HOME OFFICE - JUDICIAL COOPERATION UNIT

EVIDENCE SESSIONS

Monday 4th April 2011

PANEL:

Sir Scott Baker (Chair)
David Perry
Anand Doobay

IN ATTENDANCE:

Keir Starmer, QC (Director Public Prosecutions)
Dominic Barry (CPS)
Anne-Marie Kundert (CPS)
Karen Townsend (CPS)
Patrick Stevens (CPS)

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SESSION TWO

(At 14.00)

CHAIR: Keir?

MR STARMER: I've got with me Patrick Stevens, Karen Townsend, Dominic Barry, from the International Division, and Anne-Marie Kundert from the Extradition Unit. So I think it'll probably be easiest to sit here because if there are points of detail we can deal with today, that may help you.

CHAIR: In case anybody didn't know, Anand Doobay on the right, David Perry on the left, and I'm Scott Baker. We've had the advantage of having now got a transcript of what we said last week.

MR STARMER: I'm not sure that's an advantage. [Inaudible] was reasonably okay, and then looking at the transcript, it's half sentences.

CHAIR: And as far as today is concerned, this is a closed session, and there will be a transcript of what's been said, and you'll have an opportunity of correcting it before it becomes part of the annex to our report, and eventually all goes on the website. By all means feel free to say anything now, it comes out if you actually want to.

MR STARMER: Thanks very much, that's great.

CHAIR: Anyway, we really just wanted to have a chat around various aspects of this, and try and get your input. I mean, as far as the Secretary of State's discretion is concerned, there is not much left in Part 1, and probably nothing to talk about there, unless you think there is.

MR STARMER: No, we thought it might be helpful - just on the national security power, the power not to exercise national - we are pretty sure that's never been exercised. You probably know that already, but just in terms of numbers, we don't think that's ever been exercised.

CHAIR: Right. Nor has the other one, has it, with the duplicate...?

MR STARMER: Yes, it has in one case. I think where there was a competing request from France and...

MS KUNDERT: Algeria.

MR STARMER: Algeria, that's the only time. We can certainly get the details of that.

CHAIR: So what did you do then?

MS KUNDERT: This is concerning a case called Khalifa who is wanted for fraud in France and also Algeria, and the EAW was submitted by France first, and the

case proceeded through to extradition being ordered by the District Judge. At that time the Secretary of State then received a competing request from Algeria for the fraud that had been conducted there. And he then made a decision as to which case should take precedent, and then both parties were advised by a letter as to the reasons why we decided the Algerian one should take precedent. So that's the only example so far of that particular section being exercise.

CHAIR: Has it never happened the other way round, where we want somebody put somewhere else?

MS KUNDERT: I'm not aware of any - you mean a country's refused or delayed?

CHAIR: Yes.

MS KUNDERT: I'm not aware of any cases where...

CHAIR: Where there are duplicate problems the other way?

MS KUNDERT: No. Well, I'm certainly not aware.

MR STARMER: Or we've lost someone to another country essentially that we wanted back.

MS KUNDERT: No.

MR STARMER: I can't think of one.

CHAIR: And there's no sort of central system for dealing with this, it has to be dealt with by each country when it happens?

MR STARMER: Yes.

CHAIR: Right. As far as Part 2 is concerned, I mean there are certain aspects of it that seem fairly straightforward, but what are feelings about the human rights issues being looked at again after the Courts have dealt with it? Or is that something that might be more easily be transferred back to the Courts?

MR STARMER: Well, we were discussing this earlier today. You've got the initial glance by the Secretary of State as part of the process, and then the Courts apply pretty much the same test as you know. And in a sense that ought to be the end, and that's appealable, etc., that ought to be the end of it. But what a number of cases have thrown up is if something happens after, at some stage. And I mean if you look at the events in North Africa in the last few weeks, you could have something which a few months ago looked like a perfectly proper extradition. Suddenly things have changed dramatically. And there needs to be some point of entry back in.

At the moment I think the only route back in is to judicially review the removing authority, and that's how the Court get the decision they get. I suppose you could say, well that works in the extreme case. I think the problem if you have a provision automatically for the Court to look at it again, is it probably will just go round the loop again if you're not careful. And so as long as there's an opportunity in an extreme case. It probably would be the health of the individual changes in some way very rapidly, or if something's happened.

CHAIR: Well we've got McKinnon case at the moment.

MR STARMER: Yes, exactly. Either that or something happens and the jurisdiction they're about to go to that suddenly makes it look a very different situation than the one the Court thought it was when it ordered or upheld, whatever the case may be.

CHAIR: So your view is that it's left to the discretion - left to the Secretary of State at that stage, rather than having some machinery that would take it back to Court.

MR STARMER: We don't – I mean, that, it seems to us, deals with that extreme situation. Somebody would appeal to the Home Secretary of State and say, 'Even though in all other respects this was a perfectly proper extradition, this has now happened, please reconsider.' Which is effectively McKinnon.

CHAIR: But it might be argued that he's getting involved in a political decision there etc, or he could be, or she could be...

MR STARMER: True. I mean, the only alternative I suppose would be to say you could appeal back to the Court somehow, you could re-petition the Court. I'm not sure in practice it makes much difference, because presumably if the Secretary of State doesn't accede, you'd probably review the decision anyway.

CHAIR: Yes, I just wondered whether if there was some exceptional jurisdiction to cater for this sort of case. Because when you have the Secretary of State involved making a political decision, inevitably it is then judicially reviewed. Then you get the exceptional, exceptional case where some other supervening event arises. The Secretary of State is then asked again to look at it, and then there's another judicial review with the possibility of [inaudible]. And I just think that the modern trend is to take the executive out of extradition in its entirety, save for those matters where the executive is best placed to make an assessment, is there a death penalty, specialty arrangements. And we were

wondering whether if any human rights protection at the end of the process were needed, it wouldn't be better supervised by a Court, rather than the Secretary of State.

MR STARMER: I don't think we'd quarrel with that, I think as long as there was the opportunity. The taking of Secretary of State out of the Part 1 procedure has helped a great deal. And therefore it would just be an anxiety that there ought to be a route back. But I wouldn't quarrel with any of that at all.

CHAIR: We've got quite a lot of evidence that the Secretary of State's discretion ought not – we ought not to go back to where we were before, but we've just been wondering a little bit on the other side of the coin as to whether it might even be narrowed further with regards to Part 2 cases; that was the territory that we were on.

MR STARMER: Yes, well I mean...

CHAIR: You're not suggesting it should become wider in any respect.

MR STARMER: No, no, no, no. Just as long as there's a route, if it was clearly vested in the Court and everybody understood, I don't think that would present a problem. You would cut out delay for the Secretary of State, not necessarily an easy decision for the Secretary of State and the Court is well placed most of the time to deal with it.

CHAIR: Anand, do you want to ask anything?

MR DOOBAY: No, I think that was our concern. [Inaudible] judicially review of removing authority, they, in reality, haven't got - It's a sort of an unfair process because they haven't got any mechanisms to take a decision on a change in human rights circumstance. So it's really just to... it's a legal means to get back before the Courts rather than having a proper mechanism to say, 'There has been a supervening event. This is the proper process in each [inaudible].'

MR STARMER: No, well again I wouldn't disagree with that.

MS KUNDERT: [Inaudible - off mic].

MR STARMER: Yes, do you want to, by all means.

MS KUNDERT: The concern that we may have is obviously a Court is adjudicated on human rights, and then an incident occurs and there could be a number of years while the Secretary of State is receiving representations. And there's a particular case under [inaudible] Deya, a request from Kenya for someone

who's wanted for child abduction. It's been three years now that the Secretary of State has been receiving representations about a particular prison in Kenya. Obviously at the end of that process there could be a judicial review [inaudible] afterwards. So you could be talking about five years after the initial decision. And as the 2003 Act removed a lot of those delays that used to be seen in the 1989 Act, and these supervening events, sometimes we get things equal periods of time on representation that were removed specifically so that the Courts were seen as the guardians of the human rights process.

CHAIR: But you think that would be better if we suggested that that go back to the Courts to deal with supervening events, rather than to the Secretary of State?

MR STARMER: Yes, I think it would make it quicker, the Court would be well placed most of the time to deal with it.

CHAIR: Yes. And obviously one is looking at [crosstalk] as we possibly can.

MR STARMER: Yes.

MS KUNDERT: Because the main gist of it is: would the Court have reached a different decision had they been aware of this information, and how the Court might be best placed to make that determination.

SPEAKER: I think the other thing as well is that if you're the Secretary of State, you can't have a once and for all hearing. You have to seek representations, then counter representations. Where if the Court is saying, 'Right, we're going to have a hearing on this particular day, the parties must be ready with any evidence that they want to put before us,' you take out that delay in the process. It may avoid that sort of difficulty.

MR STARMER: I don't think it would cause any problem for us. It will avoid the lengthy delay with the Secretary of State may be looking at it for some time, and then in any event it's going to be judicially reviewed, and then arguments about how closely the Court ought to look at it in any event.

CHAIR: Anything else on discretion? The EAW, which is probably generating the most heat.

MR STARMER: Yes.

CHAIR: Proportionality, I mean we've been given a certain amount of thought to this, and I think there's a distinction between proportionality at the receiving State end, at our end, which we've heard a certain amount of evidence really isn't something that's practical to look into and deal with - because the

receiving State doesn't have all the relevant information - and proportionality at the sending State end, which is where more might be done. But the problem from our end is we can't very easily legislate to achieve that, and it may be more a matter of education. But have you any thoughts in this direction?

MR STARMER: Well I think it is a difficulty, and I have to confess, I can't think of any way through without going to the framework arrangements, to be perfectly honest. I don't think there's anything at this end on our own that we can do. In a classic prosecution case you'd look at the public interest: what's the penalty going to be for the actual conduct. But as I was trying to explain to the committee last week, I just don't see how a prosecutor in England and Wales could apply a public interest test to an offence in another country, unless it was extreme. And it just seems so inappropriate; it's hard enough to measure our own cases. And therefore I'm not sure what we tinker with on our own is what deals with this. It's got to be a European-wide solution. That's not to say that there couldn't be one. I mean, you could have a threshold. At the moment you've got the 12-month rule, that at least cuts out some minor offences, but you've got the classic effect of loaf of bread problem.

