Extradition Review 2010/2011

Submissions on behalf of the Crown Prosecution Service

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1. Introduction

1.1 In response to an invitation from the Government's recently appointed Extradition Review Panel ('the Panel'), this document sets out the observations of the Crown Prosecution Service ('CPS') concerning the areas on which the Panel has announced it will focus in the course of its work.

1.2 The five areas on which the Panel will concentrate are:

(i) the breadth of Secretary of State's discretion in an extradition case;
(ii) the operation of the European Arrest Warrant, including the way in which those of its safeguards which are optional have been transposed into UK law;
(iii) whether the forum bar to extradition should be commenced;
(iv) whether the US-UK Extradition Treaty is unbalanced;
(v) whether requesting states should be required to provide prima facie evidence.

1.3 The five areas are very broad. What follows is not therefore an exhaustive response from the CPS, but sets out general observations in the light of the most commonly expressed concerns about the United Kingdom's current extradition arrangements.

2. Background

2.1 The CPS is the authority in England and Wales responsible for the bulk of extradition proceedings. It acts on behalf of foreign judicial authorities in proceedings under Part 1 of the Extradition Act 2003 ('the 2003 Act') and for foreign states under Part 2; it issues the majority of EAWs under Part 3 and is predominantly responsible for drafting extradition requests to states outside the EAW scheme.

2.2 The authority of the CPS to conduct extradition proceedings on behalf of foreign authorities is by virtue of section 3 of the Prosecution of Offences Act 1985 and section 190 of the 2003 Act.

2.3 Much of the work of the CPS in this field is undertaken by a specialist unit within the Special Crime Division at CPS headquarters. That unit is responsible for representing all requesting foreign states and judicial authorities in the prosecution of their requests at all levels within the domestic court system. The unit also holds responsibility for drafting extradition requests for the CPS (and some other agencies) to all category 2 territories. Responsibility for drafting import EAWs is devolved to local CPS areas.

2.4 Since the 2003 Act came into force, the CPS has witnessed a radical increase in the number of extradition cases, particularly EAWs. There has been a year-on-year increase from a total of 254 cases in 2004 to 813 in 2007 and so far at the time of writing, 1654 in 2010.

3. The role of the Secretary of State

3.1 The Secretary of State's role in extradition proceedings is limited. The discussions and various documents produced in the consultation phase prior to the enactment of the 2003 Act demonstrate that conferring a narrower limit on the Secretary of State's role was a deliberate development.

3.2 In summary, the position of the CPS is that the limitations placed upon the Secretary of State's role by the 2003 Act have made the extradition process more efficient and have not resulted in any risk of unfairness to requested persons. The CPS does not identify a need for any additional limits on the Secretary of State's power, nor does it favour a greater discretion being given to the Secretary of State to intervene or stop proceedings. This would represent a step backwards to the previous legislation and would create significant delay and extensive collateral litigation in the course of extradition proceedings.

3.3 Complications which currently arise at the stage where the Secretary of State is involved in proceedings are to a great extent attributable to delay and/or where a change in circumstances has occurred from the point at which a case has been sent to

the Secretary of State. Difficulties can arise in circumstances where the Secretary of State has made an order for extradition but some supervening event occurs prior to surrender. In those circumstances it is unclear whether the Secretary of State has a legitimate role in preventing extradition on human rights grounds, or whether, following an order for extradition, such arguments are more properly a matter for the courts.

3.4 Under the 1989 Act the extradition process was executive driven: The Secretary of State was responsible for deciding whether extradition proceedings could commence and, if so, was again responsible at the conclusion of court proceedings, for determining whether an order for extradition should be made.

3.5 The reduction of the Secretary of State's role, particularly at the start of the extradition process, was consistent with one of the core aims of the 2003 Act, which was to speed up the process of extradition. Ensuring as many decisions as possible were *judicial* and were made within the context of the extradition hearing minimised the scope for collateral legal challenge. This is a general ambition which the CPS supports.

3.6 Under the present legislation, the Secretary of State's involvement is different under Part 1 and Part 2 of the 2003 Act. Under Part 1, in all but exceptional cases, the Secretary of State has no active role. The process under the EAW scheme is for the requesting judicial authority to transmit an EAW to the receiving state's designated authority (in England and Wales that is the Serious Organised Crime Agency). The EAW is then made available to law enforcement officers, the CPS, the court, and ultimately the requested person.

