birmingham) v Director Serious Fraud Office* [2007] QB 727 and *Ahsan v Government of the United States of America* [2008] EWHC 666 (Admin), *R (McKinnon) v Director of Public Prosecutions* [2009] EWHC 2021 (Admin), *R (Abdul Bary) v Secretary of State for the Home Department* [2009] EWHC 2068.

⁴⁰ In *Sharma-Brown-Antoine* [2007] 1 WLR 780, the Judicial Committee of the Privy Council noted that in *Wayte v United States* (1985) 470 US 598, 607, Powell J. described the decision to prosecute as, "particularly ill-suited to judicial review". The Privy Council (at paragraph 14) noted with approval the following statement of principle derived from earlier decided cases: "The great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits." (At paragraph 14).

⁴¹ Although it is also well-established that judicial review of a prosecutorial decision although available in principle is a highly exceptional remedy: *Sharma v Brown-Antoine* [2007] 1 WLR 780. Lord Bingham of Cornhill and Lord Walker of Gestingthorpe, at paragraph 14 and see our comments in relation to the position in Scotland (paragraph 6.75).

⁴² The *Harvard Research Project* (1935) noted (at page 114), "It is generally agreed that the place where the crime was committed is the place where proof with regard to it can best be

- 6.56 The Joint Committee on Human Rights⁴³ is in favour of implementing the forum bar provisions, but emphasises the need to take into account the rights of victims of crime who will often be residing in the country in which the offence was committed or where the harm was felt. The forum provisions would, they argue, allow a judge to determine the appropriate location of a trial on a case by case basis. This would enable the court to take into account the rights of both the requested person and of any victims of crime, as well as any other circumstances, including access to a legal representative and evidence.
- 6.57 The evidence of the District Judges dealing with extradition cases was strongly to the contrary. They cautioned that if brought into force the sections would generate litigation and that it would be very difficult to control the evidence of the party seeking to resist extradition. For example, it will be contended that wide ranging disclosure of documents is necessary when an “*all the circumstances interests of justice*” test has to be met.
- 6.58 The Crown Solicitor for Northern Ireland also urged a good deal of caution, this was in light of experience of the arrangements with the Republic of Ireland under the Criminal Jurisdiction Act 1975. GC100⁴⁴ doubted the practicality of introducing the bar “*in the context of the increased international trend towards ‘long arm’ legislation, (see, for example, the UK’s new Bribery Act)*”.
- 6.59 We begin our consideration of these various matters by making the point that, to some extent, different considerations apply to Part 1 and Part 2 of the 2003 Act. In the first place, the Framework Decision makes express reference to the commission of the crime in the executing Members States as a ground for optional non-execution of a European arrest warrant. Article 4(7)(a) provides:

“The executing judicial authority may refuse to execute the European arrest warrant:

...

adduced. It is also true that the State where an offence is committed is likely to be much more interested in the trial of the criminal than any other state...”

⁴³ “*The Human Rights Implications of UK Extradition Policy*”, HL Paper 156, HC 767, published on 22 June 2011.

⁴⁴ The Association of General Counsel and Company Secretaries in the FTSE 100.

7. *where [it] relates to offences which:*

(a) *are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the Member State or in a place treated as such;”*

6.60 A number of European Union Member States⁴⁵ have transposed Article 4(7)(a) into their domestic law and, of these, many have it as a discretionary bar. But this fact needs to be approached with care: how a provision of this type operates in practice depends very much on the domestic legislation of the country concerned. For example, we were informed that The Netherlands implemented Article 4(7)(a) into their domestic law, but the court needs the consent of the prosecutor and it rarely operates so as to prevent surrender from taking place.

6.61 The European Union Commission proposal, which preceded the Framework Decision, envisaged that Article 4(7)(a) would operate in circumstances where a European arrest warrant was issued in respect of an act not considered to be an offence under the law of the executing Member State and which did not occur, at least in part, on the territory of the issuing Member State. On this basis some commentators have suggested that Article 4(7)(a) is reflected in sections 64(4) and 65(2) of the 2003 Act.⁴⁶

6.62 We believe that Article 4(7)(a) of the Framework Decision is used by some Member States to cater for the situation where the prosecuting authorities in the executing Member State assume responsibility for prosecuting the conduct (or decide to take no action in respect of the conduct, either because it is not a criminal offence or because a decision is taken not to prosecute after consideration of the merits).

6.63 Whether or not these views are correct, in our view the forum bar as set out in section 19B would be contrary to the principle of mutual recognition and the detailed investigation, required by the section would militate against the expeditious, streamlined surrender process envisaged by the European arrest warrant procedure. Moreover, any decision taken by the authorities in the United Kingdom to prosecute

⁴⁵ For example, the Republic of Ireland and the Netherlands.

⁴⁶ The European Arrest Warrant In Practice: T.M.C. Asser Press (2009) Chapter 6.

or not to prosecute, (when taken after a proper assessment of the merits and absent any subsequent change in circumstances), can already be dealt with under the 2003 Act to avoid injustice.

6.64 On this analysis, the 2003 Act provides protection against surrender and section 19A, if enacted, would go further than necessary and operate inconsistently with the Framework Decision. We have also seen no evidence that there is a problem with Part 1 cases as all the cases referred to above concern Part 2.

6.65 So far as Part 2 of the 2003 Act is concerned, it is necessary to say a word about the effect that the introduction of the forum bar would have on our international treaty obligations. Differing views have been expressed on this point. Baroness Scotland of Asthal, PC, QC, the then Minister of State at the Home Office and deputy to the Home Secretary, in a letter dated 19 October 2006, sent to colleagues in the House of Lords, said this:

“It is also important to stress again that as none of the UK's bilateral treaties allow extradition to be refused on the basis of forum, as soon as such a bar to extradition came into force the United Kingdom would be in breach of international obligations owed to all of its bilateral extradition partners.

Not only will this result in significant embarrassment to the United Kingdom diplomatically, but would give our extradition partners grounds on which to refuse to consider any and all requests we make to them.”

In conclusion, she said:

“The House should be in no doubt about the consequences of the proposed amendment. The UK's judicial cooperation system with the rest of the world would be seriously damaged. The UK would be in immediate breach of a range of bilateral treaties and perhaps most importantly, the international reputation of the UK would be significantly affected.”

6.66 The views expressed by Baroness Scotland caused Liberty to seek an opinion from leading and junior counsel, who expressed the view that the enactment of the forum provisions would not necessarily place the UK in breach of its international

obligations.⁴⁷ This does not, however, answer Baroness Scotland's broader point, that the enactment of section 83A would have a detrimental effect on international cooperation and make extradition to the United Kingdom more difficult.⁴⁸

6.67 In our opinion, the implementation of the forum bar would have a detrimental impact on the scheme of extradition with no corresponding benefit to outweigh the disadvantage. We have reached this conclusion having regard to the following matters:

- (i) The decided cases suggest that the issue of forum does not in fact create unfairness or oppression. In each of the cases in which it was raised, the forum argument was dismissed and for the reasons set out above, the cases would have been decided no differently if sections 19B and 83A had been in force.
- (ii) The forum bar would only operate in circumstances where the courts had decided that extradition was otherwise appropriate. In other words, it would only have any application in circumstances where extradition was not barred for any statutory reason.
- (iii) The forum bar would only operate in circumstances where the courts had decided that extradition was otherwise compatible with the Convention rights in the Human Rights Act 1998, including Article 8.
- (iv) The forum bar would require a detailed investigation of the circumstances of the particular case, this would be a source of delay and undermine international cooperation in the fight against crime.

6.68 We appreciate that there are many who hold strong views in favour of the introduction of the forum bar and forceful arguments have been advanced to us in support of their position. It may be a considerable hardship for someone to leave his

⁴⁷ We note that Counsel summarised the effect of sections 19B and 83A in the following way: The sections "*give the court hearing the extradition case the power to refuse extradition if the UK would be a more suitable venue for trial than the State requesting extradition.*" This supports our view that a decision not to prosecute would militate in favour of extradition.

⁴⁸ The Joint Committee on Human Rights, who favour introduction of the forum bar, argue that, if necessary, bilateral treaties including the US/UK treaty should be renegotiated.

place of residence and his family and go to a foreign land to be tried in a legal system with which he is unfamiliar. However, in our firmly held view the issue of forum is better decided by the prosecuting authority than the court. A decision about where a case should be tried is *par excellence* a prosecutorial decision, as is a decision whether it should be prosecuted at all: the prosecuting authority will be familiar with the detail of the case, the available evidence and the viability of proceeding in one jurisdiction rather than another.

6.69 As Lord Lloyd of Berwick noted during Parliamentary debates on the forum bar:

*“The question of whether to prosecute must be for the prosecuting authorities and it follows that the question of where to prosecute must also be for them. Where there are two competing jurisdictions it can only be resolved by agreement between the prosecuting authorities in the two different countries. I cannot see how it could conceivably be resolved by a judge in this country.”*⁴⁹

Criticisms of the Present Procedure and Recommendations

6.70 The main criticisms of the present procedure are threefold. First, that the prosecuting authority does not give sufficient weight to the requested person’s place of residence when taking a decision as to whether to prosecute. Secondly, the process of discussion between investigators or prosecutors as to who should prosecute is not transparent. Thirdly, that the requested person has no opportunity to have his views taken into account. As to the latter, no doubt most accused persons would prefer not to be extradited or prosecuted at all. However, there may be matters which are relevant to the issue of forum as regards the personal circumstances of the requested person or their family; these will be taken into account at the point of when the existing bars to extradition are considered. We believe that this is appropriate: it is not for a defendant to dictate where he should be tried, although the prosecuting authorities must, when reaching their decisions, have regard to the defendant’s interests (and those of his family) in order to comply with Article 8 of the Human Rights Convention.

⁴⁹

HL Hansard 20 October 2009 Col. 603

- 6.71 We think that the other criticisms would be met, at least in part, if the prosecuting authorities operated to clearer agreed guidelines available for all to see. We also believe that the United Kingdom should work with other Member States to ensure that the Framework Decision on conflicts of jurisdiction operates effectively.
- 6.72 We recommend that the prosecution authorities in the United Kingdom (the Director of Public Prosecutions, the Director of Public Prosecution for Northern Ireland and the Lord Advocate) should prepare and make publicly available guidelines on decision-making in cases where the United Kingdom shares jurisdiction to prosecute with another territory. It would seem to be uncontroversial that these should be based on the Eurojust Guidelines.
- 6.73 We think that these Guidelines should address the significance to be accorded to the residence or nationality of a suspect when making a decision to prosecute.
- 6.74 Notwithstanding the considerable discretion in how the guidelines should be applied, the prosecuting authorities would be amenable on ordinary public law principles to judicial review for failure to apply the guidelines. However we anticipate it would be very rare for the court to entertain, and rarer still for the court to grant, such an application.
- 6.75 The Scottish courts are even more reluctant to interfere with a prosecutorial decision and there is an unresolved question of whether a decision of the Crown Office and Procurator Fiscal Service that failed to have regard to such guidelines would be amenable to judicial review. We doubt, however, that an individual would be left without a remedy were the guidelines to be disregarded in an obvious and blatant manner.
- 6.76 We are not aware of any Scottish decision to this effect the High Court can never intervene in a decision by a prosecutor. A decision to cede jurisdiction to another state is not a prosecutorial decision in quite the same sense as a decision to prosecute or not to prosecute. Perhaps more importantly we were advised that the principle of

nobile officium could be used to prevent what would otherwise amount to a serious injustice.⁵⁰

Our Conclusions

- 6.77 We have concluded that the forum bar provisions should not be implemented. Whilst a small number of high profile cases have highlighted the issue of forum, we have no evidence that any injustice is being caused by the present arrangements.
- 6.78 The extradition judges at City of Westminster Magistrates' Court could not think of any case already decided under the 2003 Act in which it would have been in the interests of justice for it to have been tried in the United Kingdom rather than in the requesting territory.
- 6.79 The major disadvantage of introducing the forum bar is that it will create delay and has the potential to generate satellite litigation. This would slow down the extradition process, add to the cost of proceedings and provide no corresponding benefit. Much has been achieved by the 2003 Act in making extradition more sensitive to modern needs; the introduction of the forum bar would be a backward step. Prosecutors are far better equipped to deal with the factors that go into making a decision on forum than the courts. Their decision making should, however, take place as early as possible, be more open and transparent and the factors that they take into account should be incorporated into formal guidance which should specifically address the significance to be accorded to the nationality or residence of a suspect.
- 6.80 Accordingly, we recommend that the forum bars in sections 19B and 83A should not be implemented, but formal guidance should be drawn up, made public and followed by prosecuting authorities when deciding whether or not to prosecute in the United Kingdom a case involving cross-border criminal conduct.

⁵⁰ *Nobile officium*, an inherent discretion, where no other mode of review appears competent or appropriate. An aggrieved person may petition the *nobile officium* for redress or to prevent injustice or oppression.

Part 7 The United States/United Kingdom Treaty

7.1 In this section we address the question of whether the Treaty on Extradition between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland is imbalanced.¹

7.2 We first put the issue in context.

The Context

7.3 As we have noted above, the United Kingdom and the United States have had treaties since 1794.² The 1794 Jay Treaty was followed by the Webster-Ashburton Treaty of 1842. This was replaced by the Blaine-Pauncefote Treaty in 1889 which in turn was replaced by a treaty concluded in 1931. A new treaty was agreed in 1972 and this was followed by a supplementary treaty in 1985. This supplementary treaty was itself amended by an exchange of notes between the governments in 1986.³

7.4 Under these various treaties both parties undertook to extradite accused persons on the presentation of evidence that would justify the committal for trial of the person sought if the offence of which he was accused had been committed in the territory of the requested party. In the case of the United Kingdom, evidence sufficient to justify the committal for trial of a person accused of a criminal offence is evidence to satisfy

¹ The Treaty was signed by both governments on 31 March 2003.

² The Jay Treaty which marked the end of hostilities between the United States and Great Britain and which lapsed in 1807.

³ A Treaty entered into by the United States becomes part of its domestic law upon ratification. This is provided for by Article VI of the United States Constitution. The 1972 Treaty was not ratified by the United States until 1976. It was given effect in the United Kingdom by the United States of America (Extradition) Order 1976 SI 1976 No. 2144 which came into operation on 21 January 1977. The supplementary treaty in its amended form was given effect in the United Kingdom by the United States of America (Extradition) (Amendment) Order 1986 SI 1986 No. 2020.

the *prima facie* evidence requirement;⁴ in the United States the probable cause test applies.

- 7.5 The evidential requirement in the 1972 Treaty was contained in Article IX which provided:

*“Extradition shall be granted only if the evidence be found sufficient according to the law of the requested party... to justify the committal for trial of the person sought if the offence of which he is accused had been committed in the territory of the requested party...”*⁵

- 7.6 The 1972 Treaty was replaced by the 2003 Treaty⁶ which contains a total of 24 Articles. For present purposes the relevant provision is Article 8 which governs “*Extradition Procedures and Required Documents*”.

- 7.7 Article 8(1) provides: “*All requests for extradition shall be submitted through diplomatic channels.*”

- 7.8 Article 8(2) provides that all requests for extradition are to be supported by five categories of material:

- “(a) as accurate a description as possible of the person sought together with any other information that would help to establish identity and probable location;
- (b) a statement of the facts of the offence(s);

⁴ The *prima facie* evidence request was reflected in the Extradition Act 1870 (section 10) and the Extradition Act 1989 (Schedule 1, paragraph 1). The *prima facie* case requirement did not apply in conviction cases.

⁵ Article VII(3) of the 1972 Treaty also provided that: “*if the request relates to an accused person, it must also be accompanied by a warrant of arrest issued by a judge, magistrate or other competent authority in the territory of the requesting Party and by such evidence as, according to the law of the requested Party, would justify his committal for trial if the offence had been committed in the territory of the requested Party including evidence that the person requested is the person to whom the warrant of arrest refers*”.

⁶ The 2003 Treaty was not ratified by the United States Senate until 6 December 2006. An exchange of notes took place upon the exchange of the instruments of ratification on 26 April 2007 so that the Treaty applies to Great Britain, Northern Ireland and Jersey. Shortly after the 2003 Treaty was signed, on 25 June 2003, the United States and the European Union signed an agreement on extradition. This entered into force on 1 February 2010. The 2003 Treaty underwent minor amendment as a consequence.

- (c) the relevant text of the law (s) describing the essential elements of the offence for which extradition is requested;
- (d) the relevant text of the law(s) prescribing punishment for the offence for which extradition is requested and;
- (e) documents, statements, or other types of information specified in paragraphs 3 or 4 of this Article, as applicable.”

7.9 Article 8(3) applies to accusation cases. It provides that a request for extradition of a person who is sought for prosecution shall be supported by:

- “(a) *a copy of the warrant or order of arrest issued by a judge or competent authority;*
- (b) *a copy of the charging document, if any; and*
- (c) *for requests to the United States, such information as would provide a reasonable basis to believe that the person sought committed the offence for which extradition is requested.”*

7.10 Article 8(4) applies to conviction cases and it is not necessary to summarise its terms: it has no relevance to the issue currently under consideration.

7.11 For present purposes, the important provision is Article 8(3)(c). This provision makes it clear that in the case of extradition requests submitted by the United Kingdom to the United States, it is necessary for the formal request for information to include “*such information as would provide a reasonable basis to believe that the person sought committed the offence for which extradition is requested.*” This requirement applies only to requests to the United States and not to requests submitted by the United States to the United Kingdom.

7.12 Article 10 allows the United Kingdom to request additional information be provided within a specified period⁷.

⁷ See footnote 54 to paragraph 8.64

- 7.13 It is now necessary to summarise the relevant provisions of the 2003 Act.

Relevant Provisions of the 2003 Act

- 7.14 As noted above, the 2003 Act, which came into force on 1 January 2004, introduced a new scheme for extradition: Part 2 of the Act deals with extradition to designated category 2 territories.
- 7.15 The United States was designated for the purposes of Part 2 with effect from 1 January 2004.⁸
- 7.16 As we have explained, the procedures under Part 2 of the Act provide that once the Secretary of State⁹ receives a valid request for extradition to the United States she is bound to issue a certificate under section 70.¹⁰ The case is then sent to the extradition judge who issues a warrant of arrest. Then, following the requested person's arrest, the extradition judge conducts the initial hearing followed by the extradition hearing.
- 7.17 Unless the requesting category 2 territory has been further designated by the Secretary of State for the purposes of section 84(7), the requesting category 2 territory is required to comply with the requirements of section 84.
- 7.18 In the absence of further designation, section 84(1) provides that the extradition judge must decide whether there is evidence sufficient, "*to make a case requiring an answer*" by the person whose extradition is being sought as if the proceedings were the summary trial of an information against him.¹¹
- 7.19 The United States has been designated for the purposes of section 84 of the 2003 Act with the result that extradition requests received from the United States need not be

⁸ The Extradition Act 2003 (Designation of Part 2 territories) Order 2003 SI 2003/334.

⁹ The Scottish Ministers in Scotland.

¹⁰ This is subject to the conditions set out in section 70 being satisfied.

¹¹ The test to be applied in England and Wales is known as the *Galbraith* test as formulated in *R v Galbraith* [1981] 1 WLR 1039 and page 1042: whether the prosecution evidence taken at its highest is such that a jury properly directed could convict upon it. This was held by the House of Lords to be the test applicable in extradition proceedings: *R v Governor of Brixton Prison, Ex parte Alves* [1993] AC 284 at pages 290 and 292.

accompanied by evidence sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information.¹²

7.20 In addition to the relaxation of the *prima facie* evidence requirement, designated category 2 territories are only required to provide information (as opposed to evidence) when applying for arrest warrants, whether provisional or otherwise.¹³

7.21 Since 1 January 2004, the United States has relied on its designation as a category 2 territory and its designation for the purposes of sections 71, 73 and 84.

7.22 Accordingly, in all extradition requests submitted to the United Kingdom after 1 January 2004, the United States, consistent with its status as a territory designated for this purpose, has not provided *prima facie* evidence: it has instead provided information sufficient to satisfy the requirement of the 2003 Act.¹⁴

7.23 In the case of requests submitted by the United Kingdom to the United States the position was more complicated. The reason for this was as follows. Although the 2003 Treaty was signed on 31 March 2003, it was not ratified by the United States Senate until 2006; the treaty received the unanimous ‘advice and consent’ of the US Senate Foreign Relations Committee on 29 September 2006 and US President signed the Treaty Approval Document on 6 December 2006. The Treaty entered into force on 26 April 2007 upon the exchange of instruments of ratification at Lancaster House in London. In the period between 1 January 2004 until the ratification of the 2003 Treaty, the United Kingdom was required to comply with the requirements of the 1972 Treaty, which continued to have binding effect as a matter of United States domestic law.¹⁵

¹² The Extradition Act 2003 (Designation of Part 2 territories) Order 2003 SI 2003/334, paragraph 3. There has been a similar designation under section 86 which applies if there has been a conviction in a person’s absence and they have not deliberately absented themselves.

¹³ If the category 2 territory is not designated, evidence is required instead of information, Section 71(4). (In the case of arrest warrants issued following the receipt of a full extradition request) and section 73(5) (in the case of provisional arrest warrants).

¹⁴ As a matter of practice, extradition requests submitted to the United Kingdom by the United States tend to include a good deal of information, including evidence usually in the form of affidavits from representatives of the prosecuting authority. These affidavits contain a narrative summary of the case, an outline of the procedural history, and produce the relevant legal texts.

¹⁵ As noted above, Article VI of the United States Constitution provides that a Treaty entered into by the United States becomes part of its domestic law upon its coming into effect. Thus,

- 7.24 As we have noted, Article VII of the 1972 Treaty provided that an extradition request submitted in respect of an accused person had to be accompanied by a warrant of arrest and:

“such evidence as, according to the law of the requested Party, would justify his committal for trial if the offence had been committed in the territory of the requested Party...”

- 7.25 Article IX of the 1972 Treaty provided:

“Extradition shall be granted only if the evidence be found sufficient according to the law of the requested Party either to justify the committal for trial of the person sought if the offence of which he is accused had been committed in the territory of the requested Party or to prove that he is the identical person convicted by the courts of the requesting Party.”

- 7.26 The practical effect of these provisions was that accusation requests submitted by the United Kingdom to the United States were required to satisfy the probable cause evidence requirement.¹⁶

- 7.27 From 26 April 2007, requests submitted by the United Kingdom to the United States have been required to satisfy the requirements of the 2003 Treaty and, in particular, Article 8(3)(c).

the 1972 Treaty had the force of law in the United States until the 2003 Treaty entered into force.

¹⁶ In *R (Norris) v The Government of the United States of America* [2006] EWHC 280 (Admin), the High Court rejected a complaint that the Secretary of State should have removed the United States from the list of designated category 2 territories for the purpose of sections 71, 73 and 84 of the 2003 Act. The President of the Queen’s Bench Division (now Lord Judge C.J.) stated (at paragraph 34): *“There is at present a lack of symmetry between the United States and the United Kingdom which will continue until either the United States has ratified the 2003 Treaty or the Secretary of State seeks to obtain and receive Parliamentary approval for the removal of the United States from its current designation...In the meantime, although Article IX continues to govern any extradition proceedings at the request of the United Kingdom in the United States, it no longer applies to extradition proceedings here at the request of the United States. In short, the procedure which applies on one side of the Atlantic does not apply on the other.”* This ground for complaint disappeared on 26 April 2007 when the 2003 Treaty entered into force.

- 7.28 There is a simple reason for the inclusion of Article 8(3)(c) in the 2003 Treaty and the equivalent provisions in earlier treaties: it reflects the Constitutional requirement contained in the Fourth Amendment to the United States Constitution adopted in 1791. The Fourth Amendment prohibits certain law enforcement activities, such as arrest, unless the ‘*probable cause*’ test is satisfied. The text of the Fourth Amendment is as follows:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be searched.”

- 7.29 By way of comparison, in the case of extradition requests submitted by the United States to the United Kingdom, in order to satisfy the requirements of the 2003 Act, it is necessary to provide information that would justify the issue of an arrest warrant.¹⁷ This is the reasonable suspicion test.

- 7.30 The various treaty requirements may be summarised in the following way:

Period	Requests to the United States	Requests to the United Kingdom
Before 1 January 2004	Probable cause evidence	<i>Prima facie</i> evidence
January 2004 to 26 April 2007	Probable cause evidence	Information satisfying the reasonable suspicion test
26 April 2007 to date	Information satisfying the probable cause test	Information satisfying the reasonable suspicion test

- 7.31 It follows that there have been three evidential or information standards in extradition proceedings involving requests to and from the United States: (i) the *prima facie* test; (ii) the probable cause test; (iii) the reasonable suspicion test. It can be seen from the table set out above that prior to the 2003 Treaty, there was an imbalance in the

¹⁷ Section 71(3) and (4) of the 2003 Act. The difference between information and evidence is one of form and not substance: “*information*” constitutes material in any format whereas “*evidence*” constitutes material that would be admissible in court proceedings.

standard of evidentiary proof required to support extradition requests to and from the United States: under the previous arrangements the United States was required, in effect, to put forward its case in chief in order to secure extradition; the United Kingdom was only required to provide evidence demonstrating probable cause to believe that the person committed the crime for which extradition was sought.¹⁸

- 7.32 For the purposes of our Review we believe it is necessary to consider whether there is any difference between the probable cause test and the reasonable suspicion test. Before doing so it may be helpful to make a number of points in relation to the *prima facie* evidence test as it applies in the extradition context.

Prima facie case

- 7.33 The *prima facie* case requirement is a requirement to adduce evidence to make a case requiring an answer by the requested person as if the proceedings were a summary trial of an information against him. In *R (Harkins) v Secretary of State for the Home Department*,¹⁹ in a case decided under the Extradition Act 1989, the High Court stated:²⁰

“The correct test is whether the evidence would be sufficient to warrant the claimant’s trial if the extradition crime had taken place within the jurisdiction of this court

The High Court went on to quote with approval an observation made by Auld L.J. (also in the extradition context) in *Fernandez and others v Governor of Her Majesty’s Prison Brixton*.²¹

“District Judges should be wary before embarking on the trappings of a trial, in particular the testing of credibility of complainants by reference to alleged

¹⁸ It appears that one of the objectives of the Treaty was to rectify the previous imbalance in the evidentiary standard that the United States was required to satisfy. There were difficulties created by the English rules of evidence (hearsay was generally not admissible in extradition proceedings in the United Kingdom whereas hearsay is admissible in extradition proceedings in the United States).

¹⁹ [2007] EWHC 639.

²⁰ Paragraph 29, per Lloyd Jones J..

²¹ [2004] EWHC 2207 (Admin).

inconsistencies in their accounts and to their previous conduct, lest they offend the principles of comity and reciprocity that give rise to this jurisdiction and pre-empt the function of the court of the State seeking extradition.”

- 7.34 The significance of this point is that although the *prima facie* case requirement connotes a higher evidential standard than either the probable cause or reasonable suspicion test, it does not equate exactly to the domestic *Galbraith* test. The short point is that in domestic proceedings the *Galbraith* test is applied at the conclusion of the prosecution case in the context of the substantive trial of the defendant: in extradition proceedings it is applied before the trial proceedings take place and the extradition proceedings, “*must not pre-empt the function of the court of the State seeking extradition*”. This approach, that is of not pre-empting the function of the court of the State seeking extradition, is one adopted in other common law jurisdictions such as Canada, Australia, New Zealand and the United States itself.

Probable cause

- 7.35 A well-known definition of probable cause is, “*a reasonable belief that a person has committed a crime*”.²² The Oxford Companion to United States Law defines probable cause as, “*information sufficient to warrant a prudent person’s belief that the wanted individual had committed a crime*”. It has also been defined as “*Evidence which would warrant a man of reasonable caution in the belief that a felony has been committed.*”²³
- 7.36 In a memorandum prepared by the American Law Division for the United States Senate Select Committee on Intelligence,²⁴ it is stated,

*“in over-simplified terms, probable cause ‘exists where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found...’”*²⁵

²² Lectric Law Library, <http://www.lectlaw.com/def2/p089.htm>

²³ *Wong Sun v United States* (1963) 371 US 471, 479.

²⁴ Probable cause, reasonable suspicion, and reasonableness standards in the context of the Fourth Amendment and the Foreign Intelligence Service Act, Congressional Research Service, 30 January 2006. <http://www.fas.org/sgp/crs/intel/m013006.pdf>

- 7.37 The memorandum also explains the reasonable suspicion test as it applies in the United States,

*“...reasonable suspicion is a standard, more than a hunch but considerably below preponderance of the evidence, which justifies an officer’s investigative stop of an individual upon the articulable and particularized belief that criminal activity is afoot.”*²⁶

- 7.38 It appears that the probable cause (and reasonable suspicion) standard is incapable of precise definition or quantification into percentages, because whether or not the standard is satisfied depends on a consideration of all relevant circumstances.²⁷ In Ornelas v The United States²⁸ it was stated:

“Articulating precisely what ‘reasonable suspicion’ and ‘probable cause’ mean is not possible. They are common sense, non-technical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act. As such, the standards are not really, or usefully, reduced to a neat set of legal rules. We have described reasonable suspicion simply as a particularized and objective basis for suspecting the person stopped of criminal activity, and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found. We have cautioned that these two legal principles are not ‘finely tuned standards’ comparable to the standards of proof beyond a reasonable doubt or proof by a preponderance

²⁵ The authorities cited in support of this proposition are: Ornelas v The United States (1996) 517 US 690, 696; Illinois v Gates (1983) 462 US 213, 238.

²⁶ The reasonable suspicion test was recognised in United States law by Terry v Ohio (1968) 392 US 1. It has been described as a particularised and objective basis for suspecting legal wrongdoing: United States v Arvizu (2002) 534 US 266, 273. It appears that in the United States domestic law a distinction is drawn between “probable cause” and “reasonable suspicion” although the courts have had difficulty in articulating the difference. Irrespective of any difference between reasonable suspicion and probable cause in United States law, it appears that probable cause in the United States equates to reasonable suspicion in the United Kingdom (see below).

²⁷ Maryland v Pringle (2003) 540 US 366, 371. The court stated that the substance of all the definitions of probable cause, “is a reasonable ground for belief of guilt and that the belief of guilt must be particularized with respect to the person to be searched or seized.”

²⁸ (1997) 516 US 690.

of the evidence. They are instead fluid concepts that take their substantive content from the particular context in which the standards are being assessed. The principle components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to a reasonable suspicion or a probable cause.”

Reasonable suspicion

7.39 In the United Kingdom, the standard to be met to justify an arrest or the issue of an arrest warrant is the reasonable suspicion test. The reasonable suspicion test conveys an objective standard, but this is a lower standard than that required to prove a *prima facie* case. In order to satisfy the reasonable suspicion test, it is permissible to rely upon matters which are not admissible in evidence, or matters which while admissible, could not form part of a *prima facie* case.²⁹ In this respect, the law of the United Kingdom satisfies the requirements of Article 5(1) of the European Convention on Human Rights which requires reasonable suspicion for an arrest for a criminal offence.³⁰

7.40 Transposed to the extradition context, in the case of a request received from the United States, section 71(2)(a) of the 2003 Act provides³¹ that the extradition judge may issue an arrest warrant if there are reasonable grounds for believing that:

- (a) the offence in respect of which extradition is requested is an extradition offence.
- (b) there is information that would justify the issue of a warrant for the arrest of a person accused of the offence within the judge’s discretion.

²⁹ *Hussein v Chong Fook Kam* [1970] AC 942.

³⁰ *O’Hara v The United Kingdom* [2002] 34 EHRR 32.

³¹ As it applies to category 2 territories designated for the purposes of section 71.

- 7.41 Section 71 makes it clear that the extradition judge is required to make a judgment based on objective grounds in respect of two matters. First, the extradition offence issue and secondly, whether the circumstances justify the issue of a warrant.

Our Analysis of the Tests

- 7.42 In our opinion, there is no significant difference between the probable cause test and the reasonable suspicion test.
- 7.43 We believe that any difference between the two tests is semantic rather than substantive, and the challenge to those who suggest that the tests are in some way different is to articulate precisely what the difference is and how the difference would apply in any particular case.
- 7.44 In our opinion it is significant to note that:
- (i) Both tests are based on reasonableness;
 - (ii) Both tests are supported by the same documentation;
 - (iii) Both tests represent the standard of proof that police officers in the United States and the United Kingdom must satisfy domestically before a judge in order to arrest a suspect.
- 7.45 We agree with the views expressed in the United States case law, that they are common sense, non-technical expressions, intended to convey an objective basis for concluding that the reasonable suspicion or probable cause is supported by objectively verifiable facts: in each case, there must be a particularised and objective basis for suspecting legal wrongdoing.

Extradition Between the United States and the United Kingdom in Practice

- 7.46 Having considered the legal tests, we now turn to consider how extradition between the United States and the United Kingdom operates in practice. This is important for a number of reasons. First and foremost it demonstrates that all extradition requests emanating from the United States (whether submitted to the United Kingdom or elsewhere) must satisfy the probable cause test. Secondly, it demonstrates that extradition proceedings in the United Kingdom are far more elaborate than their equivalent procedures in the United States. This latter point explains why, as a matter of practice, extradition from the United Kingdom to the United States is generally more difficult to secure than vice versa.

Outgoing requests: from the United Kingdom to the United States

- 7.47 Outgoing requests for extradition from England and Wales are prepared by the Crown Prosecution Service, acting in its capacity as the independent prosecuting authority. The Crown Prosecution Service will only prepare an extradition request if satisfied that the tests for a domestic prosecution have been met. These tests are set out in the Code for Crown Prosecutors issued by the Director of Public Prosecutions under the Prosecution of Offences Act 1985.³² The Code provides that a prosecution will only be brought if there is sufficient evidence to provide a realistic prospect of conviction and where a prosecution is justified in the public interest.³³
- 7.48 The prosecutor will usually provide a summary of the prosecution case, an explanation of the relevant law and the relevant legal provisions together with the arrest warrant and indictment (if there is one).
- 7.49 The extradition request, containing the materials stipulated in the Treaty, is sent from the United Kingdom to the State Department in the United States, via the British Embassy in Washington. Within the State Department, a legal advisor reviews the request to ensure it conforms to the requirements of the Treaty, and if so, it is authenticated and a declaration is prepared for use by the Department of Justice in the course of the extradition proceedings.

³² The latest edition of the Code for Crown Prosecutors was published in February 2010.
³³ Code for Crown Prosecutors, paragraphs 4.5 and 4.11.

- 7.50 The request is then considered by the Department of Justice³⁴ to ensure that it contains information sufficient to meet the probable cause standard (as required by the United States Constitution and as reflected in Article 8(3)(c) of the 2003 Treaty).
- 7.51 If the request is in order, it is then sent to the United States Attorney for the district where the requested person is believed to be located. An Assistant United States Attorney then initiates the judicial phase of the extradition process by filing a complaint in support of an application for an arrest warrant. The application for the arrest warrant is made to a judicial officer, either a magistrate or a District Judge.
- 7.52 An arrest warrant will be issued only if the judicial officer concludes that the probable cause standard is satisfied.
- 7.53 Once the requested person is apprehended, the extradition proceedings continue before the relevant judicial officer. At the requested person's first appearance he is informed of the reason for his arrest and of the possibility of waiving his rights or consenting to extradition.³⁵ The proceedings are then adjourned for the formal extradition hearing to take place and the arrested person is either remanded in custody or on bail.³⁶
- 7.54 At the formal extradition hearing, the essential issue for determination is whether in accordance with the requirements of the Treaty, there is information sufficient to sustain the charge or charges. The extradition hearing is not considered to be a criminal proceeding in the strict sense,³⁷ and the requested person is not entitled to the Constitutional rights ordinarily available to an accused person at a criminal trial.³⁸ The extradition hearing has been compared to a preliminary hearing in a United States

³⁴ The Office of International Affairs.

³⁵ The requested person is entitled to the appointment of counsel.

³⁶ Bail is ordinarily granted only if the requested person can show that he or she is not a flight risk or that there exist special circumstances justifying release.

³⁷ This is consistent with the approach taken in other common law jurisdictions including the United Kingdom. It is also the approach adopted by the European Court of Human Rights.

³⁸ For example, the requested person does not have the protection of the Sixth Amendment to the Constitution adopted in 1791 which provides, amongst other things, "*In all criminal prosecutions the accused shall enjoy the right...to be confronted with the witnesses against him.*" By way of contrast, a person extradited to the United States for trial has this as well as other constitutional protections.

domestic criminal case where evidence of criminality may be heard and considered. The ordinary rules of criminal evidence do not apply.³⁹

7.55 The judicial officer does not weigh conflicting material or make factual determinations.⁴⁰ Given the narrow purpose of the hearing, the requested person has no right to present a defence such as alibi or self-defence to the charges against him. Nor does the requested person have the right to introduce evidence which merely contradicts the case against him, or which raises issues concerning the credibility of the prosecution witnesses. The requested person is, however, permitted to challenge his extradition on the basis that the Treaty requirements have not been satisfied.⁴¹

7.56 In accordance with well-established common law rules, courts in the United States have traditionally declined to consider questions concerning the legal procedures or treatment that an individual might face after extradition has taken place.⁴² There is no abuse of process jurisdiction.

7.57 At the conclusion of the hearing, if the judicial officer is satisfied that the requirements of the Treaty have been met, he issues a certificate of extraditability.⁴³ A certified copy of the certificate is then delivered to the Secretary of State by the clerk of the court.

7.58 The decision to issue a certificate of extraditability may be challenged by petitioning for a writ of habeas corpus. When considering a habeas corpus petition, the appeal court's review is limited to three issues:

- (i) whether the judicial officer had jurisdiction over the requested person;
- (ii) whether the crime fell within the terms of the Treaty;

³⁹ The evidence may consist of hearsay as well as unsworn statements.

⁴⁰ The hearing is limited to an examination of the factual basis underlying the offence or offences so as to ensure that the Treaty requirements are satisfied and there is sufficient information to support a reasonable belief that the accused committed the offences.

⁴¹ For example, he may argue that the offence is not an extraditable offence or that the dual criminality test has not been met.

⁴² These are matters for the Secretary of State to consider (see below).

⁴³ This certifies that the requested person is eligible to be extradited. The final decision on extradition rests with the Secretary of State.

- (iii) whether there was probable cause that the requested person committed the crime for which his extradition is sought.

7.59 We were informed that the substantive extradition hearing rarely takes more than a day to conclude.

7.60 At the conclusion of the judicial phase of the extradition process, it falls to the Secretary of State to make the final decision on surrender. In making her decision, the Secretary of State will generally consider four issues:

- (i) whether surrender would be compatible with the United States' obligations under the United Nations Convention Against Torture 1984;⁴⁴
- (ii) humanitarian considerations, including medical concerns;⁴⁵
- (iii) whether the request is politically motivated;
- (iv) whether the requested person is likely to be persecuted or denied a fair trial or humane treatment.⁴⁶

7.61 The ultimate decision of the Secretary of State to surrender a requested person is discretionary.⁴⁷

7.62 Where an order for surrender is made it is regarded for the purpose of United States law as an executive act performed in connection with the conduct of foreign affairs. The significance of this point is that the Secretary of State's decision to surrender a requested person is treated as final and not subject to judicial review. The non-justiciability of the Secretary of State's decision is based on the rule of "*non-*

⁴⁴ Where allegations of the risk of torture are made the requested person cannot be extradited if it is established on the balance of probabilities that he will be tortured.

⁴⁵ The Secretary of State may seek assurances with respect to concerns specific to the individual, for example the continuity of medical treatment.

⁴⁶ A new trial assurance may be sought by the Secretary of State where the requested person has been convicted in absentia.

⁴⁷ We were informed that it is rare for the Secretary of State not to order extradition. We understand that the Secretary of State has never, under the existing treaty arrangements, declined to authorise surrender to the United Kingdom.

enquiry”: this rule limits the court’s authority to intrude upon the executive’s prerogative powers exercised in connection with foreign affairs.

- 7.63 We should also note that a requested person arrested in connection with an extradition request, may elect either to waive his right to contest the extradition request or consent to an extradition order being made in his case.
- 7.64 In the case of waiver, subject to approval by the court, the requested person is liable to immediate transfer to the requesting State. The approval of the Secretary of State is not required in such a case and, because the requested person is not surrendered pursuant to Treaty arrangements, specialty protection does not apply.
- 7.65 In the case of consent, the judicial officer makes an order certifying the case for consideration by the Secretary of State and the Secretary of State proceeds to make an order for surrender. In consent cases, the individual is extradited pursuant to the Treaty arrangements and the rule of specialty applies. Since the 2003 Act has come into force the United States has not refused any extradition request made by the United Kingdom.

Requests to the United Kingdom

- 7.66 In the case of requests submitted by the United States to the United Kingdom, the procedure may be summarised as follows. First, the prosecutor responsible for the case in the United States will either obtain an arrest warrant or a Grand Jury⁴⁸ indictment together with an arrest warrant. In either case, it is necessary for the prosecutor to satisfy the probable cause standard. In an accusation case, the extradition request will contain the matters specified in Article 8(2) and (3) of the 2003 Treaty and Article 8(2) and (4). The statement of the facts of the offence is usually provided in the form of a detailed narrative of the circumstances giving rise to alleged offences, an explanation of the factual background and a summary of the procedural history to the case. These details will usually be included in an affidavit exhibiting the documentation.

⁴⁸ The Grand Jury is an investigative agent. United States prosecutors present information to a Grand Jury for the instigation of charges they wish to bring. A Grand Jury comprises 16 to 20 individuals, who are a mixture of lawyers and laymen.

- 7.67 The extradition request is submitted through diplomatic channels to the United Kingdom where it is then dealt with in accordance with the provisions of the 2003 Act⁴⁹.

Our Observations On The Procedures

- 7.68 We have summarised the procedures in relation to extradition requests to and from the United States because they support a number of conclusions:

- (i) The documentation provided by the United Kingdom to the United States is similar to the documentation provided by the United States to the United Kingdom.
- (ii) Accusation requests submitted by the United States to the United Kingdom must include a copy of the warrant or order of arrest issued by a judge in the United States. Such a warrant or order of arrest can only be issued if the probable cause test is satisfied. It follows that in all extradition requests where a person is sought for prosecution the probable cause test will have been satisfied in the United States.
- (iii) Extradition proceedings conducted under the 2003 Act in the United Kingdom appear to be more elaborate and complex than equivalent proceedings in the United States.

- 7.69 We have already concluded that there is no appreciable difference between the reasonable suspicion and probable cause tests and our analysis of the practical operation of the extradition process satisfies us that there is no imbalance between the respective tests as they are applied in each jurisdiction.

- 7.70 In this context we think it important to make another point. Critics of the United States/United Kingdom extradition arrangements frequently point to the extradition of the so-called “*Natwest 3*” (or “*Enron 3*” as they were also known) whose return to the United States was ordered by the Secretary of State following unsuccessful legal

⁴⁹ See paragraphs 2.7-2.14 and Appendix C

challenges in the domestic courts: *R (Birmingham and others) v Director of the Serious Fraud Office*⁵⁰. In that case, although the extradition request was submitted by the United States to the United Kingdom after 1 January 2004, it had been prepared to meet the evidential requirements of Schedule 1 to the Extradition Act 1989 and included evidence sufficient to show a case to answer.⁵¹ This case does not support the argument that the Treaty relationship between the United Kingdom and the United States is imbalanced in favour of the United States, nor is there any other case that we are aware of that could support the argument.

How The Treaty was Viewed by the United States

- 7.71 In this section, we set out the views expressed by certain individuals who were involved in providing information to the United States Senate when it was considering whether or not to ratify the Treaty. We focus our attention on the information provided by the then Secretary of State, Colin Powell, and a senior official in the United States Department of Justice (Mary Ellen Warlow). These contemporaneous expressions of opinion provide a good indication of how the Treaty was viewed in the United States.
- 7.72 In October 2003, the Secretary of State wrote to the United States Senate submitting the new 2003 treaty for the Senate's advice and consent. The relevant portion of this letter was in the following terms:

“Article 8...describes the documents that are required to support a request for extradition...Article 8(3) provides that a request for extradition of a person sought for prosecution must be supported by...(c) for requests to the United States, such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is sought. The treaty will not change the evidentiary burden required for extradition requests to the United States, but the treaty's entry into force will

⁵⁰ [2007] QB 727.

⁵¹ See Paragraph 41 of the High Court judgment. We are aware that in many cases decided under the 2003 Act detailed information is frequently provided by the United States authorities: *Norris v Government of the United States of America* [2008] 1 AC 920; *McKinnon v Government of the United States of America* [2005] 1 WLR 1739; *Tajik v Government of the United States of America* [2008] EWHC 666 (Admin).

allow the United States to take advantage of the United Kingdom's Extradition Act of 1989 which applies only to treaties that enter into force after 1989. Under the 1989 Act, the evidentiary requirements for extradition from the United Kingdom are lowered from a 'prima facie' standard to 'evidence sufficient for issuance of a warrant' which is analogous to the U.S. probable cause standard."

- 7.73 Mary Ellen Warlow, the Criminal Division's Director of the Office of International Affairs within the Department of Justice, in her submission to the United States Senate's Committee on Foreign Relations on 15 November 2005, viewed matters in similar terms. She was asked this question:

"The proposed treaty contains the last provision (in Article 8(3)(c)), requiring that the request for extradition to the United States be supported by 'such information as would provide a reasonable basis to believe that the person sought committed the offence for which extradition is requested'.

- What is the standard for extradition from the United States under the proposed treaty, and upon what specific provisions of the treaty and U.S. law is that standard based?"

She responded:

*"The standard for extradition from the United States under Article 8(3)(c) of the proposed treaty and under U.S. law is that of probable cause. Under U.S. law, the United States Constitution, together with federal case law, provides the standard used by courts to evaluate the sufficiency of foreign evidence provided in support of an extradition request. The applicable standard requires that there be probable cause to believe that the person who is before the court is the person charged or convicted in the foreign country and, in those cases where the person has not been convicted, probable cause to believe that person committed the offenses for which extradition is sought. See *United States v Wiebe*, 733 F.2d 549, 553 (8th Cir.1984). ("The probable cause standard applicable in extradition proceedings is defined in accordance with federal law and has been described as evidence sufficient to cause a*

person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt.”)”

Ms Warlow was further asked, having testified that the proposed treaty eases the evidentiary burden the United States has to meet in order to seek extradition from the United Kingdom, lowering it from a standard of *prima facie*:

“(a) *What is the standard for obtaining extradition in the United Kingdom under the proposed treaty and the Extradition Act 2003 (U.K.)?*

(b) *Is it not the case that the United States is already benefiting from the lower standard by virtue of approval in the United Kingdom of the Extradition Act 2003 and the subsequent designation of the United States as a Part 2 country pursuant to that Act?”*

She responded:

“The standard for obtaining extradition in the United Kingdom is defined under UK domestic law; we understand that this evidentiary standard is comparable to the U.S. ‘probable cause’ standard.”

7.74 We are in no doubt that the United States authorities believed that the 2003 Treaty was both intended to achieve and would achieve a broad symmetry in extradition between the two states in respect of the evidential test to be applied.

7.75 We consider that this belief was justified.

The Joint Committee On Human Rights

7.76 The report of the Joint Committee on Human Rights⁵² contains the following recommendation:⁵³

⁵² “*The Human Rights Implications of UK Extradition Policy*”, HL Paper 156, HC 767, published on 22 June 2011.

⁵³ Paragraph 192.

“The Government should increase the proof required for the extradition of British citizens to the United States so as to require sufficient evidence to establish probable cause, as is required for the extradition of a United States citizen to the United Kingdom. This will require renegotiation of the United Kingdom/United States Extradition Treaty.”

- 7.77 We do not agree with this recommendation. We set out the reasons for our disagreement in the following paragraphs.
- 7.78 First we consider that in the extradition context, it is wrong as a matter of principle to distinguish between British citizens and non-British citizens. The United Kingdom and the United States have always favoured the extradition of nationals and no distinction has been made in the various United Kingdom/United States treaties between nationals and non-nationals: Article 3 of the 2003 Treaty provides, *“Extradition shall not be refused on the nationality of the person sought.”* Moreover, the ‘*probable cause*’ protection in the Fourth Amendment to the Constitution applies to all persons within the United States whether citizens or not. In fact a greater number of United Kingdom nationals are extradited from the United States to the United Kingdom than United States Nationals.
- 7.79 Secondly, the distinction drawn by the Joint Committee between British citizens and others, suggests that British citizens are entitled to greater protection than non-British citizens. Such an approach cannot be justified. If it is suggested that the justice administered in the United States is not to be trusted, then there should be no extradition at all. In fact, the history of extradition between the United States and the United Kingdom provides no basis for concluding that individuals returned to that jurisdiction are generally not treated fairly. As has been recognised by the courts in this jurisdiction, the United States is a rights-based democracy where accused persons have protections provided by the Constitution to ensure that they are able to participate effectively in a criminal trial process that is conducted fairly: extradition from the United Kingdom to the United States takes place against the background of this protection.

- 7.80 Thirdly, we believe that the only difference between the probable cause and the reasonable suspicion test is semantic: there is no difference between the two tests in practice and accordingly there is no basis for renegotiating the Treaty.

Additional Observations

- 7.81 The Treaty between the United States and the United Kingdom operates in the United Kingdom through the 2003 Act. Therefore, the real issue is whether the extradition arrangements, as applied by the domestic law of the United Kingdom, operate unfairly against those persons in this jurisdiction who are sought for trial in the United States. On this issue our views are clear: we do not believe that the arrangements operate unfairly.
- 7.82 We agree with the view expressed by Baroness Scotland of Asthal, PC, QC the then Attorney General in a letter dated 19 October 2009:

“The information that must now be provided in order for a US extradition request to proceed in the UK is in practice the same as for a UK request to proceed in the US. It is important to stress that in both cases the standard of information which must now be provided for an extradition request to be accepted is the same as must be provided to a criminal court in that country in order for a domestic arrest warrant to be issued. When the UK makes an extradition request, the US courts must be satisfied there is information demonstrating a probable cause to issue an arrest warrant. Probable cause has been defined as, for example: “facts and circumstances ... sufficient to warrant a prudent person to believe a suspect has committed, is committing or is about to commit a crime” (United States v Hoyos, 892 F.2d 1387, 1392 (9th Cir.1989)). When the US makes a request, UK courts must be satisfied that there are reasonable grounds for suspicion to issue an arrest warrant. Reasonable suspicion has been defined...in the following terms:

‘circumstances of the case ... such that a reasonable man acting without passion or prejudice would fairly have suspected the person of having committed the offence’. While development of the criminal law in the two countries means that there are semantic differences between these two tests

the crucial point is that in both these cases the standard of information to be provided is exactly the same as must be provided in order to justify arrest in an ordinary criminal case in that country.

As can be seen then, the standards to be met by the two countries in extradition cases are as close as is possible given our different legal systems”

- 7.83 In our view this letter accurately summarises the position.
- 7.84 We also note that a number of criticisms which were made to our review supposedly relating to the 2003 Treaty, in fact related to the system of criminal justice in the United States. We recognise that whilst the United Kingdom has a similar system to that in the United States, there are significant differences.⁵⁴ However, what is important is whether the system of justice in the United States is such that it would lead to the violation of a requested person’s Convention Rights or to extradition in circumstances which are manifestly unjust or oppressive. We have concluded that the 2003 Act allows for proper protections against both injustice and oppression.
- 7.85 We also note that there is a concern that persons who are resident in the United Kingdom should be permitted to serve any sentence imposed in the United States in the United Kingdom. We agree that this is desirable not least to assist with rehabilitation and to take into account the right to respect for family life. We have already described the prisoner transfer arrangements which exist with the United States and the way in which these have been applied in a particular case⁵⁵. We would hope that this process can be made to operate as efficiently as possible to ensure that there is no undue delay. There has been some comment about the respective numbers of extraditions between the United States and the United Kingdom. The United States has a population about five times the size of the United Kingdom. However, the United States has less than twice as many people extradited to it than the United

⁵⁴ In *McKinnon v Government of the USA and another* [2007] EWHC 762 (Admin), the court expressed “a degree of distaste” for the way in which plea negotiations had taken place but said that these “cultural reservations” were not such that extradition should not take place. The House of Lords when considering the same case, [2008] UKHL 59 found that the differences between the system in the United Kingdom and the United States were not as stark as was sought to be portrayed and found the comments of the High Court to be too “fastidious”.

