

**HOME OFFICE – JUDICIAL COOPERATION UNIT****EVIDENCE SESSIONS**Tuesday 5<sup>th</sup> April 2011**PANEL:**Sir Scott Baker (Chair)  
David Perry  
Anand Doobay**IN ATTENDANCE:**

Professor John Spencer

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Transcribed from the Official Tape Recording  
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**SESSION ONE**

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1 CHAIR: Good morning.

2 PROFESSOR SPENCER: Good morning.

3 CHAIR: It's very good of you to come.

4 PROFESSOR SPENCER: It's good of you to ask me. *[laughter]*.

5 CHAIR: We've tried to set up this court in the most informal manner that we can,  
6 with the result that the microphones are there and they're just behind us, so  
7 that it will pick up everything. You can sit anywhere you like.

8 PROFESSOR SPENCER: Here somewhere?

9 CHAIR: In that row will be fine. I think you probably know all three of us, don't  
10 you?

11 PROFESSOR SPENCER: David Perry.

12 CHAIR: David Perry, yes, and Anand Doobay.

13 PROFESSOR SPENCER: Yes, and yourself.

14 CHAIR: The arrangements that we've got are such that we've got a transcript being  
15 prepared of everything that's said. It is a closed session, so the public don't  
16 have access, but we do intend eventually to publish the evidence that we've  
17 received and the submissions from people, including oral submissions, but you  
18 have an opportunity to correct, alter or add anything you wish –

19 PROFESSOR SPENCER: Thank you.

20 CHAIR: – before it goes public and you are supplied with a copy in a few days' time.  
21 And I say on behalf of all of us that we are really extremely grateful and we  
22 really do value your time on this, and we'd like your assistance on certain  
23 areas that are giving us reason for thought at the moment, but as far as the  
24 EAW is concerned, I think your view is that it's generally working pretty well  
25 and that there are two perceptions, as you put it: one that other countries don't  
26 operate such a fair system as the UK does; and, secondly, that Poland is asking  
27 for far too many people to be returned. That's your broad view, I think?

28 PROFESSOR SPENCER: Yes, that's what I said in the letter and I still adhere to  
29 that, yes.

30 CHAIR: Proportionality. We've had submissions about that. I think our provisional  
31 view in relation to proportionality is that there's rather less that can be done  
32 from this end, that can be done from the state seeking extradition and at the  
33 other end; we feel it's going to be difficult for an English/Scottish Court to  
34 start probing whether a particular request is proportionate or isn't.

1 PROFESSOR SPENCER: I agree with that and I think there's a problem too about  
2 different cultural differences and what's regarded as a serious offence in what  
3 country. We used to hang people for shop thefts at the beginning of the  
4 19<sup>th</sup> Century, and at the end of the 19<sup>th</sup> Century you could be sure to go to  
5 prison for it, and nowadays, if you're particularly unlucky, you get a fixed  
6 penalty which nobody will enforce [*laughter*] and is it for us to say to the  
7 Poles, who still take these things seriously, that it's not a serious offence and  
8 it's disproportionate to try to bring somebody to justice for it? As I said in my  
9 letter and as I said when we had that session at the Institute of Advanced Legal  
10 Studies, the real problem is something that you can't fix but which Europe  
11 badly needs to fix, which is some mechanism for dealing with these cases  
12 across borders without having to surrender and, in fact, there's quite a lot of  
13 the mechanism there, because we already have the legal machinery for  
14 enforcing other countries' fines. If the Polish judge to whom I was talking  
15 was telling the truth, they would not be firing EAWs at us all the time if our  
16 Police were prepared to help them find the people on whom they wish to serve  
17 summonses.

18 CHAIR: Do any – are there any – is there any use of these provisions for enforcing  
19 fines?

20 PROFESSOR SPENCER: I've no idea. Before that session in London, I checked and  
21 found that the provisions had been brought into force. I've never heard of  
22 them being used, but then I'm not a practitioner, so I wouldn't. I mean, do  
23 you know, David?

24 DAVID PERRY: No, I don't know, John.

25 CHAIR: We haven't heard of any, put it that way.

26 PROFESSOR SPENCER: No, but I suspect the answer is nothing's happened  
27 upstream to make it possible.

28 CHAIR: Yes. Our thinking at the moment is that there are, as far as the EAW is  
29 concerned, there are two lines of approach really. One is that there are certain  
30 safeguards under the framework decision that haven't been implemented by  
31 the UK that UK legislation could deal with, service of sentences and so forth,  
32 but that's pretty limited. The other avenue is really what can be done  
33 persuasively on a more European-wide basis.

1 PROFESSOR SPENCER: It may be something could be done persuasively on our  
2 Government without actual legislation, which is persuading the authorities to  
3 be willing to help, for example, the Poles to find the addresses of Poles who  
4 they want to prosecute under some lighter system of criminal procedure.

5 CHAIR: There is, I think, quite a lot going on behind the scenes and it's quite  
6 difficult to get a complete grip on how much and where – and we will be  
7 going to Brussels next month, when we hope to get a bit more information –  
8 but I don't know how much information you have about what is or isn't going  
9 on behind the scenes.

10 PROFESSOR SPENCER: Little bits and pieces. I do other things than this mainly,  
11 and then I'm summoned to an expert meeting in Brussels and I rapidly catch  
12 up with the topic again.

13 MR DOOBAY: I think that may be *[laughter]* our approach too!

14 PROFESSOR SPENCER: Are you going, because I may ask – you should be asking  
15 me – but are you planning a visit to Poland?

16 CHAIR: We're not at the moment. I'm not sure how much more we would get out of  
17 going than everybody else who has already been, because the Home Office  
18 have been out there –

19 PROFESSOR SPENCER: Lord Justice Thomas gave me the name of the Pole who  
20 talked interestingly about this at a meeting that he and I were at.

21 CHAIR: He is giving evidence tomorrow and –

22 PROFESSOR SPENCER: I which case he'll pass that on, I suspect.

23 CHAIR: – I've already seen him and he is, I think, pretty knowledgeable about what  
24 goes on, on a Europe-wide basis, and I think we would take his advice as to  
25 whether it was felt that we should go to Poland and if that is in the affirmative,  
26 we might well do so, but at the moment I think our thinking is that we're  
27 getting information from other sources.

28 MR PERRY: John, we were hearing from evidence yesterday from the DPP and  
29 some question was raised as to whether defendants in Poland actually have to  
30 be present in Court. I don't know whether you can shed any light on that,  
31 because we were investigating the possibility of lesser measures and he  
32 thought that part of the difficulty might be that people have to appear  
33 personally in Court.

34 PROFESSOR SPENCER: I'm afraid I can't shed any light on that. I gather from the

1 Polish Judge, whose name I can't remember but whose person I keep  
2 dropping, that they have a lighter method of criminal procedure – rather like  
3 our Magistrates' Court procedure – for dealing with people who don't turn up,  
4 and so presumably in lower level type cases as here – though we don't say too  
5 much about that when we're at International Conferences – people can be  
6 dealt with in their absence, but about more serious cases, I don't know.  
7 Somebody must know.

8 CHAIR: The suggestion is that those who issue the warrants in Poland aren't  
9 necessarily completely consistent and there are some who are slightly more  
10 liberal, looking at it from our point of view than others.