3.7 The 2003 Act provides for two situations where the Secretary of State may intervene: Firstly by virtue of section 179 where there are competing claims to extradition under Parts 1 and 2 of the Act. Secondly, by virtue of section 208, in cases concerning national security.

3.8 In respect of the first of these reserved categories, where a Part 1 warrant has been certified by SOCA and a certificate issued by the Secretary of State in respect of a request under Part 2, the Secretary of State has significant powers under section 179(2): If neither sets of proceedings has yet been disposed of she may order proceedings on one of the requests to be deferred until the other has concluded. If an

extradition order has been made in respect of either, she may order extradition to be deferred pending disposal of the other. Limitations on which factors the Secretary of State may take into account when determining which competing request should prevail are established by section 179(3).

3.9 As concerns the second of the reserved categories, Section 208 entitles the Secretary of State to stop extradition proceedings where they are contrary to national security and where she is satisfied that in committing the alleged conduct, the requested person was acting for the purpose of assisting in the exercise of a function conferred or imposed by or under an enactment, or as a result of an authorisation given by the Secretary of State.

3.10 Whilst these reserved powers are potentially significant, the CPS has no experience of such powers ever having been used. On one view the powers under section 179 of the 2003 Act could be placed under the court's control as in circumstances where there are two Part 1 competing warrants; however Parliament plainly intended that the Secretary of State should retain her powers in these unusual circumstances. As far as national security is concerned, it is submitted that retention of these powers by the Secretary of State is unproblematic in both practice and principle.

3.11 Under Part 2 of the 2003 Act, the Secretary of State's powers are more extensive and resemble more the powers held under the previous statutory regime. Extradition arrangements under Part 2 are based on a range of international instruments and a far greater degree of government to government involvement. This is to be contrasted with proceedings under Part 1 which are based on the EAW scheme and occur between local judicial authorities across Europe. In respect of Part 2 requests, as well as holding the powers set out above, initially the Secretary of State is responsible for certifying valid requests, and is then required to send the request to an appropriate judge.

3.12 Following the extradition hearing, the Secretary of State again has a statutory function. Whilst no longer required to consider whether it would be wrong, unjust or oppressive to order surrender, she must consider whether those matters preventing or deferring extradition set out at sections 94-96A are made out. That may involve exercising her right not to order extradition where the requested person could face the death penalty on surrender, or where there are no 'speciality' arrangements with the requesting country or the person was extradited earlier to the UK. If the Secretary of

State does find that surrender is prohibited, she must order the discharge of the requested person. If none of the prohibitions apply, or appropriate assurances have been given by the State, the Secretary of State must order the person to be extradited.

3.13 The CPS is of the view that these functions should remain with the Secretary of State: So long as the end of the Secretary of State's involvement results in a decision on whether an order for extradition should be made, it appears right that the matters dealt with under sections 94-96A should be considered once a case has been sent to the Secretary of State as part of her function.

3.14 In addition to the functions of the Secretary of State, the time limits for the performance of those functions seems appropriate. If the requested person wishes to make representations he or she must do so within six weeks of the case being sent to the Secretary of State. The Secretary of State has then to make her own decision within two calendar months of the day the case is sent to her. In practice, if the representations are complex the Secretary of State may apply to the High Court for an extension of the decision date. More than one extension may be sought in any one case, and granted if it appears necessary. The CPS is not aware that this practice has caused any difficulties to date and does not invite any amendment to extradition arrangements in this regard.

3.15 In conclusion, the CPS does not invite any significant amendment to the role of the Secretary of State. It particularly urges caution against expanding any discretion to include a wide power to intervene or stop extradition proceedings. It is submitted such a development would result in unpredictable, protracted and highly litigious extradition proceedings.

4. Operation of the EAW scheme

4.1 At the outset it is necessary to recognise that the 2003 Act gave effect to what was a radical departure from previous extradition arrangements established by the '*Council Framework Decision on the European arrest warrant and the surrender procedures between Member States*' ('the Framework'). In its pre-amble, the Framework explains that:

> "*According to the Conclusions of the Tampere European Council of 15 and 16 October 1999, and in particular point 35 thereof, the formal extradition procedure should be abolished among the Member States...*

> *The objective set 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..."*

4.2 At the heart of the EAW scheme, and central to its functioning, is the principle of mutual trust and recognition between Member States. This was clearly expressed by Baroness Hale in Hilali, Re [2008] UKHL 3, where at paragraph 32 she said this:

> *"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."*

Acceptance of this principle and approach enables the expeditious surrender of requested persons between Member States.

