

**HOME OFFICE - JUDICIAL COOPERATION UNIT**

**EVIDENCE SESSION**

Thursday 7 April 2011

**PANEL:**

Sir Scott Baker (Chair)  
David Perry QC  
Anand Doobay

**IN ATTENDANCE:**

Lord Justice Thomas

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Transcribed from the Official Tape Recording  
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(At 10.30)

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CHAIR: We're very grateful to you for giving us your time on this. We think there's quite a lot about which you can help us. As far as the EAW is concerned the position we're in at the moment – please tell us if you think there are other approaches – is that we think a certain amount can be done by way of domestic legislation that won't be offensive to anything in the framework decision. We think that there's quite a lot going on behind the scenes on which we do want your help as to which buttons to press and so forth; and we think that beyond what could be done domestically there's quite a lot that might be done of a rather more persuasive nature and what we might recommend, but in the end it's really going to require the co-operation of others to achieve it. Beyond that, tearing up the framework decision isn't really an option and a lot of it works quite well. So, that's where we are on that.

We'd also much appreciate your thoughts on other areas, in particular the Secretary of State's discretion and forum, which we might come to later because we've got some thoughts on that. I wonder if you can help us on that. But as far as the EAW is concerned, we are going to Brussels on a date in the second week in May – I think it's 10 May – and will see various people there, and we would like your advice as to who we ought to be seeing and what we ought to be asking them, where you think the pressure points are and what you think may be achievable behind the scenes.

LORD JUSTICE THOMAS: That's very easy. I do believe you ought to see Lotte Knutson who is head of criminal justice. She is now in charge of criminal justice.

CHAIR: I should say one thing: we are being recorded. You'll get an opportunity to correct, alter or add anything you wish.

LORD JUSTICE THOMAS: What then happens to the transcript?

CHAIR: The transcript eventually will be published along with the rest of the evidence, but you'll have a chance of changing anything you like.

LORD JUSTICE THOMAS: And there's nothing that I can then say that is confidential? That's the point.

CHAIR: Well, you can say it to us and it'll go on the transcript but you can then take it off.

1 LORD JUSTICE THOMAS: As long as I can do that then it's easier; otherwise, it's  
2 very difficult for me.

3 CHAIR: You'll get the transcript within three or four days.

4 LORD JUSTICE THOMAS: There are two problems the Government face. The first  
5 is that they obviously have got the road map which they're pressing on with,  
6 and my understanding is that the first chunk – the right to an interpreter – is  
7 done. I understand there's not a lot of problem at the moment with the second  
8 one, the right to information. Initially, there was a serious problem but I think  
9 that's now been overcome. My understanding is that the third one – the right  
10 to legal assistance – is due to be published in May or early June. I don't think  
11 that will produce any problems at all as far as the UK is concerned, but it  
12 won't deal with, as I understand it, the subject of the level of remuneration, or  
13 who has to be paid.

14 CHAIR: What about dual legal assistance?

15 LORD JUSTICE THOMAS: That is under discussion. I think the Commission is  
16 quite keen on it, but maybe you'll find that finance ministries are not.

17 CHAIR: We had that impression, too.

18 LORD JUSTICE THOMAS: That's always the problem. And then they will press  
19 ahead. Caroline Morgan is working on the legal aid one and as she has been at  
20 the centre of this whole business since about 2000, I think, and has a better  
21 history of our involvement in it than anyone else it would be desirable if you  
22 saw her.

23 Then there is the third subject about which I think it would be desirable  
24 for you to chat to Lotte Knutson: the problem of enforcement and how you get  
25 states to do what is in the various instruments. It may be courteous also to see  
26 the Director General, Françoise Le Bail. Are you seeing her, too?

27 MR DOOBAY: No. We've written to her and she's been invited to attend the  
28 meeting, but I don't know yet whether she will. We certainly hope to.

29 LORD JUSTICE THOMAS: You're going to see UKREP. I'm sorry to use that term.  
30 Claire Fielder, I assume, has finished, has she?

31 MR DOOBAY: She's finished now.

32 LORD JUSTICE THOMAS: And Rebecca Ellis is there yet?

33 MR DOOBAY: Rebecca Ellis has started.

34 LORD JUSTICE THOMAS: I think it's worthwhile to see the person who does it.

1 You know how the negotiating structure works, or you can be told by them.  
2 It's an extraordinary structure.

3 CHAIR: They're going to tell us.

4 LORD JUSTICE THOMAS: You should see Christophe prince, and you need to see  
5 the person who does the work on the ground. I'm not sure there's an awful lot  
6 of point in seeing the ambassador because he comes in only if there's  
7 something very serious. Would that be fair? And then I think you ought to  
8 see people at the Parliament, whether it's Baroness Ludford or Diana Wallace  
9 and one of the other people there. I think that would be a good idea. I don't  
10 know whether it would then be sensible to see the former Swedish  
11 representative – his name's gone out of my head – who works now for the  
12 Council.

13 MR DOOBAY: Hans Neilsen.

14 LORD JUSTICE THOMAS: Yes. It might be sensible or worth seeing him because  
15 he works for the third of the institutions in Brussels. You're not going  
16 anywhere else in Europe, are you?

17 CHAIR: Not as presently planned but that doesn't mean to say we won't. If we're  
18 persuaded it's worthwhile we will.

19 LORD JUSTICE THOMAS: It might be sensible – I'd like to think about it a bit  
20 further – to go and see a country which has problems similar to our own. The  
21 Netherlands is probably quite a good example. I think the advantage to you is  
22 to say that you're not seeing this purely through British eyes. I'd like to say  
23 something about Poland because the problem is different there; it's a very  
24 specific problem. Whether you would want to go and see one of the countries  
25 that people complain about is slightly more difficult, but it might be  
26 worthwhile seeing all the people who are interested in it. There are quite a lot  
27 of judges now who are interested in the problems that arise. Germany is  
28 slightly more difficult because of the 16 different jurisdictions, but I would  
29 certainly go to the Netherlands. Can I have a further think about that?

30 CHAIR: Do, please.

31 LORD JUSTICE THOMAS: It may be sensible to see the professor at the Free  
32 University of Brussels who wrote the report on all this work; it's rather  
33 academic. Her name's gone out of my head at the moment. The person who  
34 knows an enormous amount about this problem, and whose opinion I greatly

1 respect, is Peter Csonka but he is now the Justice and Home Affairs  
2 Co-ordinator for the Hungarian presidency. Whether or not he'll be in  
3 Brussels when you go I don't know; normally, he's incredibly busy, but again  
4 he has a huge background. He was effectively Caroline Morgan's boss.

5 CHAIR: One of the things that has been brought home to us pretty starkly is that the  
6 legal aid situation for extradition in the district judge's court is not satisfactory  
7 and is causing serious problems, because there has to be a means test; forms  
8 go off to Liverpool, Manchester or somewhere else and there are endless  
9 delays. In the end, many of them don't get legal aid in that they haven't been  
10 able to fill in the form because they haven't got the information; they're in  
11 prison or whatever. There seem to be quite strong views that, if possible,  
12 means testing should be removed and legal aid should be available on an  
13 interests of justice test which would be met in virtually every case.

14 We have asked the MoJ to set about as soon as they possibly can a  
15 review of what can be done in this direction, pointing out to them that if they  
16 look in the right places it's the belief of many that there will be significant cost  
17 savings in the speed of getting cases through. People will be kept in custody  
18 awaiting hearings for less time and there will be fewer abortive days. Do you  
19 have any view or thoughts on this that might help?

20 LORD JUSTICE THOMAS: When I inquired about the delays that occur through  
21 means testing in the Crown Court I was told that the position was very bad at  
22 the end of last year but it has now significantly improved. Therefore, I think it  
23 would be worthwhile to do an up-to-date check.