I mean, arguably at the European-wide level you could build in some proportionality. We have it in the sense that we've issued guidance, I've issued guidance. So when we're seeking a European arrest warrant, we have to go through a series of questions for ourselves as to whether we really need it, how important it is, what's the nature of the case, what's the likely sentence, age, etc., person that we're seeking back. So it's perfectly possible to do it, because we do it day in, day out. But that's a voluntary arrangement. You either get each country to have similar voluntary arrangements, or at the European level you say, given the volume and the difficulties, from now on this scheme only really operates for cases that get over that threshold. But on our own I'm not sure there's much we can do.

CHAIR: Well we did hear from ACPO this morning that there's a certain exercise of proportionality goes on with the executing warrants, because if it's a warrant for murder then it gets top of the pile, if it's for a minor theft, it goes to the bottom of the pile. So there is that element. But on the other hand, that doesn't answer the resource problem, does it?

MR STARMER: I don't think it helps. I'm not sure it's much of an answer in the long

run anyway. Because one day you get to the end of the pile, and then you've got a very old, and a very minor warrant, which just doubles the problem. So good to prioritise the murder, but probably not the complete solution.

CHAIR: Right . How much impact do you have behind the scenes with Europe, as it were, to deal with some of these problems surfacing with regard to EAWs and meeting people and so forth?

MR STARMER: Well, can I begin to answer that then pass along the team for any experience they have. I went for a visit to Eurojust last month, and the answer is quite a lot. It's quite a sophisticated arrangement there. Each of the countries has their desk. Problems can be dealt with at Eurojust, they've got the facilities not just to talk country to country, but when necessary to have more than one country, most of them are at least three countries. And facilities to have the investigators and the prosecutors all come into one place in The Hague, and solve real-time problems. And it's a pretty sophisticated and prudent set up, and it's developing all the time, it's only been up and running since I think '03.

Comment [C1]: To clarify - the majority of cases with Eurojust involvement are cases that affect three or more Member States, however, they are also able to assist in bilateral issues between two countries as well.

CHAIR: Is this Eurojust?

MR STARMER: Eurojust. But it's very impressive and it's a really good sort of place for solving practical problems.

CHAIR: Do they have minutes of meetings and so forth, do they publicise these?

MR STARMER: I think, I mean, just taking it in stages, the general arrangements are all set out, they have... because this is an interesting issue, how do you resolve when two or three countries have an interest in a case, where that case is going to end up. They developed principles for that, which are publicly available. Whether they have minutes of the meetings that they have, I'm not sure.

MR STEVENS: Presumably, many of those would be case sensitive, at the time would be fact-sensitive and so they wouldn't be available at the time. But on review in due course those might be available, could be made available.

MS TOWNSEND: I think on the proportionality question with Poland as well, we work very closely with the Home Office who are the policy lead, and I attended a bi-lateral in Warsaw just before Christmas with Home Office, SOCA, and Crown Office colleagues. I think we've probably taken a step to deal bi-laterally with the Poles on this problem. But I do understand from

Dutch colleagues that, for example, they had a coordination meeting in Eurojust last year, with the Poles, to talk about that issue. But the Home Office here has chosen to tackle it directly, bi-laterally.

CHAIR: We're told that the Pole position is getting better. Is that your experience?

MR STARMER: I must say the latest numbers we have didn't suggest that, but maybe they'll change, but we're still seeing stuff coming through from 12 months ago. I don't think we've... Have we noticed a discernable change?

MS KUNDERT: I think it's hard to answer because we don't do an analysis of the type of cases that you get, it's hard to say that all of those cases that we receive are disproportionately issued. Because the only test that we're ever looking for is whether or not there's an extradition offence, we don't keep statistics of what we consider to be a trivial offence. So it's very hard to say if the problem is the same, has increased, or decreased because we don't perform that exercise.

MR STARMER: But the numbers are quite extraordinary. I mean, Poland, on our numbers, issued 4,844 EAWs. The next highest is Germany at 2,433, and so on and so forth. And somebody has done some analysis of what that works out per head of population and it's far more. And then for us surrendered to Poland were 425 last business year, compared to the next highest, Lithuania, at 55. Now it's perfectly true that within that 425 we, the CPS, are not able to say *x* percent of what we might call minor or might be appropriately dealt with by some proportionality. But the number is very high.

CHAIR: And you can tell from the numbers, there must be...

MR STARMER: I mean, this is what I've not been able to get to the bottom of: even if you say the legality principle plays its part, that's not unique to Poland. Lots of countries don't have any public interest tests before they prosecute, and would require everybody to at least appear before the Court as part of the process. It certainly is part of the explanation for Poland, but other countries have that principle.

CHAIR: What's the other explanation?

MR STARMER: It may be that they haven't got any guidance for their own investigators, prosecutors, or judges, as the case may be, about what they apply for. In other words, the guidance we've got for our prosecutors saying, 'Look at this before you even apply,' doesn't appear to apply in Poland. Now I don't think anybody's done any analysis to say if there is an equivalent of that

across all of Europe. It might be quite interesting to find out. But why is it that the Germans, etc., don't, who've also got a reversion of the legality principle, don't in fact seek so many back? It may well be that they're exercising a discretion before they even apply. I suspect it is.

CHAIR: So we don't really know what goes on in Poland before issue of the warrant?

MR STARMER: Did you glean any more? Sorry, carry on.

MS TOWNSEND: I think we were getting mixed messages when we're speaking to Polish prosecutors. A number still maintain that they have an obligation to prosecute in all cases, whereas others feel that there might be some room for manoeuvre. And through the discussions that we had then, the main problem seemed to be, in the minor cases, locating the individual in the UK. They knew they were in the UK, but not exactly where, to put them in touch with the Court to discuss the case, and sending an EAW was the mechanism to trigger the search and location of that person. And one of the things that was suggested was whether the mutual legal assistance channels would be more appropriate to do that, and serve notice on them from the Court, and to try and resolve the matter without an EAW if the person was happy to cooperate with the Polish Court.

MR STEVENS: And I think that the fact that we were getting mixed messages is support for the Director's point that there may be some, not only in other countries who have a legality principle who are taking a different approach, but there might even be some within Poland who are taking a different approach.

CHAIR: Right.

MR STARMER: I think there is also, but we haven't bottomed this out, a rule in Poland that you've got to appear in person for the early stage of the process before the Court. And at least some of their people have interpreted that as being, 'You've got to get the person coming back, come what may.' Whereas as Karen says, there may be room for exploring whether that couldn't be done by mutual cooperation, so that they didn't actually have to go through the arrest warrant.

CHAIR: Is there any scope for dealing with some of these minor offences from Poland by way of fines, and reciprocal enforcement of fines?

MR STARMER: I can't for the life of me think why not, off the top of my head. I

mean, it seems to me, particularly the very minor stuff, have a fine that's enforceable anywhere in Europe subject to certain limits I would think.

CHAIR: Has that been floated? I mean, [inaudible].

MS TOWNSEND: [Inaudible]Framework Decision on the recognition of financial penalties.

MR STARMER: But it would still require... just thinking aloud, it would still require the Court in Poland, presumably in the absence of the individual, to impose the fine in the first place, and then seek to enforce it in England and Wales. I think the problem is, as I understand it, that they would say they can't get to the final determination without having got the person back in the first place. If that could be solved, I think the enforceability of whatever the sanction is going to be exercised, ought to be a relatively easy part.

CHAIR: Video link?

MR STARMER: Video link, I mean this...

MS KUNDERT: There has been a trend in Polish cases where so called "iron letters" have been produced in Court. So the person is arrested on European arrest warrant, brought before the Court, and then defence are then seeking to compromise the warrant. So you'll get lots of applications where they're applying to adjourn so they can compromise the warrant. And what they're seeking to do is either using lawyers or family members in Poland to go to the Court and see if they can either pay the money, or even make an arrangement for the person to return voluntarily on bail, sort it out, and then come back to the UK. And that's happened on a number of cases. So it has been disposed of by the payment of money, but instead of actually having a statute here to say you can pay your money here, they've actually arranged it through the family members. And even when we go into the appeal stage, you're still getting efforts to compromise the warrant all the way -

CHAIR: So this is after the warrant's been issued, and sorted out without the person having to attend in person?

MS KUNDERT: That they are then instructing family members...

CHAIR: Family members or friends.

MS KUNDERT: Or lawyers to basically... Obviously, they're trying to withdraw the warrant in Poland.

CHAIR: Right.

SPEAKER: And does the warrant get withdrawn?
MS KUNDERT: Yes. It can be. This is why it's difficult for the judge, because on one hand he's been asked to expedite the EAW through the Court process; on the other hand he's receiving representations from the defence saying, 'Give us two weeks,' because in two weeks' time the warrant can get withdrawn.
MR STARMER: That suggests that there is something can be done locally without the person being physically there. I'm not quite sure what's going on in these cases, but some arrangement is being arrived at.
CHAIR: I mean, is this something that happens in 1%, 5%, 10% of cases, or is it very...?
MS KUNDERT: It has been an ongoing trend I would say in the last six months.
CHAIR: Yes. Do you know if this has been picked up in Eurojust?
MS KUNDERT: I was certainly aware of it before the last meeting, and I gave some examples of the letters that we receive.
MR DOOBAY: I just wonder if I would ask something. Because it's one of the things which – I know that we're talking about the fact that proportionality is set out to be in the issuing State, rather than executing one. But it does seem to me that in practice sometimes EAWs are issued not in order to prosecute people for charge-ready cases. And that there may be some difficulty in the UK because we – our mechanisms are set up to receive and execute an EAW, not to really explore whether: Did you really mean an EAW when you sent this to us. Is there something else which would achieve the ends which you're aiming for? Could we serve a summons instead? And whilst with the Polish examples, because there are so many of them, you're looking at it on a wider sort of systemic basis and saying, 'Are there some reasons why we've got so many?' But I just wondered whether as a whole within the EAW there might be something we could look at to try to consider in individual cases whether an EAW is the most appropriate mechanism.
MR STARMER: Well, I mean I think the answer is possibly. And I think when you say charge-ready, there's obviously a difficulty with those countries that don't operate on the basis of charge being the gateway. And they may well, the Court, Judge or whatever it is, maybe sees it at a much earlier stage. And we've got to respect that that's a different way of bringing criminal proceedings, etc.

So there's not much room there, but I can't see why, perhaps with some little adjustment, there couldn't be an exploration as long as it was cooperative as to whether or not the warrant was really necessary, and whether some other form of mutual legal assistance. Because if that is getting... that's being explored, that's beginning to some extent, it's happening in practice, why that couldn't be more formalised, or more widely available.

CHAIR: SOCA's view is that their role is simply to test the legal validity of the warrant, and they are very focused on that, and it's not within their remit to go outside it.