11 PROFESSOR SPENCER: Yes.

12 CHAIR: I don't know whether that's your experience?

13 PROFESSOR SPENCER: I'm afraid I don't know. What I have heard is that a lot of  
14 these cases – where Poland issues arrest warrants – get rapidly sorted out  
15 when the person at this end manages to get hold of a Polish lawyer, who can  
16 then deal with the Polish authorities.

17 CHAIR: That, of course, is some way down the system and it's after the Police have  
18 expended quite a lot of money –

19 PROFESSOR SPENCER: And energy, yes.

20 CHAIR: – and energy in getting hold of the chap.

21 PROFESSOR SPENCER: Yes.

22 MR PERRY: The other thing John, you wrote an article, written in the Criminal  
23 Review, about the German cases, where Germans or certainly some of the  
24 Courts in Germany, I think not the Constitutional Court, but some of the lower  
25 courts, have tried to import a proportionality requirement –

26 PROFESSOR SPENCER: Yes.

27 MR PERRY: – in their execution of requests.

28 PROFESSOR SPENCER: Yes.

29 MR PERRY: And I think, in particular, a request from Spain, and I think drug  
30 trafficking cases, and I think one of the views that you'd expressed was that  
31 that may be possible – a possible way forward, but not for the United  
32 Kingdom, because of the opt-out arrangements in relation to the Lisbon  
33 Treaty. I wonder if you could just explain that for us, John? First of all, what  
34 happened in Germany and then whether you think there's a future for it.

1 PROFESSOR SPENCER: In Germany they have Grundgesetz, which overrules  
2 everything else, and there are bits and pieces relating to that which can be  
3 invoked. Of course we don't have an equivalent here, so we have to forget  
4 that.

5 Secondly, Germany hasn't made any derogation from the enhanced status  
6 of the European Charter, which contains a mention about proportionality  
7 penalties, and the Court in Stuttgart said, 'First of all, if push came to shove,  
8 we could refuse to give effect to a EAW that was disproportionate, relying on  
9 the German constitution. Secondly, we could also do it by referring to the  
10 framework decision to the broader context of European law, in which the  
11 European Charter now has status with the other foundation documents, and we  
12 could read into the framework decision a requirement for proportionality,  
13 thanks to the enhanced status of the Convention under the' – either the TEU or  
14 the TFEU, I forget which. I suppose it's the TEU. I said I didn't think that  
15 would work as an argument here, because in conjunction – in conspiracy with  
16 the Poles, we've agreed a derogation from the enhanced effect of the Charter,  
17 so that it didn't give any rights beyond rights which were already recognised.

18 I subsequently discussed that with Cambridge College, notably my  
19 colleague Catherine Barnard, who said, 'Actually, if you read the Protocol, it  
20 doesn't necessarily mean that; maybe our Courts could rely on the Charter to  
21 that effect.' So maybe I got that bit wrong. Unfortunately, I haven't got the  
22 arguments in the front of my mind to give them to you now, but I could  
23 certainly send you the article that Catherine Barnard wrote about it, if you'd  
24 find that interesting.

25 MR PERRY: I think it would be, yes. We would appreciate that.

26 MR DOOBAY: Yes, it would be. We would be extremely interested.

27 PROFESSOR SPENCER: It was ironic, of course, that we, together with the Poles,  
28 put out of gear the argument we would have liked to use *[laughter]*.

29 MR PERRY: One of the other things that we've been told and, I mean, this is just  
30 anecdotally, is that the Dutch seem to apply some form of proportionality over  
31 tests. I'm not quite sure (a) whether they do and if so on what basis, but I'm  
32 not sure whether you have any knowledge of that?

33 PROFESSOR SPENCER: I don't. I know, unlike with Poland, I know a lot of Dutch  
34 lawyers who would tell us and I could find out easily enough. Somebody I

1 know well, who's actually Italian, has written about this. He's just migrated to  
2 the University of Maastricht to teach all this and it would be easy to find out  
3 from him. I have made a lot of Dutch contacts over the years.

4 MR PERRY: That would be useful.

5 PROFESSOR SPENCER: Let me make a note. *[laughter]*. The President of the  
6 Dutch Supreme Court, Geert Corstens, actually wrote a book about European  
7 criminal law and also wrote the first big book on Dutch criminal procedure  
8 and he'd know, but he's rather a busy man to ask. *[laughter]*

9 CHAIR: Do you have any experience of Albania and Norway, which I think are two  
10 European countries that are outside the EAW system?

11 PROFESSOR SPENCER: No relevant experience. I talked informally with Timothy  
12 Workman about cases he had from Albania, but that's all.

13 CHAIR: We've got Tim coming in here later in the week.

14 PROFESSOR SPENCER: I can't help you with those.

15 MR DOOBAY: One of the things that you mention in your letter, John, was about  
16 extradition between the United Kingdom and the rest of Europe was a running  
17 sore before the 2003 Act and, of course, Lord Bingham talked about a system  
18 disfigured by delay. Some of the representations that we received are  
19 suggesting that there should be a return to the Secretary of State's discretion.

20 PROFESSOR SPENCER: God preserve us! *[laughter]*

21 MR DOOBAY: And obviously that wouldn't work in Part 1 cases, because the  
22 framework decision simply doesn't permit it, but any views generally in  
23 relation to the suitability of the Secretary of State being involved in  
24 extradition?

25 PROFESSOR SPENCER: I suppose it's a useful safeguard when you're dealing with  
26 countries outside the European Union. The trouble is when you then have the  
27 possibility of a whole series of judicial review applications directing the Home  
28 Secretary to think again, which spins it out and out and out, that is what we  
29 used to have under the previous arrangement.

30 CHAIR: We've been thinking along the lines of the Secretary of State has, of course,  
31 a residual discretion at the moment and he deals with capital punishment  
32 specialty, which, it seems to us, eminently suitable to remain with him.

33 PROFESSOR SPENCER: Yes.

1 CHAIR: But the area that's giving us some trouble is the residual human rights  
2 discretion, witness the McKinnon case, which goes back to him at the end of  
3 the road, and what we're looking at, at the moment, is the possibility of some  
4 kind of residual power in the Court to refer a case back to the Court if there's  
5 some most unusual supervening event after the Court has heard the case,  
6 rather like the Taylor and Lawrence jurisdiction, or the statutory jurisdiction  
7 that enables the Court to reopen a case if something fresh has happened that  
8 might have affected their decision.

9 PROFESSOR SPENCER: Well I hadn't thought about that, but it sounds a sensible  
10 idea to me. One of the problems – this is in relation to the rest of the world, or  
11 in relation to Part 1?

12 CHAIR: No, Part 2.

13 PROFESSOR SPENCER: Part 2, yes. Well I'm more worried about the rest of the  
14 world than I am of the Part One territory's. I didn't like the McKinnon case  
15 and my instinctive reaction, not having thought about it, is that it's a wise idea.