24 CHAIR: But the problems are different with extraditees.

25 LORD JUSTICE THOMAS: Of course, but that was purely the problem of delays.  
26 As to getting information, if you can persuade someone to look across the  
27 board at the budget you may well find it's cheaper.

28 CHAIR: Well, that's what we feel and that's pretty critical in getting the system to  
29 work more flexibly and efficiently. Just while we're on procedural matters,  
30 the time limits cause some problems. What we're looking at there is whether  
31 there ought to be either a longer time limit or perhaps greater discretion in the  
32 interests of justice for the time limit to be extended. The other side of that  
33 particular coin is that at the moment, according to a note we've had from the  
34 Admin Court, there are a lot of unmeritorious appeals which come through as

1 of right and block up the system. It's certainly our provisional view that  
2 there's a good argument for introducing a system similar to judicial review  
3 where you apply for leave to appeal on paper and have a right to pursue it  
4 orally if it's refused, or something of that kind.

5 LORD JUSTICE THOMAS: I think it would be useful to tie that up with legal aid. It  
6 would be sensible if you were given the right to apply on paper with some  
7 legal aid with it, because at the moment I think you have to apply for legal aid  
8 separately. Rather like in crime, I don't see why you shouldn't have an  
9 automatic right to legal aid and apply on paper for leave to appeal. If the  
10 judge grants leave then legal aid ought to be automatic. If it's not granted then  
11 the rules that apply elsewhere ought to apply, namely you take your chance in  
12 an oral appeal for leave.

13 CHAIR: Right.

14 LORD JUSTICE THOMAS: Time limits are a problem in the Divisional Court  
15 particularly in serious cases where you have leaders, because it is an area  
16 where there are very few people who do this work. The number of leaders is  
17 not that great, so finding time means an inevitable extension of time. I spoke  
18 about this to the President yesterday and he felt that the very real problem  
19 faced by the Court of Appeal, apart from that identified by Mr Justice Collins  
20 and Mr Justice Ouseley, is really that of time limits. I was looking at a case  
21 yesterday where the time limit was massively extended to accommodate  
22 leading counsel. I think it is right that there should be a more flexible  
23 approach to time. I seem to remember that when I was SPJ and this first came  
24 in the times were appalling. They've gradually got a lot better, but no doubt  
25 the Home Office has statistical evidence about that. They were terrible in  
26 2004-05, if my memory is correct, and they've got an awful lot better. There  
27 were administrative problems and delays. But, on the whole, if you look at  
28 our system its great advantage compared with most other European systems is  
29 that it is concentrated in a very few judges. I'm not sure how many courts of  
30 appeal they still have in France; they were bringing down the number, but they  
31 have at least 26. Each of those is entitled to hear a European arrest warrant  
32 case and deal with it. In Poland there is a huge number. In most European  
33 countries they have a huge number, but in northern European states they have  
34 concentrated it. I think that our system of having specialist judges to deal with

1 it, and relatively few judges who deal with it on appeal, produces a very  
2 efficient way of getting things dealt with. Within that context, I think that as  
3 long as someone in the judiciary is responsible for keeping an eye on the  
4 overall timing of cases I see no harm in relaxing the times, or giving discretion  
5 for a relaxation.

6 CHAIR: On the question of a corps of specialist judges, ACPO were quite strongly of  
7 the view that it was very expensive for the police to bring to London suspects  
8 arrested in Newcastle, Liverpool, Birmingham and other places. I know this is  
9 going over old territory, but they would like courts elsewhere, not necessarily  
10 many but one or two, that could deal with extradition cases in the north of  
11 England or other places. Other views to the contrary are also expressed very  
12 strongly. For example, I think district judges themselves would much prefer it  
13 to be based in Westminster. Another aspect of this is: should there be a  
14 specialist corps of solicitors trained to do this work and unless they're on the  
15 list they don't do it, or is the present arrangement satisfactory?

16 LORD JUSTICE THOMAS: As I understand it, but Andrew will know more about  
17 the details of this than I do, district judges in this area of the law, usually  
18 criminal law, have played a greater role in training people than in other areas.  
19 Therefore, there is a much better opportunity for the district bench to  
20 participate in training both prosecutors and defence lawyers. I do think there  
21 is something to be said, particularly if you are to give legal aid willy-nilly, for  
22 restricting those who can practise in this area. There would undoubtedly be an  
23 attraction to people who knew nothing about it if they were aware this was a  
24 piece of work where you got legal aid as of right without means testing.  
25 People might see this as something which they didn't know anything about to  
26 move into, so, subject to anything the authorities might say about it, there is a  
27 great deal to be said for concentrating this on a pool of solicitors and barristers  
28 who do this work because it is dealt with so much more quickly if you know  
29 what you're doing.

30 As to judges, I remember discussing this some time ago and the firm  
31 view of the district bench has always been that they should deal with it in  
32 London. We did set up a network of remote links to deal with terrorist cases,  
33 and occasionally judges would go to Manchester or elsewhere. Now that  
34 video technology has improved immensely, I don't know why it's not possible

1 to do these cases by that means. If you looked at it five years ago it was  
2 awful, but there is no reason why you couldn't have a centre in Manchester or  
3 Leeds – presumably, it would be Manchester and Leeds because they are the  
4 two places that would interest people – and do it by video link. I think having  
5 a separate group of judges there would mean that maybe the expertise was  
6 diluted. I don't know what the volume is like, but that would need to be  
7 worked on. You'd also need to train the local practitioners; that would be  
8 essential.

9 CHAIR: Video link is used at the moment to some extent for remand cases without  
10 bringing people up from Belmarsh and so forth.

11 LORD JUSTICE THOMAS: Yes.

12 CHAIR: But there seems to be a bit of an issue as to whether or not you have to  
13 obtain the defendant's consent to do that. You would go a stage further,  
14 would you?

15 LORD JUSTICE THOMAS: I don't see why not. There has been an enormous  
16 improvement in video technology.

17 CHAIR: I have certainly been in battle over many years over the criminal[?] video  
18 link.

19 LORD JUSTICE THOMAS: There are two problems. One is that people have had  
20 bad experiences; the other is that from time to time we do get bad experiences  
21 with the current contractors for the prison video system. Sometimes it simply  
22 doesn't work. I was doing a case the week before last when it froze on several  
23 occasions until we could get it to work, and in one short appeal we abandoned  
24 it. There is still a problem. There's no problem with most commercial  
25 solutions, but the prison video link itself does not always work. People are not  
26 used to doing hearings by video link, but I see no reason why in a case where  
27 you're not going to have any evidence –

28 CHAIR: You might have documents, which is one of the reasons for not having video  
29 links.

30 LORD JUSTICE THOMAS: But if you are to see the person live I think you've got to  
31 send the judge out. We are not yet sufficiently familiar with video links. If,  
32 say, you have an extradition hearing with several witnesses – they're not that  
33 common – then I would have thought the judge would have to go. I think  
34 what you need to do is ask: what's the volume in Liverpool, Manchester and



1 Leeds? Is there sufficient there to build up a cadre of expertise? If there is – I  
2 may not be very popular with the senior district judge or chief magistrate for  
3 saying this – I see no reason why we should operate a London-centric system,  
4 but I'm probably biased as I fought to get administrative courts out of London  
5 for a long time.

6 CHAIR: I think the picture is that there probably aren't enough in any one place. This  
7 is the difficulty. There'll be a few in Liverpool, the odd one in Cardiff, a  
8 couple in Manchester and a few more in Leeds.

9 LORD JUSTICE THOMAS: Yes, but if you had one in Manchester then, provided  
10 you can cross the Pennines, it's a much quicker than coming to London.

11 MR PERRY: You talked about going to somewhere like the Netherlands where the  
12 problems might be similar. What sorts of problems are they experiencing?

