

HOME OFFICE – JUDICIAL COOPERATION UNIT

EVIDENCE SESSION

Wednesday 6th April 2011

PANEL:

Sir Scott Baker (Chair)
David Perry
Anand Doobay

IN ATTENDANCE:

Shami Chakrabati (Liberty)
Jodie Blackstock (JUSTICE)
Jago Russell and Daniel Mansell (Fair Trials International)

Transcribed from the Official Tape Recording
Ubiquis
Clifford's Inn, Fetter Lane, London EC4A 1LD
Tel: +44 (0)20 7269 0370

(At 10.30)

1
2 CHAIR: We are extremely grateful for you all coming and giving your time. We are
3 conscious that we have got three different organisations today. The first thing
4 to say is that we have got a tape running of everything that is said and we hope
5 in due course to publish the evidence that we have heard here and submissions
6 here along with everything else but you will have an opportunity to correct,
7 alter or change anything before it goes public and I am sure you will want that.
8 Please let us have it back reasonably soon after you have done it. The other
9 thing is that bearing in mind that we have got submissions from three different
10 organisations, we have been giving some thought as to how the best way of
11 approaching it might be. You are all in a sense coming at things from broadly
12 the same angle. You are on parallel lines but raise different points and
13 sometimes the same issue and sometimes different issues. We thought that
14 probably the most comprehensive of the submissions which goes wider than
15 just dealing with the EAW is JUSTICE's submission. What we thought we
16 would do would be to work our way through that reasonably chronologically
17 with everybody chipping in on any points and saying anything they want to
18 and then we can pick up anything that has not been picked up there from other
19 submissions.

20 I think Anand, you wanted to mention your connection for the record.

21 MR DOOBAY: Yes. For the transcript I am going to declare my interest so I am a
22 CFTI[?] of FTI and a member of the Legal Experts Advisory Panel, I am a
23 Council Member of JUSTICE and a member of the Finance Committee but
24 I've had no involvement with the preparation of the submissions from either of
25 those organisations in this matter.

26 CHAIR: Right.

27 MS BLACKSTOCK: We are not going to object.

28 CHAIR: As far as the EAW is concerned, this is may be, as it were, a general point
29 first, but I think there are a possible two avenues. One avenue, the most direct
30 avenue, is changes that could be made with domestic legislation without
31 offending the framework of the decision; and the alternative route is: what can
32 be done by various means as it were behind the scenes which we would
33 obviously need your assistance about. I think that the prospects of simply
34 tearing up the framework decision and starting again are not terribly realistic

1 so we have really got to work with what we have got and see how best to get
2 round it is the way that we look at it at the moment.

3 MR RUSSELL[?]: Can I perhaps just clarify on that point? I think in terms of the
4 framework decision, as you know, we have proposed an amendment to the
5 framework decision. Although I wouldn't want you to have the impression
6 that that means we are advocating tearing up the framework decision –

7 CHAIR: No, no.

8 MR RUSSELL: – but rather encouraging the UK Government to be engaged in
9 European discussions on how that framework decision might be reformed –

10 CHAIR: Certainly.

11 MR RUSSELL: – because I think there is some possibility of that.

12 CHAIR: Yes.

13 MS BLACKSTOCK: I think it all comes in the context of by the year 2014, there has
14 to have been a decision at EU level about whether we continue to engage with
15 the... well simply the UK continues to engage –

16 CHAIR: Indeed.

17 MS BLACKSTOCK: – with any of the instruments so far. So it is an opportunity for
18 us to have perhaps more bargaining power than otherwise might be available
19 which is at least a positive thing.

20 CHAIR: Well that is a very good point. With that in mind, also we will be going to
21 Brussels in May. We are seeing John Thomas, Lord Justice Thomas tomorrow
22 and I think he should be pretty helpful in assisting us with the right buttons to
23 press and the right people to see because you can spend a lot of wasted time
24 barking on about something to somebody who has not got any influence and
25 we want to make sure that we get at the right people.

26 MS CHAKRABATI: Just to add from a Liberty perspective, of course we would like
27 to see some renegotiation –

28 CHAIR: Indeed.

29 MS CHAKRABATI: – of the framework decision but we do set out in our
30 submission ways in which we think the implementation even of that
31 framework decision is wanting.

32 CHAIR: Yes.

33 MS CHAKRABATI: And improvements that can be made even before we get to the
34 promised land of renegotiation in relation in particular to forum but also in the

1 way that dual criminality is approached. I mean these very broad categories of
2 offences rather than specific offences that can lead to real injustice.

3 CHAIR: So if we start as it were at the beginning, involvement of non-judicial
4 authorities. It is quite difficult to know what really goes on behind the scenes
5 in different countries and what can we actually do about this?

6 MS CHAKRABATI: We are following the JUSTICE submission that some of us
7 don't have.

8 MS BLACKSTOCK: Only I have.

9 CHAIR: Oh. I have a copy here if that is helpful.

10 MS BLACKSTOCK: What I did was flag-up within the section on Part 1 issues,
11 some things that come to mind for us from reports that we've read and from
12 experiences we have had in the research we have done, the first of those that
13 we identified was involving non-judicial authorities and the decision-making
14 process, a good example being in Denmark where they still have an executive
15 decision maker. It's still the Ministry of Justice rather than a judicial decision
16 on when to issue. It's difficult to answer the question in terms of what we can
17 do. We have suggested work behind the scenes I think in terms of if we
18 hopefully do get to the point of reviewing the framework decision and it was
19 certainly a point that was identified within the final report carried out by the
20 working group in the council which we've called the Fourth Report
21 throughout ours.

22 CHAIR: That is a fourth round report, is that right?

23 MS BLACKSTOCK: That's right. So it has been flagged.

24 CHAIR: Has that yet been produced, has it?

25 MS BLACKSTOCK: It has been produced and the conclusions have been adopted.
26 They were adopted last June by the council.

27 CHAIR: I thought 1, 2 and 3 had but –

28 MR RUSSELL: There are Commission evaluation reports. There is a third
29 Commission evaluation report which is coming out in a couple of weeks' time
30 and there is also a Council evaluation report and those are two different things.

31 MS BLACKSTOCK: Yes, two distinct things. The Council report has over the years
32 since it came into force reviewed each country in quite a lot of detail.

33 CHAIR: Right.

34 MS BLACKSTOCK: And the fourth round report was summing up those

1 conclusions having had an expert review each member state's implementation.
2 The Commission's approach so far has been to say, have you implemented the
3 framework decision as written, full stop –

4 CHAIR: Yes.

5 MS BLACKSTOCK: – whereas the Council report looked at some of the practical
6 problems that are arising out of the framework decision itself. One of those
7 identified, as we say is, who is making the decision.

8 CHAIR: And why is it judicial authority.

9 MS BLACKSTOCK: Yes. It is an ongoing difficult issue –

10 CHAIR: Yes.

11 MS BLACKSTOCK: – which we are finding in the debates currently about the
12 European Investigation Order as well because many member states will not
13 have a decision made by judicial authority.

14 CHAIR: But is this actually causing a problem? I mean, are you seeing warrants that
15 should not be, if they had been made by judicial authority or is this more a
16 theoretical problem?

17 MS BLACKSTOCK: In some respects it's theoretical in this context of justice being
18 seen to be done, being fair, being open.

19 CHAIR: Right.

20 MS BLACKSTOCK: It has an impact in relation to a proportionality test coming into
21 force because a decision on proportionality would have to be made by a judge
22 in our view to ensure that it was done fairly and openly.

23 CHAIR: Yes.

24 MS BLACKSTOCK: It also has an impact on any arguments that might want to be
25 raised by a person affected by the warrant, the requested person, in the issuing
26 authority. What we might come onto is our suggestion of individual
27 representation requirement. That only works in the issuing stage if the
28 defence lawyer has the opportunity to go before a judicial authority making a
29 decision openly and make submissions. It's largely about the right to
30 representation and for hearing.

31 CHAIR: Right.

32 MS BLACKSTOCK: It's a matter of justice argument more than anything.

33 MR RUSSELL: We would agree with that. We think that when it comes to issuing
34 authorities, it really is about dual representation and we became aware of a

1 case recently that was raised at our Legal Experts Advisory Panel where a
2 European Arrest Warrant had been issued in relation to a suspended sentence
3 which had been activated in Poland. In that case dual representation was
4 crucial because the lawyer in Poland could go out for the judge and say, 'What
5 is the problem here?' and the judge could say, 'Well actually I just want to
6 know that this person hasn't committed any offences since moving to the UK.'

7 CHAIR: So does your point really come to this, that a proportionality test in the
8 issuing state involves of necessity the legal representation of the person sought
9 to be extradited because only that person can make sure that the issuing
10 authority has got all the material on which to make the proportionality
11 decision?

12 MR RUSSELL: That is certainly one aspect. I think Jodie is right to draw the two
13 out. I think that a proportionality test needs to be carried out by a judicial
14 authority, a judge –

15 CHAIR: Yes.

16 MR RUSSELL: – and also if dual representation is to be effective, then the action
17 needs to be taken in the issuing State before a judge.

18 MS BLACKSTOCK: It might be a cause and effect scenario that there is always
19 going to have to be a decision maker in the first place –

20 CHAIR: Yes.

21 MS BLACKSTOCK: – who decides to instigate, but as a result of that there would
22 need to be a reasoning process which could then be challenged.

23 CHAIR: Right.

24 MS BLACKSTOCK: And largely, that's not possible if it's an executive decision.
25 Otherwise then you're going into judicial review which is obviously
26 unnecessary and complex –

27 CHAIR: It is adding complexity to the system, is it not?

28 MS BLACKSTOCK: Yes.

29 CHAIR: I mean, that is where the criticism will come in I suspect.

30 MS CHAKRABATI: All I would say from the sort of big picture perspective is that
31 the idea that one is going to harmonise overnight the detailed criminal justice
32 arrangements of these various Member States is even more outlandish than
33 any idea of moving towards renegotiating the framework decision. And I
34 would argue that if we're looking at this through the lens of our extradition

1 arrangement, there are things that we can do, relatively modest things that we
2 can do –

3 CHAIR: Yes.

4 MS CHAKRABATI: – we can do here to put some natural justice, to put some
5 proportionality, to put some basic safeguards into the system. That isn't to say
6 that there aren't some who wouldn't like to design the promised land of a
7 Europe that really does have a harmonised criminal justice system or at least
8 harmonised protections but I personally think that that is less realistic than
9 things that we can do to our Extradition Act, to the way in which we
10 implement even the existing framework decision or indeed to renegotiate it.
11 In terms of specific examples, in paragraph 53 of our submission we give the
12 example of Spanish arrest warrants that come, often with these words, and not
13 always translated, that this is a preliminary inquiry. A preliminary inquiry is
14 then seen as the basis for summary extradition from someone from this
15 country to another country without even something that would amount to, you
16 know, to our understanding of a basic judicial safeguard. I think this just
17 highlights even Mr Blunkett's own reflections that various assumptions were
18 made at the time of these arrangements that have not been borne out by the
19 reality of a law in practice in the various Member States.

20 MR RUSSELL: There is currently a case that's going through the British courts that
21 may be referred up to the Supreme Courts on this example of the Spanish issue
22 that Shami is raising which is a case where there is actually no, it's a private
23 prosecution –

24 CHAIR: Yes.

25 MR RUSSELL: – and where there is, you know, there is no, it's a preliminary
26 investigation for a private –

27 CHAIR: Well, if there's no preliminary investigation...

28 MR RUSSELL: Well it's, the query is for the purposes of a prosecution.

29 CHAIR: Yes.

30 MR RUSSELL: I mean to me I think I'd agree with Shami's point that this idea of
31 having a common concept of what is a judicial authority is actually not
32 realistic. The question really is, the issue is, I think that the bigger issue is the
33 fact that there are no tests really that are currently being applied by the people
34 issuing the warrants and I think that the number of warrants would come down

1 significantly if there were tests to be applied before issuing warrants and that's
2 one of the core problems.

3 CHAIR: Well that's a proportionality test –

4 MR RUSSELL: Absolutely.

5 CHAIR: – at the issuing end.

6 MR RUSSELL: It's not so much who – it is partly who is doing it but it's more the
7 fact that somebody needs to be asking questions before issuing warrants.

8 MS CHAKRABATI: Just to finish the point. I suppose as we're talking about tests,
9 there is no test about judicial authority either. There is the handbook, the
10 EAW handbook which is issued and was updated in relation to proportionality
11 which I'm sure we'll come on to in a moment. It doesn't have a judicial
12 authority test in it. It's an assumption that it will be carried out by judicial
13 authority and it says that throughout. It's a judicial decision making process.
14 I think what we could, as the UK, attempt to influence in the debate in
15 Brussels about this is more work to understand who is making the decision in
16 each member state –

17 CHAIR: Yes.

18 MS CHAKRABATI: – and whether that then accords with the requirement of the
19 framework decision and of the Treaty.

20 CHAIR: Are we all of one mind that as far as proportionality is concerned, we have
21 really got to target the issuing state rather than anything we can do at this end,
22 I mean behind the scenes, because proportionality is something which is
23 inherently in the hands of the issuing state, is it not?

24 MR RUSSELL: Well I wouldn't agree with that. I mean what we are proposing is a
25 two-stage solution.

26 CHAIR: Yes.

27 MR RUSSELL: I think you can expect – extradition after all is a big deal.

28 CHAIR: Yes.

29 MR RUSSELL: Shipping someone off to another country is a big deal and therefore I
30 think there is a very good justification for a court in the UK for example to
31 answer the question before ordering someone's extradition. Is this
32 proportionate? Are there alternatives? Does the level of this offence justify
33 the extradition? And Germany seems to be applying those kinds of tests and
34 so one of the proposals that we suggest is that that test should be applied in the

1 UK. Alongside that, the issuing authority yes, there should be a test applied in
2 the framework decision for the issuing authority. You can imagine a situation
3 where there are facts which demonstrate that extradition is disproportionate
4 but could not possibly be known to the issuing authority. So it's a relatively
5 minor offence but the real clinch point in terms of demonstrating that
6 extradition would be disproportionate is the fact that the person since leaving
7 Poland has had six children, you know, two or three of them have serious
8 physical disabilities. They are the sole carer for a wife –

9 CHAIR: This would be an Article 8 issue, would it not?

10 MR RUSSELL: But it's a proportionality issue as well in terms of the fact you
11 couldn't possibly expect Poland to know that all that was happening in the UK
12 and therefore the UK Court has to be asking a proportionality question.

13 MS CHAKRABATI: I completely agree with that by the way. I think that of course I
14 would like to see courts around the world, let alone courts in the EU, think
15 more seriously about this process but I come back to the point, this is a review
16 as I understand of Britain's extradition arrangements and our responsibilities
17 in this country of those who facilitate extradition to other countries, extradition
18 being a punishment in itself. It may be a punishment that is borne out later on
19 by a Rolls Royce judicial process in the receiving country but nonetheless to
20 be taken from your family and your legal system and your language and so on
21 is an issue in itself and I think if there were any ways in which we can crowbar
22 a bit of discretion back into the system, I personally – and at Liberty we
23 disagree with the very restrictive approach that our courts have taken in
24 applying the human rights test for example.

25 CHAIR: Well there has been a bit of a shift from Mr Justice Mitting in the last couple
26 of months –

27 MR RUSSELL: Sorry, just before we move on to human rights and –

28 CHAIR: I wasn't thinking of moving –

29 MR RUSSELL: Okay, sorry. Just on proportionality.

30 MS CHAKRABATI: If you can't separate proportionality, you can't... So every time
31 somebody is taken from their home and extradited to another country, the
32 proportionality features in the fact that their human rights will be impacted on
33 per se.

34 MR RUSSELL: I think that's absolutely right but just on the very narrow issue of

1 introducing a proportionality test in the executing state in the UK.

2 CHAIR: Yes.

3 MR RUSSELL: I mean there is precedent for introducing refusal grounds that don't
4 appear in the European Arrest Warrant framework decision. Denmark, Italy,
5 Malta and the Netherlands and the UK have all introduced refusal grounds that
6 aren't in the framework –

7 CHAIR: I mean I have to be quite careful in this territory do I not? Because take for
8 example theft. There is a high maximum penalty but a whole variety of
9 different circumstances in which theft can be committed and a particular kind
10 of theft in the issuing state may be much more serious there than it is here.
11 For example, in the farming community, to – well not perhaps the piglet but
12 issues of that kind. You see where I am coming from?