MR STARMER: I think that's probably right under the statute. And I think if this is going to happen, it needs to have a firm footing so everybody understands. I think trying to find a discretion in SOCA or us that isn't written into the statute is fraught with difficulties. It would be better if there's some sort of amendment to the framework, the general framework, or some agreement across Eurojust or something that this is how these cases will be operated. Dominic?

MR BARRY: There's an EAW handbook, I don't know if you're aware of that, which — I mean it last came out in December of last year, and they put in proportionality for the first time, and they've mentioned some of these issues about consider the length of the sentence, etc., etc. They also then talk about, 'Consider other MLA options which might be available.'

MR DOOBAY: That's the one I had in mind, is that maybe there's a facilitation method to assist with the handbook guidance you would have whoever it was in the UK to help, because the handbook is aimed at sort of changing behaviour between the member States. It just seems at the moment that within the UK, everyone's very focused on their statutory duties, and nobody's really looking at what's in the handbook to try and help other members[?]. Apart from the Polish case where it's...

MR STARMER: I'm just trying to think how you would – that obviously is up to SOCA how they would want to answer it. I think it might be a bit much to ask them to undertake this. It would probably have to be us, for better or worse, to look at it and say, 'Is this a case that actually could be dealt with by way of mutual legal assistance, and set it up through Eurojust or pick up the phone?'

CHAIR: But it wouldn't get to you before it went through SOCA.

MR STARMER: I'm just thinking, it wouldn't get to us, SOCA would have looked at it. Arguably so long as they thought that the authority that issued it was an appropriate authority, they would have executed it, the person would have come to Court. That's why at the moment it's done on an adjournment of the first period, but you're halfway into the problem before you – you either say SOCA do it, and I just think they would say, 'We're not really in a position to...'

CHAIR: Yes.

MR STARMER: 'Carry out quasi judicial assessment, whether this is a real warrant case or not.' I suppose you could say in some cases they might want to seek our advice before going any further once they actually receive the warrant, if it looks as it's the sort of case where – I mean, they might. I mean, we can give advice to SOCA, and we don't have a difficulty with that. So if it was to be built in, it would make sense if it was built in in that window. SOCA get the warrant just before they execute it, and I would have thought they would say they want our advice on that. I would have thought we could work that out.

CHAIR: But then who takes the executive action, and gets in touch with the Poles, as it were?

MR STARMER: Well, I think it would have to be us, wouldn't it? I think SOCA would say, 'Do you think this is the sort of case where you ought to contact the Polish authorities and ask them whether they really want a warrant, or whether they might be equally satisfied with some other form of mutual legal assistance?' Presumably with an invitation to the Poles that if it's the latter, they might want to withdraw the warrant, and pursue mutual legal assistance. I mean, I think that's how it would work, unless you change – unless there was an amendment to the legislation, well I could see there might be that scope without changing anything.

MS KUNDERT: You're kind of completely reversing everything, because the assumption is this mutual recognition; that the warrant says you wanted the person for the purpose of a prosecution, that's all you should need. And the Courts have made clear that only in exceptional cases should the Courts be looking at any intrinsic evidence. Because they don't want to get involved in the criminal system of Sweden, Germany, but as you correctly identified, Director, we've already got the warrant unless it was – they were thinking

about it, and came to us for advice early. You've already got the warrant and it's a bit more difficult to go back and question, then and say, are you sure you want – you've correctly issued this?

CHAIR: We really would need somebody to persuade the Poles to have an individual at their end who would be appointed contact from somebody from the Director's office to deal with cases that might get taken out of the system.

MR STARMER: Yes, and you wouldn't be asking them – you wouldn't be suggesting it was wrong to have issued the warrant; you would be saying to them, 'You're perfectly entitled to pursue this warrant, it's perfectly valid on its face, and we can execute in the usual way. On the other hand, it appears to us that this is a warrant for what looks to us to be a minor offence, probably will end up with a £25 fine, there is this other way we can deal with this, if that would equally satisfy your needs, could we pursue it that way?' A mutual cooperation, and if they said, 'No, I'm sorry, that's a warrant, can you please go through the usual procedures,' that would be the end of that conversation. It couldn't be anything more elaborate than that, but that might be a practical way of dealing with some of the problems.

MR DOOBAY: It just seems at the moment that's a way that's possibly without going against the spirit of mutual recognition without questioning what they're doing. But simply trying to help. Because in reality as we've seen in some of these cases, it's not necessarily [inaudible].

MR STARMER: I think in the long term we should all encourage the work that's being done on a European level to get a threshold written into the overall framework arrangement. Because the numbers here are going up year, on year, on year, that's bound to continue. And at the moment it's a Polish problem, it could equally be another country.

CHAIR: What are the resource implications for you?

MR STARMER: Well, the numbers are going up and up, we've got a specialist unit. At the moment, correct me if I'm wrong about this, it takes – we spend about £2 million on our extradition unit, which is, to be fair, a small percentage of our overall budget. So we're managing within the resource that we've got. But obviously as the numbers go up, it becomes more demanding.

CHAIR: Presumably that £2 million includes getting people back from places as well?

MR STARMER: Yes. Where we've got to do some work at this end.
CHAIR: Yes.
MR STARMER: Obviously not for the work that's done elsewhere. But, you know, as the number of cases goes up, so it becomes increasingly more expensive, and our budgets going up. Whatever the percentage of our budget is, it's a greater percentage this year than it was last year, and that's going to be happening for the next four years, that's one think I'm absolutely clear about. But I would not want to be seen to be saying at this stage that this is – we've reached a real critical point, because we haven't.
CHAIR: I mean, there's I suspect no doubt that the EAW system is much more cost efficient than the old system.
MR STARMER: Much quicker, much simpler, and to that extent cheaper overall. Yes.
CHAIR: So you would support it?
MR STARMER: Yes. I mean, if it operates as it's intended to operate, it ought to have all safeguards within it, to produce a just process, and a just result, if you accept that bits of several arrangements that have to depend on claimity, and mutual recognition. If that's the platform on which you're working, then this is a perfectly good scheme. I mentioned to the committee last week, I think the recent cases on how human rights breaches are approached has – may have settled the issue there a little, the threshold was put a bit high for a while. You don't know how long these cases are going to survive, whether they're a different threshold. But certainly I think the cases in the last couple of months that have said, you don't have to have constitution of this order before you can win a human rights argument are welcome.
CHAIR: Identification. Have you any experience of cases where people who have been extradited and they've been wrongly identified? I mean, there are two aspects to this: is the person you're extraditing the person you think they are? And the other aspect is of extraditing somebody who says, 'It wasn't me that committed the crime. '
MR STARMER: Do you want to answer that?
MS KUNDERT: Okay. The only person we're aware of was obviously the case in relation to Edmond Arapi, but he wasn't actually extradited. And in that particular case it was an Italian request, the particulars on the warrant were

correct, but obviously it wasn't Mr Arapi himself who was the actual suspect of the murder. There'd obviously been some mistake initially. But that's the only case where we aware that mistaken identity has been made. We're not aware of any cases where they've actually been extradited and then later been found out to be the wrong person.

CHAIR: SOCA were saying that on the, 'It wasn't me that did it,' that that's a defence matter. I mean, if the identification is wrong there, then it's a matter of the Court at trial as to deal with. And it's tough, if I could put it that way, that somebody gets extradited that shouldn't have been.

MR STARMER: Yes, if it's simply identification issue, then it's got to be resolved by the Court that's trying the criminal issue, and I suppose it is tough if you've been hauled back to your country only to find it accepted at some point in the proceedings that it wasn't you. The example Anne-Marie gives is obviously it's simply someone's – there's a mistake on the warrant, but there's nothing much that proceedings they can do about it.

MS KUNDERT: Yes, but the warrant was actually correctly drafted, had all the correct particulars, but the intelligence that the police had when they were, you know, trying to find out if it was that particular Mr Arapi, that's what went wrong. This difference between alibi evidence, and you're not the person that actually committed the offence, and actually you not being the person that's sought in the warrant.

CHAIR: I'm with you, yes.

MR STARMER: The only caveat I think I'll add is I don't suppose that we know the outcome of each and every case for someone to return, because once they're returned and they leave, then unless it's a high profile case, or there's a particular reason for us to know the outcome, we wouldn't know. I think all we can say is there's no evidence that it's caused particular issues. Looking at the numbers there must be some in there where somebody has run an identification defence and succeeded I would have thought.

CHAIR: And if you had evidence that would help a defence, presumably that would be given to the lawyers at the time of extradition, or not necessarily?

MR STARMER: Yes, duty of candour and extradition on wrong identification.

CHAIR: Right.

MR STARMER: Then I think the answer would invariably be, yes. But one of the

issues of course we've got to look at, and if we had any reason to think it was wrong, then we should.

MR DOOBAY: If the person, because I'm thinking of the Arapi case, part of this case was, I was in the UK at the time when it was said that I was in Italy committing this crime. And presumably if you are – if you're prosecuting, if you're bringing the case [inaudible] cogent evidence to show that's correct, you transmit that back to the requesting State, so they can make their own decision whether or not they in light of that decide that they're then mistaken in their request. Is that the way it would work in practice?

MR STARMER: Yes.

MS KUNDERT: Generally as soon as the person is produced at Court, anything that person says we record into Court outcomes; it comes back to the lawyer. So if the person says, 'I wasn't in Italy at that particular time, I've never left the UK,' that would generate an enquiry from me to say, 'The person has now been arrested, this is what he's saying.' They're also encouraged to do proof of evidence and obviously they're encouraged at the City of Westminster to provide some sort of skeleton arguments and submissions. And we use that as the basis making requests for further information. So if there are a real issues being raised, then we will transmit that. And in somewhere like Italy as well, we'll use our liaison magistrate to try and make enquiries on our behalf. But as soon as an issue is raised, we know it has to be dealt with, because the Judge has to make a decision on it. So if there's information that we can get from the requesting State, we'll obviously produce that to the Court.

MR DOOBAY: Because I think that we – or certainly my understanding that you couldn't get involved in a trial of factors. If I was in Italy but I wasn't at that bank at the time, you can't have been involved in that. But with Arapi I think it was slightly clearer cut in that he was saying I was in England, and obviously that is something which the UK as a whole could verify, and you have a direct line of communication back to the requesting State.

MR STARMER: I think as Anne-Marie says, there would be nothing wrong with using our lines of communication back to the Italian authorities to say, 'You need to know that this is being said, we have some records, and you might want to reconsider in the light of what we're showing you.' No intrinsic problem with that. The difficulty of course is if the Italian authorities say, 'All

well and good, we'll sort that out when they arrive back here.' At that stage I think – but unless it then raised some issue under Article 6 or something, I think it would be quite – we've done all probably we can do under the arrangements.

