

**HOME OFFICE – JUDICIAL COOPERATION UNIT**

**EVIDENCE SESSIONS**

Tuesday 5 April 2011

**PANEL:**

Sir Scott Baker (Chair)  
David Perry QC  
Anand Doobay

**IN ATTENDANCE:**

Dr Lizzie Franey

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**SESSION TWO**

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1 CHAIR: We are extremely grateful to you for coming and also for your submissions.

2 DR FRANEY: Thank you for asking me.

3 CHAIR: We are spending a large chunk of this week talking to various people who  
4 have submitted evidence and with whom we felt it would be useful if we had  
5 further discussions to try to thrash out some of the difficult areas and so forth.  
6 The proceedings are going to be transcribed and we intend eventually to put  
7 them into the public domain, but you'll have an opportunity of correcting,  
8 altering or adding anything you wish in the meantime before it goes public. If  
9 there's something you would rather not have said or you feel you would like to  
10 amend it please do.

11 DR FRANEY: Thank you.

12 CHAIR: Reading your submission, I would detect you're pretty satisfied with the  
13 existing state of affairs, except perhaps for the return of Polish defendants to  
14 serve their sentence in Poland in some instances. Would that be an over-  
15 simplification?

16 DR FRANEY: There are certain things I'm not satisfied with. There is the fact that  
17 discharge is used as a sanction for a lot of sections in the Act. That seems to  
18 me to be disproportionate. The fact is that defendants are forced to travel so  
19 far across the country. This is my own personal view; it is not shared by  
20 others. Others think there are good reasons to have people travelling across the  
21 country.

22 CHAIR: Well, it is shared by ACPO, I think, who suggested that the time had come to  
23 have more than just the Westminster courts dealing with these cases.

24 DR FRANEY: I think that there is a good argument for that. The argument for having  
25 just one court is to have some expertise amongst the judges and the court staff.  
26 But in the days when Bow Street was doing all the extradition before the 2003  
27 Act there were between 50 and 70 cases a year and that was enough to give  
28 people expertise. Last year there were 1,593.

29 CHAIR: Would you say, for example, that new judges should be trained up for places  
30 like Manchester, Liverpool, Newcastle or Birmingham, or do you see a  
31 nominated district judge going out to do a week here and a week there?

32 DR FRANEY: I must say I hadn't thought about it. I think they live in London. I'm  
33 not certain how happy they'd be to travel. Both ways are possible. There  
34 would also need to be some training for the court officers and the legal

1 advisers, but again we've done that; we have expanded the group of people  
2 who deal with that.

3 CHAIR: The Admin Court has done it recently in the High Court.

4 DR FRANEY: Yes, they have; they have expanded to four centres.

5 CHAIR: But we have had some quite strong submissions the other way, that it's best  
6 to keep it tight, and one aspect of it that is suggested would be useful would be  
7 if we could beef up the arrangements somehow for getting legal aid—the legal  
8 aid authorities have some expertise in the subject—and have really one or two  
9 people dealing with all applications in London.

10 DR FRANEY: Legal aid is a different problem. It is Liverpool that really actually has  
11 the problem. It doesn't seem to me that legal aid needs to be where the cases  
12 are, and certainly at the moment we send the papers to Liverpool which deals  
13 with the complicated means cases. With modern technology and electronic  
14 communications I'm not certain that is actually a problem.

15 CHAIR: I hadn't realised that stuff went to Liverpool. I don't know if my colleagues  
16 did, but one of the complaints about legal aid is that you can't get it quickly  
17 enough at the beginning of the proceedings.

18 DR FRANEY: That's correct, yes. It is to do with people's means. We would always  
19 grant legal aid in extradition cases on the interests of justice criteria, because  
20 there is already a seriousness because of extradition. It's the means that cause  
21 the problems.