⁵⁵ See paragraphs 4.26-4.31 and footnote 6 to paragraph 6.6

Kingdom.⁵⁶ Therefore, the difference in population would be one factor that would suggest that the United States would have more people extradited to it.

Conclusion on Treaty Imbalance

- 7.86 The United States and the United Kingdom have similar but different legal systems. In the United States the Fourth Amendment to the Constitution ensures that arrest may only lawfully take place if the probable cause test is satisfied; in the United Kingdom the test is reasonable suspicion. In each case it is necessary to demonstrate to a judge an objective basis for the arrest. There is no practical difference between the two tests and the 2003 Treaty does not operate in an unbalanced manner. Nor is there any basis to conclude that extradition from the United Kingdom to the US operates unfairly or oppressively.
- 7.87 For these reasons we have concluded that there is no basis for seeking to renegotiate the 2003 Treaty.

⁵⁶ See Appendix D

Part 8 The *Prima Facie* Case requirement

- 8.1 Historically, all extradition requests to the United Kingdom in accusation cases had to be accompanied by admissible evidence which would be sufficient to warrant a person's trial if the extradition crime had taken place within the United Kingdom. This is commonly known as the *prima facie* case requirement. Over time this requirement was relaxed. Under Part 1 of the 2003 Act there is no *prima facie* evidence requirement; this is also the case under Part 2 of the 2003 Act in respect of certain designated territories.
- 8.2 As part of our Review we were asked to consider whether requesting States should be required to provide *prima facie* evidence and we address the point below. We first put the matter in context.

The Context

*The 1868 Select Committee*¹

- 8.3 The 1868 Select Committee recommended² that a requesting State should provide evidence in a required form to establish a *prima facie* case against an accused person. The Committee failed to explain the rationale for this recommendation, and the evidence heard by the Committee illustrated the difficulties caused by the requirement: France, a civil law jurisdiction, had difficulty submitting evidence admissible according to the rules of English evidence.

¹ Report of the Select Committee on Extradition of the House of Commons 1868, Command Paper 393.

² One member of the Committee proposed that the *prima facie* case requirement should be removed, but the majority disagreed.

The 1878 Royal Commission on Extradition

- 8.4 The 1878 Royal Commission endorsed the 1868 Select Committee's recommendation. Again there was no discussion concerning the theoretical underpinning of the evidential requirement.³

The 1870 Act

- 8.5 The Extradition Act 1870 enacted the *prima facie* evidence requirement.⁴

The Harvard Research Project

- 8.6 In 1925, the practice of extradition was examined by a League of Nations Committee of Experts. The Committee concluded that a general agreement on extradition, although desirable, was unlikely to happen in the near future. This prompted the preparation of a draft Convention on Extradition by the Research in International Law project organised by Harvard Law School: the Harvard Research Project.
- 8.7 The draft Convention did not include a general *prima facie* case requirement. It was understood that the absence of such a requirement would limit the number of states likely to become parties to the Convention and in an effort to secure acceptance of the draft, it provided for possible reservations at the time of signing or ratification.⁵
- 8.8 At the time of the *Harvard Research Project* the *prima facie* evidence requirement was seen as an Anglo-American rule⁶ that had developed partly as a result suspicion

³ One member of the Commission, in a partly dissenting opinion, refers to it as the “*just and obvious rule*”.

⁴ Section 10.

⁵ Article 12 of the Draft Convention deals with the contents of the extradition request (referred to as the requisition) and the required supporting documents: it does not refer to the need to provide evidence. Article 17 deals with the extradition hearing and makes it clear that “*no further evidence of guilt of the person claimed shall be required*”. The authors were clear that this was intended to remove the *prima facie* case requirement. Reservation 5 allowed for a general *prima facie* case requirement and Reservation 6 provided for a *prima facie* case requirement for nationals of the requested State.

⁶ *Harvard Research Project* (1935), Pages 176-177 where the early United States and United Kingdom extradition treaties containing the requirement are listed. Civil law countries

that other systems of law were inadequate and partly from a desire to provide the protection of the same domestic criminal procedure to those accused of crimes abroad.⁷

- 8.9 The Research suggested that neither of these two reasons provided sufficient justification for the requirement. In relation to the first, it was suggested that greater understanding and faith in other judicial processes was desirable: *“It is believed that States should now be willing to accept each other's warrants of arrests as evidence that, upon examination in the requesting State, sufficient evidence of guilt has been adduced to justify a criminal trial.”* In relation to the second, it was argued that an extradition hearing was not the same as a domestic criminal trial and the analogy was a false one.

***Council of Europe Convention on Extradition 1957 (“ECE”)*⁸**

- 8.10 The European Convention on Extradition (ECE) was prepared following the work of a Council of Europe Committee of Experts. The Explanatory Report to the ECE records that one member of the Committee favoured a provision in the following terms:

“When the request for extradition concerns a person proceeded against or convicted by default, the requested Party may request the requesting Party to produce evidence showing that the offence has probably been committed by the person claimed. Where this evidence appears to be insufficient, extradition may be refused.”

- 8.11 Although this proposal was rejected by the Committee, it was agreed that a general reservation to this effect might be formulated so as to encourage the largest possible number of states to accede to the ECE.⁹

generally accepted an arrest warrant which set out the nature of the act charged as sufficient evidence of guilt to justify extradition.

⁷ Page 180.

⁸ See paragraphs 3.71-3.73.

⁹ Article 26 of the ECE allows reservations to be made by a Contracting Party when signing or depositing an instrument of ratification or accession. Six countries have made reservations concerning the provision of evidence; Andorra, Denmark, Iceland, Israel, Malta and Norway.

The 1974 Report

- 8.12 In 1970, a Government Working Party was established to consider what changes should be made to the United Kingdom's extradition law. It reported in 1974.¹⁰ At that time the United Kingdom was not a signatory to the ECE, preferring instead to operate extradition by way of bilateral treaties rather than multi-lateral conventions.
- 8.13 The Working Party Report made reference to a fundamental principle of the United Kingdom's approach to extradition: that the United Kingdom “*should enter into extradition treaties only with those States whose standards of justice and penal administration we find acceptable*”. This accorded with usual Home Office practice which was to obtain information about the administration of justice and treatment of offenders before commencing treaty negotiations. The Working Party recognised that conditions in a foreign state could change over time and that there were countries with which the United Kingdom then had treaty arrangements who would no longer be considered suitable extradition partners.
- 8.14 In the opinion of the Working Party, the *prima facie* case requirement together with the United Kingdom's rules of evidence, resulted in a failure to surrender a number of individuals who were probably guilty and had the effect of deterring requests for extradition. It also noted that the *prima facie* requirement added to the duration, complexity and cost of extradition proceedings.
- 8.15 Overall, the Working Party concluded that the *prima facie* case requirement should be maintained, but recommended a relaxation of the rules of admissibility of evidence, which it was hoped might mitigate the difficulties caused by strict adherence to the requirement. Underlying the decision to maintain the position, was a concern to ensure that British nationals should have the right (as in domestic proceedings) to “*the safeguard of a preliminary judicial enquiry into whether there is a case to answer before he is committed for trial*”. However, it was felt invidious to only offer this safeguard to British nationals and not to other nationalities; it was, therefore, to be available to all requested persons.

¹⁰

Report of the Working Party on the Extradition Act 1870.

- 8.16 The Working Party also believed that “*the requirement of prima facie evidence remains the only real safeguard against the trumped up case, and we venture to think that it must serve to deter some applications for extradition where a warrant of arrest has been issued in a foreign State on largely unsupported suspicion of guilt.*” Other reasons given for justifying the requirement related to the need to have sufficient information to determine double criminality and a political defence. It was felt that in the absence of a *prima facie* case requirement it might be necessary to seek further information from the requesting State before the case could be put to the courts.

The 1982 Review

- 8.17 The justification for the *prima facie* evidence requirement was again examined by the Interdepartmental Working Party which reported in 1984.¹¹
- 8.18 The Working Party noted that one of the primary justifications for the requirement was a desire to ensure equal treatment with those subject to domestic committal proceedings. However, it was recognised that this justification did not apply to Scotland where the test for committal was different.¹²
- 8.19 The Working Party recognised that domestic committal proceedings very often dispensed with the preliminary examination of evidence, but the right was preserved at the defendant’s election.¹³
- 8.20 Nevertheless, the Working Party was of the view that the *prima facie* evidence requirement provided a safeguard in setting a standard for the quality of extradition request which the United Kingdom was prepared to accept.

¹¹ *A Review of the Law and Practice of Extradition in the United Kingdom; the Report of an Interdepartmental Working Party*, published by the Home Office.

¹² In Scotland, a petition with a relevant charge simply had to be signed by the procurator fiscal and presented to the Sheriff; there was no evidence presented and the Sheriff made no assessment of whether a *prima facie* case was made out. This distinction continues to exist. “...*the Sheriff commits accused persons for trial on presentation of a petition containing a prima facie relevant charge signed by the Procurator Fiscal.*” Renton and Brown’s Criminal Procedure 6th Edition at page 179, paragraph 12.37. Therefore, it remains the case in Scotland that the court is not provided with any evidence to make a determination of whether evidence has been provided to make out a *prima facie* case.

¹³ The power to commit a defendant for trial without consideration of the prosecution evidence was first introduced into English law by the Criminal Justice Act 1967. It is now to be found in section 6(2) of the Magistrates’ Court Act 1980.

- 8.21 On the other hand, the Working Party found that the principal argument in favour of discarding the requirement was that, together with the English rules on admissibility of evidence, it presented a serious obstacle to successful extradition requests, even where the Requested States had sufficient evidence to obtain a conviction. Extradition proceedings were also longer and costlier because of the requirement.
- 8.22 A majority of the Working Party considered that the double criminality rule, the political offence safeguard and the speciality rule provided sufficient protection from manifestly unjust or oppressive extradition and were in favour of discarding the *prima facie* evidence requirement:

“Even if no prima facie evidence were required the magistrate and the Secretary of State would still have the information before them to establish the identity of the fugitive, the facts complained of and the relevant legal provisions. If the fugitive raised a "political" defence, further information could be sought on this aspect of the case. It would thereby be established whether the alleged offence was of a political nature and whether it seemed likely that the motive of the requesting State in seeking the fugitive's return was to punish or prosecute him on a trivial or trumped-up charge for his political beliefs.”

The 1985 Green Paper

- 8.23 The Government Green Paper, published in 1985, repeated the arguments put forward by the 1982 Working Party Review. It suggested that if the United Kingdom was sufficiently satisfied with the standards of justice to enter into an extradition treaty with a foreign state, then the foreign state should be the judge of the sufficiency of evidence required for prosecution.
- 8.24 The 1985 Green Paper considered that the *prima facie* case requirement was the principle obstacle to the United Kingdom's ratification of the ECE. It noted that if the United Kingdom became a party to the ECE it, “*would benefit from easier extradition arrangements with those European countries with which we have*

*particularly close commercial and legal ties, including our partners in the European Community”.*¹⁴

The 1986 White Paper

- 8.25 The 1988 Criminal Justice Plans for Legislation White Paper in 1986 included a proposal for legislation to remove the *prima facie* case requirement which it said would then allow the UK to become a party to the ECE.

The 1989 Act

- 8.26 Under Part III of the 1989 Act, section 9(8) required,¹⁵ the court to decide whether *“the evidence would be sufficient to warrant his [the defendant’s] trial if the extradition crime had taken place within the jurisdiction of the court.”*¹⁶
- 8.27 Schedule 1 of the 1989 Act¹⁷ required evidence which would *“justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England and Wales”*.¹⁸

¹⁴ No mention was made of the possibility that the United Kingdom could become a party to the ECE and enter a reservation to maintain the *prima facie* case requirement. This is despite the fact that the 1974 Report recommended that the *prima facie* case requirement should be maintained and that in order to accede to the ECE a reservation to allow this requirement to continue would be required (Paragraphs 283 and 296).

¹⁵ Unless an Order in Council provided otherwise.

¹⁶ Section 9(8) was amended by section 158(5)(d) of the Criminal Justice and Public Order Act 1994 *“sufficient to make a case requiring an answer by that person if the proceedings were the summary trial of an information against him”*. This amendment was brought into force on 1 April 1997 at the time when amendments to the procedure governing domestic committal proceedings were introduced by the Criminal Procedure and Investigations Act 1996.

¹⁷ Which applied to requests from foreign states such as the United States of America and Belgium.

¹⁸ Paragraph 7, subsequently amended by section 158(8)(c) of the Criminal Justice and Public Order Act 1994 so that there had to be evidence produced which would *“make a case requiring an answer by the prisoner if the proceedings were for the trial in England and Wales of an information for the crime”*. Again, this amendment was brought into force on 1 April 1997 at the time amendments to the procedure for domestic committal proceedings were introduced by the Criminal Procedure and Investigations Act 1996.

- 8.28 Changes to domestic committal proceedings were introduced by the Criminal Procedure and Investigations Act 1996 and the defendant's right to give evidence in committal proceedings was removed.¹⁹
- 8.29 Despite the legislative changes, the nature of the *prima facie* case requirement remained unchanged. This was confirmed by the High Court *R v Governor of Brixton Prison ex parte Gross*.²⁰ The amendments were made to cater for the expected abolition of domestic committal proceedings which did not in fact take place.²¹

The 1990 Model Treaty

- 8.30 In 1990, the United Nations adopted a model treaty on extradition inviting member states when they negotiated new extradition treaties or revised existing arrangements to take its provisions into account. This does not include a *prima facie* case requirement.²²

United Kingdom's Ratification of ECE in 1991

- 8.31 In 1991 the United Kingdom ratified the ECE and did not make any reservation to allow for it to request evidence to be provided to support an extradition request.²³

¹⁹ The Criminal Justice and Public Order Act 1994 (which amended the 1989 Act) contained provisions intended to abolish domestic committal proceedings but these were never brought into force.

²⁰ [1999] QB 538- see paragraph 8.57

²¹ The Criminal Justice Act 2003 also enacted legislation to abolish domestic committal proceedings. This has yet to be brought into force. It is discussed further below.

²² Article 5 (Channels of communication and required documents)

²³ Other countries have made reservations in relation to Article 26. For example, Israel's reservation is in the following terms:

“Israel will not grant extradition of a person charged with an offence unless it is proved in a court in Israel that there is evidence which would be sufficient for committing him to trial for such an offence in Israel.”

Reservations to allow for evidence to be required in certain circumstances with the right to refuse extradition if this evidence does not meet a specified standard have been made by: (i) Andorra; (ii) Denmark; (iii) Iceland; (iv) Israel; (v) Malta; (vi) Norway.

8.32 The UK's ratification of the ECE was given effect by the European Convention on Extradition Order 1990.²⁴ Article 3 of the Order provided that State Parties to the ECE did not have to “*furnish the court of committal with evidence sufficient to warrant the trial of the person if the extradition had taken place within the jurisdiction of the court*”.

8.33 In 1991, when the Order came into force, the *prima facie* case requirement was dispensed with in respect of the State Parties to the ECE. The State Parties at that time were:

(i) Austria	(viii) Luxembourg	(xv) Iceland
(ii) Cyprus	(ix) the Netherlands	(xvi) Israel
(iii) Denmark	(x) Norway	(xvii) Italy
(iv) Finland	(xi) Portugal	(xviii) Liechtenstein
(v) France	(xii) Spain	(xix) Turkey
(vi) Germany	(xiii) Sweden	
(vii) Greece	(xiv) Switzerland	

8.34 The following countries ratified the ECE which entered into force in the years indicated and these countries were then relieved of complying with the *prima facie* case requirement. The year in bracket is that in which the *prima facie* requirement was removed by the United Kingdom.

1992	The Czech and Slovak Republic
1993	Hungary Poland
1994	Bulgaria

²⁴

SI 1990/1507

1995	Croatia Czech Republic ²⁵ Lithuania Slovakia ²⁶ Slovenia
1996	Malta (1997)
1997	Belgium (1998) Estonia Latvia Moldova (1998) Romania (1998)
1998	Albania (1999) Ukraine (1999)
1999	The Former Yugoslav Republic of Macedonia (2001)
2000	The Russian Federation (2001)
2001	Andorra Georgia (2002)
2002	Armenia Azerbaijan (2003) Serbia and Montenegro (2003)
2003	South Africa

The 2001 Review

8.35 The *prima facie* evidence requirement was again considered by the 2001 Extradition Review.²⁷ By this time the only States who were subject to the *prima facie* case requirement were those who were not parties to the ECE.²⁸

²⁵ Which was one of the two states formed after the Czech and Slovak Republic was dissolved.

²⁶ Which was one of the two states formed after the Czech and Slovak Republic was dissolved.

²⁷ By the time of the 2001 Review there had been a number of developments within the European Union. The Treaty of Amsterdam (1997) had included the aim of establishing the European Union as an area of freedom, security and justice. This had been followed by a decision at the Tampere Special European Council (1999) that mutual recognition of judicial decisions should become the cornerstone of judicial cooperation in criminal matters within the European Union.

²⁸ Principally, the United States of America, Canada, Australia and New Zealand.

- 8.36 The Review asserted that there were strong arguments in favour of removing the *prima facie* case requirement with the United Kingdom's closest extradition partners "*especially where we have confidence in the overall fairness of their judicial systems*".
- 8.37 The 2001 Review proposed an extradition system with four tiers system of countries with only some tiers having a *prima facie* case requirement and it was noted that the removal of the *prima facie* case requirement for ECE requests did not appear to have weakened the protection available for requested persons. It was suggested that the court of the requested country is not, on the whole, the appropriate place to judge the evidence against the individual. Instead this should properly be done by the court of trial in the requesting country.
- 8.38 The Review, noted two main objections to the *prima facie* evidence requirement:
- (i) that the United Kingdom was applying a domestic standard to evidence that would ultimately be considered in the requesting country under its own laws and procedures; and
 - (ii) the requesting country's ability to meet the *prima facie* requirements could be affected, not by a lack of evidence, but by whether it could present its case in a way that met the United Kingdom's evidential requirements.
- 8.39 In the case of those countries with which the UK did not have general extradition arrangements,²⁹ it was recommended that the *prima facie* case requirement be retained "*as an additional safeguard for the fugitive*".

The 2003 Act - Category 1 Territories

- 8.40 The *prima facie* case requirement does not apply in the case of requests made by a category 1 territory and this represented no change from the position under the ECE.³⁰

²⁹ Either because there was little operational need for extradition arrangements with those countries, or because the UK did not have sufficient confidence in the standard of their criminal justice systems.

The 2003 Act - Category 2 Territories

Territories with prima facie case requirement

- 8.41 In the case of category 2 territories, section 84 of the 2003 Act requires the judge in accusation cases to decide “*whether there is evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him*”.
- 8.42 Whilst this test is identical to the test under the 1989 Act, the 2003 Act made a number of significant changes. Section 84(2) gives the judge a very wide discretion to admit hearsay evidence: this means that the judge can take into account a summary of witness statements provided in a statement by a prosecutor or police officer. This has made it much easier for countries to meet the *prima facie* case requirement.³¹
- 8.43 Moreover, if the requesting territory has been designated for the purposes of section 84(7) then the judge does not need to consider the *prima facie* case requirement at all.
- 8.44 The countries which have to meet the *prima facie* case requirement because they have not been designated are listed below together with an indication of whether it is a bilateral or multilateral extradition agreement which has given rise to their designation as category 2 territories.

³⁰ All category 1 territories (with the exception of Ireland and Gibraltar) were parties to the ECE prior to the 2003 Act coming into force and so had been relieved of the *prima facie* case requirement under the 1989 Act. Requests from Ireland had not been dealt with under the 1989 Act but instead under the Backing of Warrants (Republic of Ireland) Act 1965. Gibraltar was included in the EAW Framework Decision and was designated as a Category 1 territory in 2007. (i) Austria; (ii) Belgium, (iii) Bulgaria, (iv) Cyprus, (v) Czech Republic, (vi) Denmark, (vii) Estonia, (viii) Finland, (ix) France, (x) Germany, (xi) Gibraltar, (xii) Greece, (xiii) Hungary, (xiv) Ireland, (xv) Italy, (xvi) Latvia, (xvii) Lithuania, (xviii) Luxembourg, (xix) Malta, (xx) Netherlands, (xxi) Poland, (xxii) Portugal, (xxiii) Romania, (xxiv) Slovakia, (xxv) Slovenia, (xxvi) Spain, (xxvii) Sweden.

³¹ Some common law jurisdictions which have a *prima facie* case requirement (such as Canada), have allowed for a record of case to be used to satisfy this requirement. A record of case is a document which includes a summary of the prosecution evidence available for use by the requesting State and which is certified by a judicial or prosecution authority to be accurate.

Date of Designation	Territory	Bilateral / Multilateral Agreement
1 January 2004	Antigua and Barbuda	London Scheme ³²
	Argentina	Bilateral (1889)
	The Bahamas	London Scheme
	Bangladesh	London Scheme
	Barbados	London Scheme
	Belize	London Scheme
	Bolivia	Bilateral (1892)
	Botswana	London Scheme
	Brazil	Bilateral (1995)
	Brunei	London Scheme
	Chile	Bilateral (1897)
	Colombia	Bilateral (1888)
	Cook Islands	London Scheme
	Cuba	Bilateral (1904)
	Dominica	London Scheme
	Ecuador	Bilateral (1880)
	El Salvador	Bilateral (1881)
	Fiji	London Scheme
	The Gambia	London Scheme
	Ghana	London Scheme
	Grenada	London Scheme
	Guatemala	Bilateral (1885)
	Guyana	London Scheme
	Hong Kong Special Administrative Region	London Scheme
	Haiti	Bilateral (1874)
	India	Bilateral (1992)
	Iraq	Bilateral (1932)
	Jamaica	London Scheme
	Kenya	London Scheme

³² “The London Scheme for Extradition within the Commonwealth” is a multilateral extradition arrangement between members of the Commonwealth.

	Kiribati	London Scheme
	Lesotho	London Scheme
	Liberia	Bilateral (1892)
	Malawi	London Scheme
	Malaysia	London Scheme
	Maldives	London Scheme
	Mauritius	London Scheme
	Mexico	Bilateral (1886)
	Monaco	Bilateral (1891)
	Nauru	London Scheme
	Nicaragua	Bilateral (1905)
	Nigeria	London Scheme
	Panama	Bilateral (1906)
	Papua New Guinea	London Scheme
	Paraguay	Bilateral (1908)
	Peru	Bilateral (1904)
	Saint Christopher and Nevis	London Scheme
	Saint Lucia	London Scheme
	Saint Vincent and the Grenadines	London Scheme
	San Marino	Bilateral (1900)
	Seychelles	London Scheme
	Sierra Leone	London Scheme
	Singapore	London Scheme
	Solomon Islands	London Scheme
	Sri Lanka	London Scheme
	Swaziland	London Scheme
	Tanzania	London Scheme
	Thailand	Bilateral (1911)
	Tonga	London Scheme
	Trinidad and Tobago	London Scheme
	Tuvalu	London Scheme
	Uganda	London Scheme
	Uruguay	Bilateral (1884)
	Vanuatu	London Scheme

	Western Samoa	London Scheme
	Zambia	London Scheme
	Zimbabwe	London Scheme
2 August 2007	Algeria	Bilateral (2006)
26 June 2008	United Arab Emirates	Bilateral (2006)
25 March 2010	Libya	Bilateral (2009)

Territories without prima facie case requirement

8.45 The State Parties to the ECE have been designated for the purposes of Part 2, with the result that all those which had been designated under the 1989 Act, now provide the same level of information as under the earlier legislation.³³

8.46 The only countries, other than state parties to the ECE, designated to remove the *prima facie* case requirement are:

(i) Australia

(i) Canada

(iii) New Zealand and

(iv) United States.³⁴

8.47 The United States of America was designated after the United States/United Kingdom Extradition Treaty had been signed in 2003. The Treaty removed the *prima facie* case requirement.³⁵ The Government explained the designation of Australia, Canada

³³ However, those countries which were Member States of the European Union were designated as category 1 territories when the 2003 Act came into force. After the enlargement of the European Union, the new Member States were re-designated from category 2 to category 1.

³⁴ These four countries were designated to with effect from 1 January 2004 when the 2003 Act came into force.

³⁵ The United Kingdom expected the United States of America to ratify the Treaty shortly after it was signed. It was in anticipation of this that the United States of America was designated. In any event, the United Kingdom considered the United States of America its largest extradition partner to be a democracy where human rights were respected and protected. On this basis the United Kingdom did not believe there was a reason to maintain the *prima facie* case

and New Zealand not because of any treaty obligations but on the basis that they are democratic states and trusted extradition partners.

- 8.48 Since the 2003 Act came into force a number of other countries have since become party to the ECE. We set out below the year in which the ECE came into force for each of these countries.³⁶

2005	Bosnia and Herzegovina ³⁷
2006	Montenegro ³⁸
2009	Monaco ³⁹ San Marino ⁴⁰

The 2003 Act - Convention Territories

- 8.49 The United Kingdom is a party to a number of multilateral international conventions which impose obligations on the State Parties to criminalise certain types of conduct. The United Kingdom is also required to prosecute or extradite any persons accused of these offences who are found within its jurisdiction.⁴¹
- 8.50 In the case of extradition requests for offences under these various conventions made by a country which is designated as a category 1 or category 2 territory, then no difficulty arises. In order to cater for the situation where an extradition request is

requirement, particularly as countries which were parties to the ECE had been designated for the same purpose.

³⁶ In most cases the country was designated by the UK to remove the *prima facie* case requirement in the same year but sometimes there has been a short delay before designation.

³⁷ Although the *prima facie* requirement was only removed by the UK in 2006

³⁸ Montenegro was previously part of Serbia and Montenegro which did not have the *prima facie* requirement. Although it has been designated as a separate category 2 territory when it became an independent country in 2006 it has not yet been designated to remove the *prima facie* case requirement. It is expected that this designation will take place in 2011.

³⁹ Although the *prima facie* requirement has not yet been removed by the UK by designation- it is expected that this will happen in 2011.

⁴⁰ Although the *prima facie* requirement has not yet been removed by the UK by designation- it is expected that this will happen in 2011

⁴¹ These conventions deal with issues such as hostage taking, drug trafficking and financing of terrorism.

made by a country which is not designated under the 2003 Act, section 193 allows the country to be treated as if it was designated as a category 2 territory.⁴²

The 2003 Act - Special Extradition Arrangements

- 8.51 If the United Kingdom receives an extradition request from a country which is not designated as a category 1 or 2 territory and it does not fall within one of the conventions, to which the United Kingdom is party, the United Kingdom can consider whether to enter into a special extradition arrangement.
- 8.52 The Secretary of State will first consider whether to enter into such an arrangement as there is no requirement to do so.⁴³
- 8.53 If, as a matter of principle, the Secretary State agrees to enter into a special extradition arrangement, then the United Kingdom and the requesting country must reach a Memorandum of Understanding to deal with the specific extradition request.⁴⁴
- 8.54 The Secretary of State will then be able to certify that special extradition arrangements are in place and this will allow the request to be dealt with under the 2003 Act. The country will be treated as a category 2 territory and will need to meet the *prima facie* case requirement.⁴⁵

⁴² Any country which is treated as a category 2 territory to allow an extradition request for an offence covered by an international convention will be subject to the *prima facie* case requirement.

⁴³ The Secretary of State will normally consider the subject of the request, the offence for which extradition is requested and she will require confirmation that the person is in the United Kingdom and that an arrest warrant has been issued.

⁴⁴ This covers the matters that would usually be included in a formal extradition treaty would normally deal with. Once this has been negotiated and agreed it will be signed by the parties.

⁴⁵ For example, special extradition arrangements were made with Rwanda to allow for extradition requests to be dealt with by the United Kingdom which related to allegations of involvement in genocide. The High Court eventually discharged the defendants refusing to allow their extradition. It found that their extradition would have been likely to lead to violations of their human rights: *Brown v. Government of Rwanda* [2009] EWHC 70 (Admin).

Criminal Justice Act 2003 and Committal Proceedings

- 8.55 Lord Justice Auld's "*Review of the Criminal Courts of England and Wales*" which reported in 2001 reviewed the desirability of continuing with committal proceedings and found that their continuation was no longer justified. The abolition of committal proceedings was recommended. This recommendation was given statutory effect in Schedule 3 of the Criminal Justice Act 2003.⁴⁶
- 8.56 If committal proceedings are abolished in domestic criminal proceedings one of the historical justifications for the *prima facie* evidence requirement in extradition proceedings disappears. In any event, the scope of committal proceedings have been limited in recent years and they are no longer available for indictable offences which can only be tried in the Crown Court.

The Application of the *Prima Facie* Case Requirement In the Extradition Context

- 8.57 In determining whether there is a case to answer the judge must apply the test formulated by the Court of Appeal in *Galbraith*.⁴⁷ namely, whether the prosecution evidence taken at its highest is such that a jury properly directed could convict upon it. In *R v Governor of Pentonville Prison Ex p Alves*,⁴⁸ the House of Lords confirmed that this was the correct test in extradition cases and that the defendant was able to call evidence which the judge must have regard to when deciding whether there was a *prima facie* case. In *R v Governor of Brixton Prison Ex p Gross*,⁴⁹ the High Court confirmed that the amendments made to the 1989 Act by the Criminal Justice and Public Order Act 1994 which introduced the language of summary trials had not altered the test or the practice of the defendant calling evidence.

⁴⁶ This part of the Criminal Justice Act 2003 has not yet been brought into force. The Government has stated that consideration is being given to the abolition of committal proceedings.

⁴⁷ [1981] 1 WLR 1039, 1042.

⁴⁸ [1993] AC 284.

⁴⁹ [1999] QB 538.

- 8.58 In R v. Governor of Pentonville Prison Ex parte Osman,⁵⁰ the High Court explained how a judge should approach the application of the test in the extradition context:

“...it was the magistrate's duty to consider the evidence as a whole, and to reject any evidence which he considered worthless. In that sense it was his duty to weigh up the evidence. But it was not his duty to weigh the evidence. He was neither entitled nor obliged to determine the amount of weight to be attached to any evidence, or to compare one witness with another. That would be for the jury at trial.”

Cases under the 2003 Act

- 8.59 In a number of cases under the 2003 Act, the High Court has considered the *prima facie* case requirement, even though the country making the request had been designated for the purposes of section 84.

- 8.60 In Bermingham and others v Government of the United States of America and another⁵¹ the High Court considered and rejected an argument that the extradition request had been delayed so as to take advantage of the designation of the United States of America. Law L.J. noted:

“The request was made in good faith, and as it happens, though the prosecutor did not have to demonstrate as much, a prima facie case is shown on the documents accompanying the request.”

- 8.61 A similar argument was advanced in McKinnon v Government of the United States of America and another.⁵²

“On any basis there is a prima facie case against Mr McKinnon and no one could have sensibly thought otherwise.”

⁵⁰ [1990] 1 WLR 277, at page 299. The case arose from a request for the return of Mr Osman to Hong Kong where he was wanted to stand trial on charges of fraud.

⁵¹ [2007] QB 727 at 773.

⁵² [2007] EWHC 762 (Admin), at paragraph 39.

Abuse of Process as a Bar to Extradition

- 8.62 Following the enactment of the 2003 Act, the High Court has confirmed that the courts have a discretion to stay extradition proceedings on the basis that they amount to an abuse of the Court's process.⁵³
- 8.63 The significance of this point is that the courts have developed an additional safeguard for requested persons along with a mechanism for investigating the merits of the extradition request.
- 8.64 In R (on the application of the Government of the United States of America) v Senior District Judge, Bow Street Magistrates' Court and others,⁵⁴ the High Court considered how the court should approach an allegation of abuse of process.

*“Where an allegation of abuse of process is made, the first step must be to insist on the conduct alleged to constitute the abuse being identified with particularity. The judge must then consider whether the conduct, if established, is capable of amounting to an abuse of process. If it is, he must next consider whether there are reasonable grounds for believing that such conduct may have occurred. If there are, then the judge should not accede to the request for extradition unless he has satisfied himself that such abuse has not occurred.”*⁵⁵

⁵³ R (Birmingham and other) v Government of the United States of America and another [2006] EWHC 200 (Admin).

⁵⁴ [2006] EWHC 2256 (Admin).

⁵⁵ The Court considered what procedure the judge should employ and whether he has the power to order disclosure.

“The appropriate course for the judge to take if he has reason to believe that an abuse of process may have occurred is to call upon the judicial authority that has issued the arrest warrant, or the State seeking extradition in a Part 2 case, for whatever information or evidence the judge requires in order to determine whether an abuse of process has occurred or not.”

This procedure or a similar procedure to obtain further information has been followed in a number of cases where the requested person raises bars to extradition. The judge may draw inferences from any failure to provide information or evidence that he has called for. The failure to provide information or evidence may also leave the material put forward by the defendant unchallenged. For Part 1 cases, the European Arrest Warrant Framework Decision foresees the need to request additional information (Article 15(2)). For Part 2 cases, the ECE also makes provision for requests for supplementary information (Article 13) and there is a similar provision in the United Kingdom/United States Extradition Treaty 2003 at Article 10.

- 8.65 The abuse of process jurisdiction is broad enough to prevent any extradition request made for an improper motive.⁵⁶

The Submissions To The Review

- 8.66 Most of those who submitted representations to our Review did not believe there should be a reintroduction of the *prima facie* evidence requirement for all countries. An overwhelming majority did not believe that category 1 territories should have to provide *prima facie* evidence. A number felt that all category 2 territories should have the *prima facie* case requirement reinstated. Others believed that there were sufficient protections to allow for the cases from designated countries to be examined properly. There was a widespread concern about the need to ensure that the designation of countries was the subject of review or reconsideration.
- 8.67 We received some representations arguing for the retention of the current requirements for *prima facie* evidence or suggesting the re-imposition of the *prima facie* case requirement for some or all of the currently designated countries. There was no suggestion that we should remove the *prima facie* case requirement for any more countries, or categories of countries.
- 8.68 Many respondents, including one who argued in favour of reintroducing the *prima facie* evidence requirement, accepted that reintroducing the requirement would not necessarily lead to different outcomes in cases before the court. Many of the public responses focussed specifically on the United States of America and referred to specific cases or to the question of the imbalance in the extradition arrangements with the United States of America.⁵⁷ The *prima facie* case requirement was referred to by some as an essential safeguard against oppressive extradition requests. Conversely, there were suggestions that it was not very effective as a safeguard and that other protections within the 2003 Act are adequate.

⁵⁶ In Scotland, where there is no abuse of process jurisdiction as such, the High Court of Justiciary exercises a nobile officium, an inherent discretion, where no other mode of review appears competent or appropriate. An aggrieved person may petition the nobile officium for redress or to prevent injustice or oppression. (We were informed that this was available as a potential remedy in cases of extradition.)

⁵⁷ We have dealt with the issue of the United States/United Kingdom Treaty in Part 7. We have concluded that there is no imbalance.

- 8.69 In support of the *prima facie* case requirement, reference was made by some respondents to the case of Andrew Symeou.⁵⁸ Mr Symeou's return was sought by the Greek authorities to stand trial on a charge of manslaughter. He sought to resist extradition and made various criticisms of the Greek police investigation and the evidence gathered by the investigation. The High Court declined to refuse extradition and stated:

“The absence of even an investigation before extradition into what has been shown by the Appellant here may seem uncomfortable; the consequences of the Framework Decision may be a matter for legitimate debate and concern. But we have no doubt but that the common area for judicial decisions in criminal matters means that the judicial systems of the countries of the European Union must be regarded as capable of providing sufficient minimum safeguards for a fair trial in a civilised country, including provisions for the exclusion of evidence obtained by coercion. The same process would be applied in reverse were English authorities to seek the extradition of a Greek citizen who contended that the English police had obtained evidence by violence or manipulation. It would be for the English and not the Greek Courts to resolve the issues.”

- 8.70 Since receiving evidence from this respondent, Mr Symeou has been acquitted by a court in Greece.⁵⁹
- 8.71 Some of those who provided submissions to the Review believed that the 2003 Act provides adequate mechanisms for obtaining evidence or information, where necessary, through dialogue with the issuing state. We were informed that cases are sometimes adjourned in order to obtain further evidence to clarify matters and that in this type of case the *prima facie* case requirement is unnecessary.
- 8.72 One case repeatedly advanced to illustrate the value of the *prima facie* case requirement concerned the request from the United States of America for the return of

⁵⁸ *Symeou v Greece* [2009] 1 WLR 2384.

⁵⁹ My Symeou spent some time in pre-trial detention in Greece and we would hope that the European Supervision Order will help to avoid this in similar cases in the future (see paragraph 4.34).

Lotfi Raissi. This was a request made under the 1989 Act. Mr Raissi was discharged from the proceedings when evidence was not forthcoming to substantiate allegations of his involvement in the September 2001 terrorist attacks in the United States.

8.73 We heard from the extradition judge who dealt with Mr Raissi's case. He expressed the hope that the human rights protections in the 2003 Act would operate to provide a safeguard if a similar case were now to arise that the United States of America has been designated to remove its obligation to provide evidence.

8.74 A number of respondents expressed concern at the designation of countries which have extremely poor human rights records and suggested periodic reviews of the designations to consider if they are still appropriate. One respondent referred to the Russian Federation which has had extradition requests refused on the basis that the requests are politically motivated.⁶⁰

The Joint Committee on Human Rights

8.75 The Joint Committee on Human Rights concluded that *"adding a requirement for the requesting country to show a prima facie case- or a similarly robust evidential threshold in a civil law state- before a person is extradited will improve the protection of human rights of those subject to extradition. In particular, this will require investigatory authorities to assess the available evidence before issuing a request for extradition, particularly within the EU, thus reducing the likelihood that a*

⁶⁰ This concern about the misuse of extradition requests for politically motivated requests is shared by the Council of Europe this issue was considered in its report adopted in 2009 (Allegations of politically motivated abuses of the criminal justice system in Council of Europe member states, Document 11993, 7 August 2009). The report led to Resolution 1685 which was adopted by the Parliamentary Assembly of the Council of Europe. This Assembly noted that the criminal justice systems of all member states of the Council of Europe were exposed to politically motivated interferences, although to very different degrees. It therefore called on member states to:

"ensure that the competent authorities for deciding on extraditions and other types of judicial cooperation take into account the degree of independence of the judiciary in the requesting state - in practice as well as in law - and refuse extradition whenever there are reasons to believe that the person concerned is unlikely, for political reasons, to be given a fair trial in the requesting state."

*person could be extradited on speculative charges or for an alleged offence which they could not have committed.”*⁶¹

- 8.76 We note that only one organisation argued in favour of the reintroduction of the *prima facie* evidence requirement for all countries: the other respondents to the Joint Committee did not consider reintroduction of the requirement to be justified.
- 8.77 The Committee referred to the case of Mr Edmund Arapi as providing evidence of the need for a *prima facie* evidence requirement to deal with cases of mistaken identity. However, the Committee mistakenly refers to Mr Arapi as having been extradited to Italy. In fact the EAW for Mr Arapi was withdrawn by the Italian authorities before he was extradited to Italy. Moreover, it is not clear how a *prima facie* evidence requirement would operate as a protection in cases of mistaken identity. If the mistake is to the identity of the person named in the warrant, this will not be cured by the evidential requirement. If the mistake is to the perpetrator of the crime, this is ordinarily a matter for the court of trial.

Our Analysis

- 8.78 The United Kingdom has historically considered the provision of *prima facie* evidence to be a safeguard and it was a requirement in all extradition requests for accused persons. After a lengthy period of reflection, consultation and debate, the United Kingdom took the decision to ratify the ECE without entering a reservation in respect of the requirement. This led to the abolition of the requirement in respect of nineteen State Parties to the ECE when the Convention came into force for the United Kingdom in 1991.
- 8.79 The principal reasons for this change were two-fold:

⁶¹ In support of the recommendation the Committee also referred to the case of Mr Michael Turner as it had heard evidence that this extradition request had been made for investigative purposes. However, Justice has commented that a *prima facie* requirement would probably not have stopped Mr Turner's extradition. For the reasons explained below we do not believe that the Committee's proposal would in fact either improve the protection of human rights for those subject to extradition requests or provide any safeguard against speculative requests. It would however add to the length and complexity of the extradition process.

- (i) Civil law jurisdictions were not able to make successful extradition requests as there is nothing comparable to the *prima facie* evidence requirement in their legal systems. It was also felt that this operated as a deterrent to the making of extradition requests.
- (ii) The parties to the ECE were countries with which we had close political commercial and legal ties and the safeguard was unnecessary.

8.80 Since 1991, the United Kingdom has designated (or will soon designate) the remaining twenty eight countries which have become parties to the ECE. Whilst there is sometimes a delay between a country becoming a party and being designated by the United Kingdom, this is the result of delays in the administrative process of designation; and not because the United Kingdom is giving consideration to the question of whether or not to designate the country.

8.81 The agreement of the United Kingdom is necessary before any non-member state of the Council of Europe is able to ratify the ECE.

8.82 A number of countries have either expressed a desire to become members of the Council of Europe or have taken steps to start the application process. These include Morocco, Kazakhstan and Belarus. All Member States of the Council of Europe “*must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms*”. They must also become signatories to the European Convention on Human Rights. However, it is clear that membership of the Council of Europe does not guarantee that human rights will not be violated.

8.83 The current position is that Member States of the Council of Europe are not required to provide any evidence at all and a number of these countries have been designated in this way for up to twenty years. In order to introduce a requirement for any party to the ECE to provide *prima facie* evidence, the United Kingdom would have to negotiate with the Council of Europe, as well as the State Parties to the ECE, and seek to introduce a reservation after ratification. If a State party objected, then the reservation would not be possible. Alternatively, the United Kingdom could withdraw from the ECE and rely on bilateral extradition agreements with the State parties. However, the United Kingdom does not have bilateral extradition treaties with most

of these countries. There are a few State Parties with which the United Kingdom does have bilateral extradition treaties, but these treaties are now very old; with the earliest being made with Norway in 1873. An additional problem is caused by changes in countries which have occurred since any bilateral extradition treaty was signed.⁶² A further option would be for the United Kingdom to withdraw from the ECE and then seek to re-ratify, depositing a reservation at the time of re-ratification. However, this could be seen as an abuse given that it would be designed to circumvent the restriction in the ECE which specifies when a reservation may be made.⁶³

- 8.84 The United Kingdom has also implemented the European arrest warrant Framework Decision which allows for surrender based on the principle of mutual recognition. Therefore, from 1 January 2004 all Member States of the European Union have not been required to provide evidence. However, as all the Member States were parties to the ECE their position did not change: they had already been designated to remove the *prima facie* requirement. In order to impose a *prima facie* evidence obligation on any European Member State, the United Kingdom would have to withdraw from the Framework Decision.
- 8.85 The 2001 Review suggested that there were strong arguments in favour of removing the *prima facie* requirement with the United Kingdom's closest extradition partners "*especially where we have confidence in the overall fairness of their judicial systems*". This led to the designation of the United States of America, Australia, Canada and New Zealand. The United Kingdom anticipated that the United States would ratify the Treaty to bring it into force and so designated the United States of America.
- 8.86 The 2003 Act contains safeguards even for those countries which do not have to provide a *prima facie* case. These safeguards were referred to in the 1982 Review and 1985 Green Paper. They include the abuse of process jurisdiction, the bars to extradition and the requirement to ensure that extradition is compatible with the rights contained in the Human Rights Act 1998.

⁶² Whilst the United Kingdom signed a bilateral extradition treaty with Yugoslavia in 1900 this might not apply to the countries which have come into existence following the break up of Yugoslavia.

⁶³ Article 26 allows a reservation to be made when a country signs or deposits its instrument of ratification or accession.

- 8.87 Significantly, as a result of the abuse of process jurisdiction, the court can call for evidence or information if it is concerned that an extradition request has been submitted for an improper purpose. The failure to provide evidence or information in response to a defendant arguing that a bar to extradition exists can lead to the court treating the defence evidence as unchallenged or drawing an inference adverse to the requesting territory.

Our Conclusions and Recommendations

- 8.88 It is clear that the United Kingdom could not require European Union Member States to meet the *prima facie* case requirement without withdrawing from the European arrest warrant Framework Decision.⁶⁴
- 8.89 It does not seem to us that there is any need to re-introduce the *prima facie* case requirement for category 1 territories. No evidence was presented to us to suggest that European arrest warrants are being issued in cases where there is insufficient evidence.
- 8.90 A *prima facie* case requirement would not in any event address the issue of mistaken identity or alibi.
- 8.91 In both category 1 and 2 cases, we consider that the extradition judges are able to subject extradition cases to scrutiny and ensure that any abusive request is identified and dealt with appropriately. The Crown Prosecution Service has an obligation to ensure that the Court is aware of any material which is relevant to its decision and given that the requested person or their lawyer may be unaware of any previous findings which are critical of a requesting State, we recommend that guidance is issued by the Director of the Crown Prosecution Service which explicitly requires a prosecutor to bring these decisions to the attention of the court⁶⁵.

⁶⁴ If the United Kingdom did impose a *prima facie* case requirement for Ireland, as one of the Member States, then this would be the first time in history that such a requirement would exist.

⁶⁵ *R (Raissi) v Home Secretary* [2008] EWCA Civ 72 at paragraph 140 “It must follow in our view, that the CPS has a duty to disclose evidence about which it knows and which destroys or severely undermines the evidence on which the requesting state relies.”

- 8.92 We believe that there are legitimate concerns about the fact that once a country has been designated as a category 2 territory no subsequent reassessment of the designation takes place. When considering Part 2 cases the domestic courts rely on the designation as a measure of the trust reposed by the United Kingdom in the category 2 territory in question.
- 8.93 We invite the Government periodically to review the category 2 designations, taking into account adverse extradition decisions in the United Kingdom and adverse judgements of the European Court of Human Rights, or other courts and bodies responsible for monitoring compliance with international human rights standards. We recognise any review would potentially affect treaty arrangements and it is for that reason that we believe it is for the Government to conduct such a review and to decide what should occur as a result.
- 8.94 We also suggest as part of this review that the Government should consider whether the country should continue to benefit from the ability to present hearsay evidence, as currently allowed under section 84(2). This would be a less radical step than removing the designation and the Government may wish to consider whether for some countries it is necessary to introduce an ability to use a “*record of case*” process.⁶⁶
- 8.95 We understand that removing the designation of a country would be a serious step and could cause diplomatic repercussions. We also appreciate that the United Kingdom has an interest in having extradition arrangements with other countries to ensure that people cannot evade prosecution by the authorities in the United Kingdom.⁶⁷ However, these factors should not outweigh the need to ensure that we do not maintain general extradition arrangements with countries which routinely violate human rights or abuse the system of international cooperation for extradition.

⁶⁶ Some common law jurisdictions which have a *prima facie* case requirement (such as Canada) have allowed for a record of case to be used to satisfy this requirement. A record of case is a document which includes a summary of the prosecution evidence available for use by the requesting State and which is certified by a judicial or prosecution authority to be accurate.

⁶⁷ This explains why the United Kingdom has extradition arrangements with certain category 2 territories, where outward extradition from the United Kingdom would be unlikely to take place (for example, Zimbabwe).

- 8.96 At the very least such a review would provide an opportunity to raise these concerns and have them addressed by category 2 territories.

Part 9 The Secretary of State's Discretion

9.1 One of the matters we were expressly asked to consider is the breadth of the Home Secretary's discretion in an extradition case.

9.2 We address this issue in the following paragraphs. We first put the matter in context.

The Context

9.3 As explained above, historically, extradition procedures involved a division of responsibility between the courts and the executive. At the conclusion of the court process the Secretary of State had the final word on surrender. Under the Extradition Act 1870 the Secretary of State enjoyed a general discretion not to surrender an accused or convicted person whenever, in his view, it would be wrong, unjust or oppressive to do so. This general discretion also existed under the Fugitive Offenders legislation and the Extradition Act 1989.¹

9.4 In *Atkinson v United States of America Government*² the House of Lords held that by providing this safeguard Parliament had excluded the jurisdiction of the courts to dismiss extradition proceedings on the grounds that they amounted to an abuse of the Court's process.

9.5 Under the 2003 Act, the Secretary of State has only a limited role to play in proceedings under Parts 1 and 2.³ One of the major objectives of the 2003 Act was to

¹ The general discretion existed alongside other bars to extradition and the position in relation to each statute has been summarised above. The Secretary of State had no part to play in the operation of the Backing of Warrants (Republic of Ireland) Act 1965.

² [1971] AC 197.

³ In Part 1, the Secretary of State continues to have a role in deciding between competing requests for extradition (section 179). Additionally the Secretary of State may prevent extradition from taking place on the grounds of national security (section 208). In Part 2 the Secretary of State is required to consider the matters in section 93(2)(a)-(d) (death penalty, speciality, earlier extradition, earlier transfer).

remove the general discretion of the Secretary of State and to increase the role of the judiciary in the extradition process.

- 9.6 To compensate for the more limited role of the Secretary of State the courts have developed an abuse of process jurisdiction as an additional bar to extradition. The jurisdiction is available to prevent extradition if the prosecutor manipulates or uses the procedure of the court in order to oppress or unfairly prejudice a defendant before the court.⁴

The Secretary of State's Decision Making under the 2003 Act: Competing Extradition Requests and National Security

- 9.7 There are three sections that give the Secretary of State (or in Scotland, the Scottish Ministers) a discretion⁵ in relation to both Part 1 and Part 2 cases. These are sections 126 (competing extradition requests), 179 (competing claims to extradition) and 208 (national security).
- 9.8 Section 126 applies where there are competing Part 2 requests for extradition and Section 179 where there is a Part 1 warrant and a Part 2 request. The Secretary of State (or, in Scotland, the Scottish Ministers) has a discretion to decide which should take priority but, in exercising it, has to take into account certain criteria.⁶ As far as we are aware, this discretion has only been exercised on one occasion.
- 9.9 Section 208 gives the Secretary of State a discretion to halt the extradition process if he believes the person's extradition would be against the interests of national security and certain other conditions are met. This power (so far as we are aware) has never been exercised.

⁴ *R (Government of the United States of America) v Bow Street Magistrates' Court* [2007] 1 WLR 1157, per Lord Phillips of Worth Matravers C.J. at paragraph 82.

⁵ We use the terms '*discretion*' in this context to denote the fact that the Secretary of State has power to decide between alternative courses of action. In truth, the power is limited by the fact that the Secretary of State's scope for reaching one decision rather than another is limited by the statutory scheme.

⁶ see sections 126(3) and 179(3).

- 9.10 We received no submissions that the discretions under sections 126, 179 and 208 should be altered or removed. There is no suggestion that the existence of these discretions causes any difficulties in practice.
- 9.11 We recommend that the discretions under section 126, 179 and 208 remain as they are.