CHAIR: Just on the EAW scheme, there's some talk about the possibility of there being augmented a European supervision order that would effectively permit someone to be on bail within this jurisdiction until the case was trial-ready. So you'd be released here, supervised by the Courts here as though it were a domestic case, but then as soon as you were – as soon as the trial in the requesting State was ready to receive you, you would have to surrender to your bail, and then be returned. Can you see any difficulty in that sort of system operating that would cause less disruption to the extraditee, make sure that they weren't detained in an overseas jurisdiction for an unreasonable amount of time?

MR STARMER: No, if it's a European wide agreement, I can't see what the problem would be. It would be simply a question of having the bail available across Europe as well as the warrant available across Europe.

MS KUNDERT: Presumably it would encompass the methods of getting the evidence, because in order to be trial-ready there may be questioning of witnesses. So there must be some process where you could –

MS TOWNSEND: That could be swept up by the future introduction of the European Investigation Order and existing MLA channels.

MS KUNDERT: But is that the same thing as the European Supervision Order?

CHAIR: No.

MS TOWNSEND: No, that's bail.

SPEAKER: It's a different – it's a mechanism really to ensure that you don't send someone back and they then have to wait in that jurisdiction possibly in prison for a year, while the case is then assembled.

MS KUNDERT: I'm just trying to work out how do they get to that particular stage of the process if that system normally requires that person to give evidence.

MS TOWNSEND: It would be, in domestic proceedings where as a foreign national, they would normally bail but they would be able to move back to their country of residence under an ESO.

CHAIR: They would still be able to move.

MS KUNDERT: They would go backwards and forwards?

MR STARMER: Without doing too much into detail[?], it would be perfectly possible presumably to have a conditional order that you'd have to involve yourself in whatever part of the investigation and investigators of the requesting country. So they say, 'Well, okay, we'll have an order that allows you to remain in the country you're in on bail, to return when we reach this stage. But since we will require from you the following, and normally we'd expect you to be in Court for that, you're going to have to provide it within the following timetable.' If that's all built in I can't myself –

MR PERRY: It may also be a solution to the proportionality problem, because if you were here and you were in a position to solve your problems, so an order, in effect, for your return had been made subject to it being executed as some time in the future.

MR STARMER: Yes.

MR PERRY: The other thing that I was wondering about trying to sort of deal with things at a European level, is I wonder how realistic it is to have a dialogue with a particular State, a) if you're the only State engaging in the dialogue because you're going to then – you may be thought of as being the poor European partner. And also if you are operating the sharing of information system, and the second generation is coming on-stream, where all of this is going to be electronic. And you're going to be receiving the EAWs when the person may not actually be in your jurisdiction. So I wonder whether, whether in fact it's got to be at a European level.

MR STARMER: I think the long term solution has to be at the European level. What you can do possibly in the meantime is to look at opportunities that might present themselves under the current arrangement. But in the long term, it's got to be a European-wide understanding. Because otherwise you're too dependent on the two desks talking to each other, and having different conversations with different countries, or particular relationships with a prosecutor in another country, and that's not a sensible basis long term resolving any of this.

MR PERRY: And then we've had some representations in relation to appeals, and two issues that have arisen. First of all that the time limit is too short, and whether there ought to be an interest of justice exception built in. And the second issue

is whether there ought to be an appeal subject to a leave requirement rather than the position as it is at the moment where appeals can be brought without –

MR STARMER: Subject to what everybody else says, our view is that [inaudible] didn't represent quite the problem that was made out as presenting. Is that right?

MS KUNDERT: The actual notice of appeal is simply filling out a form. Quite often we don't even have grounds attached, all that's required is the date of the arrest, so the Court can determine when the case should be heard and encompass the rules, and the judgment of the Court. We very rarely get any skeleton arguments or details filed within the seven days. We have seen submissions about the difficulty of having seven days to try to get all the information and evidence in. The reality is the seven days is just the filling out of the particular form itself and everything else follows. And there is a method where you can apply to the Court for them to extend the date if it's in the interest of justice to do so, because you either want to call evidence, or produce more evidence.

CHAIR: But you've got to do that before the end of the seven days, haven't you?

MS KUNDERT: No, no. The seven days is just the lodging of the actual appeal notice. In terms of actually what evidence you're going to produce before the appeal court, you can make representations and solicitors do say, 'We want to adduce this,' or, you know, 'We're getting legal aid for that,' and the Court will go in front of the –

CHAIR: I don't quite follow, because some of the – there've been some cases that have failed solely on the basis that simply the time limit has expired and there's no discretion to extend.

MS KUNDERT: That is quite right, but it's the lodging of just an appeal notice. It doesn't actually – I think the point I'm trying to make is the criticism has been it's a complex process and to have seven days to lodge an appeal is insufficient. I'm saying in practice, the only document they need to file within the seven days is the actual form itself saying, 'Notice of appeal.' It doesn't actually contain any of the detailed submissions at that stage. All of that material follows in accordance with the Court directions in due course.

CHAIR: Well is there any point in having this notice in in any way in seven days, if it

doesn't actually tell you anything?

MS KUNDERT: Because – well, there have been efforts, obviously because – there have been a number of cases where there's actually no idea as to what the appeal is about– it's uncontested in the lower court, and then we receive a notice of appeal. And the notice of appeal doesn't have any grounds or anything attached to it. But they've lodged it. But the Courts will just deal with the admissibility point at the same time as they'll deal with the actual appeal itself. They'll list it for an appeal, and if they decide that – they'll just decide everything all on the same day. But we have tried to get Courts to invite detailed grounds of submissions, but at the moment although you will get letters being sent out by them saying, 'Please supply further grounds,' there's no consequence if you don't actually do that.

MR DOOBAY: Can I just break it down slightly, because my understanding is slightly more to do with the seven days. You have to file the notice of appeal at Court, you also have to pay the fee, and I understood you also had to serve the sealed copy of the notice of appeal on the CPS, or whoever is against you. And I don't – some of the representations haven't focused upon the complexity thing at all. But instead if you are an unrepresented defendant in prison, filing a notice of appeal, paying a Court fee, receiving back a sealed copy of the order, serving it on the CPS within seven days, in prison, is quite difficult to do. And there's certainly at least one case where the person, the defendant, filed the notice of appeal, the Court faxed back the sealed copy of the order, the prison failed to give him the sealed copy of the order for three days. And so he simply couldn't – he couldn't serve it on the CPS and the Court said, 'We have no discretion.'

MR STARMER: Well, the Court should always have a discretion.

MR DOOBAY: So some of the representations aren't so much about you haven't got – that it's a complicated process, more about if you're a defendant, a person in prison, complying with those steps is difficult. And [inaudible], should the Court be able to say, 'You did everything you possibly could, we're going to exercise our discretion to allow the appeal to continue.'

MS KUNDERT: There have been a number of those in recent weeks, and I know the Court service have been in liaison with prison authorities. Because these are the kinds of cases I was talking about, where there's been an uncontested

hearing in the Magistrates, absolutely no issues are raised at all, and then there's an appeal, and they've had the assistance of the Court staff – sorry, not Court staff, prison staff to assist them in actually filing the documents.

And in terms of the grounds, they haven't said that the judge made any error on fact or law, it's basically, 'We like the prison here in England, we want to stay here rather than going back to Poland, and my girlfriend lives down the road.' I mean, there's about four or five of them of that particular type. And, yes, there were issues, because I could see on the appeal notices that they've had to get some waiver for their fees, which they obviously arranged through the prison.

But there are completely two distinctive issues, because I have seen those saying, 'The seven days is too tight because we can't get our evidence together.' And in those circumstances where you send the filing with the form, and the lodging of the fees, seven days is there because at the moment you have to remove – SOCA has duty to then remove once that decision is made, and –

CHAIR: You don't want them hanging around too long, and sevens days is enough.

MS KUNDERT: Well it's just making sure that the decision is final. And also in the past we're having – people were starting to come over to do the collection, and then they were here, and then they realised there was an appeal that had been lodged. So that was my understanding why the time was extended in the recent amendments. And you had seven days to lodge your appeal, and then once that was definitely – and if you'd lodged it or not, they then had ten days for the practical arrangements of removal.

MR DOOBAY: I suppose I'm just soliciting it at two different things. Because whether your appeal has merit is one thing, absolutely goes forward having an application for permission. But whether your appeal was lodged in time, is a different thing. And because, as you're saying, the Courts in reality don't do anything at the main hearing, you're not getting any benefit from having a seven day period which is a guillotine, because even if you lodge your notice on day eight, the Court won't decide that your appeal has been –

MR STARMER: I think Anne-Marie's point is at least you know within seven days whether you can get on with the arrangements for removal or not. If something is in in seven days, you know to say to the team that are going to

come and remove, 'Don't bother coming, there's going to be an appeal of some sort. We don't know when that's going to be determined, but don't make any practical arrangements.' If you don't have a hard-edged seven days, then you run into the problem that just as the plane lands and all the arrangements are, there's then something put in at that stage, which means you've wasted a lot of time and money. So that's the practical problem.

But there's always – I don't think we want to be standing in the way of saying no flexibility in the Court in any circumstances on any time limit, save for the most extreme cases. I mean, there should always be residual power in the Court to act justly. So I mean I think to recognise the practical reason why it's there as a hard-edged date, seven days is a short period of time, and what the practical consequences might be if that's interfered with. But I don't think from my part that what goes with that is to say, we must retain inflexibility in the face of a clear injustice. There must be a way of cutting through that.

MS KUNDERT: [Inaudible – off mic].

MR STARMER: Yes, maybe a slightly longer – whatever the precise timeframe, once you've got a hard-edged date and people say you've not got then discretion beyond that, that can cause an injustice.

CHAIR: What about the second point, which is leave for appeal, rather than an automatic right of appeal?

MR STARMER: I mean, I think our view would be that the appeal provisions are reasonable generous at the moment on factual law, and without leave. I don't think we've discussed this as a –

CHAIR: We've had representations from the administrative court and from elsewhere that there are a number of hopeless appeals that are clogging up the system, meaning that you've got a meritorious appeal it takes longer to be heard. And therefore what is being suggested is something along the lines of the leave to apply the judicial review proceedings. If you apply on paper and you've got a right to renew to the Judge if it's refused.