22 CHAIR: Why shouldn't there simply be an automatic grant-----

23 DR FRANEY: There used to be.

24 CHAIR: -----with means being sorted out later?

25 DR FRANEY: I think it is fair to say they probably never would be sorted out later.  
26 But there used to be a system when legal aid was granted automatically for  
27 free and it was only the interests of justice test that was considered. I can't  
28 imagine an extradition case in which the interests of justice test would not be  
29 satisfied. Therefore, it was pretty well automatic. I've worked in the Courts  
30 Service now for over 25 years and I've seen means testing for legal aid come  
31 in and out of fashion. What I do know is it is really expensive to implement,  
32 and I'm certain savings are made by not having means testing.

33 CHAIR: Well, that's fascinating. We have asked if another department, as it were, of  
34 the Home Office—not that we're a department of it, but we are reporting to a

1 particular part—can look into the legal aid questions. It's crucial to what we're  
2 doing, but it seems to us that the system could be improved with it not  
3 necessarily becoming any more expensive, because there would be cost  
4 savings.

5 DR FRANEY: I think it could be improved. Dealing with unrepresented defendants  
6 on extradition is fairly difficult. It's much easier to deal with small summary  
7 trials with unrepresented defendants, because most people have an  
8 understanding of the domestic criminal process; they've seen it on television;  
9 they've got some understanding of a simple trial, whereas with extradition the  
10 reasons not to be returned are quite technical. Defendants do not want to  
11 understand it; they don't want to be sent back. On the whole, they are here  
12 rather than in their home country for a reason. That's not always so but on the  
13 whole that's what it's about.

14 CHAIR: Looking at means testing at the moment, how many of them actually come  
15 back with a refusal on means grounds, or a contribution on means grounds?

16 DR FRANEY: I'm sorry that I can't answer that. I'm sure I could go and find out. But  
17 it seems to me just from sitting in court quite a lot that every time there are  
18 defendants before the court who have not got legal aid.

19 CHAIR: But then it goes off to Liverpool with a form having been filled in, but  
20 probably the sort of people who are going to be extradited haven't got any  
21 means anyway a lot of the time.

22 DR FRANEY: What they don't have is what's required to prove that they've got no  
23 means to get legal aid. The legal aid requirements require documentary proof  
24 of their income, loss of a job, if they've lost a job, and all sorts of things. You  
25 are dealing with people who on the whole don't speak English. On the whole,  
26 their families don't speak English and they don't come from societies that are  
27 quite as bureaucratic as ours.

28 CHAIR: It just occurs to me that the Home Office legal aid people, who hopefully  
29 will be looking into this topic in the near future, might be very well advised to  
30 make you their first port of call for the sort of information that they can get.

31 DR FRANEY: Legal aid is now administered by the Ministry of Justice. It was the  
32 Home Office and it became the Ministry of Justice. I've been in contact with  
33 and made representations to them over the past few years on occasions asking

1           them to do something about legal aid. I've had back quite positive replies but  
2           nothing has happened.

3 CHAIR: Well, we have had quite positive replies, but we have not got to the point of  
4           anything happening yet. But we have raised this subject with them because we  
5           can see one possibility, when we get to our report, would be that legal aid  
6           problems were causing a significant injustice in the working of the EAW  
7           system and, rather than get in the position of making that statement and a  
8           recommendation that it ought to be looked at, we would prefer, if we can, to  
9           be able to make some positive recommendations about what could be done.

10 DR FRANEY: They certainly cause delays. I'd like to think that judges take enough  
11           time so it isn't actually a significant injustice, but delay in itself causes an  
12           injustice.

13 CHAIR: And delay costs money.

14 DR FRANEY: Oh, yes, it does; it costs a lot of money, and dealing with  
15           unrepresented defendants through interpreters is very slow.

16 CHAIR: What's the position about interpreters? Can you get them at the drop of a  
17           hat?

18 DR FRANEY: Yes, on the whole; there are Polish interpreters every day.

19 CHAIR: Probably Polish cases every day!

20 DR FRANEY: That's right, because there are Polish cases every day. We have a  
21           group of Polish interpreters who work together very well. They will do a case,  
22           but in fact they're very good at assisting us to transfer cases between one court  
23           and another and that kind of thing. There are a few jurisdictions—is it  
24           Hungary?—for which there are not very many interpreters. But it's very few  
25           and it's not often that we have to adjourn a case for an interpreter, and if we do  
26           adjourn it then we get one.