13 MS CHAKRABATI: Yes. What we set out at 18, at paragraph 18 on page 9 of our
14 submission is perhaps a sort of halfway house and a verification test. What we
15 would be asking is that the issuing state carries out their proportionality check.
16 They're going to be required to do that as a result of all of the soft-law
17 agreement in any event; that has been agreed at EU level, not in the
18 framework decision but they are aware that that is what is expected now by
19 agreement. Largely, everyone has agreed on that as much as they can do so
20 we would suggest that we carry out a verification check. Has the issuing state
21 looked into proportionality? Is that clear from the warrant that they've sent
22 through?

23 CHAIR: Yes.

24 MS CHAKRABATI: If it isn't and they can't demonstrate that they've carried out the
25 proportionality test then that creates a bar to extradition. So rather than it
26 being us carrying out the proportionality check ourselves, it still is within the
27 hands of the issuing authority. That still remains within the remit of mutual
28 recognition of the principles that we are supposed to be adhering to. In effect
29 it creates a bar where it can't be demonstrated that proportionality has been
30 satisfied and that will be applying the Luxembourg standard rather than some
31 ad hoc standard that the member state itself wishes to attempt to apply. That
32 doesn't mean that Article 8 won't then apply of course separately –

33 CHAIR: Yes.

34 MS CHAKRABATI: – in the decision making process. So the example that Jago

1 gives should still be available and that's an issue about human rights standards
2 and what standards our courts are applying and whether the evidence is
3 available, which we can come on to.

4 CHAIR: Yes.

5 MS CHAKRABATI: But in terms of the actual, the proportionality debate that has
6 been taking place in Brussels and our understanding of what that test might
7 mean from the outset, I think they are two separate things and we would
8 certainly –

9 MS BLACKSTOCK: I suppose I have to register slight disagreement with that
10 because there is some commonality in these positions but now we see the
11 difference as well and Liberty has a very clear position that no one should be
12 extradited anywhere without a basic *prima facie* case being shown in Court.

13 CHAIR: Yes.

14 MS BLACKSTOCK: So that will mean a basic case to answer. So in other words,
15 the point about, you know, it was a pig rustling in a rural community etc, etc
16 would come out in that basic analysis.

17 CHAIR: I mean Liberty's position really is that you would like to put the clock back
18 quite a long way, would you not.

19 MS CHAKRABATI: I wouldn't put it that way because I think that the problems that
20 were perceived in the pre 9/11 extradition system were problems largely to do
21 with who decides and how often and I would agree with those who were
22 frustrated with what was a very convoluted system because there was
23 effectively lots of judicial and lots of political discretion –

24 CHAIR: Yes.

25 MS CHAKRABATI: – at every twist and turn so you have a complex series of Home
26 Secretary decisions, each one judicially reviewed. I can remember being in
27 the Home Office at the time and there was, I think, an understandable and
28 laudable frustration with a never ending system of that kind. I think that what
29 should have replaced that was something that removed most of the political
30 discretion, replacing it with judicial judgment – structured judicial judgment –
31 which is what we proposed, leaving perhaps a residual role for the Home
32 Secretary right at the end of the process which is an important safeguard in
33 case there is new intelligence, in case the situation has changed. There's
34 always that final diplomatic element. I think that what happened instead of

1 removing all of this Home Secretary discretion and therefore the room for
2 umpteen judicial reviews was an attempt to squeeze out not just the political
3 discretion but the judicial discretion as well, replacing it with their really quite
4 rigid rules in relation to summary extradition that had been generally
5 interpreted pretty rigidly by the courts and that's what squeezed the
6 compassion and the fairness out of the system.

7 CHAIR: Anand, do you want to come in on this before we move on further?

8 MR DOOBAY: Can I just go back and answer a couple of points which we talked
9 about? The first thing I just want to ask about is the notion that it requires a
10 judge in the issuing or the executing state to give proportionality because
11 we've been hearing some evidence this week about how we deal with the
12 position in the UK when we're making outgoing requests. Actually, the
13 situation here appears to be that the police themselves adopt the
14 proportionality test when deciding whether or not a case is charge ready and
15 whether it's worth – whether the likely outcome if someone were to be
16 convicted is sufficient to justify the resources in actually making a request to
17 another country. The CPS then do the same, they also provide a code and it's
18 only if you get past those two hurdles they go a court in order to ask for the
19 issue of a warrant which is then sent – which is circulated or sent to another
20 country. So it doesn't appear that the court plays much of a part in deciding
21 whether it would be proportionate but the decision makers here certainly do
22 take into account not just evidential sufficiency and public interest but
23 resources and the likely outcome because they don't want to spend money if
24 the likely sentence for someone even if theoretically high is in reality not very
25 high indeed. I just wonder whether there is a principle point here in terms of
26 who should make the proportionality decision or whether in fact it's about the
27 fact that somebody should make it and should apply some criteria fairly as the
28 handbook suggests.

29 MS CHAKRABATI: I think we're talking about people's liberty just as we would if
30 we were arresting people and locking them up as in the preliminary stages of a
31 prosecution in this country. In addition to the liberty issue, there is an
32 enhanced compromise, a greater compromise to someone's rights and
33 freedoms because of the international element because by definition you will
34 be less likely to qualify for bail as a fugitive in another jurisdiction with less

1 ties etc, etc plus the language, family impact and so on. So given that there is
2 this attack on the person's liberty for a period of time until they can stand trial,
3 there has got to be a judicial element in the process. From a Liberty
4 perspective, that has to happen in the country that is sending somebody
5 because this person in this jurisdiction is the responsibility of the courts in this
6 country and they should not be surrendered. They should never be
7 surrendered without basic judicial safeguards here.

8 Now as for the point made by the JUSTICE colleague about the potential
9 safeguards that can come from the requesting state, that's all to the good and if
10 that means that the court in the UK that is potentially authorising the
11 extradition is going to be more persuaded, is going to feel greater comfort that
12 this is not a frivolous charge but there has been some consideration of
13 proportionality, that's all well and good but from a Liberty perspective,
14 ultimately, the protection against frivolous support or summary extradition has
15 to be in a court in this country.

16 CHAIR: Are you critical of the way that we do it at the moment? We do not have a
17 proportionality test carried out by judicial authority before we seek to extradite
18 someone from Spain or wherever. I mean, on the basis that it is, as Anand was
19 saying, is really covered by the police and the CPS?

20 MS CHAKRABATI: In terms of how we request the...?

21 CHAIR: Yes. I mean, it seems to me that what is sauce for the goose is sauce for the
22 gander and you are obviously more critical about how it happens from Poland
23 and elsewhere.

24 MS CHAKRABATI: Absolutely.

25 CHAIR: You must automatically be critical from...?

26 MS CHAKRABATI: I would say that every point I make, assuming that we are in
27 the UK and we are sending people to Portugal or Spain or Germany, could be
28 transposed as if we were in Portugal or Germany. What I say is, ultimately the
29 judicial safeguard that I care the most about is the one before a person is
30 extradited.

31 CHAIR: So what should we do then when we are trying to get somebody back from
32 Spain that we are not doing at the moment?

33 MS CHAKRABATI: Well I mean, in an ideal world I would say that you would alter
34 – that each country would alter the system so that nobody was sent from their

1 local jurisdiction to any requesting state without a *prima facie* case shown in a
2 local court and that's where you would look. At that point you would look at
3 the most appropriate forum. You would look at proportionality. You would
4 look at any other factors that affect the justice of this outcome and then –

5 CHAIR: So basically you are looking for a pretty fundamental change?

6 MS CHAKRABATI: Ideally our position is for a pretty fundamental change but
7 along that road there are more moderate changes that we believe could put a
8 lot of compassion and a lot of fairness back into the system.

9 CHAIR: Right.

10 MS CHAKRABATI: For example, most appropriate forum is something that we
11 think could be done.

12 CHAIR: Well we will get to the forum in due course.

13 MS CHAKRABATI: Yes. But I mean the basic point is we are looking for judicial
14 discretion to be returned but we think the most important safeguard is actually
15 in the place from which you are to be extradited because that's where you are,
16 that's where your family is and that's where your language and your lawyers
17 are.

18 MR RUSSELL: Realistically, that's the first you know about an extradition.
19 Actually, even if there is a test being applied in the issuing state, the likelihood
20 that you will know that the arrest warrant has been issued and that you will
21 have an opportunity to challenge that in the issuing state –

22 CHAIR: Right.

23 MR RUSSELL: – is of course they are not going to tell you, you know. They are not
24 going to tell you, 'We're looking to arrest you'. The first you'll know about it
25 is when you are brought before the Magistrates' courts in the United Kingdom
26 or you are arrested by the police and told that there's a warrant. In practice, I
27 think the statistics kind of speak for themselves here. If you look at the
28 number of warrants that the UK authorities are issuing, they are very, very
29 small in comparison to a country like Poland. Poland, it's a judicial authority
30 which is issuing the warrants. The question is: what questions are being asked
31 by the people issuing these things? To me, the big problem is the fact that
32 questions aren't being asked so you can have a judicial authority, you know,
33 willy nilly issuing hundreds of warrants a year as seems to happen in Poland
34 or you could have, you know, a responsible set of police and prosecutors in the

1 United Kingdom applying a set of tests in the United Kingdom which means
2 that they are only issuing warrants when it is necessary, when it is
3 proportionate, when there is a realistic chance of conviction. So I think you
4 can – it's very easy to get caught up with issues about form, you know, what is
5 a judicial authority and what's not a judicial authority. To me, the question is,
6 are questions being asked?

7 MR MANSELL[?]: When it comes to proportionality and Anand, you mentioned the
8 likely sentence that would be imposed, we are aware that in certain Polish
9 cases the Polish consular authorities are liaising with Polish judges and asking
10 them, you know, 'This EAW has been issued, what is the likely sentence that
11 would be imposed?' and then wondering whether or not the EAW should be
12 withdrawn as a result. That's something that we'd like to see a lot more of
13 and it's difficult to get a sense of what likely sentence would be imposed if a
14 judge is not involved at some stage.

15 CHAIR: Who is making the enquiries at the moment such as they are?

16 MR MANSELL: It's our understanding that the Polish authorities in this country, the
17 Consular authorities are aware that there is an issue with proportionality –

18 CHAIR: Right.

19 MR MANSELL: – and this is something they are exploring but as a means to
20 reducing and withdrawing –

21 CHAIR: But on a general basis rather than on a case specific basis?

22 MR MANSELL: I think this is on a case specific basis.

23 CHAIR: Because we heard from SOCA earlier in the week and really their position is
24 that they are only concerned really with the validity of the warrant. We were
25 pressing them for, well why it can't be done in some cases that when you have
26 doubts about the proportionality of a particular case, you get on the telephone
27 and make some enquiries and see whether there are other means of dealing
28 with it.

29 MR RUSSELL: There is a practical issue about timing. Sometimes defence
30 practitioners will try and raise those kinds of arguments and try and ask for
31 adjournments or delays in the proceedings, in the court proceedings to try and
32 enable a practitioner in Poland for example to negotiate a different solution to
33 enable the person to go over to Poland in order to pay a fine or satisfy the
34 judges there that they aren't continuing to commit other offences, to explain

1 why they left the country or to try and speak to the Polish Consular authorities
2 in the UK if that's a possibility. The problem is that at the moment there isn't
3 really enough flexibility in terms of the ability of the courts to say, 'Okay time
4 out.' This looks like a kind of case in which there may be another solution
5 which is better which could be pursued. I mean that's not talking about a kind
6 of fixed proportionality test at all. That's talking about actually having a bit of
7 common sense or introducing that into the system so alternatives can be
8 pursued.

9 CHAIR: There is machinery for enforcing fines in other countries in this country
10 which does not seem to be being used very much but is beginning to be used.
11 I do not know if you have any views about that, whether this is a route that
12 might be pursued more regularly?

13 MS CHAKRABATI: Yes. We've spoken about that in our submission. It's only just
14 in fact coming into force which is the reason why we're not seeing it. The
15 financial penalty is the framework decision and most Member States have
16 only just brought it in, literally December last year but absolutely that provides
17 a route because many of the cases from Poland are conviction cases where
18 people have failed to pay their fine and then fled the country. It would be very
19 easy... I had a conversation with the Ministry of Justice representative at a
20 meeting in Brussels from Poland and he said it would be so simple if we just
21 had a lawyer go to court and say, here are the bank details, transfer, they are
22 more than willing for you to take the money out -

23 CHAIR: Yes.

24 MS CHAKRABATI: - and you avoid the whole process. So it comes back again, all
25 of these things that have been referred to we would say, to having dual
26 representation as a scheme. It's going back to Anand's point. I think what we
27 would say is, even though the decision is being taken at CPS level and it
28 clearly works, it's the proportionality test which reflects that we only seek
29 warrants on the basis of where we think that it is in the public interest to do so.
30 There is still a judicial decision at the end of that process and whilst, as we
31 would perhaps argue in all domestic warrants, it isn't particularly detailed.
32 Magistrates don't scrutinise to any degree the decision - the warrant - that
33 comes before them. If there were to be something glaring on it, you would
34 hope that a Judge would question it and would raise the necessity for the

1 public interest in the request being raised.

2 More importantly, there is then a judicial decision which can be
3 challenged if a lawyer is instructed at any point to do so. It may be that that
4 only comes practically and logically once the warrant has been issued and the
5 matter is raised in the executing country but if there is this process of having
6 two lawyers, one in each country, that then affords the other lawyer like in the
7 Polish example. Those cases are now part of our European Arrest Warrant
8 project so we will be able to submit the details to you shortly hopefully. That
9 allows the lawyer to go back to the judge who made the decision in the first
10 place and say, 'Here are our representations, please withdraw the warrant'. So
11 it may not even be that it kicks in before the warrant is submitted but at least it
12 gives an opportunity for it being withdrawn if there is a decision available to
13 challenge. If it's only an executive decision, then you get into administrative
14 law which becomes much more complex.

15 CHAIR: Anand.

16 MR DOOBAY: One thing which we have been exploring because I've... Obviously
17 to mention SOCA's position which is, you get a warrant, it's valid, we execute
18 it. We've been considering whether or not there might be a more flexible
19 initial stage, so before you get a certified warrant which is then executed, so
20 that the UK could look at all the alternative measures which are available,
21 could look at the things which are set out in the handbook now as to what you
22 should consider before you issue what is a pretty draconian measure of the
23 European Arrest Warrant. We've been considering whether or not it would be
24 helpful to have somebody, some person in the UK, who is looking at these
25 alternative measures before the warrant is certified, to have a dialogue with the
26 requesting authority to say, it looks like this is a suspended sentence where the
27 person is simply left and would it help if we could locate them and serve a
28 summons for you rather than arrest them under a European Arrest Warrant.
29 I'm assuming that you would think that would be a helpful thing because it's
30 not against the spirit of mutual recognition. You're simply trying to help them
31 to achieve the aim that they are trying to achieve and it stops it getting to
32 European Arrest Warrant.

33 MS CHAKRABATI: I think it's been provided for in the framework decision
34 because it's postponement rather than refusal and it is anticipated that that

1 dialogue will take place. Perhaps the grounds, and I can't recall off the top of
2 my head what your grounds are but –

3 MR DOOBAY: But it's before you even execute. Thinking about before you arrest
4 somebody, before – it stops you getting into the court process.

5 MS BLACKSTOCK: No. I want to cut in here because I'm sensing there's probably
6 a greater divergence of emphasis between Liberty and JUSTICE than I
7 previously anticipated so I just want to record that the elephant in the room
8 with all of this is whilst we all support international law and cooperation
9 between states – and that's incredibly important in a sort of shrinking
10 interconnected world; of course people should not be able to escape justice
11 just by hopping a border – there are issues to do with the divergence of legal
12 systems and protections and frankly in relation to democratic legitimacy. We
13 talk about the public interest test that we bring, that we apply in relation to
14 prosecutions in one country or another, whose public interest when people
15 sign up to the laws that they are to be governed by, whose laws and whose
16 legal system did they actually sign up to.