4.3 The view of the CPS is that the EAW scheme is without question a useful tool in effective cross-border law enforcement throughout Europe, and is widely used. It must be noted that the United Kingdom clearly benefits by being a member of the EAW scheme in that it is able to issue Part 3 warrants to secure the expeditious surrender of requested persons to this jurisdiction.

4.4 For some time doubts have been expressed by defence representatives and interested groups about the validity of the underlying principle of mutual recognition. The proponents of these doubts point to varying standards of justice across the Member States. The CPS is not is in a position to assess the merit in such criticisms; however it must be observed that the principle of mutual recognition is a cornerstone of the EAW scheme. All Member States are contracting parties to the European Convention on Human Rights, and must therefore be expected to safeguard those rights, including Article 6. Remedies for any breaches exist within Member States' domestic courts

and the European Court of Human Rights. To this extent, the CPS does not accept the strength of the criticisms made against the EAW scheme's reliance on the principle of mutual recognition between Member States. The CPS is also conscious that the civil and inquisitorial legal systems of the vast majority of the Member States are entirely alien to our own adversarial common law system. Great caution and sensitivity is required before any fair assessment of the comparative adequacy of foreign legal systems can be reached.

4.5 Any significant alterations in the way the United Kingdom approaches its obligations under the EAW scheme would require negotiation and co-operation at Member State level. In such circumstances it would be difficult to see how any substantial amendments could be made which departed from the core principle of mutual recognition. As Lord Bingham said in Paragraph 5 of Dabas, NO. [2007] UKHL 6 *"framework decisions are binding on member states as to the result to be achieved but leave to national authorities the choice of form and methods. In its choice of form and methods a national authority may not seek to frustrate or impede achievement of the purpose of the decision, for that would impede the general duty of cooperation binding on member states under article 10 of the EC Treaty".*

4.6 Aside from the concerns about the principle of mutual recognition, by far the most commonly raised concern raised against the EAW scheme is the quantity of EAWs issued for what appear to be comparatively minor (and sometimes quite old) offences. There is no avoiding the fact that some Member States issue far more EAWs than others. It appears that some issue EAWs for every eligible offence where a defendant is at large, either as an accused or convicted person. Such practices inevitably lead to the extradition of requested persons from the United Kingdom for what appear to be relatively insignificant criminal offences and also result in a heavy burden on receiving States in administering the EAW scheme. This is inevitably a burden felt by the courts, the legal aid system and the CPS.

4.7 The ways in which Member States apply the Framework is of course largely a matter for their domestic law. The CPS would however welcome some form of discussion at Member State level aimed at bringing about a more consistent approach as to how the EAW scheme is operated across Europe. It is understood that the difficulties described above are difficulties experienced by a number of Member States.

4.8 To some extent a filter exists under the Framework and under the 2003 Act by the requirements of sections 64 and 65 of the 2003 Act. These sections require a minimum term of imprisonment for criminal conduct to constitute an 'extradition offence'. However, an offence, for example Theft, may be committed by both serious

and trivial conduct. One frequently finds that 'trivial conduct' leads to the issue of EAWs in certain Member States, usually those which have no 'public interest' filter. To that extent the filter already in place does not operate as a filter on the grounds of *seriousness* of criminal conduct.

4.9 Partly in response to the volume of EAWs issued but also in connection with the apparently trivial conduct the subject of many EAWs, it has been suggested that some kind of bar to extradition based on 'proportionality' should be introduced. The CPS has considerable misgivings about the introduction of such a bar.

4.10 In the first place, whilst there is clearly no standalone 'proportionality' bar to extradition similar considerations do feature as part of any enquiry into whether the interference with a requested person's Article 8 ECHR rights, which extradition amounts to, can be justified.