MR STARMER: I would have thought that would operate well within these - As I understand it, the approach on appeal is intended to achieve the result that there's only one real appeal route, there's not all sorts of other... That's a good outcome. I can't see that putting a leave provision in there that's no different in principle to judicial review is contrary to that outcome. And if it gets rid of

some of the cases which compromise the last minute, and were hopeless in the first place, I can't see that's an injustice to anyone.

CHAIR: Right. The other matter that we've been asked to consider that we're looking at is the possibility of introducing a forum bar, and we were keen to get the views of the Crown Prosecution Service on what the likely impact would be if a forum bar were to be enacted.

MR STARMER: As we set out in our written submissions, there is a concern about we do think it'll introduce delay and make things more complicated as a practical result. Now it may be that that's inevitable, which we have a different line of argument available. But it will have that effect. So that's the first concern.

The second is that you'd have to pretty quickly establish either some rules or some case law to determine a situation where the prosecutor in this jurisdiction has not yet taken a decision whether to prosecute, and the Court was inclined to the view that this was the appropriate jurisdiction. You'd either have to say, 'Well the Court can order the prosecutor to prosecute.' Well that would be a first. Or you might have a Court that makes a decision this is the appropriate jurisdiction, only for the CPS to say, 'Well, for various reasons, either because of evidential problems that we are more familiar with than the Court, because of some public interest consideration, we in fact are not going to prosecute in this jurisdiction.' And therefore the individual's not been extradited because it's more appropriate to be tried here, but they're not going to be tried here because the code test hasn't been satisfied for some reason or another.

Now, there are practical difficulties. The first is inevitable, if there's a legal point people are about to argue it, quite rightly. The second is a practical consideration: probably either prior rules or some quickly established case law could deal with most of the wrinkles. Because you might have established some principles that if a prosecutor in this country wasn't anywhere near a decision, it would be very rare for the Courts to decide this was the appropriate jurisdiction. I can see the Court developing its own principles. But there are those two difficulties.

CHAIR: What about if a prosecutor had already decided not to prosecute in this jurisdiction?

MR STARMER: Well then the Court would be in some difficulty saying that this was the appropriate jurisdiction in the full knowledge that there'd been a decision not to prosecute. So it would be slightly difficult because of course we would always say that we could look again at a decision. But –

CHAIR: I mean, it seems to me that there is a real danger here in the Courts getting into effectively taking the prosecutorial decision by the back door, and that's something that the Courts have resolutely avoided doing in ordinary judiciary review of domestic decisions.

MR STARMER: I think that's right, and that's an anxiety we have. Just looking as it were to the future, what we've seen over recent years is an increasing, vastly increasing, number of cases where there's an international element, and therefore this is an area that's going to develop hugely in the future. And we've seen alongside that, and as part of that, the extension of extra territorial jurisdiction. One thing where someone runs from one country to another, and you want to get them back. It's quite another where each country develops its powers of territorial jurisdiction, and the reach in which the country overlaps to a very great extent. And I think you do need to establish some common rules about how all that's going to be resolved.

Eurojust have done their bit, they've published some principles so that, as between investigators and prosecutors across Europe, there's an understanding as to how they would seek to resolve these issues. Equally you've got the arrangements between us and the US that the attorneys put in place. Broadly the same sort of principles at play. But - and this is something I think I'm slightly more anxious about than perhaps the rest of the team - in the end there are a set of principles drawn up by those that are operating the system, and there is at least some argument saying that a Court, or the democratically accountable bodies, ought to have a say in what the principles are.

CHAIR: I was going to ask you about the American – the UK, US arrangements that the attorneys set up. I mean, we've heard a little bit about that this morning, but I think that we've rather taken the view that we'd like to hear a good deal more about it, probably from the SFO, because there maybe a difference between the bog standard murder, organised drug gang, and these financial type offences where things like price fixing and so forth are dealt with by regulators. But at the moment, speaking entirely for myself, I do not have a

clear picture in my mind's eye as to what happens at the meeting between the two prosecutors here and the United States, and what boxes they tick, and don't tick with regard to deciding which of them is going to have the case.

MR STARMER: I think I'd be correct - I don't think formally we've ever gone through the procedure, have we?

MS KUNDERT: No, it's just been in the "spirit" of the guidance.

MR STARMER: Yes, we operate what we call a spiritual. I don't think we've actually gone through the procedure in a formalised way determining each of the points in deciding where a case should be prosecuted. We've operated the spirit of it. And that speaking from myself, that's where I'm slightly anxious. I think that's a perfectly good thing, I think it's done in all good faith, etc. But it seems to me that there ought to be a clearly understanding of the governing principles and the way they're applied between us and the United States, or any other country for that matter. And this is an area where there are likely to be many, many more cases as we go forward, and sooner or later it's an issue which is going to have a degree of prominence and probably going to come before the Courts for a resolution. And I think it may be wise to look at it now rather than wait for a problem to arise.

CHAIR: But are you saying it should ultimately be the prosecutor's decision, or the – according to guidelines have been settled and agreed, or it should be the Court's decision? I'm a little apprehensive about the Courts getting into what is really the province of the prosecutors.

MR STARMER: Well I think the most sensible way which is to have an openly agreed set of principles that everybody had signed up to, and leave it to the prosecuting authorities to operate those principles, subject to judicial review of us, if we're part of the –

CHAIR: [Like prosecuting for assisted?] suicide?

MR STARMER: Yes, but for failure to follow – we agree up front and openly –

CHAIR: Yes.

MR STARMER: In a sense precisely, we make – it is – the criteria on which the decision will be made, the principles on which the decision will be made, are publicly available, have been thought through, signed off by the appropriate bodies, and they're thought to be the most sensible principles. We then operate that independently without any assistance from the Court in the first

instance, and seek to reach a decision. Inevitably, as far as we're concerned, that would be a reviewal decision because somebody could come along and say, 'Well, you didn't faithfully follow the principles,' just as they can say, You didn't faithfully follow the assisted suicide guidelines,' or anything else. That it seems to me allows us to get on with our job as prosecutors to reach the necessary arrangements with prosecutors in other countries, but to leave the Courts with a supervisory jurisdiction to say where you've gone way outside the principles that you said you would apply, and which everybody else has seen and approved of and you've made an unlawful decision.

CHAIR: So you'd have reviewable principles, and the Court could come back and say, 'Well, you've gone wrong on this occasion because you didn't apply *x* and *y*. But the Court wouldn't be able to make a forum decision in the same way that if there was a forum bar.

MR STARMER: No, I think on that model the Court would simply say, 'You've failed to apply the principles that you're bound by, you must go away and retake the decision.' And so it would be a classic sort of judicial review approach. It leaves the decision with the prosecutor, which is where it should be. Because the front of Court is getting involved in the detail is fraught with the – without being case specific, there are cases where of course we've got a team going backwards and forwards to the States to look at quite detailed bits of evidence. I can't see how the Court could possibly get involved in that exercise.

MR DOOBAY: There would be difficulties as well, you know, at the stage of unity because you're involved in negotiations with the representatives of an overseas jurisdiction who couldn't be judicially reviewed in relation to what they were – in relation to what they were doing. So even if the Court said to you, go away and do it, the Court would only be speaking to one of the parties. I think in Europe the Treaty of Lisbon makes it clear that Eurojust will in fact have competence to resolve conflicts in 2014 or whatever. And I'm not sure, you probably know, but I think there's a framework decision to resolve conflicts of jurisdiction in criminal proceedings. But I don't think that's yet in force, but it may be by 2012 or something, I'm not sure. So it's going to lead the United States and Australia, and other jurisdictions I suppose. But I agree, there are likely to be more issues in relation to a forum in the future.

MR STARMER: There are going to be more trains coming down this track. That having been said, the principles that Eurojust has devised are very similar to, unsurprisingly, the principles that underpin the attorneys' guidelines in relation to the US. And so I think you could legitimately say that there's a pretty well understood norm here, where's the investigation most advanced, where's the evidence available, where are the victims, where's the impact? There's a series of things, which pretty well everybody agrees ought to be the considerations that are taken into account in these cases. And I don't think it will be very difficult to reach agreement on these things because they're obviously the right considerations, and to some extent they've been applied in a number of cases. So the only question is who gives consideration to those issues, and what's the role of the Court at the end of the exercise? And I think we would say the Court shouldn't be involved in the direct application of the principles because that's fraught with all sorts of difficulties. Let the prosecutors – have your established principles in the open, let the prosecutors get on with it in good faith, if they get it reviewably wrong then a Court can step in and require them to go through the exercise again.

CHAIR: Is that going to work though with the, I mean, with the Americans for example, and you reach a deal with them and then the Court says, go away and talk about it again. The Americans say, 'Well we sorted this, we're not going to have another talk to you about it.'

MR STARMER: Well, I mean that would be a practical limit on what the Court do.

CHAIR: Yes. I'm just looking at whether the Court's powers are nugatory in this, and therefore we are back not having solved the forum question.

MR PERRY: I wonder whether it's one of those things where the Courts would give – one of those areas where the Courts would give you so much latitude as a prosecutor, because they would understand that, for the reasons Scott mentions, that it may actually be the Court acting in vein to say, 'Go away, and apply the right principles.' Because the Americans may turn round and say, 'Well, as far as we're concerned we have, and we've decided.'

MR STARMER: Well, I mean, the Court wouldn't be saying to the American authorities to do it, all it can say to the CPS is, 'You seem to have misapplied the principles in some way.'

MR PERRY: But suppose the Americans said, 'Well we disagree with your Court,

we think you applied them properly, and we're not willing to enter into any more dialogue.' And you would then go back to the Court and the Court says, 'Well, where are we? We can't see the Americans authorities.' you can't judicially review the American authorities, because they'll just say you're pleading – impeding a foreign state. So where does that leave us?

MR STEVENS: I think practically, ultimately your assessment of where we could end up must be correct in that situation. I think practically and in general terms, our relationship with the Americans is operationally such that if we were able to go back to them and say that this is the decision the Court has reached, and they feel that we need to go through this process in this way to ensure that we can go back to the Court, it doesn't necessarily mean that the decision will be different; it means that the process has been more thoroughly considered. We're not prejudging the outcome, but you're inviting them to come back to the table. I think that our relationship is such that we would expect them to come back to the table.

MR STARMER: I mean, I suppose at the end of that exercise it would be the remedy that was sort of brought within the framework of the legislation; ultimately it would act as a bar on extradition, because otherwise again it would be completely toothless, and the Court would say, well, we'd like you to go back and reconsider. If you're not able to do that then we consider you to be acting unlawfully, and the remedy would be some sort of limit on the extradition, which would make the Americans think again about whether they would – hence the dialogue. I mean, I take the point that unless you've got probably teeth at the end of the exercise, it might not get you very far.