13 LORD JUSTICE THOMAS: Well, Poland is a major problem. Some of the judges  
14 there hold the view that you have had expressed to you here, which is the fact  
15 that we have the common area for justice that was put in place with mutual  
16 confidence but we know that there are countries where what is on paper is not  
17 the actuality. My concern is that you might be perceived as looking at this  
18 through Anglo-Saxon eyes. Our views on the problems of EAW, which arise  
19 largely because procedural standards are not common across Europe, are  
20 shared by quite a lot of judges. Therefore, I'd like to suggest where you ought  
21 to go or whether it is cheaper for the Home Office to ask someone to come  
22 here. I think it might be valuable for you, if you are to present a report which  
23 might have a European impact, not to do it purely on the basis of what you've  
24 been told in this country. Do you see what I mean?

25 CHAIR: Absolutely, yes.

26 LORD JUSTICE THOMAS: It's a perception point more than anything else.

27 CHAIR: There's a limit to what can be done without co-operation behind the scenes.  
28 How do we best set it up?

29 LORD JUSTICE THOMAS: As a result of our concerns about the operation of the  
30 European arrest warrant in practice, one idea was trying to get judges who deal  
31 with this subject to come together. There was a very good piece of work done  
32 on the EAW by Theodora Christou who works for the AIRE Centre. I have  
33 suggested to her that as part of that a group of extradition judges should meet.  
34 We got about 10 or 12 of them to come to London. We had another meeting

1 near Schiphol Airport – I’m not going to say ‘Amsterdam’ because it was  
2 sandwiched between Schiphol Airport and the A4 motorway – in the middle of  
3 December. Judge Daphne Wickham came with me. It was largely about co-  
4 operation. At the meeting at the end of December which lasted for about two  
5 hours we again discussed bringing these judges together. What was  
6 interesting about these meetings was that they showed there was broadly a  
7 common view as to the problems. Therefore, if you want me to find you two  
8 or three judges – whether you ask them to come to London for the day or  
9 whether you go to one or two places must be a matter entirely for you – I  
10 could give you the contacts without any problems.

11 CHAIR: That would be very helpful. I haven’t got anything else on video links. We  
12 heard from John Spencer who was very helpful and thought-provoking.

13 LORD JUSTICE THOMAS: He came to the second meeting in Schiphol.

14 CHAIR: He says that legislation has recently come into force with regard to the  
15 enforcement of fines which might get rid of quite a few of the Polish cases.

16 LORD JUSTICE THOMAS: Yes.

17 CHAIR: And there is some indication that the numbers from Poland are beginning to  
18 drop off.

19 LORD JUSTICE THOMAS

20 CHAIR: The point has been made many times about the disproportionate number of  
21 Polish requests. I think it’s pretty clear that there’s not much that can be done  
22 about a proportionality test at the English end of the EAW – in fact, probably  
23 nothing – but much more could be done by working away behind the scenes at  
24 the Polish end, for example. But the other side of this – this is probably  
25 something Anand has been asking about more than anybody else – is that we  
26 asked SOCA, which checks the validity of warrants to start with, whether it  
27 asks, for example, ‘Well, do you really want this warrant in this case, or is  
28 there another way you can deal with it?’ But SOCA’s view was that their role  
29 was simply to check the validity of the warrant. What we were really  
30 exploring was whether there were other means of contact at a reasonably early  
31 stage in the process between the UK and, for example, Poland in individual  
32 cases, saying, ‘Look, is this the best way forward, or can you deal with this by  
33 way of a fine?’ or whatever. Anand, this is really your territory.

34 MR DOOBAY: It really arises from the fact that we know some of these cases are

1           compromised, so there is another resolution found once you've started the  
2           expensive process of having European arrest warrant proceedings here. We  
3           also believe that some of the problems are caused by the individuals leaving  
4           the country, so there's no way to contact them. I suppose that what I've been  
5           asking is: everyone seems to be very focused on their role in the system,  
6           which is receipt of a warrant, check that it is valid and then execute it. I  
7           wonder whether there could be an earlier stage, or anywhere in the process,  
8           where someone else thinks, 'Let's see if there's a different way to achieve the  
9           aim of the requesting stage that is not so coercive, intrusive and expensive as a  
10          European arrest warrant.'

11       LORD JUSTICE THOMAS: One problem that emerges in other areas is the way in  
12          which, for example, the role of the Polish system is, if I remember correctly,  
13          modelled much more on the French than German system, whereas the  
14          prosecuting authorities have a quasi-judicial status, so it comes from a judicial  
15          body. Once it was appreciated that SOCA was not a judicial body the  
16          question was whether their interference would be seen by people dealing with  
17          it in Poland as something that was wrongful. I suspect that would be the  
18          problem. But what we lack across Europe – this is a problem that will arise  
19          elsewhere – is an interchange and a sufficient meeting together of the judges  
20          of the countries that have a problem. I don't know whether you are aware that  
21          in the operation of the Brussels conventions relating to children Lord Justice  
22          Thorpe set up a network run by his legal secretary. If there are problems with  
23          children, which are obviously much more sensitive, there is now a system  
24          between most of the states of Europe and elsewhere whereby judges come  
25          together to try to sort this out. That is really what I would love to see in  
26          extradition cases, but I think it has to be done judge to judge. The problem is  
27          that there isn't in Europe a mechanism for this; it's an aspect of a much wider  
28          problem.

29       MR DOOBAY: I think that's partly what we've been hearing this week, because  
30          SOCA says it doesn't want any part of this; that's not its function and it would  
31          to CPS if it was concerned about it. Certainly, some judges find it practically  
32          difficult. The framework decision does envisage judicial authority  
33          communication but practically there's no mechanism to allow that; there are  
34          no interpreting facilities available, or certainly it's not commonly done,

1 according to the evidence we've heard, so it's trying to find some  
2 communication mechanism. At the moment it seems to be only the CPS,  
3 because it acts on behalf of the judicial authority, that is used as a conduit to  
4 try to relay things back, but it's a question of trying to work out whether  
5 there's a better way to do this and have more communication and resolve  
6 things in a different way.

7 LORD JUSTICE THOMAS: One of the problems with the way in which a lot of  
8 European criminal justice legislation has emerged is that it presupposes a kind  
9 of mutual confidence and common standards that actually don't exist. One of  
10 the problems we have in the City of Westminster court is that one would have  
11 to beef it up and (a) persuade them that this is necessary – I don't think there  
12 would be much of a problem in persuading them this was necessary – and (b)  
13 set up a mechanism and make certain you had a mechanism in other countries.  
14 I think we could do this with Poland, which is a major problem. If we have  
15 problems with the Netherlands, Denmark or Belgium, certainly Spain, there  
16 would be no difficulty. How easy it would be with certain other countries I  
17 would need to explore.

18 CHAIR: You would be looking at a mechanism country to country. There would be,  
19 as it were, a liaison group between England and Poland?

20 LORD JUSTICE THOMAS: Yes. You would have to do it that way. For example, I  
21 can't remember how many Polish courts can issue EAWs but it's a very large  
22 number, so it would be no use having a contact point in about 25 different  
23 courts. You need one that speaks English, which is now not really a problem  
24 in a European state.

25 CHAIR: If there's a problem in an individual case it's a little difficult to see how a  
26 judge from England could ring up the liaison group in Poland and get it sorted  
27 out. It's more likely that the problem in that case won't be solved in that case  
28 but will be highlighted before the group later on, as it were. Is that right?

29 LORD JUSTICE THOMAS: I think there are two problems. The first thing I would  
30 like to deal with – but it's always difficult to find the money to do it – is the  
31 macro problems of talking to each other. Once you've got used to talking to  
32 each other then it's probably possible to do the second stage. Suppose that a  
33 court in *x* town in Poland had decided to issue an EAW for someone who had  
34 committed an offence for which a penalty of one month had been imposed

1 10 years ago. It is absurd. They may be here with a family and a home. If  
2 this had happened in the UK almost the last thing you would do is send them  
3 to prison; or if they were to go prison you'd make arrangements to do it here;  
4 you wouldn't go through this process. You would ring up and say, 'Do you  
5 really want to do this? Isn't there another way round it?' But first you've got  
6 to get trust in the broader picture – I agree with you completely – before you  
7 can proceed to the particular.