4.11 As expressed above, the view of the CPS is that if the issue of proportionality needs to be addressed, discussions would have to take place at the Member State level. The view of the CPS is that consensus would be preferable to a system where each Member State has unfettered scope to impose its own views on when extradition is or is not 'proportionate'. Indeed, arriving at a consistent position on the question of proportionality, which will necessarily entail judgements about what conduct offences are or are not serious, across the breadth of Europe is fraught with difficulty. What has already become abundantly clear in the seven years of the EAW scheme is that what appears to be a less serious offence in one country may, for good reason, be treated very differently elsewhere. Such issues require sensitive handling: The CPS agrees with the approach consistently taken by the courts in this jurisdiction, which is to tread cautiously around the passing of value judgments on the seriousness of criminal conduct in different jurisdictions.

4.12 Furthermore, the CPS observes that writing a proportionality bar into the United Kingdom's domestic legislation may, where successfully invoked, ultimately prevent extradition, but it would not address the volume of EAWs processed by the courts. Any suggestion that the designated authority should be able to take proportionality into account when considering whether or not to certify an EAW is to be deprecated: Determining proportionality is eminently a judicial function and one in which all parties to the proceedings are likely to seek involvement. It can be safely predicted

that placing any consideration of proportionality with SOCA and outside of the extradition hearing would likely lead to an increase in judicial review challenges.

4.13 A further criticism often advanced against the operation of the EAW scheme was that the time limits to appeal, particularly under Part 1 of the 2003 Act were too short and caused injustice. This criticism appears to have faded more recently. Whilst the window to appeal validly is relatively short, this is consistent with the principle of expedition under Part 1 of the Act. The experience of the CPS is that the time limits are generally very well understood by defence practitioners and defendants. The District Judges invariably tell requested persons in the clearest terms what their obligations are if they wish to appeal. The great majority of litigants in person, both in custody and remanded on bail, are able to successfully appeal in the required way. The CPS concludes that the strictness of the time limit is well known and adhered to. The *need* for strictness is also well appreciated (see Mucelli and The Government of the Republic of Albania and the Secretary of State for the Home Department [2007] EWHC 2632 (Admin) and Mucelli v Government of Albania; Moulai v Deputy Public Prosecutor in Creteil, France [2009]. In the most recent cases where appeals have been prevented due to a failure to comply with time limits it has more often than not been attributable to oversight on the part of the appealing party (whether CPS or the requested person's representatives) see, for example Salazar-Duarte v The Government of the United States of America [2010] EWHC 3150.

4.14 One area which the CPS does invite the Panel to consider is the automatic right to a statutory appeal. Section 26 has resulted in a groundswell of appeals with no filtering mechanism. It is now common to see litigants in person raising no issues in opposition to their extradition before City of Westminster Magistrates' Court and then delaying extradition proceedings for periods often in excess of four months because they have lodged an appeal. The incentive to do this, particularly in conviction cases, is clear: Many defendants would prefer to serve as much of their sentences in this jurisdiction than in the requesting state, or they would prefer to delay extradition to use the time in an effort to compromise the EAW in some way. Some effort is made to police this problem by the issuing of 'unless orders' and use of strike out powers, however there is an understandable reluctance to pursue this course where, often foreign, defendants are representing themselves.

4.15 Aside from the impact on the authorities in this jurisdiction caused by substantial delay in what are frequently unmeritorious appeals (many being withdrawn by

consent very shortly before the hearing is to take place), it should also be recognised that delay causes significant problems for requesting states in successfully conducting domestic prosecutions. It is often the case, particularly in Italian cases, that extensive delays result in severe procedural difficulties when conducting a trial following surrendered.

4.16 The CPS invites the panel to consider whether the appeal mechanism should be modified to filter out unmeritorious appeals at an early stage in the process, perhaps by introducing a leave mechanism.

5. Whether the forum bar to extradition should be commenced

5.1 There is currently no forum bar to extradition proceedings. Sections 19B and 83A were inserted into parts 1 and 2 of the 2003 Act respectively, by paragraph 5 of Schedule 13 to the Police and Justice Act 2006 but are not yet in force.

5.2 Sections 19B and 83A would permit extradition to be barred where a significant part of the conduct alleged to constitute the extradition offence occurred in the UK, and 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. The 'interests of justice' test involves a judge taking into account whether the UK authorities have decided to initiate proceedings against the person requested.