17 Whilst I agree that the thinking that you are developing as a means of
18 ameliorating the rigidity, such as it is, of the framework decision is bound to
19 be an improvement on the system as you've described it by SOCA. I still say
20 that, as a matter of human rights principle and frankly democratic legitimacy,
21 it is important to try and revisit the rigidity of that framework decision. I
22 mean, look at Germany; look at the way in which the higher courts in
23 Germany have actually found aspects of implementation of this decision
24 unconstitutional. I think that... I really applaud what you are suggesting
25 because if things are looking at at an early enough stage administratively
26 between the two executives, then maybe some of the harshness of the
27 framework decision can be avoided. I don't think that any of that in the end
28 will be a substitute for having a properly reformed system.

29 MR DOOBAY: No, and I think we can – I am taking that as read because I think that
30 it is worthwhile just going through different options so I think that we, as I
31 said at the beginning, one option is to get rid of it, one option is to renegotiate
32 them. I just want us to run through –

33 CHAIR: I think your position here Shami, and I summarise it, is chipping away at the
34 branches is all very well and that is something but you would rather we were

1 attacking the trunk?

2 MS CHAKRABATI: I would say do both because every branch that you chip away
3 at might actually do justice for some person who need not be extradited.

4 CHAIR: Okay.

5 MR RUSSELL: Can I just come in on this point that Anand made just because it
6 seems to me that it's a fantastic idea actually and it's something that really
7 ought to be happening already given that across the European Union
8 proportionality is meant to be a relevant – you know, a key legal principle that
9 member states... And this is about proportionality. It's not minor offence
10 proportionality but it's clear disproportionate to extradite someone if there is
11 an alternative less draconian measure available. So I think that's absolutely
12 right but I think you still have got this problem of what happens –

13 CHAIR: Suitable alternative measure.

14 MR RUSSELL: Suitable alternative measure, absolutely. And you still though have
15 the problem if you have a country which will not take part in those kinds of
16 discussions and they say, no, actually we've got an arrest warrant here and you
17 have to recognise it, which is I think where Shami is absolutely right. Because
18 of that risk, you do need to have that fallback. Hopefully it will be used less
19 often. Hopefully mutual recognition will work and those discussions will
20 work and a suitable warrant will be issued. But it's not at all inconceivable
21 that there will be countries that refuse to take part in that or that the number of
22 warrants that are being issued mean that it is an enormous bureaucracy and
23 that it's not possible to chase down every possible alternative. And in those,
24 given that very real risk there needs to be a fallback refusal ground on the
25 proportionality grounds in the executing state.

26 MR MANSELL: And I suppose that the corollary of prosecution authorities talking
27 to each other and engaging more in a discussion is a dual representation, is
28 ensuring that the person is represented in both states.

29 CHAIR: There are cost implications on that, aren't there?

30 MR MANSELL: There are.

31 MS CHAKRABATI: There are cost implications and it's an issue which comes up in
32 every single meeting we have in Brussels.

33 CHAIR: Yes.

34 MS CHAKRABATI: But we talked about it, always will; there has been no difficulty

1 putting costs into EUROJUST, into EUROPOL. There are billions spent on
2 these institutions every year. Even the European Judicial Network has a
3 fantastic budget to ensure that there is dialogue between judicial decision
4 making. There is absolutely nothing for defence and all of these decisions
5 should add a fundamental cornerstone and I dearly agree, JUSTICE does agree
6 with Liberty on this but I think because we have been in so many of these
7 meetings over so many framework decisions, we're attempting to be
8 pragmatic about perhaps the small chipping bits that we can achieve
9 immediately rather than the bigger picture on it. It's quite clear that there isn't
10 equality of arms on these decisions. We have got an instrument – we've got a
11 series of about 10 instruments to be exact now which are aimed at ensuring
12 prosecutions can happen more swiftly and effectively across European
13 borders. That is absolutely right. With movement of people, matters can
14 move into judicial process, but it must be fairly balanced with equality of
15 arms.

16 At the moment, because of the nature of how these instruments work
17 because we're talking about – an issuing state will transmit an instrument,
18 there's no possibility in that first stage for the defence to nip it in the bud as it
19 were, ensure that the proportionality issues or the fair representations are made
20 before it is executed. We're grappling at the second stage to try and pull it
21 back –

22 CHAIR: Right.

23 MS CHAKRABATI: – and stop the process. It seems entirely legitimate to us that
24 that is balanced.

25 CHAIR: Well I take the point.

26 MS CHAKRABATI: If it costs money, so be it.

27 CHAIR: Yes.

28 MR RUSSELL: Can I give you a practical example, because I'm not so sure about
29 this costing money issue. We had a case very recently, a Polish guy being
30 extradited for going over his overdraft limit. Now having spoken to Polish
31 lawyers about that particular case, they thought it was pretty likely that if they
32 were – given they were paid the fees to go and visit the prosecutor, it was
33 entirely possible that they would have been able to get the prosecutor to agree
34 to another resolution for that case which didn't involve extradition.

1 CHAIR: Yes.

2 MR RUSSELL: We managed to get fees negotiated then and it was about €1,500 I
3 think that would have cost to get this private defence practitioner in Poland to
4 go and visit the prosecutor and to negotiate another settlement. The man in
5 question just could not find €1,500. As a result, what's happening in that case
6 is that there are going to be appeals. A case is going to continue for a very
7 long time –

8 MS CHAKRABATI: That's very true.

9 MR RUSSELL: – through the UK courts and if he is extradited, he is likely to spend
10 a very long time in pre-trial –

11 CHAIR: So the cost balance you are saying is another issue?

12 MS CHAKRABATI: Yes.

13 MR RUSSELL: Absolutely. There are cases where –

14 MS CHAKRABATI: You could massively reduce the appeals.

15 MR RUSSELL: Yes, absolutely.

16 CHAIR: Fair point. David.

17 MR PERRY: On the point about dual representation, would it assist if there was a
18 mechanism for delayed extradition with – possibly under the European
19 supervision order so that if someone was on bail with the opportunity to
20 resolve any questions such as whether there was an outstanding debt or
21 whether some warrant could be set aside – so that's one possibility working
22 within the existing system. The other possibility is, if there are sentences
23 being imposed which in fact should be served, whether they should be served
24 in this jurisdiction. So those are just two possibilities that we may want to
25 look at. I mean, I don't think we're going to solve the problem with dual
26 representation because I don't think they are going to listen to a panel in
27 London saying that you've got to have lawyers in every jurisdiction. Just
28 using the case of the Polish suspended sentence, we have heard some evidence
29 that the judges at the City of Westminster are amenable to arguments to delay
30 extradition proceedings if they think that matters can be resolved by
31 agreement. Rather than having that as an ad hoc system, perhaps if there were
32 some alternative mechanism...

33 MR RUSSELL: Well that is possible under the Act at present, isn't it? It's possible
34 under Section 35 and 36 I think that the time for surrender can be 10 days

1 from the decision to surrender the person or, if the two authorities decide on a
2 different date, 10 days within that date. So there is the possibility under the
3 Act as it is currently drafted for something like that to happen.

4 MR PERRY: The difficulty is, I suppose, that as with most of these things, we are
5 limited in what we can do without the agreement of the issuing authority. But
6 those are just two matters; it looks as though there's broad agreement.

7 MS CHAKRABATI: I think this is all very helpful. Going back to the metaphors
8 about branches and trunks and all the rest of it, clearly anything that we can do
9 within the arrangements that we currently have or within modest modifications
10 of those arrangements such as the Act but not the framework decision – or
11 practice but not the Act – anything we can do to demonstrate that we're going
12 to take these decisions a bit more seriously and whether that's slowing them
13 down on occasion or, you know, things we haven't got to yet, looking at
14 forum more carefully, looking at human rights issues slightly differently –
15 anything that we can do to put some judgment back into the system – is going
16 to send a signal I would suggest to the investigating authorities in other
17 countries that this isn't quite as simple as you think and maybe you should
18 moderate your practice because you actually do want to achieve extradition in
19 certain cases. So you know, I would welcome anything like that that you think
20 that you can achieve.

21 MR PERRY: Equally we have to have a system that works –

22 MS CHAKRABATI: Yes.

23 MR PERRY: – and that serves –

24 MS CHAKRABATI: Absolutely.

25 MR PERRY: – the interests that extradition is designed to serve.

26 MS CHAKRABATI: But the horrors that led to such a draconian alteration in the
27 arrangements were very serious cases that were dragging on for years and
28 years and I don't think anybody thinks there's an appetite of judicial or a
29 political or a popular appetite in this country or anywhere to see a return to a
30 system where terror suspects can't go from London to Paris for years and
31 years. I think it's really possible to avoid that while still putting a bit of
32 judgment and judicial discretion back.

33 MR RUSSELL: And I mean that's the structure of the paper that you see now but
34 there are things that we can clearly do that the framework decision allows you

1 to do. Actually, on the specific point that you make, allowing a person to
2 serve a sentence if it's a post-conviction warrant and they are a British
3 national or resident, it's clearly in the framework decision, it clearly... At the
4 moment, the absence of that in the UK legislation leads to ludicrous results.
5 We've had, there's a case of Atkinson and Binnington we're involved in – a
6 conviction warrant – had they been able to serve their sentence in the United
7 Kingdom, they would have probably consented to, you know, consented to
8 that.

9 As it happened, that was not a possibility. They were extradited to Cyprus
10 I believe and then a few months later sent back to the UK to serve their
11 sentence. So I think that's one very practical thing you can do which the
12 framework decision allows you to. You also mentioned another one which is
13 more complicated but would make a massive difference to a lot of people
14 which is delayed execution of warrants. One of the things we're really
15 concerned about at Fair Trials International is people whose extradition is
16 ordered but who then wait for months or years in the requesting country
17 awaiting their trial. I think it's one thing for somebody to be extradited and
18 then tried one week or two later.

19 CHAIR: Well bailed.

20 MR RUSSELL: Yes.

21 CHAIR: Bail here.

22 MR RUSSELL: Bail. If they have complied with bail conditions in the United
23 Kingdom, allow them to remain on those bail conditions, monitor where they
24 are and then extradite them –

25 CHAIR: And then they would be with their families.

26 MS CHAKRABATI: Exactly.

27 MR RUSSELL: Exactly. One of our clients, Andrew Symeou, he could have
28 finished his degree by now.

29 CHAIR: Yes.

30 MR RUSSELL: And he would have, you know, would have still gone to Greece to
31 face the trial. There is nothing that undermines mutual recognition in that
32 context at all.

33 MS BLACKSTOCK: No, no, that's international cooperation.

34 MS CHAKRABATI: And most of your Article 3 and Article 8 arguments then fall

1 away because you are giving effect to them by not putting in the conditions
2 where prison may be below standards that we would expect but not up to what
3 the court suggests are Article 3 standards and you're dealing with the private
4 and the family life aspects of sending them to another country which are very
5 different to being put on trial here. Clearly, it's much more of an impact
6 despite what the courts have ruled on it.

7 CHAIR: On the subject of prison conditions, I appreciate that your position probably
8 I think is that you are not happy with the way the courts are interpreting
9 Article 3. That's the starting point. But there is probably a limit as to how
10 much we can pursue that.

11 MS CHAKRABATI: Yes.

12 CHAIR: We have got Europe as well to contend with on that.

13 MS CHAKRABATI: Exactly.

14 CHAIR: And one of the problems is that if somebody is sent to Country A, unless
15 you have got something systemically really bad with rats in all the prisons,
16 you are not going to get very far with an Article 3 argument when you cannot
17 show where the individual is going to be put. We have been toying with a
18 thought in a different direction which is, one really needs to attack this through
19 the other members of the EAW system; and is there a case for having the
20 equivalent of an inspector of prisons but on a Europe-wide basis so that he
21 could go round the prisons in the EAW countries and have a look and form his
22 own views on it?

23 MR MANSELL: We have CPT reports that are compiled at the moment.

24 CHAIR: What are CPT reports?

25 MR MANSELL: The Committee for the Prevention of Torture.

26 CHAIR: Right.

27 MS CHAKRABATI: The Council of Europe's Committee.

28 CHAIR: Yes.

29 MR MANSELL: Yes, and that is a recognised central body that collects this type of
30 information. Unfortunately when it comes to Article 3, what we're seeing is a
31 requirement for specific and current conditions which is understandable. But
32 even when that high threshold is met by the recent case of Janovic, you have
33 an expert in prison conditions in Poland, sorry that was Lithuania, who says
34 that they are inhuman and degrading and they are absolutely awful, talking

1 about the specific prison that the person will be sent to. It fails. So I think that
2 the problem is that there is an issue about evidence being gathered on prisons
3 but even when that evidence is present, the court is interpreting the human
4 rights in an incredibly high fashion.

5 MS CHAKRABATI: I ought to just say that the Commission is going to propose in
6 the next couple of months a Green Paper on detention conditions which will
7 involve the potential for an EU inspectorate.

8 CHAIR: Ah. Well that is helpful.

9 MS CHAKRABATI: So that may be something during the course of your review that
10 you will be able to contemplate.

11 CHAIR: Yes. Who are we going to be able to get details of this Green Paper from do
12 you think?

13 MR RUSSELL: You could speak to Caroline Morgan at the European Commission
14 would be the person to speak to.

15 MS CHAKRABATI: Yes.

16 CHAIR: Right.

17 MR RUSSELL: Well so she has now got responsibility for that file and also Tricia
18 Harkin who has got responsibilities for it as well. Okay. Those are the two
19 people.

20 I mean, can I just say I think it's worth at this point saying that on prison
21 conditions, this to me demonstrates something that inevitably we don't want to
22 dwell on too much but that actually introducing a mutual recognition system
23 across the European Union when there are big questions about something as
24 basic as whether the conditions meet Article 3 standards was probably not the
25 wisest idea, to put it very mildly. And you know, it's great that there is now
26 some movement on the road map and on defence rights and there is some
27 willingness to look at prison conditions across the European Union. We are
28 being told that, you know, we as human rights campaigners are getting that
29 because of the European Arrest Warrant but it is the wrong way around. You
30 shouldn't have had extradition on a no questions asked system.

31 CHAIR: But we are where we are, aren't we?

32 MR RUSSELL: We are where we are but it's worth at least not replicating those
33 problems for future mutual recognition matters.

34 CHAIR: What about the Charter on Fundamental Rights? I mean, we have not

1 signed up to that at the moment, have we?

2 MS BLACKSTOCK: Well we have, we have. It's binding as the Lisbon Treaty is
3 incorporated by it but we have a protocol which is to some extent unclear and
4 we are awaiting judgment of the court in Luxembourg to explain what the
5 parameters of that mean. There are rights and privileges in the Charter and
6 there is a distinction between the two for a start as to how they should be
7 applied.

8 CHAIR: Well what does it add to the Human Rights Convention?

9 MS BLACKSTOCK: It adds firstly a court which is much more accessible because
10 of the preliminary –

11 CHAIR: Luxembourg?

12 MS BLACKSTOCK: Yes, the preliminary reference procedure. It allows a court in
13 the course of proceedings rather than after domestic remedies have been
14 exhausted to have a dialogue with the Court to ask for a reference and an
15 explanation from the Court which is exactly what has happened in the Charter
16 case. I'm talking about the Sayeedi case. It wasn't swamped in the way that
17 the Strasbourg court is so rather than having to wait at least six years, 160,000
18 cases are now pending before the Strasbourg court. It cannot cope.
19 Luxembourg is in a much better position to be able to deal with applications
20 before it and for speedy resolutions of matters such as the effect of an EAW
21 on someone's Charter rights. If the starting point is the Convention then it's a
22 bottom rung then a ceiling, so at the moment we don't really know where it
23 will go. It's a bit like when the Human Rights Act was incorporated here,
24 there was no anticipation that it would have the reach that it did and there was
25 hope that it perhaps reached a bit further than it did. But the Charter had the
26 potential at least to allow the arguments that are been raised and frustrated at
27 the moment to be dealt with by a Luxembourg court.

28 The only real decision we've had from Luxembourg on the arrest warrant
29 is the advocates to the Wert[?] case from Belgium which is right at the
30 beginning and that case on one interpretation suggests it should only be used
31 for serious cases. If the court were to revisit that decision now six years later,
32 it may well say there is a proportionality issue and each member state must
33 accord to it and that would resolve the issue that we're talking about because it
34 would implement that amendment into the framework decision immediately.