8 CHAIR: But is there any arrangement with Poland at the moment at all?

9 LORD JUSTICE THOMAS: For this to be done?

10 CHAIR: Yes.

11 LORD JUSTICE THOMAS: I believe not. This is particularly a problem with Poland  
12 because of the numbers.

13 CHAIR: Presumably, one would start with the countries where the problem was the  
14 biggest, i.e. Poland.

15 LORD JUSTICE THOMAS: Provided we can find the means of setting about this I  
16 believe that now at ministerial and judicial level – I imagine that from our  
17 financial perspectives it would be quite interesting – there's no reason why we  
18 shouldn't be able to set about doing this.

19 MR PERRY: It sounds to me as though it would be helpful if we said something in  
20 our report about encouraging contact between judges, because certainly the  
21 pro forma European arrest warrant has the email, telephone number and  
22 contact details of the issuing judicial authority. Lizzie Franey told us about  
23 instances – not many – where sending an email to the email address had  
24 provoked a response that had solved problems. Therefore, it seems to me that  
25 that's something that could usefully be done.

26 LORD JUSTICE THOMAS: I don't see any harm in letting you have the minutes of  
27 these two meetings so you can see what we were trying to do. Can I digress  
28 slightly? One of the big debates also going on in Europe at the moment is  
29 about training. In Brussels you may well be told by those who visit states that  
30 whenever they go to an average court in a European state they find that the  
31 judges say they don't know anything about European law. What is it, etc?  
32 But that's not true if you go to the City of Westminster; they know all about it,  
33 but in many other European countries they're not terribly familiar with it. At  
34 the moment the Commission is looking to produce a better report on training.

1 One of the things they're keen on is that the Stockholm programme provides  
2 for up to 50% of judges to have the opportunity of an exchange, but when you  
3 do the calculation on the back of an envelope you work out that there are  
4 80,000 judges in Europe and the thought of all these exchanges horrifies  
5 anyone who has to pay for it. What you need to do is look at specialisms and  
6 encourage the development of contact between people who do the same sorts  
7 of cases. I hope that has got through, because this system will not work until  
8 you've built that degree of trust.

9 MR PERRY: Having contact between judges and some form of central authority as a  
10 contact point to diffuse the inquiries that are made from this end would be the  
11 most sensible mechanism.

12 LORD JUSTICE THOMAS: Yes.

13 MR PERRY: On the point you mentioned about the one month imposed 10 years ago,  
14 one thing we've been thinking about is that in conviction cases is having a  
15 provision in our legislation that permits the execution of the warrant by  
16 ordering that the sentence should be served in this jurisdiction. I suppose that  
17 that would involve the sentence being subject to our early release provisions,  
18 so if it were a six-month sentence you would serve only half of it.

19 LORD JUSTICE THOMAS: Every system in Europe has one means of letting people  
20 out of prison earlier.

21 MR PERRY: I wasn't criticising our early release provisions but saying that the actual  
22 cost of keeping these people in prison on short-term sentences means there  
23 will be a net saving overall, particularly if they are willing not to contest the  
24 extradition hearing because they know they will remain here. It sounds as  
25 though those opinions could be a positive development.

26 LORD JUSTICE THOMAS: I would agree.

27 CHAIR: Alerts. We had concern expressed to us in a number of quarters about cases  
28 where somebody was discharged, for example in this country, but the alert  
29 remained on the Schengen system. People have been arrested on two or three  
30 occasions. What can be done about it? It seemed to me that, apart from  
31 anything else, even if the alert was removed you could issue a fresh warrant,  
32 but at least that may get rid of some of the cases through inertia, in that they're  
33 just not being removed because of the inertia of the country concerned. But  
34 there are other cases where, for example, there may be a very technical reason

1 why the individual has been discharged and a time limit may not have been  
2 met and the issuing state may have every good reason for wanting to pick that  
3 individual up somewhere else. But it is argued that that contravenes the right  
4 to free movement in the community, etc, etc, etc. Any views?

5 LORD JUSTICE THOMAS: Not really. Surprisingly, no one has taken it to  
6 Luxembourg from another state where there's jurisdiction. I don't know.  
7 They've had quite a few cases on the EAW recently, some of which come  
8 from one German judge. No one has taken this point.

9 CHAIR: We've also heard quite a bit from Liberty about the human rights approach  
10 of the United Kingdom courts. It seems to us that that's a matter for the  
11 judiciary to deal with and they've got the convention to apply. The decision  
12 of John Mitting has caused a bit of a flurry on article 3, but there has been a bit  
13 of a movement in the other direction with two cases since then, the names of  
14 which don't immediately come to mind. We've also had representations made  
15 on the Charter on Fundamental Rights. It's said that the human rights  
16 provisions in the legislation should be changed and be compliant with the  
17 charter which, as yet, is not binding on us but is binding on some states.

18 LORD JUSTICE THOMAS: My recollection of HMG's position in relation to the  
19 charter and the precise way it applies is that it is a complex one.

20 CHAIR: That's why I wasn't explaining it well!

21 LORD JUSTICE THOMAS: Whether it would make any difference – whether the  
22 provisions of the charter are sufficiently differently expressed from the  
23 provisions of ECHR – I'm afraid I haven't looked at it for today so I couldn't  
24 express a view.

25 CHAIR: The other point is that there is also a route through to the European Court in  
26 Luxembourg which it has been suggested has some relevance.

27 LORD JUSTICE THOMAS: The compulsory jurisdiction of the European Court in  
28 criminal cases is something on which I wouldn't wish to comment; I think it's  
29 a political matter. They will pick it up. As we accede to the road map, my  
30 recollection is that we have to accede to the compulsory jurisdiction of the  
31 Luxembourg Court in the interpretation of that. But we are not subject to the  
32 compulsory jurisdiction of the European Court on directives on anything pre-  
33 Lisbon. What will happen in five years' time –

34 CHAIR: It's 2014; it's three years, isn't it?

1 LORD JUSTICE THOMAS: [Inaudible] My view is that it is essential, because most  
2 of the provisions of the road map implement our standards, that we should  
3 firmly join them. There is a view expressed by some that it's all right for  
4 those who don't have our standards of justice; they can subscribe to them but  
5 we don't have to. I always think that a degree of leadership is required. You  
6 can't really say, 'Well, these poor people need it; we don't because we're  
7 good enough.' You really have to show that you're part of it. I think that a lot  
8 of the problems relating to the EAW will be solved by (a) adherence to  
9 legislation covered in the road map, and (b) some much more effective means  
10 – I'll explain what I mean in a moment – of making certain that judges and  
11 foreign states implement what is in the road map, or what is passed by  
12 Regulations.

13 CHAIR: So, you would welcome a recommendation from us in that direction?

14 LORD JUSTICE THOMAS: You have to be careful because this is quite political.  
15 There are two ways to improve procedural standards in Europe, one of which  
16 is to wait for Strasbourg to do it. That has two disadvantages: first, it always  
17 occurs *ex post facto*; second, I'm one of those – probably I'm prejudiced  
18 because I sit on the Criminal Procedure Rules Committee – who thinks that  
19 rule-making and procedural issues are best done through a body that  
20 represents everyone rather than simply by judges on a case by case basis. In  
21 our jurisdiction I wouldn't like to make up criminal procedure by judicial  
22 decision. It's not very sensible. Therefore, I think it is the best way through.  
23 But both the Strasbourg jurisprudence and the road map present the problem  
24 of getting states to come up to these standards. I think evidence has been  
25 given to you in which people have expressed concerns about failure to adhere  
26 to standards. You will find there's a common chime among the states in  
27 Europe that have high standards that other states really don't have them and  
28 bringing them up is a major problem. What I think is difficult is to use the  
29 Convention or to burden English judges with the invidious problem of saying,  
30 'Well, we've looked at Ruritania. Of course it's subject to the road map or  
31 decisions of the ECHR, but we're quite satisfied that in that country they don't  
32 adhere to them.' Judges dislike doing that in civil cases. I think that to make  
33 judges do it in criminal cases is not at all an easy thing to require them to do.