Decision Making Under Part 2

- 9.12 In Part 2 cases the Secretary of State is involved at the beginning and at the end of the process.⁷
- 9.13 Under section 70, when the Secretary of State receives a valid request for extradition she must issue a certificate and send the case to an appropriate judge unless certain criteria are met, in which case she may refuse to certify. Those criteria are:
- (a) She has decided in favour of a competing request under section 126.
 - (b) The person whose extradition is requested has been recorded by the Secretary of State as a refugee within the meaning of the Refugee Convention.⁸
 - (c) The person whose extradition is requested has been granted leave to enter or remain in the United Kingdom on the ground that it would be a breach of Article 2 or 3 of the Human Rights Convention to remove him to the territory to which extradition is requested.
- 9.14 Section 70 has given rise to a problem concerning the interrelationship between extradition and claims for asylum. This problem, which we address below, does not relate to the breadth of the Secretary of State's discretion: although the word "may" is used in section 70(2), application of this section does not in practice give rise to any exercise of discretion on the part of the Secretary of State, either the criteria exist or they do not.

⁷ Sections 70 and 93.

⁸ The Refugee Convention means "*the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol to the Convention*" (Section 167(1) of the Immigration and Asylum Act 1999).

9.15 Section 93 applies at the end of the court phase of the extradition process. It only arises if the judge concludes there is a case to send to the Secretary of State for her decision whether the person should be extradited.⁹ At that point, the Secretary of State must decide whether she is prohibited from ordering the person's extradition. The grounds on which she may do so are:

- (a) Death penalty;¹⁰
- (b) Speciality;¹¹
- (c) Earlier extradition to the United Kingdom from another territory;¹² and
- (d) Earlier transfer to the United Kingdom by the International Criminal Court.¹³

9.16 Essentially these are factual questions for the Secretary of State to decide and there will ordinarily be a clear answer for each of them.¹⁴ They do not involve the exercise of any discretion on the part of the Secretary of State. Depending on the answers to those questions, the Secretary of State is required either to discharge the requested person or order extradition. There is a right of appeal to the High Court against the Secretary of State's decision.¹⁵ The only real issue that has arisen with regard to the Secretary of State's powers in relation to these provisions has arisen in relation to speciality.¹⁶

9.17 A more difficult problem has arisen as a result of the fact that the Secretary of State is a public authority within the meaning of the Human Rights Act 1998. The effect of her status as a public authority is that her decisions must be compliant with the Convention rights set out in the Schedule to the Human Rights Act 1998. Thus, when the judge sends a case to the Secretary of State for her decision, she must also act

⁹ It follows that the extradition judge will have concluded that none of the bars to extradition applies to the requested person's case and that extradition is compatible with the Convention rights in the Human Rights Act 1998.

¹⁰ Section 94.

¹¹ Section 95.

¹² Section 96.

¹³ Section 96A.

¹⁴ Either the death penalty will be imposed or it will not; either speciality protection exists or it does not; either there has been earlier extradition/transfer or there has not.

¹⁵ Sections 108 and 110.

¹⁶ For example, *Welsh v Secretary of State for the Home Department* [2007] 1 WLR 1281.

compatibly with Convention rights.¹⁷ Difficulties have arisen in practice where there is a material change of circumstances following the conclusion of the court phase of the extradition process.¹⁸ At this stage representations are sometimes made to the Secretary of State claiming that it would be a breach of the Human Rights Act 1998 for the Secretary of State to order extradition and the Secretary of State is duty bound to consider the representations. In McKinnon v Secretary of State for Home Affairs¹⁹ the High Court stated:²⁰

“The Secretary of State has accepted that he has an implied power to withdraw any extradition order where, as here, something new has arisen exceptionally between the exhaustion of the statutory remedies under the 2003 Act of the person whose extradition is sought and his actual removal. This proposition has the authority of the first judgment of the Divisional Court [2007] EWHC 762 (Admin) at 61 to 63. The basis for this implied power is s 6 of the Human Rights Act 1998, which renders it unlawful for the Secretary of State, as a public authority, to act in a way which is incompatible with a Convention right. It follows that the “something new” must be evidence that that person's Convention rights would be infringed by his extradition. The Secretary of State also accepts that his decision in such circumstances is susceptible of judicial review.”

- 9.18 We are doubtful whether Parliament either expected or intended that cases such as McKinnon would go back to the Secretary of State for further consideration on human rights grounds: the 2003 Act was intended to limit the executive's role in extradition to the greatest possible extent and thus remove any perception that decisions are taken for political reasons or influenced by political considerations.

¹⁷ The extradition judge will have concluded that extradition is compatible with human rights before sending the case to the Secretary of State under section 87.

¹⁸ This usually arises after an unsuccessful appeal to the High Court against the extradition judge's decision to send the case to the Secretary of State and/or against the decision of the Secretary of State to order extradition.

¹⁹ [2009] EWHC 2021 (Admin)

²⁰ At paragraph 64, per Stanley Burnton L.J.

Submissions To The Review

- 9.19 The strong thrust of the submissions made to the Review was that greater judicial involvement in the extradition process is beneficial and that it would be retrograde to reintroduce or increase the Secretary of State's discretion. Some of the submissions went so far as to suggest that the Secretary of State's involvement should be removed altogether.
- 9.20 One respondent to the Review said that there were two principal reasons why the Secretary of State should not have powers to prevent extradition:
- (i) there is no proper mechanism for the Secretary of State to resolve factual disputes;
 - (i) a conflict of interest may arise between, on the one hand, the Secretary of State's obligation under extradition arrangements with foreign states and, on the other hand, the Secretary of State's responsibilities and duties toward the requested person.
- 9.21 In their submission to the Review, the Scottish Government suggested that the role of the Scottish Ministers could be reduced or removed in relation to some of the section 93 considerations. It was suggested that, as some of the issues involve questions of fact, they could easily be transferred to the judiciary to decide and that this would remove an unnecessary layer of procedure. They further suggested it might be appropriate to retain ministerial involvement in relation to national security, specialty and human rights. On this latter point, they went so far as to suggest that consideration be given to amending section 93 to include an express requirement on the Minister to consider human rights issues. So far as we are aware, Scottish Ministers have not faced the same problem as the Secretary of State with fresh human rights challenges at the conclusion of the court phase of the extradition process.²¹

²¹ For reasons set out below we see no benefit in duplicating human rights decision-making and are not in favour of including a provision in section 93 that human rights issues be considered for a second time by the Secretary of State when that bar to extradition has already been considered by the extradition judge under section 87 and in the event of any challenge to the extradition judge's decision, by the High Court on appeal.

- 9.22 The Joint Committee on Human Rights²² was not convinced that any changes should be made to the Secretary of State's role.

Our Analysis

- 9.23 We are firmly of the view that the Secretary of State's powers should not be increased. We think the Secretary of State's involvement as regards the death penalty, specialty and the other grounds in section 93 which do not involve the exercise of discretion, are matters with which she is best able to deal. The only respondent to suggest otherwise, apart from the Scottish Government, was the Criminal Bar Association. We believe that the Secretary of State is much better placed to deal with these matters than the courts. For example, a death penalty issue is, on occasion, dealt with by an undertaking from the state seeking extradition that the death penalty will not be imposed: this is a matter more appropriately addressed by the executive.
- 9.24 Moreover, we think the Secretary of State's involvement should be further limited by removing from her consideration with human rights matters which we believe are more appropriately the concern of the judiciary.
- 9.25 We explain our reasons for reaching this conclusion in the following paragraphs.
- 9.26 As the law currently stands it is possible for a person who has failed to resist extradition in the court process to raise human rights issues with the Secretary of State prior to their surrender from the United Kingdom. Where this occurs, representations are submitted by the requested person to the Secretary of State. These are followed by representations submitted on behalf of the requesting State, followed by counter-representations and a response to the counter representations, before the Secretary of State finally makes a decision. This is a source of delay, sometimes for months and even years.

²² “*The Human Rights Implications of UK Extradition Policy*”, HL Paper 156, HC 767, published on 22 June 2011, paragraph 202.

- 9.27 The Secretary of State's decision is then susceptible to challenge by way of an application for judicial review: whether by the requested person or the requesting State.²³
- 9.28 At the conclusion of the judicial review procedure, it is possible for the whole process of representations to begin again, taking into account any material change in circumstances.
- 9.29 In our view, this situation is unacceptable and could be remedied by giving the last word on human rights issues to the judiciary.
- 9.30 We see a number of advantages in ensuring that human rights issues arising at the end of the extradition process are decided by the courts rather than the Secretary of State. These are:
- (i) Speed. The court will remain seized of the proceedings and can use its case management process to control the process. The backward and forward movement of cases between the courts and the Secretary of State will cease. The court has the necessary expertise to deal with human rights issues and may have already considered the same or similar human rights issues in any earlier appeal.
 - (ii) The process will be a transparently non-political one. This is important not only from the viewpoints of the person whose extradition is sought, and the requesting State, but also the Secretary of State, who will be relieved of taking a decision which may be perceived as having been influenced by political considerations.
- 9.31 How might our proposal be achieved?
- 9.32 We think there is an analogy with the procedure adopted by the High Court in *Ignatova and Others v The Judicial Authority of the Courts of Milan and Others*.²⁴ We are of the view that if a human rights issue is raised after the Secretary of State

²³ A challenge by the requesting State is possible although in practice this is unlikely.

²⁴ [2008] EWHC 2619 (Admin). In that case, the High Court held that supervening events arising under Part 1 could be dealt with by seeking to reopen the High Court appeal.

has ordered extradition and there has either been no appeal or there has been an unsuccessful appeal, applications should be made to the High Court for the matter to be resolved.

- 9.33 We expect that cases falling within this category would be few and far between: examples would include serious medical conditions, either in the case of the requested person or a member of his or her close family, or a dramatic change in the conditions in the requesting State.
- 9.34 The supervening event will almost inevitably arise after the Secretary of State has made the order for extradition, that is after exhaustion of the statutory appeal process: any change of circumstances between the extradition judge's order under section 87(3) and the decision of the Secretary of State can be dealt with in the context of a statutory appeal against the decision of the judge.²⁵ One potential difficulty arises if the requested person has not appealed against the decision of the extradition judge to send the case to the Secretary of State. In these circumstances, we recommend that any human rights issue arising after the Secretary of State's order should nevertheless be considered by the High Court.
- 9.35 There are two principal reasons why we consider that these applications should be considered by the High Court (even in those cases where there had been no previous appeal from the extradition judge's decision). First, the importance of the issue to be determined. Secondly, in the interests of finality and certainty it needs to be to a tribunal from which any further appeal is limited. We recommend that there is the same limited right of appeal to the Supreme Court as currently exists under section 114.
- 9.36 The grounds for re-opening the case would need to be tightly drawn. We recommend the approach adopted by the Court of Appeal in *Taylor v Lawrence*,²⁶ namely, the existence of exceptional circumstances and where re-opening the case is necessary in

²⁵ The 2003 Act makes it clear that any appeal against the judge's decision will not be heard until the Secretary of State has made her decision and section 104 provides that the High Court can consider fresh evidence that includes evidence not available to the judge at the time he made his decision.

²⁶ [2003] QB 528.

order to avoid real injustice. We envisage the High Court would have similar powers to those it currently has under section 103 of the 2003 Act.²⁷

- 9.37 Some respondents to the Review were of the view that the Secretary of State should have the last word in matters of extradition on the basis that new matters touching upon the fairness of extradition might come to light immediately prior to the act of surrender. It is difficult to envisage circumstances that would not be encompassed by human rights or national security. If our proposal is accepted, then, save with respect to human rights considerations, the Secretary of State would be in no different position than she is at present. If the Secretary of State became aware of developments after ordering extradition which she believed might, in the event of extradition, lead to a violation of a person's human rights, then we assume she would inform the person so that they could make an application to the court.
- 9.38 We do not believe that our proposal would add significantly to the workload of the High Court; it would consolidate within the High Court proceedings what currently takes place in proceedings brought by way of judicial review. As far as we are aware there have been four cases in which the Secretary of State has had to consider fresh human rights issues after the court process has concluded. There is only a 14 day period between the end of the court process and the time when the individual should be removed from the United Kingdom and thus the scope within that short period for any supervening event to arise is likely to be limited.
- 9.39 We should make clear that our proposal, if accepted, would not reduce the protections available to a requested person seeking to resist extradition: it is designed to ensure that the decision-making is vested with the Court rather than the Secretary of State.
- 9.40 We recommend that the necessary changes to the legislation should apply to Scotland.²⁸

²⁷ That is, it may allow the application and order the person's discharge, dismiss the application or, exceptionally, direct the extradition judge to decide again a question or questions he decided at the extradition hearing. Where the case is referred to the extradition judge, his decision should stand as the decision of the High Court.

²⁸ It appears to us that any legislative changes will apply to Northern Ireland as the Secretary of State deals with all Part 2 extradition requests other than those dealt with by the Scottish Ministers.

Time Limits

- 9.41 The Secretary of State is required to make a decision within 2 months of being sent the case unless she applies to the Designated Judge for an extension of time.²⁹ The Secretary of State need not take into account any representations received from a requested person four weeks from when she is sent the case by the extradition judge.³⁰ We understand that extensions to this time limit are routinely given. We would recommend that it is only in truly exceptional circumstances that representations should be allowed after the four week period expires. We have received comments about the length of time it takes the Secretary of State to make a decision under section 93 and this has led to concerns that when making her decision the Secretary of State is taking into account more than is allowed under the 2003 Act. We would hope that in almost all cases the Secretary of State would be able to make her decision within the 2 month period on the limited factual questions she has to consider having received any representations from the requested person in the initial four week period. We expect the Designated Judge will in any event ensure on application to extend this period that matters are being dealt with expeditiously.
- 9.42 We now go on to address the relationship between extradition and asylum.

The Relationship Between Extradition and Asylum

- 9.43 We are aware that a number of problems have arisen in circumstances where a requested person claims or has been granted asylum.
- 9.44 The relevant provisions in the 2003 Act are sections 39 and 40 for Part 1 cases and section 121 for Part 2 cases.
- 9.45 These provisions apply only in circumstances where an asylum claim has been made after the commencement of extradition proceedings.
- 9.46 There are three different situations to be considered:

²⁹ Section 99
³⁰ Section 93(5)

- (i) Where an asylum or human rights claim has been made and allowed prior to the issue of a certificate under section 70 of the 2003;
- (ii) Where an asylum claim made before the commencement of the extradition proceedings remains undetermined;
- (ii) Where an asylum claim is made following the commencement of extradition proceedings.

We address each of these situations in the following sections.

Where an Asylum or Human Rights Claim Has Been Made and Allowed Prior to the Issue of a Certificate Under Section 70 of the 2003 Act.

9.47 Section 70(2) of the 2003 Act, gives the Secretary of State a limited discretion in a Part 2 case to refuse to issue a certificate under section 70,³¹ a certificate may not be issued if the requested person has been recorded as a refugee or granted leave to enter or remain in the United Kingdom on the ground that it would be a breach of Article 2 or 3 to remove him to the territory requesting extradition. There is no similar provision for Part 1 cases.³²

9.48 The relationship between extradition and asylum was considered by the High Court in District Court in *Ostroleka, second Criminal Division (a Polish Judicial Authority) v Dytlow and Dytlow*.³³ The following points emerge from the judgment:

- (i) In a case where refugee status has been granted to the requested person in respect of the requesting territory and where that status is not under active reconsideration, the Secretary of State has no real discretion under section 70(2).

³¹ The Secretary of State has the power not to send the case to a judge if certain conditions apply. It is for this reason that we describe the discretion as ‘*limited*’: it is circumscribed by the terms of the section.

³² In such a case the Serious Organised Crime Agency is obliged to certify a European arrest warrant so long as it conforms to the requirements of section 2.

³³ [2009] EWHC 1009 (Admin)

- (ii) The existence of refugee status, so long as it persists, constitutes a valid objection to extradition.
- (iii) Whilst the 2003 Act makes no express provision for the discharge of a person who enjoys the status of refugee,³⁴ there is an implied power to refuse to order extradition where the proceedings amount to an abuse of process.³⁵

9.49 The position is more complicated if the requested person has been granted refugee status in respect of a country which is not the requesting territory. In *Dytlow* the High Court stated that the protection in Article 33(1)³⁶ of the Refugee Convention “*would prevent the extradition of a person to his home territory (or indeed any other territory) where his life or freedom would be threatened on account of his race or other factor there referred to (essentially the Refugee Convention grounds)*”.

9.50 Accordingly, if the requested person has been granted refugee status in respect of a country other than the requesting territory, this status should not constitute an automatic bar to extradition. Instead, if the requested person claims that they will face unfair treatment in the requesting territory on one of the Refugee Convention grounds, they are entitled to rely on the extraneous considerations bar to extradition.³⁷ If they seek to rely on the risk that they might be sent from the requesting territory to the country from which they have refuge, for example because the requesting territory would not properly honour its obligations under the Refugee Convention, then it should be for the court to determine whether there is such a real risk of treatment contrary to Article 3 of the Human Rights Convention.³⁸

³⁴ As opposed to someone who claims asylum after the commencement of the extradition proceedings - see sections 39 and 70.

³⁵ This implied power was identified by the High Court in *R (Bermingham) v Director of the Serious Fraud Office* [2007] QB 727.

³⁶ “*No contracting state shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*”

³⁷ Section 13 for Part 1 or section 81 for Part 2.

³⁸ *Ignoua v Italy* [2008] EWHC 2619 (Admin)

- 9.51 Where an Asylum Claim Made Before the Commencement of the Extradition Proceedings Remains Undetermined.
- 9.52 There is no provision in the 2003 Act which deals expressly with this situation. In light of the provisions dealing with these cases where asylum is claimed following the commencement of extradition proceedings, this omission is surprising; it is clear that the protection against return for refugees extends to an asylum seeker.³⁹
- 9.53 We recommend that the protection afforded by sections 39 and 121 be extended to apply to asylum claims made by the requested person in respect of the requesting territory which have been made before extradition proceedings have been commenced.
- 9.54 The effect of this recommendation will be that the extradition process will have to await determination of the asylum claim.
- 9.55 We recognise that the position is more complicated if the asylum claim relates to a state other than the requesting territory. If the requested person contends that they will face unfair treatment in the requesting territory on one of the Refugee Convention grounds they can seek to rely on the extraneous considerations bar to extradition.⁴⁰ If the requested person claims that there is a risk that they might be sent from the requesting territory to the State from which they are seeking refuge, for example because the requesting territory would not properly honour its obligations pursuant to the Refugee Convention, that is in the event of an asylum claim being made there, then it should be for the court to determine whether this is such a real risk. If the court finds a real risk exists then we would recommend that extradition should not be allowed to take place until the asylum claim has been finally determined and the court can use its case management powers to achieve this.⁴¹

³⁹ *R (European Roma Rights Centre) v Immigration Officer* [2005] 2 A.C. 1, the House of Lords confirmed that there was a general principle that a person who left the state of his nationality and applied to the authorities of another state for asylum, whether at the frontier of the second state or from within it, should not be rejected or returned to the first state without appropriate inquiry into the persecution of which he claimed to have a well-founded fear.

⁴⁰ Section 11(1)(b) for Part 1 or section 79(1)(b) for Part 2.

⁴¹ *R (Dos Santos) v Judge Margarida Isabel Pereira De Almeida of the Cascais Court, 2nd Criminal Chamber, Portugal* [2010] EWHC 1815 (Admin).

Where an Asylum Claim is Made Following the Commencement of Extradition Proceedings.

- 9.56 In Part 1 cases, section 39 of the 2003 Act provides that even if the Serious Organised Crime Agency is satisfied that the European arrest warrant conforms to the requirements of section 2, extradition cannot take place until the asylum claim has been determined. A claim is determined when all statutory avenues of appeal have been exhausted. There are provisions in section 40 for dealing with cases falling within the Dublin Convention.⁴² The effect is that a pending asylum claim will not stop extradition taking place if the requesting territory has responsibility for the for determining the asylum claim or will only send the person to another country in accordance with the Refugee Convention.
- 9.57 In Part 2, section 121 contains provisions which mirror section 39. This section provides that, where an asylum claim is made following the issue by the Secretary of State of a certificate under section 70, the extradition cannot proceed until the asylum claim has been determined. There is no comparable provision to section 40. This is because the Dublin Convention does not apply to non-Member States of the European Union.
- 9.58 Again the position is more complicated where the outstanding asylum claim relates to a State which is not the requesting territory. If the requested person contends that they will face unfair treatment in the requesting territory on one of the Refugee Convention grounds, then they can seek to rely on the extraneous considerations bar to extradition.⁴³ If they claim that there is a risk that they might be sent from the requesting territory to the country from which they are seeking refuge, for example because the requesting territory would not properly honour its obligations pursuant to the Refugee Convention, then it should be for the court to determine whether this is such a real risk. Obviously, where the Secretary of State has issued a certificate under section 40 for a Part 1 case, then this issue will not arise. If the court finds it is a real

⁴² The Dublin Convention Council Regulation (EC) No. 343/2003 is an agreement between European Union Member States which provides a system for allocating responsibility for determining an asylum claim by a third country national who has entered the European Union. The aim of the Convention is to avoid multiple asylum claims being made by the same person throughout the European Union.

⁴³ Section 13 for Part 1 or section 81 for Part 2.

risk then we would recommend that extradition should not be allowed to take place until the asylum claim has been finally determined.

Other Asylum and Immigration Matters

Resolution of Asylum Claims

- 9.59 It has been suggested to us that any outstanding asylum claim made by a person subject to an extradition request should be resolved before the commencement of extradition hearing. On this point we agree with the analysis recently provided by the Court of Appeal that this is normally the appropriate course of action.⁴⁴

British Citizenship

- 9.60 A further situation has been drawn to our attention: namely, where a person granted asylum status or humanitarian protection⁴⁵ applies for and is given British citizenship. It is claimed this creates an anomaly in that a person who has not been granted British citizenship is in a better position to resist an extradition request than someone who has.⁴⁶ In our view, a person has a choice as to whether or not to apply for British citizenship. Ordinarily they will only be able to do this after being in the United Kingdom for a number of years. If the circumstances giving rise to the grant of refugee status or right to enter or remain on the grounds of Article 2 or 3 of the Human Rights Convention remain relevant at the time of any extradition proceedings, they will fall to be considered in the normal way at the extradition hearing on the basis of the existing bars to extradition.⁴⁷

⁴⁴ *R (Chichvarkin & Anor) v Secretary of State for the Home Department* [2011] EWCA Civ 91.

⁴⁵ This is provided because to require a person to leave the United Kingdom would risk a violation of a Convention right.

⁴⁶ See paragraphs 9.47-9.57

⁴⁷ These will be primarily the bars relating to extraneous considerations and human rights (see paragraphs 2.7-2.14). It may also be possible for the requested person to renounce their British citizenship and rely on his refugee status.

Re-entry into the United Kingdom

- 9.61 We have been informed of one case in which an accused person was extradited to Italy to stand trial on charges of terrorism; their refugee status was then revoked and indefinite leave to remain cancelled. The accused person was then acquitted of most of the allegations, but not permitted to re-enter the United Kingdom in order to pursue an appeal against the revocation and the cancellation. However, following a legal challenge, the Court of Appeal confirmed that an individual has the right to re-enter during a period of 28 days following service of the decision on him in order to exercise his right of appeal.⁴⁸

Acquittals

- 9.62 We would expect the Secretary of State to take into account an acquittal of an extraditee when considering any application for them to re-enter the United Kingdom following extradition.⁴⁹

⁴⁸ *Secretary of State for the Home Department v MK (Tunisia)* [2001] EWCA Civ 333.

⁴⁹ The Joint Committee on Human Rights also considered this issue at paragraphs 222-224, “*The Human Rights Implications of UK Extradition Policy*”, HL Paper 156, HC 767, published on 22 June 2011.

Part 10 Other matters

- 10.1 In the course of our Review we identified a number of additional matters which we thought it right to address. These additional matters are set out below.

Appeals

- 10.2 We have identified a number of unsatisfactory features about the appeal process.

Time Limits

- 10.3 In Mucelli v Government of Albania¹ the House of Lords confirmed that a notice of appeal had to be both filed and served on the respondent and any interested party within 7 days for a Part 1 case² and 14 days for a Part 2 case³. The House of Lords held that the court did not have the power to extend the periods for filing and service of the notice of appeal. This strict deadline has led to a number of appeals under Part 1 being ineffective for want of jurisdiction. We have received several representations that this produces an unfair result. A number of judges have also highlighted the unfairness in their judgments.⁴
- 10.4 A stark example of the potential injustice caused by this strict time limit is provided by the case of Mann v The City of Westminster Magistrates' Court and others,⁵ In that case the defendant had been convicted in Portugal following a trial which he argued

¹ [2009] 1 WLR 276

² Section 26(4)

³ Section 103(9)

⁴ Halligen v Secretary of State for the Home Department [2011] EWHC 1584 (Admin), Laws L.J. stated: "It would seem to offend the basic principles of fairness that a person served with a notice of extradition should be deprived of a statutory right of appeal through no fault of his own." Szelagowski v Regional Court of Piotrkow Trybunalski Poland [2011] EWHC 1033 (Admin) Sullivan L.J. stated (at paragraph 18): "I merely observe that this case demonstrates how a rigid statutory time limit which cannot be extended under any circumstances can work injustice in practice." Bergman v District Court in Kladno, Czech Republic [2011] EWHC 267 (Admin), Irwin J. stated (at paragraph 10): "I record my concern that unrepresented litigants who are in custody will often find it very hard to comply with the necessary requirements, despite every effort on the part of the court staff."

⁵ [2010] EWHC 48 (Admin).

was grossly unfair. His lawyers in Portugal had failed to file within the required time limit the documents required to appeal against the conviction. He was then subject to extradition proceedings in the United Kingdom. Following the order for extradition, his lawyers failed to file and serve the notice of appeal within the required 7 day period. Accordingly, the High Court had no jurisdiction to entertain the appeal and Moses L.J. said this:⁶

“Neither Parliament, in enacting the strict statutory scheme relating to Part 1 extraditions in the 2003 Act, nor the House of Lords in Mucelli and in Hilali, nor this court in Navadunskis can possibly have envisaged one man being deprived of proper legal assistance by two sets of lawyers in two separate jurisdictions on two distinct occasions. Yet I accept this court is powerless to act. It has no jurisdiction.”

- 10.5 There are further problems for defendants who are in custody and unrepresented. They may have great practical difficulty in completing a notice of appeal, filing it with the Court, paying the required fee and serving a copy of the Notice (whether or not this is sealed) on the Crown Prosecution Service. Several judges have sought to ameliorate the effect of the strict time limit by using powers of the court⁷
- 10.6 We have identified two possible mechanisms for alleviating potential injustice. Either the time limit for Part 1 is extended from 7 to 14 days, or the court is given a discretion to extend the time limit in the interests of justice.
- 10.7 On the whole we prefer the former, as this is an area in which certainty and finality is important.
- 10.8 We think the risk of injustice will be further reduced if the formalities required to be completed in the 14 day period are limited in both I Part 1 and Part 2 appeals.
- 10.9 We therefore recommend the following changes:

⁶ At paragraph 17.

⁷ For example, the court’s general powers of case management, pursuant to the Criminal Procedure Rules Part 3.1, have been invoked.

- (i) the time limit for the giving of a notice of appeal for Part 1 cases should be 14 days rather than 7 days (this will require an amendment to section 26(4) of the 2003 Act);
- (ii) although it is desirable that Form N161⁸ is used, a failure to use this form should not mean that the document is not a valid Notice of Appeal.
- (iii) to be a valid Notice of Appeal a document must satisfy four requirements:
 - (a) it should purport to be a notice of appeal (and not notice of an intention to appeal);
 - (b) it should identify the appellant;
 - (c) it should identify the decision under appeal; and
 - (d) it should identify the grounds of appeal⁹
- (iii) It is important for the court to be provided with an outline of the grounds of appeal, the absence of detailed grounds should not invalidate the notice of appeal.¹⁰ The court can direct that written grounds are provided, and the Crown Prosecution Service could make an application if concerned that inadequate grounds have been submitted.¹¹ If our recommendation for a requirement for leave to appeal¹² is implemented then there will need to be a time limit within which perfected grounds of appeal must be filed.

⁸ Appellant's notice (all appeals except small claims track appeals)

⁹ *Pomieczowski v District court of Legnica 59-220, Poland; Rozanski v Regional Court 3 Penal Department, Poland; Ungureanu v Tribunalul Maramures (Maramures County Criminal Offences Court), Romania* [2011] EWHC 2060 (Admin) where Laws LJ stated that a notice of appeal must identify, amongst other things, the decision under appeal.

¹⁰ *Kaminski v Poland* [2010] EWHC 2772 (Admin) where Ouseley J held that the absence of grounds of appeal would not render a notice invalid. We would suggest that if our recommendations are implemented to reduce the formalities required and to extend the time limit then there should be requirement to set out, at least in outline, the grounds of appeal.

¹¹ In *Filipek v Lublin Provincial Court Poland* [2011] EWHC 1961 (Admin) the High Court made an order for grounds to be provided which was ignored. The court dismissed the appeal.

¹² See paragraphs 10.10-10.16

- (iv) Any court fee should not be required to be paid within the 14 day time limit and a longer period should be allowed.¹³
- (v) The copy of the Notice of Appeal which is served on the Crown Prosecution Service and any other interested party should not have to be sealed.¹⁴
- (vi) The court should provide the defendant with a form explaining the right of appeal, the time limit and what must be done in this period.¹⁵

Leave To Appeal

- 10.10 There is at present an unfettered right of appeal to the High Court in Part 1 and Part 2 cases both on law and fact (section s26(3),103(4), 108(3) and 110(4).
- 10.11 As the figures in the boxes below illustrate, in 2010, 261 appeals were lodged in Part 1 cases and 18 in Part 2 cases. In the first seven months of 2011, 111 appeals were lodged in Part 1 cases and 10 in Part 2 cases. Thus the average is approximately 20 new appeals each month. Although it is not possible to make an exact comparison, the picture from the statistics with which we have been provided is that about one in six or seven of every case decided in the City of Westminster Magistrates' court is appealed to the Administrative Court. The average waiting time before disposal of the appeal is currently about 18 weeks in Part 1 cases and 27 weeks in Part 2 cases. This is likely to increase.¹⁶
- 10.12 In 2010, 146 appeals were disposed of in Part 1 cases with 17 allowed and 124 dismissed. 5 cases were withdrawn. The figures for Part 2 cases were 12 appeals with 3 allowed, 7 dismissed and 2 were withdrawn. In the first seven months of 2011, 121

¹³ *Marsh v Prague 6 District Court Czech Republic* [2010] EWHC 3810 (Admin) where Pill L.J. stated that if the fee was not paid within the seven day period then the notice of appeal was deemed not to have been filed.

¹⁴ *Kane v Trial Court No 5 Marbella Spain* [2011] EWHC 824 (Admin) where Collins J. considered that the notice should not have to be sealed (at paragraph 45)...

¹⁵ This was suggested by the court in *Szelagowski v Regional Court of Piotrkow Trybunalski Poland* [2011] EWHC 1033 (Admin).

¹⁶ In Scotland, in 2010, there were 146 Part 1 cases and 6 Part 2 cases. In the year 2009/2010 there were 29 appeals, of which 27 were dismissed.

cases were disposed of under Part 1 with 7 allowed, 111 dismissed and 3 withdrawn. In Part 2 cases, 9 appeals were dismissed, 2 allowed with 1 withdrawn.

European arrest warrant cases: England and Wales

	2010	2011 (to end July)
Cases at City of Westminster Magistrates' Court	1497	869
Cases contested at City of Westminster Magistrates' Court	1438	846
Statutory appeals to High Court	261	111
Appeals allowed	17	7
Appeals dismissed	124	111
Appeals withdrawn	5	3

Part 2 cases

	2010	2011 (to end July)
Cases at City of Westminster Magistrates' Court	92	70
Cases contested at City of Westminster Magistrates' Court	88	68
Statutory appeals to High Court	18	10
Appeals allowed	3	2
Appeals dismissed	7	9
Appeals withdrawn	2	1

- 10.13 In 2010, the total success rate was 20 out of 158 (12.65%) and in the first seven months of 2011, 9 out of 133 (6.29%). These figures are entirely consistent with the submissions we received and our own experience, that the court system is burdened by unmeritorious appeals. The result is that the lead time for hearing appeals becomes ever longer, meritorious appeals are delayed and the time limits imposed by the legislation are being routinely extended.

- 10.14 In our view, a filter should be imposed (as already exists in judicial review cases). No appeal should go forward without leave of the judge whose decision is being appealed or a judge of the High Court. Leave to appeal should be sought and granted or refused on paper with right of appeal against refusal to a judge at an oral hearing. We think the test should be the same as for judicial review namely that the appellant would have to show an arguable case.
- 10.15 If this recommendation is implemented it will ensure that appeals without merit are eliminated at the earliest opportunity. This will allow appeals with merit to be heard and disposed of more quickly. This would be consistent with the general principle that: the appeal process exists to detect and correct error: not as a mechanism to be used to delay the judicial process. We also consider that the introduction of a permission requirement is consistent with the modern trend and that a right of appeal without permission is now the exception rather than the rule in the administration of criminal justice.
- 10.16 Our recommendation applies also to Scotland and Northern Ireland.

Appeals on Questions of Fact

- 10.17 The judges of the Administrative Court have expressed concern about the right of an appellant to bring an appeal on matters of fact. They point out that many Member States do not permit appeals on fact in European arrest warrant cases and that the process is unnecessarily time consuming.
- 10.18 The circumstances in which it is permissible for an appellant to rely on fresh evidence have been considered in a number of cases.¹⁷ The 2003 Act distinguishes between a new issue and new evidence.¹⁸ Where an issue was available to be raised by a claimant on the evidence adduced at the extradition hearing, the claimant will in general, if not always, be entitled to raise that issue on appeal even though the issue

¹⁷ *Szombathely City Court v Fenyvesi and Fenyvesi* [2009] EWHC 231 (Admin); *Kalniets v District Court of Ogre, Latvia* [2009] EWHC 534 (Admin) and *Herdman v City of Westminster Magistrates' Court* [2010] EWHC 1533 (Admin).

¹⁸ Section 104.

was not raised at that hearing.¹⁹ In order to consider fresh evidence it must not have been available at the extradition hearing and it appears that the court will interpret ‘available’ as meaning that it was not at the disposal of the party wishing to adduce it and it could not have been obtained with reasonable diligence. The admissibility of fresh evidence does not extend to situations where the appellant is unhappy with expert evidence called at the extradition hearing and has since found or seeks expert evidence more favourable to him.²⁰ It may be possible to admit evidence which was ‘available’ in order to avoid a breach of the Human Rights Convention, but normally only if this new evidence would be decisive.

10.19 Given the limits now imposed on appeals on fact and our recommendation that leave to appeal should be required in every case we would see no reason for appeals on fact to be removed. The Administrative Court judges have drawn our attention to the number of unmeritorious appeals on fact, but we believe that a requirement of permission to appeal should substantially deal with the problem.

10.20 Where it is asserted on appeal that arguments were not made or evidence was not adduced by reason of the professional negligence or misconduct of legal representatives, the practice of the Court of Appeal, Criminal Division should be followed. The appellant should be formally invited to waive privilege, and the legal representatives invited to respond to the points against them.²¹

Other Causes of Delay

10.21 Other causes of delay have been identified in the course of our Review:

- (1) failure promptly to provide a transcript or note of the extradition judge’s reasons;
- (2) failure to serve adequate grounds of appeal;

¹⁹ *Hoholm v Government of Norway* [2009] EWHC 1513 (Admin).

²⁰ *Undrits v Northern Circuit Prosecutor’s Office Estonia* [2009] EWHC 3430 (Admin); *Hewitt v Spain* [2009] EWHC 2158 (Admin).

²¹ *Sondy v Crown Prosecution Service* [2010] EWHC 108 (Admin).

- (3) the need for payment of a fee or the obtaining of a fee exemption.

10.22 The first two are matters that can be remedied by amendment to the rules and we recommend that they are considered by the Rules Committee. We make no recommendation in relation to the third matter, save to say that in our experience it is unusual for a fee to be required in a criminal matter and we wonder whether if the fee were abolished costs would be saved by the increased efficiency of the appeal process.

Delay Before the European Court of Human Rights.

10.23 There are currently nine cases pending before the European Court of Human Rights involving extradition requests submitted to the United Kingdom by the United States. In each case the applicants have exhausted their rights of appeal in the United Kingdom. In each case the applicant has sought and obtained Rule 39 relief which in effect means that he cannot be extradited unless and until his application to the Strasbourg Court is dismissed.²² We list below the cases and dates on which Rule 39 measures were imposed.

- | | |
|--------------------|------------------|
| • Philip Harkins | 2 April 2007 |
| • Babar Ahmed | 12 June 2007 |
| • Haroon Aswat | 12 June 2007 |
| • Joshua Edwards | 2 August 2007 |
| • Syed Ahsan | 23 May 2008 |
| • Abu Hamza | 4 August 2008 |
| • Khalid Al-Fawwaz | 23 December 2009 |
| • Adel Abdul Bary | 23 December 2009 |

²²

Rule 39 states:

- “1. The Chamber or, where appropriate, its President may, at the request of a party or of any other should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.
2. Notice of these measures shall be given to the Committee of Ministers.
3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated.”

- Jose Inzunza 30.5.11²³

10.24 There is currently no indication when these cases will be decided. Delays of this kind are, in our view, unacceptable; they are unfair to the individual and militate against the prospects of a fair trial. Article 6 of the Human Rights Convention entitles a defendant to a fair and public hearing within a reasonable period of time.²⁴ Unsurprisingly, the United States authorities are concerned about the delay in these cases, two of which, (Al Fawwaz and Bary) involve allegations dating back to 1997. Delays of this kind are inimical to justice and threaten the viability of trial held after such a lengthy period of time. While we appreciate that the Strasbourg Court is struggling to cope with an increasingly heavy caseload, we recommend that this matter is taken up by the Government urgently with the European Court of Human Rights and that the Court should be encouraged to give priority to those cases where Rule 39 relief has been granted and where delay may jeopardise the viability of a trial.

10.25 There is as far as we are aware, only one other UK extradition case pending before the European Court of Human Rights in which Rule 39 measures have been imposed. That is *EB v United Kingdom*, a Part 1 case in which the requesting State is Poland and the measures were imposed on 2 November 2010.

Legal Aid

10.26 We received uncontradicted evidence from the extradition judges at the City of Westminster Magistrates' Court and from practitioners of the problems and potential injustice caused by the delay in means testing for legal aid. The extradition judges at City of Westminster Magistrates' Court expressed concern about the increasing volume of extradition work, the slowness of the process and the need to reduce the time between arrest and the final extradition hearing. They made strong representations that the most important change, from their point of view, required is

²³ Harkins and Edwards are charged with murder. Al-Fawwaz and Abdul Bary are alleged to have participated in the United States Embassy bombings in Nairobi and Dar Es Salaam. Ahmed, Aswat, Ahsan and Abu Hamza are charged with terrorism offences. Inzunza is charged with drug trafficking.

²⁴ The Sixth Amendment to the United States Constitution also provides an accused person with a right to a speedy trial.

for legal aid to be available at the time of the requested person's first appearance in court. They pointed out that every requested person qualifies for legal aid under the "*interests of justice*" criteria and that under the 1989 Act legal aid had been available at the first appearance. Now, however, all applicants are means-tested. Currently, the absence of legal aid results in many requested persons appearing before the extradition judge unrepresented. This causes serious delay and adds to the cost of the process. The extradition judges told us that means testing is difficult where the individual is in custody, may not speak English or have access to relevant documents such as bank statements or other financial records.²⁵

- 10.27 Understandably, solicitors are unwilling to incur costs until legal aid has been granted. The High Court has now confirmed (correctly in our view), that it may be reasonable to postpone an initial hearing to allow a person to obtain legal aid and legal representation.
- 10.28 The extradition judge's submission to us was consistent with what we heard from other sources.
- 10.29 We are concerned to ensure that defendants have effective legal representation.
- 10.30 A number of points arise from the submissions made to us by the City of Westminster extradition judges. First, Article 11(2) of the Framework Decision gives a requested person a right to be represented by legal counsel and an interpreter.²⁶ Secondly, it is important that defendants who may be foreign nationals and therefore unfamiliar with the English legal system and / or language receive effective legal advice, particularly as extradition is a complicated and technical area of law which can involve unfamiliar legal concepts. Thirdly, it is not possible for a person to consent to their extradition if they are unrepresented and waiting for legal aid to be assessed.²⁷ Fourthly, the City of Westminster District Judges point out that the delays caused by the necessity to

²⁵ Many applicants may only have casual employment with means of proving this or obtaining proof from an employer. An applicant may lose their job as a result of their arrest and detention. However, they will need to provide written confirmation from their former employers of this. If they lose their employment then they also become less able to pay privately for legal representation.

²⁶ The importance of legal representation in European Arrest Warrant proceedings is emphasised by the inclusion of a specific Article dealing with these proceedings in the Draft Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate on arrest.

²⁷ Sections 45 and 127.

means test each applicant create consequential cost. Obvious examples are accommodation in prison on remand, wasted court time, wasted Crown Prosecution Service time and time wasted by interpreters.

10.31 Having received these submissions, we invited the Ministry of Justice to investigate the cost implications of granting free legal aid to requested persons as is currently the case in Northern Ireland.²⁸ The extradition judges were of the view that there would be a considerable net saving of public money in adopting this course. The result of the study is annexed to this report: it appears to us to be inconclusive. We note that it does not take into account the cost of interpreters attending ineffective hearings, a cost we assume to be not insignificant. We also note that it refers to a concern that solicitors might be asking for adjournments using legal aid means testing as the main reason. We are not sure what this means: either legal aid has been assessed or it has not.²⁹ Finally the study is rightly concerned with the financial impact and so assesses savings on the basis of whether they are “cashable” and so would lead to a real reduction in spending or whether they would lead to a reduction in costs attributable to extradition cases but would not affect overall spending on the criminal justice system. We note that changes have been made over the past year to try to improve and speed up the means testing process; however, the information we received (since we received the study from the Ministry of Justice) has not suggested that these have had any success.

10.32 In a judgment, handed down on 16 September 2011, one of the designated extradition judges at the City of Westminster Magistrates’ Court said this:

“It is deeply depressing that any [Requested Person], particularly one remanded in custody, is not able to have the immediate benefit of legal aid. These delays are extremely expensive. Until legal aid is granted no work is done on behalf of the Requested Person and during that time the UK taxpayer has to pay for his accommodation at HMP Wandsworth. Further there are costs associated with courts, interpreters and the CPS for each court hearing. The Legal Services Commissioner might be protecting its budget (but the

²⁸ See s.184(1) of the 2003 Act.

²⁹ The study also assumes that the legislation will be enacted to limit the size of potential recoveries for defendants who are discharged. If this does not happen then there would be a further saving.

administrative costs of processing and then rejecting these applications are not inconsequential), but more importantly` it is doing so to the obvious detriment of other budgets. Anyone looking at the issue holistically would immediately see that to grant legal aid, in all extradition cases, at the first hearing would save tens of thousands of pounds over a year. It is troubling that this RP had to wait over 11 weeks to obtain his legal representation order – see also Article 11.2 FD.”³⁰

- 10.33 We are grateful to the Ministry of Justice for carrying out their study within such a short timescale. This was done to enable us to allow us to consider it before finalising this Report. However, we recognise that they have not had sufficient time to consider this issue in sufficient detail or to test the assumptions which they have made.
- 10.34 In our opinion, there are two aspects to the legal aid problem. The first is the cost-effectiveness of any changes; the second is the fairness and efficiency of the extradition process. The two cannot be divorced and considered in isolation. We recommend that careful but urgent consideration looking at both the financial implications and the interests of justice is given by both the Ministry of Justice and the Home Office to reintroducing non means-tested legal aid for extradition proceedings in England, Wales and Scotland. This will bring the position into line with Northern Ireland and ensure that the United Kingdom routinely complies with its obligation under Article 11(2) of the Framework Decision. It will promote fairness, assist in reducing the length of the extradition process and remove the burden currently placed on extradition judges who are frequently required to deal with unrepresented defendants, many of whom do not speak English and who are unfamiliar with court procedures in the United Kingdom.³¹
- 10.35 If the Government decides not to reintroduce non means-tested legal aid for extradition proceedings then other steps need urgently to be taken to remedy the

³⁰

The District Court of Lublin, Poland v Jakub Stopyra unreported

³¹

This would also facilitate the United Kingdom’s attempts to comply with the time limits in Article 17 of the European arrest warrant Framework Decision.

present unsatisfactory situation; for example, giving the court a discretion to grant legal aid³² where there is an unreasonable delay in making an assessment.

Training

- 10.36 We also heard evidence from the extradition judges in England and Wales and Scotland that they would welcome a mandatory extradition training scheme for any lawyers who wish to engage in legal aid extradition work. They believe that lawyers who are familiar with this area of law are better able to advise clients effectively and advance cases expeditiously. We agree with the views expressed by the judges and recommend that such a scheme is developed. We consider that this is largely the responsibility of the legal profession working in collaboration with the judiciary.

Regional Extradition Courts

- 10.37 Traditionally, extradition cases have been dealt with by specialist judges. Under the earlier legislation there were Metropolitan Stipendiary Magistrates' sitting at Bow Street Magistrates' Court (in England and Wales) and Sheriffs in Scotland. The Access to Justice Act 1999 introduced a new unified bench of professional judges to sit in the magistrates' courts and they are now known as District Judges (Magistrates' Courts). Bow Street Magistrates' Court closed in July 2006 and extradition work was moved to the City of Westminster Magistrates' Court. This Court closed on 22nd September 2011 and extradition work is now dealt with at the Westminster Magistrates' Court. The rationale for centralisation of extradition hearings at Bow Street Magistrates' Court was that extradition cases were often extremely technical, difficult and occasionally sensitive, whether politically or otherwise: by having a relatively small cadre of judges it was possible to develop expertise with the result that cases were dealt with more efficiently and with a consistency of approach.

³²

Judges in the Crown Court have a discretion to grant legal aid in some circumstances in England and Wales; for example during contempt proceedings, hearings to deal with non-compliance with an order of the Crown Court and attendance before the Court pursuant to a bench warrant. In Northern Ireland the extradition judge has the power to grant legal aid-s.184(1) of the 2003 Act.

- 10.38 The submissions to the Review reflected a concern that it would not be possible to maintain the level of necessary expertise if there were regional courts dealing with extradition cases as the numbers of cases outside of London would not be sufficient to develop and maintain this. There was also a concern that it would be difficult to have sufficient designated judges available to deal with initial hearings which have to be dealt within a very short timescale.³³ Set against this is a concern that requested persons are in some instances being transported far from their homes and families and either kept in custody in London or required to travel to London for hearings. There is not the same concern in Scotland and Northern Ireland.
- 10.39 On balance, we do not think that another court should be used for extradition cases at the present time but we think this should be kept under review particularly given the expected dramatic increase in numbers of European arrest warrant cases in the United Kingdom when SIS II becomes operational.³⁴

Provisional Arrest

- 10.40 One submission to the Review criticized the use of provisional arrest on the basis that it amounted to detention without charge and was therefore contrary to Article 5 of the Human Rights Convention. This submission did not explain the basis for the criticism and we are satisfied that it has no merit.
- 10.41 Our reasoning is as follows. Article 5 of the Human Rights Convention protects an individual's right to liberty. In summary, a deprivation of liberty is justified if three conditions are satisfied:
- (i) Where the procedure in question is prescribed by law;
 - (ii) Where detention can be justified on a substantive legal basis;
 - (iii) Where one of the specific grounds in Article 5(1)(a) to (f) is met.

³³

See Appendix C

³⁴

See paragraph 4.7

10.42 Article 5(1)(f) provides for the lawful arrest and detention of a person against whom action is being taken with a view to extradition.

10.43 The position under the 2003 Act is as follows:

- (iv) Provisional arrest is prescribed by law;
- (v) Detention is justified on a substantive legal basis;
- (vi) Detention is permitted by Article 5(1)(f)

10.44 We also note that the United Nations Model Treaty provides for provisional arrest and detention for a period of up to (a suggested)40 days.³⁵

10.45 Moreover, we received no submission to the effect that the provisional arrest mechanisms under the 2003 Act cause any difficulties in practice.

10.46 For these reasons, we make no recommendation for change in relation to provisional arrest.

³⁵

Article 9(4).

Part 11 Detailed Conclusions and Recommendations

The Operation of the European Arrest Warrant¹

- 11.1 We have concluded that the European arrest warrant has improved the scheme of surrender between Member States of the European Union and that broadly speaking it operates satisfactorily. The biggest problem arises from the sheer number of arrest warrants issued by certain Member States without any consideration of whether it is appropriate to issue an arrest warrant and if there is a less coercive method of dealing with the requested person. This problem has been recognised by the European Union and the European Commission has accepted that a proportionality requirement is necessary to prevent European arrest warrants being used in cases which do not justify the serious consequences of a European arrest warrant.
- 11.2 The Commission has recommended that uniformity should be achieved by use of the European Council's Handbook on how to issue a European arrest warrant. The Handbook sets out the factors to be taken into account when issuing a European arrest warrant. The Commission will monitor whether this does effectively deal with this problem and will consider whether further action, which could include legislative measures, is required.
- 11.3 Apart from the problem of proportionality, we believe that the European arrest warrant scheme has worked reasonably well.
- 11.4 As with any new system of extradition, it has taken time for practitioners and the courts to become familiar with its operation.
- 11.5 Of course, the scheme has its imperfections and moves are taking place at European Union level to improve its operation. We have made a number of recommendations to improve the operation of Part 1 of the 2003 Act and we have addressed the detailed

¹ See Part 5

criticisms which were made to us about the European arrest warrant scheme. Our detailed conclusions and recommendations are set out below.

- 11.6 The scheme is premised on the equivalence of the protections and standards in the criminal justice systems in each Member State. However, the Commission recognises that in some aspects (such as the length and conditions of pre-trial detention) action is required to raise standards. We recommend that the United Kingdom Government work with the European Union and other Member States through the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings and other measures urgently to improve standards. We note that the Joint Committee on Human Rights recommended that the United Kingdom Government should “*take the lead in ensuring there is equal protection of rights, in practice as well as in law, across the EU*”.²
- 11.7 Overall we do not believe that Part 1 of the 2003 Act operates unfairly or oppressively.

The Human Rights Bar (Sections 21 and 87 of the 2003 Act)³

- 11.8 We are of the view that the human rights bar to extradition provides appropriate protection against prospective human rights violations in category 1 and category 2 territories.
- 11.9 The domestic courts have interpreted the human rights bar in accordance with the principles developed and applied by the European Court of Human Rights in the context of extradition. This is consistent with the obligation contained in section 2 of the Human Rights Act 1998.
- 11.10 The current position may be summarised as follows:
- (i) In the absence of any proof to the contrary it must be assumed that a category 1 territory will comply with its obligations under the Convention.

² Paragraph 137, “*The Human Rights Implications of UK Extradition Policy*”, HL Paper 156, HC 767, published on 22 June 2011.

³ See paragraphs 5.29-5.89

- (ii) A defendant is entitled to adduce evidence to displace the assumption.
 - (iii) This evidence may include reports prepared by respected organisations or bodies concerning the risk of human rights violations occurring in the category 1 territory.
 - (iv) It will require clear and cogent evidence to establish that in a particular case the defendant's extradition involves a contravention of his rights.
- 11.11 We are satisfied that section 21, in part 1, and section 87, in part 2, coupled with the other safeguards contained in the 2003 Act, provide fair and transparent mechanisms for contesting surrender/extradition and we do not believe that they operate so as to cause or permit manifest injustice or oppression.
- 11.12 Accordingly, we have concluded that neither section 21 nor section 87 requires amendment.