27 CHAIR: And who pays?

28 DR FRANEY: The state.

29 CHAIR: And that is entirely independent of any legal aid?

30 DR FRANEY: Yes; the state pays for an interpreter. The Home Office is looking at  
31           interpretation and also documents in terms of getting them translated, which of  
32           course is a different question from interpretation.

33 CHAIR: Do either of you want to ask anything on the legal aid stuff, or do you want  
34           to explore other territory?

1 MR DOOBAY: Can I just ask you a couple of questions?

2 DR FRANEY: Of course you can. If I could just say Anand, that when it comes to  
3 legal aid when the Legal Services Commission changed it they deliberately  
4 kept the actual workings of legal aid away from legal advisers, and therefore  
5 my knowledge is to a certain extent limited by that.

6 MR DOOBAY: I suppose what I'm looking for is more the anecdotal than the  
7 empirical because I appreciate that's what you have. I'd just like to follow up  
8 something that Scott was talking about. Does it happen very often that after a  
9 protracted period of trying to establish a defendant's means the Legal Services  
10 Commission says, 'In fact your means are such that you're not entitled to legal  
11 aid'? Does that ever happen?

12 DR FRANEY: It does happen.

13 MR DOOBAY: Less than often?

14 DR FRANEY: Yes. And what also happens quite often is they just say they won't  
15 deal with it without documentation and that documentation cannot be  
16 forthcoming, so they don't get legal aid. That happens a lot.

17 MR DOOBAY: When they just haven't got information they assume-----?

18 DR FRANEY: Yes. I think that happens more than it actually being refused.

19 MR DOOBAY: As to the costs of delay which you talked about, obviously there are  
20 the costs of hearings being adjourned, the court staff and judges.

21 DR FRANEY: And of course prisons.

22 MR DOOBAY: And detention costs, and also the costs of transporting people  
23 backwards and forwards. How do you think it would speed up the process to  
24 have a lawyer involved at an earlier stage?

25 DR FRANEY: They explain what extradition is about, what the bars are, what  
26 arguments can be made and they assist them to make those arguments in a  
27 fairly simple way. Quite often, people just want to argue. Even though they  
28 have been told it's not going to work they still want to make the point. A lot of  
29 them are very good at explaining to people that there is nothing to argue, that  
30 whilst they don't want to consent the best thing to do is just not to contest the  
31 extradition and go back and sort it out. They are also good at explaining to  
32 them the things to argue at the actual trial, or that they should ask for a retrial  
33 or an appeal or parole or whatever the alternatives are back in the requesting  
34 state. Those are all things which people find it very difficult to understand.

1 The court really doesn't have the hours that that kind of discussion will take.

2 We do end up doing it on occasions, but it is a real waste of a court's time

3 MR DOOBAY: Clearly. And also it's not the role of the court to deal with some of  
4 the potential issues.

5 DR FRANEY: That's right, it's not. It's not the role of the court to say, 'That's not  
6 something you can argue.' Sometimes, you just have to listen to everything  
7 they say and then the judge will decide whether or not they have raised  
8 anything that could even get anywhere close amounting to a bar.

9 CHAIR: We've heard that many of the cases from Poland are really cases that ought  
10 not to be extradited at all by our standards. Do you find that there is much  
11 contact between either the lawyers and the Polish authorities or the court and  
12 the Polish authorities to try to see if there is an alternative means of dealing  
13 with some of the less serious cases?