1 The problem has been thus far that under the previous Treaty of course, there
2 was only a discretion to use the court and many member states didn't take that
3 up. Now, certainly as of 2014, it will be the position where the court will
4 automatically have final jurisdiction on these issues and if we remain within
5 the arrest warrant scheme, we will be able to take references up to the Court
6 on Charter matters. It has the potential for a very great impact JUSTICE
7 believes.

8 MR RUSSELL: We are in an incredibly frustrating position now where we are
9 affected by the decisions of the Court where there are big issues that the Court
10 might be able to deal with like proportionality but in which it's not possible to
11 get a referral from the British courts. I think that could make a big difference
12 because actually the –

13 CHAIR: What are you saying we should be recommending?

14 MS BLACKSTOCK: Well the only recommendation –

15 CHAIR: Is that added to the two Human Rights sections?

16 MS BLACKSTOCK: Yes, which doesn't take us very far admittedly but what it does
17 do is put within the remit of the District Judges who are dealing with these
18 cases, and with the lawyers at first instance who are dealing with these cases,
19 the option, it's very new but if the obligation was to consider a convention and
20 charter within the framework of our Act, at least that would filter down into
21 their reasoning. At the moment there isn't really anything for them to consider
22 other than the Strasbourg principles because we don't have anything higher
23 than that. At the minute, member states which do use the jurisdiction of the
24 court –

25 CHAIR: But it may not happen until 2014?

26 MS BLACKSTOCK: Well there are jurisdictions who use the Court at the moment
27 and it may be that we'll see references before then on the Charter coming
28 through and then there will be an obligation to consider them. So who knows
29 when they are coming up, but... I'm, you know, not in contact with people
30 who are bringing in such cases at the moment. But certainly from 2014, it will
31 be absolutely applicable in this jurisdiction.

32 MR RUSSELL: But there are EU legal issues that could be taken to the Court outside
33 of the Charter in any event. Proportionality is not a Charter... but that's meant
34 to be a general legal principle of the European Union. Another one is free

1 movement of people and an issue we haven't come on to yet of their inability
 2 to require a warrant to be removed if it is refused by one or more Member
 3 States on general grounds. That restricts free movement of people because
 4 you are then stuck in the United Kingdom, for example, unable to leave that
 5 country because France will refuse to move the warrant. So outside of the
 6 Charter, if it were possible to make referrals to the European Court of Justice,
 7 there are other ways that some of these problems with the warrant could
 8 perhaps be dealt with through the European court.

9 MR MANSELL: The Charter refers to the preservation of human dignity I think
 10 which obviously could be useful in terms of an Article 3 argument –

11 CHAIR: Yes.

12 MR MANSELL: – the lowest bar in that respect and there is a proportionality section
 13 in there too. I think –

14 MS BLACKSTOCK: That relates to penalties.

15 MR MANSELL: To penalties, yes. My understanding is that because of the protocol,
 16 it will be difficult for judges to apply it unilaterally. It would require some
 17 sort of legislation so –

18 CHAIR: David?

19 MR PERRY: Just going back to the Secretary of State's discretion, is it really
 20 desirable to have discretion on the part of the Secretary of State at all? I mean,
 21 why can't courts be making those decisions if there is a supervening event that
 22 raises human rights questions? Why should a politician be making the
 23 decision rather than a court?

24 MS CHAKRABATI: I think that in general, that's where we are. It's just that we
 25 think there may be room for a final residual discretion on the part of the
 26 Secretary of State, possibly on the basis of intelligence, possibly on the basis
 27 of changed events, you know, because there is a sort of international
 28 dimension to this. Possibly the Secretary of State at the eleventh hour will
 29 have access to new material and rather than go right back to the beginning of
 30 trying to argue things through the judicial system, it seems to us that it might
 31 be judicious to just retain a very residual discretion in the final analysis for the
 32 Secretary of State to halt an extradition. The downside of recommending that
 33 would obviously be if that then led to, you know, umpteen judicial reviews –

34 CHAIR: Would you really need to go right back to the beginning? What has been

1 going through our minds is –

2 MS CHAKRABATI: Yes.

3 CHAIR: I mean, look at for example Part 2 where the Secretary of State's discretion
4 at the moment is greater than Part 1. The problem is that the cases go, like the
5 McKinnon case, back to the Secretary of State at the end of the road. Then
6 another decision is made and it is back in the courts for judicial review.

7 MS CHAKRABATI: Yes.

8 CHAIR: And we can see that for example, issues as to the death penalty and
9 speciality are probably matters that can be dealt with quite speedily by the
10 Secretary of State but there are other matters, human rights issues, that involve
11 more evidence coming and going, delay and so forth. If there was a procedure
12 to refer it back for example to the High Court in the same way that there could
13 have been an appeal from the District Judge for the High Court but on very
14 specific and limited grounds, namely a change in the human rights situation
15 since the matter had been before the Court, why couldn't the Court deal with
16 that rather than go back to the Secretary of State. Then it would be final –

17 MS CHAKRABATI: I guess what I, yes absolutely.

18 CHAIR: – and the court would have the same powers as it would have as if it were
19 dealing with an appeal from the Magistrates.

20 MS CHAKRABATI: I want to be absolutely clear that I think that the fundamental
21 problem with the system as it's now developed is a lack of judicial discretion,
22 not a lack of a political discretion. I think that one can conceive of very, very
23 limited circumstances where the Secretary of State becomes privy at some
24 stage late in a process where someone has been through the courts, that the
25 Secretary of State becomes privy to information that is not even available to
26 the accused person, to the person who is awaiting extradition where the
27 Secretary of State might want to be able to halt an extradition. I think there
28 are very limited circumstances where that would arise but it might arise.

29 CHAIR: You mean for example a situation like where the security services have
30 given him highly confidential information –

31 MS CHAKRABATI: Potentially.

32 CHAIR: – but if he is extradited to Spain, that he is likely to lose his life.

33 MS CHAKRABATI: Well for example, I think this is, you know, not going to be the
34 common or garden case. And I also think, to answer my own problem which

1 is, you don't want endless judicial reviews of this residual discretion, given
 2 that one would have put judicial discretion back into the system and someone
 3 would have been able to exhaust arguments about proportionality, about
 4 human rights, about forum and so on, I don't think the courts are going to be
 5 very keen to have frivolous judicial reviews of the Secretary of State for not
 6 exercising this very, very limited eleventh hour discretion. I would just never
 7 want to rule out the possibility. In our system, including post the Human
 8 Rights Act, there is a responsibility to protect human rights that sits with the
 9 politicians as well as with the courts and I would never want to completely
 10 squeeze that out of the system particularly –

11 MR PERRY: How would we know whether the Secretary of State had exercised the
 12 discretion?

13 MS CHAKRABATI: How do we know that the...?

14 MR PERRY: How would you know? I just want to see how this works in practice.

15 MS CHAKRABATI: Yes.

16 MR PERRY: So someone has been returned to Spain and the suggestion is there is
 17 some secret intelligence that should have prevented their removal to Spain.
 18 They are just about to be returned to Spain. How do we know whether the
 19 Secretary of State has exercised the discretion?

20 MS CHAKRABATI: Well of course we'll only know potentially if the Secretary of
 21 State halts the extradition. What we will never know potentially –

22 MR PERRY: No. Presumably in every case you'd be obliged to write to the
 23 Secretary of State and say there is this discretion in the Act and I want a
 24 reassurance that you've exercised it.

25 MS CHAKRABATI: And the Secretary of State would no doubt as, you know, in
 26 most cases, write back and say, I have looked at everything the courts have
 27 considered in your case. I have looked at the decisions that the courts have
 28 made and have no new, I mean you –

29 MR PERRY: Well I'd write a letter then saying, 'Well I want to know what you've
 30 got.' 'Have you got anything Secretary of State?'. And the Secretary of State
 31 would say, 'My policy is neither to confirm nor deny the existence of the
 32 material in these circumstances' and you take judicial review to go to the court
 33 to say, I don't trust the Secretary of State. I mean, where are we?

34 MS CHAKRABATI: Perhaps, and that might happen in the first case but I suppose

1 the point I'm making is, I don't –

2 MR PERRY: And what about the other cases?

3 MS CHAKRABATI: Well all I'm saying is, you could take the view that there is no
4 role for a politician in extradition at all. This is now going to be a purely
5 judicial matter but that does require, for any judicial system to work and to
6 work fairly, that does require the parties appearing before the court to have
7 certain information available to them. I think that extradition should
8 primarily, overwhelmingly be a judicialised system. But given that we are
9 talking about international affairs to some extent and given that there is always
10 a residual possibility that the Secretary of State would have information that
11 nobody else has and might want to be able to halt – not to order an extradition
12 – but to halt an extradition exceptionally in the interests of justice, I wouldn't
13 want to rule that out in circumstances where the person facing extradition and
14 the courts have no other way of knowing what the Secretary of State –

15 CHAIR: Well what does the Secretary of State do in those circumstances? He simply
16 says, no extradition, I am putting a bar on this, I cannot tell you the reasons
17 and that is it.

18 MS CHAKRABATI: Well you know, there are other contexts, there are many other
19 contexts in our system where the Secretary of State effectively still has the
20 ability to do that. People lose their liberty on something pretty close to that
21 analysis in the system. I don't think you can rule out the possibility that secret
22 intelligence or affairs between states will ever work in the interests of the
23 vulnerable individual rather than always working against them.

24 MR PERRY: Can I just mention, can I just ask something else? What is it about
25 *prima facie* evidence that makes it attractive? I just want to understand what
26 the rationale for it is. Is it that it shows that the request is genuine or is it that
27 it permits the extraditee to test the substance of the allegations made against
28 him or is it both?

29 MS CHAKRABATI: You could describe it I suppose to some extent as a
30 combination of both except that every request is genuine because no doubt
31 somebody wants this person to turn up in –

32 MR PERRY: Well they may not be genuine.

33 MS CHAKRABATI: Well –

34 MR PERRY: There may be abusive requests. There may be –

1 MS CHAKRABATI: Alright, okay but it depends on what you mean by genuine.

2 MR PERRY: Yes.

3 MS CHAKRABATI: On its face, somebody is, you know, somebody... It is
4 demanded that Person X is handed over to the legal authorities in another
5 jurisdiction. As a matter of form, that is a genuine request. It's a real request.
6 It's not a fraudulent request. I don't think that anybody should be taken from
7 their home and their jurisdiction and their language and their support system
8 and so on to another country even to face what could be a Rolls Royce system
9 of due process without basic evidence –

10 MR PERRY: Just focussing on this particular requirement, it's just one of many.

11 MS CHAKRABATI: Yes.

12 MR PERRY: I just want to focus on this.

13 MS CHAKRABATI: It shows that the request has some evidential basis behind it. It
14 isn't supposition or allegation.

15 MR PERRY: So it's not to show that it's a genuine case?

16 MS CHAKRABATI: Well, as I say, it depends what you mean by a genuine case. It
17 shows that there is some evidence rather than just suspicion or accusation and
18 I think that's important.

19 MR PERRY: Suppose a foreign state then certifies to say we're trial ready and we've
20 got evidence and this is a summary of the evidence, does that satisfy the same
21 requirement?

22 MS CHAKRABATI: It might well do but there has got to be at least some basis for
23 the accused person to challenge, not in the way that you challenge it at trial but
24 at least challenge it perhaps on the basis that you might have done in perhaps
25 committal proceedings, when we used to have committal proceedings in this
26 country, just to say this is not, you know, this is not evidence. That person
27 doesn't exist. I wasn't even in the nightclub, you know, you've got the wrong
28 person. So that that can go into the mix. It can't just be, we've got evidence,
29 there is a charge.

30 MR PERRY: Well that's why I want to understand why you say that –

31 MS CHAKRABATI: Well to go back to your original question then, there has got to
32 be some basis of challenging the suggestion that there is a case to answer.

33 MR RUSSELL: I suppose to some extent, although we're looking at the European
34 Arrest Warrant and haven't therefore focussed on *prima facie* cases at all –

1 MR PERRY: Yes.

2 MR RUSSELL: – because it's not, in our view that's not a possibility but along the
3 same lines as what Shami is saying, we think there needs to be the possibility
4 or requirement as to further evidence if for example, you know, there's a very
5 strong suggestion that there is a mistaken identity involved. I think there
6 needs to be some ability if there's a glaring error if you like as to further
7 questions.

8 CHAIR: Well there's two, on mistaken identity, there is really two aspects to it,
9 aren't there? There is the aspect of, is this the person who is named in the
10 warrant and we've heard some fairly compelling evidence from ACPO that
11 they have pretty rigid procedures for making sure that the person is the person
12 in the warrant with biometric evidence etc, etc and so forth. The other aspect
13 of it is when you get a person who says, 'Well it wasn't me. I wasn't actually
14 in this country, in Spain, at the time committing this offence and here is my
15 passport to show you that actually I was in the UK.'

16 MS CHAKRABATI: I was somewhere else, yes.

17 CHAIR: But is that not essentially a matter for defence at the hearing and provided
18 that there is some method that the UK authorities make sure that the
19 information is conveyed to the requesting state and it may be that in a clear cut
20 case the information that is conveyed to the requesting state is, okay we got it
21 wrong and now withdraw the warrant.

22 MR RUSSELL: It's about suspending it and asking questions. I think there are some
23 cases in which actually creating the opportunity or requirement for the British
24 courts to say to the issuing country that this really doesn't look right. This
25 person wasn't in the country etc. Can you look at it again and come back and
26 satisfy me? I think –

27 MS CHAKRABATI: I think people should be able to make the equivalent of a
28 submission of no case to answer. There is just not enough even – there is just
29 not enough to warrant somebody being taken from this jurisdiction to another
30 jurisdiction.

31 CHAIR: But then you have got to hear the evidence, haven't you?

32 MS CHAKRABATI: Well you've got to have some examination. You don't have to
33 hear all the evidence.

34 CHAIR: Well you can only decide that there is no case to answer if you have heard

1 the evidence.

2 MS CHAKRABATI: Well you have to at least see a summary of the evidence and be
3 able to say –

4 MR PERRY: How would that assist in an identification case? You've got a
5 statement from a witness who says, 'Yes it's X.'

6 MS CHAKRABATI: Well it won't always assist but for example, in the example
7 given just a moment ago where the person says, it could not be me because
8 here is the evidence that I was actually locked up in Belmarsh on the day that
9 you say I was in a nightclub in Portugal or you know... What's wrong with
10 being able to stop that extradition happening at that point?

11 MR PERRY: That's a different question. We're talking about the mechanism to stop
12 it. I quite agree that if you have incontrovertible evidence that X did not
13 commit the crime –

14 MS CHAKRABATI: Yes.

15 MR PERRY: – then that's one thing.

16 MS CHAKRABATI: Yes.

17 MR PERRY: But that does not depend upon whether the British authorities have
18 requested *prima facie* evidence because whatever the evidence, you may have
19 more than *prima facie* evidence –

20 MS CHAKRABATI: Yes.

21 MR PERRY: – you may have the whole evidence in the case.

22 MS CHAKRABATI: Yes.

23 MR PERRY: You may have no evidence.

24 MS CHAKRABATI: Yes.

25 MR PERRY: But what you have got is information that this person could not have
26 committed that crime.

27 MS CHAKRABATI: Yes.

28 MR PERRY: Now on the other hand, we're looking at practical safeguards –

29 MS CHAKRABATI: Yes.

30 MR PERRY: – or safeguards that ought to be practical and ought to have some value
31 –

32 MS CHAKRABATI: Yes.

33 MR PERRY: – because of the consequences that are going to follow. The only point
34 I was making is that a requirement to *prima facie* evidence would not

1 necessarily provide a practical safeguard in an identification case where you
2 were simply disputing.

3 MS CHAKRABATI: That's right.

4 CHAIR: Particularly a weak identification case that looked alright on the paper but
5 once you got the evidence turns out that the Court could not be –

6 MS CHAKRABATI: Of course. The ability of an accused to argue there is no
7 *prima facie* case, the ability of an accused to end this ordeal then and there in a
8 London court is going to vary hugely. But it is, I would argue, a safeguard in
9 extradition proceedings for there to be this hurdle, this relatively low hurdle
10 that there is a basic case that has been aired, perhaps on paper, not with live
11 witnesses cross-examined but just a basic evidential threshold has been aired
12 in a local court before the ordeal of being taken from one jurisdiction to
13 another.