34 CHAIR: One of the main territories where this is a problem is prison conditions.



1 LORD JUSTICE THOMAS: Yes.

2 CHAIR: We heard there was some move for uniformity in this. I don't immediately  
3 recollect the details; my colleagues probably will remember it.

4 MR DOOBAY: The commission is to publish a Green Paper on pre-trial detention.

5 LORD JUSTICE THOMAS: There are two problems.

6 CHAIR: But the other idea that is floated is whether there's any mileage in having, for  
7 example, a European equivalent of the prisons inspector who can go round and  
8 have a look on a broader basis.

9 LORD JUSTICE THOMAS: There's the European Commission for the Prevention of  
10 Torture. Although they look primarily at detention of terrorists or other  
11 people they take a slightly broader view of poor prison conditions. I think  
12 they have done quite a lot of good. Have you come across a group called  
13 CEPEJ (Commission Européenne pour l'Efficacité de la Justice), which is a  
14 Council of Europe body? It publishes a book of statistics. One of the things  
15 HMG is keen on doing is to produce statistics as between court *A* and court *B*  
16 so you can tell that if you go to Basset you'll come on in six years; if you go to  
17 New Town you'll come on very quickly, the idea being to shame people into  
18 bringing up standards. The question really is: should we begin to move  
19 towards a requirement on states? One government was very keen on this;  
20 others were not. It was actually just publishing the bringing up of standards. I  
21 don't think CEPEJ published details of average periods of detention, but I can  
22 check that for you. Perhaps you can persuade people at least to publish hard  
23 data. How long it takes from the moment you're arrested, or you're served  
24 with something, to the time you are convicted at first instance, and how long  
25 an appeal takes, ought to be something people should put on the table. I think  
26 some countries would not come out of it all that well. At some stage you have  
27 to accept that either judges or the states take responsibility for bringing up  
28 standards. When I was president of the ENCJ – we are still doing this – we  
29 pushed for a judicial evaluation of European judicial systems because we  
30 don't believe there's any way of bringing some of them up to scratch without a  
31 form of judicial evaluation. But you can imagine that some people are not  
32 very happy about that.

33 CHAIR: It sounds a bit like an appraisal to me.

34 LORD JUSTICE THOMAS: But it's no use having standards unless you enforce

1           them. .Yes, standards are coming but how do you make certain they're  
2           applied? Indeed, this is the base problem of EAWs.

3   MR DOOBAY: Can I just come back to something you touched on a minute ago in  
4           terms of human rights? Let's accept that there are situations where somebody  
5           who is subject to an EAW is going to a country where there'll be a violation of  
6           their rights, whether it's prison conditions, length of pre-trial detention or  
7           whatever it might be. At the moment there is a bar in the Act to stop  
8           extradition if there is a prospective violation of rights. Obviously, a judge  
9           here is in an invidious position when dealing with that but he is required to do  
10          it. Leaving aside the recent to-ing and fro-ing in the case law as to exactly  
11          how judges approach it and assuming that they required to do this, and  
12          therefore there is a rebuttal presumption that there won't be a breach but  
13          evidence can be put forward to suggest that there will be, how do you see the  
14          role of the Court in approaching that problem? In virtually every case now the  
15          defendant raises a human rights issue. They try to defeat the rebuttal  
16          presumption in their particular case and the judge at both the lower court and  
17          Admin Court is confronted with having to make a decision about it.

18   LORD JUSTICE THOMAS: First, the Strasbourg court as regards the prohibition on  
19          ordinary extradition sets the bar very high and it's very difficult to overcome  
20          it. But if you were to ask an English court how to do it, you need to look a bit  
21          more at the experience which used to be quite common in civil cases.  
22          Lord Denning in the *Atlantic Star* in the early 1970s dealing with similar  
23          litigation said that England was a very fine place to do litigation. If you look  
24          at our shop window you have wonderful procedure. I think the country  
25          concerned in *Atlantic Star* was Turkey and that was not quite so good. In the  
26          House of Lords it was said that the days of Little England had shown it was a  
27          wonderful system and that carrying out a comparative exercise with other  
28          systems was not a happy one. It is very difficult for a judge to be confronted  
29          with evidence. Therefore, we've steered away from it in civil cases. It might  
30          be useful to have a note – if you wanted a note I could get someone to do one  
31          for you – about the problem and how we've moved away from it. In civil  
32          cases it's now very rare to look at the comparative merits. Last summer I did  
33          a big fraud case arising out of the financial crash. If the trial was here it would  
34          be before a judge; if it was in New York it would be before a jury. We

1 would take the view that trial by jury was most unsuitable for this sort of thing  
2 and so a judge would then be in the position of commenting on it. We do not  
3 make that sort of comment. What I would worry about is a judge being faced  
4 with having to decide what prison conditions were like in Ruritania, or what  
5 happened in the Court room, for example you didn't get interpreters. A judge  
6 would be in quite an invidious position to have to do that, and the reliability of  
7 the evidence, unless there was independent reporting, would be quite difficult.  
8 Whether you would need the CPS to become involved in it other than as the  
9 agent for the foreign government I'm not sure, but I think it's quite tricky for  
10 judges to be put in that position. My experience of civil cases is that it is  
11 inappropriate.

12 MR DOOBAY: I suppose the real issue being raised for us is that some  
13 representations say that this is a meaningless protection because you agree that  
14 potential violations will occur. There is a requirement to look at potential  
15 violations, but it's so difficult to satisfy the hurdles of evidence that in reality  
16 the only way for this to work is for you to go to the country, have the violation  
17 occur and then complain about it in the country.

18 LORD JUSTICE THOMAS: I would like the problem to be tackled in the countries.  
19 Looking at the 27 – I've said this to many people – this system becomes  
20 unworkable in the end. . It becomes unworkable unless you bring up the  
21 standards. This is why I'm so keen on evaluation.,. That is public because we  
22 wrote some things to support that. But politically there is a huge problem.  
23 There is quite a lot of strong judicial feeling on this subject in northern Europe  
24 that both the judges and politicians in other countries need to put the resources  
25 into their systems to bring them up to standard.

26 CHAIR: You made a speech in October to a criminal justice conference, didn't you?

27 LORD JUSTICE THOMAS: Yes. I've said this on quite a number of occasions. I  
28 can send you some.

29 CHAIR: When we spoke earlier you referred to various extracts from the speech.  
30 Perhaps we might have the speech.

31 LORD JUSTICE THOMAS: Yes. I'll send you a couple that I've given. We're all  
32 agreed there's an undoubted problem, as the cases sent in by Fair Trials  
33 International illustrate. If you talk to anyone, there's obviously a problem.  
34 How do you best tackle it? One is to withdraw, which is entirely a political

1 matter and there are huge ramifications across the justice systems of so doing;  
2 the second is essentially to get the judge to examine the system of the other  
3 country and pronounce on it; the third is to do something effective other than  
4 to say, 'We've passed instruments, fine; we've ticked the box', and not make  
5 it enforceable. I'm very anxious that pressure is applied to improve standards,  
6 probably by the publication of statistics in the first instance, so that people are  
7 shamed into bringing their system up to scratch.

8 MR DOOBAY: I totally agree with all of that, but one of the suggestions I've seen is  
9 that by having judges refuse on that basis is another way of applying pressure  
10 in terms of raising standards.