14 DR FRANEY: I'm not sure that that is a fair summation of the Polish cases, because  
15 every day I go to the office. We have a board on which we can see the new  
16 cases. I would have a quick look at them to see what's coming in. To be fair,  
17 Poland is usually about serious offences such as robbery. There will be theft,  
18 but it's by no means the case that everything is not serious. They have quite a  
19 number of suspended sentences which are then implemented, because they  
20 have an equivalent of our suspended sentences whereby people have  
21 requirements. If they don't comply with those requirements then a sentence is  
22 imposed in their absence, if they don't comply and they're summonsed. They  
23 have a system whereby they are supposed to live an address. They're  
24 summonsed at that address and then the sentence is imposed if they are not at  
25 the address.

26 CHAIR: But, to get a feel for it, this would be somebody who was living in Poland  
27 and was subject to a suspended sentence in Poland and then had pushed off  
28 from the address they were at?

29 DR FRANEY: Yes.

30 CHAIR: So, normally they would have been in this country for a relatively short time,  
31 would they? Or in some cases it would take a long time to track down that  
32 they have come here?

33 DR FRANEY: Sometimes it takes quite a long time to track down that they have got  
34 here, yes. Quite a lot of them come to the attention of the authorities almost by

1 accident. For the most serious cases where they are believed to be in this  
2 country they are most definitely searched for, but for the lesser ones—it  
3 doesn't always mean that they're not serious at all—if it's not thought they are  
4 here, or there's no reason to think they are here, the authorities have got only  
5 so many resources to track down people. If they come to the attention of the  
6 authorities for some reason or another, you'll find that quite often it's because  
7 they've committed an offence in this jurisdiction. Nothing may actually  
8 happen about that; it may not be further actioned, but as a result of that there is  
9 an inquiry made as to whether they've got anything outstanding.

10 CHAIR: In Poland?

11 DR FRANEY: That is a new thing, but, yes. It used to be the case that the name  
12 would go into the police check and it would flash up that there is an EAW out  
13 on that name. But the recent change, since the summer of last year, means that  
14 the police now check with a foreign state on a foreign national who's charged  
15 with an offence in this country to see they've got any previous convictions in  
16 their country, and that's flagged up when they are wanted.

17 CHAIR: But you talk of suspended sentences here. What is the range of the period of  
18 the suspended sentence? Are these short sentences or longer sentences?

19 DR FRANEY: I'm not sure I have the knowledge to answer that question. They strike  
20 me as being very similar to suspended sentences here. I've never had anything  
21 that struck me as being anything particularly different from the suspended  
22 sentence in this country.

23 CHAIR: And what's the answer to these problems? Might one answer be that they  
24 will serve the sentence here rather than go back to Poland?

25 DR FRANEY: There is that. For those who have settled here a lot of them would just  
26 prefer to serve their sentence here. Of course, a lot of people have not only  
27 come here to work; they've brought their families with them. Some of them  
28 accept, 'Yes, I've breached my suspended sentence.' If that sentence has to be  
29 implemented they would rather serve it here than go back to Poland.

30 CHAIR: And if they go back to Poland do you know whether the sentences are being  
31 implemented, or may they be substituted by a further period of suspension or a  
32 fine or something similar?

33 DR FRANEY: I believe there is that possibility. Everything I hear about Polish law is  
34 anecdotal, but I believe that can happen on occasions. Certainly, there are



1 applications to adjourn cases in this jurisdiction, extraditions, so that they can  
2 make representations to the judge in the foreign jurisdiction. We do know that  
3 now and again that works. It doesn't work in all of the cases that make these  
4 applications.

5 CHAIR: By "make representations" do you mean through lawyers or on the  
6 telephone?

7 DR FRANEY: Lawyers on the whole, I think.

8 CHAIR: So, it is not a case of the defendant having to go back to Poland?

9 DR FRANEY: No. They instruct lawyers in Poland. It's a shame they didn't do it  
10 before they got arrested on the EAWs. It's a very expensive process for this  
11 jurisdiction, particularly if they are in custody. It is not a reason to adjourn the  
12 proceedings, but now and again it's done.

13 MR PERRY: One of the things that we have also been looking at is the possibility of  
14 delayed extradition and the possibility of serving a sentence here, which may  
15 be one of the optional bars for declining to extradite under the framework  
16 decision which has not as yet been enacted.