14 CHAIR: I wonder how many cases that would actually stop being extradited as
15 against what happened at the moment?

16 MS CHAKRABATI: I don't know but –

17 CHAIR: Indeed, if any.

18 MS CHAKRABATI: Well –

19 MR RUSSELL: I mean the case that starts off, I remember some mistaken identity
20 and I agree, it's a difficulty. That's one case but it is one case in which
21 thankfully we were able to resolve in other ways. Italy withdrew the warrant
22 against Edmond Arapi. It seems to me that a case like that cannot depend on
23 the ability to get Radio 4 coverage or a question in Parliament for resolution.

24 MR DOOBAY: We've raised this issue in terms of mistaken identity and we've
25 raised it with the CPS for example who have said, we actioned the request
26 from the State, if the defendant puts forward that they feel there to be
27 incontrovertible evidence that they were in the UK, we will relay that back to
28 the requesting state and we will try and persuade them that there is very strong
29 evidence and we will try and ensure that they withdraw the warrant.

30 CHAIR: Right.

31 MR DOOBAY: The difficulty is that that's an easy case where the person is in the
32 UK, there is 19 witnesses who swear to the fact they're in the UK. The more
33 likely mistaken identity alibi I would submit are much more finely balanced
34 where there is two witnesses who say they were in Spain. There are two who

1 say they were in the UK and it's very difficult to resolve. I think that one
2 thing which we are struggling is, of course we see that UK authorities
3 presented with very strong evidence that the person couldn't have committed
4 the offence should do what they can to transmit that to verify themselves, so
5 we have raised it with the police whether you would investigate that, whether
6 you could do something to help the defence if it appeared a strong argument.
7 It's whether it's something more than that.

8 Let's say that you... The CPS transmit back what's raised by the defence.
9 You persuade the police to assist you in trying to gather more evidence to help
10 you. Should there then be the ability for the Court here to say, well the
11 requesting state had all the information but despite that, we are going to weigh
12 up two witnesses here, we're going to weigh it up against three witnesses
13 there, some physical evidence there, some DNA. We're going to decide
14 whether or not this is a case of mistaken identity or whether in fact there is -

15 MS CHAKRABATI: I wouldn't advocate that. I think it's more about - I think
16 whether you halt the extradition or not, you add to the legitimacy of the
17 process if the person knows that there isn't just accusation and suspicion, there
18 is some evidence and that, where the evidence is just completely on its face
19 ridiculous and not sufficient to justify that process, that there was the ability
20 for a case to be halted at that point. It must mean something because the
21 Americans take it rather seriously and, you know, it must mean something to
22 people to know that there is just basic, a basic evidential threshold met or
23 other jurisdictions would not treasure the safeguard in the way that they do.

24 MR RUSSELL: And on the point you make about the SOCA, I mean I'm delighted
25 that that's what they're saying, that this process is already happening. All I
26 could point out is that in Edmond Arapi's case actually, the Magistrates' Court
27 had ordered his extradition so it hadn't happened quickly enough to stop that
28 glaring mistaken identity in his case and his extradition had been ordered.
29 Actually, when you're talking about 700 extraditions a year and 1,000 arrests
30 under European Arrest Warrants a year in the UK, maybe actually making
31 sure that the courts also have the ability perhaps to stop the glaring case or
32 themselves require, you know, to be satisfied that the evidence is at least being
33 considered and responded to where there is a case like Edmond Arapi's may
34 well have... I just think it didn't work out in Edmond Arapi's case actually, at

1 the Magistrates' Court stage. There are lots and lots of cases, 1,000 cases of
2 arrests a year and that's a lot of to-ing and fro-ing for SOCA to do and if that's
3 all happening behind the scenes, you can't see any of it so having some
4 judicial role in those kinds of cases or ability for the judges to intervene on
5 mistaken identity points is why we propose the amendment. Discretion: there
6 was talk about discretion and we didn't comment. I mean, we haven't said
7 anything one way or the other about discretion in our briefing.

8 CHAIR: Yes.

9 MR RUSSELL: We've focused on the European Arrest Warrant. The reason is that
10 we think that discretion - the whole reasons for European Arrest Warrant was
11 to remove political -

12 CHAIR: Well, the Secretary of State's discretion in Part 1 cases is very, very limited,
13 isn't it?

14 MR RUSSELL: Absolutely, and we have real concerns about re-introducing political
15 discretion. I think Shami is absolutely right. There is a clear need for greater
16 judicial discretion in extradition decisions but I would, though, like to reflect
17 on this specific example that Shami raises of confidential information, that
18 there be a threat to National Security for the Secretary of State to disclose -

19 CHAIR: Yes.

20 MR RUSSELL: - because actually it's a possibility. What I'd like to think about is
21 whether there is any judicial solution, any way of reaching a judicial solution
22 to that kind of case.

23 MR DOOBAY: I was going to ask you a further question on that because I have, I
24 think if the Secretary of State has information which they are aware of which
25 related to an extradition case where they have ordered extradition, I'm
26 struggling to see why they couldn't go back to the court themselves and say,
27 there are all sorts of protections in terms of dealing with PII information which
28 the parties can't have. I don't understand why the court couldn't still be the
29 decision maker because, as we were discussing before, if the Secretary of State
30 is not going to bring that information forward, we're never going to know
31 anyway so it relies upon the Secretary of State saying, 'I've got some
32 information.' If that happens, then I don't see why the Secretary of State can't
33 go to the courts to make a decision even if you have to have whatever
34 safeguards the court normally puts in place to deal with information which is

1 very sensitive –

2 MS CHAKRABATI: I think that theoretically you're right but my experience of
3 working in Government and outside it on matters that include the relationships
4 between the states would suggest that your wonderful legal principled solution
5 is not always completely attractive to politicians when they are dealing with
6 their allies. I can conceive of possibilities, moments, when it - not necessarily
7 National Security, it could be relationships with a power, another power that's
8 friendly or not so friendly, where actually it would be in the interests if the
9 Secretary of State becomes aware of reasons why it would be in the interests
10 of justice to halt an extradition but where it might not be very attractive to
11 have everything the Secretary of State knows taken to, you know, taken to a
12 court and aired in court and they might not want to be seen to be referring
13 issues to do with that other power to a court. You see this in other contexts
14 actually all the time. I wouldn't die in a ditch over it. I think that extradition
15 should be overwhelmingly a judicialised process and a process where we
16 return some discretion to the courts in the state that the request has come to
17 but as I say –

18 CHAIR: I am puzzled by this, Shami, because if there is force in your point then one
19 ought to be able to look across the spectrum of the past and say, 'Well why on
20 earth did the Secretary of State suddenly decide against extraditing X or Y or Z
21 without giving any reasons at all to anybody?' and that has not, I don't think,
22 happened.

23 MR RUSSELL: The other thing that occurs to me is that it's actually very helpful in
24 terms of relationships between states for governments to be able to say this
25 was a judicial decision and not a political one.

26 MS CHAKRABATI: Absolutely.

27 MR RUSSELL: And if the Home Secretary were refusing to extradite –

28 MS CHAKRABATI: Absolutely. Generally speaking, it's absolutely better that, 'It
29 wasn't us, it was those wicked old judges, unelected judges who did this –'

30 CHAIR: We are debating this for a long time but I think that if you wish to put in
31 another single sheet of paper with further thoughts on this because I think it
32 may be that we have slightly sprung this on you.

33 MR RUSSELL: Well, I hadn't reflected on this possibility. I think it's a very
34 interesting one outside of the Part –

1 MS CHAKRABATI: We are told we're going to have a Green Paper in due course in
2 another area of policy, another area of interaction between the Executive and
3 the courts about how the courts deal with national security matters and about
4 whether it's too much exposed on judicial review etc, etc. It relates to issues
5 that were very excited before the election. It is just a perennial concern of the
6 Executive that there are some things and they are always to do, nearly always
7 to do, with either national security or the relationship between states. There
8 are some things that the Executive knows that should not be aired in a court.
9 Now often I think the Executive goes far too far and trusts the judiciary not
10 enough and I think that extradition is overwhelmingly about people's
11 fundamental rights and freedoms, to be protected from crime but also to be
12 treated fairly. I just cannot rule out the possibility that one day somebody
13 could be saved from an unfair extradition by a Secretary of State who knows
14 something that will not be easily or readily volunteered. It's not that the
15 Secretary of State would conceal anything from a court where there are live
16 proceedings but there could be a moment one day where new matters come to
17 light to the Secretary of State at the eleventh hour and this has come via the
18 relationship –

19 CHAIR: Well, I think we have the point but, speaking for myself, I have not got the
20 detail of any particular situation that persuades me.

21 MS CHAKRABATI: No, nor have I. I can't point to a particular extradition –

22 CHAIR: I am not at the moment impressed that all three organisations are going to be
23 of the same mind.

24 MS BLACKSTOCK: I just have perhaps two points on it. I think the first one would
25 be that the Secretary of State was under an obligation anyway to comply with
26 convention rights so I don't see what putting it into legislation would - what
27 difference it would make and if it doesn't come back to –

28 CHAIR: Well, the answer to that surely would be there would be an alternative
29 remedy and then there would be no obligation on the Secretary of State to go
30 through the human rights groups.

31 MS BLACKSTOCK: But it would be on the basis of convention rights that they
32 would be preventing it anyway.

33 CHAIR: Yes.

34 MS BLACKSTOCK: If it is not coming back to court and we don't know what

1 they've done, then I don't see how it resolves the situation. The obligation is
2 there - If they have details that this person is going to be subjected to inhuman
3 treatment or whatever it is, they have an obligation to prevent the extradition,
4 to stop whether it is legislated or not.

5 CHAIR: Well the obligation would be to tell the court about it rather than to do
6 something about it.

7 MS BLACKSTOCK: That's the argument you are making but I don't think it's the
8 argument that Liberty is making at the moment. They're saying don't send it
9 back.

10 CHAIR: Yes. I see the point.

11 MS BLACKSTOCK: If we were ever to get hold of some information to say that
12 that, there had been intelligence and the Secretary of State had not prevented
13 an extradition, I think that would still be reviewable, whether there was a
14 statutory requirement or not. It's a conventional obligation -

15 CHAIR: We are going to have to move on because there are other very important
16 things to talk about.

17 MS BLACKSTOCK: Yes. Just a second point if I may just briefly. I think our
18 concern on it would be that at the moment, if there is an issue, particularly in
19 relation to Part 1 cases rather than Part 2, which comes to light out after the
20 court proceedings have concluded, there is no way of getting back into court
21 because the legislation is very strict.

22 CHAIR: Yes.

23 MS BLACKSTOCK: There's no residual, inherent jurisdiction and that is the
24 problem.

25 CHAIR: Yes.

26 MS BLACKSTOCK: Incorporating a Secretary of State discretion to try and deal
27 with that problem I think is the wrong way of looking at it. I think we would
28 want to see inherent jurisdiction placed into the Act and that would solve a lot
29 of this difficulty.

30 MR PERRY: Or an express jurisdiction.

31 MS BLACKSTOCK: Indeed.

32 MR PERRY: Rather than relying on an inherent jurisdiction -

33 MS BLACKSTOCK: Well I suppose you only need inherent if there isn't express,
34 yes.

1 MR PERRY: Just to make sure that there is a proper safeguard that is not dependent

2

3 MS BLACKSTOCK: Well, that would be our primary point but anyway, I don't want
4 to labour the point.

5 MR PERRY: Yes, okay.

6 CHAIR: Okay. As I say, if you want to put another sheet of paper –

7 MR RUSSELL: Yes. I'd just like to reflect on this example.

8 CHAIR: You are very welcome to. Trials in absentia.

9 MS CHAKRABATI: Yes.

10 CHAIR: There's a framework decision that is, is made[?] by the 28th March. That is
11 in now, is it?

12 MS CHAKRABATI: It ought to be. What I haven't done is check whether the UK
13 have actually transposed it.

14 CHAIR: Right.

15 MS CHAKRABATI: It's not an issue for us because we have probably more detailed
16 rules on this or requirements on this than even the framework decision says, so
17 it probably isn't even going to be picked up by the UK authorities. It comes
18 up in a lot of cases where there is a concern about the right of retrial, and I've
19 put it in there to highlight it as one of the problems. It may not be something
20 that can be dealt with through UK legislation. What can be done is as with the
21 new instruments that are coming into force in relation to supervision and
22 sentencing, the UK can use its persuasive authority to engage in dialogue with
23 other member states about it. It isn't something that would change anything
24 from domestic legislation.

25 MR RUSSELL: There is a practical issue on right to a retrial which we've seen a fair
26 few times, which is when a person is extradited on the basis of an
27 understanding or a guarantee that the retrial will be given in another EU
28 member state, because of the way extradition works, there at the moment is no
29 process for ensuring that that actually happens or for witnessing whether it
30 does happen. One of the leading authorities I think on this point, Da An Chen
31 is an example in point and that was a case –

32 CHAIR: My case I think it was.

33 MR RUSSELL: – in which he was extradited on the basis of the understanding that
34 Romanian law would guarantee him a retrial –

- 1 CHAIR: Yes.
- 2 MR RUSSELL: – because they were a party to the European Convention on Human
3 Rights. Three years later he still has had no retrial. In fact, his only right
4 under Romanian law was to apply for the right to a retrial and that application
5 was rejected. So there is an evidential problem. If a country is giving
6 guarantees or saying there is a right to a retrial, what we need to work out is
7 some way for defence practitioners to be able to then come back to court the
8 next time Romania uses the same argument to say, ‘Well actually Romania
9 didn’t do that the last time so can we really rely on that guarantee a second
10 time around.’ It’s an evidential specific, you know, decisions are made on the
11 basis of undertakings or understandings of the law which aren’t in practice
12 being applied or –
- 13 MR MANSELL: And yet again this comes back to dual representation because you
14 need the lawyers on the ground in the requesting state saying, ‘Well okay this
15 is what it says in – ’
- 16 CHAIR: At all, yes.
- 17 MR MANSELL: – in practice. It is not being followed.
- 18 MS CHAKRABATI: It is going to happen.
- 19 CHAIR: I thought we did have some expert evidence in that case?
- 20 MR RUSSELL: There was some expert evidence that said, as a matter of
21 constitutional law, it was a monosystem[?], I think in Romania, and therefore,
22 because it had signed up to the European Convention of Human Rights –
- 23 CHAIR: Yes.
- 24 MR RUSSELL: – and because the Convention requires there to be a retrial if there
25 was conviction in absentia. We can trust that that law will be complied with.
26 In practice, that’s not the way the law works in Romania at all. You apply for
27 the right to a retrial and you are either given the right to a retrial or you are
28 not. Now you wouldn’t have known that at the time but three years down the
29 line it’s pretty obvious this guy still had no retrial and is serving a sentence for
30 murder even after a trial in absentia.
- 31 CHAIR: David?
- 32 MR PERRY: I’ve got nothing else on that.
- 33 CHAIR: Okay. Just moving on then, challenging Schengen alerts. That’s a matter of
34 some concern. We have had quite a lot of discussion between ourselves about

1 this and I am not sure quite what the way through it is. Extradition is a two-
2 way thing and, supposing we are looking at a case the other way round, we are
3 trying to get somebody extradited from Italy and the extradition is rejected on
4 what seems to us to be an entirely technical ground - The fellow moves to
5 Spain and if the alert had been removed, then end of story, but the other side
6 of the coin is that we could always issue a fresh warrant; would countries not
7 do this?