The problem with no cause and condition is in the end it's a prosecutor's set of arrangements.

CHAIR: What are the Americans to do about this, the other side of the coin, if they're – I mean are they still downsizing the Courts at all, or?

MR STARMER: I don't know actually. I don't know. Under their constitution –

MR STEVENS: I can only speak, from a speech I have from Bruce Swartz at the International Association of Prosecutors last year where he was giving a series of examples of things that people have tried to argue on a foreign basis, and equivalent of human rights bars to extradition in this direction, and saying that the principle is that the Courts in America will very much take the view that

the American citizen is subject to what a citizen in that country would be subject, and that is the end of it. And they don't go behind that. That is as I understand their approach, but I don't claim expertise on this.

MR DOOBAY: I just wonder whether where someone is tried is almost the paradigm decision that should be for prosecutors. I mean when we have problems between Scotland and England, the terrorism cases where you discussed with the Scottish.

MR STARMER: I mean, most of the time I think that's not a problem, and I think you could have a set of principles and that would be perfectly operative. The money laundering laws do put a different spin on some of all this. There are some cases you probably know coming out of the Caribbean where a lot of activity is taking place in a particular country, there's one going on in Trinidad, where all the contracts in Trinidad, the contracts that were said to be corrupt were in Trinidad, all the money was Trinidadian money. But some of the money was laundered through a bank in Miami. The Americans said, well we've got jurisdiction. Then I suppose the question is, is everybody comfortable with the prosecutors just deciding amongst themselves, or should there be some open principles subject to some sort of scrutiny. You could say, well you possibly strengthen judicial review, certainly for us the Article 8 route would provide possibly a way in. So it might be – you might be able to say well in the extreme case a Court would find a way. Or you say, I think actually, there ought to be pretty well a public set of principles that are agreed upon for prosecutors to operate.

CHAIR: Would they be the same principles that you would operate with America, Columbia, New Zealand, Australia, everywhere? I mean, you might as well have an international agreement then to get everybody to sign up to these, or do you envisage that there might be different criteria between the UK and country *a*, and UK and country *b*?

MR STARMER: I was envisaging that'd be common across most countries, and that's what happens across Europe with the Eurojust principles, they're intended to operate across the EU. And therefore it doesn't matter whether you're dealing with a country – the way the questions are answered obviously might vary according to the state you're dealing with.

CHAIR: Have you got a – is there anywhere that one could find a list of the criteria

that are currently operated when prosecutors – because in the –

MR STARMER: The Eurojust principles are publicly available.

CHAIR: Eurojust would have it, would it?

MR STARMER: I mean, we can provide that you to you if that would be helpful, that and anything else to show how in practice these decisions are –

CHAIR: And that's what you do with the Americans is you operate the Eurojust procedures, do you?

MR STARMER: Well it's not the Eurojust procedures.

CHAIR: Or the Eurojust criteria.

MR STARMER: It's the spirit of the Attorney – of the agreement between us and the Americans. But the underlying principles are similar.

MS KUNDERT: Don't foget, you normally have the guidelines, you have Eurojust and there's also a case called *Cotroni* which is often cited in the cases which is a US Canadian case, which again cites up the relevant practice, and we can get all of those to you.

MR DOOBAY: Have you ever encountered any difficulties where you've actually fallen out with an overseas prosecuting authority in deciding the most appropriate place for a trial? Or is it something that's usually resolved? I mean, does it trespass on anything that's – that we shouldn't be hearing about?

MR STARMER: I don't think so. I certainly haven't had any examples since I've been in office. In a position before I was –

CHAIR: Do you know if the SFO do, and do they operate the same principles?

MR STARMER: Dominic, do you know?

MR BARRY: That's just where there's dialogue – where there's dialogue that isn't really a problem. Because of the Eurojust guidance, with respect some of them are just common sense really, no matter what way you look. It's just trying to ensure that you get the dialogue. There is a potential for not having dialogue with the country, which is why you get the conflicts of jurisdiction framework decision, it's trying to encourage people, by 2012, to make sure you have the dialogue in advance so you don't create yourself a problem.

MR STARMER: Thank you, that's a really important issue, which is having the principles and the dialogue is critical, because what we have had in some situations is procedures going on in both countries but weren't necessarily cited by what was going on elsewhere, and that's caused a headache. But

that's a practical question of communication and dialogue rather than an in principle problem. And actually I think there's some EU work going on to make sure that in future across Europe at least there's much better dissemination of information about what everybody's doing in these cases.

MR STEVENS: And I think the answer, I can't speak obviously for all the prosecutors' experiences in their individual discussions that they've had in some of the more challenging cases. But I think the answer is that there is the potential for any – most cases are resolved relatively simply and straightforwardly in an association with the criteria. But of course in any mature and complex series of discussions, there is the possibility for a difference of opinion. But one has to resolve those, and that's the potential reality of being – sort of having sophisticated and detailed discussions where you're coming at it from different perspectives. So I can't speak for examples, but I can speak for saying that the opportunity for disagreement exists, but they are able to be resolved.

CHAIR: And that presumably, the last port of call would be a face-to-face meeting with the attorney on each side?

MR STARMER: Yes. I think most – all of the practical details where there's dialogue have been resolved one way or the other. The issues are likely to be people not wanting to deal with it in their jurisdiction. I think common conceptions [inaudible] very often very happy to yield.

CHAIR: Do cost criteria come into this?

MR STARMER: Not under the Eurojust principles, whether that drives some of the approaches I don't know. But it's not identified as a part of the principles, I don't think. I'd better go and have – I mean it's not actually one of the principles, whether it forms part of the discussion.

CHAIR: And these money laundering cases, I mean they must be very difficult to decide where the best forum is when there are obviously in some cases several candidates?

MR STARMER: Yes, well classically money will have gone through different jurisdictions. And that I suppose is why I – my own view I think is that that's becoming increasingly the case, and therefore this is not a problem that we've got at the moment, it'll stay in the same proportion going forward. It's like to be a bigger headache year-on-year. And it might be better to have a clear

understanding how we're going to operate it.

CHAIR: Where does confiscation fit in to all this? I mean, is confiscation simply an offshoot of the criminal proceedings wherever they are, or are there any self-contained issues about confiscation proceedings?

MR STARMER: Well there are self-contained issues. In a sense confiscation is – the problem with confiscation is normally for us, an order is very often made in this country the confiscation where the assets aren't here. And therefore somehow we need to find a way of enforcing the order that's been made here, somewhere else, and that is a practical difficulty in a number of other jurisdictions.

CHAIR: We've passed that, or was it that the extradition is not involved in that, is it?

MR STARMER: Extradition is not – I don't think that – well, I wouldn't have thought that falls in your remit, but it is a headache.

MR DOOBAY: Can I just come back to the forum. And can I just share some concerns there in terms of I think there are increasing cases where the jurisdiction of two countries allows prosecution for the same offence, and it's pretty evenly balanced in terms of which country using the criteria could prosecute. And actually according to the criteria resources are the determining factor, that all of the others under the Eurojust guidelines are evenly balanced then you can take into account cost of prosecuting. So I think that one of the things that we've seen in our submissions is a concern that the residence or nationality of the suspect isn't taken into account enough in determining which country should prosecute when two countries have the ability to prosecute. And I see that in your guidance, it is a factor to be used by the CPS, and I just wonder how do you use it, and how much weight it is accorded?

MR STARMER: Well I'm not sure off the top of my head I'm in a position to answer that, because most of these discussions at the European level would be very case specific. And I certainly haven't been involved in any of them, we can certainly try and get you a better answer on that. But I mean in a sense that just for me underlines why I think it would be far better if there was a publicly facing set of principles that have been trawled over and agreed upfront, rather than prosecutors trying their best to point to the right principles and rank them. Only for somebody to come along afterwards and say, I don't think you've got that quite right. But let's go through that difficult exercise now, let's have a

level of agreement, and then for the prosecutor to operate against those principles.

MR STEVENS[?]: I think, I would certainly agree with that, part of my concern is that a lot of the principles in here in terms of what you take into account for Eurojust guidelines, the decision at the beginning of the process is generally taken by prosecutors, or investigators. And it's only later on in the process that it's subject to any scrutiny. So you decide which country you'll prosecute and then six years later there's an extradition order. By that time you've weighted all of questions, so the investigation will be very advanced, the evidence would have been gathered in one particular country.

Comment [C2]: We think this was said by one of the panel members but we cannot remember who

MR STARMER: But you've got to bear in mind the practical reality here. Whilst I'm keen for public facing principles and all's good, you've got to be very careful at what stage... It was very recently announced, the cracking of a paedophile ring across Europe. There's been a very sophisticated, collaborative, operation by investigators across Europe where you couldn't conceivably have had any scrutiny of the arrangements that were being put in place prior to the arrest which were about six weeks ago.

MR DOOBAY: Sorry I wasn't suggesting that.

MR STARMER: But the practical consequence of that will be, but I mean this is just a practical consequence, if you decided that in order to crack this particular ring, you've got to have the major part of the investigation in this country to make it effective. [Inaudible] in determining what are the principles forever in favour of country *x*, but that's a practical reality of it. All I'm saying is that at some stage if the principles are public, there could be later scrutiny. But I mean there will be decisions that are decided along the way, which the Court invariable can't do very much about, and quite right too.

MR DOOBAY: No, I'm not disagreeing with that. I'm saying if you've got the agreed principles which are out there, then of course ex post facto it may be not much by way of a remedy available, but at least you have a real decision, which is reviewable.

And even if you – coming back to the remedy issue. If you at a later stage review the decision in the CPS, and the Court says, actually we think for example, you haven't paid enough attention to factor *x*, which you said you are considering, then the decision you're reviewing is not necessarily the

conversation you had between the US and CPS. It's the decision of the CPS as to whether or not to prosecute potentially.

MR STARMER: Possibly. I mean, presumably you would only be reviewing a decision where we've decided not to prosecute, or we had decided that the available – the appropriate forum was another country, and therefore we had not taken a decision one way or the other on whether to prosecute. So the challenge would be when you made a decision on the appropriate forum, you didn't give sufficient weight to the following factor. So you should retake that, but that would be to retake the decision on where the appropriate forum is.

MR DOOBAY: Which would then lead you to a potential –

MR STARMER: Well I can see that in a strong case if the Court said, you failed to take this into account, and if you had taken into account we think there'd be a materially different outcome, then you're getting quite close to telling the prosecutor to prosecute. But at the end of the day all the Court can do is say reconsider in light of this judgment. But I mean, these are issues that judicial reviews have thrown up for years for different bodies and different ways, they're often uncomfortable but that's not a reason not to have them.