16 CHAIR: Prison conditions is one of the real running sores in Part 1 cases and there is  
17 an argument put forward that the Courts here don't pay proper regard to prison  
18 conditions and therefore only lip service is being paid to Article 3 complaints.  
19 I think the situation has slightly been remedied by two decisions of the Court  
20 relatively recently, that is in February or January of this year, which have  
21 rowed back from John Mitting's rather more extreme position in an earlier  
22 case, but there's still the problem of prison conditions and it's quite difficult  
23 for an English Court to get round to looking at what conditions are like in  
24 Greece or Poland, because it really, in the end, depends on whether the  
25 individual is going to go to the prison that has rats in it or if he is going to go  
26 to one of the others, and unless you've got really strong, systemic evidence  
27 that they're all over the Article 3 limit, there's not a lot that we can do about it.  
28 Have you any thoughts on the way ahead on this sort of territory?

29 PROFESSOR SPENCER: Well as I said in my letter, I think we're in trouble if we  
30 start giving our Courts general powers to start listening to complaints about  
31 other countries within Europe not living up to the Convention standards, and I  
32 thought that, under our legislation, most unusually the Secretary of State can  
33 actually delete people – delete countries from the range of states that are  
34 within what we call Part 1 territories. Of course, that wasn't the idea behind



1 the framework decision at all – but if we had endless complaints about  
2 absolutely terrible justice conditions of any sort, particularly prison conditions,  
3 maybe the remedy is for the Secretary of State to intervene.

4 CHAIR: But it will be difficult for him to intervene unless there was something  
5 pretty strong from Strasbourg.

6 PROFESSOR SPENCER: Yes.

7 CHAIR: In which case it would probably have been remedied by that route, wouldn't  
8 it?

9 PROFESSOR SPENCER: Well one would hope it had been, but it might not have  
10 been.

11 CHAIR: Another idea that we've just been floating is this is probably territory that is  
12 best dealt with by recommendations for things that could be done behind the  
13 scenes on a Europe-wide basis, and we wonder if there's anything in the  
14 pipeline anywhere for having, for example, the equivalent of an inspector of  
15 prisons, but on a Europe basis, who can go to any country he wants and have a  
16 look at the conditions?

17 PROFESSOR SPENCER: Yes, a pretty sensible idea and if the result of concerns  
18 about the EAW are a levelling up in the quality of prison conditions, well and  
19 good.

20 CHAIR: I mean I think we want to try and level up not only in prison conditions but  
21 in general the standards of the administration of justice.

22 PROFESSOR SPENCER: Yes. On prison conditions, a related matter, which was a  
23 point that Judge Daphne Wickham made at a session that I was present at, is  
24 the problem that we shift people off who have been living here for years to be  
25 tried in countries where they then sit in prison for ages and ages pending trial,  
26 and we really ought to have some mechanism for suspending the execution of  
27 the European Arrest Warrant until somewhere near the date when they're  
28 actually going to try them. I only remembered that when I was coming down  
29 on the train and hence I hadn't looked at the various other framework  
30 decisions to see whether there was already some European legislation.

31 CHAIR: It was going through my mind. I was wondering whether that could be done  
32 under –

33 MR PERRY: The European Supervision Order, which enables you to remain on bail  
34 in the executing state and then you're obliged to return to the requesting

1 territory, rather like you would be on bail in domestic proceedings with an  
2 obligation to attend Court on a specific date, so we think that greater use of the  
3 European Supervision Order could alleviate some of that particular problem.

4 PROFESSOR SPENCER: Yes.

5 MR PERRY: It wouldn't work in custody cases.

6 PROFESSOR SPENCER: No. In custody cases, it would be a kindness to the  
7 wanted person and his family, probably, to hold him in custody here rather  
8 than the other end of Europe if he'd been living here for a substantial time, I  
9 suppose. I don't know whether that could be done under the present law? No,  
10 I suppose. Whether it could be done under the law as amended compliantly  
11 with the – in compliance with the framework decision I'm not so sure.

12 CHAIR: There would be cost implications, wouldn't there?

13 PROFESSOR SPENCER: I don't imagine the Government would be too keen, given  
14 our own prison crowding problem, but we wouldn't be talking huge numbers  
15 here, would we?

16 MR PERRY: No. There'd be problems under the framework decision because of the  
17 time limits by which you are required to comply with the request.

18 CHAIR: Yes. It would need change to the framework decision, which is probably  
19 some way down the line.

20 PROFESSOR SPENCER: On the other hand a little closer if the UK, pushed forward  
21 by your review, says it would be a good idea.

22 CHAIR: Yes.

23 MR PERRY: And then, sorry, I was going to say, then at the other end, there's a  
24 possibility of the enactment of the part of the framework decision that permits  
25 surrender to be conditional on the return of the wanted person in the event of  
26 conviction to serve any sentence in this jurisdiction, so that deals with that side  
27 of the problem.

28 PROFESSOR SPENCER: Yes.

29 MR PERRY: And that there's also the optional ground for surrender if, in a  
30 conviction case, you say we will actually execute the sentence that has been  
31 imposed in this jurisdiction, so that leaves that particular problem.

32 PROFESSOR SPENCER: Yes.

33 MR PERRY: So that we do feel that there are some mechanisms that can deal with  
34 some of these problems.

1 PROFESSOR SPENCER: Some of it, yes. Yes.

2 MR DOOBAY: I just wanted to touch upon – we discussed Article 3 and prison  
3 conditions and also Article 5 in terms of the length of pre-trial retention, but  
4 Article 6, which I think you mentioned in the letter, how do you think we  
5 should deal with, in the UK, allegations that the trial process in the country  
6 which has issued the EAW isn't sufficient to meet the Article 6 there?

7 PROFESSOR SPENCER: I don't think we can do much, except in the most flagrant  
8 case related to the particular individual. My feeling is that the administrative  
9 Court has probably got hold of the right end of the stick in taking a firm view  
10 about it. That is not what Fair Trials International say in their excellent report,  
11 but I think we have to be realistic and I think we have to remember that it's  
12 what everybody says all the time about the courts in another country.

13 CHAIR: You made the point, I think, about Italians being told, yes.

14 PROFESSOR SPENCER: So I think that is a difficult point and I think if we listen to  
15 generalised allegations about 'in their procedure, you don't have this, that or  
16 the other,' then we would have large delays and probably a lot of them in not  
17 very strong cases.

18 CHAIR: We're getting the same arguments in the American cases, in particular about  
19 plea bargaining being very unsatisfactory, but I don't think that complaints  
20 about how other systems operate is really within our remit.

21 PROFESSOR SPENCER: No. Often, when you look at another system, it's got  
22 something in it that looks bad, but when you look more closely, it's got  
23 something else that cancels it out which isn't so bad, so I am sceptical as to  
24 whether we can do any more than our judges have already done about that  
25 one.

26 MR DOOBAY: In terms of the notion – I just need to come back to something you  
27 mentioned – around [inaudible], obviously we have the power to remove the  
28 designation for some of the category 1 territories, but that would cause a  
29 difficulty, because obviously under the framework decision, we should be  
30 allowing them to use the European Arrest Warrant, so presumably if the UK  
31 had a real concern about one member state, if something which the  
32 Government was going to have to deal with, as well as the European level –

33 PROFESSOR SPENCER: Yes.

1 MR DOOBAY: – as well as being designated, because whilst that does exist at the  
2 domestic level, it would cause us presumably some greater difficulties at the  
3 European level to explain why we've done that, despite remaining within the  
4 framework decision.