8 MR RUSSELL: Well I think that's absolutely right. Obviously if a fresh warrant is
9 issued and the refusal was on the technical ground, the warrant wasn't filled in
10 properly, that would be absolutely right. The problem we have now is where a
11 an extradition is refused on principled grounds, for example that, you know,
12 that if you could have -

13 MS BLACKSTOCK: Length of time.

14 MR RUSSELL: - length of time, passage of time would be a classic one or where
15 there was, you know, if there were a case where extradition were refused on
16 the basis of present conditions in that country. If there were - or a conclusion
17 was reached that a person's trial was a flagrant denial of justice and therefore
18 to extradite them to serve the sentence would be a flagrant, you know - should
19 not be permitted. It seems to me that if you have a mutual recognition system,
20 there ought to also be mutual recognition of decisions not to extradite on
21 those, on certain principle grounds. On technicalities. The way around that
22 issue is to reissue a warrant which deals with the technical problem. The
23 current situation is that if you are a practitioner and you win an extradition
24 battle on principled grounds, that the success is severely muted by the fact that
25 your client is then unable to leave the country because -

26 CHAIR: And you say there is a travel restriction on this. Well there is a travel
27 restriction -

28 MS CHAKRABATI: Well, in effect -

29 CHAIR: - but would you say that that is a breach of the community -

30 MR RUSSELL: The right to free movement of people.

31 CHAIR: Free movement. How big a problem is this?

32 MR RUSSELL: It's a massive, it's a big problem.

33 CHAIR: How many cases a year are there?

34 MR RUSSELL: Well, there aren't that many cases. Basically, if ever you succeed in

1 stopping an extradition on principled grounds, and as you know, we are
2 arguing that there should be more principled grounds on which a court should
3 be able to refuse an extradition, unless you have this kind of provision, the
4 importance of that is muted by the fact that every time that person leaves the
5 country –

6 CHAIR: I mean, they could issue a fresh warrant if they want to.

7 MR RUSSELL: Well it depends, doesn't it? If the problem is a technicality, you
8 issue a fresh warrant, you deal with the technicality and you therefore –

9 CHAIR: Well, even if it's not a technical one, you can still issue a fresh warrant, can
10 you not?

11 MR RUSSELL: Well, I'd say that the amendment would have to be, and the
12 amendment we have suggested is not wide enough to deal with that problem
13 but the amendment would need to make sure that it, you know, that the
14 warrant was removed and that a warrant relating in the same form relating to
15 the same –

16 CHAIR: I mean, is there a bigger problem with just sheer idleness, that they are
17 simply left on the alert system because they have not got round to removing
18 them?

19 MR RUSSELL: Well there is a problem with that. There are cases where a person
20 has served their sentence and they remain on the Schengen system. That's an
21 issue but that's not in my view the biggest issue. The biggest issue is when
22 you've got someone who, a court has looked at their case, refused the
23 extradition on principled grounds and then the minute they leave the country,
24 they could be rearrested. We've had one client that has been arrested in three
25 different countries until eventually, again through political and media
26 pressure, the issuing authority agreed reluctantly to remove the warrant but
27 you shouldn't have to pursue media and political strategies to get a warrant
28 removed if three countries have refused it.

29 CHAIR: Would this not be dealt with by more education of other EAW countries?

30 MS BLACKSTOCK: Well I think in that instance, they didn't accept the principled
31 argument. It had been 20 years and they considered there wasn't a time
32 limitation in their law and they wished to pursue the case –

33 CHAIR: Right.

34 MS BLACKSTOCK: – despite that there were in fact issues about it being trial in

1 absentia etc. The obligation is there in the Schengen Convention. It has been
2 agreed between member states and accepted but it hasn't been implemented.

3 CHAIR: Right.

4 MS BLACKSTOCK: So our argument is, if we implement the section that's there,
5 then at least in the UK we're able to present ourselves as complying but at the
6 moment we can't achieve anything because we don't accept either this article
7 or its implementation into our law.

8 MR PERRY: It would have to be very, very focussed, wouldn't it, on the basis upon
9 which the warrants had been refused –

10 MS BLACKSTOCK: Yes.

11 MR PERRY: – because a principled argument would be that the conduct constituting
12 the offence did not constitute a conduct - did not amount to conduct that would
13 constitute an offence in the UK. Now if it were refused on those grounds, it
14 would be ludicrous to remove it from the Schengen alert system because
15 another jurisdiction may assert a double criminality rule that [crosstalk] apply.

16 MS BLACKSTOCK: Absolutely.

17 MR RUSSELL: I agree with that, and clearly the amendment we propose is, the aim
18 of which is to just highlight the problem. Clearly, there would need to be a
19 negotiation. This is one of the important issues I believe, which requires an
20 amendment to the framework decision and it would require a discussion about
21 which refusal grounds should be mutually recognised.

22 MR PERRY: How would it work in passage-of-time cases when the passage-of-time
23 decision before our courts would have been taken on the basis that it was
24 unjust or oppressive on the basis of the evidence before our court and it would
25 be oppressive on the basis of your situation here?

26 MS BLACKSTOCK: Yes.

27 MR PERRY: Now are we entitled to say, if he moves his situation, suppose he
28 uproots, suppose he divorces his wife and leaves the five children to be taken
29 care of and when he was before the English courts he said, 'Well actually I
30 need to be here because all my children need my care' and then he runs away,
31 with his wife's bank account to France, and says, 'Poland, you can no longer
32 prosecute me.'

33 MS BLACKSTOCK: That's not going to work. That can't work.

34 MR PERRY: It can't work, can it?

1 MS BLACKSTOCK: It depends on where you focus it. The drafting would have to
2 encompass fundamental principles or convention rights or –

3 MR PERRY: Yes.

4 MS BLACKSTOCK: The wording at the moment in these instruments seems to be
5 ‘fundamental principles of domestic law’ which we don’t necessarily have but
6 other member states seem to like that wording so it would have to be
7 something around that. If a decision is taken here to remove the warrant from
8 Interpol or wherever, coming up on the Schengen system for example, that
9 wouldn’t preclude, as has rightly been pointed out, any further warrant being
10 raised. But that further warrant being raised would have to take into account
11 the principles of fundamental law and whether in fact by re-raising[?] it, it
12 would contravene those. So if a requested person does do what you said and
13 remove themselves from the scenario where they had Article 8 reasons to
14 prevent them being removed because of their family life, that would no longer
15 apply. It would require the issuing state to consider those issues upon issue of
16 the new warrant and then France I suppose would hopefully have a defence
17 lawyer who would appreciate the issues that have gone before in the
18 instructions that they have receive and raise whatever argument might apply
19 thereon. At the moment, there is no way of even beginning to implement that
20 sort of system.

21 MR RUSSELL: The case that that raises is obviously the case of Deborah Dark; the
22 facts of that case, I don’t know how peculiar they are but the ordeal she went
23 through is certainly significant and the fact that it was passage of time but it
24 was also the fact that the passage of time had made it impossible for her to
25 have a fair retrial because the evidence had disappeared. It was all on facts
26 and it had faded and therefore it was not at all possible for her to be offered a
27 fair retrial. Now that kind of set of facts could, you know, it seems to me,
28 would justify France removing the warrant but if the same position had been
29 taken in Spain and in the United Kingdom, yet despite that, if she’d have
30 travelled anywhere outside of Spain and the United Kingdom, she would have
31 been rearrested and sent back to France potentially.

32 MS BLACKSTOCK: But that’s a circumstance where it would have universal
33 application so if any other court picked up a new European Arrest Warrant
34 from France, despite the removal, if France kept renewing or putting forward

1 new warrants, the same issue would apply. There would still not be the
2 evidence upon which an Article 6 compliant trial could be held. Hopefully
3 they'd get the message and stop bothering because it would be costing them a
4 lot of money by then.

5 MR DOOBAY: But I think that part of our concern in terms of thinking this through
6 practically is that actually all you are doing is forcing the issuing state to focus
7 on it and to decide whether or not they accept your argument because let's
8 look at it like this. Let's say that the UK said, 'Prison conditions in X country
9 are so bad that we are refusing to extradite Mr Smith. Country X may well
10 say, 'We don't accept that as being the correct position in terms of our prison
11 conditions and we're issuing now a new EAW and when you go to Germany,
12 we're going to rerun this argument and we're going to show you how prison
13 conditions aren't as bad as you in the UK had thought it to be.'

14 MS BLACKSTOCK: Yes, but they might do that.

15 MR DOOBAY: So you're forcing them to rethink it because -

16 MS BLACKSTOCK: Yes.

17 MR DOOBAY: - sometimes when they use a request here, they don't do anything.
18 They just leave it there because they've lost the request, nobody actively
19 thinks, 'Should we change it, should we withdraw the alert on the basis of
20 what has happened in a court?' But essentially that's - I mean, am I right in
21 thinking that, in practice, what you're doing is making them proactively look
22 at the outcome of the case, decide whether or not in light of that outcome they
23 want to continue with their request.

24 MR RUSSELL: I think that's what our suggested amendment is aimed at. I mean, it
25 is this idleness point and this is a problem talking to practitioners; in practice,
26 there are a lot of these cases where warrants are abused on principle and if
27 they remain in place but in a situation where they've got to retake the decision,
28 if it's just idleness that has been left as live then it is very unlikely to be
29 reissued.

30 CHAIR: So the simple answer then would be that every time that an EAW fails, then
31 the - that would be removed and they would have to issue a fresh warrant.

32 MS BLACKSTOCK: If it is on a fundamental principled ground as opposed to a
33 technical ground.

34 CHAIR: But that is going to be very difficult to define, is it not?

1 MS BLACKSTOCK: Well if you say, 'We don't - the warrant isn't valid because
2 you've put a list in a schedule, not in the warrant,' it would be very unfair to
3 remove the alert for that reason, although arguably it would always be invalid,
4 wouldn't it? So perhaps that's not the best example.

5 MR RUSSELL: That might be a very - I mean that might be a good option if
6 basically the arrest warrant automatically falls away, you at least need to put
7 your mind to the question of whether or not you think it's justified to reissue a
8 new warrant and then presumably at that point, the person that's the subject of
9 that warrant will know a warrant has been issued and if they want they can try
10 and challenge it in the issuing state if they think there is some fundamental
11 flaw with the decision to issue the warrant. So I think that is certainly one
12 possible practical way of at least getting them to focus on the question of, 'Is
13 this a general application, is this that, you know, is this something that
14 questions whether or not we should be - '

15 CHAIR: If it is not either all or nothing, you are going to create a big grey area in the
16 middle that somebody is going to have to work out what to do.

17 MS BLACKSTOCK: You're right. And thinking it through, even if it is a technical
18 reason, it's still invalid for that technical reason so it would still need to be
19 reissued but a thought process will have to be gone through as to whether they
20 decided -

21 MS CHAKRABATI: I suppose in the end there might be some question. If this is all
22 about cooperation and moving towards harmonisation within the EU, there is
23 perhaps a question to be addressed down the road of whether there should be a
24 mechanism for people to challenge repeated abuse of warrants that are not
25 honoured but that keep being reissued.

26 CHAIR: Yes.

27 MS CHAKRABATI: But that then is moving towards some kind of centralised
28 mechanism for dealing with that.

29 CHAIR: Yes

30 MS BLACKSTOCK: Yes.

31 MS CHAKRABATI: Short of that, all you've basically got is the fact that these are
32 going to be refused in various places.

33 MR DOOBAY: Yes. And it's something which we've been thinking about in terms
34 of, because of - each time somebody is discharged, a judge is discharging

1 them so it's something which they could look at at the same time as when they
2 are discharging someone because there is always a judicial decision which is
3 leading to that. So if you have the provision, it could be applied judicially at
4 the same time –

5 MS BLACKSTOCK: Absolutely.

6 MR DOOBAY: – as when you are looking at the discharge.

7 MS CHAKRABATI: So are you suggesting that if there is a judge in any state that
8 the request has come to –

9 MS BLACKSTOCK: Yes.

10 MS CHAKRABATI: – could not only not honour the warrant for whatever reasons
11 but could also say that –

12 MR DOOBAY: Could remove the Schengen information alert.

13 MS CHAKRABATI: Yes. Well I mean good luck with that, yes.

14 MR DOOBAY: But as we say, it's just that that would only ever be a prompt for the
15 issuing state to rethink it.

16 MS CHAKRABATI: Of course.

17 MR DOOBAY: They could of course tomorrow say, thanks very much but here's a
18 new EAW.

19 MS BLACKSTOCK: You can't prevent them reissuing.

20 MR DOOBAY: Well also you have the interval[?] system so no matter what you do
21 with Schengen, you're never going to be able to stop [looking at it?].

22 CHAIR: It might be just helpful if we could go on to the forum bar because I think
23 that is quite a big issue to talk about and there are other things that we can
24 come back to later but I would not want to squeeze our time on forum. We've
25 had quite a lot of evidence about this. I know that Shami feels pretty strongly
26 about it from what she has already said today quite apart from the
27 representations. The really big hurdle seems to us to be that in these days
28 when we have international crime across borders increasing and sometimes
29 crime in several countries, the decisions are in practice being taken by
30 prosecuting authorities, take for example the UK and the United States and
31 they have a protocol for meeting each other in difficult cases and working out
32 against a set of criteria where a particular case should be prosecuted.

33 The difficulty that I think we see at the moment is the courts in this
34 country have always been very reticent to take over the prosecutor's role, not

1 least because they have not got the expertise or information to make the
2 decisions about witnesses etc, etc, etc. It is only in very limited circumstances
3 that the courts will judicially review a decision to prosecute or not to
4 prosecute. Are you in favour of the forum bar being implemented or the
5 forum bars - there are two different sections, Part 1 and Part 2, as drafted at the
6 moment and if so, how do you see that working or do you see some other kind
7 of forum bar replacing those?

8 MS CHAKRABATI: Well from our point of view, the forum amendment that has not
9 been implemented, we urged at the time and subsequently that it should have
10 been implemented. Of course ministers in the previous government made it
11 perfectly clear that they had no intention of implementing it. One could
12 probably improve on it of course with discussion and consideration but the
13 basic principle is not a drafting one. The basic principle is that we do think
14 that you can help to square this difficult circle between international mutual
15 cooperation in relation to criminality on the one hand but also doing justice to
16 individuals on the other by allowing the courts to consider in a particular case.
17 This is especially important in cases where there are lots of connections with
18 the country that's facing the request. Where for example a person lives here,
19 where the conduct that is being impugned took place here, either because the
20 person, like Gary McKinnon, was, you know, in his bedroom on the Internet
21 or because, as in the case of the NatWest Three, they were in the United
22 Kingdom but also the victim is a British based[?]

23 There are all sorts of circumstances where it is obvious that when you're
24 looking at the whole picture of what's in the interests of justice, one of the
25 ways to square the circle in a particular case is that the person could be dealt
26 with here. It's something that could be implemented without the huge task of
27 looking at the framework directive or even renegotiating arrangements with
28 the US. It's something that could be done fairly quickly as a matter of
29 domestic law and politics and we think it should happen as soon as possible.

30 CHAIR: But you are going to get a vast increase in litigation, are you not, then
31 because in every single case there's going to be a forum issue that the courts
32 are going to have to decide and how are they going to decide it? How are they
33 going to decide whether a significant part of the criminality took place here
34 without going into all the evidence?

1 MR RUSSELL: It seems to me that these decisions being made at the moment, they
2 are being made by prosecutors in private conversations in which there is no
3 public involvement; there is no defence involvement at all. I don't doubt for a
4 second that there will be, it will take some time for the courts to develop the
5 principles that are applied and to work out how to make decisions on forum. I
6 would greatly welcome bringing questions around the forum into an open
7 court where those kinds of issues, because you talk about prosecutors making
8 these decisions on the basis of principle. I don't know that they are. I mean, I
9 don't think anybody knows how those decisions that the prosecutors --

10 CHAIR: Well this is very much interesting us at the moment as to how they are made
11 and what the criteria are and there may be a good argument for greater
12 openness in the criteria.

13 MR RUSSELL: But you see, it is a challenge --

14 CHAIR: Would that not solve the problem to some extent or...?

15 MR RUSSELL: The decisions being made over Cognacs in Brussels. I was told by a
16 prosecutor about that kind of, you know, thing. This is a common way that
17 decisions -

18 CHAIR: You can have the old NatWest three and I will have the Barclays four[?].

19 MS CHAKRABATI: That's just not good enough frankly when people's
20 fundamental rights in prisons are potentially engaged. I can - you know, we
21 have a public interest test. No doubt there are different tests for different
22 prosecutors around the world. In some countries every crime must be
23 prosecuted, at least theoretically, though practically, clearly, that doesn't
24 happen. In other jurisdictions, there's more of a discretion. In reality, this
25 cannot - extradition is such a serious thing for the individual concerned, this
26 cannot just be left to who cares enough, frankly, whose political priority it is to
27 prosecute and prosecute hard and prosecute now in a particular jurisdiction. It
28 seems to me that you cannot look at the justice of a particular extradition in
29 the round without at least being able to consider whether justice could be done
30 by dealing with the person here.