5.3 Currently, since neither section are in force, the forum argument is advanced on the basis that trial in a foreign jurisdiction is arbitrary for the purposes of Article 6 ECHR and amounts to a disproportionate interference with a requested person's Article 8 ECHR rights.

5.4 Such arguments have not found favour. Most recently this issue was addressed in Mehtab Khan v Government of the United States of America [2010] EWHC 1127 (Admin) where at paragraph 45 Mr. Justice Griffith Williams said this:

> *"45 Mr Fitzgerald submitted there is a full list of the relevant factors as to the determination of the appropriate* forum *for the trial of a criminal matter where there are two competing jurisdictions set out in the judgment of La Forest J in US –v- Cotroni (1989) 48 CCC (3d) 193 ; these include where the impact of the offence was likely to have been felt, whether the evidence is mobile, in what jurisdiction were most of the acts in furtherance of the crime committed, the nationality and residence of the accused and the severity of*

the sentence the accused is likely to receive in each jurisdiction. He cited Laws LJ in Bermingham (above) at paragraph 121:

> *"I do not accept [the USA government's] submission that the possibility of a trial in the United Kingdom is legally irrelevant in a case like this. There might be an instance in which such a possibility could tip the balance of judgment in favour of a conclusion that the defendant's extradition would amount to a disproportionate interference with his Article 8 rights. That, I think, has to be accepted if section 87 is the constitute effective judicial protection of the Convention guarantees"*

But it is important to note that Laws LJ continued:

> *"What it would take to make such a case is a very different matter"*

46 Had this issue been raised at the extradition hearing, it is in inconceivable that the District Judge would have ruled in favour of it. In Norris v. Government of the United States of America (No.2) [2010] UK SC9 at paragraph 67, the President of the Supreme Court, Lord Phillips said:-

> *"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 the countries treaty obligations. Unless the judge reached the conclusion that the scales are finely balanced he should not enter into an enquiry as to the possibility of prosecution in this country".*

5.5 The position therefore appears to be that without sections 19B and 83A coming into force, it will be very difficult for a requested person to raise forum issues meaningfully.

5.6 The CPS however has concerns about the forum bar being enacted: In respect of proceedings under Part 1, there appears to be a significant potential for conflict with principles established by the Framework. Where forum arguments are advanced by requested persons in an attempt to bar extradition it arguably risks undercutting the principle of mutual recognition of judicial decisions and the objective of ensuring "*free movement of judicial decisions in criminal matters*". Under both Parts 1 and 2 enacting the forum bar is a decision that may lead to generally more complicated and prolonged extradition proceedings.

5.7 In the first place, the number of cases which would likely be impacted should not be underestimated. Many EAWs and Part 2 requests concern cross-border crime where such issues are likely to be raised. Already, to the extent that it is possible, forum

arguments are routinely ventilated in many cases (see above). Such arguments would undoubtedly increase were sections 19B and 83A to be enacted.

5.8 It can also be anticipated that questions as to what constitutes a 'significant' part of the conduct occurring in the United Kingdom will provoke a significant degree of argument. What is 'significant' in the context of multi-national conspiracies may be extremely hard to define with any consistency or certainty.

5.9 The CPS is also alert to the difficulty which may arise in identifying clear and workable principles as to when and how domestic prosecution authorities are required to consider mounting a prosecution in the United Kingdom, and the level of considerations required to fulfil any such duty. There are obvious complications apparent in defining how a prosecuting authority in the UK should balance the competing interests of prosecution agencies of other jurisdictions with its own position and responsibilities, and the degree to which they must assess or attach weight to a requested person's representations.

5.10 The CPS also notes that introducing a forum bar will ultimately place the extradition courts in what may be an undesirable position: deciding in which jurisdictions prosecutions should occur. This is particularly problematic within the context of EAW proceedings under Part 1 of the Act which is required to operate as a fast track system of surrender. Also, conflicts could arise between the extradition courts and the prosecution authorities. Were a judge to refuse extradition on forum grounds, this decision would not obligate the CPS to initiate domestic proceedings. It is possible, for a number of reasons that extradition would be refused but that no domestic prosecution would follow. Such results could jeopardise relations with foreign states. It must also be remembered that the prosecution authorities are reliant on the submission of case file from the relevant investigator. Without being formally seized of a case and in receipt of relevant papers the CPS is unable to properly consider jurisdictional issues.