17 DR FRANEY: Yes.

18 MR PERRY: The other possibility is the European supervision order whereby  
19 someone could remain in this jurisdiction until a case is trial ready, or it could  
20 be compromised in the way you've just been describing. It may be more  
21 difficult in custody cases.

22 DR FRANEY: As regards serving the sentence, we already have the legislation in  
23 place for repatriation of British citizens. It applies only to British citizens and  
24 to certain countries, but it would be humane if as Europeans as a whole we  
25 could make it possible for people to serve sentences where their families are.  
26 As regards the European supervision order, I think that is a very good idea.  
27 MoJ policy advisers came to the City of Westminster just to see how bail  
28 worked, because I think that's going to be implemented at some point. It  
29 would be kind to have them on bail here, but I think that would require the  
30 consent of the court in a foreign jurisdiction. Of course, in extradition cases  
31 we could also use a video link for bail applications. I don't see why we  
32 couldn't do that.

33 CHAIR: Do you have a video link?

1 DR FRANEY: We have a video link which is used mainly for remand applications to  
2 stop bringing somebody from prison. When it first came in I was in two minds  
3 about it because it doesn't seem immediately human rights-compliant, but if  
4 you have good screens you really get a good picture of the person; you can see  
5 how they are, which I think is one of the most important things about a  
6 hearing. Prisoners prefer not to be moved; it's quite clear that it's not a  
7 pleasant experience to come in a van.

8 CHAIR: Another reason for not moving is that very often they lose their cell in the  
9 prison they come from because of shortage of space and somebody else gets it.

10 DR FRANEY: Yes; and when they go back they have to settled in again. We have  
11 used the video link with foreign jurisdictions to take evidence on occasions.  
12 The technology sometimes gives rise to problems, but there's no reason why  
13 we couldn't extend the use of it.

14 MR PERRY: How much communication is there with overseas judicial authorities?  
15 The framework decision encourages it.

16 DR FRANEY: In practice, not a lot. There is a language barrier. SOCA at the moment  
17 are the conduit and they have the translation facilities, I suspect it costs them a  
18 lot of money, but they do actually have those facilities. I have once or twice at  
19 the request of a district judge emailed directly and it has worked.

20 CHAIR: But SOCA are really interested only in the validity of the warrant, are they  
21 not?

22 DR FRANEY: They are the UK central authority and act as a conduit for any  
23 communications to or from other states.

24 CHAIR: We had them here yesterday. I got the impression—it may be my colleagues  
25 got a different impression—that they were very much focused on the validity  
26 of the warrant and weren't inclined to go any further than that.

27 MR DOOBAY: But I think they also act as a national central bureau[?] for us, so they  
28 will be used to dealing with other countries as part of their function, so I  
29 imagine that might be why they do that.

30 DR FRANEY: But they don't do anything other than make certain it is translated and  
31 sent and that anything we receive back is sent on to us, they act as a conduit.

32 CHAIR: But they probably have a Polish speaker.

33 DR FRANEY: They have interpreters, yes. They have translators. We have access to  
34 interpreters at court but they are not translators. There is nothing in the rules

1 which allows us to pay for translation. For example, I know that if you want to  
2 contact the Netherlands most people in that country speak English, but it's not  
3 the case in other jurisdictions.

4 MR PERRY: And what sort of contact has taken place, and in what way has it been  
5 successful?

6 DR FRANEY: I'm trying to remember. There was one case that Tim Workman, who  
7 was then senior district judge, asked me to do and it did work. There was an  
8 email on the EAW. We wanted to know something fairly quickly so I did it  
9 just to see if worked, and it did. I can't remember what they asked now. This  
10 was towards the beginning of the EAW and we weren't quite as busy as we are  
11 now. If we were going to have judge-to-judge contact we'd have to set up a  
12 system whereby we had generic mailboxes so that things didn't get lost and  
13 that kind of thing so they were answered.