Conviction Cases⁴

- 11.13 As things currently stand, surrender under Part 1 of the 2003 Act cannot be refused in a conviction case where the requested person is a United Kingdom national or resident who could serve their sentence in the United Kingdom.
- 11.14 In certain conviction cases under Part 1 of the 2003 Act, we believe the United Kingdom courts should have the option to decline to give effect to a European arrest warrant on the basis that the sentence imposed in the category 1 territory is more appropriately served in the United Kingdom.
- 11.15 We recommend that Part 1 of the 2003 Act be amended so as to allow the judge at the extradition hearing to refuse to surrender a convicted person, if the person is a British resident or national or staying in the United Kingdom, and the custodial sentence actually imposed is 12 months or less.

⁴ See paragraphs 5.90-5.99

- 11.16 Such an amendment would be consistent with Article 4(6) of the Framework Decision on the European arrest warrant (which provides an optional ground for non-execution of a warrant if the executing Member State undertakes to execute the sentence in accordance with its own domestic law).
- 11.17 In cases involving lengthier sentences which may be more serious, the Framework Decision on the mutual recognition of post-trial measures will facilitate the transfer of sentenced prisoners to their home state, including the United Kingdom.

Further Information In Case of Suspected Mistaken Identity⁵

- 11.18 In response to the criticism that the executing judicial authority cannot request further information where there is a suspicion that the person subject to the European arrest warrant is a victim of mistaken identity, we see no need to amend the 2003 Act in this regard: any amendment would add nothing to the procedures already in place which allows for further information to be requested.

The Involvement of Non-Judicial Authorities⁶

- 11.19 In response to the criticism that European arrest warrants are issued in some Member States by prosecutors, we are not in favour of any amendment to section 2 of the 2003 Act to prevent certification by the Serious Organised Crime Agency of warrants issued in category 1 territories by non-judicial authorities. Nor are we in favour of any amendment to ensure that warrants are only issued following an impartial and objective decision in the issuing category 1 territory. Any such amendments would be inconsistent with Article 6 of the Framework Decision on the European arrest warrant and would be contrary to the internationalist or cosmopolitan approach to the interpretation of the term “judicial authority” which the Framework Decision requires. No evidence has been presented to us of any injustice or oppression caused by the current arrangements
- 11.20 However, any future negotiation of the terms on which the European arrest warrant is to operate should bear in mind that the Framework Decision was intended to remove

⁵ See paragraph 5.100-5.106

⁶ See paragraphs 5.106-5.119

the executive from involvement in the surrender process. In some Member States it appears the executive still has a role to play and this should be addressed.

Proportionality⁷

11.21 The Framework Decision does not contain a proportionality test. This has led to criticisms that warrants are issued in cases where use of the European arrest warrant scheme is disproportionate. We consider that any future amendment to the Framework Decision, or any future legislative instrument enacted to deal with surrender between Member States of the European Union, should include a proportionality test, to be applied in the issuing Member State. Among the factors to be taken into account when assessing the proportionality of a European arrest warrant (or any equivalent instrument) are:

- (i) the seriousness of the offence;
- (ii) whether there is a reasonable chance of conviction
- (iii) the harm caused to the victim or the community;
- (iv) the likely sentence (in an accusation case);
- (v) the previous convictions of the requested person;
- (vi) the age of the requested person;
- (vii) the views of the victim;
- (viii) any reasonably alternative options for the issuing Member States such as proceeding by way of summons.

⁷ See paragraphs 5.120-5.155

11.22 In the meantime, we suggest that consideration should be given to encouraging Member States to consider using measures of cooperation other than the European arrest warrant where appropriate. These measures include:

- (i) Recognising and enforcing fines imposed by Member States.
- (ii) Releasing on bail using the European Supervision Order. The Framework Decision 2009/829/JHA, concerning pre-trial supervision orders which is designed to promote the use of non-custodial supervision measures such as release on bail from the Member State where a non-resident is suspected of having committed an offence to the Member State where he is normally resident. This will require trust between Member States that conditions will be enforced and we would recommend that the Government should take steps to build this both bilaterally and through the European Commission,
- (iii) Serving a summons pursuant to Part 1 of the Crime (International Co-operation) Act 2003
- (iv) Transferring probation or non-custodial measures to the United Kingdom for execution rather than issuing a European arrest warrant for a sentence imposed in default.
- (v) Transferring sentences to the United Kingdom where appropriate.
- (vi) Using a European Investigation Order (once this is in force) to allow for an efficient and effective investigation to take place before a decision is taken as to whether and when it is appropriate to issue a European arrest warrant.

11.23 We also believe that criticisms of the use of European arrest warrants in cases which are perceived to be of a relatively minor nature are likely to dissipate if efforts are made at Union level to improve the rights of the defence throughout the Member States. Improvements in defence rights are likely to increase public confidence in the principle of mutual recognition, this in turn will improve the effective working of the European arrest warrant scheme of surrender. This is not something that can be achieved by an amendment to the 2003 Act and will require efforts at Union level and within Member States as part of a Union wide scheme.

- 11.24 As a more long term proposal, we believe that steps should be taken to improve the cooperation between Member States in the initial stages of a prosecution. We envisage a procedure whereby an accused person facing trial in another Member State is summoned to a court in the United Kingdom, charged by video-link and then placed on bail in the United Kingdom before surrendering for trial in a category 1 territory.

***The Use of the European Arrest Warrant as an Aid to Investigation*⁸**

- 11.25 In response to the criticism that the European arrest warrant is being used by some Member States as an aid to investigation rather than prosecution, we do not consider that any amendment to the 2003 Act is necessary so as to require European arrest warrants to state unequivocally on their face that they have been issued for the purpose of prosecution. European arrest warrants are only available for the purposes of conducting a criminal prosecution or executing a custodial sentence and section 2(3)(b) and 2(5)(b) of the 2003 Act already required this to be stated in the warrant.

***The Removal of Schengen Alerts*⁹**

- 11.26 European arrest warrants are often transmitted through the Schengen Information System ('the SIS'). It has been suggested that the United Kingdom could implement Article 111 of the Schengen Convention and that this would enable the United Kingdom to exercise control over 'alerts' in the SIS and, in particular, control over warrants which the Courts in the United Kingdom have declined to execute.
- 11.27 We see a number of difficulties in seeking to give unilateral effect to Article 111 of the Schengen Convention, not the least of which is that it would be ineffective as the Issuing State could simply issue a new alert.
- 11.28 We have concluded that the implementation of Article 111 is a matter to be addressed at European Union level.

⁸ See paragraphs 5.156-5.164

⁹ See paragraphs 5.165-5.182

- 11.29 When the second generation of the SIS (SIS-II) becomes operational in 2013 (or thereabouts), the Government should, when the United Kingdom connects to SIS-II, follow Council Decision 2007/533/JHA of 12 June 2007 and adopt the system of flagging alerts in accordance with the criteria set out in that Decision.

Legal Representation¹⁰

- 11.30 We are in broad agreement with the view that accused and convicted persons should be legally represented in both the issuing and executing Member States: this is likely to ensure that surrender takes place with the minimum of delay as the courts in the United Kingdom (and other Member States) will be confident that the requested person's interests will be safeguarded through legal representation in the issuing Member State. Our concern is that dual representation should not be used as a device to impede the surrender process as was attempted in R v. Bow Street Magistrates' Court, Ex parte Shayler.¹¹
- 11.31 As for legal representation in the issuing Member State, this is not something that can be achieved by unilateral action within the United Kingdom. We do not favour legal representation in the issuing state for the purposes of conducting inquiries and investigations into the merits of the prosecution case: the merits or otherwise of the prosecution case are a matter for the court at trial. Nor do we favour legal representation as a mere device to delay the surrender process by challenges to the issuing judicial authority's arrest warrant. It is in the interests of suspects to be returned speedily and this is more likely to operate in their favour than delay: the speedier the process of surrender throughout the European Union the more likely it is that accused persons will be admitted to bail and that trials will take place within a reasonable time.
- 11.32 Any move toward dual representation would have to proceed on the basis that it should be a Union-wide initiative. It would be unacceptable for the United Kingdom to expect dual representation in the case of incoming requests, but not in the case of outgoing requests.

¹⁰ See paragraphs 5.183-5.192
¹¹ [1999] 1 All E.R. 98

- 11.33 While we favour the notion of dual representation we see its principal value to be the strengthening of mutual recognition. On this basis, we consider that this is another aspect of the operation of the European arrest warrant scheme which has to be addressed at supra-national level.

Dual Criminality¹²

- 11.34 In response to the criticism that the Framework Decision has effectively abolished the dual criminality requirement for a broadly defined range of offences, we are not aware of difficulties in practice from the abolition of the double-criminality requirement for offences falling within the European Framework list.
- 11.35 Moreover, the structure of sections 64(2) and 65(2) of the 2003 Act make it clear that surrender from the United Kingdom is only possible, in respect of a European framework list offence, if the conduct occurred in the category 1 territory and none of it occurred in the United Kingdom.
- 11.36 We believe that persons accused or convicted of offences falling within the European framework list, committed within the requesting category 1 territory, should ordinarily be returned for trial or punishment. In this connection, it is significant that Member States are required to take into account the interests of victims: Council Framework Decision 2001/220/JHA. This is part of a wider programme designed to enhance the protection of the victims of crime, and the surrender of accused and convicted persons between Member States is an important aspect of this programme.

A No Questions Asked System of Surrender¹³

- 11.37 It is inaccurate to characterise the surrender process under Part 1 of the 2003 Act as a ‘no questions asked procedure’, that is a procedure involving the automatic execution of the foreign warrant. Part 1 of the 2003 Act is based on mutual trust, not blind faith.

¹² See paragraphs 5.193-5.207
¹³ See paragraphs 5.208-5.220

- 11.38 In a scheme designed to combine speed with fairness, we consider that the protections available to an accused person under Part 1 of the 2003 Act are formidable. The protections, which are scrutinised carefully by the court, go some way to explaining why surrender from the United Kingdom (in contested cases) is not generally achieved within the timescales set out in the Framework Decision.

*Time Limits*¹⁴

- 11.39 In response to the criticism that the time limits within which surrender is to take place are too short, the time limits contained within the 2003 Act were designed to ensure that European arrest warrants were executed with minimum delay. The time limits are consistent with the Framework Decision and also with the interests of justice generally: complexity and delay are inimical to extradition procedures. It is clearly in the interests of justice for surrender to take place as soon as is reasonably possible. In accusation cases the requested person should be surrendered as soon as possible to the requesting State so that he/she can challenge the basis of his or her detention and so that the trial can take place in accordance with the reasonable time guarantee contained in Article 6 of the Human Rights Convention.
- 11.40 It appears from the European Commission's evaluation reports of the European arrest warrant scheme, that (in contested cases) the United Kingdom is failing to meet the 90 day time limit in a proportion of its cases. From our own experience we are aware that contested proceedings before the extradition judge can take several months to be brought to a conclusion and it is frequently the case that extradition hearings are postponed. We are also aware that so great is the volume of appeals that hearings before the High Court are rarely heard within the 40 day period: in reality it takes several months for a case to proceed through the court process.
- 11.41 We have received no evidence to suggest that compliance with the time limits set out in Part 1 of the 2003 Act (other than the time limit within which an appeal to the High Court must be brought)¹⁵ is a source of injustice or oppression. The extradition judges invariably grant adjournments where there is good reason and the period of

¹⁴ See paragraphs 5.221-5.229

¹⁵ We have recommendations to make in relation to the strict time limit for appealing to the High Court and these recommendations are at paragraphs 11.75-11.80.

time between the conclusion of the first instance proceedings and the hearing of any appeal provides ample time for the evidence and arguments to be marshalled.

Pre-Trial Detention¹⁶

11.42 It seems to us that the problem of lengthy periods of pre-trial detention can be addressed in a number of ways:

- (i) At European Union level Member States should be encouraged to ensure that proceedings are brought to trial without unreasonable delay, as is required by Article 6 of the Human Rights Convention in any event.
- (ii) Wherever possible Member States should issue European arrest warrants so as to limit the period of time an accused person spends in custody. For example, where the whereabouts of the requested person are known, and where he or she has a settled residence, it may be possible to issue a warrant at a point when the case is ready for trial or almost ready for trial.
- (iii) Greater use should be made of the so-called European Supervision Order.

11.43 A more radical solution, which would require amendment to the Framework Decision or incorporation in any surrender arrangements which amend or replace the Framework Decision, is to include a system of postponed surrender with the requested person remanded on bail in the executing State until his or her appearance is required in the issuing State. It appears to us that such a system would meet the concerns of lengthy pre-trial custody and would be consistent with the concept of a single European area in which free movement of persons is guaranteed and where there is mutual recognition of judicial decisions.

11.44 So far as the conditions of detention are concerned, we agree that the goal of creating an area of genuine freedom, security and justice requires (so far as possible) comparable treatment of individuals throughout the European Union. This is a matter that requires coordination at European Union level and we recommend that the

¹⁶

See paragraphs 5.230-5.236

Government respond to the invitation, issued by the Commission in the Green Paper on the action necessary for resolving problems of both pre and post-trial detention including sub-standard conditions of detention, and put forward proposals to resolve these problems.

11.45 It is for the independent and neutral judiciary to decide whether surrender should take place having regard to the requirements of Articles 3 and 8 of the Convention.

11.46 In order to promote a culture of mutual confidence and trust we recommend:

- (i) the promotion of communication between judges throughout the European Union;
- (ii) the promotion of communication between lawyers throughout the European Union;
- (iii) greater efforts should be made to improve the conditions of detention for persons detained both pre and post-trial.

Optional Bars to Non-Execution¹⁷

11.47 We see no need to legislate so as to provide a statutory bar to surrender based on Article 4(3) of the Framework Decision, that is, in circumstances where the United Kingdom has decided not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings. We believe that sufficient protections already exist to bar surrender, in appropriate cases where prosecutors in the United Kingdom have decided not to prosecute or halt proceedings.

11.48 We see no reason to implement any statutory time-bars as permitted by Article 4(4) of the Framework Decision.

11.49 In the case of Article 4(6), we recommend that Part 1 of the 2003 Act be amended so as to allow the judge at the extradition hearing to refuse to surrender a convicted person if the person is a British resident or national or staying in the United Kingdom,

¹⁷ See paragraphs 5.241-5-244

and the custodial sentence actually imposed is 12 months or less and we have already dealt with this in paragraphs 11.13-11.17.

11.50 In cases with lengthier sentences which may be more serious, the Framework Decision on the mutual recognition of post-trial measures will facilitate the transfer of prisoners to their home state.

11.51 We address Article 4(7) of the Framework Decision when we deal with the forum bar.

Guarantees In Particular Cases¹⁸

11.52 Article 5(2) of the Framework Decision on the European arrest warrant deals with life sentences. It provides that if the offence on the basis of which the European arrest warrant has been issued is punishable by a custodial life sentence, the execution of the warrant may be subject to the condition that the issuing Member State has provision in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency. There is no equivalent to Article 5(2) in the 2003 Act. This omission is not surprising, given that sentences of imprisonment for life which involve custodial terms in excess of 20 years are frequently imposed in the United Kingdom. This provision has not, as yet, caused any difficulty in respect of any United Kingdom outgoing requests for surrender.

11.53 So far as Article 5(3) is concerned, we see no reason to enact a specific provision to cater for the return of nationals and residents to the United Kingdom for the purpose of serving any custodial sentence passed in the issuing Member State. We have concluded that this is adequately catered for by the Repatriation of Prisoners Act 1984 and the recent Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. However, if the Framework Decision does not result in more nationals and residents serving their sentence in the United Kingdom, rather than

¹⁸

See paragraphs 5.245-5.249

being subject to European arrest warrants, then the Government may wish to consider introducing a provision to reflect this guarantee.

Forum¹⁹

- 11.54 We have concluded that the forum bar provisions should not be implemented. Whilst a small number of high profile cases have highlighted the issue of forum, we have no evidence that any injustice is being caused by the present arrangements.
- 11.55 The extradition judges at City of Westminster Magistrates' Court could not think of any case already decided under the 2003 Act in which it would have been in the interests of justice for it to have been tried in the United Kingdom rather than in the requesting territory.
- 11.56 The major disadvantage of introducing the forum bar is that it will create delay and has the potential to generate satellite litigation. This would slow down the extradition process, add to the cost of proceedings and provide no corresponding benefit. Much has been achieved by the 2003 Act in making extradition more sensitive to modern needs; the introduction of the forum bar would be a backward step. Prosecutors are far better equipped to deal with the factors that go into making a decision on forum than the courts. Their decision making should, however, take place as early as possible, be more open and transparent and the factors that they take into account should be incorporated into formal guidance which should specifically address the significance to be accorded to the nationality or residence of a suspect.
- 11.57 Accordingly, we recommend that the forum bars in sections 19B and 83A should not be implemented, but formal guidance should be drawn up, made public and followed by prosecuting authorities when deciding whether or not to prosecute in the United Kingdom a case involving cross-border criminal conduct.

¹⁹

See Part 6

The United States/United Kingdom Treaty²⁰

- 11.58 We have concluded that the United States/United Kingdom Treaty does not operate in an unbalanced manner. The United States and the United Kingdom have similar but different legal systems. In the United States the Fourth Amendment to the Constitution ensures that arrest may only lawfully take place if the probable cause test is satisfied: in the United Kingdom the test is reasonable suspicion. In each case it is necessary to demonstrate to a judge an objective basis for the arrest.
- 11.59 In our opinion, there is no significant difference between the probable cause test and the reasonable suspicion test.
- 11.60 In the case of extradition requests submitted by the United States to the United Kingdom, the information within the request will satisfy both the probable cause and the reasonable suspicion tests.
- 11.61 In the case of extradition requests submitted by the United Kingdom to the United States the request will contain information to satisfy the probable cause test.
- 11.62 There is no practical difference between the information submitted to and from the United States.

The *Prima Facie* Case Requirement

- 11.63 We have concluded that the prima facie case requirement should not be re-introduced in relation to category 1 territories. Nor should it be reintroduced in relation to designated category 2 territories. It is clear that the United Kingdom could not require European Union Member States to meet the prima facie case requirement without withdrawing from the European arrest warrant Framework Decision.
- 11.64 There is no good reason to re-introduce the prima facie case requirement for category 1 territories. No evidence was presented to us to suggest that European arrest warrants are being issued in cases where there is insufficient evidence.

²⁰

See Part 7

- 11.65 In Part 1 cases and Part 2 cases involving designated territories, we consider that the extradition judges are able to subject extradition cases to scrutiny and ensure that any abusive or oppressive request is identified and dealt with appropriately.
- 11.66 The prosecuting authorities have an obligation to disclose material which may undermine an extradition request and we recommend that guidance is issued by the prosecuting authorities confirming that relevant adverse decisions involving the requesting State should be brought to the attention of the Court.
- 11.67 A prima facie case requirement would not in any event address the issue of mistaken identity or alibi.
- 11.68 We invite the Government periodically to review designations for Category 2 territories and we set out detailed suggestions in Part 11.²¹

The Secretary of States' Discretion²²

- 11.69 We recommend that the discretions relating to competing extradition requests and national security remain as they are.
- 11.70 We are firmly of the view that the Secretary of State's powers should not be increased. We think the Secretary of State's involvement as regards the death penalty, specialty and the other grounds in section 93 which do not involve the exercise of discretion, are matters with which she is best able to deal.
- 11.71 We think the Secretary of State's involvement should be further limited by removing human rights matters from her consideration as we believe they are more appropriately the concern of the judiciary.
- 11.72 We accordingly recommend that human rights issues arising at the end of the extradition process under Part 2 of the 2003 Act should be dealt with by the courts rather than the Secretary of State.²³

²¹ See paragraphs 8.93-8.96

²² See Part 9

²³ See paragraphs 9.32-9.40

Asylum

- 11.73 The 2003 Act explicitly caters for asylum claims which are made after extradition proceedings have commenced. However, it does not deal with the position if a claim has been made prior to the commencement of extradition proceedings. In order to comply with the United Kingdom's obligations under the Refugee Convention we recommend legislative amendment. We recommend that the 2003 Act should be amended so that extradition cannot take place until an asylum claim, made in respect of the requesting territory before extradition proceedings have started in respect of the requesting territory has been finally determined.²⁴
- 11.74 We have also considered other situations which may arise concerning asylum and our conclusions at paragraphs 9.58-9.61.

Other Matters

Time Limit For Notice of Appeal²⁵

- 11.75 We believe that the inflexible time limit for the filing and service of a Notice of Appeal for Part 1 cases is operating to cause injustice. We recommend the following changes to the appeal procedures in Part 1 of the 2003 Act.
- 11.76 The time limit for the giving of a notice of appeal for Part 1 cases should be 14 days rather than 7 days (this will require an amendment to section 26(4) of the 2003 Act);
- 11.77 A valid Notice of Appeal should meet the following four requirements:
- a. it should purport to be a notice of appeal (and not notice of an intention to appeal);
 - a. it should identify the appellant;
 - b. it should identify the decision under appeal; and

²⁴ See paragraphs 9.43-9.57

²⁵ See paragraphs 10.3-10.09

c. it should identify the grounds of appeal.

- 11.78 The court fee should not be required to be paid within the 14 day time limit and a longer period should be allowed.
- 11.79 The copy of the Notice of Appeal which is served on the Crown Prosecution Service and any other interested party should not have to be sealed.
- 11.80 The first instance court should provide the defendant with a form explaining the right of appeal, the time limit and what must be done in this period.

Leave to Appeal²⁶

- 11.81 We recommend that appeals under Part 1 and Part 2 of the 2003 Act should only be allowed to proceed with the leave either of the extradition judge or the court which would consider the appeal.²⁷

Appeals on Questions of Fact²⁸

- 11.82 We do not believe there should be any further restriction of the ability to bring appeals on questions of fact. The 2003 Act already prescribes sufficient restrictions for these.

Other Causes of Delay for Appeals²⁹

- 11.83 We recommend the Rules Committee should consider amendments to deal with failures to promptly provide a note or transcript of the extradition judge's reasons or a failure by the appellant to serve adequate grounds of appeal.

²⁶ See paragraphs 10.10-10.16

²⁷ See paragraph 10.14

²⁸ See paragraphs 10.17-10.20

²⁹ See paragraphs 10.21-10.22

*Delay Before the European Court of Human Rights*³⁰

- 11.84 There are a number of extradition cases pending before the European Court of Human Rights. Nine of these cases arise from extradition requests submitted to the United Kingdom by the United States. In each of these cases the applicant has sought and obtained Rule 39 relief from the Strasbourg Court; which means that extradition cannot take place while the case is pending before the Court. Some of these cases have been before the Court for over three years. We recommend that the issue of delay before the European Court of Human Rights should be taken up by the Government and that the Court should be encouraged to give priority to those where Rule 39 relief has been granted.

*Legal Aid*³¹

- 11.85 We received uncontradicted evidence from the extradition judges at the City of Westminster Magistrates' Court and from practitioners of the problems and potential injustice caused by the delay in means testing for legal aid. We recommend that careful but urgent consideration, looking at both the financial implications and the interests of justice, is given by both the Ministry of Justice and the Home Office to reintroducing non means-tested legal aid for extradition proceedings in England, Wales and Scotland. This will bring the position into line with Northern Ireland and ensure that the United Kingdom routinely complies with its obligation under Article 11(2) of the Framework Decision. It will promote fairness, assist in reducing the length of the extradition process and remove the burden currently placed on extradition judges who are frequently required to deal with unrepresented defendants, many of whom do not speak English and who are unfamiliar with court procedures in the United Kingdom.
- 11.86 If the Government decides not to reintroduce non means-tested legal aid for extradition proceedings, then other steps need urgently to be taken to remedy the present unsatisfactory situation; for example, giving the court a discretion to grant legal aid where there is an unreasonable delay in making an assessment.

³⁰ See paragraphs 10.23-10.25

³¹ See paragraphs 10.26-10.35

11.87 We believe it is essential that a solution is found to this serious problem.

Training³²

11.88 We also heard evidence from the extradition judges in England and Wales and Scotland that they would welcome a mandatory extradition training scheme for any lawyers who wish to engage in legal aid extradition work. They believe that lawyers who are familiar with this area of law are better able to advise clients effectively and advance cases expeditiously. We agree with the views expressed by the judges and recommend that such a scheme is developed. We consider that this is largely the responsibility of the legal profession working in collaboration with the judiciary.

Regional Extradition Courts³³

11.89 On balance, we do not think that another court should be used for extradition cases at the present time but we think this should be kept under review particularly given the expected dramatic increase in the United Kingdom of European arrest warrant cases when the United Kingdom connects to SIS II.

Provisional Arrest³⁴

11.90 We received no submission to the effect that the provisional arrest mechanisms under the 2003 Act cause any difficulties in practice. We make no recommendation for change in relation to provisional arrest.

³² See paragraph 10.36
³³ See paragraphs 10.37-10.39
³⁴ See paragraphs 10.40-10.46

Appendix A The Conduct of the Review

- A.1 We began our Review by inviting a number of interested individuals and organisations to make representations or observations on the working of the United Kingdom's extradition arrangements.¹ We also invited representations via the Home Office website and to this we received 209 written responses.
- A.2 Having considered the materials and submissions, we invited a number of individuals and organisations to attend oral hearings in order to explore some of the issues arising from our Review in greater depth. We found these oral hearings extremely helpful. We are grateful to all those who gave up their time to assist us.²
- A.3 On 10 May 2011 we held a number of meetings in Edinburgh with parties involved in the extradition process in Scotland. These included the Crown Office and Procurator Fiscal Service, representatives of the Scottish government and one of the five designated extradition judges from the Lothian and Borders Sheriff Court, Sheriff Maciver. This visit was particularly helpful in assisting the Panel to understand those aspects of the extradition process in Scotland which differ from those in England and Wales.
- A.4 On 12 May 2011 we visited Brussels where we met with representatives of the European Commission and then with a member of the working party on the European arrest warrant.
- A.5 The following day, 13 May 2011, we travelled to The Hague where we met a representative of the Dutch Ministry of Justice. This was followed by a meeting with, the President of Eurojust, the Director of Europol and others.
- A.6 The meetings in Brussels and The Hague gave us an insight into the operation of the European arrest warrant, the initiatives that are being undertaken at European Union level in connection with the area of freedom, justice and security, and how some of the issues relating to the operation of the European arrest warrant are being addressed.

¹ A list of the individuals and organisations is set out below.

² A list of the individuals and organisations who attended the oral hearings is set out below.

- A.7 Between 23 and 26 May we held a number of meetings in Washington D.C.. These were with officials from the Department of Justice and the State Department as well as the Deputy Head of Mission at the British Embassy. The purpose of our visit was to obtain a better understanding of the extradition process from the United States' perspective and to probe the issue of imbalance in the United States/United Kingdom extradition treaty. Our visit concluded with a meeting with the United States' Attorney General. We were also able to visit the State, Federal and Supreme Courts and thus enhance our understanding of the United States criminal justice system.
- A.8 We are indebted to all those whom we met in Scotland, Brussels, the Hague and the United States and the warmth with which we were received. They went to great lengths to ensure that we were provided with all the information that we needed from those best able to give it.
- A.9 We are also very grateful to those at the Home Office who have assisted us with the process of gathering evidence, answering our queries and providing us with administrative support. In particular we would like to thank Tyson Hepple, Fenella Tayler, Stuart Ison, Rob McMorran and Nicola Collins.

Written representations

We invited representations from a number of parties, namely:

Administrative Court Judges

Advocate General for Scotland

The AIRE Centre

Association of Chief Police Officers (ACPO)

Association of Chief Police Officers in Scotland (ACPOS)

Bar Council

British Embassy, USA

Confederation of British Industries

Criminal Bar Association

Crown Office and Procurator Fiscal Service

Crown Prosecution Service

Crown Solicitor, Northern Ireland

Designated Extradition Judges City of Westminster Magistrates' Court

Embassy of United States of America

European Commission

European Criminal Bar Association

Extradition Lawyers Association

Faculty of Advocates (Scotland)

Fair Trials International

Financial Services Authority

Foreign and Commonwealth Office

Former Senior District Judge (City of Westminster Magistrates' Court) Tim Workman

GC100

Home Affairs Select Committee

Home Office International Directorate

Human Rights Watch

International Jurisdiction Department, City of Westminster Magistrates' Court

Joint Committee on Human Rights

Justice

The Law Commission

Law Society of England and Wales

Law Society of Northern Ireland
Law Society of Scotland
Liberty
London Criminal Courts Solicitors Association
Lord Chief Justice Northern Ireland
Metropolitan Police Service
Ministry of Justice
Northern Ireland Office
Police Service, Northern Ireland
Professor John Spencer, University of Cambridge
Scottish Government, Criminal Justice and Parole Division
Serious Fraud Office
Serious Organised Crime Agency (SOCA)
Sheriff Court, Edinburgh
UKBA Watchlist Information Control Unit

Public Consultation

We are also very grateful to all those who submitted their views to the panel via the 'extradition review inbox'. We received 209. We have read all of the emails submitted including the very detailed representations from those listed below:

Alun Jones QC
Babar Ahmad
Brian Howes
Cage Prisoners
Cliff Entwistle
David Bermingham
Freedom Association
Gerard Batten MEP
Islamic Human Rights Association
Janis Sharp
Kingsley Napley
Lucy Bermingham
Nick de Bois MP

Dr Paul Arnell (Robert Gordon University)

Richard Drax MP

Oral Evidence

We held a number of oral evidence sessions at the Royal Courts of Justice. These sessions were supplemented by a further series of meeting and visits. We are very grateful to all those who offered their time and expertise.

4 April 2011

Commander Allan Gibson, Metropolitan Police/ACPO

Acting Superintendent Murray Duffin, Metropolitan Police/ACPO

Paul Evans, SOCA

Tim Tyler, SOCA

Keir Starmer QC, Director Public Prosecutions

Dominic Barry, CPS

Anne-Marie Kundert, CPS

Karen Townsend, CPS

Patrick Stevens, CPS

5 April 2011

Professor John Spencer, University of Cambridge

Dr Elizabeth Franey, Legal Team Manager, International Jurisdiction, City Of Westminster Magistrates' Court

6 April 2011

Shami Chakrabati, Liberty

Jodie Blackstock, Justice

Jago Russell and Daniel Mansell, Fair Trials International

Former Senior District Judge Tim Workman

7 April 2011

Lord Justice Thomas

11 April 2011

Howard Riddle, Senior District Judge, City of Westminster Magistrates Court

Daphne Wickham, Deputy Senior District Judge

Nicholas Evans, District Judge

Richard Alderman, Director of Serious Fraud Office

10 May 2010 (Edinburgh)

International Co operation Unit, Crown Office

Criminal Justice and Parole Division, Scottish Government

Sheriff Maciver, Edinburgh Sheriff Court

12 May 2011 (Brussels)

United Kingdom's Permanent Representation to the EU

European Commission, Justice, Freedom and Security Directorate, Justice Department

Council Secretariat to the European Union

13 May 2011 (The Hague)

Dutch Ministry of Justice

Europol and Eurojust

23-26 May 2011 (USA)

Department of Justice Washington DC

State Department, Washington DC

British Embassy, Washington DC

State, Federal and Supreme Courts, Washington DC

Additional Meetings

17 June 2011

Baroness Ludford MEP

22 June 2011

Foreign and Commonwealth Office

Cartels and Criminal Enforcement Department, Office of Fair Trading

Ministry of Justice

Offender Safety, Rights & Responsibilities Group, National Offenders Management Service

Better Trials Unit, European and International Division

Criminal Enforcement Team, Her Majesty's Courts & Tribunals Service

Appendix B The Framework Decision on the European arrest warrant: Summary of Provisions

- B.1 In this section we summarise the various Articles of the Framework Decision on the European arrest warrant. We do so in order to give a clear picture of what the Framework Decision requires as a matter of European Union law and how it is intended to operate in practice.
- B.2 The Framework Decision comprises 35 Articles and an Annex (which contains a model European arrest warrant).

The European Arrest Warrant

- B.3 Article 1(1) defines the European arrest warrant as a “*judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purpose of conducting a criminal prosecution or executing a custodial sentence or detention order.*” Thus, the warrant is judicial in nature and is designed to operate as a mechanism for judicial co-operation.¹
- B.4 Article 1(2) provides that “*Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.*”
- B.5 Article 1(3) provides:

“This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal

¹ This is subject to Article 6 (see below) which recognises that the clear-cut common law distinction between prosecuting authorities and judicial authorities is not so easily transposed to civil law jurisdictions.

*principles as enshrined in Article 6 of the Treaty on European Union.”*²

Article 2: Offences

- B.6 By reason of Article 2, the European arrest warrant may be issued for acts punishable by the law of the issuing Member State (that is the requesting State, using the language of traditional extradition law and practice) by a custodial sentence or detention order for a maximum period of at least twelve months or, where a sentence has been passed or detention order³ made, for sentences of at least four months. It represents a change from the position under the 1989 Act: in conviction cases, where a sentence has been passed, surrender is now available for a custodial sentence of four months or more, even if the maximum sentence for the acts punishable by the issuing Member State is under twelve months.
- B.7 Paragraph 2 of Article 2 sets out a list of 32 categories of offences which, if punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years, give rise to surrender pursuant to the warrant “*without verification of the double criminality of the act.*” This provision dispenses with the double criminality rule in relation to what are known as framework list offences. The offences are described in terms of categories of criminal conduct such as participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children, child pornography, fraud, racism and xenophobia. Underlying the list seems to be an unstated assumption that offences of this character will feature in the criminal codes of all Member States and that double criminality need not be established because it can in effect be taken for granted (see *Office of the Kings Prosecutor Brussels v. Cando Armas*).⁴ In *Advocaten Vor de*

² Article 6 of TEU is at paragraph 4.54.

³ The phrase ‘*detention order*’ is not defined in the Framework Decision itself but Article 25 of the European Convention on Extradition defined ‘*detention order*’ as “*any order involving deprivation of liberty which has been made by a criminal court in addition to or instead of a prison sentence*”.

⁴ [2006] 2 A.C. 1, per Lord Bingham of Cornhill at paragraph 5. It is also significant to note that the areas covered by the framework list of offences include those in which the European Union has been most active in moves towards harmonisation of the substantive criminal law. There are Framework Decisions in relation to terrorism (2002/475/JHA [2002] OJ L164/3); people trafficking (2002/629/JHA [2002] OJ L203/1); sexual exploitation of children (2004/68/JHA [2004] OJ L13/44); fraud and non-cash means of payment (2001/413/JHA

Wereld VZW v. Leden Van de Ministerrad the Advocate General of the European Court of Justice (Advocate General Colomer) noted⁵ that the Framework Decision assumes that national courts have the jurisdiction to prosecute the offences it lists and that Member States of the European Union are required to assist one another following the commission of offences which it is in the common interest of the Union to prosecute. The Court held that the partial derogation from the principle of double criminality did not violate fundamental rights or offend the principle of legal certainty.⁶

- B.8 In respect of other offences, that is, offences not within the list of framework offences, the double criminality rule is retained although not as an obligatory requirement. This is made clear by Article 4(1) read together with Article 2(4) which provides that surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State (that is, the requested State, in the language of traditional extradition law and practice) whatever the constituent elements of the offence and however described.
- B.9 The Commission's original proposal was for the principle of dual criminality to be abandoned in its entirety. Under this proposal Member States were to be entitled to establish "*a list of conduct which might be considered an offence in some Member States, but in respect of which its judicial authorities shall refuse to execute a European arrest warrant on the grounds that it would be contrary to the legal principle of the legal system of that State.*"⁷ This 'negative list' proposal had the support of a number of Member States (including the United Kingdom) but was opposed by others; the final version, which included the list of 32 categories of offences, was the result of a compromise proposed by the Council.⁸

[2001] OJ L1491); organised crime (2008/413/JHA [2008] OJ L300/42); racism and xenophobia (2008/913/JHA [2008] OJ L328/55).

⁵ Case C-303/05 [2007] ECR I-3633, at paragraph 45

⁶ The Court stated (at paragraph 52): "*the actual definition of those offences and the penalties applicable are those which follow from the law of the 'issuing Member State'. The Framework Decision does not seek to harmonise the criminal offences in question in request of their constituent elements or the penalties which they attract.*"

⁷ Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States (COM (2001) 522-C5-0453/2002-2001/0215 (CWS), 25 September 2001)

⁸ Document 13425/01-2001/0215 (CWS), 31 October 2001

Article 3: Mandatory Grounds for Refusal

B.10 Article 3 lays down three grounds for mandatory non-execution of the European arrest warrant. These are:⁹

- (i) The offence on which the arrest warrant is based is covered by an amnesty in the executing Member State (the requested State), where that State had jurisdiction to prosecute the offence under its own criminal law.¹⁰
- (ii) The executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been a sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State. The aim of Article 3(2) is to ensure that a person is not prosecuted or tried more than once in respect of the ‘*same acts*’; it is designed to facilitate the free movement of persons within the European Union.¹¹ The Court of Justice has held that the concept of what constitutes the ‘*same acts*’ must be given an autonomous meaning throughout the European Union.¹² Where the executing Member State requires information concerning the judgment, this can be obtained using Article 15(2) of the Framework Decision.
- (iii) The person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State (the requested State).¹³

⁹ The Framework Decision does not mention the nationality of the requested person as a ground for mandatory non-execution.

¹⁰ Article 3(1) has not been transposed into United Kingdom law as amnesties are not part of our national law.

¹¹ This is also the aim of 54 of the Convention implementing the Schengen Agreement (see below).

¹² Case C-261/09 *Criminal Proceedings against Gaetano Mantello* [2011] 2 C.M.L.R. 5.

¹³ This ground of non-execution is reflected in section 15 of the 2003 Act. The age of criminal responsibility varies widely across the European Union. See *T v. United Kingdom* (2000) 30 EHRR 121. The age of criminal responsibility in England and Wales is 10 years: Children and Young Persons Act 1933, Section 50. In Northern Ireland, 10 years: Criminal Justice (Northern Ireland) Order 1998, Article 3. In Scotland it is 8 years: Criminal Procedure (Scotland) Act 1995. In the majority of Member States it is between 13 and 16 years.

Article 4: Optional Grounds for Refusal

B.11 Article 4 lays down seven grounds on which the judicial authorities of the executing Member State (the requested State) may refuse execution of the European arrest warrant.¹⁴ These grounds for optional non-execution are as follows:

- (i) If (in cases other than those falling within the list of framework offences) the act on which the arrest warrant is based does not constitute an offence under the law of the executing Member State.¹⁵
- (ii) The person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based.¹⁶
- (iii) Where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings. A further ground of optional refusal of surrender is where a final judgment has been passed upon the requested person in any Member State in respect of the same acts and this final judgment operates as a bar to further proceedings.¹⁷
- (iv) Where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the

¹⁴ Council Framework Decision 2009/299/JHA of 26 February 2009 has inserted a new Article 4 in relation to decisions rendered in the absence of the requested person. In summary, the executing Member State may refuse to execute the European arrest warrant if the person did not appear in person at the trial resulting in the conviction or sentence, unless the European arrest warrant states that he was informed of the proceedings and chose not to attend, or was legally represented at the trial or has expressly stated that he does not contest the decision. This is reflected in section 20 of the 2003 Act.

¹⁵ This makes the absence of double criminality an optional ground for refusal but not in cases falling within the European framework list.

¹⁶ Sections 8A and 22 of the 2003 Act which give precedence to domestic criminal proceedings and implement the postponement provisions in Article 24(1) of the Framework Decision. The outcome of the domestic proceedings would then be relevant to the question of whether surrender was barred on double jeopardy grounds under section 12 of the 2003 Act.

¹⁷ The first limb of this optional ground for refusal applies only to the executing Member State, whereas the second limb applies where a final judgment has been passed in any Member State. The second limb is reflected in section 12 of the 2003 Act.

acts fall within the jurisdiction of that Member State under its own criminal law.¹⁸

- (v) Where the executing judicial authority is informed that the requested person has been finally judged by a third State (that is a non-Member State) in respect of the same acts provided that, where there has been a sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country.¹⁹
- (vi) If the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in or is a national of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law. The purpose of Article 4(6) is to enable the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into his home State when the sentence imposed on him expires. In *Criminal Proceedings against Szymon Kozłowski*,²⁰ the European Court of Justice held that a non-execution decision can be based on Article 4(6) only if there is a legitimate interest in the execution of the sentence in the territory of the State where the person concerned was arrested. The Court explained that a requested person is 'resident' in the executing Member State when he has established his actual place of residence there, while 'staying' connotes a stable period of presence in and connections with that State which are of a degree similar to those resulting from residence. In *Criminal Proceedings against Dominic Wolzenburg*,²¹ the Court held that in the case of a citizen of the Union, the executing Member State cannot, in addition to a condition as to the duration of the residence, make this ground for optional non-execution subject to additional requirements such as possession of a residence permit of indefinite duration.

¹⁸ This is partially reflected in section 14 of the 2003 Act (the passage of time bar), although section 14 goes wider in that it does not depend upon the existence of a statutory time bar and does not depend upon the act falling within the jurisdiction of the United Kingdom's courts.

¹⁹ This is a double-jeopardy provision and is reflected in section 12 of the 2003 Act.

²⁰ Case C-66/08 [2008] ECR I-6041

²¹ Case C-123/08 [2009] ECR I-9621.

- (vii) Where the European arrest warrant relates to offences which:
- (a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or
 - (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offence when committed outside its territory.

It appears to be the case that Article 4(7) was principally designed to compensate for the partial abolition of the double criminality rule, in particular to deal with the problem of offences arguably falling within the Framework List which some Member States did not criminalise. The Netherlands and Belgium in particular wanted to ensure that abortion and euthanasia did not lead to surrender as offences of “*murder, grievous bodily injury*.”²²

Article 5: Guarantees

- B.12 Article 5 deals with guarantees which the judicial authorities of the executing State may require before consenting to surrender the requested person.
- B.13 Article 5(1) as originally enacted dealt with *in absentia* trials. It provided that where a person had been unknowingly convicted in his absence, surrender was optionally to

²² According to the views expressed in *The European Arrest Warrant In Practice*: T.M.C. Asser Press (2009) Chapter 6: Article 4(7) “*enables Member States to refuse extradition for conduct which under their own law is lawful, if that conduct has been committed in their territory. The territoriality exception does not entitle them, however to refuse extradition for such acts when committed elsewhere.*” The authors contend that Article 4(7)(a) is reflected in sections 64(2) and 65(2) of the 2003 Act and this appears to be borne out by the Commission Proposal which preceded the Framework Decision, Article 28 of which provided: “*The executing judicial authority may refuse to execute a European arrest warrant issued in respect of an act which is not considered an offence under the law of the executing Member State and which did not occur, at least in part, on the territory of the issuing Member State.*” Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedure between Member States, COM (2001) 0522 final – CNS 2001/0215, OJ C 332E, 27 November 2001. On this basis it appears that Article 4(7) was not intended to operate as a general forum bar to surrender.

be subject to the condition that the requested person would have an opportunity to apply for a retrial of the case. It has since been deleted.²³

B.14 Article 5(2) deals with sentences of imprisonment for life. It provides that if the offence giving rise to the European arrest warrant is punishable by a custodial life sentence or detention, the execution of the warrant may be subject to the condition that the issuing Member State has provision for a review of the sentence imposed on request or at the latest after 20 years, or for measures of clemency to which the person is entitled to apply, aimed at the non-execution of such a sentence.²⁴

B.15 Article 5(3) deals with the return of nationals and residents of the executing Member States in order to serve custodial sentences imposed in the issuing Member State. It provides:

“Where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State

²³ Article 5(1) has been deleted by the Council Framework Decision 2009/299/JHA [2009] OJ. L 81/24 and replaced by Article 4(a). This 2009 Framework Decision governs judgments *in absentia* and sets out the conditions under which a decision rendered following a trial at which the defendant did not appear should be recognised in other Member States. In summary, if the defendant was informed about the trial or had a lawyer to represent him or has a right to a retrial or an appeal amounting to a retrial, the judgment rendered *in absentia* has to be recognised. The Member States were required to implement this Framework Decision by 28th March 2011. In fact, the 2003 Act (section 20) is compliant with this Framework Decision and no amendment to the Act was necessary.

²⁴ Article 5(2) makes it clear that some Member States do not find it acceptable to imprison an offender for more than 20 years without the possibility of release. The United Kingdom is not among these States. Sentences in excess of 20 years' imprisonment are commonplace in the United Kingdom. In England and Wales the mandatory sentence of imprisonment for life following a conviction for murder is now governed by the Criminal Justice Act 2003. Sections 269 to 277 and Schedules 21 and 22 provide a statutory scheme for the setting of the minimum term (the period of imprisonment that must be served by the offender for the purposes of punishment and deterrence). In certain cases sentences in excess of 20 years' imprisonment may be imposed and in certain exceptional cases offenders may be subject to a whole-life sentence. In *R v. Bieber* [2009]1 WLR 223, the Court of Appeal considered whether a whole-life sentence under section 269(4) of the Criminal Justice Act 2003 was compatible with Article 3 of the European Convention on Human Rights (prohibition on inhuman or degrading treatment). Lord Phillips of Worth Matravers C.J., giving the judgment of the Court, said that a life sentence, if imposed to reflect the requirements of punishment and deterrence for a particularly heinous crime, was not in potential conflict with Article 3.

in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.”²⁵

- B.16 In *Criminal Proceedings against IB*,²⁶ the European Court of Justice held that Article 5(3) applied to a European arrest warrant issued for the purpose of executing a sentence imposed *in absentia*; accordingly surrender may be subject to a condition that the person concerned, being a national or resident of the executing Member State, should be returned in order to serve any sentence passed against him following a re-trial organised in his presence in the issuing Member State.

Article 6: Competent Judicial Authorities

- B.17 Article 6(1) provides that the issuing judicial authority shall be the judicial authority of the issuing member state which is competent to issue a European arrest warrant by virtue of the law of that State. Article 6(2) provides that the executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant.
- B.18 Article 6 makes it clear that it is a matter for the Member State to designate the issuing and executing judicial authorities.

Article 7: The Central Authority

- B.19 Article 7 provides that each Member State may designate a central authority (or more than one central authority) to assist the competent judicial authority.

²⁵ Article 5(3) is to be contrasted with the position under Article 6 of the European Convention on Extradition which provides that surrender may be refused on the grounds of nationality. Under the Framework Decision this is no longer the case. However, Article 5(3) enables the executing judicial authority to order surrender subject to a condition that a national or resident will be returned to the executing Member State in order to serve his sentence.

²⁶ Case C-306/09 [2010] ECR I-nyr

Article 8: The Content and Form of the European Arrest Warrant

B.20 The content and form of the European arrest warrant is governed by Article 8. This Article must be read in conjunction with the model form which is annexed to the Framework Decision.²⁷ The warrant should contain:²⁸

- (i) the identity and nationality of the requested person (the model form asks for distinctive marks and a description of the requested person together with a photograph, fingerprints and DNA profile of the requested person if available);
- (ii) the name, address, telephone and fax numbers and email address of the issuing judicial authority;
- (iii) evidence of an enforceable judgment, an arrest warrant or any other enforceable decision having the same effect. If surrender is requested for the purpose of executing a sentence already imposed, the warrant must contain a statement that the relevant judgment is enforceable;
- (iv) the nature and legal classification of the offence, particularly in respect of Article 2;²⁹
- (v) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;³⁰

²⁷ The model form has been amended by Council Framework Decision 2009/299/JHA of 26 February 2009 in relation to decisions rendered in the absence of the requested person.

²⁸ Where information is not provided, under the Framework Decision it is possible to remedy the omission by requesting supplementary information in accordance with Article 15.2. This is to be contrasted with the position under section 2 of the 2003 Act: a warrant which fails to comply with the requirements of the 2003 Act will not be effective. In *R (Hilali) v. Governor of Whitemoor Prison and another* [2008] 1 A.C. 305, Baroness Hale explained the approach to be adopted towards Article 8 in the following way (at paragraph 32): “*The issuing judicial authority will not always know where the person concerned will be found. It cannot tailor the warrant to any particular or idiosyncratic requirements of another Member State. So, while I agree that every issuing State should do its best to comply with the requirements of the Framework Decision, it seems equally important that every requested State should approach the matter on the basis that this has been done: in other words in a spirit of mutual trust and respect and not in a spirit of suspicion and disrespect. For better or worse, we have committed ourselves to this system and it is up to us to make it work.*”

²⁹ The model form requires a statement of the applicable statutory provisions.

- (vi) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;
- (vii) if possible, other consequences of the offence (such as whether the person has been convicted *in absentia* or whether the warrant also relates to the seizure and handing over of property).³¹

B.21 Article 8(2) provides that the European arrest warrant must be translated into the official language of the executing Member State, although a Member State may agree to accept a translation in one or more of the official languages of the Institutions of the European Communities.³²

Article 9: The Surrender Procedure

B.22 Under Article 9(1), when the location of the requested person is known, the issuing judicial authority may transmit the European arrest warrant directly to the executing judicial authority. By Article 9(2), the issuing judicial authority may in any event decide to issue an alert for the requested person in the Schengen Information System ('the SIS'). Article 9(3) provides that for a transitional period, until the SIS is capable of transmitting all the information described in Article 8, the alert shall be equivalent to a European arrest warrant pending the receipt of the original in due and proper form by the executing judicial authority.³³

³⁰ In order to comply with Article 5 of the European Convention on Human Rights the description of the facts should at least be sufficient to provide the requested person with information about the essential grounds for his arrest so as to be able, if he sees fit, to apply to a court to challenge the lawfulness of his decision: *Fox, Campbell and Hartley v. United Kingdom* (1996) 13 EHRR 157.

³¹ In the case of *in absentia* convictions the European arrest warrant should now contain the information set out in Council Framework Decision 2009/299/JHA of 26 February 2009: whether the person was summoned in person; or officially notified of the proceeding; or legally represented at the trial; or having been informed of the decision does not contest it. If the person was not informed of the decision, whether he has a right to a retrial or an appeal amounting to a retrial.

³² The United Kingdom requires European arrest warrants to be translated into English.

³³ Council Decision 2007/533/JHA, 12 June 2007, on the establishment, operation and use of the second generation Schengen Information System (SIS-II) provides that an alert entered in SIS-II shall constitute and have the same effect as a European arrest warrant: Article 31.

Article 10: Transmission of European Arrest Warrant

- B.23 Article 10 of the Framework Decision contains the detailed procedures for transmitting a European arrest warrant and Article 10(5) provides that all difficulties concerning the transmission or authenticity of any document required for the execution of the European arrest warrant “*shall be dealt with by direct contacts between the judicial authorities involved or, where appropriate, with the involvement of the central authorities of the Member States.*”

Article 11: The Rights of a Requested Person

- B.24 Article 11 deals with the rights of a requested person. When a requested person is arrested, he must be informed of the European arrest warrant and its contents and also of the possibility of consenting to surrender. He has the right to be assisted by counsel and by an interpreter and in accordance with the national law of the executing Member State.

Article 12: Custody / Bail

- B.25 Article 12 provides that the executing judicial authority must decide whether to remand the requested person in custody or on bail. The requested person may be released provisionally at any time in conformity with the law of the executing Member State provided that it takes all measures it deems necessary to prevent the person absconding.³⁴

³⁴ Release pending surrender is subject to national law regulating the grant of bail. In England and Wales bail is governed by the Bail Act 1976. There is a general right to bail but this right may be withheld in certain circumstances. Section 4(2B) of the Bail Act 1976 provides that the right to bail which is available to a person whose extradition is sought as an accused person does not apply if the person is alleged to have been convicted of an offence. This does not mean that bail will not be granted; it disapplies the right to or presumption in favour of bail.