31 CHAIR: How do you deal with the situation where the prosecuting authorities have
32 already decided not to prosecute here?

33 MS CHAKRABATI: Well, there are different ways in which you could deal with it.
34 One way is that the court when considering - the court would be facing an

1 argument no doubt from the extraditee that really they should be dealt with
2 here, that if you take everything into the mix, if you take the circumstances of
3 the offence, their personal circumstances, residence, nationality,
4 compassionate circumstances, who the victims are, it really should have been
5 dealt with here. The other side says, 'Well you know, the British prosecutors
6 already decided to take no action.' Maybe the court would want to hear from
7 the prosecuting authority or maybe in the end the prosecuting authorities
8 would actually have to think again given that they have a role in this picture of
9 international justice as well.

10 CHAIR: Judicially reviewable?

11 MS CHAKRABATI: Well, would they be judicially reviewable for not prosecuting
12 in circumstances where a court has said that one of the reasons why this
13 extradition will not take place is because we think that in all the circumstances
14 it would be more in the interests of justice for the person to be prosecuted
15 here.

16 CHAIR: But these are prosecutorial decisions, are they not, rather than court
17 decisions?

18 MS CHAKRABATI: Absolutely, and I completely agree that the courts have
19 traditionally been slow to interfere with prosecutorial decisions but they are
20 not completely immune from judicial review nor should they be.

21 MS BLACKSTOCK: It's a very different feature to a domestic decision to prosecute
22 because it has such an impact on the person's life. It may not reach the high
23 thresholds required for Article 8 but it still does impact very differently to if it
24 was dealt with domestically.

25 MS CHAKRABATI: The other thing is, just because a court have said that one of the
26 reasons why I'm not going to grant this extradition is because I think in all the
27 circumstances of the case it would have been more, it's more in the interests of
28 justice for person X to be tried here. That doesn't mean that the person
29 necessarily has to be prosecuted here. For example, a prosecutor might
30 nonetheless say, 'It's not in the public interest for this prosecution to take
31 place.' Maybe on occasion a prosecution will not take place but it will be a
32 new, highly relevant factor I would argue.

33 MR PERRY: Well, haven't we got to ask a slightly different question? The question
34 is not should you be tried here surely. The question is: is it fair to try you in

1 another jurisdiction –

2 MS CHAKRABATI: Yes.

3 MR PERRY: – because the point –

4 MS CHAKRABATI: That's the fundamental question, you're right.

5 MR PERRY: The point that I was just making is that no one is going to be judicially
6 reviewing that decision.

7 MS CHAKRABATI: No.

8 MR PERRY: The extraditee isn't going to say, 'Thank goodness the court said it's
9 unfair to send me to the requesting state. I'd better now judicially review the
10 CPS to make sure [crosstalk].

11 MS BLACKSTOCK: For failing to prosecute me. Of course they're not. The only
12 way you'd get a judicial review –

13 MS CHAKRABATI: You can't rule out the possibility that alleged victims I suppose
14 or that the failed state, the state that didn't succeed with the extradition might
15 bring such a challenge but you know, the likelihood of success of that
16 challenge will generally not be great because generally it's not very easy to –

17 MR PERRY: But there are all sorts of practical difficulties that follow in the train of
18 this potentially. Suppose all the evidence is in the overseas territory, so to
19 make a viable prosecution or to make a prosecution viable in this jurisdiction,
20 you have to obtain it from the state you've told can't prosecute and I just
21 wonder how realistic you think it is?

22 MS CHAKRABATI: Well two things. Firstly, in the court's assessment on forum,
23 now once forum is raised as an issue in an extradition hearing, the court will
24 take into account how difficult or easy it would be for a person to be
25 prosecuted somewhere other than the requesting state.

26 MR PERRY: So, well hang on a second then.

27 MS CHAKRABATI: Yes.

28 MR PERRY: So if the court is going to be, if in any case where the other state has
29 got all the evidence, that is going to be determinative?

30 MS BLACKSTOCK: Not necessarily determinative. It's one aspect of the test that
31 they are applying.

32 MR PERRY: And what weight is to be attached to it if it's one aspect?

33 MS CHAKRABATI: Well, the court will look at the circumstances of the case which
34 will include the issue of forum. They will look at the person saying, 'I'm

1 Gary McKinnon. I did everything that I confess I did sitting in the United
2 Kingdom on the internet and there are now grave dangers that the internet
3 makes travellers of us when we didn't even realise that we are now, you know,
4 surfing the world, not the worldwide web, potentially committing offences, all
5 sorts of offences all over the world. I say that I'm a vulnerable person. I say
6 that I am not a terrorist but I am someone who confesses that I did things I
7 should not have done. Everything I did, I did here. It is terrible for my mental
8 health and my family life and disproportionate and human rights etc, etc, etc,
9 especially as I confess and everything is very provable in a domestic court.
10 The forum aspect is one part of a picture of the circumstances of a case and
11 whether it's in the interests of justice to extradite.

12 MR PERRY: Sorry. My question was –

13 MS CHAKRABATI: Yes.

14 MR PERRY: – the other state has got the evidence. There is no viable case.

15 MS CHAKRABATI: Yes.

16 MR PERRY: So put McKinnon to one side for the moment and deal with a
17 hypothetical case. There is no viable case in this jurisdiction because there is
18 simply no evidence for that?

19 MS CHAKRABATI: That's right.

20 MR PERRY: So how can we deal with that?

21 MS CHAKRABATI: Well there's a state that wants this person and one assumes,
22 well the state wants this person because they want this person prosecuted.

23 MR PERRY: In their jurisdiction?

24 MS CHAKRABATI: Well ideally-

25 MS BLACKSTOCK: [Crosstalk] prosecuted at all.

26 MS CHAKRABATI: Ideally in their jurisdiction but one imagines that if they failed
27 to have that person returned to their jurisdiction, they nonetheless think that
28 there is an interest in prosecution and there would be an interest in cooperation
29 so that the evidence could be sent to this country. If not –

30 MR PERRY: So it would be dependent on cooperation?

31 MS CHAKRABATI: Of course, but that –

32 MS BLACKSTOCK: But frankly, extradition –

33 MS CHAKRABATI: Sorry, just to finish the point. If there were circumstances
34 where the state that was requesting the extradition and fighting for it and

1 fighting hard and saying, 'We are the place and we have the victims and we
2 have the evidence' for them to not succeed but to suddenly then not cooperate
3 with a domestic prosecution frankly would raise even more serious questions
4 about the motivation for the extradition request in the first place.

5 MS BLACKSTOCK: That's right.

6 MR PERRY: Well there may be, I suppose there may be many reasons if there are
7 victims in the particular state, if there was considered to be a public interest. I
8 mean it may not raise questions. I just wanted to see whether, you know, it is
9 going to depend upon cooperation -

10 MS CHAKRABATI: Of course.

11 MR PERRY: - and where that leads.

12 MS BLACKSTOCK: But there may also be a question about if there is so much
13 evidence, all the evidence is in the other member state, the judge is unlikely to
14 decide that there is a forum bar. It's usually going to apply in cases where
15 there is not only a defendant here but witnesses here, perhaps a complainant
16 here, at least a certain amount of evidence in this country upon which a
17 prosecution could be mounted. It's unlikely that in a different sort of case, it
18 would be successful in any event.

19 MR PERRY: That's why I asked whether, what weight you attach to that and
20 whether it's determinate.

21 MS CHAKRABATI: I think it [crosstalk]. Frankly, I think in relation to the Internet
22 in particular with some aspects of financial crime, some speech offences, other
23 things that can happen really extensively on the Internet with not much else by
24 way of, you know, by way of internationalism other than somebody sat in
25 London and committed speech offences, alleged financial offences, whatever
26 it is but they have offended the law of another quite different jurisdiction.
27 This could be a really important safeguard in that case. There's possibly no
28 real public interest in prosecution. It could be, you know, in relation to
29 aspects of the arrangements, this could be a speech offence that's really not
30 necessarily even criminal in that it's borderline criminal in this country.
31 Frankly, it could be that, should there be a prosecution at all, is kind of linked
32 to where the appropriate forum for dealing with the offending conduct.

33 MR RUSSELL: I think there are a whole range of relevant factors in signing a forum
34 and I think the ones that you've mentioned certainly, you know, where the

1 evidence is, where the victims are based, where the crime took place, where
2 the suspect's connection with the different countries involved. I think actually
3 if this bar were incorporated, there would be a period when courts had some
4 very difficult decisions to take and it would take them some time to develop
5 principles for applying a forum, a forum bar to extradition. I'd say that given
6 the enormous consequences of an extradition on the individual who is
7 extradited, actually those kinds of difficult questions need to be asked. I also
8 think that in time - I don't think you're going to set out in a single amendment
9 exactly how this kind of test is going to be applied. I think it's one of those
10 things you have to give to the courts.

11 MS CHAKRABATI: You are going to give some discretion to the judges on this. I
12 think this is a shrinking interconnected world and mutual cooperation isn't
13 always about sending people across the globe. Sometimes we see it's about
14 asserting extra territoriality for offences. It's about universal jurisdiction for
15 some serious offences and so on, so there are all sorts of reasons why one
16 jurisdiction rather than another shouldn't be the best place for a resolution.

17 CHAIR: In Part 1 there is an option, is there not in the framework -

18 MR RUSSELL: There is, yes.

19 CHAIR: - decision. Which countries have actually exercised this and what has
20 happened there?

21 MR MANSELL: A decision not to prosecute as a mandatory ground for refusal has
22 been implemented by five member states and 16 member states have
23 implemented it as an optional ground for refusal. That's 4.3 of the framework
24 decision.

25 CHAIR: Which member states have actually...?

26 MR MANSELL: I don't have that information. I just have the number of states that
27 have implemented it but we can send that on later.

28 CHAIR: I mean, do we get anything from their experience?

29 MR RUSSELL: Well, we will come back to you with the names of the countries and
30 we'll speak to a practitioner contracted[?] in those countries and see if we can
31 get you any case examples.

32 MR DOOBAY: Can I just go back a step to the prosecutor because that's where, I
33 think it started with, all of us, with the understanding that at the moment that's
34 where this decision-making process takes place. Let's assume that there was

1 some transparent criteria which were applied. Let's say that they might look
2 something like the grounds which are in the forum bar for a prosecutor to
3 determine and obviously their decision is reviewable, reviewable at the
4 moment and people have sought to review it. So let's take a decision which is
5 challengeable and it includes the grounds which you think should be in the
6 forum bar. Is that still something you don't think deals with the concerns you
7 have?

8 MR RUSSELL: For you turning to the decision of the United States and the British
9 courts to prosecute [in the United States?] or –

10 MR DOOBAY: No. [Crosstalk]. British decision. There was a decision taken
11 between whoever, Britain and the US, using the criteria, which is publicly
12 available and you're not satisfied with whatever the outcome of that decision
13 is, you challenge the outcome of that decision and you have your hearing
14 before the court who assesses whether or not they, the normal general grounds
15 in terms of the decision that has been taken not to prosecute. Obviously, again
16 you're not likely to be challenging any if you are being prosecuted, [sorry, the
17 decision not to prosecute you?].

18 MS CHAKRABATI: I think what we're talking about here primarily, as was said by
19 Mr Perry earlier, well you'd probably be a judge by now, wouldn't you?

20 MR DOOBAY: No, no.

21 MS CHAKRABATI: Strike that from the record. You get older and everyone gets
22 older and everybody is suddenly a Judge and not Mr Perry anymore, sorry.
23 This is, as was well put earlier, ultimately about the grounds on which
24 someone should not be extradited. This is not fundamentally about ordering
25 prosecutions to take place or even getting more under the skin although I
26 appreciate the point about transparency and you always get more transparency
27 in a courtroom. I can conceive of circumstances where a prosecutor has
28 looked at a case in the public interest in this country and decided not to
29 prosecute, decided that on balance, given what's happened and given how
30 much it would cost to prosecute etc, etc, that it's just not worth it. The
31 complainant isn't complaining, etc, etc and there are high profile cases that I
32 might be referring to.

33 In another jurisdiction, this is big political public interests stuff and you
34 know, perhaps we've got elected prosecutors or you know, we've got people

1 who really, really want this extradition and this prosecution to happen. I think
 2 that there is a sort of multifactoral picture which a court is best placed to look
 3 at, that balances, that puts into the balance not just the effect on the individual
 4 of being extradited but on whether, if this criminality were to be dealt with by
 5 prosecution at all, Britain wasn't actually the obvious place and the best place
 6 for that prosecution to take place. That would still leave open to a prosecutor
 7 to say, 'Okay, well this, well A, it would leave open to a prosecutor potentially
 8 to pipe up in court and explain why this is a misconception, that actually in a
 9 particular case it looks like everything took place in Britain but actually all the
 10 evidence and real harm to public interest helps somewhere else. Afterwards as
 11 well, it could leave, still leave open a great deal of discretion to the prosecutor
 12 to say, 'Notwithstanding the fact that the court looking, not just at the public
 13 interest in prosecution, but looking at the rights and freedoms of the individual
 14 concerned decided not to extradite, we're still not going to proceed to a
 15 prosecution.'

16 That might be less likely to happen than at the moment where they have a
 17 free hand but I still think there's a different role for the prosecutor and for the
 18 court and this is ultimately a decision about whether this person should go or
 19 not. We are just saying that the possibility or appropriateness of a domestic
 20 prosecution should be one of the factors.

21 MR DOOBAY: Just one of the optional bars which you've just mentioned in terms
 22 of, would you see then that if there had been a decision - I understand this is
 23 different from what you're suggesting should happen, but just a general
 24 question. Would you see that there would be some value in, if a decision
 25 positively taken by the UK not to proceed with a prosecution so there's no
 26 prosecution, criminal conviction which would be a double jeopardy bar but
 27 there's just a decision taken not to continue with the prosecution. Do you
 28 think that that should be a bar to extradition for the same conduct?

29 MR RUSSELL: There's an interesting case [inaudible] in Ireland where exactly this
 30 issue has come up where it is somebody who is, a murder case and the
 31 decision was been taken in Ireland not to prosecute them. I think the Irish
 32 courts have now settled on the fact that they don't consider that double
 33 jeopardy applies to - but it depends. If it wasn't a judicial authority and
 34 Ireland making a decision not to prosecute, then therefore double jeopardy

1 doesn't apply and it's not, you know, whereas if it were a judicial authority in
2 Ireland as in many other countries which make the decision on whether or not
3 to prosecute, double jeopardy would have applied and he wouldn't have been
4 sent to France. It's a real issue.

5 I'm not aware that it has happened in the UK. I think my starting position
6 would be that the idea of double jeopardy is to stop people going through the
7 ordeal of a prosecution twice and actually I suppose it depends on at what
8 stage what they've been through in terms of the decision on whether or not to
9 prosecute. If it was a decision taken quietly in a room by prosecutors that you
10 weren't involved in, I'm not sure that --

11 MS CHAKRABATI: I think you have to be careful about saying that one
12 prosecutor's decision not to prosecute should be an absolute bar to extradition
13 because the public interest could be different. The law could be different. To
14 be fair to victims, I don't think I could say that a decision not to prosecute in
15 one country is an absolute bar.

16 MR DOOBAY: Could I just ask one more question. Something which strikes me in
17 terms of the public discussion of forum is that there appears to be a perception
18 that if you are a British national, a British resident and it's possible to
19 prosecute you in more than one country, that that will carry some weight in
20 terms of deciding whether or not to prosecute you in the UK. Often there may
21 be cost consequences or it may be more difficult to prosecute you in the UK
22 but jurisdictionally it's possible. I mean, do you think that there should be
23 more weight given to that factor: you're a British national, a British resident, if
24 the UK is looking at whether or not to prosecute you in a discussion between it
25 and another member state?

26 MS CHAKRABATI: Possibly more than we have seen, certainly through the lens of
27 high profile cases but it shouldn't obviously be an absolute. We are looking at
28 an interconnected world and there are all sorts of reasons why it is sometimes -
29 I mean we would, you know, I believe in universal jurisdiction for example for
30 some grave crimes and I think that's an answer to stop people being deported
31 or extradited to places of torture when they are suspected of grave crimes.
32 There are all sorts of reasons why there might be a choice forum. I think all
33 that we are submitting is that when there are grave consequences for an
34 individual potentially impacting on their health and their family life and their

1 wellbeing and so on, and there is a sufficiently strong nexus with the UK for
2 this to be a real option, that should perhaps be considered a bit more than it
3 has been in recent years.