5.11 The cases usually cited by supporters of forum are often US extradition requests. However, with the USA, the January 2007 guidance of the Attorneys General of the UK and the USA (and the UK Attorney General's parallel domestic guidance), establishes a framework for dialogue between US and UK prosecutors in the most serious cases involving concurrent jurisdiction. Importantly, such deliberations are very rarely subject to judicial review proceedings. Additionally, within the EU,

liaison with the foreign judicial authority or via Eurojust can already be undertaken and will be required by the Framework Decision of April 2009 (to be implemented by June 2012) on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, which requires contact between Member States to resolve jurisdictional issues. Further, Eurojust guidelines on deciding which jurisdiction should prosecute were published in their Annual Report of 2003, are widely known and respected throughout Member States and are referenced to CPS prosecutors in online guidance.

5.12 In summary, the CPS invites the Panel to consider the potentially very great impact that enacting the forum bar will have, particularly in the context of EAW proceedings.

6. Whether the US-UK Extradition Treaty is unbalanced

6.1 Since 2003, a series of high-profile extradition cases have given rise to controversy about the US-UK Extradition Treaty of 2003 (ratified in 2006). The broad point is made that the changes brought about by the Treaty are unfairly impacting those requested persons who were not intended targets. This criticism can be broken down into the following principle points: (i) the level of evidence required to extradite from the UK to the US is less than vice-versa; (ii) the treaty is one-sided because it permits the Government of the United States to extradite UK citizens and others for offences committed contrary to US law, despite that the alleged offence may have been committed in the UK by a person living and working in the UK; (iii) the imbalance in the Treaty arrangements is made all the more acute given on the one hand the more aggressive law enforcement tactics adopted (for example 'entrapment') and on the other the often substantially higher maximum sentences to which defendants are exposed upon conviction in the US.

6.2 It is well known that prior to the US-UK Extradition Treaty 2003, the US was required to provide prima facie evidence when seeking the surrender of a requested person. Article 8 of the 2003 treaty removes that obligation. In order to comply with the terms of Article 8, the Secretary of State designated the US pursuant to section 84(7) of the Act and so it need not now provide evidence at the extradition hearing. The 2003 treaty does however impose on the UK the requirement to provide "such

information as would provide a reasonable basis to believe that the person sought committed the offence for which extradition is requested".

6.3 There is relatively a high volume of extradition between the UK and the US. It is a state with which the UK has had a co-operative and productive extradition relationship stretching as far back as 1794. Whilst acknowledging the criticisms made of the current extradition arrangement, the position of the CPS is that one must look at what happens in practice. It is essential that any argument about imbalance takes into account the following facts:

(a) Any request must comply with the formal requirements of the Act which sets out minimum standards for the content of a request to amount to a valid request;

(b) All requested persons enjoy the full range of protections under Part 2 of the 2003 Act, including full respect accorded to their Convention rights;

(c) Requests from the United States in practice invariably provide extensive details of the criminal conduct alleged (often greater detail than is provided by those States which must give prima facie evidence). The information provided in the affidavits which form part of the requests, without exception, goes far beyond a bald assertion an offence has been committed.

6.4 Any criticism of an imbalance must also consider the corresponding ease or difficulty with which United Kingdom authorities have secured the surrender of requested persons from the United States under the current arrangements. As a rule, the CPS experiences no difficulty in securing the assistance and co-operation of the United States Government. The regime imposes a predictable and relatively uncomplicated procedure which does not prove onerous for the United Kingdom. It is impossible to be specific, however, the content of US and UK requests is often similar in terms of information provided and overall length: The US requests consist of a sworn detailed affidavit, usually from a prosecutor. Requests to the US from the United Kingdom contain the sworn depositions usually of a CPS lawyer setting out the relevant law and a hearsay statement summarising the evidence, provided by the investigating police officer.

6.5 It is the experience of the CPS that requests made to the US are executed quickly and almost invariably lead to the surrender of requested persons in a timely manner.

6.6 For these reasons, the CPS does not consider that the extradition arrangements between the United States and the United Kingdom are unbalanced *in practice*. We note that this is a view shared by the author of the HOLAB report dated September 2010 that examined the perceived imbalance between the US/UK evidential standards in the extradition process.