Article 13: Consent to Surrender

- B.26 Consent to surrender is dealt with in Article 13. If the arrested person indicates that he consents to surrender the consent is to be given before the executing judicial authority in accordance with the domestic law of the executing Member State.³⁵ By Article 13(2) each Member State is required to adopt the measures necessary to ensure that consent is established in such a way as to show that the person concerned has expressed them voluntarily and in full awareness of the consequences. To that end, the requested person must have the right to legal representation.

Article 14: The Extradition Hearing

- B.27 By Article 14 where the requested person does not consent to his surrender he shall be entitled to be heard by the executing judicial authority in accordance with the law of the executing Member State.

Article 15: The Surrender Decision

- B.28 Under Article 15, the decision whether to surrender is to be taken in accordance with the time-limits and conditions set out in the Framework Decision and the executing judicial authority may request supplementary information, to be furnished as a matter of urgency, if it finds the information originally communicated by the issuing Member State be insufficient to allow it to decide on surrender.

Article 16: Multiple Requests

- B.29 By reason of Article 16, in the case of two or more European arrest warrants, the executing judicial authority must decide which is to be given priority having regard to all the circumstances and especially the relative seriousness and place of the offences, the respective dates of the European arrest warrants and whether the warrant has been

³⁵ Member States may provide that where consent to surrender takes place the specialty rule does not apply. This has been implemented by the United Kingdom in section 45(3) of the 2003 Act.

issued for the purposes of prosecution or for execution of a custodial sentence or detention order. In the event of a conflict between a European arrest warrant and a request for extradition presented by a third country, the decision on precedence is to be taken by the competent authority of the executing Member State.³⁶

Article 17: Time Limits

- B.30 The time limits and procedures for the decision to execute a European arrest warrant are set out in Article 17. As a general principle all European arrest warrants are to be dealt with and executed as a matter of urgency. Under Article 17(2), in a consent case, the decision on execution should be taken within a period of 10 days after consent has been given. In other cases, Article 17(3) provides that the final decision should be taken within a period of 60 days after arrest. Where these time limits cannot be observed, Article 17(4) requires the executing judicial authority to inform the issuing judicial authority giving reasons for the delay. In such a case, the time limit may be extended by a further 30 days, giving an overall time limit of 90 days from the date of arrest. Where a Member State cannot observe the time limits in Article 17 it must inform Eurojust and explain the reasons for the delay. In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of a European arrest warrant is required to inform the Council, which can then take steps to evaluate the implementation of the Framework Decision at Member State level.³⁷

Article 18 or 19: Temporary Transfer

- B.31 Pending the decision on surrender, Articles 18 and 19 provide, in accusation cases, for the temporary transfer of the requested person to the issuing Member State or for

³⁶ Under the 2003 Act the extradition judge has the power to deal with competing requests submitted by Part 1 territories (section 44). In the case of competing requests where one is submitted under Part 1 and one submitted under Part 2 it is for the Secretary of State to decide the question of whether the warrant or the request should take priority (section 179).

³⁷ Part 1 of the 2003 Act contains a number of time limits which are intended to ensure that a European arrest warrant is dealt with as expeditiously as possible. We were informed that surrender from the United Kingdom frequently takes longer than 90 days.

the requested person to be heard by a judicial authority of the issuing Member State before the court in the executing Member State.

Article 20: Privileges and Immunities

- B.32 Under Article 20 where the requested person enjoys a privilege or immunity in the executing Member State, the time limits in Article 17 do not start to run until the executing judicial authority is informed of the fact that the privilege or immunity has been waived. Where the power to waive the privilege or immunity lies with the executing Member State the executing judicial authority is required to request it to exercise that power forthwith. Implicit in this Article is an additional ground for non-execution, namely that the requested person is a diplomat or other official entitled to immunity and the immunity has not been waived.³⁸

Article 21: Competing International Obligations

- B.33 Article 21 provides that the Framework Decision shall not prejudice the obligations of the executing Member State where the requested person has been extradited to that Member State from a third State and where that person is protected by the provisions of the arrangement under which he was extradited concerning specialty.

³⁸ Section 208 of the Act does allow the Secretary of State not to allow surrender on the grounds of national security. A requested person may claim sovereign or diplomatic immunity from proceedings for his extradition and this would be determined in accordance with principles of customary international law and the State Immunity Act 1978 (in the case of heads of State, former heads of State and Ministers) and section 2(1) of the Diplomatic Privileges Act 1964 (in the case of diplomats). There is no specific transposition of this article into the United Kingdom by the 2003 Act. Nor is there any need for express transposition: immunity of this nature will operate as a bar to surrender and claims for immunity have been made in a number of cases: most recently, *Bat v The Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin), where it was dismissed on the facts.

Article 22: Notification of the Decision

- B.34 Article 22 requires the executing judicial authority to notify the issuing judicial authority of whether or not surrender is granted.³⁹

Article 23: Time Limits for Surrender

- B.35 Article 23 provides that the requested person must be surrendered as soon as possible on a date agreed between the authorities concerned and no later than 10 days after the final decision on the execution of the European arrest warrant. If the surrender is prevented by circumstances beyond the control of any of the Member States a new surrender date may be agreed. Surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example, if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health.⁴⁰ The execution of the European arrest warrant must take place as soon as these grounds have ceased to exist. Where a person is held in custody he must be released if the time limit for his surrender expires without surrender taking place.

Article 24: Postponed or Conditional Surrender

- B.36 Article 24(1) enables the executing judicial authority to postpone surrender so that the requested person may be prosecuted in the executing Member State or so that he may serve a sentence in its territory. Article 24(2) enables surrender to take place on conditions agreed between the executing and issuing judicial authorities.

³⁹ In practice the United Kingdom provides a reasoned decision to the issuing judicial authority with copies of any relevant judgment.

⁴⁰ This is reflected in section 25 of the 2003 Act.

Article 25: Transit

- B.37 Article 25 deals with transit of the requested person through the territory of Member States.⁴¹

Article 26: The Effects of Surrender

- B.38 By reason of Article 26 any period of detention served in the executing Member State in connection with execution of the European arrest warrant is to be deducted from the total period of detention to be served in the issuing Member State.⁴²

Article 27: Specialty

- B.39 Specialty protection is governed by Article 27. Each Member State may notify the General Secretariat that consent is presumed to have been given for dealing with the requested person for an offence committed prior to his surrender.⁴³ Where no such notification has been given the general rule is that the requested person may only be dealt with for the offence for which he was surrendered. The general rule does not apply if:

- (i) the requested person has had an opportunity to leave the territory of the Member State to which he has been surrendered or has not done so within 45 days, or has returned to that territory after leaving it;
- (ii) the offence is not punishable by a custodial order or detention order;

⁴¹ That is where the requested person is in transit to the issuing Member State and lands or disembarks or is moved through another Member State. This can sometimes cause difficulties as in *R v. Governor of Brixton Prison, Ex Parte Soblen* [1963] 2 Q.B. 243, where the requested person on arrival in the United Kingdom applied for *habeas corpus* to challenge his detention. Transit is not dealt with in the 2003 Act: in practice the United Kingdom considers transit requests and these are dealt with by the Serious Organised Crime Agency.

⁴² In the case of persons surrendered to the United Kingdom, the position prior to 4 April 2005 was governed by section 47 of the Criminal Justice Act 1991. This allowed any time spent in custody on remand to be credited by the sentencing judge. The position in relation to conduct occurring after 4 April 2005 is now governed by section 243 of the Criminal Justice Act 2003. In the case of outgoing requests, as a matter of practice, the United Kingdom always provides details of any time spent on remand to the issuing judicial authority.

⁴³ The United Kingdom has not made any such notification.

- (iii) the criminal proceedings do not give rise to a measure restricting personal liberty;
- (iv) the person could be liable to a penalty or measure not involving the deprivation of liberty (for example a financial penalty) which may give rise to a restriction of his personal liberty;
- (v) the person consents to his surrender;
- (vi) the person renounces his entitlement to the specialty rule;
- (vii) the executing judicial authority gives consent.

B.40 Surrender to another Member State or subsequent extradition to a third State is governed by Article 28 and the rules concerning specialty mirror those in Article 27.

B.41 In *Criminal Proceedings against Artur Leymann and Aleksei Pustovarov*,⁴⁴ the European Court of Justice held that the specialty rule was not offended if the constituent elements of the offence actually brought against the surrendered person correspond with the information given in the arrest warrant. Modifications concerning the time or place of the offence are allowed, in so far as: (a) they derive from evidence gathered in the course of proceedings conducted in the issuing State concerning the conduct described in the arrest warrant; (b) do not alter the nature of the offence; and, (c) do not lead to grounds for non-execution under Articles 3 and 4 of the Framework Decision.

Article 29: Handing Over Property

B.42 Article 29 deals with the handing over of property.⁴⁵ It provides that at the request of the issuing judicial authority or on its own initiative, the executing judicial authority shall, in accordance with its national law, seize and hand over property which:

⁴⁴ Case C-388/08 [2008] ECR I-8983.

⁴⁵ Section 172 of the 2003 Act deals with delivery to the issuing judicial authority of seized property. There are a series of other instruments aimed at implementing the principle of mutual recognition of judicial decisions relating to the proceeds of crime and the obtaining of

- (i) may be required as evidence;
- (ii) has been acquired by the requested person as a result of the offence.

Article 30: Expenses

- B.43 Article 30(1) provides that expenses incurred in the territory of the executing Member State for the execution of a European arrest warrant shall be borne by that Member State. Article 30(2) provides that all other expenses shall be borne by the issuing Member State.

Article 31-34: General and Final Provisions

- B.44 Article 31 provides that as from 1st January 2004 the Framework Decision is to replace all existing extradition arrangements between Member States although Member States may continue to apply bilateral or multilateral agreements which allow the objectives of the Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for the surrender of persons who are the subject of European arrest warrants.⁴⁶ Article 32 provides that extradition requests received before 1st January 2004 will continue to be governed by existing instruments relating to extradition. Article 33 provides that the Framework Decision applies to Gibraltar and Article 34 required Member States to take the necessary measures to comply with the provisions of the Framework Decision by 31st December 2003.⁴⁷

evidence: Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders and Council Framework Decision 2008/978/JHA of 13 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents or data for use in proceedings in criminal matters.

⁴⁶ Thus, the Framework Decision replaces the European Convention on Extradition 1957 as between Member States, but the European Convention continues to apply to extradition between Member States and third States who are parties to the Convention. In the case of the United Kingdom, State parties to the Convention who are not Member States of the European Union are designated territories for the purposes of Part 2 of the 2003 Act.

⁴⁷ Italy became the last of the then 25 Member States to implement the Framework Decision in May 2005. As a third pillar measure there was no legal mechanism to enforce the implementation deadline.

Appendix C The Extradition Act 2003

C.1 We provided a summary over view of the Act at paragraphs 2.7-2.14. In this section we explain the operation of the 2003 Act. We do so because we believe that the criticisms of the Act must be viewed in their proper context and this requires an appreciation of the scheme of the Act as a whole.

C.2 The 2003 Act is a highly detailed and elaborate statute. It contains 227 section and four schedules.¹

- (i) Part 1 governs extradition to category 1 territories (section 1 – 68);
- (ii) Part 2 governs extradition to category 2 territories (section 69 – 141);
- (iii) Part 3 governs extradition to the United Kingdom (section 142 – 155);
- (iv) Part 4 contains provisions in relation to police powers (sections 156 – 176);
- (v) Part 5 contains a number of miscellaneous and general provisions (section 177 – 227).

C.3 In the sections which follow we draw attention to the significant provisions and the decided case-law.

Part 1

C.4 Part 1 of the Extradition Act 2003 governs extradition proceedings in relation to a European arrest warrant. What follows is a summary of the extradition process under Part 1 as it applies to England and Wales.²

¹ By way of comparison, the Extradition Act 1870 was comprised of 41 sections: the Fugitive Offenders Act 1967, 23 sections and the Extradition Act 1989, 38 sections.

² Material differences between the operation of the Act in England and Wales, Scotland and Northern Ireland are noted in the text or by way of footnote.

Commencement of Proceedings

- C.5 Under Part 1 of the Act extradition proceedings may be commenced in one or other of two ways. First, under the procedure set out in section 5 for what is known as “*provisional arrest*”. Secondly, under the procedure set out in section 3 for arrest on the basis of a certified Part 1 warrant.³ A Part 1 warrant is certified by the Serious Organised Crime Agency which is the relevant designated authority for the purposes of Part 1 of the Act.⁴ The Serious Organised Crime Agency undertake a review of the form and content of the European arrest warrant to ensure that it conforms to the requirements of the 2003 Act.⁵

Provisional Arrest

- C.6 Provisional arrest is available where there are reasonable grounds to believe that a Part 1 warrant has been, or shortly will be, issued by a recognised authority in a category 1 territory. A constable, a customs officer or a service policeman (in limited circumstances) has power to make an arrest without a warrant.⁶
- C.7 Following provisional arrest, section 6 of the Act provides that the person arrested must be provided with a copy of the European arrest warrant as soon as practicable and must be brought within 48 hours of arrest before the “*appropriate judge*” (that is a District Judge sitting at City of Westminster Magistrates’ Court (from 27 September 2011, Westminster Magistrates’ Court) designated for the purpose of hearing

³ As a matter of practice, arrests are largely carried out by the Metropolitan Police Service Extradition Squad. Other police forces have recently become involved in making arrests pursuant to European arrest warrants. In each of the forces’ areas there is a single point of contact to ensure a consistency of approach and the National Policing Improvement Agency has provided guidance to officers. Priority is given to more serious cases, such as offences of violence.

⁴ Extradition Act 2003 (Part 1 Designated Authorities) Order 2003 (SI 2003 No. 3109) as amended by the Serious Organised Crime and Police Act 2005 (Consequential and Supplementary Amendments to Secondary Legislation) Order 2006 (SI 2006 No. 594). The Serious Organised Crime Agency came into being on 1 April 2006. The National Criminal Intelligence Service was the designated authority from 1 January 2004 until it was replaced. In Scotland the Crown Office and Procurator Fiscal Service is the designated authority.

⁵ We were informed that this review is limited to ensuring that the European arrest warrant is valid for the purposes of section 2.

⁶ Arrest without a warrant was not available under the earlier legislation, and unlike the position under the earlier statutory regimes a provisional arrest is not subject to cancellation by the Secretary of State.

extradition cases).⁷ Failure to produce the arrested person within 48 hours of arrest obliges the judge on application to order his or her discharge. A failure to provide the arrested person with a copy of the warrant confers on the judge a discretion to order his discharge.

- C.8 Specific documents must also be produced before the judge in the 48 hour period. The documents are the Part 1 warrant and certificate (that is the certificate issued by the Serious Organised Crime Agency) under section 2. If it is not possible to produce these documents within the 48 hour period following arrest, then the judge may, on application by the judicial authority responsible for issuing the European arrest warrant, grant a further 48 hour extension. Such an extension of time may be granted if the judge decides on the balance of probabilities that the requirement to produce the documents within the initial 48 hour period could not reasonably be complied with.

Arrest Under a Certified Part 1 Warrant

- C.9 Other than where proceedings are commenced by way of provisional arrest, the extradition procedures under Part 1 depend upon the existence of a certified Part 1 warrant; that is a warrant certified by the Serious Organised Crime Agency.⁸
- C.10 Section 2(2) defines a Part 1 warrant as an arrest warrant which has been issued by a judicial authority in the relevant category 1 territory.⁹

⁷ Section 67. In Scotland, one of the five designated Sheriffs who sit in the Lothian and Borders Sheriff Court. In Northern Ireland designated county court judges or resident magistrates. The City of Westminster Magistrates' Court closed on 22 September 2011. Extradition cases are now heard at Westminster Magistrates' Court.

⁸ As the United Kingdom is not yet a member of the Schengen Information System, the Serious Organised Crime Agency is notified of European arrest warrants by way of an Interpol diffusion (notice). Interpol is an international police organisation. It was created in 1923 and its principal rule is to facilitate cross-border police cooperation.

⁹ If the warrant does not comply with the requirements of section 2, it is not a valid warrant and the arrested person is entitled immediately to be discharged: *Office of the King's Prosecutor, Brussels v. Cando Armas* [2006] 2 A.C. 1, per Lord Hope of Craighead, at paragraph 26. Whether the requirements of section 2 are satisfied is a question of fact. In *Kingdom of Spain v. Arteaga* [2010] NIQB 23, the Northern Ireland Divisional Court considered the operation of section 2 and noted that there is no requirement that the warrant specify any evidence on which the accusation is based. The warrant should convey to the requested person the essence of the accusation. It was also noted that the merits of the accusation against the requested person do not fall to be considered by the executing judicial authority in the requested Member State.

- C.11 There are two types of such warrants. First, those issued in accusation cases (that is where the subject is accused in the territory issuing the warrant of the commission of a specific offence and where the warrant has been issued for the purposes of arrest and prosecution). Secondly, those issued in conviction cases (that is where the subject has been convicted of an offence and where the warrant has been issued for the purposes of his being sentenced or serving a custodial sentence in respect of that offence).¹⁰

Certification by the Serious Organised Crime Agency

- C.12 Where the European arrest warrant complies with these requirements and the Serious Organised Crime Agency¹¹ believes that the authority which issued the Part 1 warrant has the function of issuing warrants in that territory, it may issue a certificate and the warrant then becomes a certified Part 1 warrant.

Arrest Under a Certified Part 1 Warrant

- C.13 Section 3 of the Act permits a person to be arrested under the authority of a certified Part 1 warrant. An arrest on the basis of such a warrant can be made by a police constable or customs officer anywhere in the United Kingdom. Such a warrant can also be executed (in certain circumstances) by a service policeman.

¹⁰ In an accusation case the warrant must contain the following information (Section 2(3) and (4)): (a) details of the person's identity; (b) details of any other warrant relating to the same offence issued in the requesting country; (c) details of the circumstances surrounding the alleged commission of the offence, including the person's alleged conduct, where and when the offence allegedly took place and the applicable provision of the law in the requesting country (In *The Criminal Court at the National High Court, 1st Division (A Spanish Judicial Authority) v. Murua* [2010] EWHC 2609 (Admin) it was held that the description of the conduct must be fair, accurate and proper); (d) details of the sentence which could be imposed if the person is ultimately convicted of the offence. In a conviction case the warrant must contain the following information (Section 2(5) and (6)): (a) details of the person's identity; (b) details of the conviction; (c) details of any other warrant relating to the same offence issued in the requesting country; (d) where the person has not yet been sentenced for the offence, details of the sentence which could be imposed if the person is ultimately sentenced for the offence; (e) where the person has already been sentenced for the offence, details of the sentence which has been imposed.

¹¹ Acting as the authority designated by the Secretary of State for the purposes of Part 1 in respect of England, Wales and Northern Ireland. In Scotland, this task is performed by the Crown Office and Procurator Fiscal Service.

- C.14 Section 4 of the Act applies where a person has been arrested under a certified Part 1 warrant. Section 4(2) requires a copy of the warrant to be given to the arrested person as soon as practicable. If this requirement is not met the District Judge may on application order the person's discharge. Section 4(3) requires the arrested person to be brought before the District Judge as soon as practicable.¹² If this requirement is not met and the arrested person applies to the judge, the judge must order the person's discharge.

The Initial Hearing

- C.15 In the case of persons arrested either under a certified Part 1 warrant or provisionally, the District Judge sitting at City of Westminster Magistrates' Court is required to conduct an initial hearing.¹³ The purpose of such a hearing is to establish the identity of the arrested person and in particular that the person brought before the District Judge is the person in respect of whom the warrant was issued. The procedure at the initial hearing is governed by section 7 of the Act.¹⁴
- C.16 By reason of section 7(2) the District Judge is required to make the decision on identity on the balance of probabilities. If the District Judge decides the person brought before him is not the person in respect of whom the warrant was issued then he must order his discharge. If the District Judge decides the person brought before him is the person in respect of whom the warrant was issued, then he must list the case for the full extradition hearing to take place.

¹² This time limit is not as strict as the time limit imposed following provisional arrest (48 hours). In *Nikonovs v. Governor of Her Majesty's Prison Brixton and another* [2006] 1 WLR 1518, the High Court held that whether the arrested person has been produced as soon as practicable is a question of fact. A person discharged under section 4 may be proceeded against for the same conduct if a European arrest warrant is re-issued by the requesting judicial authority: *Lopetas v. Minister of Justice for Lithuania* [2007] EWHC 2407. This is similar to the position under the Extradition Act 1989: *Re Rees* [1986] A.C. 937.

¹³ The Sheriff in Scotland. The county court judge/resident magistrate in Northern Ireland; in fact extradition proceedings in Northern Ireland take place before the Belfast Recorder.

¹⁴ In *Jeziorowski v. Poland* [2010] EWHC 2112 (Admin) the High Court held that there may be reasonable cause to postpone the initial hearing where the postponement is granted to permit the requested person to obtain legal aid and representation.

Remand

- C.17 Section 8 of the Act deals with the arrangements for the remand¹⁵ of the arrested person and the judge's duty to inform the person of the contents of the warrant, and to explain that the person may consent to his extradition.¹⁶
- C.18 Under section 8(1) the District Judge is required to fix a date for the extradition hearing and this must be within 21 days of arrest. The period of 21 days can be extended if the judge believes that it is in the interests of justice to do so.¹⁷ If the hearing does not begin on or before the date fixed, and no reasonable cause is shown for the delay, then the judge must order the person's discharge.
- C.19 At the conclusion of the initial hearing the District Judge must remand the arrested person in custody or on bail.

Persons Charged with Offences in the United Kingdom

- C.20 Under section 8A, if, before the commencement of the extradition hearing, the District Judge is informed that the person is charged with an offence in the United Kingdom, any further proceedings in respect of the extradition must be adjourned until the conclusion of the domestic prosecution. If a custodial sentence is imposed in

¹⁵ An accused person has the benefit of section 4 of the Bail Act 1976 (the right to bail) but section 4 does not apply to conviction cases. (The amendments to the Bail Act 1976 were effected by section 198 of the 2003 Act. The exceptions to the right to bail contained in Schedule 1 of the Bail Act apply in extradition proceedings.)

¹⁶ Under section 8(2) the required information about consent is as follows: (a) that the person may consent to his extradition; (b) an explanation of the effect of giving consent; (c) that consent, if given, must be given in writing and once given is irrevocable. A person who consents to surrender has no right of appeal against surrender and the specialty rule does not apply.

¹⁷ The Criminal Procedure Rules (2010) SI 2010 No. 60 apply to extradition proceedings. In *R (Government of the United States of America) v. Senior District Judge, Bow Street Magistrates' Court* [2007] 1 WLR 1157, a case concerned with Part 2 of the 2003 Act, the High Court held that it is the duty of the parties to ensure that the time limits set out in the Act are complied with and that extensions of time should be granted only in exceptional circumstances where the interests of justice so require. In that case the extradition proceedings had been adjourned on no less than twelve occasions over a period of 15 months.

respect of the offence, the proceedings may be further adjourned until the person is released from custody.¹⁸

Person Serving a Sentence

- C.21 Under section 8B, if, before the commencement of the extradition hearing, the District Judge is informed that the person is in custody serving a sentence of imprisonment or another form of detention in the United Kingdom, any further proceedings in respect of the extradition may be adjourned until the person is released from custody.

The Extradition Hearing

- C.22 The District Judge's powers at the extradition hearing are set out in section 9 of the Act.
- C.23 In England and Wales, the powers available to the District Judge are (as nearly as possible) the same as those available to a magistrates' court at a summary trial.¹⁹
- C.24 It follows that the judge has the power to adjourn the hearing and remand a person in custody or on bail.
- C.25 The first question to be decided by the District Judge at the extradition hearing²⁰ is whether the offence specified in the warrant is an extradition offence as defined in section 64 (accusation cases and where the requested person has been convicted but

¹⁸ Section 8A gives precedence to domestic criminal proceedings. This is consistent with Article 5(2) of the Framework Decision on the European arrest warrant. To similar effect in section 22.

¹⁹ In Scotland, the designated judge has the same powers (as nearly as possible) as if the proceedings were summary proceedings in respect of an offence alleged to have been committed by the arrested person. In Northern Ireland, the designated judge has the same powers (as nearly as possible) as a magistrates' court would have in the hearing and determination of a complaint.

²⁰ The extradition hearing must be adjourned if the requested person faces an outstanding charge in the United Kingdom (section 22) or if the person's mental or physical condition is such that it would be unjust or oppressive to extradite him (section 25) and it may be adjourned if the person is serving a sentence of imprisonment in the United Kingdom (section 23).

not yet sentenced) or section 65 (conviction cases, where the requested person has been convicted and sentenced). If the offence is not an extradition offence then the District Judge must order the person's discharge.²¹

Extradition Offence

C.26 Section 64 of the Act defines the different types of conduct that constitute an extradition offence in two types of case: (a) where the person is accused but not yet convicted of the offence in the category 1 territory; (b) where the person has been convicted of the offence but not yet sentenced for it.

C.27 For the purposes of section 64, the conduct specified in the warrant must either meet the dual criminality test (viz. the conduct for which extradition is sought must constitute a crime both under the law of the category 1 territory and under the law of the relevant part of the United Kingdom) or, the issuing judicial authority must indicate that the offence is included within the "*European framework list*."²²

C.28 Schedule 2, which contains the European framework list of conduct, is identical to the 32 categories of offences set out in Article 2(2) of the Framework Decision. The effect of the framework list was explained by Lord Bingham of Cornhill in *Office of the King's Prosecutor, Brussels v. Cando Armas*.²³

"These are not so much specific offences as kinds of criminal conduct, described in very general terms. Some of these, such as murder and armed robbery, are likely to feature, expressed in rather similar terms, in any developed criminal code. Others, such as corruption, racism, xenophobia, swindling and extortion may find different expression in different codes. Included in the list ... are the offences of trafficking in human beings, facilitation of unauthorised

²¹ In *Berivo v. Public Prosecutor at the Bordeaux County Court, France* [2010] EWHC 2071 (Admin) the High Court stated that in determining whether a European arrest warrant established an extradition offence the Court should approach the question benevolently and without unnecessary formality.

²² The European framework list is defined by section 215 as the list of conduct set out in Schedule 2 to the 2003 Act. It is identical to the list contained in Article 2 of the Framework Decision.

²³ [2006] 2 A.C. 9 (at paragraph 5)

entry and residence and forgery of administrative documents. Underlying the list is an unstated assumption that offences of this character will feature in the criminal code of all member states. Article 2(2) accordingly provides that these framework offences, if punishable in the member state issuing the European arrest warrant by a custodial sentence or detention order for a maximum period of at least three years and as defined by the law of that state, shall give rise to surrender pursuant to the warrant 'without verification of the double criminality of the act.' This dispensation with the requirement of double criminality is the feature which distinguishes these framework offences from others. The assumption is that double criminality need not be established in relation to these offences because it can, in effect, be taken for granted. The operation of the European arrest warrant is not, however, confined to framework offences."

C.29 In the case of framework list offences, the offence in the warrant amounts to an extradition offence if the requirements of section 64(2) of the Act are satisfied. These requirements are threefold:

- (i) The conduct occurs in the category 1 territory and no part of it occurs in the United Kingdom;²⁴
- (ii) The offence falls within the framework list;²⁵
- (iii) The offence is punishable in the law of the category 1 territory with detention for a period of three years or more.

²⁴ The effect of this provision is that the dispensation with the requirement of double-criminality does not apply if any part of the conduct occurs in the United Kingdom.

²⁵ In *Dabas v. High Court of Justice, Madrid* [2007] UKHL 6, the House of Lords considered section 64(2)(b) which provides for "a certificate issued by an appropriate authority [showing] that the conduct falls within the European Framework list." It was held by a majority that this did not require an additional document separate from the European arrest warrant itself. "It would be inconsistent with the trust and respect assumed to exist between judicial authorities to insist on any additional verification which would impede the process of surrender but do nothing to protect the rights of the appellant" per Lord Bingham of Cornhill at paragraph 8.

- C.30 Thus, in the case of the framework list offences, although it is not necessary to satisfy the dual criminality requirement, extradition is only available on the basis of section 64(2) if none of the conduct took place in the United Kingdom. In other words, section 64 provides for a dual criminality requirement in relation to framework list offences when any part of the conduct, no matter how insignificant, occurs in the United Kingdom.
- C.31 In cases where the double criminality requirement has to be satisfied, section 64 distinguishes between conduct which occurs in the category 1 territory (intra-territorial offences)²⁶ and conduct which occurs outside the category 1 territory (extra-territorial offences).²⁷
- C.32 Section 64(6) and (7) relate to genocide, crimes against humanity and war crimes as well as ancillary offences under the International Criminal Court Act 2001.²⁸
- C.33 Section 64(8) governs the double-criminality test in cases where the conduct relates to a tax or duty or customs or exchange. In such cases, where equivalent circumstances in the United Kingdom are mentioned under section 64(3)(b), (4)(c) and (5)(b), it is

²⁶ Intra-territorial offences are governed by section 64(3) which provides that conduct constitutes an extradition offence if three requirements are satisfied: (a) the conduct occurs in the category 1 territory; (b) the conduct would constitute an offence under the law of the United Kingdom if it occurred in the United Kingdom; (c) the conduct is punishable under the law of the category 1 territory with imprisonment for a period of 12 months or more.

²⁷ Section 64(4) to (6) relate to extra-territorial conduct. This is conduct in respect of which a category 1 territory claims jurisdiction (and therefore the right to prosecute) even though the conduct did not take place on its soil. Section 64(4) provides that conduct constitutes an extradition offence if three conditions are satisfied: (a) the conduct occurs outside the category 1 territory; (b) the offence is punishable in the law of the category 1 territory with detention for a period of 12 months or more; (c) in corresponding circumstances the equivalent conduct would constitute an extra-territorial offence against the law of the United Kingdom which is punishable with imprisonment for a period of 12 months or more. Section 64(5) provides that conduct constitutes an extradition offence if three conditions are satisfied: (a) the conduct occurs outside the category 1 territory and no part of it occurs in the United Kingdom; (b) the conduct would constitute an offence under the law of the United Kingdom punishable with imprisonment for a period of 12 months or more if it had occurred here; (c) the conduct is similarly punishable under the law of the category 1 territory.

²⁸ The International Criminal Court Act 2001 implemented the United Kingdom's obligations of cooperation with the International Criminal Court under the Rome Statute of the International Criminal Court, 17th July 1998. The International Criminal Court has its seat in The Hague. It has jurisdiction to try individuals accused of genocide, crimes against humanity and war crimes. The Court's jurisdiction is limited to crimes committed by nationals of the State parties to the Rome Statute and ordinarily the crime must have been committed within the territory of a Party. The Court may not exercise its jurisdiction if the case is being investigated or prosecuted by a State having jurisdiction over it, unless the State in question is unwilling or unable to carry out the investigation or prosecution: this is known as the principle of complementarity.

immaterial that United Kingdom law does not contain rules of the same kind as those of the category 1 territory. This provision does not dispense with the requirement of double-criminality. It means that an offence against (say) the tax regime of a category 1 territory would nevertheless satisfy the double criminality rule if it amounted to (say) an offence of cheating the revenue, assuming the relevant conduct had occurred in the United Kingdom, even though the particular tax levied in the category 1 territory was unknown to English law.

Extradition Offences: Persons Sentenced for Offences

- C.34 Section 65 defines the different types of conduct that constitute an extradition offence in respect of category 1 territories where the person is unlawfully at large, having been sentenced for the offence.²⁹ The provisions of section 65 mirror the requirements in section 64, save that for offences outside the European Framework list the person must have been sentenced to detention for a period of 4 months or more.³⁰ Persons convicted of framework list offences must have been sentenced to detention for a period of 12 months or more.³¹

Case-Law on Extradition Offences

- C.35 The correct interpretation of sections 64 and 65 was considered by the House of Lords on two occasions, first in *Cando Armas*³² and later in *Norris v. Government of the United States of America*³³ (a case concerning the equivalent provisions under Part 2 of the Act (sections 137 and 138)). In *Cando Armas* it was decided that the distinct categories of case set out in the subsections to sections 64 and 65 are not mutually exclusive: they constitute a cumulative and overlapping list in which a condition applicable to one category might also be applicable to another. The House

²⁹ By reason of section 68A a person is alleged to be unlawfully at large after conviction of an offence if: (a) he is alleged to have been convicted of it; and (b) his extradition is sought for the purpose of his being sentenced for the offence or of his serving a sentence of imprisonment or another form of detention imposed in respect of the offence.

³⁰ In *Pilecki v. Circuit Court of Legnica, Poland* [2008] 1 WLR 325, the House of Lords held that where an aggregate sentence imposed in respect of a number of offences exceeds the 4 month period, the requirements of section 65 are satisfied.

³¹ Section 65(2)

³² [2006] 2 A.C. 1

³³ [2008] 1 A.C. 920

of Lords also held that “conduct” for the purposes of sections 64 and 65 was that complained of or relied on in the warrant and it occurred “in” the requesting territory irrespective of the physical presence of the defendant so long as the intended effect of his actions were felt there. In *Norris*, the House of Lords held that the double-criminality test involved a consideration of whether the conduct of the accused, if it had been committed in the United Kingdom, would have constituted an offence under the law of the United Kingdom: it is not necessary to look for correspondence between the elements of the foreign offence and the ingredients of the offence under the law of the United Kingdom. Accordingly, the fact that the juristic elements of the foreign offence and the domestic offence are different is irrelevant. In applying this conduct based test the House of Lords followed two of its earlier decisions decided under the Extradition Act 1870: *In re Nielsen*³⁴ and *Government of the United States v. McCaffrey*³⁵ and declined to follow the approach adopted under the Fugitive Offenders Act 1967 in *Canada (Government of) v. Aronson*.³⁶

Transposition

- C.36 Sections 64(3)(b), (4)(c), (5)(b) and 65(3)(b), (4)(c) and (5)(b) operate on the basis of transposition. This requires the District Judge in England to conduct the hypothetical exercise of substituting England for the category 1 territory, while regarding everything else as having happened where it did in fact happen. In *R v. Governor of Pentonville Prison, ex parte Tarling*,³⁷ a case involving a request from Singapore and decided under the Extradition Act 1870, Lord Keith of Kinkel explained the process of transposition in the following way:

“In considering the jurisdiction aspect it is necessary to suppose that England is substituted for Singapore as regards all the circumstances of the case connected with the latter country, and to examine the questions whether upon that hypothesis and upon the

³⁴ [1984] A.C. 606

³⁵ [1984] 1 WLR 867

³⁶ [1990] 1 A.C. 579

³⁷ [1979] 1 WLR 1417. This was followed in *R v Governor of Pentonville Prison, Ex parte Osman* [1990] 1 WLR 277, and *R (Al-Fawwaz) v Governor of Brixton Prison and another* [2002] 1 AC 556.

evidence adduced the English courts would have jurisdiction to try the offences charged.”

C.37 If the District Judge concludes that the conduct set out in the European arrest warrant does not constitute an extradition offence then the person must be discharged.³⁸

C.38 If the District Judge concludes that the conduct does constitute an extradition offence he must proceed to consider whether there are any statutory bars to extradition.³⁹

Bars to Extradition

C.39 The statutory bars to extradition are set out in section 11(1) of the Act. They are as follows:

- the rule against double jeopardy;
- extraneous considerations;
- the passage of time;
- the person’s age;
- hostage-taking considerations;
- speciality;
- the person’s earlier extradition to the United Kingdom from another category 1 territory;
- the person’s earlier extradition to the United Kingdom from a non-category 1 territory;

³⁸ Section 10(3)
³⁹ Section 10(4)

- the person's earlier transfer to the United Kingdom by the International Criminal Court.

C.40 If the District Judge finds that any one of the bars applies he must discharge the person. If not then he must proceed in one of two ways. In conviction cases he must proceed under section 20. In accusation cases he must proceed under section 21. Before dealing with sections 20 and 21 it may be helpful to explain the operation of the statutory bars to extradition.

Double Jeopardy

C.41 Section 12 contains the rule against double jeopardy. The effect of this section is to bar the extradition of a person if he would be entitled to be discharged if charged with the offence in question because of the rules of law relating to a previous acquittal or conviction. This bar to extradition reflects Article 4(3) of the Framework Decision which permits the judicial authorities in the executing Member State to refuse to execute the warrant "*where a final judgment has been passed upon the requested person in a Member State in respect of the same acts which prevents further proceedings.*"⁴⁰

Extraneous Considerations

C.42 Section 13 deals with "*extraneous considerations*". The effect of this section is to bar a person's extradition if it appears that the Part 1 warrant (although purporting to be issued simply as part of the ordinary prosecution of an extradition offence) has actually been issued for the purpose of prosecuting or punishing him for reasons of his race, religion, nationality, gender, sexual orientation or political opinions. Extradition would also be barred if it appears that he would be prejudiced at trial or

⁴⁰ When applying section 12 the extradition judge is required to make two assumptions. First, that the conduct constituting the extradition offence was an offence in the part of the United Kingdom where the judge exercises jurisdiction. Secondly, that the person was charged with the extradition offence in that part of the United Kingdom. The bar to extradition operates where *autrefois acquit* or *autrefois convict* (or in Scotland, *tholed assize*) would apply so as to entitle the requested person to be discharged if he were the subject of prosecution in the United Kingdom.

his liberty restricted, for any of the same reasons. This bar to surrender has no direct equivalent in the Framework Decision Articles, although it is consistent with Recital 12.⁴¹

Passage of Time

- C.43 Section 14 bars the extradition of a person where it appears that it would be unjust or oppressive to extradite him because of the passage of time which has passed since he is alleged to have committed the extradition offence (in an accusation case), or since he is alleged to have become unlawfully at large (in a conviction case).⁴² This bar to surrender has no precise equivalent in the Framework Decision.

Age

- C.44 Section 15 bars the extradition of a person who would have been under the age of criminal responsibility had the offence occurred in the part of United Kingdom where

⁴¹ It also reflects the basis upon which a person may claim refugee status under Article 1A(2) of the Convention and Protocol relating to the Status of Refugees (Cmd. 9171 (1951) and Cmd. 3906 (1967)). Although Part 1 of the 2003 Act does not contain an express political offence exception, section 13 is wide enough to permit a consideration of the political motivation of the offence to be taken into account in determining whether the requested person's position may be prejudiced for any of the stated reasons. The test is satisfied if the requested person shows "a reasonable chance," "substantial grounds for thinking" or "a serious possibility of prejudice": *Fernandez v. Government of Singapore* [1971] 1 WLR 987. The courts in England, Wales and Northern Ireland have also developed an abuse of process jurisdiction. This jurisdiction operates in any case where a prosecutor is manipulating or using the procedures of the court in order to oppress or unfairly prejudice a defendant: *R (Birmingham) and others v Director of the Serious Fraud Office* [2007] QB 727; *R (Government of the United States of America v Bow Street Magistrates' Court)* [2007] 1 WLR 1157; *Re Campbell's Applicant* [2009] NIQB 82.

⁴² In *Kakis v. Government of the Republic of Cyprus* [1978] 1 WLR 779, a case decided under the equivalent provision of the Fugitive Offenders Act 1967, Lord Diplock (at page 782) stated: "Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair." In *Gomes v. Government of the Republic of Trinidad and Tobago* [2009] 1 WLR 1038, it was held by the House of Lords that the test of oppressiveness and of the likelihood of injustice would not easily be satisfied; oppressiveness is more than mere hardship and whether the passage of time had made it unjust to extradite the fugitive depends upon whether a fair trial would be impossible. Council of Europe countries should readily be assumed capable of protecting an accused person against an unjust trial and the burden is on the defendant to establish the contrary (paragraphs 31 – 37).

the hearing is taking place, at the time the extradition offence was committed.⁴³ This gives effect to Article 3(3) of the Framework Decision.

Hostage-taking Considerations

- C.45 Section 16 bars extradition if the category 1 territory requesting extradition is a party to the Hostage-taking Convention (opened for signature at New York on 18 December 1979) and certain conditions apply.⁴⁴ These conditions are that, if extradited, communication between the person and the appropriate consular authorities would not be possible and the conduct constituting the extradition offence would constitute an offence under section 1 of the Taking of Hostages Act 1982 or an attempt to commit such an offence.

Speciality

- C.46 Section 17 contains the speciality bar, described as speciality under the Act.⁴⁵ The exceptions to the speciality rule are where the consent of the requested State is obtained or the person has had the opportunity to leave the country to which he was extradited but has failed to do so. The effect of section 17(1) is to bar extradition if there are no speciality arrangements with the category 1 territory where the Part 1 warrant was issued. By reason of section 17(7) a certificate issued by or under the authority of the Secretary of State, stating the existence and terms of such arrangements in a category 1 territory which is a Commonwealth country or a British overseas territory, is conclusive evidence of those matters.⁴⁶

⁴³ In England and Wales children under the age of 10 are irrebuttably presumed to be incapable of criminal responsibility: Children and Young Person's Act 1933, section 50. In Northern Ireland it is conclusively presumed that no child under the age of 10 can be guilty of an offence: Criminal Justice (Northern Ireland) Order 1998, Article 3. In Scots law a child under the age of 8 cannot be guilty of an offence: Criminal Procedure (Scotland) Act 1995, section 41.

⁴⁴ Article 9 of the International Convention against the Taking of Hostages (1979) provides that a request for extradition of an alleged offender, pursuant to the Convention, shall not be granted if the requested State party has substantial grounds for believing that the person's position may be prejudiced for the reason that communication with him by the appropriate authorities cannot be effected.

⁴⁵ The courts and practitioners have continued to use the term speciality.

⁴⁶ While at first sight it may seem strange that a Commonwealth country or a British overseas territory is referred to in this context, the 2003 Act is structured in such a way that the

- C.47 Specialty arrangements are in place if a person may only be dealt with in the requesting category 1 territory for an offence committed before his extradition falling within section 17(3)⁴⁷ or if the condition in section 17(4) is met.⁴⁸

Earlier Extradition from Category 1 Territory

- C.48 Section 18 provides that a person's extradition to a category 1 territory is barred by reasons of his earlier extradition to the United Kingdom from another category 1 territory, unless consent to his further extradition has been given on behalf of the extraditing territory. This bar to extradition applies only if the extradition arrangements between the United Kingdom and the extraditing territory require consent to be given.⁴⁹

Earlier Extradition from Non-Category 1 Territory

- C.49 Section 19 provides that a person's extradition to a category 1 territory is barred by reason of his earlier extradition to the United Kingdom from a non- category 1 territory unless consent to his further extradition has been given on behalf of the extraditing territory. This bar to extradition applies only if the extradition arrangements between the United Kingdom and the extraditing territory require consent to be given to dealing with him in the United Kingdom for the offence under consideration.⁵⁰

provisions of Part 1 may be applied to designated territories outside the European Union, provided that they do not operate the death penalty.

⁴⁷ The offences in section 17(3) are: (a) the offence for which the person was extradited; (b) an extradition offence disclosed by the same facts as the offence (for example manslaughter where the person has been extradited for an offence of murder); (c) an extradition offence to which a District Judge has given consent under section 54 of the Act; (d) an offence not punishable by imprisonment or detention; (e) an offence for which the person will not be detained in connection with his trial, sentence or appeal; (f) an offence in respect of which the person has waived his specialty protection.

⁴⁸ The condition in section 17(4) is that the person is given the opportunity to leave the category 1 territory and either does not do so within 45 days, or leaves and returns there voluntarily.

⁴⁹ Section 18 prevents re-extradition from the United Kingdom to a category 1 territory without the consent of the original requested category 1 territory.

⁵⁰ Section 19 operates in the same way as section 18 save that it applies where the earlier extradition to the United Kingdom was from a non-category 1 territory.

Earlier Transfer to United Kingdom by International Criminal Court

- C.50 Section 19A provides that a person's extradition to a category 1 territory is barred by reason of his earlier transfer to the United Kingdom by the International Criminal Court to serve a sentence imposed by the Court unless consent to his further extradition is given by the Presidency of the Court. This bar to extradition applies only if the arrangements between the United Kingdom and the Court require consent to be given for the person's extradition in respect of the offence under consideration.

The Effect of the Statutory Bars

- C.51 As noted above, if the District Judge finds that any of the bars applies, he must discharge the person. If not, then he must proceed under section 20 (in conviction cases) or under section 21 (in accusation cases).

Conviction Cases

- C.52 Section 20 is designed to ensure that a person convicted in his absence and who did not deliberately absent himself from his trial will, in the event of extradition, be entitled to a retrial.⁵¹ It applies to those cases where a person has already been tried for the offence for which extradition is sought and has been found guilty. In such a case the District Judge is required to determine three questions:

- (i) Was the person convicted in his presence or absence? If the person was convicted in his presence, the District Judge must proceed with the extradition hearing under section 21 (as in accusation cases). If the person was convicted in his absence, the District Judge must go on to consider question (ii).

⁵¹ As a general rule the accused has a right to be present at his trial: *Ekbetani v. Sweden* (1988) 13 EHRR 504 (at paragraph 25). However an accused may waive his right to be present either expressly or impliedly by failing to attend the hearing having been given notice: *Poitrimol v. France* (1993) 18 EHRR 130. Trials *in absentia* are commonplace in civil law jurisdictions and sometimes occur in England and Wales: *R v. Jones* [2003] 1 A.C. 1.

- (ii) Did the person deliberately absent himself from his trial? If so, the person is then considered to have waived the right to be present at his trial and the District Judge is required to proceed with the extradition hearing under section 21. If the person did not deliberately absent himself from his trial the District Judge must decide question (iii).⁵²
- (iii) Would the person be entitled to a retrial or review amounting to a retrial in which he would enjoy certain specified procedural rights (the right to defend himself, be provided with free legal aid if necessary and to examine the witnesses called to give evidence against him)? If the person would be entitled to such a retrial the District Judge must proceed with the extradition hearing under section 21. If he would not, the District Judge must order the person's discharge.

C.53 The effect of section 20 is that a person who has been tried in his absence must be able to obtain a new hearing and present his defence upon surrender, unless it is unequivocally established that he waived his right to be present at the original trial.

Human Rights

C.54 Section 21(1) provides as follows:

*“If the judge is required to proceed under this section (by virtue of section 11 or 20) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (C.42).”*⁵³

⁵² The question of whether the person ‘*deliberately absented*’ himself from his trial must be decided applying the criminal standard of proof: *Bleta v. Government of the Republic of Albania (No. 2)* [2005] EWHC 475 (Admin). It connotes a conscious decision not to attend and this is a question of fact: *Dula v. Public Prosecutor for Zwolle Lelystad, Holland* [2010] EWHC 469 (Admin).

⁵³ Section 1(1) of the Human Rights Act 1998 defines the ‘*Convention rights*’ as the rights and fundamental freedoms set out in the various articles of the European Convention on Human Rights specified in Schedule 1 to the Act.

- C.55 The District Judge must order the person's extradition if it would be compatible with those rights⁵⁴ but must order his discharge if it would not.⁵⁵ If the District Judge orders the person's extradition, he must remand the person in custody or on bail pending the extradition.⁵⁶

Convention Rights in the Extradition Context

- C.56 The inter-relationship between the European Convention on Human Rights and extradition has given rise to a good deal of comment. In this section we deal with the application of Convention rights in the extradition context.
- C.57 The first point to note is that section 21 does not explain the circumstances in which extradition will or will not be compatible with the Convention rights set out in Schedule 1 to the Human Rights Act 1998: this is left to the independent and impartial judiciary to decide. The ultimate arbiter of the meaning of the Convention rights is the European Court of Human Rights in Strasbourg and Section 2 of the Human Rights Act provides that domestic courts and tribunals must '*take into account*' any relevant decisions of the Court (and the European Commission) when interpreting a convention right.⁵⁷ In *R (Ullah) v Special Adjudicator*,⁵⁸ Lord Bingham of Cornhill explained: "*The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.*"⁵⁹
- C.58 The European Court of Human Rights has recognised that extraditing a person to a State where his or her human rights will or may be violated constitutes a breach by

⁵⁴ Section 21(3). We note the section provides that the judge must decide whether "*the person's extradition would be compatible with the Convention rights*" not with '*his or her*' Convention rights. This suggests that the focus is not solely on the rights of the wanted person. The judge may take into account the rights and freedoms of other individuals (for example victims of crime and under Article 8 of the Convention the family members of the requested person).

⁵⁵ Section 21(2)

⁵⁶ Section 21(4) and (5)

⁵⁷ Before 1 November 1999 three Council of Europe bodies had decision-making powers in respect of alleged violations of Convention rights. The European Commission, the European Court of Human Rights and the Committee of Ministers. The Commission received applications from victims of alleged violations and decided on the admissibility of the complaint by reporting on the merits of the case.

⁵⁸ [2004] 2 AC 323, at paragraph 20.

⁵⁹ In *R (Al Skeini) v Secretary of State for Defence* [2008] AC 153, Lord Brown of Eaton-under-Heywood suggested (at paragraph 106) that Lord Bingham's last sentence could well have ended: "*no less, but certainly no more*".

the extraditing State of its obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Human Rights Convention'). The leading authority on the point is *Soering v. United Kingdom*.⁶⁰ That case concerned a decision by the Home Secretary to extradite the applicant (a German citizen) to Virginia to face charges of capital murder, for which the penalty was death. The applicant complained that the manner in which the death penalty was implemented in Virginia, namely, after long delays, was inhuman and degrading treatment and that his extradition would be in violation of Article 3 of the Human Rights Convention.⁶¹ The Court accepted that submission but also accepted that the obligation undertaken by a state party to the Convention was confined to securing Convention rights within its own jurisdiction. On this basis, the Human Rights Convention does not require the conditions in the country of destination to be in full accord with the rights and guarantees set out in the Convention. The Court stated:⁶²

“Indeed, as the United Kingdom Government stressed, the beneficial purpose in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of article 3 in particular.”

C.59 The significance of this passage is that the Strasbourg Court made it clear that in extradition proceedings the Human Rights Convention applies only in a modified form which takes into account the desirability of arrangements for extradition. The Court later went on to state:⁶³

“Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. As movement around the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in

⁶⁰ (1989) 11 EHRR 439

⁶¹ The prohibition against torture and inhuman and degrading treatment.

⁶² At paragraph 86

⁶³ At paragraph 89

danger for the state obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.”

- C.60 The relevance of the desirability of extradition in deciding whether there has been an infringement of the Human Rights Convention was also emphasised by the Strasbourg Court in Drozdz and Janousek v. France and Spain.⁶⁴ The Court stated:⁶⁵

“As the Convention does not require the contracting parties to impose its standards on third states or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of article 6 of the Convention. To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in article 6 would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the person concerned. The contracting states are, however, obliged to refuse their cooperation if it emerges that the conviction is the result of a flagrant denial of justice.”

- C.61 In Launder v. United Kingdom,⁶⁶ the applicant claimed that his extradition to Hong Kong would interfere with respect for his family life in violation of Article 8 of the Human Rights Convention and would be disproportionate to the proposed extradition’s legitimate aim. On the issue of proportionality the European Commission stated:⁶⁷

“It is only in exceptional circumstances that the extradition of a person to face trial on charges of serious offences committed in the

⁶⁴ (1992) 14 EHRR 645

⁶⁵ At paragraph 110

⁶⁶ (1997) 25 EHRR CD 67

⁶⁷ At paragraph 3

requesting state would be held to be an unjustified or disproportionate interference with the right to respect for family life.”

- C.62 The decision in *Launder* was recently followed by the Strasbourg Court in the admissibility decision in *King v. United Kingdom*.⁶⁸ The Court⁶⁹ emphasised the importance of extradition arrangements between States in the fight against crime, in particular crime with an international or cross-border dimension and stated:

“.. that it will only be in exceptional circumstances that an applicant’s private or family life in a contracting state will outweigh the legitimate aim pursued by his or her extradition.”