5 PROFESSOR SPENCER: Yes, I see that. I see it more as a lever to cause pressure to  
6 be put on the member state, rather than something that we would actually, at  
7 the end of the road, probably do. As I think I said, or somebody said, at that  
8 meeting at the ILAS, the truth is we, for political reasons, admitted to the  
9 European Community countries whose criminal justice systems weren't really  
10 up to it. We are now living with the consequences.

11 CHAIR: But of course it is a two-way, [inaudible] extradition and we didn't  
12 [inaudible] entirely from the system, we're not going to get our criminals back  
13 from them.

14 PROFESSOR SPENCER: Yes exactly. I can – we're still on anecdotes, but –

15 MR DOOBAY: There's no [inaudible]. Part of the pleasure. *[laughter]*

16 PROFESSOR SPENCER: Years back when the Corpus Juris project was published,  
17 we had a meeting in Cambridge to present it, because I was part of it, and  
18 somebody got up who was a lawyer with Customs & Excise and said, 'This all  
19 misses the point! You can't do anything about this at all, Secretary. The real  
20 problem is extradition. That's why we can never do anything.' And we  
21 pointed out that, under the Corpus Juris proposals, for offences of budgetary  
22 fraud you wouldn't have it. You'd have a European Arrest Warrant. 'What!  
23 You can't get rid of extradition! Inconceivable[?]' *[laughter]*. I thought of  
24 these doctors who spend their lives working out cures for some terrible disease  
25 and their life's built round it, and then when it's cured they've nothing to do  
26 and *[laughter]*.

27 CHAIR: Have you had any thoughts about the relationship between extradition and  
28 asylum?

29 PROFESSOR SPENCER: None at all, no.

30 CHAIR: Because we've been pointed out there were certain inconsistencies in the  
31 way a situation is operated, but it's not territory that you've been into?

32 PROFESSOR SPENCER: No, I haven't.

33 CHAIR: Sorry, I was interrupting you.

1 MR DOOBAY: No, that's fine. One other issue, I don't know whether you've  
2 considered in evidence of one of the issues we're looking at, is whether there  
3 should be prima facie evidence test reintroduced in some countries. Is that  
4 something which you have considered?

5 PROFESSOR SPENCER: Not much, except to notice that we'd already suppressed  
6 that requirement before the European Arrest Warrant came on the scene.  
7 Would it actually make any difference really to the problems that we're  
8 dealing with? I was impressed with what Fair Trials International said about  
9 the need for some kind of quick process to deal with the problem of somebody  
10 who might have been the victim of an identity fraud and some possibility of  
11 asking for some further evidence from – or asking them to check maybe some  
12 case which is going down a wrong route.

13 CHAIR: Well we heard quite a lot about that from ACPO and SOCA and the CPS  
14 yesterday. I think that there are two aspects to this. The first aspect is, is this  
15 the man for whom the warrant has been issued, which is – the Police are pretty  
16 confident that they have biometric testing and fingerprint testing that they can  
17 be pretty confident that they are getting the person who is wanted.

18 The other aspect of it is the person who says, 'Well this is all very well,  
19 but I mean, I'm nothing to do with this crime. It's not me that you really want,  
20 it's somebody else, because I was in Britain at the time I was supposed to be  
21 murdering him in Greece,' to which the Police's answer is, 'Well that's really  
22 a matter for the Court of the trial, and we can't get involved in that, but if we  
23 have evidence, or material is put before us to suggest that there is a real  
24 possibility of a mistake, we would of course notify not only defence lawyers  
25 but the foreign Court as well.'

26 PROFESSOR SPENCER: Yes.

27 CHAIR: So I think myself, I was feeling that the identity point probably wasn't as  
28 big as Fair Trials was suggesting and you may have a different view about  
29 that.

30 MR DOOBAY: No. I think that it was quite reassuring. The CPS basically said,  
31 'Look, if the defendant put forward the type of evidence to say either, "I  
32 wasn't there," or "Somebody has stolen my identity," then we, the CPS, would  
33 transmit this back to the requesting state, and we might give them our view  
34 and it might be that they would then decide they want to withdraw the request,

1 so that is as much as we, the CPS, could do and we would try and do that and  
2 try and facilitate it,' and so I don't know whether you think there is more that  
3 could be done. I mean the view of the CPS and the Police is that we would  
4 help to relay this information evidence back, but if the requesting state said,  
5 'Thank you very much, but actually we still want them to come to face trial, in  
6 order to test this evidence at trial,' then there's not much more we can do.

7 PROFESSOR SPENCER: I rather agree with that, tough as it might seem, and  
8 though I wouldn't like to find myself in the position one day, maybe when I'm  
9 walking out of here, being nicked under a European Arrest Warrant for  
10 something I didn't do, the trouble is, again, it's what so many people would  
11 say, unfortunately. There was a time when I used to get very excited about  
12 alleged miscarriages of justice, and I still do sometimes, but two things. I had  
13 a conversation with Sir Fred Crawford, the first Chairman of the Criminal  
14 Cases Review Commission.

15 MR DOOBAY: Whom I know well.

16 PROFESSOR SPENCER: Yes, and he said, 'If only we could find some mechanism,  
17 in advance of spending a lot of time and money investigating, to know  
18 whether the person is genuine or not, because we get people who come to us  
19 and tell us apparently very genuine stories, and their families likewise, and  
20 probably their defence lawyers, and we look into it and it is terrible and yes,  
21 we refer it back, and we look at other people who come to us with an equally  
22 straight face and equally plausible relatives and equally honest defence  
23 lawyers, and the more we look into it, the more guilty we find they are.' And  
24 then I think about the Hanratty case, do you remember?

25 MR DOOBAY: Very well, yes.

26 PROFESSOR SPENCER: The current of opinion was that he was a victim of  
27 miscarriage of justice and then the DNA testing showed that he had absolutely  
28 done it, and I think in the end we have to trust the other states to investigate  
29 the case honestly according to the evidence, so I don't think there's anything  
30 we can do about that. As we were talking, I was wondering whether there was  
31 something we could try to build into the system on the lines of an application  
32 for summary judgment; you know, when something is so clear you can bring it  
33 before the Court and say, 'Look, it's so obvious it's not me; strike this one  
34 out,' but I can't see how you could build that in.

1 MR PERRY: It would be quite difficult to do that, because it would probably require  
2 facts to be investigated.

3 PROFESSOR SPENCER: In the end, the facts are best investigated in a country  
4 where it's supposed to have happened.

5 MR DOOBAY: Yes. I think in practical terms – I was certainly reassured by the  
6 CPS' view, because I'm sure that if you had a passport which showed that you  
7 were in the UK on the date when the Italian warrant says you were in Italy, the  
8 CPS would probably make quite vocal submissions to the Italians that we  
9 think this is very strong evidence, it appeared to us, to show that what you're  
10 saying isn't correct, whereas if you had very, sort of, evidence that could go  
11 either way, then they probably would relay it, but perhaps not quite as  
12 strongly.

13 CHAIR: I mean I think the – it's not as if there are a number of mistaken identity  
14 cases that are stacked up causing concern. I think there's probably one, isn't  
15 there? Is that right David?