MR PERRY: I wonder whether there might on occasion be a judicial review of a decision to prosecute here once you've got these guidelines in, because aren't you – wouldn't you just be saying, well, you're not prosecuting me, I don't want to be extradited. Someone will – you'll probably find someone will say, actually I want to be extradited now you've decided to prosecute me. I think you've made a terrible mistake and you've misapplied the guidelines, you've improperly ceded – you've improperly rebutted the attempts of the United States to assert their jurisdiction. Because we all know that litigation is – people are willing to litigate points, and they will. The only thing that makes me slight nervous about the forum aspect and principles, I'm all for principles, I just wonder what role the Courts could possibly have in telling prosecutors when and where they should prosecute. I just wonder whether – I mean, ordinarily in domestic proceedings, you wouldn't say to a defendant, do you want to be tried in –

MR STARMER: Can I give you an example though, because I think this is a really important issue, and I don't think there's an easy answer to it to be honest. Most of the time obviously if we decide to prosecute then there's lots of case

law saying the only challenge is by way of abuse of process. But I'm not sure that means that you can never do judicial review on case law, you can. But the example that we toyed with this where – a very different context – where you've got sexual intercourse between very youngsters, 12, 13, consent is not a defence. But Parliament deliberately left it to us not to prosecute all those cases where 13, 14 year olds, 15 year olds, were engaging in sexual activity, where it's purely consensual. If we decided to prosecute there, it's not an abuse of process on the face of it because the law doesn't provide a defence, part of the evidential test, etc. So there has been this threat of judicial review of a decision to prosecute, and I can see therefore there's that opportunity that –

MR PERRY: That's a very good example.

MR STARMER: So I would accept the general proposition that there is a window or there is an opportunity for judicial review even in a decision to prosecute, but that's the problem with clearly stated policies. But clearly stated policies are a good thing, or clearly stated principles are a good thing. It's the price you pay for a publicly facing set of principles that you're prepared to abide by. But I accept the proposition that litigation will inevitably follow.

CHAIR: And you've got to rely on the Courts.

MR STARMER: Yes.

MR DOOBAY: Anything else on the forum?

CHAIR: No.

MR DOOBAY: I wonder if I could ask you about the information, in the case law, and I think perhaps in the public at large, there's a sense that countries being designated has a wider symbolic meaning that there is – that the UK has looked at that country and it's considered the relationship it has, and it's decided to accord them some status, particularly where countries have been designated. So that there's no requirement to provide evidence under Part 2. Is it your view that designation is a real safeguard, and if so do you think there should be some review mechanism for countries which have been designated?

MR STARMER: That's a difficult one to answer. I mean, we've got – we think of the non-prima facie countries, we've got three groups, the Part 1 group, the European Extradition Convention group, and then US, Canada, Australia, and New Zealand. US, Canada, Australia, and New Zealand, I know there's some

anxiety about how those countries operate in some respect, but I think the reason that they're designated is because most people have a system which we understand, and we think is fair, and not many people quarrel. They might quarrel with some of the details, but they don't quarrel with the general proposition, those 1957 Convention countries; that was the thinking behind the Convention in the first place back in 1957, and it's been going on for some time. Do I think it gives a degree of legitimacy that perhaps it shouldn't? I don't know actually, I think is the answer to that. And I think it's tricky if you say that's got to be subject to greater scrutiny, because it's an international agreement, and in a sense has got nothing much to do with us.

Well, in other words, you could take US, Canada, Australia, and New Zealand as a small class, and you'll probably say well in relation to them, I don't think it raises a particular problem. If you want to start, then you've got your Part 1 cases, well if you want to unpick Part 1 then it would be to unpick Part 1. So really what you're talking about is the 20 countries under the 1957 Convention. But again can you start picking and choosing if you've got an international instrument that is supposed to form the agreed approach to those countries? Arguably not, without unpicking that Convention.

CHAIR: They go back to 1957 do they?

MR STARMER: Well, the Convention does, the actual countries – this may be helpful, it certainly was interesting to me was to have a list of each of the countries, and when it was that they –

CHAIR: We've got a list of the countries, but I don't think when it was is in there.

MR STARMER: I think we've got a list, Dominic has, when it was. Whether we've got it to hand or not, I know it exists because I've gone through it, which will tell you when it was that the non-requirement for prima facie, the no longer need for prima facie first came into effect for various countries. Which is quite an interesting and useful –

CHAIR: And that's an ongoing process is it?

MR STARMER: It's an ongoing process. I think the first one was 1960.

MR BARRY: It's really the date of ratification when they joined it, and it starts from 1960 I think, and some of the more – the former Soviet States obviously it's going to be 2002, 2003.

CHAIR: Once they've joined, they've joined, so there's no backsliding on this.

MR STARMER: And that's slightly the problem I have I suppose with the question, if that's the international arrangement then you've got to unpick that if you want to go back and question designation. But that's not to say you can't do it, because of course all of these things are –

MR DOOBAY: I suppose that's my point is that I'm not – I'm not arguing about the Convention and what our obligations are in the Convention, but we don't choose who becomes a party to the Convention. And therefore my question is more leaving aside what our obligations are in the Convention, should there be something to look at which countries are designated, leaving aside the Commonwealth countries.

MR STARMER: I think the answer to that is it's not really a question for me. And I'd like to give it a lot more thought, to be perfectly honest. But actually it's not my headache. You know what I mean. I might have a view on it. But I mean I couldn't legitimately – I'd only have a view as – it's not something which we have to deal with. And I haven't given it a great deal of thought for that reason.

MS TOWNSEND: I mean, there is a mechanism within Parliament in a sense because I understand those designations are subject to the affirmative resolution procedure, so when they are introduced there is a Parliamentary debate on them.

MR DOOBAY: Yes, certainly at the start there was when each of the countries...

MR STARMER: What we could certainly do is to give you that list, give you the dates, and if we're able to give you any more information on whether there was a resolution, if so when, whether anything was raised, we can certainly provide that, so at least you've got a full picture.

MR DOOBAY: I suppose the reason I raised it with you is because you have a solicitor-client relationship essentially with some of those designated countries. I therefore assumed you would have – from that relationship you had some knowledge of how the system works, and not from any other [inaudible] and the UK have that relationship with them. It's very apparent that the Courts accord a great degree of respect for the fact that the country has been designated by the UK, whereas certainly my sense is that that's a pretty formal process that you go through once, and that's it really. There isn't really anything more that happens to you if you're a designated country.

MR STARMER: Yes. I mean, there are probably only two ways out of that problem. One is that somebody decides that countries should no longer be designated, and unpicks the procedure. Which is the bit that isn't for us... I might they might ask us for a view on whether that's a sensible thing to do or not. Or you build it in some way, some discretion with an individual case to deal with problems not withstanding the fact there's a designation. But most legislation is obviously not set up to allow that degree of discretion by the prosecutor, which is the concern of some people.

MR PERRY: It may be that that's where – I mean, I'm interested the approach Anand's taken. Maybe that one of the – this is where the human rights bar comes in, because for example the category 2 territory, Zimbabwe. And I'm to sure whether our Court would at the moment countenance any extradition to Zimbabwe given the current situation there. But that wouldn't be because we haven't – we've removed them as a designated territory, it would just be because the current situation is such that you would probably always succeed on human rights grounds.

MR STARMER: Notwithstanding designation from those in place, it would nonetheless be incompatible with human rights to remove a person to that country. I mean, that's how it would be dealt with, and is dealt with. The sub issues that arise there are, one, have you got the threshold right for a human rights decision by the Court, which I touched on last week, and you're as familiar as I am with that. And the other is, which was put to me last week at the Committee, should a prosecutor have some role earlier on if there's a human rights problem down the line? My answer was the proper place is the Court under the section in play, with a fallback that it is nonetheless unlawful for the CPS to act incompatibly with the Convention as a fallback if for some reason the ordinary human rights routes turn out in the legislation – didn't provide an answer in a particular case. But I don't think that could be because the test is something that you disagree with.

But the only point there I did make last week, for it's worth, is, if it's obvious that a case is going to fail when assessed by the Court against human rights considerations, should there not be a role for prosecutor early on, so that you don't have to go all the way through the process? Why allow a case to get all the way to the Court in Zimbabwe or something like that, before – when it's

absolutely clear that it's going to fail on human rights ground, should not there be some earlier point of intervention by the prosecutor. It was put to me that wouldn't that be sensible, and I said, if that was thought appropriate by those amending the legislation or thinking it through, it's not something I would quarrel with. But in the main the provisions in the Act are intended to identify where it is that scrutiny applies for human rights considerations, and simply that's the right play.

MR DOOBAY: Perhaps that's a sort of continuation of what I was raising. If you took away the designation for Zimbabwe, it would have to make an ad hoc request in order to make a request, and therefore the Secretary of State at the initial stage would have to certify special arrangement. So it would stop it from just ordinarily entering the process as a Part 2 territory.

MR STARMER: Yes.

MR DOOBAY: And it would remove the difficulties for the prosecutor who received a request which you might struggle to find a discretion to do anything other than –

MR STARMER: No, I can see that. I think the difficulty there may be that there may be so many potential difficulties it might be hard, you'd have to have separate table of arrangements each time you wanted to go through it, it's quite difficult.

MR DOOBAY: I suppose it's only an extreme circumstance. I mean, Zimbabwe's an extreme...

MR STARMER: Yes. But I suppose you'd fall back on the question: what is it that that would achieve that human rights scrutiny in relation to a designated country can't achieve? I'm not saying there is no answer to that, but I think that – why introduce that unless you're pretty sure that there's not the sufficient remedy elsewhere in the process.

MR DOOBAY: Sure, and then you come back to your point which is that you're simply saving part of the process.

MR STARMER: Yes.

MR PERRY: I suppose the difficulty arises as well that, suppose there were regime change in Zimbabwe for the better, and then Robert Mugabe fled to London, it's quite useful to have Zimbabwe as a designed category 2 territory for his speedy return. But he probably wouldn't flee to London.

MR STARMER: But it'll be an alternative way of coming at a problem.

CHAIR: Your observations on prima facie evidence generally, what – I mean, we've received some evidence suggesting we should put the clock back, and right across the board, other evidence that we should put it back in some instances.

MR STARMER: What the list of countries under the '57 Convention reinforced in my mind, and I hadn't quite got this clear in my mind before I saw it, was for how long we've actually been operating a no prime facie evidence rule for a number of countries. And there are now 50 countries I think in total where there's a no prima facie evidence rule. So if it is going to be changed, it's going to change quite a lot of countries and a lot of requests which are proceeding on a no prima facie basis.