- C.63 The Articles of the Human Rights Convention most likely to arise in the context of extradition are Article 2 (the right to life), Article 3 (the prohibition on torture, inhuman and degrading treatment), Article 5 (the right to liberty), Article 6 (the right to a fair trial) and Article 8 (the right to respect for a person’s private and family life).⁷⁰

- C.64 In *Ullah*,⁷¹ Lord Bingham of Cornhill summarised the application of each of these Articles in the following way:⁷²

⁶⁸ Application No. 9742/07, 26 January 2010

⁶⁹ At paragraph 29

⁷⁰ The Joint Committee on Human Rights (Human Rights Implications of UK Extradition Policy, HL Paper 156, HC 767, published on 22 June 2011) made reference to Article 14 (the right to have the other rights secured without discrimination) but we are unaware of any cases in which Article 14 has featured prominently in extradition proceedings and our analysis has focused on the Convention rights most frequently relied on in the case law.

⁷¹ [2004] 2 A.C. 323. *Ullah* was not in fact an extradition case: it concerned a refusal of asylum. But in the context of the possible engagement of rights under the Convention, the Strasbourg Court has tended not to draw a distinction between expulsion and extradition: see *Cruz Varas v. Sweden* 14 EHRR 1, 34, paragraph 70. In *Norris v. United States of America (No. 2)* [2010] 2 WLR 572, Lord Phillips of Worth Matravers PSC did not regard extradition on the one hand and expulsion or deportation on the other as being the same for the purposes of Article 8 (paragraph 60) Lord Hope of Craighead said that the public interest in giving effect to extradition is a constant. In *HH v. Deputy Prosecutor of the Italia Republic, Genoa* [2011] EWHC 1145 (Admin) Laws L.J. noted the contrasting features of immigration and extradition policy: “Good immigration policy (it will generally be recognised) is not all one way: that is to say, it will by no means always be fulfilled by the expulsion of the alien in question ... The public interest in extradition is systematically served by the extradition; being carried into effect, subject to proper procedures.” (at paragraph 63).

⁷² At paragraph 24

“While the Strasbourg jurisprudence does not preclude reliance on articles other than Article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to Article 3 it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment ... In Dehwari ... the Commission doubted whether a real risk was enough to resist removal under Article 2, suggesting the loss of life must be shown to be a ‘near-certainty’. Where reliance is placed on Article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state ... Successful reliance on Article 5 would have to meet no less exacting a test. The lack of success of applicants relying on Articles 2, 5 and 6 before the Strasbourg Court highlights the difficulty of meeting the stringent test which the court imposes. This difficulty will not be less where reliance is placed on articles such as 8 or 9 (freedom of thought, conscience or religion) which provide for the striking of a balance between the right of the individual and the wider interests of the community even in a case where a serious interference is shown.”

- C.65 We address each of the separate Articles and their impact in extradition proceedings in the paragraphs which follow.

Article 2

- C.66 Article 2 of the Human Rights Convention provides as follows:

“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction for a crime for which this penalty is provided by law.”

- C.67 There is some difference in the case law of the European Court of Human Rights as to whether the test in relation to a breach of Article 2 requires the loss of life to be a “*near certainty*” or only “*a real risk*” in accordance with the test in relation to Article 3.⁷³ In McClea n v. High Court of Dublin, Ireland,⁷⁴ the High Court, expressed its preference for the real risk test. Lord Justice Richards stated:⁷⁵

“The adoption of essentially the same test in relation to Article 2 as in relation to Article 3 has obvious attractions to it. It is very unsatisfactory to apply a higher threshold in the case of a risk to life than in a case where the risk is of less serious harm (albeit sufficiently serious to fall within Article 3). True, the point may be devoid of practical significance since ... Article 3 can be relied on even where the risk is to life; but it is strange to have to rely on Article 3 where the subject matter falls more naturally under Article 2.”

- C.68 Article 2 is most likely to arise in cases involving the death penalty, however, section 1 of the 2003 Act prevents a State from being designated as a category 1 territory “*if a person found guilty in the territory of a criminal offence may be sentenced to death for the offence under the general criminal law of the territory.*”

Article 3

- C.69 Article 3 of the Human Rights Convention provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

- C.70 As noted above, in Ullah, Lord Bingham of Cornhill stated (at paragraph 24):

⁷³ In Launder v. United Kingdom, Application 27279/95, the European Commission of Human Rights stated that an issue might be raised under Article 2 in circumstances in which an expelling State knowingly puts the person concerned at such high risk of losing his life as for the outcome to be a near-certainty. In Bader v Sweden (Application No 13284/04) the European Court of Human Rights spoke of “*a real risk of being executed*” (paragraph 48).

⁷⁴ [2008] EWHC 547 (Admin)

⁷⁵ Paragraph 10.

*“In relation to Article 3 it is necessary to show strong grounds for believing that the person if returned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment.”*⁷⁶

- C.71 In the case of inhuman or degrading treatment or punishment the case law has consistently emphasised the need for a minimum level of severity of ill-treatment in order to reach the threshold required by Article 3.⁷⁷ In determining whether the threshold has been crossed all the circumstances must be taken into account, including the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical and mental effects, the sex, age and state of health of the victim. In the context of extradition, the courts have also recognised the importance of international cooperation in the context of extradition. In *R (Wellington) v. Secretary of State for the Home Department*,⁷⁸ a majority of the House of Lords⁷⁹ held that punishment that would be regarded as inhuman or degrading in domestic proceedings will not necessarily be so regarded when the choice between either extraditing or allowing a fugitive to evade justice altogether is taken into account. In other words Article 3 applies only in a modified form which takes into account the desirability of arrangements for extradition. The minority⁸⁰ agreed that the appeal should be dismissed but disagreed with the “*relativist*” approach adopted by the majority in relation to Article 3.⁸¹
- C.72 There have been a series of cases under Part 1 of the 2003 Act involving claims that the requested person would be subjected to inhuman or degrading treatment in the

⁷⁶ While it is necessary to show “*strong grounds*” in relation to Article 3, successful reliance on other articles “*demands presentation of a very strong case.*”

⁷⁷ For example, *Tyrer v. United Kingdom* (1978) 2 EHRR 1 (paragraph 80)

⁷⁸ [2009] 2 WLR 55. The case was decided under the 1989 Act. It concerned a request from the United States of America. Wellington was sought as an accused person. It was alleged that he had committed two murders (and other offences) in Kansas City.

⁷⁹ Lord Hoffman, Baroness Hale of Richmond and Lord Carswell

⁸⁰ Lord Scott of Foscote and Lord Brown of Eaton-Under-Heywood

⁸¹ This issue may be one of several yet to be considered by the European Court of Human Rights in a number of cases which are currently awaiting judgment before that Court. Whatever the outcome of those cases, the test under Article 3 will still require strong grounds for believing that there is a real risk of a violation of that article and it will, in any case, be essential to focus on what is likely to happen to the particular individual in his or her particular circumstances.

requesting State.⁸² In *Miklis v. The Deputy Prosecutor General of Lithuania*,⁸³ Latham L.J. rejected an argument based on generalised allegations of police brutality and stated:⁸⁴

“The fact that human rights violations take place is not of itself evidence that a particular individual would be at risk of being subjected to those human rights violations in the country in question. That depends upon the extent to which the violations are systemic, frequent and the extent to which the particular individual in question could be said to be specifically vulnerable by reason of a characteristic which would expose him to human rights abuse.”

C.73 This approach has been followed in the subsequent case law.⁸⁵

C.74 In *Kropiwnicki v. Lord Advocate*⁸⁶ the High Court of Justiciary considered whether surrendering the appellant to Poland would involve a violation of Article 3 because of the overcrowding and poor prison conditions. The appellants relied on the decision of the Strasbourg Court in *Orchowski v. Poland*⁸⁷ where it was held that overcrowding, almost total confinement within a cell and transfers between prisons with similar conditions exceeded the unavoidable level of suffering inherent in detention and exceeded the threshold of severity under Article 3. The High Court rejected the appeal on the basis that the appellant had not produced evidence that provided substantial grounds for believing that there would be a real risk of treatment contrary to Article 3 in his case. The Court approved the decision of the Sheriff who had made reference to the attempts made by the Polish authorities to improve the conditions in their prison estate. Moreover, a letter from the Polish judicial authority gave details of where the appellant would be detained and this did not include any of the prisons involved in the *Orchowski* decision.

⁸² *Jaso and Others v. Central Criminal Court No. 2 Madrid* [2007] EWHC 2983 (Admin); *Hilali v. Central Criminal Court No. 5 Madrid* [2006] EWHC 1239 (Admin); *Boudhiba v. Central Examining Court No. 5 of the National Court of Justice In Madrid* [2006] EWHC 167 (Admin).

⁸³ [2006] EWHC 1-32 (Admin)

⁸⁴ At paragraph 11

⁸⁵ *Tamarevichute v. The Russian Federation* [2008] EWHC 534 (Admin); *Gilbert Deya v. The Government of Kenya* [2008] EWHC 2914 (Admin). Both cases decided under Part 2 of the 2003 Act.

⁸⁶ [2010] HCJAC 41

⁸⁷ Application No. 17885/04, 22 October 2009

- C.75 The European Commission in its most recent evaluation report on the operation of the European arrest warrant scheme noted:

“A number of judgments of the European Court of Human Rights have highlighted deficiencies in some prisons within the EU.⁸⁸ The court has ruled that unacceptable detention conditions (which must reach a minimum level of severity) can constitute a violation of Article 3 of the European Convention on Human Rights, even where there is no evidence that there was a positive intention of humiliating or debasing the detainee. It is clear that the Council Framework Decision on the EAW (which provides in Article 1(3) that Member States must respect fundamental rights and fundamental legal principles, including Article 3 of the European Convention on Human Rights) does not mandate surrender where an executing judicial authority is satisfied, taking into account all the circumstances of the case, that such surrender would result in a breach of a requested person’s fundamental rights arising from unacceptable detention conditions.”⁸⁹

Article 5

- C.76 Article 5 of the Human Rights Convention expressly recognises extradition as one of the justifications for depriving a person of his liberty. Article 5(1), so far as material, provides as follows:

“Everyone has the right to liberty and security of the person. No-one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country of a person or of a person against whom action is being taken with a view to deportation or extradition.”*

- C.77 As noted above, in Ullah Lord Bingham of Cornhill noted that successful reliance on Article 5 in order to resist extradition would require the requested person to

⁸⁸ See, for example, the judgments in the cases *Peers v. Greece* (19 April 2001), *Salejmanovic v Italy* (16 July 2009), *Orchowski v Poland* (22 January 2010).

⁸⁹ COM(2011) 175 final

demonstrate that he risks suffering a flagrant denial of his Article 5 rights in the requesting category 1 territory.

Article 6

C.78 Article 6(1) of the Human Rights Convention provides:

“In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...”

C.79 Article 6(2) provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law and Article 6(3) sets out a number of specific guarantees applicable to criminal cases. The European Court of Human Rights has held that an extradition hearing does not amount to the determination of a criminal charge for the purposes of Article 6 and therefore the full range of protections are not applicable to the hearing.⁹⁰ However, Article 6 may be considered as relevant to extradition decisions where an individual had suffered or risked suffering a flagrant denial of justice in the requesting State: Mamatkulov and Askarov v. Turkey.⁹¹

C.80 A flagrant denial of the right to a fair trial will occur where there is a breach of the principles of the fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.⁹²

C.81 The case law under Part 1 of the Act suggests that it will be difficult successfully to argue that there has been or will be a flagrant denial of a fair trial as all the Member States of the European Union are also signatories to the Human Rights Convention: they are bound to ensure a fair trial by virtue of Article 6 and are expected to do so.

⁹⁰ Kirkwood v. United Kingdom (1984) 37 DR 158. See also R (Al Fawwaz) v. Governor of Brixton Prison [2002] A.C. 556, paragraph 87.

⁹¹ (2005) 41 EHRR 494 (Grand Chamber)

⁹² See Marmatkulov and Askarov v. Turkey, supra (joint party dissenting opinion of Judges Bratza, Bonello and Hedigan) at pages 531-539. This was applied by the House of Lords in EM (Lebanon) v Secretary of State for the Home Department [2009] 1 AC 1198.

In *Gomes v. Government of Trinidad and Tobago*,⁹³ the House of Lords held that Council of Europe States (which includes all the Member States of the European Union) should be assumed capable of protecting an accused against an unjust trial although this assumption is simply the starting point; it may be displaced by the presentation of sufficiently cogent evidence of what is likely to happen to the individual in the particular circumstances of his or her case. Lord Brown of Eaton-under-Heywood, delivering the unanimous opinion of the Appellate Committee said:⁹⁴

“As has repeatedly been stated, international cooperation in this field is ever more important to bring to justice those accused of serious cross-border crimes and to ensure that fugitives cannot find safe havens abroad.”

Article 8

C.82 Article 8 of the Human Rights Convention provides as follows:

- “1. *Everyone has the right to respect for his private and family life, his home and correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.”*

C.83 As noted above, in *Launder v. United Kingdom*⁹⁵ the European Commission on Human Rights held that it is only in exceptional circumstances that the extradition of a person to face trial on charges of serious offences committed in the requesting State

⁹³ [2009] 1 WLR 1038

⁹⁴ At paragraph 36

⁹⁵ Application 27279/95

would be held to be an unjustified or disproportionate interference with the right to respect for family life. The decision in *Launder* was followed by the Strasbourg Court in the admissibility decision in *King v. United Kingdom*.⁹⁶ The Court⁹⁷ emphasised the importance of extradition arrangements between States in the fight against crime, in particular crime with an international or cross-border dimension, and stated:

“... that it will only be in exceptional cases that an applicant’s private or family life in a contracting state will outweigh the legitimate aim pursued by his or her extradition.”

C.84 In *R (Bermingham and others) v. Director of the Serious Fraud Office*,⁹⁸ Laws L.J. stated:⁹⁹

“Now, there is a strong public interest in ‘honouring extradition treaties made with other states’ ... It rests in the value of international cooperation pursuant to formal agreed arrangements entered into between sovereign states for the promotion of the administration of criminal justice. Where a proposed extradition is properly constituted according to the domestic law of the sending state and the relevant bilateral treaty, and its execution is resisted on article 8 grounds, a wholly exceptional case would in my judgment have to be shown to justify a finding that extradition would on the particular facts be disproportionate to its legitimate aim.”

C.85 In *Zigor Ruiz Jaso, Ana Isabel Lopez, Inigo Maria Albisu Hernandez v. Central Criminal Court No. 2 Spain*,¹⁰⁰ Dyson L.J. explained the operation of Article 8 in the extradition context in the following way:

“What is required is that the court should decide whether the interference with a person’s right to respect of his private or (as the case may be) family life which would result from his or her

⁹⁶ Application No. 9742/07, 26 January 2010

⁹⁷ At paragraph 29

⁹⁸ [2007] Q.B. 727

⁹⁹ At paragraph 118

¹⁰⁰ [2008] 1 WLR 2798

extradition is proportionate to the legitimate aim of honouring extradition treaties with other states. It is clear that great weight should be accorded to the legitimate aim of honouring extradition treaties made with other states. Thus, although it is wrong to apply an exceptionality test, in an extradition case there will have to be striking and unusual facts to lead to the conclusion that it is disproportionate to interfere with an extraditee's Article 8 rights."

C.86 In Norris v. Government of the United States of America (No. 2),¹⁰¹ the Supreme Court held that it was not entirely accurate to speak of an "exceptional circumstances" test. The correct approach was to consider whether the consequences of the interference with the Article 8 rights were exceptionally serious so as to outweigh the importance of extradition. The Supreme Court also held that the person's family unit had to be considered as a whole when weighing whether the interference with Article 8 was proportionate or not.¹⁰²

C.87 In the course of his opinion, Lord Phillips of Worth Matravers PSC reviewed the Article 8 authorities in Strasbourg and in England and Wales and concluded:¹⁰³

"It is of critical importance in the prevention of disorder and crime that those reasonably suspected of crime are prosecuted and, if found guilty, duly sentenced. Extradition is part of the process for ensuring that this occurs, on a basis of international reciprocity. It is instructive to consider the approach of the Convention to dealing with criminals or suspected criminals in the domestic context ... In practice it is only in the most exceptional circumstances that a

¹⁰¹ [2010] UKSC 9 [2010] 2 WLR 572

¹⁰² The Supreme Court recently granted leave to appeal in HH and PH v. Deputy Prosecutor of the Italian Republic, Genoa [2011] EWHC 1145 (Admin). The issue concerns the extent to which the test in Norris requires modification in light of the decision of the Supreme Court in ZH (Tanzania) 2011 UKSC 4; [2011] 2 WLR 148. In ZH the appellant, a failed asylum seeker, faced removal from the United Kingdom to Tanzania. She had two children aged 12 and 9 who were British citizens. The Secretary of State conceded that it would be disproportionate to remove the appellant. The Supreme Court held that the Secretary of State was clearly right on the basis that the best interests of the children was a primary consideration which should customarily dictate the outcome of such cases. A similar issue has arisen in HH and PH where both appellants, the parents of young children, are subject to prison sentences in Italy for drugs offences.

¹⁰³ At paragraph 52

defendant would consider even asserting his article 8 rights by way of challenge to remand in custody or imprisonment ...”

C.88 Lord Phillips went on to emphasise the public interest of effective extradition and stated that a categorical assumption about the importance of extradition was an essential element when considering proportionality:

“... the interference with human rights will have to be extremely serious if the public interest is to be outweighed.”

C.89 The interrelationship between extradition and human rights may be summarised in the following way. Extradition is barred under section 21 if:

- i. Under Article 2, if the loss of life is shown to be a near certainty (or a real risk);
- ii. Under Article 3, if there are strong grounds for believing that the person if returned faces a real risk of being subjected to torture or to cruel, inhuman or degrading treatment;
- iii. Under Article 5, if the person risks suffering a flagrant denial of his right to liberty;
- iv. Under Article 6, if there is a serious risk a person will suffer or has suffered (in a conviction case) a flagrant denial of his right to a fair trial;
- v. Under Article 8, where the consequence of the interference with the rights guaranteed are exceptionally serious so as to outweigh the importance of extradition.

Order for Extradition

- C.90 Where the District Judge concludes that the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 he must order the person to be extradited to the category 1 territory in which the warrant was issued. By reason of section 35, in the absence of any appeal, the person must be extradited to the category 1 territory before the end of 10 days. This period of 10 days begins on the first day after the period permitted under section 26 for giving notice of appeal against the judge's order and the period under section 26 is 7 days starting with the day on which the order is made.¹⁰⁴

Abuse of Process

- C.91 In addition to the statutory bars to extradition, the courts have identified an inherent jurisdiction to dismiss extradition proceedings as an abuse of process: R (Bermingham and others) v Director of Serious Fraud Office;¹⁰⁵ R (Government of the United States of America) v Bow Street Magistrates' Court;¹⁰⁶ Re Campbell's Application.¹⁰⁷ This jurisdiction exists in parallel with the statutory safeguards: Poland v. Dytlow.¹⁰⁸ It operates to prevent extradition where the prosecutor is manipulating or using the procedures of the court in order to oppress or unfairly to prejudice the defendant.

¹⁰⁴ Section 35(4)(b) provides that the judge and the requesting State may agree a later date for the extradition, in which case extradition must take place before the end of 10 days starting with that later date. If these deadlines are not complied with, the District Judge must, on application, order the person's discharge, unless reasonable cause is shown for the delay. Under Part III of the 1989 Act surrender was to take place within four weeks of the conclusion of any appeal proceedings. Where the Secretary of State ordered surrender the requested person was to be surrendered within one month of the Secretary of State's order. In cases under the First Schedule there was no maximum period specified within which surrender had to take place: but if the requested person had been committed to prison and was not surrendered within two months he was entitled to apply to the High Court for his release.

¹⁰⁵ [2007] QB 727

¹⁰⁶ [2001] 1 WLR 1157.

¹⁰⁷ [2009] NIQB 82.

¹⁰⁸ [2009] EWHC 1009 (Admin)

Appeals Under Part 1 of the Act

- C.92 Appeals under Part 1 of the Act are governed by sections 26 to 32.¹⁰⁹
- C.93 Section 26 provides a right of appeal against the decision of the District Judge to order extradition to a category 1 territory under Part 1 of the Act. Section 26(1) provides that a person may appeal to the High Court¹¹⁰ against a decision of a judge to order extradition, except where the person has consented to extradition. Section 26(3) makes it clear that appeals may be made on a question of law or fact and, by reason of section 26(4) notice of an appeal must be given to the High Court within 7 days of the extradition order being made by the judge. The effect of this statutory time limit was considered by the House of Lords in *Mucelli v. Government of Albania*.¹¹¹ It was held that the notice of appeal must be filed and served on the respondent and any interested party within 7 days, starting with the day on which the order for extradition is made and that the High Court has no power to extend the statutory time limit.
- C.94 The High Court is under an obligation to commence the appeal hearing within 40 days (known as the “*relevant period*”) starting from the date on which the person was arrested on the European arrest warrant.¹¹² If the High Court does not commence the appeal hearing before the end of the relevant period then the appeal will be considered to have been allowed and the person must be discharged and the order for the person’s extradition quashed (section 31(6)). However, the High Court has power to extend the relevant period where it is in the interests of justice to do so and may do so after the period has expired.¹¹³

¹⁰⁹ In *Hilali v. Governor of Whitemoor Prison* [2008] 1 AC 805, the House of Lords decided that the appeal provisions excluded the remedy of *habeas corpus* as a basis for challenging an order for surrender. However, in *Nikonovs v. The Governor of H.M. Brixton Prison and another* [2006] 1 WLR 1518 it was held that *habeas corpus* is still available as a remedy to challenge the lawfulness of detention prior to the judge’s decision to surrender if there is otherwise no statutory right of appeal which permits a challenge to the decision in question.

¹¹⁰ Appeals must be brought in the Administrative Court of the Queen’s Bench Division.

¹¹¹ [2009] 1 WLR 276. The same principles apply to the 14 day period in section 103(9).

¹¹² Section 31(1) and (2). Practice Direction Supplementing Civil Procedure Rule Part 52 (Appeals) at paragraph 22.6A(3)(c). We were informed that it is hardly ever possible to comply with the 40 day requirement: indeed in many cases the 40 day period has expired by the time the case is dealt with by the District Judge. The statistics from the High Court for the year ended June 2010 show the average waiting time for a category 1 territory appeal was 114 days. In that period 115 appeals were heard. The reason given for the delay is the workload of the High Court.

¹¹³ Section 31(4)

- C.95 The powers available to the High Court on an appeal under section 26 of the Act are set out in section 27. The High Court may allow the appeal only if certain conditions are met.¹¹⁴
- C.96 Where the High Court allows an appeal it must order the person's discharge and quash the order for his extradition.

Prosecution Appeals¹¹⁵

- C.97 Section 28 of the Act allows the issuing judicial authority a right of appeal against a decision at the extradition hearing to order the person's discharge.¹¹⁶ As in the case of an appeal under section 26, the appeal may be on any question of law or fact. The exception to this right of appeal is when the discharge was made under section 41 (that is as a result of the warrant being withdrawn).
- C.98 The High Court's powers following an appeal against any order to discharge the person at the extradition hearing are set out in section 29.¹¹⁷

¹¹⁴ The conditions are contained in section 27(3) and (4). The conditions in section 27(3) are that the District Judge ought to have decided a question before him at the extradition hearing differently and, if he had done so, he would have been required to order the person's discharge. The conditions in section 27(4) are threefold: an issue is raised or evidence is available that was not raised or available at the extradition hearing; the issue or evidence would have resulted in the judge making a different decision at the hearing; and this would have resulted in the judge ordering the person's discharge. In *Szombathely City Court and others v. Fenyvesi and another* [2009] 4 All E.R. 324, the High Court explained (at paragraph 32) that "*evidence which was not available at the extradition hearing*" is "*Evidence which either did not exist at the time of the extradition hearing or which was not at the disposal of the party wishing to adduce it and which he could not with reasonable diligence have obtained.*" However, the Court also noted (at paragraph 34) that where new evidence may establish that the person's Convention rights would be engaged in the event of his return, then the High Court may admit fresh evidence notwithstanding that the strict requirements of the Act have not been met.

¹¹⁵ Under Part III of the Extradition Act 1989, a requesting State had a right of appeal to the High Court by way of case stated against a judge's refusal to make an order for committal. In Schedule 1 cases the remedy was by way of an application for judicial review. Under the 1870 Act there was no right of appeal where the magistrate declined to commit the requested person: a state of affairs criticised by the House of Lords in *Atkinson v. United States of America* [1971] A.C. 197

¹¹⁶ The legal representative of the category 1 territory must inform the District Judge immediately upon discharge of their intention to appeal: section 30. The judge must then remand the person in custody or on bail while the appeal is pending.

¹¹⁷ The High Court may only allow the appeal if certain conditions are met. These conditions are set out in section 29(3) and (4). The conditions in section 29(3) are that the judge ought to

- C.99 If the High Court allows the appeal, the order discharging the person is quashed and the case sent back to the District Judge with a direction to proceed as he would have been required to do if he had decided the question that resulted in the order for the person's discharge differently.
- C.100 Appeals by the issuing judicial authority are subject to the same time limits as appeals under section 26. If the High Court does not begin to hear the case within the set time period, the appeal will be considered to have been dismissed¹¹⁸ although the High Court may extend the period if it believes that it is in the interests of justice to do so.

Appeals to the Supreme Court

- C.101 Section 32 of the Act provides a right of appeal to the Supreme Court.¹¹⁹ An appeal can be brought by either the person who has been arrested under the Part 1 warrant or the issuing judicial authority. But it can be made only with the leave of the High Court or the Supreme Court.¹²⁰
- C.102 An application for leave to the High Court must be made within 14 days of the date that the Court makes its decision.¹²¹
- C.103 An application for leave to the Supreme Court must be made within 14 days of a High Court decision to refuse leave.¹²²

have decided a question before him at the extradition hearing differently and, if he had done so, he would not have been required to order the person's discharge. The conditions in section 29(4) are threefold: (1) an issue is raised or evidence is available that was not raised or available at the extradition hearing; (2) the issue or evidence would have resulted in the judge making a different decision at the hearing; and (3) as a result the judge would not have been required to order the person's discharge.

¹¹⁸ Section 31(7)

¹¹⁹ The right of appeal to the Supreme Court applies in England, Wales and Northern Ireland only. The High Court of Justiciary is the final criminal appeal court for Scotland, although appeals relating to criminal proceedings in Scotland may come before the Privy Council as devolution issues under the Scotland Act 1998.

¹²⁰ By reason of section 32(4) leave may be granted only if: (i) the High Court has certified that there is a point of law of general public importance involved in the decision; and (ii) the court granting leave considers the point to be one which should be considered by the Supreme Court.

¹²¹ Section 32(5))

¹²² Section 32(6))

- C.104 An appeal to the Supreme Court must be filed within 28 days of leave being granted¹²³ and the time limit for doing so may not be extended.¹²⁴
- C.105 Section 33 sets out the powers of the Supreme Court on appeal. Section 33(1) to (3) allow the Supreme Court to allow or dismiss an appeal made by a person who is the subject of an extradition order. If the appeal is allowed an order for the person's discharge must be made and the order for his extradition quashed.
- C.106 Section 33(4) and (5) provide that if the Supreme Court allows an appeal by the issuing judicial authority against a decision of the High Court to discharge a person, the Supreme Court is required to quash the order discharging the person and order his extradition.
- C.107 Section 33(6) to (9) apply where the issuing judicial authority appeals successfully to the Supreme Court against a decision of the High Court to dismiss its earlier appeal against the discharge of a person at the extradition hearing. Where the judge would have been required to order the person's extradition if he had reached a different decision on the question which led to the order for the person's discharge (in other words, if it was the final matter on which the judge was required to take a view), then the Supreme Court must quash the discharge order and order the person to be extradited. In any other case the Supreme Court must remit the case to the judge and require him to proceed as he would have been required to do if he had reached a different decision on the question which resulted in the person's discharge.

Surrender Following Appeal

- C.108 Section 36 governs the time period for surrender following appeal.¹²⁵ Where an appeal against an extradition order is unsuccessful or where the issuing judicial authority successfully appeals against a discharge order and the appeal court orders extradition, the person must be extradited within the "*relevant period*" which is 10

¹²³ Section 32(7)

¹²⁴ The Supreme Court of the United Kingdom Practice Direction, 12, paragraph 12.7.2

¹²⁵ As noted above, where there has been no appeal against an extradition order, the requested person must be surrendered to the category 1 territory within 10 days starting from the date of the Judge's Surrender order, unless the Judge and the issuing authority agree a later date, in which case it is 10 days starting from the agreed date: section 35.

days commencing with the day on which the decision of the relevant court becomes final. However, if the relevant court which made the appeal decision and the issuing judicial authority agree a later date, extradition must take place in the 10 day period following the agreed date. If the deadlines are not complied with the judge must, on the person's application, order his discharge, unless reasonable cause is shown for the delay.

Habeas Corpus and Judicial Review

C.109 Section 34 of the Act provides:

“A decision of the judge under this Part may be questioned in legal proceedings only by means of an appeal under this Part.”

C.110 The effect of this provision is that the remedies of *habeas corpus* and judicial review are not available for decisions in respect of which there is a statutory right of appeal.¹²⁶ However, the High Court has held that section 34 does not prevent applications for *habeas corpus* or judicial review in respect of decisions for which there is no statutory right of appeal.¹²⁷ Challenges that have been brought include those against a decision of the Serious Organised Crime Agency to certify a warrant;¹²⁸ a decision of the District Judge at the initial hearing;¹²⁹ and a decision of the District Judge to consent to a person being dealt with by the requesting State for other offences in circumstances where the individual has a valid human rights objection.¹³⁰

¹²⁶ *Hilali v. Governor of Whitemoor Prison and Another* [2008] 1 A.C. 805 and *Chen v. Government of Romania* [2009] 1 WLR 257 (paragraph 19)

¹²⁷ In which case legal aid is available for the proceedings. It is granted by the Legal Services Commission by way of a public funding certificate. The High Court has no power to grant legal aid relating to any criminal investigations or proceedings: Regulation 3(4) of the Criminal Defence Service (General) (No. 2) Regulations 2001. This is in contrast to appeals under the 2003 Act where the High Court has power to grant legal aid and assistance in the form of representation order under the Access to Justice Act 1999 and the Criminal Defence Service (General) (No. 2) Regulations 2001 (as amended): Regulation 94(1)(c).

¹²⁸ *Gronostowski v. Government of Poland* [2007] EWHC 3314

¹²⁹ *Nikonovs v. Her Majesty's Prison Brixton and another* [2006] 1 WLR 1518. The decision in *Nikonovs* was followed by the Northern Ireland Divisional Court in *Re Campbell's Application* [2009] NIQB 82.

¹³⁰ *Chylia v. District Court in Strakonice* [2008] EWHC 3292

Change of Circumstances

C.111 There are sometimes cases in which a change of circumstances occurs after the person's extradition has been ordered and the appeal process exhausted. The courts have considered this issue in a number of cases and after some uncertainty it now appears that when the change of circumstances may call into question the legality of the extradition order, the proper course of action is to apply to reopen the decision of the High Court under Civil Procedure Rules, rule 52.17: Ignaoua and Others v. The Judicial Authority of the Courts of Milan and Others.¹³¹ In that case Keene L.J. stated:¹³²

“There is ... a course of action and a remedy which is available in such circumstances and which would not be prevented by section 34 of the 2003 Act, and that is by way of an application to re-open the determination of the Divisional Court under CPR 52.17, the rule which embodies the principles set out in Taylor v. Lawrence [2002] EWCA Civ.90; [2003] QB 528. The Civil Procedure Rules undoubtedly apply to appeals to a Divisional Court under the 2003 Act. They are the ‘rules of court’ referred to in section 31 of that Act: see CPR 52 PD 120. CPR 52.17(1) provides that the Court of Appeal or the High Court will not re-open a final determination of any appeal unless

- (a) it is necessary to do so in order to avoid real injustice;*
- (b) the circumstances are exceptional and make it appropriate to re-open the appeal; and*
- (c) there is no alternative effective remedy.”*

C.112 The High Court went on to state that CPR 52.17 is no less effective than *habeas corpus*: if an applicant can show that his detention is unlawful it will be regarded as a “*real injustice*,” for the purposes of CPR 52.17(a).

¹³¹ [2008] EWHC 2619 (Admin)
¹³² At paragraph 22

Criminal Proceedings in the United Kingdom

- C.113 There are a number of provisions contained in Part 1 of the Act which deal with the position where a person is charged with an offence in United Kingdom or is serving a custodial sentence in the United Kingdom. The scheme of the Act is to give precedence to domestic criminal proceedings over extradition proceedings.

Persons Charged with Offence in the United Kingdom

- C.114 Section 22 applies if a person who is subject to an extradition request has also been charged with an offence in the United Kingdom.¹³³
- C.115 Where the person is given a custodial sentence for the United Kingdom offence, the extradition hearing can be adjourned until the sentence has been served.
- C.116 If the hearing is resumed, the District Judge is required to consider the question of double jeopardy.¹³⁴

Persons Serving Sentence in the United Kingdom

- C.117 Section 23 deals with the position where the person subject to an extradition request is serving a custodial sentence in the United Kingdom. The section applies if at any time during the extradition hearing the District Judge is informed that the person in respect of whom the Part 1 warrant is issued is in custody serving a sentence of imprisonment or another form of detention in the United Kingdom. In these

¹³³ If at any time during the extradition hearing the District Judge is informed that the person in respect of whom a Part 1 warrant is issued is charged with an offence in the United Kingdom, he must adjourn the extradition hearing until one of the following occurs: (a) the charge is disposed of; (b) the charge is withdrawn; (c) the proceedings in respect of the charge are discontinued; (d) an order is made for the charge to lie on the file, or in relation to Scotland the diet is deserted *pro loco et tempore*. In *Governor v. Her Majesty's Prison Wandsworth v. Kinderis* [2004] Q.B. 347, the High Court held that if the requested person consents to his extradition prior to the extradition hearing, section 22 does not apply and the extradition proceedings take precedence.

¹³⁴ The domestic proceedings, once concluded, may engage section 11 and operate as a bar to extradition.

circumstances the District Judge may adjourn the extradition hearing until the sentence has been served.¹³⁵

Persons in Custody

C.118 Section 37 applies if the person in respect of whom the Part 1 warrant is issued is serving a custodial sentence in the United Kingdom. It enables the District Judge to make an extradition order subject to a condition that extradition will not take place until he has received certain undertakings on behalf of the requesting category 1 territory.¹³⁶

C.119 In the case of a person alleged to be unlawfully at large following conviction, the terms of such undertakings include that the person will be returned to the United Kingdom to serve the remainder of his sentence after serving any sentence imposed on him in the category 1 territory.

Competing Extradition Requests (Part 1 versus Part 2)

C.120 Section 179 of the Act applies if, at the same time, there is a Part 1 warrant in respect of a person and a request for the person's extradition under Part 2 (that is a request made by a category 2 territory). Where the person has not yet been extradited or discharged under either request, the Secretary of State may order proceedings on

¹³⁵ Adjourning the extradition proceedings will cause delay to the extradition proceedings and in order to avoid this section 37 (see below) permits surrender to take place on the basis of an undertaking that the defendant will be returned to complete his sentence at the conclusion of the overseas proceedings.

¹³⁶ In an accusation case the terms of such undertakings include: (a) that the person will be kept in custody until the conclusion of the proceedings in the category 1 territory; (b) that the person will be returned to the United Kingdom to serve the remainder of his sentence on the conclusion of those proceedings. Section 197A provides that if an extradition order is made under section 37 in respect of a person who is serving a custodial sentence in the United Kingdom, the order is sufficient authority for the person to be removed from the establishment where he is detained. If the District Judge does not receive the undertaking before the end of the period of 21 days starting with the day on which he makes the extradition order and the person applies to the appropriate judge to be discharged, the District Judge must order his discharge. Where undertakings are given within the required period of the extradition order the person must be extradited before the end of 10 days starting with the day on which the judge receives the undertaking or where there has been an appeal before the end of 10 days starting with the day on which the decision of the relevant court on the appeal becomes final. In either case, the power to extend the 10 day period (in sections 35 and 36) applies.

either the Part 1 warrant or the Part 2 request to be deferred until the other one has been disposed of.¹³⁷

- C.121 Where the Secretary of State makes an order under section 179(2) for proceedings on a Part 1 warrant to be deferred until a category 2 request has been disposed of, section 24 of the Act requires the District Judge to remand the person in custody or on bail until the category 2 request has been disposed of.

Competing Extradition Requests Under Part 1

- C.122 The position in relation to competing Part 1 warrants is governed by section 44. If at any time during proceedings on a Part 1 warrant, before the person is extradited or discharged, the District Judge is informed that another Part 1 warrant has been issued in respect of the same person, then the District Judge may order proceedings on the warrant under consideration to be deferred pending disposal of the other warrant. Where an order has already been made for the person's extradition on the basis of the first warrant, the District Judge may order that extradition be deferred pending disposal of the other warrant.¹³⁸

Proceedings on a Deferred Warrant/Request

- C.123 Proceedings on a deferred warrant or request are governed by section 180 of the Act. Where the other Part 1 warrant or extradition request has been disposed of the District Judge has 21 days in which to order proceedings on the deferred claim to be resumed.

¹³⁷ When making a decision on deferral the Secretary of State is required to take into account: (a) the relative seriousness of the offences; (b) the place where the offence occurred or was alleged to have occurred; (c) the dates the warrant and request were issued; and (d) whether the person is accused of the offences or is alleged to be unlawfully at large after conviction of them. Section 179(2). Section 213 of the Act defines what is meant by the disposal of a Part 1 warrant and an extradition request. The provisions of the 2003 Act dealing with competing requests broadly reflect the position under Article 17 of the European Convention on Extradition and section 12(5) of the 1989 Act: the requested State was left with the choice taking account of all the circumstances.

¹³⁸ In deciding whether to defer proceedings or extradition the District Judge must take into account the following matters: (i) the relative seriousness of the offences; (ii) the place each offence was committed or is alleged to have been committed; (iii) the date each warrant was issued; and (iv) whether the person is accused of the offences or unlawfully at large after conviction of the offence.

The requested person has the right to apply to the District Judge to be discharged on the deferred warrant or request and must be discharged if no order is made for the deferred claim to be resumed within the 21 day period.¹³⁹

Time Limits

- C.124 In Part 1 cases, where a person's extradition has been ordered but deferred (as a result of a competing Part 1 warrant or category 2 extradition request) and the District Judge subsequently orders extradition to take place under section 181, the time limits for the person's extradition are governed by section 38. The effect of section 38 is that the 10-day period described in section 35 begins on the day the District Judge makes the order under section 181. In the event of an appeal, the 10 days start from the day the appeal becomes final.

Physical or Mental Condition

- C.125 Section 25 sets out what is to happen if the District Judge decides, at any time during the extradition hearing, that the person is not physically or mentally fit to be extradited.
- C.126 If it appears to the District Judge that by reason of the person's mental or physical condition, it would be unjust or oppressive to extradite him, the District Judge must either order the person's discharge or adjourn the hearing until it appears to him that it would no longer be unjust or oppressive to extradite him.
- C.127 The words "*unjust or oppressive*" in the context of extradition were explained by Lord Diplock in *Kakis v. Government of the Republic of Cyprus*:¹⁴⁰ "*unjust*" is directed primarily to the risk of prejudice to the requested person in the conduct of the

¹³⁹ Where an order was made deferring a person's extradition section 181 applies. This provides that where the other Part 1 warrant or extradition request has been disposed of the District Judge has 21 days to make an order for the person's extradition in pursuance of the deferred claim. The requested person has the right to apply to the District Judge to be discharged from the deferred extradition order and must be discharged if no order is made in respect of the order within the 21 day period.

¹⁴⁰ [1978] 1 WLR 779 (at page 782-783), a case decided under the Fugitive Offenders Act 1967.

proceedings in the requesting territory; “*oppressive*” is directed to hardship to the requested person.

C.128 In *Boudhiba v. Central Examining Court No. 5 of the National Court of Justice, Madrid, Spain*,¹⁴¹ the High Court noted that the question under section 25 is not whether the person is suffering from a mental or physical illness, but whether by reason of his mental or physical condition it would be unjust or oppressive to extradite him. The High Court has held that a high threshold has to be reached in order to succeed in an argument under section 25 and the more serious the offence for which the person is sought, the greater the public interest in returning him to stand trial or serve a sentence of imprisonment: *R (Ahsan) v. Government of the United States*¹⁴² and *Spanovic v. Government of Croatia and another*.¹⁴³ In *HH v. Deputy Prosecutor of the Italian Republic, Genoa*,¹⁴⁴ the High Court refused to discharge the appellant under section 25 on the basis that her mental condition was such that it would be oppressive to extradite her. This conclusion was based (partly) on the fact that she was not suffering from a mental illness. Laws L.J. stated that even if it had been concluded that she was suffering from a mental illness there was every reason to presume that she would be properly looked after in Italy: a civilised State and fellow signatory to the European Convention on Human Rights. In *Jansons v Riga District Court, Latvia*¹⁴⁵ the High Court found surrender was barred on the basis that the requested person was mentally unfit and presented as a serious suicide risk.

Asylum and Extradition

C.129 A person granted asylum in the United Kingdom has the status of a “*refugee*” within the meaning of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and its 1967 Protocol (‘the Refugee Convention’).¹⁴⁶ Under the Refugee Convention, to which the United Kingdom is a party, a refugee is any person who:

¹⁴¹ [2007]1 WLR 124

¹⁴² [2008] EWHC 66 (Admin) (paragraph 68)

¹⁴³ [2009] EWHC 723 (Admin) (paragraph 39)

¹⁴⁴ [2011] EWHC 1145 (Admin)

¹⁴⁵ [2009] EWHC 1845 (Admin)

¹⁴⁶ Cmd. 9171 and Cmd. 3906

“.. owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country of nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country ...”

- C.130 Where a person is granted refugee status he or she cannot then be returned, or refouled, to the state from which he has sought refuge and Article 33(1) of the Refugee Convention provides:

“No contracting state shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

- C.131 The person granted refugee status in the United Kingdom will also be granted a period of leave to remain in the United Kingdom.

- C.132 The effect on extradition proceedings of the grant of asylum was explained by the High Court in *District Court in Ostroleka, second Criminal Division (a Polish Judicial Authority) v. Dytlow and Dytlow*.¹⁴⁷ The High Court decided that Article 33 of the Refugee Convention prevents the extradition of a person to his home territory (or any other territory) where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. It was held that to order the extradition of a person or persons enjoying the status of refugees in the United Kingdom would amount to an abuse of process.

- C.133 In *R (Dos Santos) v. Judge Magarida Isabel Pereira de Almeida of the Cascais Court 2nd Criminal Chamber, Portugal*,¹⁴⁸ the High Court held that an asylum claim made outside the relevant period would not in itself operate as a bar to extradition.

¹⁴⁷ [2009] EWHC 1009 (Admin). The defendants had in fact been discharged from the extradition proceedings on Article 8 grounds.

¹⁴⁸ [2010] EWHC 1815 (Admin). In that case the asylum claim was not made in respect of the requesting category 1 territory.

Asylum Granted Before Extradition Proceedings Commenced

- C.134 In the case of a person who has been granted asylum before extradition proceedings are commenced, the question of whether or not extradition can take place depends upon whether the person is or is not a citizen of the requesting territory, whether he will face persecution in the requesting territory and whether he could be removed from the requesting territory other than in accordance with the Refugee Convention.

Asylum Claim During the Extradition Proceedings

- C.135 In the case of a person who makes an asylum claim at any time during extradition proceedings under Part 1 of the Act, the position is governed by sections 39 and 40.¹⁴⁹ Under section 39 the person in question must not be extradited until his asylum claim is finally determined.¹⁵⁰ Where the claim for asylum is successful the person has the protection of the Refugee Convention and extradition will only take place if the person is not a citizen of the requesting territory and he will not face persecution if returned to that territory or be removed from that territory other than in accordance with the Refugee Convention.
- C.136 Section 40 provides that a person's extradition is not prevented under section 39 before his asylum claim is finally determined where the Secretary of State has certified that certain conditions apply.¹⁵¹

¹⁴⁹ By reason of section 216(7), "*Asylum claim*" has the meaning given by section 113(1) of the Nationality, Immigration and Asylum Act 2002 (viz. a claim made by a person that to remove him from or require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention).

¹⁵⁰ An asylum claim is determined when it has been considered and all statutory avenues of appeal have been exhausted.

¹⁵¹ The conditions are set out in section 40(2) and (3). The conditions in section 40(2) are that the requesting category 1 territory has accepted responsibility for considering the person's asylum claim and that the person is not a citizen of that country. The conditions in section 40(3) are that the Secretary of State believes that the person is not a citizen of the requesting category 1 territory, that he will not face persecution if returned to that territory and that he would not be removed from that territory other than in accordance with the Refugee Convention.

Withdrawal of Warrants

- C.137 The provisions which govern the position where a warrant under Part 1 of the Act is withdrawn are to be found in sections 41 (withdrawal of warrant before extradition), 42 (withdrawal of warrant while appeal to the High Court pending) and 43 (withdrawal of warrant while appeal to the Supreme Court pending). The effect of these provisions is that where a warrant is withdrawn the requested person must be discharged as soon as practicable.

Consent to Extradition

- C.138 Section 45 of the Act deals with consent to extradition.¹⁵² A person who consents is considered to have waived his right to specialty protection and can therefore be proceeded against in the category 1 territory for any offence committed before his extradition. Consent must be given to the District Judge and recorded in writing; once given consent cannot be revoked. A person may only give his consent to extradition if legally represented at the time he consents or if he has been informed of his right to apply for legal aid but has failed to exercise this right or legal aid has been refused or withdrawn.
- C.139 By reason of section 46, the District Judge must order the person's extradition within 10 days of consent (subject to sections 48 and 51) and if he does not make such an order within the 10 day period, he must, on the person's application, discharge him.

Extradition Following Consent

- C.140 Section 47 deals with extradition following consent. Extradition must take place within 10 days from the date the order is made, or if the District Judge and the category 1 territory agree a later date, 10 days from the agreed date. If the person has not been extradited within the 10-day period, the District Judge must, on the person's application, order his discharge, unless reasonable cause is shown for the delay. If,

¹⁵² The Extradition Act 1870 did not provide any procedure for consensual surrender. The Extradition Act 1989 (section 14 and paragraph 9 of the First Schedule) provided a procedure under which the requested person could waive his rights under the Act.

after ordering a person's extradition following their consent, the District Judge is informed of the withdrawal of the warrant and the person has not yet been extradited, the judge must order the person's discharge.

Other Warrant Issued Following Consent

C.141 Section 48 deals with the situation where a person has consented to his extradition and a second Part 1 warrant is issued in respect of him before the District Judge orders his extradition. In these circumstances the District Judge is not required to order the person's extradition but he may do so or he may postpone the proceedings until the other warrant has been disposed of.¹⁵³

C.142 Where the District Judge orders the person's extradition on the basis of the first warrant, extradition must take place within 10 days from the date the order is made or, if the District Judge and the category 1 territory agree a later date, 10 days from the agreed date. If the person has not been extradited within the relevant 10 day period, the District Judge must on the person's application, order his discharge, unless reasonable cause is shown for the delay.

Proceedings Deferred

C.143 Where the District Judge decides to defer the proceedings in respect of the first warrant until the competing warrant has been disposed of, he must remand the person in custody or on bail. If an order is subsequently made under section 180 for the deferred proceedings on the first warrant to be resumed, the District Judge then has 10 days from the time that order is made to order the person's extradition.

¹⁵³ In deciding whether or not to order extradition the District Judge must take into account: (a) the relative seriousness of the offences; (b) the place where each offence was committed or is alleged to have been committed; (c) the date each warrant was issued; (d) whether the person is accused of having committed the offence or of being unlawfully at large after conviction.

Extradition Request Following Consent

- C.144 Section 51 deals with the position where the person consents to his extradition under a Part 1 warrant but, before ordering his extradition, the District Judge is informed that an extradition request in respect of that person has been made by a category 2 territory. If the District Judge has been so informed he must not make an order for extradition until he has been informed of the Secretary of State's decision (made under section 179(2)) as to which of the Part 1 warrant and the Part 2 request is to proceed first. If the decision is for proceedings on the Part 1 warrant to be deferred until the Part 2 request has been disposed of, the judge must remand the person in custody or on bail. If an order is subsequently made under section 180 for the resumption of the deferred proceedings on the Part 1 warrant, the judge then has 10 days from the time that order is made to order the person's extradition.
- C.145 If the order made by the Secretary of State under section 179(2) is for the proceedings on the competing request to be deferred until the Part 1 warrant has been disposed of, the District Judge must order the person's extradition to the category 1 territory within 10 days of being informed of the order.

Undertakings in Relation to Person Serving Sentence

- C.146 Where an extradition order is made after a person has consented to his extradition and that person is serving a custodial sentence in the United Kingdom, the District Judge may make the order subject to a condition that extradition will not take place until he has received certain undertakings on behalf of the category 1 territory. The terms of any such undertaking may include a requirement that the person is kept in custody during the entire proceedings in the category 1 territory. The District Judge may also require the person to be returned to the United Kingdom to serve his domestic sentence. Where the District Judge imposes a condition on an extradition, the 10-day period in which the person is to be extradited begins on the day the District Judge receives the undertaking.

Extradition Following Deferral

- C.147 Section 53 applies where a person has consented to extradition, which has then been deferred because of a competing Part 1 warrant or category 2 extradition request, and the District Judge subsequently orders the extradition is to go ahead under section 181(2). In these circumstances the 10-day period in which the person is to be extradited begins on the day the judge makes the order under section 181(2).

Requests by Category 1 Territories for Consent to Deal with Other Offences

- C.148 Section 54 of the Act applies if a person has been extradited under Part 1 of the Act and the District Judge receives a certified request from a category 1 territory asking for his consent to the person being prosecuted for an offence other than that for which he was extradited. A certified request is a request certified by the Serious Organised Crime Agency on the basis that it has come from the proper judicial authority for making such requests in the category 1 territory.
- C.149 Following receipt of the certified request, the District Judge must serve notice on the person that a request for consent has been received, unless it would not be practicable to do so.¹⁵⁴ The District Judge is required to hold a consent hearing within 21 days of the Serious Organised Crime Agency receiving the request. The 21 day time limit may be extended by the District Judge if he considers it to be in the interests of justice.¹⁵⁵

¹⁵⁴ As the person will already be in the category 1 territory the notice may be served using the procedures contained in the Crime (International Co-operation) Act 2003.

¹⁵⁵ The questions for decision at the consent hearing are set out in section 55 of the Act. The District Judge must first decide whether his consent is necessary. If he decides that it is not, the requesting authority must be informed of this decision. If the District Judge decides that consent is necessary, he must then consider whether the offence to which the request relates is an extradition offence. If he decides that it is not an extradition offence, consent must be refused. If the District Judge concludes that the offence is an extradition offence, then he must decide whether he would have ordered the person's extradition under sections 11 to 25 if the person were in the United Kingdom. If the judge decides that he would have done so, he must give consent. If he decides that he would not have done so, consent must be refused. The decision on whether or not to give consent is a matter between the issuing and executing judicial authorities and the 2003 Act does not expressly provide for participation in the process by the requested person. The decision of the District Judge is amenable to judicial review but presumably the requested person's remedy will more properly lie in the requesting category 1 territory.