16 DAVID PERRY: Yeah one, there was one, but he wasn't actually extradited, because  
17 once he produced his passport –

18 PROFESSOR SPENCER: Judge Joachim Vogel, otherwise Professor Joachim Vogel,  
19 who I think wrote the judgment in that German case, sits as a judge in  
20 extradition cases, and I heard him tell the story how he was once presented  
21 with an EAW from Italy, and it was the case of somebody who self-evidently  
22 couldn't have been there at the time, and he just rang the prosecutor in Catania  
23 and sorted it out with him, and he dropped it, and I suspect a lot of these cases  
24 are sorted out that way, sometimes with the judge intervening. I put that to  
25 Timothy Workman once when I was talking to him and he said, 'Well yes, of  
26 course, that's all right if it's somewhere where you know somebody or you  
27 can speak the language, but we don't have too many Albanian speakers here.'

28 *[laughter]*

29 CHAIR: Yes, and I don't think you can very well write that into the Act either.

30 MR PERRY: Although the framework decision does encourage communication  
31 between judicial authorities, which I think is something that could be used  
32 [inaudible] egregious cases.

1 CHAIR: Well there's certainly quite a lot of communication when there are defective  
2 warrants. SOCA has done a lot of that to make sure that the Court [inaudible]  
3 to a defective warrant.

4 PROFESSOR SPENCER: Probably, there are moves towards trying to train and  
5 bring together the judges in the different member states who actually deal with  
6 these cases. There was a conference in Amsterdam back in December, and  
7 probably networks of people who could talk to each other are a way of  
8 alleviating this problem.

9 CHAIR: On an entirely different topic, as you are aware, there is in legislation as yet  
10 unimplemented a forum bar both under Part 1 and Part 2, and we've had quite  
11 a lot of evidence from people who say this is very important, it ought to be  
12 introduced immediately and why hasn't it been, and on the other side of the  
13 coin there are those who say that if it is introduced, it will completely clog up  
14 the system and it's, in any event, totally contrary to the concept of the Part 1  
15 cases, where there's procedure for dealing with them.

16 PROFESSOR SPENCER: Well I agree with the first people over that. The Article 47  
17 of the framework decision appropriates a ground for optional non-execution,  
18 'Where the European Arrest Warrant relates to offences which are regarded by  
19 the law of the executing member state as having been committed in whole or  
20 in part in the territory of the executing member state, or a place treated as  
21 such, or have been committed outside the territory of the issuing member state  
22 and the law of the executing member state does not allow prosecution for the  
23 same offence.' Anyway, it's the first part of that, 'are regarded by the law of  
24 the executing member state as having been committed in whole or part in the  
25 territory of the executing member state, or a place treated as such.' And I  
26 looked at the French implementing legislation on this, which just says the  
27 Court may refuse to execute it where, under French law, it's regarded as the  
28 facts having occurred in France and under French law our Courts have  
29 jurisdiction over it. They seem to have lived with that without their system  
30 breaking down under it. Would there be that many cases where somebody's  
31 wanted in Poland for something and our Court would actually have  
32 jurisdiction over it?

33 CHAIR: I think it's possibly more a Part 2 problem than a Part 1 problem, but that's  
34 just an impression.



1 MR PERRY: I think the problem is that – this problem you never used to get under  
2 the old legislation, because it reflects two modern trends: first of all the nature  
3 of trans-national offending; and secondly, the greater use of extra-territorial  
4 offences. So you combine those two trends and you get the possibility of  
5 offences being trialled – triable in an overseas jurisdiction, even though the  
6 mastermind has been sitting in London at the computer, but may have directed  
7 harm at the overseas jurisdiction, or even he may have been masterminding  
8 the people trafficking, which was the facts of the Cando Armas case, in  
9 Belgium while he's in London.

10 PROFESSOR SPENCER: In London, yes.

11 MR DOOBAY: Or alternatively he may have sent one email to another state, which  
12 has given them the jurisdiction to prosecute, even though most of it was in the  
13 UK.

14 PROFESSOR SPENCER: In practical terms, it would mean what? It would mean  
15 that the Westminster Magistrates Court were presented with an argument that  
16 it ought to be dealt with here, please.

17 CHAIR: The answer given to us via the Crown Prosecution Service and the Director  
18 on this is that there is very close co-operation between prosecuting authorities  
19 of different states. There is a system for dealing with this in the –

20 MR PERRY: Eurojust Guidelines.

21 CHAIR: Eurojust, and as far as, for example, America is concerned, a Part 2 country  
22 where this is particularly topical, they have meetings between the prosecuting  
23 authorities, they work to guidelines and then they come up with a decision,  
24 and it would be very difficult, it is argued, for the Courts to go into territory  
25 which would really be usurping the prosecuting authority's decision whether  
26 or not to prosecute, which in domestic terms the courts are very, very reluctant  
27 to do. How do you deal with a situation, for example, where the Crown  
28 Prosecution Service have already decided not to prosecute in this country?  
29 Are they then going to be told by the Court, well the forum bar is going to  
30 operate in this case, no extradition, so do you end up then with a chap not  
31 being prosecuted at all, for what might be quite a serious offence, or do you  
32 force the Crown Prosecution Service to do something that you wouldn't force  
33 them to do in ordinary domestic legislation? I mean that's a bit of a summary,  
34 but –

1 PROFESSOR SPENCER: Yes, I see.

2 CHAIR: – but where the argument has run.

3 PROFESSOR SPENCER: Has this been a practical issue very much in Part 1  
4 European Arrest Warrant cases? I must say it's not one I've heard of.

5 CHAIR: I don't think it has.

6 MR PERRY: No, only in Part 2.

7 MR DOOBAY: There have been a couple, but it's certainly not as widespread. I  
8 mean there was a VAT carousel fraud case; there was a cigarette smuggling  
9 case. There are some, but it's certainly not been as controversial as in Part 2.

10 CHAIR: I mean there's certainly quite a strong public perception, in that if the  
11 prospective defendant is living here, has been here for a significant period of  
12 time and his roots are all here, that that ought to be a pretty dominant factor in  
13 deciding in which country he should be prosecuted. I'm not convinced that  
14 that plays enormous weight in the CPS's argument. That's just an impression.

15 MR DOOBAY: It certainly seems that in the Part 2 cases the public believe that if  
16 it's possible to prosecute something in two different jurisdictions, then the fact  
17 that you are a British National or British resident should weigh quite heavily  
18 in favour of you being prosecuted here, even if it costs more or it would be  
19 more difficult in terms of bringing evidence to the UK.

20 PROFESSOR SPENCER: There are conveniences of others than the defendant at  
21 issue in these cases.

22 CHAIR: And certainly the CPS say, 'Well we look at things like: where is the  
23 evidence, where are the victims, where was the offence committed?' They ran  
24 through quite a large series of matters, which their point was it would be much  
25 more difficult for the Court to evaluate these than it is for prosecutors who are  
26 meeting with opposite numbers and weighing up the problems and working  
27 out where the investigations have got to in each of the two countries.

28 PROFESSOR SPENCER: Well subject to any further reflections on the train back, it  
29 sounds to me the CPS have got hold of the right end of that particular stick.