11 LORD JUSTICE THOMAS: Within a common area what it will do is highlight the  
12 problem. If you go to Brussels they'll talk to you about the common area for  
13 justice. You know, Anand, what happens at these meetings of the common  
14 area for justice. This is why I think it's very important that you have not just  
15 an Anglo-Saxon view, but a wider shared view.

16 MR PERRY: One of the ways in which we can possibly ameliorate the problem in  
17 relation to detention is the European supervision order. Suppose you had the  
18 ability to defer extradition of someone on bail in this jurisdiction until the case  
19 was trial ready. Then they're tried and if they are convicted and sentenced to  
20 imprisonment the other provision permits the serving of the sentence here or  
21 repatriation. That may take some pressure out of the problem in relation to  
22 prison conditions.

23 LORD JUSTICE THOMAS: As the cases show, someone is extradited to, say,  
24 Ruritania and waits for a year or two years for trial. Provided suitable  
25 arrangements can be made for them to be held here, there's no earthly reason  
26 why that could not be done. I had thought the whole purpose of the  
27 supervision order was to enable that to happen.

28 CHAIR: The flip side would be that somebody we wanted from Ruritania would stay  
29 there under a supervision order until we were trial ready, but would that  
30 present any problem with pre-trial procedures, or would we simply do it by  
31 video link?

32 LORD JUSTICE THOMAS: We should be able to do it by video link. Obviously, the  
33 legal aid authorities might have something to say about who has to pay to go  
34 out and see them, but that's a different question. Why you can't do this by

1 modern telecommunications I really don't know. Once you've met and know  
2 someone, doing something by video link is much easier.

3 MR PERRY: I suppose that if they fail to come back they could be tried in their  
4 absence.

5 LORD JUSTICE THOMAS: Presumably, if you are under a supervision order the  
6 local court has power to arrest you and put you on the next plane.

7 MR DOOBAY: I think it's a mutual recognition measure, so it's issued by the Court  
8 which is trying it. If they were being tried here the English court would say,  
9 'We want to release you on a European supervision order and send it to Italy  
10 where you live to enforce it, and if you don't come back for the pre-trial  
11 hearing there's an expedited form of the European arrest warrant, so we'll  
12 physically get you back.' Is that not appropriate?

13 LORD JUSTICE THOMAS: Yes. The real problem is whether the judge in Ruritania  
14 will be prepared to do that to a judge in Barsest. Would a judge in Barsest be  
15 prepared to do it? The fundamental problem is that we have these  
16 mechanisms put in place without, unfortunately, having brought the judges up  
17 to speed and those judges having confidence in one another.

18 CHAIR: Anything else on the EAW? Can we move on to the Secretary of State's  
19 discretion? This is one of the five questions we've been asked to look at. As  
20 far as concern Part 1 cases, the discretion is very limited and covers only  
21 competing extradition cases for national security, so I don't think there's any  
22 particular problem there. Our present thinking is that we certainly wouldn't  
23 want to put back the clock and increase the Secretary of State's discretion in  
24 Part 1 cases.

25 As far as concern Part 2 cases, the Secretary of State has rather greater  
26 discretion particularly at the end of the process. We can see that the Secretary  
27 of State's discretion obviously has to remain, for example, on specialty and  
28 capital punishment. But we are concerned about the amount of time that is  
29 spent in some cases, witness for example *McKinnon* where human rights  
30 issues may be raised after the whole thing has been through the Courts on  
31 however many occasions.

32 What we're thinking about at the moment – we'd like your assistance  
33 on this – is whether the discretion currently exercised by the Secretary of  
34 State, because he's the public body that has to do that under the human rights

1 provision, can be pulled back into the Courts and for the judge rather than the  
2 Secretary of State to be given discretion to do that in exceptional  
3 circumstances where there has been a critical change of circumstance between  
4 the extradition hearing and the actual removal.

5 At the moment, we think that if that is appropriate it will be better for it  
6 to go to the High Court rather than the district judge because we don't want  
7 the ping-pong effect to continue. The High Court judge would perhaps have  
8 the same powers that he had originally when he was hearing an extradition  
9 appeal which would include in exceptional circumstances, if there had to be  
10 evidence about something, referring it to the magistrate. But the position  
11 would be that there would then be no other appeal except on a point of law to  
12 the Supreme Court and that would be the end of the story. What are your  
13 views about that? Is it something that is at least worthy of investigation?

14 LORD JUSTICE THOMAS: I think it's worth investigating. I absolutely think that if  
15 it's to be done it has to be done in the High Court; otherwise, you just build in  
16 an automatic appeal. In a case where that arose you could appeal  
17 automatically, so there's no point in going for something where that happens.

18 CHAIR: Absolutely.

19 LORD JUSTICE THOMAS: As to the High Court, the only concern one would have  
20 would be how many cases there would be and whether it would impose a  
21 burden. I suspect that in most cases people would say there's been a change of  
22 circumstance. It's pretty obvious that if you're about to go somewhere where  
23 you don't want to go you'll try everything.

24 CHAIR: But at the moment it's getting bogged down with the Secretary of State with  
25 political undertones. We think the Courts might be able to deal with it much  
26 more expeditiously.

27 LORD JUSTICE THOMAS: I have no doubt about that. The only thing I'm worried  
28 about is how much work this would give us. One can be sure of one thing:  
29 Her Majesty's Treasury would not be inclined to increase the number of  
30 judges to deal with this.

31 CHAIR: I wouldn't have thought it would be that many.

32 LORD JUSTICE THOMAS: As long as it's not that many it's well worth looking at.

33 CHAIR: Particularly if the criteria were tight; it's up to the judges to interpret them  
34 once the power is there. The other side of it which causes a little bit of

1 concern is: we're not entirely sure what aspects the Secretary of State  
2 considers at this late stage, whether issues of national security are creeping in  
3 or, more particularly, questions about international comity which at the  
4 moment never see the light of day. On one view they ought to be flushed out  
5 into the public domain, but we don't know.

6 LORD JUSTICE THOMAS: I'm not sure. I can go this far but because of what I'm  
7 currently doing I can't go any further: I think there must be elements where  
8 national security can arise. As regards national security matters, in issues of  
9 extradition that must be a matter for the Secretary of State.

10 CHAIR: Well, it's there in Part 1; I'm not sure it's still there in Part 2. They would  
11 have to stay.

12 LORD JUSTICE THOMAS: National security for all kinds of reasons must remain  
13 with the Secretary of State, because in respect of *A* there may be a particular  
14 reason, which you can't tell anyone, why you're not prepared to extradite.

15 CHAIR: But that doesn't seem to have happened. We can't put our finger on any  
16 cases where everything else has been ready for extradition and national  
17 security, or some unexplained factor –

18 LORD JUSTICE THOMAS: I don't think you should rule out such a thing  
19 happening. I prefer to say no more.

20 MR DOOBAY: On the number of cases, our hope is that there wouldn't be that many  
21 because once the appeal's been dismissed there are quite strict time limits for  
22 physically removing the person. So, something would need to arise between  
23 the end of the appeal and, I think, 14 days later when the individual is  
24 physically removed from the country in order to claim there had been a  
25 supervening event and invoke the jurisdiction of the High Court.

26 LORD JUSTICE THOMAS: I think it's very well worth looking at. One has found a  
27 lot of areas where the Secretary of State historically had a function. In this  
28 day and age it almost certainly is not the Secretary of State's function; it's a  
29 judicial one.

30 CHAIR: That was our thinking.

31 LORD JUSTICE THOMAS: Obviously, one sees it in the setting of the tariff in  
32 prisons; one sees it now on parole. In both areas the Secretary of State used to  
33 have a role. I think that in August last year the Secretary of State finally lost  
34 everything to do with parole decisions. I suspect that this is just a hangover.

1 One thing that is absolutely central – but there may be others – is national  
2 security. He must have a right to say ‘no’.