Consent to Re-extradition

- C.150 Section 56 applies if the District Judge receives a certified request for his consent to the person's extradition to another category 1 territory. A certified request is a request certified by the Serious Organised Crime Agency on the basis that it has come from the proper judicial authority for making such requests.
- C.151 The District Judge must then serve notice on the person that a request for consent has been received, unless it would not be practicable to do so.
- C.152 The District Judge is required to hold a consent hearing within 21 days of the Serious Organised Crime Agency receiving the request. The District Judge has the power to extend the 21-day period if he considers it to be in the interests of justice.¹⁵⁶

Consent to Re-extradition to Category 2 Territory

- C.153 Section 58 applies if a person has been extradited to a category 1 territory and the Secretary of State receives a certified request for consent to extradite the person from the category 1 territory to a category 2 territory. A certified request is one certified by the Serious Organised Crime Agency on the basis that it has come from the proper judicial authority for making such requests in the requesting territory. The Secretary of State must then serve notice on the person that a request for consent has been received, unless it would not be practicable to do so.
- C.154 The Secretary of State must go on to decide whether the offence is an extradition offence¹⁵⁷ in relation to the category 2 territory. If she decides that it is not, she must refuse consent. If the Secretary of State decides that the offence is an extradition offence she must decide whether the appropriate judge would send the case to her under sections 79 to 91 if the person were in the United Kingdom. If she decides that the judge would not she must refuse consent. If she decides that the judge would send her the case, the Secretary of State must then decide whether the person's

¹⁵⁶ The questions for decision at the consent hearing are set out in section 54. They are identical to the questions set out in section 55 (questions to be decided at the consent hearing where the category 1 territory seek consent to the person being prosecuted for an offence other than that for which the person was extradited).

¹⁵⁷ As defined in section 137

extradition would have been barred if the person were in the United Kingdom. If it would not have been barred, the Secretary of State may then give her consent. If it would have been barred she must refuse consent.

Return of a Person to Serve Remainder of Sentence

- C.155 Section 59 deals with the position of a person who was serving a custodial sentence in the United Kingdom, is extradited and then returned to this country to serve the remainder of his domestic sentence. In this situation the person is liable to be detained to serve the sentence and, if he is at large, he is to be regarded as being unlawfully at large. Time spent in custody out of the United Kingdom in connection with the person's extradition does not count as time served towards his sentence in the United Kingdom unless he is acquitted of the extradition offence or any other offence for which he was allowed to be dealt with in the requesting territory. In this case, time spent in custody outside the United Kingdom in connection with these offences does count as time served for the purpose of the United Kingdom sentence.

Costs

- C.156 Sections 60 to 62 of the Act deal with costs.
- C.157 Under section 60, an order for costs may be made against a person who unsuccessfully challenges proceedings held under Part 1 of the Act. An order for costs can be made by a District Judge, the High Court or the Supreme Court in such sum as is considered just and reasonable. Such an order for costs must specify the amount to be paid and may name the person to who the costs are to be paid.
- C.158 Under section 61 an order for costs may be made in favour of a person who is discharged under Part 1 of the Act. An order for costs may be made by a District Judge, the High Court or the Supreme Court. The amount is that which the relevant judge or court think is reasonably sufficient to compensate the person in question for any expenses incurred as a result of extradition proceedings under Part 1. Where the

judge or court consider it inappropriate for the person to recover the full amount an order for costs may be made in an amount considered to be just and reasonable.

Persons Serving Sentences Outside Territory Where Convicted

- C.159 Section 63 applies where a Part 1 warrant is issued in relation to a person who has been convicted of an offence in one territory (the convicting territory), is repatriated to another territory (the imprisoning territory) under an international arrangement to serve his sentence and is unlawfully at large from a prison in that other territory. In these circumstances the application of the Act is modified to allow extradition where the warrant is issued by a judicial authority in either the convicting territory or the imprisoning territory.

Part 2

C.160 Part 2 of the 2003 Act governs extradition to category 2 territories, that is territories designated for the purposes of Part 2 by the Secretary of State. They are in effect territories outside the European Union with which the United Kingdom has general extradition arrangements.¹⁵⁸ Under Part 2, responsibility for extradition is shared between the judiciary and the Secretary of State.¹⁵⁹

Commencement of Proceedings

C.161 As in the case of Part 1 of the Act, the procedures under Part 2 may be initiated in one of two ways; either by a provisional arrest or by arrest following the receipt and certification of a full extradition request submitted to the United Kingdom by a category 2 territory.¹⁶⁰

Provisional Arrest

C.162 Section 73 provides for the issue of a provisional arrest warrant for a person who is in or on his way to the United Kingdom. The section applies if a justice of the peace receives information in writing and on oath that a person is in, or believed to be in, or travelling to, the United Kingdom. The justice of the peace must be satisfied that the person is accused of an offence or is unlawfully at large after conviction of an offence by a court in a category 2 territory. By reason of section 73(3) the justice of the peace may issue a warrant if he has reasonable grounds to believe that certain conditions are met. The conditions are:

- i. The offence is an extradition offence;

¹⁵⁸ The arrangements may be found in: bi-lateral treaties; the European Convention on Extradition (as many State parties to the European Convention on Extradition (for example Albania and Norway) are not Member States of the European Union); Commonwealth schemes and United Nations Conventions.

¹⁵⁹ In Scotland the functions of the Secretary of State have been devolved to Scottish Ministers.

¹⁶⁰ In England and Wales, arrests under Part 2 of the 2003 Act are carried out by the Metropolitan Police Service Extradition Unit.

- ii. There is evidence [or information¹⁶¹ in the case of certain countries designated by the Secretary of State] that would justify the issue of a warrant in the relevant part of the United Kingdom.¹⁶²

Arrest Under Provisional Warrant

- C.163 A provisional warrant may be executed by any police constable or customs officer, or by any person to whom it is directed even if neither the warrant nor a copy of the warrant is held by that person at the time of execution.
- C.164 Where a warrant is directed to a service policeman it may be executed only in a place where that service policeman would have the power to arrest a person under the relevant service law. In all other cases a warrant can be executed in any part of the United Kingdom.
- C.165 Under section 74 of the Act the person who has been arrested under a provisional warrant must be given a copy of the warrant as soon as practicable after the arrest. If this requirement is not met and the person applies to the judge, the judge may order the person's discharge. The arrested person must also be brought before a District Judge as soon as practicable. However, the requirement does not apply if the person was granted police bail following the arrest¹⁶³ or if the Secretary of State has decided,

¹⁶¹ Section 71(4) permits the Secretary of State to designate category 2 territories with the effect that '*information*' rather than evidence is required. The designated category 2 territories are listed in the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 (SI 2003/3334) as amended. They are Albania, Andorra, Armenia, Australia, Azerbaijan, Bosnia Herzegovina, Canada, Croatia, Georgia, Hong Kong Special Administrative Region, Iceland, Israel, Liechtenstein, Macedonia FYR, Moldova, Montenegro, New Zealand, Norway, Russian Federation, Serbia, South Africa, Switzerland, Turkey, Ukraine, United States of America.

¹⁶² In England and Wales, section 1 of the Magistrates' Court Act 1980 provides that on an information being laid before a justice of the peace that a person has or is suspected of having committed an offence, the justice may issue a warrant to arrest that person and bring him before a magistrates' court. The power of arrest is premised upon there being reasonable cause or reasonable suspicion and the standard is an objective one. In *Hussien v Chong Fook Kam* [1970] AC 942, Lord Devlin, speaking for the Judicial Committee of the Privy Council stated (at page 948): "*Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'*" *Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.*" The law of the United Kingdom relating to arrest has been held by the European Court of Human Rights to be compatible with Article 5(1) of the ECHR which requires reasonable suspicion for an arrest for a criminal offence: *O'Hara v United Kingdom* (2002) 34 EHRR 32.

¹⁶³ Police bail is not available in Scotland.

under section 126, that the request has been deferred because a competing request is to take priority. If the person is not brought before the judge as soon as practicable and he applies to the judge, the judge must order his discharge.

Provisional Warrant: The Arrested Person's First Appearance

- C.166 At the first appearance hearing, the District Judge sitting at City of Westminster Magistrates' Court is required to inform the person either that he is accused of an offence in the relevant category 2 territory or that he is alleged to be unlawfully at large after conviction.¹⁶⁴
- C.167 At the conclusion of the hearing the District Judge is required to remand the person in custody or on bail.
- C.168 At this stage the person is subject to the proceedings by reason of his arrest under a provisional warrant. If a certified extradition request and supporting documents are not received by the District Judge within the "*required period*" the person's discharge must be ordered. The required period is 45 days from the date of arrest and any longer period permitted by order made by the Secretary of State for a designated category 2 territory.¹⁶⁵ This longer period takes account of the different time periods specified in particular bilateral treaties.
- C.169 Where the person has been provisionally arrested and the documents are received by the District Judge within the required period, section 76 of the Act requires the District Judge to fix a date for the extradition hearing. The date must be within 2 months of the date on which the District Judge receives the documents. Where the interests of justice so require, a later hearing date may be fixed. Section 76(5)

¹⁶⁴ The District Judge must also give the person the following information: (a) that he may consent to his extradition; (b) an explanation of the effect of consent and the procedure that will apply; (c) that consent must be given in writing and is irrevocable.

¹⁶⁵ The Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 (SI 2003/3334) designates a number of category 2 territories for this purpose. They include the United States of America and the longer permitted period in respect of that country is 65 days. The United Nations Model Treaty also provides for provisional arrest (Article 9) but sets the period of detention is set at (a suggested) 40 days (Article 9(4)). The release of the person does not prevent re-arrest or the institution of proceedings if the request and supporting documents are subsequently received.

requires the person to be discharged if the extradition hearing does not begin by the date fixed and the person applies to the District Judge.

Full Extradition Request

C.170 Section 70 of the Act provides for what is to happen when the Secretary of State receives a full extradition request for a person's extradition to a category 2 territory. By reason of section 70(1) the Secretary of State is required to issue a certificate if she receives a valid extradition request from a category 2 territory in respect of a person who is in the United Kingdom.¹⁶⁶ However, under section 70(2), the Secretary of State may refuse to issue a certificate if she has the power to order that proceedings on the request be deferred (under section 126) or if the person whose extradition is requested has been recorded as a refugee within the meaning of the Refugee Convention or if the person has been granted leave to enter or remain in the United Kingdom on the ground that it would be a breach of Article 2 or 3 of the Human Rights Convention to remove him to the territory to which extradition is requested. Where none of these matters applies, the Secretary of State is required to send the certificate confirming that the request has been made in the approved way to the District Judge.¹⁶⁷ The certificate must be accompanied by the extradition request and a copy of the relevant Order in Council.

Arrest Warrant Following Extradition Request

C.171 On receipt of the documents, the District Judge may issue a warrant for arrest if he has reasonable grounds for believing that certain conditions are met. These conditions are set out in section 71(3):

¹⁶⁶ A valid request is one that complies with the requirements in section 70(3): it must identify whether the person is accused of the commission of an offence or has been convicted of an offence. The request must also be made in the approved way.

¹⁶⁷ The Secretary of State is not required to specify whether the requested person is sought as an accused or convicted person. Nor is it necessary to specify the equivalent English offence constituted by the conduct. This avoids the technical difficulties which sometimes arose under the earlier legislation. In *Re Farinha* [1992] COD 602, a case decided under the Extradition Act 1989, it was held that because the equivalent United Kingdom offences were not accurately set out in the authority to proceed, the authority was defective.

- (i) that the offence for which extradition has been requested is an extradition offence;
- (ii) there is evidence [or information in the case of those countries designated by the Secretary of State]¹⁶⁸ that would justify the issue of an arrest warrant if the person was accused of the offence or was unlawfully at large following a conviction for that offence.¹⁶⁹

Arrest

- C.172 A warrant issued under section 71 may be executed by any police constable or customs officer or by any person to whom it is directed. The warrant may be executed in any part of the United Kingdom. Where the warrant is directed to a service policeman it may be executed only in a place where that service policeman would have the power to arrest a person under the relevant service law.
- C.173 A person who has been arrested following an extradition request must be given a copy of the warrant as soon as practicable after the arrest. If this requirement is not satisfied and the person applies to the judge, the judge may order the person's discharge.¹⁷⁰
- C.174 By reason of section 72(3) of the Act, save where the arrested person has been granted police bail¹⁷¹ or where the Secretary of State has decided that the request should not be proceeded with, the arrested person must be brought before the District

¹⁶⁸ Section 71(4) permits the Secretary of State to designate category 2 territories with the effect that '*information*' rather than evidence is required. The designated category 2 territories are listed in the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 (SI 2003/3334) as amended. They are Albania, Andorra, Armenia, Australia, Azerbaijan, Bosnia Herzegovina, Canada, Croatia, Georgia, Hong Kong Special Administrative Region, Iceland, Israel, Liechtenstein, Macedonia FYR, Moldova, Montenegro, New Zealand, Norway, Russian Federation, Serbia, South Africa, Switzerland, Turkey, Ukraine, United States of America.

¹⁶⁹ A warrant may be issued in the United Kingdom if the '*reasonable suspicion*' test is met. In England and Wales, section 1 of the Magistrates' Court Act 1980 provides that on an information being laid before a justice of the peace that a person has or is suspected of having committed an offence the justice may issue a warrant to arrest that person and bring him before a magistrates' court.

¹⁷⁰ Section 72(5)

¹⁷¹ In Scotland bail (section 72(10)) there is no power vested in constables in Scotland to grant bail.

Judge as soon as practicable. If the person is not brought before the District Judge as soon as practicable and he applies to the judge, the judge must order his discharge.¹⁷²

The Requested Person's First Appearance

C.175 On his first appearance before the District Judge, the requested person must be informed of the contents of the request for extradition.¹⁷³

C.176 The District Judge is required, by section 75 of the Act, to fix a date for the extradition hearing. The date is to be within 2 months of the date on which the person first appears before the judge. Where it would be in the interests of justice a later hearing may be fixed. Section 75(4) requires the person to be discharged if the extradition hearing does not begin by the fixed date and the person applies to the judge.

Person Charged with an Offence in the United Kingdom

C.177 If at any time before the beginning of the extradition hearing the District Judge is informed that the person is charged with an offence in the United Kingdom, the judge must order further proceedings in respect of the extradition to be adjourned until the domestic proceedings are concluded. If a custodial sentence is imposed in respect of the offence, the judge may adjourn the extradition proceedings until the person is released from custody.¹⁷⁴

Person Serving a Sentence in the United Kingdom

C.178 If at any time before the beginning of the extradition hearing the District Judge is informed that the person is in custody serving a sentence of imprisonment or another

¹⁷² Section 72(6)

¹⁷³ He must also be given certain information about consent: (a) that he may consent to his extradition; (b) an explanation of the effect of consent and the procedures that apply; (c) that consent must be given in writing and is irrevocable.

¹⁷⁴ Section 76A, which is the Part 2 equivalent of section 8A.

form of detention in the United Kingdom, the judge may order further proceedings in respect of the extradition to be adjourned until the person is released from custody.¹⁷⁵

The Extradition Hearing

The Judge's Powers

C.179 Section 77 provides that the powers available to the District Judge at the extradition hearing are as nearly as possible the same as those available to a magistrates' court at a summary trial, in England and Wales.¹⁷⁶

C.180 It follows that the District Judge has the power to adjourn the hearing and remand a person in custody or on bail.

Initial Stages of the Extradition Hearing

C.181 The extradition hearing begins with the District Judge considering the sufficiency of the extradition request and supporting documents. He must first decide whether the documents sent to him by the Secretary of State consist of or include:

- (i) the extradition request, Secretary of State's certificate and a copy of the relevant Order in Council;
- (ii) identification evidence;
- (iii) details of the offence in question;
- (iv) in accusation cases, a warrant of arrest or judicial document authorising the person's arrest issued in the category 2 territory;

¹⁷⁵ Section 76B, which is the Part 2 equivalent of 8B.

¹⁷⁶ A judge at summary proceedings, in Scotland; or a magistrates' court in the hearing and determination of a complaint, in Northern Ireland.

- (v) in conviction cases, a certificate of conviction and (if sentence has been imposed) of the sentence.

C.182 If the documents do not meet the requirements the District Judge must order the person's discharge (section 78(3)). If the documents are sufficient, then the District Judge is required to decide whether:

- (i) on a balance of probabilities, that the person before him is the person whose extradition is requested;
- (ii) the specified offence is an extradition offence;
- (iii) copies of the documents have been served on the person.

C.183 If the District Judge is not satisfied on any of these points he is required to order the person's discharge. If the District Judge is so satisfied he is required to proceed to section 79 (bars to extradition).

Extradition Offence: Part 2

Accusation Cases

C.184 Section 137 defines the different types of conduct that constitute an extradition offence in respect of category 2 cases where the person is accused or convicted in the category 2 territory but has not yet been sentenced.¹⁷⁷

¹⁷⁷ Under section 137(2) conduct is an extradition offence if: (a) the conduct occurs in the category 2 territory; (b) the conduct would amount to an offence punishable with detention for a period of 12 months or more if it occurred in the United Kingdom; (c) it is similarly punishable under the law of the requesting category 2 territory. Under section 137(3) conduct is an extradition offence if: (a) the conduct occurs outside the category 2 territory; (b) it is punishable under the law of the category 2 territory with a custodial sentence of 12 months or more; (c) in corresponding circumstances, the equivalent conduct would constitute an extra-territorial offence against the law of the United Kingdom punishable with a custodial sentence of 12 months or more. Under section 137(4) conduct is an extradition offence if: (a) the conduct occurs outside the category 2 territory and no part of it occurs in the United Kingdom; (b) the conduct would amount to an offence punishable with detention for 12 months or more if it occurred in the United Kingdom; (c) it is similarly punishable under the law of the category 2 territory. Section 137(5) and (6) deal with offences of genocide, crimes against humanity and war crimes as well as ancillary offences covered by provisions contained in the

Conviction and Sentence

C.185 Section 138 defines the different types of conduct that constitute an extradition offence in respect of category 2 territories in cases where the person has been convicted and sentenced for the offence.¹⁷⁸

Bars to Extradition

C.186 The statutory bars to extradition are set out in section 79 of the Act. They are as follows:

- the rule against double jeopardy;
- extraneous considerations;
- the passage of time;
- hostage-taking considerations.

C.187 Section 79(3) requires the District Judge to order the person's discharge if any of the bars apply.

C.188 The bars to extradition are explained in sections 80 to 83.

International Criminal Court Act 2001. Section 137(7) provides that if conduct constitutes an offence under the military law of a category 2 territory but not an offence under the general criminal law of the United Kingdom, it does not amount to an extradition offence within the meaning of section 137.

¹⁷⁸

Under section 138(2) conduct constitutes an extradition offence if: (a) the conduct occurs in the category 2 territory; (b) the conduct would constitute an offence punishable with imprisonment for a period of 12 months or more if it occurred in the United Kingdom; (c) a sentence of detention for 4 months or more has been imposed in the category 2 territory. Under section 138(3) conduct constitutes an extradition offence if: (a) the conduct occurs outside the category 2 territory; (b) a custodial sentence of 4 months or more has been imposed in that territory for that conduct; (c) in corresponding circumstances the conduct would constitute an extra-territorial offence punishable with imprisonment for a period of 12 months or more under the law of this country. Under section 138(4) conduct constitutes an extradition offence if: (a) it occurs outside the category 2 territory and no part of it occurs in the United Kingdom; (b) the conduct would constitute an offence punishable with imprisonment for a period of 12 months or more under the law of this country had it occurred here; (c) a sentence of detention for 4 months or more has been imposed for the conduct in the category 2 territory. Section 138(5) and (6) deal with offences of genocide, crimes against humanity and war crimes, and ancillary offences under certain provisions of the International Criminal Court Act 2001. Section 138(7) provides that if conduct constitutes an offence under the military law of a category 2 territory but not an offence under the general criminal law of the United Kingdom, it does not amount to an extradition offence within the meaning of section 138.

The Rule Against Double Jeopardy

- C.189 The effect of section 80 is that a person's extradition is barred if he would be entitled to be discharged because of a previous acquittal or conviction if he were charged with the offence in question in the part of the United Kingdom where the judge exercises jurisdiction¹⁷⁹.

Extraneous Considerations

- C.190 The effect of section 81 is that a person's extradition is barred if it appears that the request has been issued for the purpose of prosecuting or punishing that person for reasons of his race, religion, nationality, gender, sexual orientation or political opinions. His extradition would also be barred if it appears that he would be prejudiced at trial or his liberty restricted, for any of the same reasons.¹⁸⁰

Passage of Time

- C.191 The effect of section 82 is that a person's extradition is barred where it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have committed the extradition offence or since he is alleged to have become unlawfully at large.¹⁸¹

Hostage-taking Considerations

- C.192 The effect of section 83 is that a person's extradition is barred if the category 2 territory requesting extradition is a party to the Hostage-taking Convention and certain conditions apply. These conditions are that if extradited communications between the person and the appropriate consular authorities would not be possible and that the conduct constituting an extradition offence would constitute an offence under

¹⁷⁹ The equivalent provision in Part 1 is (the slightly differently worded) section 12.

¹⁸⁰ The equivalent provision in Part 1 is section 13.

¹⁸¹ The equivalent provision in Part 1 is section 14.

section 1 of the Taking of Hostages Act 1982 or an attempt to commit such an offence.¹⁸²

Accusation Cases

C.193 Section 84 deals with those cases where the person has been accused of a crime but has not stood trial. The District Judge is required to decide whether the evidence supplied to him would be sufficient to make a case requiring an answer if the proceedings were a summary trial in this country. If the District Judge decides the evidence is insufficient to make out a case to answer at a summary trial, then he must order the person's discharge.¹⁸³ If the evidence is different, then the District Judge must proceed to consider human rights issues under section 87.

C.194 By reason of section 84(7) the requirement to provide evidence sufficient to make a case requiring an answer does not apply to category 2 territories designated by order made by the Secretary of State. The territories so designated include countries which are parties to the Council of Europe Convention on Extradition 1957 and other common law countries.¹⁸⁴

Conviction Cases

C.195 Section 85 deals with those cases where the person has already been tried for the offence for which extradition is sought and has been found guilty.¹⁸⁵

¹⁸² The equivalent provision in Part 1 is section 16.

¹⁸³ In Scotland the test is whether the evidence is sufficient to make out a case to answer in summary proceedings for an offence. The general rule in criminal cases in Scotland is that evidence is required from two sources before any criminal charge can be proved. Section 84(8) disappplies the general rule ("*evidence from a single source shall be sufficient*"). In Northern Ireland the test is whether the evidence is sufficient to make out a case requiring an answer if the proceedings were the hearing and determination of a complaint.

¹⁸⁴ The territories so designated are: Albania, Andorra, Armenia, Azerbaijan, Bosnia Herzegovina, Canada, Croatia, Georgia, Iceland, Israel, Liechtenstein, Macedonia FYR, Moldova, Montenegro, New Zealand, Norway, Russian Federation, Serbia, South Africa, Switzerland, Turkey, Ukraine, United States of America: The Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 (SI 2003/3334), as amended.

¹⁸⁵ The equivalent provision in Part 1 of the Act is section 20.

- C.196 Section 85(1) requires the District Judge to consider whether the person was convicted in his presence or in his absence. If the person was convicted in his presence the District Judge must proceed with the extradition hearing under section 87 (human rights).
- C.197 If the person was convicted in his absence the judge must then decide whether he deliberately absented himself from the trial. If the person deliberately absented himself from his trial, the judge must proceed with the extradition hearing under section 87 (human rights).
- C.198 If the person was convicted in his absence and did not deliberately absent himself from his trial, the District Judge must then decide whether he would be entitled to a retrial or review amounting to a retrial on return to the requesting territory. The retrial or review must include certain minimum rights. These include the right to defend himself, to be provided with free legal aid if necessary and to examine witnesses called to give evidence against him.
- C.199 If the person would not be entitled to such a retrial the District Judge must order the person's discharge. If the person would be entitled to such a retrial the District Judge must proceed with the extradition hearing under section 86.
- C.200 Section 86 requires the District Judge to decide whether the evidence supplied to him would be sufficient to make a case requiring an answer if the proceedings were a summary trial in England and Wales.¹⁸⁶ If the District Judge decides the evidence is insufficient to make out a case to answer at a summary trial, he must order the person's discharge. If the evidence is sufficient, then the District Judge must proceed to consider human rights under section 87.
- C.201 By reason of section 86(7), the requirement to provide evidence sufficient to make a case requiring an answer does not apply to category 2 territories designated by order made by the Secretary of State as territories not required to submit *prima facie*

¹⁸⁶ The position in Scotland and Northern Ireland is identical to that which applies under section 84 (see paragraph C.193 and footnote 183 above). This is unsurprising; the effect of section 86 is to treat a person who has been convicted, but who is entitled to a rehearing on the merits, as an accused person.

evidence. In the case of these designated territories the District Judge must proceed to consider human rights under section 87.¹⁸⁷

Human Rights

C.202 Under section 87, the District Judge must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.

C.203 If the District Judge decides the question in the negative he must order the person's discharge. If he decides the question in the affirmative he must send the case to the Secretary of State for her decision whether the person is to be extradited.

C.204 Section 87 is the equivalent to section 21 in Part 1 of the Act and human rights protection operates under Part 2 as it does in Part 1.¹⁸⁸ Extradition will be barred:

- (i) under Article 2, if the loss of life is shown to be a near certainty (or a real risk);
- (ii) under Article 3, if there are strong grounds for believing that the person if returned faces a real risk of being subjected to torture or to inhuman or degrading treatment;
- (iii) under Article 5, if the person risks suffering a flagrant denial of his right to liberty;
- (iv) under Article 6, if the person risks suffering a flagrant denial of his right to a fair trial;
- (v) under Article 8, where the consequence of the interference with the rights guaranteed are exceptionally serious so as to outweigh the importance of extradition.

¹⁸⁷ The designated category 2 territories are the same territories designated for the purposes of section 84.

¹⁸⁸ We have summarized the relevant case law at paragraphs C.56 to C.89 above.

Abuse of Process

- C.205 As in the case of proceedings under Part 1 of the Act, the courts have developed an abuse of process jurisdiction which operates in parallel with the statutory bars to extradition.¹⁸⁹

Criminal Proceedings in the United Kingdom

- C.206 Section 88 of the Act applies if at any time during the extradition hearing a person who is subject to an extradition request has also been charged with an offence in the United Kingdom.¹⁹⁰ In these circumstances, the District Judge must adjourn the extradition hearing until:

- (i) the charge is disposed of or withdrawn;
- (ii) proceedings on the charge are discontinued;
- (iii) proceedings on the charge are discontinued with the option that a fresh prosecution on the same charge could be brought in the future.

- C.207 Where the person is given a custodial sentence for the United Kingdom offence, the extradition hearing can be adjourned until the sentence has been served. If the District Judge has considered the question of double jeopardy under section 80 before adjourning the hearing, he must consider it again when the hearing is resumed.

Person Serving Sentence in the United Kingdom

- C.208 Under section 89 if at any time during the extradition hearing the District Judge is informed that the person who is the subject of an extradition request is also serving a

¹⁸⁹ *R (Birmingham) v Director of Serious Fraud Office* [2007] QB 727, *R (Government of the United States of America v Bow Street Magistrates' Court)* [2007] 1 WLR 1157, *Re Campbell's Application* [2009] NIQB 82.

¹⁹⁰ The equivalent provision in Part 1 is section 22.

custodial sentence in the United Kingdom, he may adjourn the extradition hearing until the sentence has been served.¹⁹¹

Competing Extradition Claims

C.209 Section 126 sets out what is to happen when the Secretary of State receives an extradition request in respect of a person in the United Kingdom who is already the subject of Part 2 proceedings and who has not yet been extradited or discharged.

C.210 The Secretary of State has the power, under section 126(2), to order proceedings on one of the requests to be deferred until the other request has been disposed of.¹⁹²

C.211 Where the Secretary of State has ordered Part 2 proceedings to be deferred and an order for the person's extradition has already been made, the Secretary of State may order the extradition itself to be deferred pending disposal of the competing category 2 request.¹⁹³

C.212 The procedure for dealing with the deferred claim for extradition is set out in sections 180 and 181. In summary, the District Judge may order that the deferred claim be resumed. This is subject to time limits (within 21 days of the disposal of the competing claim) and the District Judge must order the person's discharge if the required period has expired and that the judge has not ordered the deferred extradition be resumed or that the person be discharged.

¹⁹¹ The equivalent provision in Part 1 is section 23.

¹⁹² In taking this decision the Secretary of State must, in particular, take into account: (a) the relative seriousness of the offences; (b) the place where they were committed; (c) the dates on which the requests were received; (d) whether each is an accusation or conviction case.

¹⁹³ Under section 179 (which applies where there is a Part 1 warrant and a request for the person's extradition under Part 2) the Secretary of State may order proceedings on either the Part 1 warrant or the Part 2 request to be deferred until the other one has been disposed of. Section 90 addresses the situation where a category 2 request or a Part 1 warrant is received while a different extradition request from a category 2 territory in respect of the same person is under consideration and yet to be disposed of. When the District Judge is notified at any time during the extradition hearing that the Secretary of State has made an order under section 126(2) or 179(2) that proceedings on the request under considerations are to be deferred pending the disposal of the competing request, he is required to remand the person in custody or on bail.

Extradition Following Deferral

- C.213 Section 120 governs the position where a person's extradition has been deferred and the judge subsequently orders that extradition is to go ahead under section 181(2). Where these circumstances occur and no appeal is made, the person must be extradited within 28 days of the date on which the order was made. Where there is an appeal, the 28 days start from the day on which the appeal decision becomes final or if later the day the judge makes the order under section 181(2).

Physical or Mental Condition

- C.214 Section 91 of the Act sets out what is to happen if the District Judge decides at any time during the extradition hearing that the person is not physically or mentally fit to be extradited. If it appears that by reason of the person's mental or physical condition it would be unjust or oppressive to extradite him, the judge must either order the person's discharge or adjourn the hearing. The hearing may be resumed at such time as the person's condition has improved to the extent that extradition would no longer be unjust or oppressive.¹⁹⁴

The Secretary of State

- C.215 Section 92 applies if the District Judge sends a person's case to the Secretary of State. The District Judge is required to notify the person that he has a right of appeal against the judge's decision but that his appeal will not be heard until after the Secretary of State has made her decision.¹⁹⁵

¹⁹⁴ Section 91 is the Part 2 equivalent of section 25 and the principles governing the operation of the section are identical to those set out above. See paragraphs C.125 to C.128.

¹⁹⁵ The appeal lies to the High Court or in Scotland the High Court of Justiciary. Under the earlier legislation the Secretary of State's decision whether or not to order extradition did not fall for determination until the conclusion of the judicial phase of the extradition process. The objective of the 2003 Act was to ensure that any challenge to the decision of the extradition judge and the Secretary of State was subject to a single appeal procedure.

C.216 Under section 93 the Secretary of State is required to consider the case and to order the person's discharge if extradition is prohibited by sections 94 to 96A. If it is not prohibited she must order the person's extradition unless:

- (i) she is informed that the extradition request has been withdrawn;
- (ii) she makes an order for further proceedings on the request to be deferred¹⁹⁶ and the person is discharged under section 180;
- (iii) she orders the person's discharge for reasons of national security.¹⁹⁷

C.217 In deciding whether a person's extradition is prohibited,¹⁹⁸ the Secretary of State is not required to consider any representations made by or on behalf of the person received more than 4 weeks after the day on which the judge sent the case.¹⁹⁹

C.218 By reason of sections 94 to 96A, extradition is prohibited in four situations.

Death Penalty

C.219 Section 94 prevents the Secretary of State from ordering the extradition of a person who has been, will be or could be sentenced to death, unless an assurance has been received that the sentence will not be imposed or, if imposed, will not be carried out.²⁰⁰

¹⁹⁶ Under section 126(2) or 179(2)

¹⁹⁷ Under section 208

¹⁹⁸ Under sections 93 to 96A

¹⁹⁹ In practice this deadline is frequently extended.

²⁰⁰ Following the passing of the Murder (Abolition of Death Penalty) Act 1965 it became the practice of the United Kingdom to negotiate in new extradition treaties a provision enabling extradition to be refused if the offence for which surrender is requested is punishable by death. Surrender is only granted in such circumstances if the requesting State gives adequate assurances that the death penalty will not be carried out. The scope and effect of assurances contained in Diplomatic Notes were considered by the High Court in *Ahmad and Aswat v. The Government of the United States of America* [2006] EWHC 2927 (Admin): absent any accusation of bad faith it is to be presumed that a requesting State will abide by its assurances. In *Al-Muayad v. Germany* (Application 35865/03, 20 February 2007), the Strasbourg Court held that the German authorities and courts were entitled to rely on assurances given by the United States given their long standing experience of extraditions to the United States and the fact that assurances were respected in practice. The weight to be given to assurances depends on all the circumstances: *Saadi v. Italy* (2008), application number 37201/06.

Speciality

C.220 Section 95(1) prohibits the Secretary of State from ordering a person's extradition to a category 2 territory where there are no speciality arrangements in place. (This prohibition does not apply if a person has consented to his extradition.) Speciality arrangements are in place if the person may only be dealt with in the requesting territory for an offence, where it is one, falling within section 95(4) or, where the person has first had the opportunity to leave the territory. The offences in section 95(4) are:

- (i) the offence in respect of which the person is extradited;
- (ii) an extradition offence disclosed by the same facts as that offence;
- (iii) an extradition offence in respect of which the Secretary of State consents to the person being dealt with;
- (iv) an offence in respect of which the person has waived his right not to be dealt with.²⁰¹

C.221 Section 95(5) allows speciality arrangements with a Commonwealth country or a British overseas territory to be made either generally or for particular cases.²⁰²

Earlier Extradition to the United Kingdom

C.222 Section 96 prohibits extradition where a person has been extradited to the United Kingdom from another country (the extraditing territory) and extradition is now requested to a different category 2 territory. The Secretary of State is prohibited from

²⁰¹ In *Welsh v. Secretary of State for the Home Department* [2007] 1 WLR 1281, the High Court noted (at paragraphs 135 and 136) that section 95 has to be applied to many treaties and foreign justice systems and must be capable of accommodating the reasonable range of sentencing practices and values which other countries adopt. It must therefore be given a flexible and purposive interpretation.

²⁰² Under section 95(6) a certificate issued by or under the authority of the Secretary of State confirming, in the case of category 2 territories which are Commonwealth countries or British overseas territories, the existence of such arrangements and stating their terms is conclusive evidence of these matters.

ordering extradition if arrangements with the extraditing territory require consent for re-extradition to the category 2 territory and that consent has not been given.

Earlier Transfer to United Kingdom by International Criminal Court

- C.223 Section 96A applies where a person has been transferred to the United Kingdom to serve a sentence imposed by the International Criminal Court and his extradition is now requested to a category 2 territory. The Secretary of State is prohibited from ordering his extradition if an arrangement with the Court requires consent for re-extradition to another country and that consent has not been given.

Criminal Proceedings in the United Kingdom

- C.224 Section 97 applies where a person is the subject of an extradition request under Part 2 of the Act, his case has been sent to the Secretary of State and he has also been charged with an offence in the United Kingdom.²⁰³
- C.225 If the person is sentenced to a custodial sentence for the United Kingdom offence, the Secretary of State may delay making a decision as to extradition until the end of that sentence.
- C.226 Section 98 applies if a person is the subject of an extradition request under Part 2, his case has been sent to the Secretary of State and he is also serving a custodial sentence in the United Kingdom. In these circumstances the Secretary of State is allowed to delay making her decision until the sentence has been served.

²⁰³ In these circumstances the Secretary of State is required to defer making a decision until: (a) the charge is disposed of or withdrawn; (b) proceedings on the charge are discontinued; or (c) proceedings on the charge are discontinued with the option that a fresh prosecution on the same charges could be brought in the future.

Undertaking in Relation to Person Serving Sentence in the United Kingdom

- C.227 Section 119 allows the Secretary of State to make an extradition order subject to a condition that extradition will not take place until he has received certain undertakings on behalf of the requesting category 2 territory. The section applies if the person is serving a sentence in the United Kingdom either in custody or on licence. The Secretary of State can specify the terms of any such undertaking including that the person is kept in custody during the entire proceedings in the category 2 territory. She may also require the person to be returned to the United Kingdom to serve his United Kingdom sentence, on conclusion of the proceedings in the category 2 territory or after serving any sentence imposed there.

The Secretary of State's Decision

- C.228 By reason of section 99 of the Act, once a case is sent to the Secretary of State, she is required to make a decision on a person's extradition within 2 months. If she fails to do so and the person applies to the District Judge, the District Judge must order his discharge. However, the period of 2 months can be extended by the District Judge on application by the Secretary of State.²⁰⁴
- C.229 If the Secretary of State decides to order a person's extradition, she is required to inform the person of her decision and of his right of appeal to the High Court.²⁰⁵ She must also inform a representative of the category 2 territory of any such order.²⁰⁶ If the Secretary of State orders a person's extradition and has received an assurance in

²⁰⁴ In *R (Zaporochenko) v. City of Westminster Magistrates' Court* [2011] 1 WLR 994, it was held that the two-month period started on the day the case was sent to the Secretary of State and where the claimant's extradition was ordered one day outside the statutory time limit, he was entitled to be discharged.

²⁰⁵ Section 101 specifies who may make an order for a person's extradition or discharge. Such an order may be made (in England, Wales and Northern Ireland) under the hand of: (a) the Secretary of State; (b) a Minister of State; (c) a Parliamentary Under-Secretary of State; (d) a senior official (which means a member of the Senior Civil Service or a member of the Senior Management Structure of Her Majesty's Diplomatic Service). In Scotland an order under section 93 for a person's extradition or discharge must be made under the hand of a member of the Scottish Executive, or a junior Scottish Minister, or a senior official who is a member of the staff of the Scottish Administration.

²⁰⁶ Section 100(1).

respect of the death penalty, a copy of this assurance must be given to the person when he is informed of the order.²⁰⁷

- C.230 If the Secretary of State decides to order a person's discharge she is required to inform both the person and a representative of the category 2 territory.²⁰⁸

Appeals

- C.231 Appeals under Part 2 of the Act are governed by sections 103 to 116.

Appeal Against the Decision of the District Judge

- C.232 Section 103 provides a right of appeal to the High Court against the decision of the District Judge to send the case to the Secretary of State. The appeal can be on a question of law or fact. Any appeal under this section must be lodged within 14 days starting on the day the Secretary of State notifies the person of the order she has made.²⁰⁹
- C.233 If the appeal is lodged, it will be heard after the Secretary of State has made her decision.

The High Court's Powers

- C.234 The High Court's powers on an appeal under section 103 are set out in section 104 of the Act. The High Court may allow or dismiss the appeal or direct the judge to reconsider issues that were decided at the extradition hearing. The appeal can only be allowed if the conditions in section 104(3) or (4) are satisfied.²¹⁰

²⁰⁷ Section 100(3).

²⁰⁸ Section 100(4).

²⁰⁹ In *Mucelli v. Government of Albania* [2009] 1 WLR 276, the House of Lords held that notices of appeal were to be filed and served on the respondent and any interested party within the 14 day period and that the High Court had no power to extend the statutory time limit.

²¹⁰ The conditions in section 104(3) are that: (a) the judge ought to have decided a question before him at the extradition hearing differently; (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge. The

- C.235 If the High Court allows the appeal it must order the person's discharge and quash the order for his extradition.
- C.236 Where the High Court uses its power²¹¹ to direct the judge to decide again a question which he decided at the extradition hearing, the judge must also order the person's discharge if he comes to a different decision on a question that he has been directed to decide again by the High Court.
- C.237 However, if the judge comes to the same decision as he did at the extradition hearing the appeal must be taken to have been dismissed by a decision of the High Court.²¹²

Appeals by the Requesting State

- C.238 Section 105 provides a right for an appeal to be brought on behalf of the requesting State against a decision at the extradition hearing to discharge the person. The appeal can be on a question of law or fact. Notice of appeal must be given within 14 days of the order for the person's discharge.

The High Court's Powers

- C.239 The High Court's powers on an appeal under section 105 are set out in section 106. The High Court may allow or dismiss the appeal or direct the judge to decide the relevant question again. The relevant question is one that resulted in the person's

conditions in section 104(4) are that: (a) an issue is raised or evidence is available that was not raised or available at the extradition hearing; (b) the issue or evidence would have resulted in the judge deciding a question before him at the extradition hearing differently; (c) if he had decided the question in that way, he would have been required to order the person's discharge. Under section 104(1)(b)

²¹¹

²¹²

Section 104(7). In *R (Okandeji) v. Bow Street Magistrates' Court* [2005] EWHC 2925 (Admin) it was held that where the High Court remitted a question to the judge under section 104(1)(b) and the judge comes to the same conclusion as he did at the original extradition hearing the appeal was to be treated as a decision of the High Court and therefore judicial review of the judge's decision was unavailable. In this situation the remedy is to seek certification of questions of law of general public importance and apply for leave to appeal to the Supreme Court.

discharge. The appeal can only be allowed if the conditions in section 106(4) or (5) are satisfied.²¹³

- C.240 If the High Court allows the appeal it must quash the order discharging the person, remit the case to the judge and direct him to proceed as he would have been required to do if he had decided the relevant question differently at the extradition hearing.
- C.241 If the High Court directs the judge to decide the relevant question again and he decides it differently, the extradition hearing will continue. If the judge makes the same decision then the appeal must be taken to have been dismissed by a decision of the High Court.
- C.242 Under section 107, the requested person may be remanded in custody or on bail pending the determination of the requesting State's appeal under section 106. The power in section 107 (to remand in custody or on bail while the appeal is pending) only arises if immediately after the judge orders the person's discharge, the judge is informed that the requesting territory intends to appeal.

Appeals Against the Decision of the Secretary of State

- C.243 Section 108 allows a person to appeal on a question of law or fact against the decision of the Secretary of State to order the extradition. Notice of appeal must be given to the High Court within 14 days from the date on which the person was notified of the Secretary of State's decision.

²¹³ The conditions in section 106(4) are that: (a) the judge ought to have decided the relevant question differently; (b) if he had decided the question in the way he ought to have done, he would not have been required to order the person's discharge. The conditions in section 106(5) are that: (a) an issue is raised or evidence is available that was not raised or available at the extradition hearing; (b) the issue or evidence would have resulted in the judge making a different decision at the hearing; and (c) as a result the judge would not have been required to order the person's discharge.

The High Court's Powers

- C.244 The powers available to the High Court on an appeal by a person against the extradition order are set out in section 109. The High Court may allow or dismiss the appeal but may only allow the appeal if the conditions in section 109(3) or (4) are satisfied.²¹⁴
- C.245 If the appeal is allowed, the High Court must order the person's discharge and quash the order for his extradition.

Appeals by the Requesting State

- C.246 Section 110 allows the category 2 territory to appeal to the High Court against a decision of the Secretary of State to order a person's discharge. The appeal may be brought on any question of fact or law. Notice of appeal must be given within 14 days of the requesting State being informed of the order for the person's discharge.

The High Court's Powers

- C.247 The powers of the High Court on an appeal under section 110 are set out in section 111. The High Court may allow or dismiss the appeal but may only allow the appeal if the conditions in section 111(3) or (4) are satisfied.²¹⁵

²¹⁴ The conditions in section 109(3) are that: (a) the Secretary of State ought to have decided a question before her differently; (b) if she had decided the question in the way she ought to have done, she would not have ordered the person's extradition. The conditions in section 109(4) are that: (a) an issue or information is raised or available that was not raised or available to the Secretary of State at the time of her decision; (b) the issue or information would have resulted in the Secretary of State deciding a question differently; and (c) this would have resulted in a decision not to order the person's extradition.

²¹⁵ The conditions in section 111(3) are that: (a) the Secretary of State ought to have decided a question before her differently; (b) if she had decided the question in the way she ought to have done, she would have ordered the person's extradition. The conditions in section 111(4) are that: (a) an issue or information is raised or available that was not raised or available to the Secretary of State at the time she made her decision. (b) the issue or information would have resulted in the Secretary of State deciding a question differently; and (c) this would have resulted in a decision to order the person's extradition.

- C.248 If the High Court allows the appeal it must quash the order discharging the person and order the person's extradition.

Detention Pending Conclusion of Appeal

- C.249 Section 112 sets out the arrangements for the detention of a person when the Secretary of State is informed that the category 2 territory intends to appeal against the decision of the Secretary of State to order the person's discharge.²¹⁶

Time Limits

- C.250 Section 113 provides that rules of court must prescribe the period within which the High Court must begin to hear an appeal under sections 103, 105, 108 or 110. The time period has been fixed at 76 days of the appellant's notice being filed or the date on which the Secretary of State informs the person or requesting State of her decision (if this is later). The High Court has power to extend the period even after it has expired, if it believes it to be in the interests of justice to do so.²¹⁷

Appeals to the Supreme Court

- C.251 Under section 114 an appeal to the Supreme Court may be pursued by the requested person or by the category 2 territory.²¹⁸ An appeal can only be made when leave has been granted by the High Court or the Supreme Court.²¹⁹

²¹⁶ By reason of section 112(2) the remand order made by the judge under section 92(4) remains in force until the end of the period of 3 days beginning with the day on which the person's discharge is ordered. If within that 3-day period the Secretary of State is informed in writing by the category 2 territory of an intention to appeal, the remand order remains in force until the appeal proceedings are concluded.

²¹⁷ Civil Procedure Rules Part 52 Practice Direction Paragraph 26A.

²¹⁸ In Scotland the decision of the High Court is final.

²¹⁹ Leave can only be granted where the High Court has certified that there is a point of law of general public importance involved in the decision and the court granting leave believes that there is a point which should be considered by the Supreme Court. An application for leave to appeal must be made within 14 days of the High Court's decision and applications to the Supreme Court must be made within 14 days from the date the High Court refuses the application for leave to appeal. If leave to appeal is granted, the appeal must be filed within 28 days of leave being granted.

- C.252 The powers of the Supreme Court are set out in section 114. It may allow or dismiss an appeal and where an appeal by the person who is subject to the extradition order is allowed, it must order his discharge and quash the extradition order.
- C.253 If the Supreme Court allows an appeal by the requesting State against a decision of the High Court to discharge a person or not to quash an order by the Secretary of State for his discharge, the Supreme Court is required to quash the order discharging the person and order his extradition.²²⁰
- C.254 Where the requesting State successfully appeals to the Supreme Court against a decision of the High Court to dismiss its earlier appeal against the order to discharge a person at the extradition hearing, it must quash the order discharging the person, remit the case back to the District Judge and require him to proceed as if his original decision had been different.

Habeas Corpus and Judicial Review

- C.255 Section 116 of the Act provides that the decisions of the District Judge in the extradition hearing and decisions of the Secretary of State ordering extradition or discharging a requested person may only be challenged by means of an appeal under the Act.²²¹
- C.256 The High Court has held that a decision against which there is no appeal under the 2003 Act may be challenged by way of an application for *habeas corpus* or judicial review.

²²⁰ In *Norris v. Government of United States of America* [2008] 1 A.C. 920, the House of Lords held that it has an inherent power to remit determination of an issue to an inferior tribunal where the interests of justice so require, and that this is a power which nothing in the 2003 Act purports to abrogate (paragraph 110).

²²¹ The equivalent provision in Part 1 of the Act is section 34.

Supervening Events and the Secretary of State

C.257 It has been decided by the High Court that notwithstanding the terms of section 116, there may be cases in which the Secretary of State is susceptible to a human rights challenge by way of judicial review. This arises because the Secretary of State is a public authority within the meaning of section 6 of the Human Rights Act 1998. Under that provision, it is unlawful for a public authority to act incompatibly with the Convention rights set out in Schedule 1 to the Act. The 2003 Act does not disapply section 6. Accordingly, where the statutory appeals against the decisions of the District Judge and the Secretary of State have been exhausted, but something arises between finality in those proceedings and actual extradition to the requesting State (for example, a supervening illness which impacts on the subject's ability to travel to or face trial in the requesting State), the High Court has jurisdiction to entertain an application for judicial review of the Secretary of State's decision to maintain her extradition order on human rights grounds: *McKinnon v. Government of the United States of America and the Secretary of State for the Home Department*.²²²

Extradition

- C.258 The time limits for extraditing a person who is subject to an extradition order are contained in sections 117 and 118 of the 2003 Act.
- C.259 Under section 117, where the Secretary of State has ordered the person's extradition and no appeal has been lodged, the person must be extradited within 28 days of the date on which the order was made. The District Judge must, on a person's application, order his discharge if this deadline is not met, unless reasonable cause is shown for the delay.
- C.260 Under section 118, which applies where an appeal has been brought to challenge the extradition order and the appeal has been dismissed, the person must be extradited within 28 days from the date on which the appeal decision becomes final. If this deadline is not complied with the judge must, on the person's application, order his discharge unless reasonable cause is shown for the delay.

²²²

[2007] EWHC 762 (Admin)

Asylum

- C.261 Section 121 sets out what is to happen where a person makes an asylum claim at any time during extradition proceedings under Part 2 of the 2003 Act.²²³
- C.262 Where an asylum claim is made by the person at any time between the issue of a certificate on an extradition request from a category 2 territory and the person's extradition in pursuance of the request, the person must not be extradited until the claim is finally determined.²²⁴

Withdrawal of Extradition Request

- C.263 Sections 122 to 125 deal with the situation where an extradition request is withdrawn. In summary, where the extradition request is withdrawn the person must be discharged from the proceedings as soon as practicable.

Consent to Extradition

- C.264 Section 127 provides that a person who has been arrested under a warrant issued following the receipt of an extradition request or under a provisional warrant may consent to his extradition. If a person consents to his extradition before his case is sent to the Secretary of State, he must do so before the District Judge. However, if a person consents after his case is sent to the Secretary of State he must give his

²²³ The provisions of section 121 mirror those of section 39. However, unlike Part 1 cases there is no procedure whereby the Secretary of State may certify that the person is not at risk of persecution in, or onward refoulement from, the category 2 territory which has sought extradition. In addition, because there is no equivalent of the Dublin Convention for non-European Union Member States there is no provision for certification of asylum claims on the basis that the territory to which the person is to be extradited has accepted responsibility for the claim.

²²⁴ In *R (Chichvarkin and others) v. Secretary of State for the Home Department* [2011] EWCA Civ. 91, it was held that extradition proceedings should ordinarily be stayed pending the outcome of asylum proceedings. Where an asylum claim is made before the commencement of the extradition process, the Secretary of State has adopted a policy of informing the requested person that they will not in practice be extradited until the asylum claim has been determined.

consent to the Secretary of State. Consent must be given in writing; it is irrevocable and may only be given under certain circumstances.²²⁵

- C.265 Section 128 provides that where a person consents to his extradition before the District Judge, the judge is no longer required to fix a date for the extradition hearing or, if the hearing has started the judge no longer has to continue with it. Instead, the District Judge is required to send the case to the Secretary of State for her decision as to whether the person is to be extradited. A person who consents to extradition before his case is sent to the Secretary of State is taken to have waived his right to specialty protection and the Secretary of State is not required to consider whether the person's extradition is prohibited by reason of section 95 of the Act (specialty).

Consent to Other Offences Being Dealt With and Re-extradition

- C.266 Sections 129 to 131 apply where a person has been extradited to a category 2 territory and a request is made for consent to prosecute the person for an offence other than the offence for which he was extradited or for re-extradition. The requests are dealt with by the Secretary of State.²²⁶

²²⁵ These circumstances are that the person is legally represented or that he has been informed of his right to apply for legal aid but has failed to exercise this right, or legal aid has been refused or withdrawn. This has the effect that no person can consent to his extradition without having received or having had the opportunity to receive legal advice.