14 CHAIR: How many new cases a week are you getting?

15 DR FRANEY: It varies. We had 130 in January; we had 108 in February. I haven't  
16 really been keeping such a close eye on it, but when I went in today to have a  
17 look we had seven. I think it was six yesterday.

18 CHAIR: We heard that the number of cases in Poland was beginning to drop.

19 DR FRANEY: I think that's right. Again, it's anecdotal but that's my feeling just  
20 from looking at them.

21 CHAIR: A significant drop or just the feeling that it might be going down?

22 DR FRANEY: They don't seem to be the majority of cases any more. Certainly, for a  
23 time definitely 50 per cent of our work was to do with Poland. I don't think it  
24 is any more, but it's just a feeling. I could check quite easily; we have a  
25 spreadsheet from which I could check.

26 CHAIR: I think it would be quite helpful to get up-to-date information on that. Have  
27 you any idea why they are dropping?

28 DR FRANEY: No. There was a meeting between the Home Office and the Polish  
29 judges, which I've heard was actually quite successful. I heard that afterwards  
30 the Polish judges had been talking amongst themselves about proportionality  
31 and when they should issue EAWs and when they shouldn't. Whether that had  
32 any effect I don't know.

1 MR DOOBAY: Can I just come back to something you mentioned before? Am I right  
2 in thinking that one of the requirements of the suspended sentence is to live at  
3 an address?

4 DR FRANEY: Yes.

5 MR DOOBAY: So, if they have simply moves from Poland to the UK they have  
6 breached the terms of their suspended sentence?

7 DR FRANEY: It's all part and parcel of Polish law, from what I can gather. It sounds  
8 like a system that would work excellently when people really didn't move a  
9 great deal. People are required to live at a particular address, not just for the  
10 suspended sentence but throughout the whole of the proceedings, so they can  
11 be written to and receive documentation.

12 CHAIR: Can they get the address changed if they ring up the authorities?

13 DR FRANEY: I don't know whether it is as simple as ringing up, but they can get it  
14 changed. Again, I don't know all the ins and outs of it, but I know it can be  
15 changed. What I don't know is whether it can be changed to a foreign country.

16 MR DOOBAY: I suppose where I was going with this is whether there is the  
17 possibility of having a different mechanism. If for example the Polish  
18 authorities were to say: 'Actually, what we want to do is to serve a summons.  
19 We don't know where this person is any more. If you could locate them in the  
20 UK and serve the summons for us then in first instance we would be happy  
21 with that. Obviously, if they ignored the summons we might then need to issue  
22 a European arrest warrant.' But it sounds as though in some of these  
23 suspended sentence cases a first step could be to try to serve the summons if  
24 they knew where the person was.

25 DR FRANEY: Quite a lot of them have not just moved without permission; they are  
26 supposed to pay money and they don't. They say that the reason they've come  
27 to England is because there's work here and no work in Poland. I agree that  
28 what we need is a real European-wide ability to serve summonses. Just as a  
29 court we cannot in the UK serve a summons outside the United Kingdom. We  
30 have to have a certificate of service sent by first class post to an address in  
31 England and Wales; you can't do that to the continent, but there is no reason  
32 why things can't be changed.

1 CHAIR: Do you get any applications to enforce fines imposed in Poland, for example,  
2 because there is legislation, I think, equivalent to section 111 of the  
3 Magistrates' Courts Act.

4 DR FRANEY: It's very recently come into force for the magistrate court and we've  
5 just started doing it. I don't know whether there has been any for Poland yet.  
6 The central accounting office, I think, would be able to tell us.

7 CHAIR: Do you think that's going to be a useful way?

8 DR FRANEY: Yes, I do, yes.

9 CHAIR: It should reduce the number of EAWs?

10 DR FRANEY: I hope so. Whether it does or doesn't, it's still useful. I think you will  
11 find they will be able to be enforced.

12 CHAIR: If somebody drives their car at 100 miles an hour in France and gets stopped  
13 by the French police, are there enforcement proceedings over here in relation  
14 to that?