30 CHAIR: So you're moving from one end of the thing to the other? *[laughter]*

31 PROFESSOR SPENCER: I am, yes. Particularly if it's not perceived to be a severe  
32 problem in the European cases.

33 CHAIR: But I don't think we'll find it easy to resolve this at all.

1 MR PERRY: No, certainly one of the difficulties with the forum bar that hasn't been  
2 enacted, consistent with the point you made in your article – you've just  
3 mentioned the French legislative instrument; our forum bar is about four times  
4 longer – and you first of all have to – the court first of all has to consider  
5 whether a significant part of the conduct alleged to constitute the offence took  
6 place in the United Kingdom, and then it would have to consider, in view of  
7 that and all the other circumstances, it would not be in the interests of justice  
8 for the person to be tried for the offence in the requesting territory. And then  
9 the Court is directed that, when it's looking at the interests of justice, the judge  
10 must take into account whether the relevant prosecuting authority in the  
11 United Kingdom have decided not to take proceedings. It doesn't say that's  
12 determinative; it just says you've got to, so it's possible that you could have  
13 no prosecution.

14 Now it appears that that would involve the Court first of all deciding  
15 whether a significant part of the conduct had taken place in the United  
16 Kingdom. I'm not quite sure how you'd resolve that, because that could be a  
17 very, very tactical question, then – and the interests of justice, where  
18 presumably you'd have to take in account where the witnesses were, who got  
19 the evidence. It's quite a complicated provision.

20 PROFESSOR SPENCER: I suppose particularly, given the way the issue would have  
21 to be resolved with us, which would be oral evidence presumably, I guess part  
22 of the reason the French managed to make their system work in this respect is  
23 it is probably all done on written submissions anyway, and –

24 MR PERRY: I was going to ask you about that. One of the things that I think I've  
25 never really been able to understand is why is extradition such a problem in  
26 the United Kingdom, because the French don't seem to have any problem with  
27 delays, or so far as I'm aware.

28 PROFESSOR SPENCER: They invented them. *[laughter]*

29 MR PERRY: But is there a problem with extradition in France, or Germany, or  
30 Holland, Italy? I mean the Hussain Osman case, to which you made reference,  
31 where he's returned within four weeks for a very serious offence.

32 PROFESSOR SPENCER: I don't really know. I had a discussion with Jean Pradel,  
33 who's an eminent French colleague, about the time the European Arrest  
34 Warrant came into force in France, and he was shocked about a Frenchman

1 being shipped off to Poland to face a causing death by dangerous driving  
2 charge, which he plainly thought no honest Frenchman should have to face in  
3 any country other than France. But my cursory reading of the French Press  
4 doesn't indicate there's been the agitation about it there's been in this country.  
5 Why would that be?

6 MR PERRY: Well I know before the EAW, of course, that there were – France had  
7 started a worldwide jurisdiction so it would prosecute its own citizens within –

8 PROFESSOR SPENCER: People – it does, yes.

9 MR PERRY: – France and Germany I think the same, and I think the Scandinavian  
10 countries also, but in terms of extradition, because we, of course, extradite a  
11 lot of foreign nationals also. There are people in jail in this jurisdiction  
12 awaiting extradition to the United States who are United States citizens, who  
13 still resist it and spend quite a long time in the process, but are there similar  
14 cases in the civilian system?

15 PROFESSOR SPENCER: I don't know. Again, I could ask my friend Jean Pradel  
16 and others, who doubtless know and would tell me and I could tell you. I  
17 think part of the reason is, it's rather a common lawyers' perception that we  
18 have the only just system in the world, and I think probably that if you read  
19 the *Daily Mail* and things, and you read the things the Conservatives said  
20 when the Extradition Act, Part 1 was before Parliament, you know, 'We  
21 mustn't co-operate with these other countries, because you're all presumed  
22 guilty there.' There was even somebody saying that in the last but one edition  
23 of Counsel, to the annoyance of one of my friends who actually worked in  
24 France for a bit. And I think that is something which is more strongly felt by  
25 us than by the people in continental Europe. Just like we wouldn't have  
26 policemen for years and then fell in love with them when we had them, and  
27 conversely the French have always had them and now are cynical about them  
28 and think they're an unnecessary evil and maybe they're not culturally waving  
29 the flag for the superiority of French criminal justice quite so much  
30 [laughter]. Would you like me to ask my contacts in whatever European  
31 countries to see whether it's been a matter of public concern, as it has here?

32 MR PERRY: Do you think, just developing that point, John, do you think that – I  
33 mean, if you're being returned from France to Poland, I imagine that the

1 system operating in Poland is more familiar to you than it would be to an  
2 English lawyer, for example.

3 PROFESSOR SPENCER: Well pretty much, yes, because the criminal justice  
4 systems in most parts of continental Europe are based on the French model,  
5 though a lot changed. They all had Napoleon's Code d'Instruction criminelle,  
6 basically kept it and adapted it afterwards, so they all work in approximately  
7 the same way, though with significant changes. Italy remodelled theirs on  
8 what they thought were Anglo-Saxon lines, but aren't really. The  
9 Scandinavians always had something different, but yes, I think that is true:  
10 essentially you have powerful public prosecutors who in theory tells the police  
11 what to do. You have, in some countries still, a juge d'instruction or the  
12 equivalent, so it's all more familiar to them anyway I think, yes.

13 MR PERRY: And then one of the things that we've been invited to consider is that  
14 the charter on continental [inaudible], and it's been suggested that as a more  
15 contemporary and expensive human rights instrument, with protection of the  
16 right to human dignity, that that could also be an additional protection in  
17 addition to the European Convention on Human Rights. Any views on that  
18 one? First of all, are there difficulties because of the way the United  
19 Kingdom's approached the Treaty of Lisbon in relation to the Charter, because  
20 as I understand it, we're not supposed to be adding more rights than the ones  
21 that we already have, and secondly, do you think it would provide more  
22 expensive protection?

23 PROFESSOR SPENCER: I think as to the first question, the protocol (Protocol 30),  
24 as you say, only says we can't use it in order to create new areas of rights that  
25 we don't already have, and would we really be doing that if we amended the  
26 Extradition Act to refer to something in the – I don't know. It depends.  
27 Nobody quite knows what that protocol means actually. I would have thought  
28 we probably wouldn't be in trouble over that, but I'd need to –

29 MR DOOBAY: Would or wouldn't, sorry?

30 PROFESSOR SPENCER: We wouldn't, I think. Would it give us anything the  
31 European Convention doesn't? Not much I think, because it's mirrored it  
32 closely. There is the issue about proportionality of penalties, which is in the  
33 Charter, which isn't in the European Convention, so I think it might add a  
34 little; it probably wouldn't put us – we probably could do it without getting

1 into running across protocol 30, but I'd need to think about that question. I  
2 don't think I've given a very coherent answer. I'll think about it on the train  
3 home.

4 CHAIR: Would proportionality of penalties come in at all with life with no  
5 possibility of a review?

6 PROFESSOR SPENCER: Yes it might. That's already a possible ground under the  
7 framework decision anyway, which we didn't implement.

8 CHAIR: Should it be implemented?

9 PROFESSOR SPENCER: It probably should, but again, pots and kettles you know.  
10 We are heavy hitters as regards heavy penalties, and think about Schedule 21  
11 to the Criminal Justice Act 2003 and all these other things, so it probably  
12 wouldn't make an awful lot of difference.