3 MR PERRY: It may actually lead to fewer cases, I suppose. Perhaps that may be  
4 rather too Panglossian. At the moment we have successive judicial reviews,  
5 so the Secretary of State says, ‘I don’t accept your change of circumstances’,  
6 and it is judicially reviewed. By the time the judicial review has been heard a  
7 further period of time has elapsed for the claimant to say there’s another  
8 change of circumstances and he now wants to add them together. There’s  
9 another consideration by the Secretary of State and a further judicial review.  
10 We’re rather hoping that at least it’s ‘judicialised’ and is expeditious.

11 LORD JUSTICE THOMAS: It should be much quicker.

12 CHAIR: Forum. As you’re aware, there’s a provision not yet implemented for a  
13 forum bar. I think there is a strong feeling, perhaps epitomised by the *Daily*  
14 *Mail* but not specifically expressed as such, that if you are a resident or a  
15 national of this country you jolly well ought not to be sent anywhere else to be  
16 tried unless there are very compelling reasons. If the forum bar was  
17 implemented we can see some very serious problems not only in the amount  
18 of work it would generate but it would mean that virtually every case would  
19 look at all the evidence to see whether it was a United States case or United  
20 Kingdom case, and in no time at all the English and Welsh courts would enter  
21 into the realm of the prosecutor. There are problems about how you deal with  
22 situations when a decision has been made by the Crown Prosecution Service  
23 not to prosecute here and so forth.

24 We had a very interesting discussion with Keir Starmer in this  
25 territory. We know that there are guidelines operated by the CPS when there’s  
26 a transnational case that theoretically could be prosecuted in more than one  
27 country, and this is going to happen more and more as the world shrinks with  
28 the internet and so forth. For example, it’s clear that when the CPS is  
29 discussing a particular case with the American authorities it will do so against  
30 various criteria. From what we’ve heard, the top criteria would be: which  
31 jurisdiction has the greatest prospect of getting a conviction? But there are  
32 other criteria, including where the witnesses and victim are, where the  
33 defendant is living, etc, etc.

34 Our present feeling is that to talk of forum bars is putting it too high.



1           What we're really looking at are forum considerations. At the moment  
2 essentially those are matters for the prosecuting authority rather than the  
3 Courts. On the other side of the coin, we believe – I think Keir is not  
4 unsympathetic to this – that the criteria and principles according to which the  
5 CPS operates on an international basis ought to be more open and clear so  
6 people can see whether they've been properly applied.

7 LORD JUSTICE THOMAS: I think that deciding where you prosecute a fraud,  
8 bribery, drugs case or presumably a pollution case – there are huge numbers of  
9 cases where something happens in one country and the effects are felt in many  
10 others or in one – is a major problem.

11 CHAIR: Price fixing?

12 LORD JUSTICE THOMAS: Yes. My view is that there certainly ought to be  
13 transparency as to how it's done. I completely agree with Keir; the process  
14 ought to be known. I think that in an Anglo-Saxon common law system it's  
15 very difficult to see how a judge can say that someone should be prosecuted in  
16 this country. Take, for example, someone who runs a boiler room fraud in  
17 London where all the victims are in Vienna. Are we really going to compel  
18 the DPP or SFO to spend huge amounts of money prosecuting here when  
19 everyone has suffered in Vienna?

20 CHAIR: Can you get them over here, and will the foreign state help?

21 LORD JUSTICE THOMAS: Yes. I think it's difficult for a judge to impose on a  
22 prosecutor an obligation to prosecute. I've never seen anything wrong in  
23 someone saying, 'I think I ought to be prosecuted here. I want to ask the DPP  
24 to prosecute and hold things up while he gives his decision.' That seems to me  
25 to be sensible. I don't see why you can't have the right to ask to be  
26 prosecuted, but if he says 'no' it seems to me that for the judge to say, 'I don't  
27 agree; you've got to prosecute', would be to impose on the British state a  
28 hopeless position: first, in terms of resources; second, in terms of a prosecutor  
29 that doesn't want to proceed; and, third, where in our circumstances the  
30 penalty might be very low.

31 CHAIR: Would you go so far as to say that if somebody says to the prosecuting  
32 authority, 'Would you prosecute me here?' that authority ought to consider it  
33 even in a case where there has been no investigation up to that point at all?  
34 One of the criteria that the CPS takes into account is how far the investigation

1 has got where there's a dual issue. I think they're really saying that if there's  
2 been no investigation here then they wouldn't ordinarily contemplate  
3 prosecuting here – or maybe I'm putting it too high.

4 MR PERRY: I think that's right.

5 LORD JUSTICE THOMAS: I don't know. I think that would again go to whether a  
6 prosecutor was obliged to conduct investigation, which would have major  
7 resource implications for the CPS. One has to be realistic in this day and age.  
8 If my recollection is right, all these institutions have to reduce their budgets by  
9 a considerable amount. In present circumstances to impose on, for example,  
10 the police an investigation which they haven't carried out but they know  
11 another party has carried out, provided they were satisfied a proper and fair  
12 investigation had been carried out in another country there would be no reason  
13 to require them to do it all over again. The thing that really troubles me is:  
14 suppose somebody is passing through London airport – as happens from time  
15 to time – or he's got a tiny office from which he sends out emails; or  
16 somebody is based here but all the criminality except for a small amount is  
17 being done overseas. I think that to impose this burden is wrong. I also think  
18 you have to look at the sentencing aspect if all the damage has been suffered  
19 in another country.

20 I don't think I've had these discussions with Fenella and colleagues in  
21 the Home Office and CPS, but there's the whole problem we face in relation  
22 to extra-territoriality. The traditional view of government has been that a  
23 criminal offence is an offence against the Queen's peace. Therefore, they are  
24 quite strict about what they're prepared to take on. Whether this would  
25 impose a further burden I don't know. The one thing I'm absolutely against is  
26 a judge telling the prosecutor, 'You've got to prosecute', but I don't see any  
27 harm – it may be desirable – in giving a person the right to ask the prosecutor  
28 to prosecute here.

29 CHAIR: One thing we've been looking at is whether sufficient weight is being given  
30 in the prosecutorial decision in a cross-border case to the residence of the  
31 defendant and his family. That comes in at a human rights level lower down  
32 the line, but certainly I got the impression that it didn't figure terribly high on  
33 the CPS's list of criteria. That may be just an impression.

34 LORD JUSTICE THOMAS: But then there is the countervailing factor that there are

1 three interests in a criminal prosecution: the alleged victim of the crime; the  
2 interests of the state and obviously the state's resources in this particular case;  
3 and the interests of the defendant. In any case the prosecutor should always  
4 balance the three interests, but I would be very much against something that  
5 just looked at it through the eyes of the defendant without taking into account  
6 the interests of the state and the victim. If 500 people had been defrauded in  
7 Vienna, to say they all had to come to London just because the individual  
8 lived in London would be wrong.

9 MR DOOBAY: I think the problem we are seeing are not the extreme cases which are  
10 quite easy to deal with but the ones that are slightly more finely balanced  
11 where there's some evidence here and some somewhere else; there's  
12 jurisdiction to prosecute in both places; there are some witnesses here and  
13 others somewhere else. I wonder whether there is an issue in terms of public  
14 perception, in that the public believe that in those more finely balanced cases  
15 less weight will be given, for example, to resource implications and more  
16 weight given to the location of the defendant, and perhaps there's a need for  
17 much more transparency in terms of how the scales are balanced, because  
18 certainly my sense from the public debate is that the public believe that a great  
19 deal of weight should be given to the fact that somebody is here in the more  
20 finely-balanced cases.

21 LORD JUSTICE THOMAS: I think the way in which prosecutorial decisions are  
22 made in cases like this with the right of judicial review is something that I  
23 wouldn't want to comment on for various reasons, but it seems to me there  
24 may be something you can look at there. But I find it inherently very  
25 troubling, and it would radically change our way of doing things, if a  
26 prosecutor had followed the proper process and the decision they had made  
27 was reasonable, or whatever the judicial review test is in a particular case, and  
28 you told them that they had to prosecute. I think that just changes the role of  
29 the judge. It would be an extraordinary step to take in circumstances like  
30 these.