15 DR FRANEY: I think now there can be.

16 CHAIR: You're probably fined on the spot there and you don't get your car back.

17 DR FRANEY: I think in France and Germany they are fined on the spot for that kind  
18 of thing. I understand that fines can be enforced now the legislation is in place.  
19 I must admit I haven't read it in detail whether it now applies to all European  
20 countries or whether, like the EAW, some people join up to it. I don't know. I  
21 do have all the legislation on a computer, but I haven't read it.

22 MR DOOBAY: Can I just follow that through a little? Let's assume that there are at  
23 least some alternative mechanisms that might be useful in these cases. For  
24 example, you have the ability to serve a summons in the UK as a request from  
25 another authority; you now have the ability to enforce fines, which may not  
26 have been complied with; and the Repatriation of Prisoners Act applies not  
27 just to English nationals but residents as well, so you have the ability to  
28 transfer a sentence. But presumably the court does not see itself as being in a  
29 position to suggest any of these alternatives if it is dealing with a European  
30 arrest warrant case.

31 DR FRANEY: They are not at the moment; none of those would apply. The Act has  
32 very few bars to extradition.

1 MR DOOBAY: I don't mean in terms of bars. It is not your function to say to the  
2 requesting judicial authority, 'It seems that this might actually achieve what  
3 you're trying to do and is more proportionate than a European arrest warrant.'

4 DR FRANEY: No; it's not the function of a court to tell another court what to do, and  
5 it's certainly not the function at the moment the way it's set up. The idea of  
6 the EAW is that you accept the EAW is issued correctly.

7 CHAIR: Our thinking at the moment is that it may be one or two things could be done  
8 to implement provisions in the framework decision that haven't been  
9 implemented that would improve matters a bit, but what's available there is  
10 pretty limited. It isn't a practical proposition to think in terms of the  
11 framework decision being changed, but the second line of attack might be that  
12 there ought to be more steps taken through the authorities in Europe to try to  
13 achieve things by persuasion that others are suggesting ought to be achieved  
14 by introducing proportionality provisions, and so forth. At the moment we're  
15 just wondering how much can be done, as it were, behind the scenes.

16 DR FRANEY: The enforcement of fines is definitely a new thing. I think the service  
17 of summonses would be excellent.

18 MR DOOBAY: Certainly, what I've been interested to hear about is that we have had  
19 a problem with Poland and we have engaged with them to try and work out  
20 why we had it. We are suggesting to them alternative things which might still  
21 satisfy them in terms of what they are looking to achieve. We've done that  
22 because we've had a systemic problem with Poland and numbers, but it seems  
23 to be quite a sensible thing not to tell the requesting state what to do but to say,  
24 'Is there another way to achieve the thing you're trying to achieve? Can we  
25 help you to do that?' If at the end of the day they say, 'No, there isn't, and  
26 actually what we want is a European arrest warrant,' so be it.

27 DR FRANEY: Yes.

28 MR DOOBAY: But you are not going against the spirit of the EAW.

29 DR FRANEY: By suggesting other things before an EAW is issued—no, you are not.

30 MR DOOBAY: My concern is that there is not anyone who does that, because  
31 actually our system here is set up simply to implement EAWs and the Act  
32 does not allow anyone to have such a role.

33 DR FRANEY: The Act doesn't allow it, but I would have thought at a European level  
34 there would be that kind of interaction.

1 MR DOOBAY: Is it something you would see as a positive step?

2 DR FRANEY: Oh, yes, absolutely. Anything that would enable people to comply  
3 with community sentences or suspended sentences, or even to comply with a  
4 trial that's going on, whilst maintaining their family, their job and their ties to  
5 wherever they belong is very positive, because the whole idea of Europe is  
6 that people can move if they want to. I don't understand the role of all of the  
7 European organisations, but there's an organisation called Eurojust.

8 MR PERRY: I think that's right. I'm thinking that possibly it's more a co-ordination  
9 body. We're receiving requests in the UK and therefore it arises case by case.  
10 Where it's arisen in a large number of Polish cases we have taken steps to try  
11 to talk about it; in other individual cases it may be that we don't, because  
12 everybody involved in the process is simply executing the European arrest  
13 warrant.