13 MR DOOBAY: Can I just go back to something we were talking about a minute ago?  
14 You mentioned that the French implemented the bar on forum and in that form  
15 it's in the [inaudible] decision, and David was mentioning that the French  
16 have a long tradition of trying French citizens in France, even if the offence  
17 was committed outside of France, and I wonder whether that might be a reason  
18 why it's not controversial in France, because the French, I think, may be less  
19 concerned about trying an offence which has a peripheral connection with  
20 France but is under French jurisdiction for a French citizen, because that's  
21 their tradition, in the same way that's the German tradition, so they don't have  
22 any real qualms about saying, 'We have the technical ability to prosecute.  
23 This is a French citizen. We will prosecute and therefore we will exercise the  
24 bar to stop extradition, because that's what a French citizen would expect us to  
25 do.'

26 PROFESSOR SPENCER: Yes. I can see that. It may well be that that was why they  
27 were so happy to accept that part of the framework decision.

28 MR DOOBAY: Because it strikes me that in the UK we just don't have that tradition;  
29 many continental countries have had constitutional bars on extraditing their  
30 own nationals, and the quid pro quo has been that they [cross-talk] reassure  
31 that they're not sort of immune from prosecution.

32 MR PERRY: I wonder what happens though if the French say, 'We're not going to  
33 extradite; we will prosecute. Please hand over the evidence'? So you say to  
34 the issuing state, 'We, the French, don't have any evidence. Please hand it

1 over,' and the issuing State says, 'Well we're not very happy about this. We  
2 think this is a case that should be prosecuted in our jurisdiction. We're not  
3 going to give you the evidence.'

4 PROFESSOR SPENCER: I was talking, as it happens, to a French avocat, whom I  
5 met at a conference only the other day, who was dealing with trying to defend  
6 a client where something like that was happening actually. He'd been  
7 suspected of a murder committed in Ireland and they had dropped the case.  
8 He hadn't been formally acquitted. The Irish DPP just thought there wasn't  
9 enough evidence. Then he went back to France, whose citizen he was, and the  
10 French said, 'Right, we're having you,' and they were trying to get the  
11 evidence out of France – out of Ireland and it wasn't proving easy, so I think  
12 they do have these problems. But again, you'd need to talk to a French lawyer,  
13 who would answer your questions about this I'm sure.

14 MR DOOBAY: I mean I certainly know there's a German issue where this arose, and  
15 they used Eurojust as the justification to say, 'Look you have two options: one  
16 is you give us the evidence and allow us to prosecute,' or –

17 MR PERRY: I mean it may be that's why in the Lisbon Treaty, I think, there is now  
18 an express provision that enables conflicts of jurisdiction to be resolved at an  
19 EU level. I can't remember which provision of the Treaty it is, but it's around  
20 88 or something like that. The other thing I wanted to ask, because there's  
21 another point that we've been asked to consider, both in relation to Part 1 and  
22 Part 2 of the Act – the prima facie evidence point that we were discussing a  
23 moment ago – but may I just ask, in relation to Part 1, if you were to go to a  
24 jurisdiction such as France and say you've got to make out a prima facie case,  
25 would they know what we were talking about?

26 PROFESSOR SPENCER: I suspect they would. They don't call it that, but they have  
27 a phrase, it's *preuves graves et concordantes*, or something like that. I think  
28 they have the notion of it as needed before certain measures can be taken  
29 against people in the French criminal justice system. Cases can get thrown out  
30 in France by a *juge d'instruction* who finds there's a *non-lieu*; a *non-lieu*  
31 would be on the basis there's insufficient evidence on which to proceed. So I  
32 think they have the notion. They might be puzzled by the phrase, but I think  
33 they have the notion.

1 MR DOOBAY: But the trial there would not involve the prosecution adducing all its  
2 evidence in the way that we understand it, and then getting to the end of its  
3 case and then saying, 'Right, over to you.'

4 PROFESSOR SPENCER: You don't have submissions of no case to answer, as far as  
5 I know.

6 MR DOOBAY: No.

7 PROFESSOR SPENCER: And in France the judge examines the witnesses to begin  
8 with and then the prosecution and defence have a go. It's altogether rather  
9 different.

10 CHAIR: Just looking at the evidence of Dr Franey, who is a legal team manager,  
11 international jurisdiction, to sit with Westminster Magistrates' Court, you  
12 probably know her anyway, do you?

13 PROFESSOR SPENCER: I may have met her, but I don't recognise the name.

14 CHAIR: In her evidence she was saying that 'provision of a prima facie case causes  
15 problems for civil law jurisdictions. This was recognised by the European  
16 Convention on Extradition, which specifically required information, rather  
17 than evidence, for extradition within Europe. Civil law jurisdictions in other  
18 parts of the world, particularly in South America, struggled with the concept  
19 of a prima facie case. Common law jurisdictions, such as United States,  
20 Canada and Australia, understand the concept.'

21 PROFESSOR SPENCER: Well I think –

22 CHAIR: She appears to take a possibly different view about that.

23 PROFESSOR SPENCER: Well as I said, they might be puzzled at the phraseology,  
24 but I think if it were explained to them, they understand what we're actually  
25 looking for.

26 CHAIR: Okay.

27 PROFESSOR SPENCER: As I said, we suppressed the requirement years back in  
28 European cases – definitely well before the framework decision.

29 MR PERRY: I just wanted to – the other thing I wanted to ask you about, John, was  
30 the future on improvements in procedural safeguards in Europe, because one  
31 of the points that I think is perhaps valid in these areas is, if you're going to  
32 have a European Arrest Warrant perhaps you should first of all have  
33 concerned yourself with making sure that you could be satisfied with the  
34 systems that exist in other states, and we've received some information about



1 the road map on procedural safeguards, and it looks as though interpretation  
2 and translation are going to be the first significant measures, and some work is  
3 being done on this by the Commission and others, and I just wondered what  
4 your view is as to the improvements, the progress on improvements in  
5 procedural safeguards and how you might see that developing in the future?

6 PROFESSOR SPENCER: I wrote an article about that in an obscure journal, just  
7 published the other day, which I will send you if you like.

8 MR PERRY: That would be very helpful.

9 PROFESSOR SPENCER: That at least says what's happening. I know quite well the  
10 European civil servant who was very active in pushing this along, one  
11 Caroline Morgan. I don't know whether you know Caroline Morgan or not?

12 MR DOOBAY: You'll be meeting Caroline in Glasgow[?] soon.

13 PROFESSOR SPENCER: Caroline Morgan started off as a defence solicitor in this  
14 country and then joined the European Civil Service, so she's somebody in the  
15 machine who has, surprisingly, a defence lawyer's perspective on some of  
16 these problems. She's probably responsible, more than anybody, for pushing  
17 this along every year, and you'd be well to talk to her about where it's actually  
18 going. She said it was almost impossible to get anything sensible done when  
19 you had to have unanimity to get a framework decision, and the bigger the EU  
20 got, the more some country could be a prima donna and awkwardly insist on  
21 their particular thing going in. And then, to its great shame, the UK decided to  
22 block the whole thing, as it did in 2006, I think it was – shockingly, so a lot of  
23 us think.

24 She then said how the UK reversed its position on that and was now co-  
25 operative, and then we have the Lisbon Treaty and it's possible for these  
26 things to be agreed by quality – a qualified majority voting, and she said she  
27 thought there was a good chance of getting a sensible outcome on a lot of  
28 these, because in the end member states insisting on throwing their dummy out  
29 of the pram will just be told somebody else wouldn't pick it up for them and  
30 we'd just vote it through. So I think there probably is a chance of this getting  
31 somewhere.