31 CHAIR: Not only that, but it also gives rise to issues of comity. What happens then if  
32 the foreign court takes exactly the opposite view?

33 LORD JUSTICE THOMAS: Yes – and proceeds to try the person *in absentia*.

34 MR DOOBAY: The forum bar as currently drafted goes a step further, in that it

1 doesn't tell the prosecutor to prosecute but if the prosecutor has chosen not to  
2 and the Court bars extradition on the basis of forum, the person potentially  
3 will never be prosecuted because the Court cannot force the prosecutor to  
4 prosecute.

5 LORD JUSTICE THOMAS: And that will cause terrible problems. In this day and  
6 age I think one must see things in the light of the interests of the other state  
7 and, presumably, the interests of the victim of the crime in that other state,  
8 unless it's a victimless crime. There would then be great concern that  
9 someone's 'got away with it'. I see no harm in a pause and asking the  
10 prosecutor if he hasn't actually thought about and the remedies internally in  
11 the prosecution service, but I would be very reluctant to see a judge becoming  
12 involved any further.

13 CHAIR: Anything else? Do you want to say anything to us about the imbalance in  
14 the US/UK treaty and its operation?

15 LORD JUSTICE THOMAS: I've done some US/UK extradition treaty cases. When  
16 I've looked into it in those cases no particular problem has arisen, but I don't  
17 think it would be appropriate for me to comment on any other cases. The fact  
18 that imbalances haven't arisen in the cases I've done doesn't mean there aren't  
19 imbalances, but whether or not there are I can't say.

20 CHAIR: We're going to America for a week in May, so they'll be able to tell us about  
21 it. David, is there anything else?

22 MR PERRY: Only if you have any views on *prima facie* evidence. Effectively, we  
23 did away with this back in 1991 under the European convention, but the point  
24 made to us is that to have a proper safeguard in relation to both Part 1 and Part  
25 2 cases all states should be required to adduce statements from witnesses in  
26 the case so that the judge here considering the request for extradition can be  
27 satisfied on the face of the documents that it is a genuine case for extradition  
28 and there is substance in the allegations made against the defendant.

29 LORD JUSTICE THOMAS: In the one matter that I've dealt with where this sort of  
30 problem arose I think the current system generally will show where there is no  
31 ground whatsoever, and to introduce a *prima facie* requirement would take us  
32 back to extradition being a very slow process.

33 CHAIR: In Part 2 cases there's a schedule of cases where *prime facie* evidence isn't  
34 needed, and there are other ones where it still is. It's up to the Secretary of

1 State to decide.

2 LORD JUSTICE THOMAS: Yes. I think that if you trust the judicial system  
3 sufficiently – you have to because it's in Europe – then I think it emerges  
4 where it is completely baseless.

5 CHAIR: But the point is made that once the case has been scheduled under schedule 2  
6 it never seems to get un-scheduled. Regimes change in countries. I don't  
7 know what the position is in Libya, but Libya may have been perfectly okay  
8 two months ago but you wouldn't be so inclined to send somebody there now  
9 without *prima facie* evidence – or even if there was.

10 LORD JUSTICE THOMAS: It seems to me that in the scheduled countries – it's  
11 certainly my experience – the diplomatic service is extremely shrewd in its  
12 assessment of judicial systems. Our diplomatic corps is of the highest calibre.  
13 Where I know personally how something works and have seen their  
14 assessments I've never disagreed with it. I think that the information that  
15 comes in from our diplomatic service, which no doubt the Secretary of State  
16 considers, should enable one to say at any given time whether or not the  
17 system is such that you can require a *prima facie* case. Whether there's a  
18 readiness to change it, I can quite see the diplomatic sensitivities. If you say a  
19 place is okay and now you want to reverse it I can see the difficulties  
20 diplomatically.

21 MR PERRY: It seems to me this raises a question about what you are actually looking  
22 for when requesting a *prima facie* case. If you take Scott's point about Libya,  
23 it may be a genuine request and there may be a *prima facie* case, but the fact  
24 that it is unsafe to extradite there is not dependent upon whether it's a genuine  
25 case or there are good witnesses to speak truthfully to the allegation; it's more  
26 fundamental than that. One of the things we were exploring in some of our  
27 discussions is that if you require *prima facie* evidence to show whether or not  
28 an extradition request is a genuine case it seems, on what you've just said, that  
29 there are other ways of doing it within the current system. If it's to test the  
30 substance of the allegations made against the defendant, query is that a proper  
31 thing to be doing, within limits, in the extradition process? There is a view  
32 that we shouldn't be having the trial here and then the trial in the requesting  
33 state. But if there are other safeguards which ensure that it is a genuine case  
34 and there are real points to be taken as to the allegations made against the

1           defendant – as long as there are other safeguards – I wonder whether the *prima*  
2           *facie* case takes it very much further.

3   LORD JUSTICE THOMAS: I very much see the force of the points you've just  
4           made.

5   CHAIR: Is there anything that you think we ought to know that you haven't spoken  
6           about?

7   LORD JUSTICE THOMAS: No. I think you've covered everything.

8   CHAIR: Or anything to indicate we're barking up the wrong tree from which we  
9           should be discouraged?

10   LORD JUSTICE THOMAS: I can safely say no to the latter point. I think the  
11           problem with America is very different from the problem of Europe and needs  
12           different solutions. There must be much more political will to put right what's  
13           wrong with certain systems in Europe. I think we're all agreed about that.  
14           The question is: how do you do it?

15   CHAIR: Yes; that's what we're looking at.

16   LORD JUSTICE THOMAS: I'm for – probably coincidentally, it just happens to  
17           agree with what HMG are doing at the moment – people disclosing what they  
18           do, making them publish their times and things like that as a first step.

19   CHAIR: Thank you so much.

20   LORD JUSTICE THOMAS: If I may ask, when are you intending to report?

21   CHAIR: We've been asked to report by the end of the summer. If you want to know  
22           where we are at the moment, we're going to Scotland and Brussels in the  
23           second week of May; we're going to the States in the week before the Whitsun  
24           break; we've set aside a couple of weeks in early/mid-June for any  
25           sweeping-up exercises, or talking our way through this; and hopefully we shall  
26           then be doing first drafts which we will change and work on. We would hope  
27           to break the back of it by the end of July with a view to reporting back at the  
28           end of September.

29   LORD JUSTICE THOMAS: On a purely practical note, I've sent you the papers to  
30           which I've referred. If you do decide you want to go to one or two other  
31           countries that share our views or have similar ones, or persuade someone to  
32           come here, can we do that through Stuart? He can let Chris know and I'll  
33           make the relevant phone calls.

34   CHAIR: Holland is your first suggestion?

1 LORD JUSTICE THOMAS: Denmark may be another place; Spain may be worth  
2 going to. I'd like to think about it. . I just think that if a decision is made to  
3 change things which has a European impact it's very important, whatever you  
4 decide to do, that you strengthen HMG's hands in getting changes by ensuring  
5 this is not seen merely as people in this country complaining.

6 CHAIR: So, we would increase our street cred if we did that?

7 LORD JUSTICE THOMAS: Our street cred in Brussels first, yes.

8 CHAIR: We can come back to you if we need to?

9 LORD JUSTICE THOMAS: Yes, do. I'll make the phone calls. As you probably  
10 know, Peter Gross is doing a report on disclosure. I think he's going off to  
11 Berlin and the Hague just to know how their disclosure regimes work, because  
12 one is always told that one of the problems is that we can't do anything about  
13 it because of the European convention. It's nice to see you. You've obviously  
14 taken on a huge job of work.

15 *(End of session)*