7. **Should requesting states be required to provide prima facie evidence?**

7.1 It is assumed that this issue relates only to proceedings under Part 2 of the Act. The position of the CPS is that in respect of Part 1 cases it would be contrary to the Framework Decision to require Member States to provide prima facie evidence. The EAW scheme is predicated upon principles of mutual recognition which make the provision of evidence unnecessary. This approach was supported by Lord Hope in the House of Lords case of Hilali [2008] UKHL 3, where in Paragraph 14 he quoted with approval the quotation of Lord Scott in Cando Armas:" *The merits of the extradition request were to be taken on trust and not investigated by the member state from which extradition was sought.....The principle underlying these changes is that each member state is expected to accord due respect and recognition to the judicial decisions of other member states. Any inquiry by a member state into the merits of a proposed prosecution in another member state becomes therefore inappropriate and unwarranted. It would be inconsistent with the principle of mutual respect and recognition of the judicial decisions in that member state*". Aside from that point of principle it would also have substantial practical impact in Part 1 proceedings: The United Kingdom is already amongst the slowest States within the scheme to process EAWs from arrest to surrender. Adding in more time for prima facie evidence to be considered and argued in court proceedings would risk causing yet further delay. It is the view of the CPS that any requirement for Member States to provide prima facie evidence could only realistically be based upon a decision to leave the EAW scheme. For the reasons set out above the CPS does not advocate such a course.

7.2 In respect of States outside the scope of the EAW scheme, the 1989 Act required more requesting States to provide prima facie evidence than under the 2003 Act. One of the key aims of the current legislation is to remove evidential requirements where

possible, and where not, to simplify the rules on admissibility of evidence. This is in part to facilitate the simplification and speeding up of extradition proceedings.

7.3 If the principle of expeditious extradition is to be retained then the CPS submits there should be no requirement for prima facie evidence in all cases. Many countries with which the United Kingdom has well established relationships of good faith no longer have to provide prima facie evidence. States which are in this position have been designated by the Secretary of State.

7.4 The CPS is not in a position to evaluate the international political impact caused by any renegotiation of treaties to reflect a requirement for prima facie evidence in all extradition cases under Part 2. Domestically however, such a change would undoubtedly herald the return of protracted and more complex extradition proceedings. To require prima facie evidence would place far greater burdens upon the courts to consider potentially substantial amounts of material. Requested persons would routinely be entitled to give and call evidence in proceedings concerning the sufficiency of the evidence against them. These changes would radically alter the extradition regime.

7.5 A broad requirement for prima facie evidence also goes against the prevailing trend in extradition proceedings of leaving 'trial issues' for the courts of requesting States.

7.6 The argument in favour of requiring prima facie evidence is based on a perception that requested persons are exposed to a risk of injustice without it. It must be recognised however that extradition courts in this jurisdiction are bound, irrespective of the presence or absence of prima facie evidence, actively to protect and safeguard requested persons' human rights, combined with a now well established abuse of process jurisdiction to be exercised where there are doubts about the legitimacy of an extradition request.

7.7 In summary it is the view of the CPS that the inability of a court to enquire into whether there is 'a case to answer' in some requests does not expose a defendant to a significant risk of injustice in circumstances where (i) the courts in this jurisdiction are enjoined to consider the requested person's human rights; (ii) the requesting state is a state with which the United Kingdom has a valued history of cooperation and (iii) the court retains an abuse of process jurisdiction to safeguard extradition procedures.

8. Conclusion

8.1 The primary concern of the CPS in submitting its observations is to assist in ensuring any amendments to the current extradition scheme are founded upon an assessment of the operation of the current scheme in *practice* rather than in the abstract. In particular, it is essential for full consideration to be given to the impact of any amendments on core principles of mutual recognition and the potential for amendments to cause increased complexity and delay in proceedings.

8.2 The CPS does not seek to invalidate all of the concerns expressed about some of the features of the United Kingdom's current extradition arrangements. It does however seek to underline the advantages of addressing such problems within the existing system and with the understanding and cooperation of the United Kingdom's extradition partners. The impact of some of the more dramatic changes advocated by a number of interested groups would undoubtedly be very significant and would alter the approach to extradition and how it is managed within our legal system. That is not a course which the CPS feels, in its experience, is necessary or desirable to remedy the difficulties which exist.

Crown Prosecution Service
4th January 2011