32 My impression is things will get difficult when a directive is put forward  
33 that is going to cost significant amounts of money, and they are thinking about  
34 one to do with legal advice and legal aid at the moment. The sequence of

1 events is there's been a directive agreed already on translation and  
2 interpretation, there are negotiations going ahead about one on minimum  
3 rights to information – and the UK's opted in to the negotiations on this – and  
4 they have, further down the stream, the one on legal advice and assistance,  
5 with which they foresee problems because that's costly and we're in economic  
6 recession.

7 My feeling, and some other people's feeling, about this is that it's one  
8 thing to enact a directive, and it's another thing to have the thing actually  
9 applied in all member states. At a meeting in Brussels, I said, and some other  
10 people said, 'When these directives are produced, it actually needs to be  
11 written in as an obligation on the member state to make it part of their law that  
12 the defendant who didn't get what this directive requires could raise this as an  
13 objection to the case going forward, because without that, unfortunately, the  
14 directive won't have the teeth that it ought to have.' So I think I am a bit  
15 optimistic, much more optimistic than I was, and certainly much more  
16 optimistic than I was when the UK suddenly said it was going to block all this  
17 in 2006.

18 CHAIR: On the legal aid topic, we haven't troubled you with that because it's  
19 probably not particularly your province, but we've got evidence from quite a  
20 number of different sources that the legal aid arrangements in the Magistrates'  
21 Court are very unsatisfactory, in that they are causing unnecessary delays, as  
22 well as potential injustice to defendants, and we have talked to some Home  
23 Office officials with a view to getting them to at least start looking at  
24 possibilities for modifying the system and doing a cost benefit exercise to see  
25 what costs would be saved in making a more efficient system, but obviously  
26 money is pretty relevant in all this at the moment.

27 PROFESSOR SPENCER: I can't say anything much of use about that. I think it's a  
28 good thing that we centralise dealing with these things in three Courts, and I  
29 think at least that creates the possibility of a cadre of experienced lawyers who  
30 know the law on these matters, as well as judges who know the law on these  
31 matters, but if they're not going to be paid enough to deal with it, or there  
32 aren't enough of them, then there's going to be a problem. And I can't but  
33 sympathise with those who say it's essential to make sure they have properly

1 informed people who are able to defend these cases. It's going to save time  
2 and trouble to the legal system in the end.

3 CHAIR: Not least you get a knowledgeable lawyer, who may be able to get back in  
4 touch with the prosecuting authorities in Poland or wherever and find that  
5 there are good reasons for withdrawing the warrant.

6 PROFESSOR SPENCER: Yes, if you're knowledgeable, you know how to sort it out  
7 whether that's what the law actually says, yes. I was very shocked where the  
8 Garry Mann case – to see that Garry Mann not only got let down by his Polish  
9 lawyers, but then he got let down by his English ones. As Lord Justice Laws,  
10 I think it was, said at the end, well whoever could have imagined that that had  
11 happened twice over, but it did. You can make a system foolproof, but not  
12 bloody foolproof! [laughter]

13 MR DOOBAY: I must remember that!

14 CHAIR: Have you got anything you'd like to ask us, or topics you'd like to raise with  
15 us, if you think it would be beneficial, while you're here?

16 PROFESSOR SPENCER: I think we've covered everything that I had in mind. I  
17 read the Fair Trials International document, which I think is excellently done.  
18 I don't agree with all of it. One of the other things I shall do, if I may, is write  
19 a brief response to the points they make –

20 CHAIR: Please do.

21 PROFESSOR SPENCER: – and send that to you.

22 CHAIR: We too have been very impressed by that document, and I think we too  
23 don't, at least initially, agree with all the points they are making.

24 PROFESSOR SPENCER: No, but it's a good starting point I think.

25 CHAIR: Yes, yes, absolutely.

26 PROFESSOR SPENCER: So I'll add that to my list of jobs that I said I would do.

27 MR PERRY: Just one matter that's just occurred to me: we were discussing this  
28 morning the operation of human rights in the extradition context, and we were  
29 discussing the decision of the House of Lords in *Wellington*, the case in which  
30 Lord Hoffman and the majority of three to two, took a relativist approach to  
31 human rights protection and extradition, given the public interest that there is  
32 in giving effect to extradition arrangements. So in the *Wellington* case it was  
33 'If you send me to the United States, I'm going to be serving a sentence of life  
34 imprisonment without parole.' In fact it was found to be a reducible sentence,

1 but certainly the Strasbourg Court, in relation to Article 6, has taken the  
2 flagrant breach approach, and the Supreme Court in *Norris*, in relation to  
3 Article 8 took an exceptional – it's got to be an exceptional case approach. Do  
4 you see a merit in that type of approach in extradition?

5 PROFESSOR SPENCER: I haven't thought about that and I'm not sure I can give  
6 you a coherent answer, but shooting from the hip, I think so. If it's very  
7 shocking, then we shouldn't, but otherwise we have to give them some margin  
8 of appreciation to sort out their justice systems as seems fit to public opinion  
9 in their countries, I think.

10 MR PERRY: If you do have any thoughts –

11 PROFESSOR SPENCER: If I have any thoughts – I'll think about that one as well  
12 and write to you if I have further thoughts about it.

13 CHAIR: There just seem to me certain questions I had about Lord Hoffman's  
14 approach, which is he seems to be saying that because it's extradition,  
15 therefore there's a higher threshold for Article 3 breaches than might be the  
16 case in other circumstances. It could get pretty close to that.

17 PROFESSOR SPENCER: Yes, that is worrying, yes.

18 MR DOOBAY: Certainly I find it less troubling to have a qualified test[?] where  
19 there are qualified rights. So for Article 6 there's a balancing exercise, and of  
20 course you could say one side has more weight than the other, but for Article 3  
21 there isn't a balance involved. It's a straightforward prohibition.

22 CHAIR: You certainly can't have much margin of appreciation of the right to life.

23 PROFESSOR SPENCER: I'll think about that. It merits a more considered answer I  
24 think.

25 CHAIR: Thank you so much for coming. It's really been terrific from our point of  
26 view, and as we were saying beforehand, we don't often get the opportunity of  
27 running a seminar with a professor. It's usually *[laughter]*.

28 PROFESSOR SPENCER: Well I'm very honoured to be asked, so thank you, and I  
29 find it quite fascinating as well and I'll follow up those points and –

30 CHAIR: If you have any other thoughts that you think might benefit us, do by all  
31 means let us know.

32 PROFESSOR SPENCER: Well I may have. My mind's now going around all this  
33 again, having prepared it to come down.

34 CHAIR: It's not an easy task to tot our way through all this stuff.

1 PROFESSOR SPENCER: No, unless you're actually into extradition law as your  
2 main theme, like I suppose Anand obviously is, there's a lot to catch up, a lot  
3 of very technical law and a lot of particular knowledge to get around.

4 CHAIR: Particularly to myself, the EAW situation, there's so much going on in  
5 Europe that seems to be sort of inter-linked and crossing over, and I'm not  
6 quite sure how it all fits in.

7 PROFESSOR SPENCER: I don't think anybody else is either, so – *[laughter]*.

8 CHAIR: Good, thanks very much. Thank you. Bye bye.

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*(End of session)*