²²⁶ In the case of a valid request (that is one made by a recognised authority) for consent to prosecute the person for another offence, the Secretary of State must serve notice on the person that he has received a request for consent, unless it would not be practicable to do so. The Secretary of State must decide whether the offence to which the request for consent relates is an extradition offence. If she decides it is not, she must refuse consent. If she decides that it is she must then decide whether the District Judge would send the case to her under sections 79 to 91 of the Act. If the Secretary of State decides that the District Judge would not send the case to her, she must refuse consent. If the Secretary of State decides that the District Judge would send the case to her, she must then decide whether extradition in respect of the offence would be prohibited (if the person were in the United Kingdom) by section 94 (death penalty), section 95 (specialty), section 96 or 96A (earlier extradition). If the Secretary of State decides that extradition would be prohibited for any of these reasons, then consent must be refused. If the Secretary of State is satisfied that extradition would not be prohibited, then consent may be given. Section 130 provides for a similar procedure where the Secretary of State receives a valid request for consent to re-extradite the person to another category 2 territory for an offence other than the offence for which he was extradited. Section 131 applies where the Secretary of State receives a valid request (that is one made by a recognised authority) for consent to re-extradite the person to a category 1 territory for an offence other than the offence for which he was extradited. The Secretary of State must serve notice on the person that he has received a request for consent, unless it would not be practicable to do so. The Secretary of State must decide whether the offence is an extradition offence within the meaning of section 64. If she decides that it is the Secretary of State must

Return of Serving Prisoners

- C.267 Section 132 applies where a person who was serving a custodial sentence in the United Kingdom is extradited and then returned to this country either to serve the remainder of his United Kingdom sentence or otherwise. In this situation the person is liable to be detained to serve his sentence.²²⁷

Costs

- C.268 Section 133 allows for an order for costs to be made against a person who unsuccessfully challenges proceedings held under Part 2 of the Act. The relevant judge or court has the power to make an order for the person to pay costs that he/it considers just and reasonable. Such an order for costs must specify the amount to be paid and may also include the name of the person to whom the costs are to be paid.
- C.269 Section 134 allows an order for costs to be made in favour of a person who is discharged or taken to be discharged under Part 2 of the Act. The relevant judge or court has power to make an order for payment of an amount which he/it thinks is reasonably sufficient to compensate the person in question for any expenses incurred as a result of the extradition proceedings. Where the relevant judge or court considers it inappropriate for the person to recover the full amount he/it is required to assess the amount considered to be just and reasonable and specify that sum as the appropriate amount in the order.

decide if the District Judge would order extradition under sections 11 to 25 if the person were in the United Kingdom. If the Secretary of State decides that the offence is not an extradition offence or that the judge would not order extradition, then consent must be refused. If the Secretary of State is satisfied that the offence is an extradition offence and the judge would order extradition then consent may be given.

²²⁷ Time spent out of the United Kingdom in connection with the person's extradition does not count as time served towards his sentence in the United Kingdom unless he is acquitted of the extradition offence or any other offence in respect of which he was allowed to be dealt with in the requesting territory.

Persons Serving Sentences Outside Territory where Convicted

C.270 Section 136 applies when an extradition request is made in relation to a person who has been convicted of an offence in one territory (the convicting territory), is repatriated to another territory (the imprisoning territory) under an international arrangement to serve his sentence, and is unlawfully at large from a prison in that other territory. The effect of the section is to modify the application of the relevant sections in Part 2 of the Act to allow extradition of a person where the request is made either by the convicting territory or by the imprisoning territory.

Part 3 of the 2003 Act

C.271 Part 3 of the 2003 Act contains provisions governing extradition to the United Kingdom. Sections 142 to 149 deal with extradition from category 1 territories, while section 150 deals with specialty protection following extradition from category 2 territories.²²⁸

Part 3 Warrants: Category 1 Territory

C.272 Section 142 provides for the issue of an arrest warrant to form the basis of extradition to the United Kingdom from a category 1 territory.²²⁹ A domestic warrant must have been issued in this country for the arrest of the person in question (unless the person is unlawfully at large after conviction of an extradition offence and liable to be arrested without a warrant). There must also be grounds to believe that the person has committed an extradition offence (as defined in section 148) or is unlawfully at large after having been convicted of an extradition offence in this country.²³⁰

²²⁸ The Extradition Act 1989 did not cater for outgoing extradition requests and they were made under the royal prerogative. The use of the royal prerogative continues for outgoing requests under the 2003 Act, but this is supplemented by the legislative provisions in relation to requests to category 1 territories.

²²⁹ The European arrest warrant has been used to obtain the surrender of suspects in high profile cases: Hussain Osman, a suspect in the London bombings, was sent back from Italy to the United Kingdom where he was later convicted of his involvement in the attacks. In June 2005 Victor Demborskis, suspected of the rape and murder of a teenage girl in Wembley, was surrendered to the United Kingdom within weeks of fleeing to Latvia.

²³⁰ In England and Wales the Crown Prosecution Service prepare the European arrest warrant in draft form. The lawyer with responsibility for the case will satisfy him or herself that a domestic warrant of arrest is in existence and that there are reasonable grounds for believing that the requested person has committed an extradition offence or is unlawfully at large after being convicted of such an offence. The lawyer applies the test for prosecution contained in the Crown Prosecution Service Code for Crown Prosecutors (i.e. that there is a realistic prospect of conviction and it is in the public interest to prosecute). An application will then be made for a Part 3 warrant. By reason of section 142(1) a Part 3 warrant may be issued by an ‘*appropriate judge*’ which means a District Judge, a justice of the peace or a judge entitled to exercise the jurisdiction of the Crown Court (section 149). In Scotland the appropriate judge is a sheriff and in Northern Ireland a justice of the peace, a resident magistrate or a crown court judge. We were informed by the designated Scottish Sheriffs that outgoing requests for extradition are usually restricted to cases where a custodial sentence of at least 4 years is likely to be imposed, or has been imposed. In Northern Ireland the Crown Solicitors’ Office is the authority responsible for advising the Police Service of Northern Ireland in relation to all outgoing requests for extradition. Outgoing requests tend to be confined to the more serious types of offences.

Service of Sentence in Category 1 Territory

- C.273 Section 145 applies if, in a conviction case where a sentence has been imposed, an undertaking is given on behalf of a category 1 territory that the requested person will be required to serve the sentence in the territory and on the basis of the undertaking the person is not extradited to the United Kingdom. In these circumstances the sentence for the offence must be treated as served but the person's conviction for the offence must be treated as a conviction for all other purposes.

Speciality: Category 1 Territories

- C.274 The speciality arrangements for dealing with a person for offences committed before his extradition to the United Kingdom from a category 1 territory are set out in section 146.
- C.275 The effect of consent to extradition to the United Kingdom is governed by section 147.

Speciality

- C.276 The speciality arrangements for dealing with a person for offences committed before his extradition to the United Kingdom from a Commonwealth country, a British Overseas territory or the Hong Kong Special Administrative Region of the People's Republic of China are contained in section 150.
- C.277 Section 151A also deals with speciality where a person is returned from a category 2 territory (other than a Commonwealth country or a British overseas territory or the Hong Kong Special Administrative Region of the People's Republic of China). The general rule is that the person may only be dealt with in the United Kingdom for the offence in respect of which the person is extradited, an offence disclosed by the information provided to the territory in respect of that offence, or an offence in respect of which consent to the person being dealt with is given on behalf of the territory.

Remission of Sentence

- C.278 Section 152 applies to a person who has been convicted of an offence in the United Kingdom prior to his extradition but this is not the offence for which he has been extradited to the United Kingdom. Any sentence for the offence must be treated as served, although the conviction must be treated as a conviction for all other purposes.

Return of Person Acquitted or not Tried

- C.279 Section 153 applies to a person who is accused of an offence in the United Kingdom and extradited to the United Kingdom in respect of the offence from another category 1 territory. If the domestic criminal proceedings have not started within six months of the person's return to the United Kingdom and within a further three months the person asks the Secretary of State to return him to the extraditing territory, the Secretary of State must arrange for him to be returned to the extraditing territory free of charge and with as little delay as possible. A similar obligation arises if the person is acquitted or, if convicted, is receives an absolute or conditional discharge.

Undertaking in Relation to Person Serving Sentence

- C.280 In the case of serving prisoners whose return is sought to the United Kingdom, section 153A provides that the Secretary of State may give an undertaking to the requested territory that the prisoner will be kept in custody until the conclusion of the domestic prosecution. The Secretary of State may also give an undertaking that the prisoner will be returned to the requested territory to serve the remainder of his sentence on the conclusion of the domestic prosecution or after he has served any custodial sentence imposed in the United Kingdom. Under section 153B, where a person is returned to the United Kingdom after serving a sentence in an overseas territory, pursuant to an undertaking given under section 153A, the person is liable to be detained in pursuance of any custodial sentence which remains to be served in the United Kingdom.

Returning a Person to Extraditing Territory to Serve Sentence

- C.281 Section 153C governs the position of a person returned to the United Kingdom for the purposes of being prosecuted for an offence subject to an undertaking that he will be returned to the extraditing territory. In the event of being convicted, a person who is to be returned to a territory by virtue of such an undertaking must be returned as soon as reasonably practicable after the sentence is imposed and any other proceedings in respect of the offence are concluded.²³¹

²³¹ Nothing in section 153A or 153C requires the return of a person to a territory in a case in which the Secretary of State is not satisfied that the return is compatible with the Convention rights within the meaning of the Human Rights Act 1998 or with the United Kingdom's obligations under the Convention relating to the Status of Refugees done in Geneva on 28 July 1951 and the Protocol to the Convention: section 153D.

Part 4 of the 2003 Act

- C.282 Part 4 of the 2003 Act (sections 156 to 176) contains provisions dealing with police powers in connection with the extradition of a person under Part 1 or Part 2. Broadly speaking, the provisions are designed to ensure that the law enforcement powers available in a domestic police investigation are available in extradition proceedings. These powers include search and seizure warrants (section 156), production orders (section 157), search of the arrested person (section 163), entry and search of premises after arrest (section 164). The treatment of the arrested person is governed by sections 166 to 171. These provisions provide for the taking of fingerprints and samples, searches and examination for the purpose of establishing identity and for rights under the Police and Criminal Evidence Act 1984 to be applied to extradition defendants by order.²³²
- C.283 Where property is seized or produced under Part 4, section 172(2) allows a police constable to hand the property to a person acting on behalf of the requesting authority.
- C.284 Section 173 requires the Secretary of State to issue codes of practice to cover the use of powers contained in Part 4. The process by which the Secretary of State issues a code of practice is set out in section 173(2) and (3). She is required to publish the code in draft form, consider any representations made on the draft and, if appropriate, amend the code before bringing it into effect by order.²³³

²³² The Extradition Act 2003 (Police Powers) Order 2003, SI 2003/3106 has applied certain provisions of the Police and Criminal Evidence Act 1984 to Part 4. There is no power to search for evidence in conviction cases, nor may arrested persons be kept incommunicado (which is sometimes permitted in domestic investigations).

²³³ The first edition of the Codes was published on 18 December 2003 and they came into force on 1 January 2004: The Extradition Act 2003 (Police Powers: Codes of Practice) Order 2003, SI 2003/3336. The Codes of Practice apply to police officers operating in England, Wales and Northern Ireland.

Part 5 of the 2003 Act

- C.285 Part 5 of the 2003 Act (sections 177 to 227) contains miscellaneous and general provisions.

British Overseas Territories

- C.286 Section 177 provides for the extension of provisions of the 2003 Act to apply to extradition from a British overseas territory, the Channel Islands and the Isle of Man.²³⁴
- C.287 Section 178 provides for the extension of provisions of the Act to apply to extradition to a British overseas territory, the Channel Islands and the Isle of Man.

Competing Claims for Extradition

- C.288 The effect of a competing claim for extradition and deferral of a warrant or request is governed by sections 179 to 181. The effect of these provisions has been summarised above.

²³⁴

As things currently stand extradition between British overseas territories and between those overseas territories and the United Kingdom is governed by the Extradition (Overseas Territories) Order 2002, made under the Extradition Act 1989 (which was preserved for these purposes). Any extension of the 2003 Act to overseas territories would need to be the subject of agreement between the overseas territories and the United Kingdom. In Jersey, extradition law effectively mirrors Part 2 of the 2003 Act (Extradition (Jersey) Law 2004 (Appointed Day) Act 2004, in force 28 September 2004). In the case of Guernsey and the Isle of Man the Extradition Act 1989 is still in force (although an Extradition Bill is currently before the Tynwald). The practical effect of this is that if a request for extradition is received in respect of a person believed to be in Guernsey or the Isle of Man, the request must be sent to the Home Office in accordance with the terms of any relevant bilateral or multi-lateral treaty. The request is then considered and processed under the 1989 Act. Where the Secretary of State issues an Authority or Order to proceed the case is dealt with at the City of Westminster Magistrates' Court. If an arrest warrant is issued it will be executed by the Metropolitan Police Service in conjunction with the local constabulary. Once arrested, the arrested person is brought before the City of Westminster Magistrates' Court for the extradition proceedings to take place. In the case of outgoing requests, the relevant authorities in Guernsey or the Isle of Man submit the requisition to the Home Office for onward transmission to the requested State.

Legal Aid

C.289 Sections 182 to 185 concern legal aid.

Legal Advice, Assistance and Representations: England and Wales

C.290 Section 182 provides that the provisions of Part 1 of the Access to Justice Act 1999 apply to extradition proceedings (including any subsequent appeal) in the same way that they apply to criminal proceedings in England and Wales.²³⁵

Legal Aid: Scotland

C.291 Section 183 provides that the provisions of the Legal Aid (Scotland) Act 1986 apply to extradition proceedings in the same way that they apply to summary proceedings in Scotland.

Legal Aid: Northern Ireland

C.292 Section 184 gives a designated county court judge or resident magistrate and a judge of the High Court a power to grant legal aid to a person in connection with proceedings under the Act. Legal aid may be granted to a person only if it appears to the judge that the person's means are insufficient to enable him to obtain legal aid and it is desirable in the interests of justice that the person should be granted legal aid.

Re-Extradition

C.293 Sections 186 to 189 contain provisions which enable a person who has been extradited from the United Kingdom, but returned to serve the remainder of a custodial sentence imposed in the United Kingdom, to be re-extradited to serve any custodial sentence imposed in the requesting territory.

²³⁵ Legal aid is subject to a means test in England and Wales: Criminal Defence Service Financial Eligibility Regulations 2006 SI 2006 No. 2492.

The Role of the Crown Prosecution Service

- C.294 Section 190 amends section 3 of the Prosecution of Offences Act 1985 (functions of the Director of Public Prosecutions) with the result that the Crown Prosecution Service is required to act and advise as appropriate, on behalf of the requesting territory in extradition proceedings under the 2003 Act.²³⁶

International Conventions and Special Extradition Arrangements

- C.295 Sections 193 and 194 provide a mechanism for applying the 2003 Act to extradition arrangements between the United Kingdom and other territories which are not category 1 or category 2 territories. Section 193 applies where the United Kingdom and the other country are parties to an international convention which imposes an obligation either to prosecute or extradite offences falling within the scope of the convention.²³⁷ Section 194 provides for the certification of special extradition arrangements with another territory.²³⁸ In either case the Part 2 procedure applies in respect of any request made by the relevant country.

²³⁶ In Scotland this role is performed by the Lord Advocate (section 191) and in Northern Ireland by the Director of Public Prosecutions for Northern Ireland and the Crown Solicitor for Northern Ireland. Extradition work is undertaken by a specialist unit within the Crown Prosecution Service although responsibility for drafting outgoing European arrest warrants has been devolved to local Crown Prosecution Service areas.

²³⁷ The Extradition Act 2003 (Parties to International Conventions) Order 2005 (SI 2005/46) has been made under section 193(1). This Order contains the current list of territories designated by section 193. Extradition requests can only be made in respect of criminality covered by the Convention.

²³⁸ Section 194 enables the United Kingdom to respond to *ad hoc* extradition requests from countries where no general extradition arrangements exist. It is modelled on section 15 of the Extradition Act 1989. When the United Kingdom agrees to enter into a special extradition arrangement, the next step is for the United Kingdom and the State making the extradition request to agree a Memorandum of Understanding; this is, in effect, a mini-extradition treaty (although a Memorandum of Understanding has a different and less formal status than a treaty in international law) relating only to a particular request. Once the Memorandum has been agreed it will be signed by a representative of the United Kingdom and the State making the request. The next stage is for the Home Secretary to certify that special extradition arrangements are in place. The extradition request will be dealt with under the procedures in Part 2 of the 2003 Act. See for example *Brown v. Government of Rwanda* [2009] EWHC 70 (Admin).

Human Rights: Appropriate Tribunal

- C.296 Section 195 makes it clear that the appropriate judge is the only appropriate tribunal in relation to proceedings under section 7(1) of the Human Rights Act (proceedings for acts incompatible with Convention rights) if the proceedings relate to extradition under Part 1 or Part 2 of the Act.

Genocide, Crimes Against Humanity and War Crimes

- C.297 Section 196 ensures that genocide, crimes against humanity, war crimes and related offences under the International Criminal Court Act 2001 are extradition offences.

Custody and Bail

- C.298 Sections 197 to 201 contain provisions relating to custody and bail under the Act.

Evidence

- C.299 Sections 202 to 206 concern matters of evidence and procedure.

Receivable Documents

- C.300 Section 202 governs ‘*receivable documents*.’ A Part 1 warrant may be received in evidence, as may any document issued in a category 1 or category 2 territory if it purports to be signed by a judge, magistrate or officer of the territory or purports to be certified by the Ministry or Department of the territory responsible for justice or for foreign affairs or purports to be authenticated by the oath or affirmation of a witness. However, by reason of section 202(5), a document that is not duly authenticated is not prevented from being received in proceedings under the Act.²³⁹

²³⁹ In *Friesel v. Government of the United States of America* [2009] EWHC 1659 (Admin) it was decided that the hearsay evidence provisions of the Criminal Justice Act 2003 do not apply to extradition proceedings. The effect of section 202(5) is to preserve the decision of the House

Documents Sent by Facsimile

C.301 Documents sent by facsimile are treated as originals by reason of section 203.

Part 1 Warrants Transmitted by Electronic Means

C.302 Under section 204, a Part 1 warrant sent by electronic means (other than by facsimile) is to be treated as an original Part 1 warrant.

Written Statements/Admissions

C.303 Section 205 provides for proof by written statements and formal admissions.

Burden and Standard of Proof

C.304 Section 206 provides that where a question arises concerning the burden or standard of proof during extradition proceedings, it must be decided through the application of existing law in criminal proceedings.²⁴⁰

Live Links

C.305 Sections 206A and 206B enable hearings other than extradition hearings to be conducted using a live link from the place at which the requested person is being held in custody at the time of the hearing.

of Lords in *Schtraks v. Government of Israel* [1964] A.C. 556. In that case it was held (at 582) that material submitted by the defendant in support of his submission that he would be subject to persecution did not have to be authenticated. A requested person may rely on newspaper reports or articles produced by human rights organisations to substantiate arguments under sections 13 and 21 (in Part 1 cases) or sections 51 and 87 (in Part 2 cases).

²⁴⁰ Unless the 2003 Act provides otherwise, the requesting State bears the burden of proof to the criminal standard.

Other Miscellaneous Provisions

- C.306 Sections 207 to 212 contain a number of miscellaneous provisions dealing with the power of the Secretary of State to provide by order for the Act to have effect with specific modifications in relation to requests for extradition for more than one offence (section 207): the power of the Secretary of State to prevent a person's extradition where it would be against the interests of national security (section 208); the use of reasonable force (section 209); rules of court (section 210); service of notices (section 211) and Article 95 alerts (section 212).

Interpretation

- C.307 Sections 213 to 216 are interpretation provisions.

Multiple Offences

- C.308 The text of the 2003 Act must be read together with the Extradition Act 2003 (Multiple Offences) Order 2003.²⁴¹ The effect of this Order is to modify the provisions of the Act in the case of extradition requests involving more than one offence.

²⁴¹

SI 2003 No. 3150 (made under powers conferred by section 207 of the 2003 Act).

Appendix D Extradition Figures

The series of figures below provide a snapshot of extradition requests to and from the UK between 1963 and 1973¹, prior to the entry in to force of the Extradition Act 2003 (between 1997 and 2003) and from 2004 to the present day.

Extradition requests to the UK 1963 - 1973

Year	1963	1964	1965
Requesting country (number of requests)	France (1) Germany (1) Italy (1)	Belgium (1) Germany (2) USA (1)	Germany (1) Iraq (2) Italy (2) Netherlands (1) USA (2)
Total	3	4	8

Year	1966	1967	1968
Requesting country (number of requests)	France (2) Germany (2) Greece (1) Italy (5) Sweden (5) Switzerland (1) USA (2)	Argentina (1) Belgium (1) France (1) Germany (2) Greece (1) Italy (1) Netherlands (2) Spain (1) Switzerland (1) USA (1)	Belgium (3) Germany (1) Greece (1) Italy (2) Spain (1) Sweden (1) Switzerland (2) USA (2)
Total	18	12	13

Year	1969	1970	1971
Requesting country (number of requests)	Denmark (2) France (1) Germany (3) Greece (1) Iraq (2) Israel (1) Italy (1) Netherlands (2) Portugal (1) USA (3)	Denmark (1) France (1) Germany (3) Greece (1) Italy (3) Luxembourg (2) Spain (1) Sweden (5) Switzerland (2)	Austria (1) Belgium (1) Denmark (1) Finland (1) France (2) Germany (6) Iraq (2) Italy (1) Sweden (6) USA (7) Yemen (1)
Total	17	19	29

¹ Taken from the 1974 Working Party Report on the Extradition Act 1870

Year	1972	1973	
Requesting country (number of requests)	Belgium (1) Denmark (2) France (2) Germany (5) Israel (1) Italy (1) Spain (1) USA (4)	Austria (1) Belgium (2) Germany (8) Iraq (1) Israel (1) USA (6)	
Total	17	19	

Extradition requests from the UK 1963 – 1973

Year	1963	1964	1965
Requested country (number of requests)	Spain (1) Switzerland (1)	Spain (1) USA (1)	Italy (1) Spain (1)
Total	2	2	2

Year	1966	1967	1968
Requested country (number of requests)	Germany (1) Italy (1)	France (1) Spain (1)	France (1) Germany (2) Israel (1) Spain (1) Sweden (1) USA (1)
Total	2	2	7

Year	1969	1970	1971
Requested country (number of requests)	Belgium (2) Finland (1) France (1) Germany (1) Greece (2) Italy (1) Spain (2)	Denmark (1) France (1) Spain (1)	Belgium (1) Denmark (1) Germany (2) Italy (1) Netherlands (3) Spain (2) USA (1)
Total	10	3	11

Year	1972	1973	
Requested country (number of requests)	Belgium (2) France (3) Germany (1) Greece (1) Netherlands (3) Spain (2) Switzerland (1) USA (1)	France (1) Germany (2) Greece (2) Netherlands (2) Spain (4) Switzerland (1) USA (1)	
Total	14	13	

Extradition requests to the UK 1997 – 2003

Year	Requests received	Surrendered
1997	107	43
1998	111	45
1999	101	38
2000	78	47
2001	133	55
2002	137	53
2003	114	55
Total	781	336

Extradition requests by the UK 1997 – 2003

Year	Requests made
1997	44
1998	64
1999	56
2000	70
2001	82
2002	70
2003	87
Total	473

European arrest warrant ('EAW') figures: 2004 – 2011 (end of March)

EAW arrests by the UK

Year	Number of persons arrested pursuant to EAWs
2004	46
2005	154
2006	408
2007	513
2008	661
2009	863
2010	1355
2011	325
Total	4325

EAW surrenders by the UK

Year	Number of surrenders
2004	24
2005	77
2006	151
2007	332
2008	515
2009	628
2010	1068
2011	312
Total	3107

EAW surrenders by the UK to selected EU countries² (2004 – end March 2011)

Country	Total number of surrenders
Czech Republic	162
France	72
Germany	108
Hungary	54
Ireland	124
Italy	41
Latvia	78
Lithuania	355
Netherlands	68
Poland	1659
Romania	80
Spain	61

² Those Member States for which the UK has surrendered more than 40 people since the entry into force of the EAW Framework Decision.

EAWs issued by the UK

Year	Number
2004	96
2005	131
2006	126
2007	198
2008	218
2009	220
2010	256
2011	50
Total	1295

EAW surrenders to the UK

Year	Number
2004	19
2005	63
2006	76
2007	99
2008	96
2009	80
2010	116
2011	32
Total	581

EAW surrenders to the UK by selected countries³ 2004 – March 2011⁴

Country	Total number of surrenders
France	50
Germany	23
Ireland	117
Netherlands	83
Poland	21
Spain	179

³ Those EU Member States which have surrendered more than 20 people to the UK since the entry into force of the EAW Framework Decision.

⁴ EAW figures have been provided by the Serious Organised Crime Agency ('SOCA'). SOCA has informed the review panel that further data cleansing on these periods has revealed that there may be some minor inaccuracies in these figures but they do provide a good indication of the country breakdowns for these periods.

Non-EAW extradition 2004 – 2011

Extradition requests to the UK and surrenders

2004

Country	Arrests	Surrenders
Albania	3	
Australia	1	
Bulgaria	1	1
Croatia	1	
Czech Republic	4	
Estonia	1	
France	1	1
Germany	8	2
Italy	5	3
Lithuania	2	2
Netherlands	1	2
Poland	1	
Romania	1	
Russian Federation	3	
Slovakia	1	
USA	24	3
TOTAL	58	14

2005

Country	Arrests	Surrenders
Albania	3	1
Australia	4	2
Canada	4	2
Croatia	2	1
Czech Republic	4	3
Estonia		1
Germany	1	3
India	1	
Israel	2	
Italy	6	
New Zealand	1	
Norway	1	
Romania	11	2
Russian Federation	2	
Slovakia		1
Turkey	1	1
USA	16	8
TOTAL	59	25

2006

Country	Arrests	Surrenders
Albania	8	3
Armenia	1	
Australia	6	2
Canada	1	1
Croatia	2	1
Czech Republic		1
Germany		2
Hong Kong	2	
India	1	
Israel		2
Italy		2
Kenya	1	
New Zealand		1
Norway	1	1
Romania	2	1
Russian Federation	2	
Switzerland	2	1
Trinidad & Tobago	2	
Turkey	1	
USA	15	16
TOTAL	47	34

2007

Country	Arrests	Surrenders
Albania	10	3
Australia	3	4
Canada	1	3
Italy		3
Mauritius	1	
New Zealand	1	1
Norway	1	1
Romania		1
Russian Federation	1	
Switzerland	1	
USA	8	8
TOTAL	27	24

2008

Country	Arrests	Surrenders
Albania	5	4
Algeria	1	
Australia	1	1
Canada		1
Croatia	1	
Israel	1	
New Zealand	2	1
Russian Federation	8	
South Africa	1	
Switzerland		1
Turkey	1	
Ukraine	1	1
USA	9	6
TOTAL	31	15

2009

Country	Arrests	Surrenders
Albania	4	4
Argentina	2	
Australia		1
Azerbaijan	1	
Bosnia & Herzegovina	1	
Brazil	1	
Canada	2	
Croatia	1	1
Hong Kong	2	3
Iceland	1	1
Israel		1
New Zealand		1
Norway	4	1
Romania		1
Russian Federation	5	
South Africa	1	
Switzerland	4	3
Trinidad & Tobago		1
Turkey	1	1
USA	19	16
TOTAL	49	35

2010

Country	Arrests	Surrenders
Albania	6	3
Argentina	1	
Australia	2	1
Azerbaijan	2	
Brazil		1
Canada	3	1
Croatia	2	1
Hong Kong		1
India	2	
Moldova	1	1
New Zealand		
Norway	3	2
Russian Federation	1	
Serbia	1	
South Africa	1	
Switzerland	2	1
Thailand	1	
Trinidad & Tobago		1
Turkey	7	1
Ukraine	2	
United Arab Emirates	2	
USA	14	10
TOTAL	53	24

2011 (up to 31/7/11)

Country	Arrests	Surrenders
Albania	2	2
Argentina	2	
Australia	2	2
Azerbaijan	1	
Canada		2
Moldova	1	
Montenegro	1	
Norway		2
Russian Federation	3	
Switzerland	1	1
Turkey	4	2
Ukraine	3	
United Arab Emirates	2	
USA	7	6
TOTAL	29	17

Non-EAW extradition requests by the UK 2004 - 2011

Year	Requests made
2004	34
2005	30
2006	29
2007	37
2008	49
2009	37
2010	37
2011 (to 31/7/2011)	18
Total	271

Non-EAW surrenders to the UK 2004 - 2011

2004

Country	Surrenders
Australia	4
Belgium	5
Cyprus	1
Denmark	1
France	3
Gambia	1
Germany	2
Israel	1
Italy	1
Jamaica	3
Mauritius	1
Netherlands	9
Spain	11
Switzerland	1
USA	2
TOTAL	46

2005

Country	Surrenders
Canada	1
Cayman Islands	1
Czech Republic	1
Germany	2
Italy	2
Jamaica	2
Netherlands	1
Norway	1
Serbia	1
Spain	3
Sri Lanka	1
USA	1
TOTAL	17

2006

Country	Surrenders
Australia	4
Dutch Antilles	1
France	1
Netherlands	1
South Africa	1
Spain	1
Switzerland	1

Thailand	1
USA	3
TOTAL	14

2007

Country	Surrenders
Australia	1
Grenada	1
India	1
Jamaica	1
Kosovo (ad hoc)	1
New Zealand	1
Somalia	1
South Africa	1
Spain	2
Switzerland	2
Thailand	2
USA	7
TOTAL	21

2008

Country	Surrenders
Australia	3
Canada	1
Italy	1
Mauritius	1
Morocco (ad hoc)	1
Netherlands	1
New Zealand	1
South Africa	1
Sri Lanka	2
Thailand	1
Trinidad and Tobago	2
Turks & Caicos	1
USA	10
TOTAL	26

2009

Country	Surrenders
Australia	2
Canada	2
Columbia	1
Croatia	1
Dubai	1
India	1

Iraq	1
Jamaica	1
Mexico	1
South Africa	1
Switzerland	1
Thailand	4
Turkey	1
Turks & Caicos	1
USA	7
TOTAL	26

2010

Country	Surrenders
Afghanistan (ad hoc)	1
Australia	1
Bangladesh	1
Bahrain (ad hoc)	1
Barbados	1
Canada	1
Iraq	1
Netherlands	1
Peru	1
Spain	1
Thailand	3
Turkey	1
USA	5
Venezuela	1
TOTAL	20

2011 (Up to 31/7/11)

Country	Surrenders
Australia	1
Bangladesh	1
Canada	1
Ghana	1
Norway	1
South Africa	3
St Vincent	1
Thailand	4
UAE	2
USA	3
TOTAL	18

UK/US figures 2004 - 2011

TOTALS	2004	2005	2006	2007⁵	2008	2009	2010	2011[*]
REQUESTS TO UK BY US								
Requests received	36	8	17	10	11	19	18	11
Arrests	24	16	15	8	9	19	14	7
Surrendered	3	8	16	8	6	16	10	6
Discharged (by courts)	0	1	1	1	3	1	0	0
Refused (Secretary of State)	0	0	0	0	0	0	0	0
Withdrawn by requesting State	1	2	1	0	1	2	1	0
Not Returned (Miscellaneous)	0	0	1	1	0	0	0	0
REQUESTS BY UK TO US								
Requests made	2	9	4	15	9	5	8	2
Returned to UK	2	1	3	7	10	7	5	3
Refused	0	0	0	0	0	0	0	0
Withdrawn (by requesting State)	0	1	1	1	3	0	2	2
Not Returned (Miscellaneous)	0	0	0	0	0	0	1	0

*Figures for 2011 are up to 31 July 2011 only

⁵

The 2003 UK-US Extradition Treaty came into force on 26 April 2007

Appendix E: The United Kingdom's extradition arrangements

Countries designated under Part 1 of the Extradition Act 2003¹ (parties to the European arrest warrant)

Austria
Belgium
Bulgaria
Cyprus
Czech Republic
Denmark
Estonia
France
Finland
Germany
Gibraltar
Greece
Hungary
Italy
Ireland
Latvia
Lithuania
Luxembourg
Malta
Netherlands
Poland
Portugal
Romania
Slovakia
Slovenia
Spain
Sweden

¹ Section 1 2003 Act

Countries designated under Part 2² of the Extradition Act 2003 (countries in bold are not required to provide prima facie evidence³)

Albania

Algeria

Andorra

Argentina

Armenia

Australia

Azerbaijan

Bangladesh

Barbados

Belize

Bolivia

Bosnia Herzegovina

Botswana

Brazil

Brunei

Canada

Chile

Colombia

Cook Islands

Croatia

Cuba

Dominica

Ecuador

El Salvador

Fiji

FYR Macedonia

Georgia

Ghana

Grenada

Guatemala

² See Section 69 of the 2003 Act

³ Designated under sections 71(4), 73(5), 84(7) and 86(7) of the 2003 Act

Guyana

Haiti

Hong Kong Special Administrative Region⁴

Iceland

India

Iraq

Israel

Jamaica

Kenya

Kiribati

Lesotho

Liberia

Libya

Liechtenstein

Malawi

Malaysia

Maldives

Mauritius

Mexico

Moldova

Monaco⁵

Monaco

Montenegro

Nauru

New Zealand

Nicaragua

Nigeria

Norway

Panama

Papua New Guinea

Paraguay

⁴ Hong Kong is designated only under sections 71(4) and 73(5) so as to remove its obligation to provide evidence to secure an arrest warrant. However, in accusation cases it must still prove a *prima facie* case.

⁵ It is anticipated that Monaco will be designated to remove the *prima facie* evidence requirement in the near future.

Peru

Russia

Saint Christopher and Nevis

Saint Lucia

Saint Vincent and the Grenadines

San Marino⁶

San Marino

Serbia

Seychelles

Sierra Leone

Singapore

Solomon Islands

South Africa

Sri Lanka

Swaziland

Switzerland

Tanzania

Thailand

The Bahamas

The Gambia

Tonga

Trinidad & Tobago

Turkey

Tuvalu

Uganda

Ukraine

United Arab Emirates

United States

Uruguay

Vanuatu

Western Samoa

Zambia

Zimbabwe

⁶ It is anticipated that San Marino will be designated to remove the *prima facie* evidence requirement in the near future.

Appendix F Ministry of Justice High Level Cost Benefit Analysis of Removing Legal Aid Means Testing in Extradition Case

Summary of Impacts

Ministry of Justice (MoJ) have produced high level scenarios of the potential annual savings and costs that could result from abolishing criminal legal aid means testing for extradition cases. In producing these high level scenarios, the following factors have been considered:

- the potential increase in legal aid costs from those individuals currently either not applying for criminal legal aid or those applying for but not being granted criminal legal aid;
- the potential savings from fewer court adjournments and delays;
- the potential savings from reduced pressure on remand prison places;
- the potential savings to Crown Prosecution Service (CPS);
- reduced claims on Central Funds¹ as a result of fewer privately funded extradition cases.

Given issues with data availability and quality, MoJ developed high level scenarios covering a range of possible situations, particularly in relation to the percentage of delays caused by legal aid means testing and the length of time associated with such delays.

Summary: Estimated Annual Costs & Savings Table

Cost Type	Annual Increase in Potential Costs	Annual Potential Savings
Criminal legal aid costs	£450,000	
Remand places		£100,000 to £550,000
Claims from Central Funds		£100,000

¹ Individuals who are found not guilty in criminal cases and who have paid privately for their defence may have their expenses reimbursed, including legal costs, from Central Funds. The Ministry of Justice is responsible for the Central Funds budget which is separate and distinct from the Legal Aid budget.

Courts		£20,000 to £40,000
CPS		£20,000 to £40,000
Total	£450,000	£250,000² to £750,000²

There is a large range in the estimates because of the uncertainties around some of the assumptions. Therefore, the estimates should be viewed as indicative.

The results are inconclusive in terms of whether there would be a net increase in costs. They suggest that, notwithstanding the uncertainty around key assumptions, MoJ could expect anything from a net annual increase in costs of £200,000 to a net annual decrease in costs of £300,000 if legal aid means testing was to be abolished for extradition cases.

If MoJ considers the likely “cash” impacts, it is estimated that there would be a net increase in cash spending as increased legal aid costs are likely to result in an increase in cash spend whereas increased remand places (the greatest source of cost savings) are unlikely to have an impact on actual cash spend.

Background

There is concern from the Independent Review Panel on Extradition (IRPE) that the extradition process is not as efficient as it could be. The Panel feels that there are too many adjournments and ineffective hearings.

Evidence to the IRPE leads the Panel to suspect that part of the inefficiency stems from delays in the legal aid means testing process which means that defence lawyers request an adjournment of the substantive extradition hearing pending a decision on the grant of legal aid.

The IRPE believes that if means testing was to be removed, it would eliminate a barrier to the smooth running of the extradition process. This could generate net savings to the Criminal Justice System (CJS) through more effective use of court time and earlier disposal of cases which would reduce pressure on the population of remand prisoners.

It is against this background that MOJ were commissioned to undertake short term analysis:

- to determine the actual impact of criminal legal aid means testing on the extradition process, and
- to identify the implications for costs and savings if criminal legal aid means testing were to be abolished in extradition cases.

Plausible high level scenarios were constructed based on a series of assumptions. This approach was adopted in light of the lack of robust data on both the causes of adjournments and the consequences of adjournments. As with all scenarios, there is a degree of subjectivity involved in the analysis. However, as with all studies of this sort, this approach was fully justified given the time and data constraints and the high level purpose of the analysis.

² These total figures have been rounded up to the nearest £50,000.

Were this analysis to be extended, these are the sort of issues that could warrant further exploration:

- More detailed assessment of the extradition process to determine if legal aid means testing is indeed a barrier in the extradition process, and.
- Collection and analysis of more detailed data around the extradition process. If such data could not be identified, the undertaking of a data collection exercise to obtain in particular data on the length of delays resulting from adjournments.

Adjournments Resulting from Criminal Legal Aid Means Testing

A key issue when assessing potential savings is to understand the extent to which the criminal legal aid means testing process can lead to adjournments. There is a suspicion among some District Judges that criminal legal aid means testing is a major cause of adjournments. This is echoed by anecdotal evidence from the CPS that possibly more than 50% of adjournments are caused by issues related to the means testing scheme.

It is impossible to corroborate these anecdotal reports as there is no recorded data on the causes of an adjournment in extradition or other criminal proceedings. Furthermore, MoJ cannot assess the extent to which solicitors requested an adjournment citing criminal legal aid means testing as the main reason even if this was not the primary reason.

Potential Increase in Costs

The main increase in costs arising from the removal of means testing fall into two categories: - extending legal aid to 'failed' claimants and extending legal aid to those individuals who would not otherwise apply for criminal legal aid. In this analysis MOJ have not considered the consequences for criminal legal aid in extradition appeals.

'Failed' Claimants

To estimate the potential increase in criminal legal aid costs from those that have applied but failed on means, the research takes the percentage of individuals who failed and assumes that without a means testing process all would have been granted legal aid. It has also been assumed that their legal aid costs would have been identical to those currently receiving criminal legal aid at an average cost of £3,200 per case.

New Claimants

For the purposes of estimating the potential impact on criminal legal aid costs, it is assumed that between 32% and 38% of individuals facing extradition proceedings do not currently apply for criminal legal aid.

From this tranche of individuals, it is assumed that a proportion will not apply for a legal aid representation order as the issue of extradition will be resolved at the first court hearing for which representation by the court duty solicitor will be available. It is also assumed that a small proportion will still choose to instruct a lawyer on a private fee-paying basis regardless of whether criminal legal aid is means tested or not.

However, a proportion of individuals not currently applying for legal aid would apply if means testing was removed. It is assumed that between 50% and 58% of all individuals who do not currently apply would now do so. These figures are based on the situation prior to the introduction of criminal legal aid means testing in magistrates' courts in October 2006.

It is further assumed that the criminal legal aid costs of those individuals who now choose to apply would have been identical to those currently receiving legal aid at an average cost of £3,200 per case. It is likely that current privately funded legal costs exceed £3,200.

The research does not include any costs arising from additional administration associated with the criminal legal aid application process. It does also not consider any change in the outcome of cases.

Potential Savings

The main potential savings from removing criminal legal aid means testing are reduced adjournments; this should result in reduced time spent on remand and reduced time allocated to extradition hearings in magistrates' courts.

There will also be some potential savings for CPS as they sometimes instruct external counsel for extradition cases rather than use 'in-house' lawyers. Where external counsel are instructed and the hearing is adjourned, payment will still have to be made.

There will also be some reduction in claims to Central Funds as a result of a reduction in privately funded cases. In these cases, if extradition is denied, the defendant can currently reclaim their legal costs from MOJ's Central Funds budget.

The research assumes no other potential savings from the removal of means testing in extradition cases.

Remand Savings

When individuals are held on remand awaiting their court hearing, any delays in the extradition process can lead to additional time spent on remand.

To estimate the reduction in time spent on remand as a result of the means testing process, the research estimates the delay in proceedings associated with each adjournment. The total number of adjournments is multiplied by the proportion of adjournments attributed to mean testing issues and further multiplied by the average delay caused by each adjournment.

MOJ then multiply by the annual unit cost for a prison place which is £40,000 per year.

These remand prison place savings are unlikely to result in reduced cash spend.

Court savings

When a case is delayed as a result of an adjournment, court time is used up by the adjournment hearing. MOJ have assumed that each adjournment hearing takes 15 minutes.

All adjournment hearings throughout the year are added up and multiplied by the proportion of adjournments that resulted from criminal legal aid mean testing issues. This gives the total magistrates' court time - in minutes - that can be attributed to legal aid mean testing issues. This is multiplied by the average unit cost per hour to give an overall estimate for the magistrates' court costs attributed to criminal legal aid mean testing issues.

These court time savings are unlikely to result in reduced cash spend.

CPS

The CPS will be represented at each adjourned hearing. In a proportion of these hearings, CPS will have instructed external counsel to attend the hearing for which payment will have to be made.

It is assumed that CPS costs resulting from adjournments can be calculated from the number of adjournments multiplied by the percentage of adjournments handled by an external counsel, and further multiplied by the unit cost for an external counsel to attend an adjournment hearing.

These CPS savings are likely to result in reduced cash spend the extent of which is dependent on the use of external counsel and the contractual arrangements with them.

Central Funds

When an extradition request is refused by the court in a privately funded case, the individual may claim their defence costs from Central Funds. The amount that is payable under such a claim is limited to 'reasonable' legal costs and expenses.

However, provisions under *Legal Aid, Sentencing and Punishment of Offenders Bill* will reduce the amount that can be claimed to levels which are more consistent with current legal aid rates.

This analysis will assume that *Legal Aid, Sentencing and Punishment of Offenders Bill* is passed successfully and that future claims on Central Funds will, therefore, be pegged at criminal legal aid rates.

With any removal of means testing, those who now apply for criminal legal aid and are rejected will in future be granted legal aid. They will, therefore, not claim from Central Funds if their cases are successful. Similarly, those who do not currently apply for criminal legal aid but who decide to do so in the future will also not claim from Central Funds if their cases are successful.

To estimate the savings to Central Funds, the total number of privately funded cases is multiplied by the proportion of cases in which extradition is refused. This figure is subsequently multiplied by the average cost of a case – this figure is expected to mirror legal aid rates once the provisions in the *Legal Aid, Sentencing and Punishment of Offenders Bill* are passed.

These Central Funds savings are likely to result in reduced cash spend

Summary of Analysis

Throughout the following analysis MOJ have used the 2010 (calendar year) figure of 1,350 extradition cases a year. All other figures used in this analysis have also been based on 2010 data, although this might not capture recent trends in extradition volumes, performance or outcomes.

Potential increase in costs:

Criminal Legal Aid

MoJ have been able to estimate the total cost of removing means testing for extradition cases:

Cost of extending criminal legal aid to “rejected” applicants ranges approximately from £270,000 to £295,000 per year.

Cost of extending criminal legal aid to new applicants ranges approximately from £140,000 to £190,000 per year. This is based on the assumption that legal aid costs are approximately £3,200 per extradition case.

The proportion of those currently not claiming criminal legal aid who would decide to do so if it was no longer means tested is assumed to range from 50% to 58%.

It is assumed that the proportion of those currently applying for criminal legal aid and who are not financially eligible is estimated at approximately 10% and that the percentage of extradition cases where criminal legal aid is claimed ranges from 62 to 68%.

Therefore, the total estimated cost of removing legal aid means testing from extradition cases is approximately between £435,000 and £460,000³ per year. This relatively narrow range is then ‘rounded’ to the single value of £450,000.

Potential savings:

Remand Savings

There will be reduced numbers held on remand as extradition cases are less likely to be adjourned.

The analysis assumes that each adjournment results in a delay of between 1 and 3 weeks, and that criminal legal aid means testing delays are responsible for between 33% and 66% of all

³ To ensure consistency, the high value for the “rejected applicants” range must be considered with the low value in the “new applicants” range and vice versa. So the calculated range is £270,000 (low rejected applicants) + £190,000 (high new applicants) which equals £460,000 as one total estimate and £295,000 (high rejected applicants) + £140,000 (low new applicants) = £435,000 as the other total estimate. Therefore the total range is £435,000 up to £460,000.

adjournments. Furthermore, it assumes that the percentage of extradition hearings that are adjourned for any reason is 40% and that the average number of hearings after an adjourned hearing is 1.2

On this basis, it is estimated that there will be a reduction of between approximately 2.3⁴ and 13.5⁵ remand prison places. Using a unit cost of £40,000 per prison place per year, MoJ estimates annual savings of between approximately £100,000⁶ per year and £550,000⁶ per year.

These savings are unlikely to result in reduced cash spend.

Court savings

There will be reduced time taken up in the magistrates' courts with adjournments.

The total time saved annually in magistrates' courts (assuming that the time allocated in magistrates' court for an adjournment hearing is 15 minutes) is estimated to be between approximately 53 hours (based on 33% of adjournments caused by legal aid) and 106 hours (based on 66% of adjournments caused by legal aid).

Therefore the total court savings are estimated to range between:

- 53 hours * £400 (unit hourly cost of magistrates' court - unit costs for those magistrates' courts hearing extradition cases are assumed to reflect the average unit cost taking into account all magistrates' courts across England and Wales).

This equals approximately £21,000 per year.

And:

106 hours * £400 (unit hourly cost of magistrates' court)

⁴ To calculate remand places, an assumption must be made about the percentage of individuals in extradition cases who are remanded in custody; MOJ assumed this figure to be 55%.

1350 (annual number of extradition cases) * 55% (% remanded in custody) * 1 week (length of delay) * 1.2 (average number of adjournments once adjourned) * 33% (% of adjournments caused by criminal legal aid means testing) * 40% (% cases with adjournments) / 52 weeks.

This equates to 2.26 remand prison places, this was rounded up 2.3 remand prison places.

⁵ To calculate remand places, an assumption must be made about the percentage of individuals in extradition cases who are remanded in custody, MOJ assumed this figure to be 55%.

1350 (annual number of extradition cases) * 55% (% remanded in custody) * 3 weeks (length of delay) * 1.2 (average number of adjournments once adjourned) * 66% (% of adjournments caused by Legal Aid means testing) * 40% (% cases with adjournments) / 52 weeks.

This equates to 13.6 remand prison places, this was rounded down to 13.5 remand prison places.

⁶ Rounded to the nearest £10,000.

This equals approximately £42,000 per year.

Court savings are therefore estimated to be between £20,000 and £40,000⁸ per year but these savings are unlikely to result in reduced cash spend.

CPS

There will be reduced CPS time spent on attending adjournment hearings.

The annual reduction in the number of adjournments is estimated to be between approximately 212 hours (based on 33% of adjournments caused by legal aid) and 424 hours (based on 66% of adjournments caused by legal aid).

Therefore, assuming a unit cost of £80 per adjourned hearing and that all adjournments involve external counsel⁷, the total CPS savings are estimated to range between approximately:

212 adjournments * £80 (CPS external counsel adjournment cost)

This equals approximately £17,000 per year

And:

424 adjournments * £80 (CPS external counsel adjournment cost)

This equals to approximately £34,000 per year

CPS savings are, therefore, estimated to range between £20,000 and £40,000⁸ per year, most of this will result in reduced cash spend.

Central Funds

There will be reduced claims on Central Funds resulting from a decrease in privately funded cases.

Assuming that the *Legal Aid, Sentencing and Punishment of Offenders Bill* is passed, this will lead to claims from Central Funds being aligned with standard legal aid rates. It is further assumed that the percentage of privately funded cases that result in extradition being denied is 22%.

Savings from those individuals currently 'rejected applicants' for legal aid ranges from approximately £60,000 up to £65,000 per year.

Savings from those 'new applicants' currently not applying for legal aid ranges from approximately £42,000 down to £30,000 per year.

⁷ This is an overestimate as some adjournments are handled by internal CPS lawyers.
⁸ Rounded up to the nearest £10,000.

Therefore, the total savings from claims on Central Funds will range from approximately £95,000 to £100,000⁹ per year. This relatively narrow range is then ‘rounded’ up to the single value of £100,000.

These savings are likely to result in reduced cash spend.

Total savings

The total savings from abolishing the criminal legal aid means test in extradition cases are approximately between £250,000¹⁰ and £750,000¹⁰ per year. Remand and Central Funds account for the bulk of these potential savings.

However, the only savings which are likely to result in reduced cash spend are the reduced claims from Central Funds (approximately £100,000 per year) and savings to CPS (approximately £20,000 to £40,000 per year).

Conclusion

MoJ were unable to determine the impact of criminal legal aid means testing in extradition case adjournments. There was no data with which to estimate objectively the proportion of adjournments which may be attributed solely to the current criminal legal aid means testing process.

The potential increase in costs from abolishing criminal legal aid means testing for extradition cases are estimated to be approximately £450,000 per year. The potential savings resulting from abolition of the means test are estimated to be between £250,000 and £750,000 per year, mainly reflecting the uncertainty in the savings from a reduction in the remand population.

Given the numerous assumptions underpinning this analysis, both the range of savings and costs should be seen as indicative ‘broad brush’ estimates. However, taken together the numbers are inconclusive regarding the net effect of removing criminal legal aid means testing for extradition cases.

However, MoJ have identified key reasons why there would probably be a net increase in costs:

- There is reason to believe that the potential savings have been overstated:
 - It was assumed that 1/3 to 2/3 of adjournments are caused by legal aid means testing delays. HMCTS have indicated that this was probably an overestimate even in 2010 (the year on which this analysis is based). Since then there has been a further improvement in legal aid means testing processing which suggests the real proportion of adjournments caused by criminal legal aid means testing delays is now lower than the 1/3 to 2/3 assumption.

⁹ To ensure consistency the high value for the “rejected applicants” range must be considered with the low value in the “new applicants” range and vice versa. So the calculated range it is £60,000 (high rejected applicants) + £42,000 (high new applicants) which equals £102,000 as one total estimate and £65,000 (high rejected applicants) + £30,000 (low new applicants) = £95,000 as the other total estimate. Therefore the total range is £95,000 up to £102,000 (this is then rounded down to £100,000.

¹⁰ These total figures have been rounded up to the nearest £50,000.

- It was assumed that the time delay caused by these adjournments leads to an increase in time spent on remand of between 1 week and 3 weeks. HMCTS have indicated that this is very likely to be an overestimate. Some extradition cases are even re-listed within a couple of days.
- The increased costs are attributed to criminal legal aid; this would constitute a 'real' increase in spending in cash terms whereas much of the estimated savings, especially from reduced remand prison places, are unlikely to result in reduced cash spend. This perhaps strengthens the view that abolishing criminal legal aid means testing would result in a net increase in actual cash spending.