I mean, our position is if the system is based on international committee, mutual recognition, then that's a part of those arrangements. If it's not then of course you could have a different approach. But in fact it is operated for a large number of countries and has been in some respect for some time.

CHAIR: Have you got any evidence of any particular problems on the absence of prima facie evidence rule? Any particular cases where you could say, well, that case flags up a problem that the Panel ought to be aware of because this can be difficult?

MR STARMER: No, I don't think so. I mean, if there was evidence from a particular country that they were seeking individuals without showing prima facie, and there was a clear pattern when they were returning the proceedings were being dropped, therefore they hadn't thought it through properly in the first place, that would have been dealt with by our Courts, then I think we'd be aware of that. But I'm not aware of it.

MS KUNDERT: I know in certain US cases there's often been the argument of if we had a prima facie case it would have made a difference. But in some of those judgments the judges have gone out of their way to confirm that actually what's been submitted would have more or less amounted to a prima facie case anyway. So I don't think any of those particular cases have raised the issue that there wouldn't have been an extradition order had there been prima facie.

CHAIR: I mean, are you aware of any case where it would have made a difference if there was a prima facie evidence rule?

MR STARMER: Well, no, but hesitatingly no. But not because I think there's

problem, but I'm not sure we'd know.

CHAIR: Yes.

MR PERRY: One case that's been put to us is the Raissi case where it was under the old legislation, and there was – it was a United States request, and he was kept in custody on the basis that the United States would be seeking his extradition for involvement in terrorist offences. And then when the evidence – he was arrested under a provision order, and then when the evidence was finally provided, it only supported a prosecution for minor offences including obtaining a pilot's licence via deception. And the point that is being made is that under the current scheme a request may have been made for his return for terrorist offences, when in fact there was no evidence to substantiate that. I don't know if you've got any view of this to –

MR STARMER: Well, I acted for Mr Raissi so I think I'd better not answer that question.

MS KUNDERT: But the country – I think one has to be clear in the Raissi case, the Court were looking at the representations that were made by the prosecution in terms of bail applications over the four and a half months. When the actual request for extradition came in it was solely on the basis of the information given in relation to the obtaining of the pilot's licence.

What I would say is in order for the Americans to have submitted a request in relation to conspiracy to murder or things like that, they would have had to have produced a warrant, an indictment, an affidavit setting it all out. So I think it would have been clear if they had a basis of a case in relation to those particular charges. But the actual Raissi case, the references to the conspiracy to murder in relation to what was said on the initial remind while we were waiting for the full case to come though – I think you have to look at the steps very clearly with the Raissi case because it wasn't actually about prima facie case and conspiracy to murder. It was whether or not the Americans would actually in the time produce further evidence or charge to request an extradition on those particular grounds, in addition to the grounds for obtaining a licence by deception essentially.

MR PERRY: Is it invariably the case in the United States' requests submitted to the United Kingdom that you will have a grand jury indictment?

MS KUNDERT: It's a warrant and an indictment...

MR PERRY: A warrant and a grand jury.
MR STARMER: We think so, I mean, we could certainly double check on this, because that is quite important consideration and we were discussing it earlier on, we think probably yes. But I'm not entirely sure we've bottomed this out, and we could certainly come back to you on that, David. But I think certainly in some cases.
MR PERRY: We're going to be going to Washington, so –
MS KUNDERT: You normally get a warrant and an indictment, affidavit from the prosecutor, and the extracts of the applicable law as well as any identification material.
MR PERRY: I mean, my own experience is I've never come across a United States extradition request where there hasn't been a grand jury indictment.
MR STARMER: I think that's probably right. It's just we haven't gone back and completely bottomed that out. But it may be that you may be able to do that while you're over there.
CHAIR: Have you have had any difficulty in getting suspects back from the United States?
MR STARMER: I think the answer to that is no. We do have some statistics on this, and the numbers of – the numbers of individuals where we've requested return to the UK from the States year-on-year. And we've analysed where they've been refused, withdrawn, or not returned. On these figures the refused, they've all got zeros in them, and therefore wherever we have made a request which has got to the appropriate stage in their Court proceedings, there's always been a return.
CHAIR: I looked, admittedly a while ago, and it seems that the actual returned didn't quite match the number of requests over a period of time without there being refusals. And I wonder whether they got lost on the way.
MR BARRY: That's earlier requests.
MR STARMER: Yes. I can see the year-on-year figures establish that. Dominic, do you know the answer.
MR BARRY: I think they're talking about arrests and surrenders in that year, but the arrest and surrender may relate to a request which was made the year before.
MR STARMER: If you look at it longitudinally, so if you look – we've got figures for '04 to '10, what you see in some years is that the number of requests is

higher than the number of returns.

CHAIR: And if you add up all the requests, and number of returns, it's quite a lot less.

MR STARMER: In some years there's more returns than were requested. That having been said, a number have obviously dropped out along the way.

CHAIR: Why?

MR STARMER: We've got figures for withdrawn by us. We could do some work on these figures, but there are clearly more requests than there are returned. It looks as though none are refused. A number have been withdrawn, and so in '08 three were withdrawn, in '10 two withdrawn, and then each of the other years one was withdrawn. So a number of them fallen away for that reason. And one of them was not returned for some other reason; that may leave some unaccounted for, and we could probably try and drill down and find out what that's about.

MR ISON: It may be, Scott, that some of the cases in relation to some requests, they could still be outstanding. There will be a certain number of people that have never been found.

MS KUNDERT: Not located.

MR ISON: So that would, I think, account for those.

MR DOOBAY: Just following on from the prima facie evidence point, the United States have to supply to the United Kingdom information that would justify the issue of the warrant or arrest of the wanted person, so in effect information that would provide reasonable grounds to suspect [inaudible] a warrant. Whereas we have to supply to the United States information as to provide legitimate reasonable basis to believe that the person sought committed the offence for which extradition is requested. So reasonable grounds to suspect, or reasonable basis to believe, can you see a distinction between the two?

MR STARMER: Probably not much, but I have not looked at the American jurisprudence and what is required to satisfy their test. I know where it comes from and I've seen some of the case law, but I've not had the opportunity to – I don't think it's a great distinction, but without tracing some of that case law in America, which I haven't done, I'm not entirely sure as to the difference. But I think we would say it's not a great distinction.

MR DOOBAY: Can I change topic completely? I wondered whether you had

experience in terms of any difficulties with regard to legal aid or, particularly for Part 1 cases, looking to see if there are any consequential costs caused by these legal aid difficulties, whether in terms of wasted hearings, or increased custodial periods.

MR STARMER: Anne-Marie?

MS KUNDERT: In relation to City of Westminster obviously in the first hearing the encouragement of the duty solicitor schemes obviously encourage representation at the initial hearing. We obviously get court outcomes and I don't think there are many outcomes asking for adjournment to legal aid, it's not common. And I think the Courts generally try and encourage cases to progress if they can. I've seen legal aid issues in relation to appeal case and judicial review applications where there's been lack of progress and the defence have set out their attempts to deal with getting prior authorisation for medical reports, and expert reports, and sometimes that can bring a long delay to the process.

MR DOOBAY: But it's not in the Magistrate's?

MS KUNDERT: But generally, not in the Magistrate's.

CHAIR: We've heard from ACPO that they're unhappy about there only being one Court where extradition cases are dealt with, and it costs a lot of money, and it would be more efficient if there was another Court or two in the north of the country. On the other hand, we've got quite a lot of evidence in that there's a big advantage in having the extradition cases concentrated in Westminster because there are District Judges who know the form, there are solicitors round about who are specialists and do all the work, and also barristers in London who know the subject too. Any comments?

MR STARMER: Not really. It has an advantage for us because we've got our specialist team based in London with easy access to the Court and to the team of specialists counsel, for example, that we would use. So it's much more efficient and effective for us, but we don't have to transport anybody to Court.

I think it would be hard to argue you really couldn't have a Court in, let's say, Manchester doing something, because you could easily get the degree of expertise. It is more convenient for us because we have our specialist team here, and you need to be a specialist, that's absolutely clear, and that's why we've got a specialist team.

MS KUNDERT: It's not a new idea. I mean, it was floated about by the Home Office about 2003 I think when the Act first came in, and at that stage obviously the Metropolitan Police did all the arrests. I think they've changed part of it, because they've devolved a lot of the arrests to the regional forces now, so –

MR STARMER: That said, there's no hard view no way or the other. It's very convenient, it allows the expertise to all be in one place. If a Court was opened in Manchester just as the judicial review is going on there, these days I'm sure it would be perfectly workable.

CHAIR: David? Anand?

MR DOOBAY: One small thing on the side; I wondered whether you had any difficulties in dealing with cases where there've been asylum claims before the request was made, but there's an issue that needs to be dealt with in terms of the Act?

MR STARMER: I think this has come up, hasn't it?

MS KUNDERT: Asylum: one of the trends at the moment is, if there's an outstanding asylum issue, as to whether or not extradition proceedings should be stayed, and certainly in the case of Khalifa I mentioned earlier, there was a decision by the High Court that we should wait and find out the determination of the entire immigration case in that particular instance before we can move on to extradition. I think that's also happened in another case. So that's an example where asylum issues directly impacted on extradition.

The other issue that cropped us as well is when someone was – had made a claim for asylum and then became a British Citizen; that's another issue, what right of protection that person now has on an extradition request out for him – if he can then be returned. Because the argument is you're now a British Citizen, you come out of that scheme; you've got the access to the consular services. So that's another issue that's cropped up in Court in the last six months. I'm not an expert on asylum law. But quite often asylum, we only knew if a person actually had it because from the very first appearance in Court, when you're deciding bail or custody, the person is then having to say to the Court 'I've got asylum', and they've almost had to "out" themselves.

CHAIR: Any more? Well, thank you very much indeed for coming, it's been very, very helpful from our point of view. We've had a very good debate on various issues, and I think it's helped us. If there's anything that you'd like to add,

please do, but if you think there are signs that we're barking up the wrong tree or anything, let us know now.

MR STARMER: I don't think there's anything now that we'd want to add. What we'll endeavour to do is pull together all the bits and pieces where we've said we'll provide something, and send it to you as soon as we can.

CHAIR: It's always possible that something may crop up that we'd want a bit more help on, and can we contact you at this stage?

MR STARMER: By all means come back to us on anything either that's arisen, or that didn't arise.

CHAIR: Thank you. Many, many thanks.