4 CHAIR: Yes. Your main point is that this is a matter of grave importance to the
5 individual and it ought to be ventilated openly before a court...?

6 MS CHAKRABATI: Absolutely.

7 CHAIR: – rather than behind closed doors by prosecutors?

8 MS CHAKRABATI: I think that's definitely the case for the individual but I think
9 that you make a different point about public perception as well and I come
10 back to this issue of legitimacy in any criminal justice system. I think there is,
11 you know, something that has to be recognised and hasn't perhaps been
12 recognised enough by politicians in reform of extradition more generally is
13 that people do seem to feel a connection to the criminal justice system of the
14 country where they are national, where they live and where they work and so
15 on. Now you can argue that if you go on holiday, you know, at your own risk
16 be it, if you get involved in international business dealings and so on. I think
17 with the advent of the internet in particular and to some extent the ease of
18 which we travel, there is a challenge, there's a real challenge to this idea that I
19 obey the laws of the land, i.e. this land, this court and the public has to be
20 taken with the Government and with the courts on this journey towards
21 international cooperation in a way that makes them see that you can have
22 cooperation that is legitimate and fair and have sufficient checks and balances
23 to put back to deal with the fact that we are still a sovereign country and there
24 are still differences of procedure and practice even within the EU.

25 MR RUSSELL: And I think bringing forum into an open court, a place where it can
26 be discussed and principles can be established openly is a very - I mean forum
27 clearly applies outside the extradition context too. Decisions are made all the
28 time by prosecutors about where to arrest a suspect with a truck full of drugs
29 that's travelling round the European Union, decisions made on forum there.
30 Again those decisions made behind the scenes, confidentially but where
31 you've got a judicial authority, where you've got a Judge involved and you
32 need to have a Judge involved in decisions on whether or not to extradite, the
33 question about forum I think has to be one that is aired and where principles
34 start to be developed on forum in open court.

1 MS CHAKRABATI: Yes.

2 MR RUSSELL: I think the public perception issue on British nationals and residence
3 and the amount of protection offered to them is something that could be dealt
4 with in the other suggested amendments, i.e. transfer post conviction in a
5 member state and serving a sentence in the UK.

6 MS BLACKSTOCK: Yes. This is not a territoriality principle you know, we haven't
7 had that for hundreds of years, well eight[?] hundred years in this country. It's
8 not about merely preventing nationals being sent to be tried for their crimes.
9 It's purely about ensuring it's done as Shami says, in the fairest place and in
10 the context of their life, where their life is now. If it's purely British citizens
11 sitting in the UK but everything about the crime is in the US, that's no reason
12 to bar their extradition.

13 MS CHAKRABATI: No. If anything, you will bolster the legitimacy in the public
14 mind of that extradition process by giving some discretion back to other
15 British Judge who said, you know, 'This is why you are going. We have seen
16 a basic summary of what has happened and off you go.' Ironically, some
17 modest amendments to the scheme of extradition would possibly bolster the
18 principle of international cooperation in the public light[?]. Sometimes it is
19 presented, sometimes collective and several positions are presented as being
20 either Euro-sceptic or anti-American or anti-international cooperation. Far
21 from it. I do think that putting some fairness and legitimacy back into the
22 system is actually good for a project of international cooperation.

23 MR RUSSELL: One of my real concerns is when you see a decision like Lord Justice
24 Moses's decision and his comments in the Garry Mann case where you've got
25 a Judge whose saying, you know, 'This man is clearly the victim of a serious
26 injustice but my hands are tied. I can do nothing to stop his extradition.' Now
27 that does no good for faith in the justice system and in a way, if you were
28 going to have a situation which there is so little discretion that the courts can't
29 do anything anyway, you're better off not getting the court's hands dirty with
30 this system. The problem is that the lack of discretion, the lack of the ability
31 to do justice

32 MS CHAKRABATI: Much has been made in the context of America for example of
33 the lopsided, how many times have you read it in various newspapers, the
34 lopsided extradition arrangements between, you know, the US and the UK.

1 Yes, they are lopsided because the Americans are right. This is not about
2 seeking to level down protection. It's about trying to level it up and
3 everything that I've certainly argued, I'm sure colleagues would agree, in
4 terms of what protection should be afforded here, I would like to see afforded
5 to anyone anywhere before they are taken from where they live and work and
6 a local court.

7 MR RUSSELL: You may hear when you are in Brussels discussions, or I do often
8 hear in Brussels, the idea that actually an arrest warrant is not extradition at
9 all, it's a surrender and that it's no different from arresting somebody in
10 London to take them up to Manchester for a trial there. It's just simply not
11 true.

12 MS BLACKSTOCK: That's is not the experience –

13 CHAIR: We do not have to go to Brussels to [crosstalk].

14 MR RUSSELL: No, maybe not.

15 MS BLACKSTOCK: But I'm afraid that's just not the political reality or the cultural
16 reality for people living even in modern Europe; they're lucky if they get an
17 interpreter.

18 MR RUSSELL: I wasn't going to ask anything else in relation to forums.

19 CHAIR: Can we move on then or what would you like to...?

20 MR PERRY: Well I think, as we've mentioned in the United States, United Kingdom
21 extradition Treaty, I'd just like to ask whether - what people consider to be the
22 difference between the two tests that appear in the Treaty.

23 MS BLACKSTOCK: Well you'll see from our submission that in terms of the
24 difference in the, when you take the Treaty and the Act together, in fact there
25 isn't that much difference.

26 MR PERRY: Yes.

27 MS BLACKSTOCK: And a lot of the public perception about the constraints that
28 apply in the UK are misguided because the test in the Act requires you to have
29 a reasonable suspicion. You must present a summary of the offence. You
30 must present the relevant law, the relevant documentation to show that the
31 offence has been committed. All of those steps which you would require in
32 the UK to obtain an arrest warrant are satisfied. The issue then about the
33 *prima facie* test which Liberty has as a separate issue –

34 CHAIR: Separate, yes I agree, yes.

1 MS CHAKRABATI: – in our view. What may at first when the Treaty was written
2 have appeared to be an imbalance is actually resolved by the Act coming into
3 force in our view.

4 MS CHAKRABATI: I disagree, sir. We should probably just put that on the record.

5 MS BLACKSTOCK: Okay.

6 MS CHAKRABATI: And probable cause is a constitutional protection and you need
7 a reasonable basis to believe that the person sought committed the offence for
8 which the extradition is requested. Rather than get into arguments on, you
9 know, theoretical and academic arguments about what that means, look at the
10 disparity in who is being extradited in which direction. I won't labour it at the
11 time but we've put it in paragraph 42 of the submission.

12 MR PERRY: Can I just ask whether people have experience of, I'm sure you have,
13 seeing United States requests?

14 MR RUSSELL: Well I mean our focus has been on arrest warrants and actually, in
15 reality the cases that we see at Fair Trials International are pretty much
16 exclusively Arrest Warrant cases. I don't know. I think there is one case and
17 Shami will probably know it better, it's Lofti Raissi -

18 MS CHAKRABATI: Yes.

19 MR RUSSELL: – in which an extradition was, I think, refused to the United States in
20 a situation in which it may not now, it's arguable that under the new Treaty
21 and the Act –

22 MR PERRY: [Crosstalk] because the that was under the old –

23 MS CHAKRABATI: It was just [crosstalk] but it is an example of American
24 arrangements. We say more about it in the submission but I might add that
25 our position on the lopsided point is shared by the American Civil Liberties
26 Union. They have, you know, we've checked our analysis of their law with
27 them and they agree with us that we should do more to, you know, to afford
28 the kind of protections that their Constitution and the Treaty affords to them.

29 MR PERRY: I'm just trying to get to the - to look at the practical position because
30 my experience, and it may be that my experience, that doesn't inform what
31 happens in every case but my experience is that you always have, in a request,
32 an indictment that has been returned by a grand jury. An American indictment
33 is not like an indictment in England and Wales which simply has the statement
34 of offence and then just uninformative particulars of offence. It sets out in

1 detailed paragraphs what the prosecution case is and what the witnesses will
 2 actually say or who provides the evidence. That's my experience. You also
 3 have the abstract of law plus you have affidavits from the prosecutors. I'm
 4 just wondering whether the complaint is to do with the Treaty as I think
 5 Justice made the point that that is absolutely the wrong question and whether
 6 in practice the Treaty fades into the background and it comes back to the
 7 question of whether you have a *prima facie* case or not. I just wonder whether
 8 the Treaty is a red herring. I mean, can I just add to that just so you know. In
 9 the NatWest Three case for example, although that was under the 2003 Act,
 10 the Americans provided a *prima facie* case and the judicial authorities in this
 11 jurisdiction found that there were substantial links with the United States so it
 12 wasn't -

13 MS CHAKRABATI: Yes.

14 MR PERRY: Now, if it be the case under the 2003 Act that you're still getting not a
 15 fair assertion that X has committed Y but an indictment with a narrative, with
 16 affidavits, with law, is your complaint really with the Treaty or is it more
 17 fundamentally with, not with any imbalance in the Treaty but with our
 18 domestic legislation?

19 MS CHAKRABATI: The fundamental complaint has got to be the domestic
 20 legislation because that's what affords people protection from extradition.
 21 That is the law of this country. If that's the sense of your question, I
 22 absolutely agree. Well, you know, treaties are open to interpretation and of
 23 course there is practice and I'm delighted to hear what you say about your
 24 experience of the practice. I agree with you about that particular case but our
 25 feeling is that more was given than might be necessary to comply with the
 26 Treaty.

27 MR PERRY: I wasn't mentioning the case to make any particular point in relation to
 28 that case.

29 MS CHAKRABATI: No. What I'm not in a position to do is to say whether in
 30 every case we're seeing grand jury indictments and/or the other material that
 31 you've described.

32 MR PERRY: But I think that that's the - you see I think that must be the position
 33 because in the same way that the Treaty has to reflect the constitutional
 34 position of probable cause, I think the issuing of warrants and a grand jury

1 indictment also has to satisfy the same requirements. I think that every
2 request, I think you'll find, I may be wrong but I think you'll find that every
3 request does have a grand jury indictment which is in the form of a narrative.
4 My experience is that you get more information from the United States than
5 for example you get from other -

6 MS CHAKRABATI: Well all I would say about that then is good. It is good and I'm
7 glad that that is happening but you would expect us to say that needs to
8 happen as a matter of right and law and that means primarily, in a sense it has
9 got to be the Extradition Act and then it is for the Government to decide what
10 they need to do or not do to the Treaty, whether it's amendment of the Treaty,
11 whether it's letters of comfort around the Treaty, whether it's nothing at all
12 because the understanding is already there. I think certainly as a matter of the
13 Extradition Act, it would need to be amended for that practice to be by right

14 CHAIR: Anything else?

15 MR DOOBAY: Can I just return to a point which we looked at earlier in terms of the
16 *prima facie* case because I think that leaving the Treaty to one side because
17 we've discussed already with the Act so leaving the test to one side, there is no
18 requirement to provide *prima facie* evidence to the US. That was a change
19 under the 2003 Act. Let's assume, for argument's sake, that you do get an
20 indictment, you do get a statement from the prosecutor and you do get an
21 arrest warrant and you do [inaudible] of US law, you don't get, as a matter of
22 right, evidence because they are designated. All of that is information to
23 satisfy the test -

24 MS CHAKRABATI: What I heard from Mr Perry was that you get affidavits from
25 witnesses and so on.

26 MR DOOBAY: No.

27 MS BLACKSTOCK: From the prosecution.

28 MR DOOBAY: The indictment, you get an affidavit from the prosecutor.

29 MS CHAKRABATI: Okay.

30 MR DOOBAY: The indictment will refer to the source of the evidence.

31 MR RUSSELL: And the prosecution may well run through, I have statements from
32 Mr Smith and Mrs Smith so he may well recite the evidence within it but you
33 don't as a matter of right get the evidence. Am I right in understanding that
34 you would still want to get the evidence and if so, coming back to what we

1 touched on earlier, what's the benefit of having evidence? Is it that you've
2 seen US cases where you think that if there had been a requirement to have
3 evidence rather than just this information, the request would have been
4 refused?

5 MS CHAKRABATI: That's potentially, yes, potentially, yes. There are cases
6 pending at the moment, I'm not sure it's appropriate to, you know, to even go
7 further. I'm not even in a position to off the top of my head but yes, I do think
8 that there is a difference for example between, say, here is an indictment and
9 here is who I have got. There is a difference between even that position and
10 setting out witness evidence in writing. I think that one is what I would
11 appreciate and understand as a *prima facie* case and the other is something
12 short of that.

13 MR RUSSELL: If there is an issue around it, as I say, we don't see US cases very
14 often at all but I think in practice there may be an issue in relation to plea
15 bargaining and the fact that plea bargains are quite often closed so at the time
16 of the extradition, you're not able to see the plea bargain evidence which is
17 forming the main part of the case against you. Whereas if there were a *prima*
18 *facie* case potentially you might be able to, you know, look at that kind of
19 evidence as opposed to just the fact that, yes, there is a statement which is
20 being kept secret which was given as a result of a plea bargain. I don't know.

21 MR DOOBAY: I suppose that my question is really about, do you think, I mean in
22 these cases that you have concerns about, is it that you want to test the
23 evidence because you don't think there is any evidence or is it that you think
24 that there is something else wrong with it so -

25 MS CHAKRABATI: I think you could be testing the evidence in terms of its basic
26 voracity. I think you could be testing proportionality. I think this basic
27 package of evidence will shed light on a number of factors that we say are
28 relevant to this extradition position[?], potentially on forum, potentially on a
29 Jago has mentioned, plea bargaining, potentially on passage of time and
30 proportionality of this extradition and of what's motivating the prosecution at
31 this stage. I do think that you can't as a court look at the factors that we are
32 now saying that a court should be able to look at without at least some basic
33 witness statements.

34 CHAIR: Links in with forum I suppose as well, is it not?

1 MS CHAKRABATI: Exactly. It would help, I think it would help this forum
2 assessment as well to, you know, to see who the witnesses are and what they
3 are saying.

4 MR RUSSELL: I suppose the reason I am asking is that leaving forum to one side for
5 a moment, if in some cases where countries, I am not talking about the US
6 now specifically but let us take the Russian Federation as an example.
7 Designated country, no requirement to provide evidence, does not provide
8 evidence ordinarily. However, if you have an argument and you're able to
9 convince the court you have a credible argument but the request is abusive and
10 that even there is no merit in the allegations, they are just made up in order to
11 provide a pretext for the request or that there is some ulterior motive which is
12 why you are being prosecuted, the court will examine the allegations against
13 you and if you raise credible evidence about it, it may well ask the requesting
14 state to answer it. If it doesn't, it will draw inferences against them because
15 they failed to answer it.

16 MS CHAKRABATI: It's going to be a lot easier to make that argument with a few
17 witness statements to read and to probe and to challenge than it is just on the
18 basis of a bare charge or bare accusation. I'm so glad that you mentioned the
19 Russian Federation because it is worth putting on the record how deeply
20 concerning it is that that's one of the countries that we're talking about.

21 MR RUSSELL: But from that context, it's a question of degree. Obviously if you
22 just had a one-page description, it would be pretty difficult for anyone to
23 understand what they were accused of. It doesn't necessarily [crosstalk]
24 evidence.

25 MS CHAKRABATI: I think basic witness statements in many cases, some basic
26 witness statements are possibly the difference between something that's their
27 accusation and charge and process on the one hand and something that looks
28 like a *prima facie* case, a basic bundle of core evidence. In lots of cases it's
29 going to be a witness statement that makes all the difference I think for that
30 relatively cursory examination. It's not the trial by any stretch but it's going
31 to be a lot easier for you to make some basic fundamental argument.

32 CHAIR: Well we have been going for a good two-and-a-half hours and it has been I
33 think very, very valuable as far as I am concerned and I think probably my
34 colleagues would agree with that. We are very grateful to you for coming. If

1281

1 | there is anything else that you think that you want to tell us, put it on a piece
2 | of paper please and thank you all very much.

3 | *(End of Session)*