14 DR FRANEY: Yes, there is that too, absolutely. There was a review by the European  
15 Council of how it was working.

16 MR DOOBAY: And then there was a handbook which had these suggestions in it,  
17 saying that each state should try and look at all of these things.

18 DR FRANEY: Yes. There is a body within Europe that does review it. Is it the  
19 European Council?

20 CHAIR: We have a resident magistrate in Paris and the French have a resident  
21 magistrate in London.

22 DR FRANEY: We do, yes.

23 CHAIR: But what about Poland?

24 DR FRANEY: I don't think we do.

25 CHAIR: Is the concept of resident magistrates in Paris and London a complete one  
26 off, or does that happen in many other jurisdictions?

27 DR FRANEY: There's one in Paris, Italy and Spain, and there used to be one in the  
28 United States. I'm not sure whether there still is now. They are actually  
29 members of the Crown Prosecution Service and their job is to facilitate our  
30 cases in those foreign states, so they're particularly involved in mutual  
31 assistance and things like that.

32 CHAIR: It suddenly occurred to me that in the Princess Diana inquest I had quite a lot  
33 of dealings with the resident magistrate in Paris.

34 DR FRANEY: Yes.

1 CHAIR: And then a little bit with the French resident magistrate in London. Just  
2 thinking laterally for a moment, I wonder whether this is a system of liaison  
3 and communication that may be of some value in other states, or if there's any  
4 equivalent to that, to achieve what Anand is really talking about.

5 DR FRANEY: I don't think there is one; I'm not aware of one in Poland. But we do  
6 take evidence in Poland sometimes, so I presume it happens the other way  
7 around as well.

8 MR PERRY: Just on the enforcement of fines, following passage of the Criminal  
9 Justice and Immigration Act 2008, was a unit set up at City of Westminster to  
10 administer enforcement?

11 DR FRANEY: No. They are being enforced by all magistrates' courts.

12 MR PERRY: So, how does that work in practice? Is someone available to receive the  
13 request?

14 DR FRANEY: It goes to the central accounting office for the whole of London and  
15 then it referred to the courts. I haven't been involved in any of that process,  
16 but I'm aware it's being set up by others within the organisation, and I'm  
17 aware it's working.

18 CHAIR: Say the person they want is in Newcastle.

19 DR FRANEY: It will go to Newcastle.

20 CHAIR: Do they all start in London or do they go to where they think the person  
21 might be?

22 DR FRANEY: I don't know the answer to that; I'm sorry. I can certainly find out for  
23 you. They must start somewhere in particular, but yes, they go to the local  
24 court.

25 MR DOOBAY: To go back to the issue raised at the beginning about discharge as a  
26 sanction, in practice how often is somebody discharged for a breach of section  
27 4?

28 DR FRANEY: Not often, but we get a lot of argument about it. It really wastes the  
29 court's time, but now and again they are discharged. Usually, they are arrested  
30 again, which I'm not certain is a particularly useful thing for a defendant.

31 MR DOOBAY: So, it doesn't prevent the bringing of additional proceedings?

32 DR FRANEY: Not in itself, but there can be arguments about further delay, abuse and  
33 that kind of thing.

34 CHAIR: It's not equivalent to an acquittal?



1 DR FRANEY: No; being discharged from extradition is not equivalent to an acquittal.

2 We get a number of very sad letters, at City of Westminster magistrates' court,  
3 asking us to write to courts in various other jurisdictions to say that we have  
4 discharged or dismissed this person, which is what they usually think. Could  
5 we please write to say that they should let them go? I have to write letters to  
6 say that discharge from extradition proceedings is not a dismissal of the  
7 charge.

8 CHAIR: Do you have much of a problem with the reverse side of that, that you have  
9 people discharged in other European countries and then you're getting  
10 warrants asking you to execute?

11 DR FRANEY: I can't think of one like that.

12 MR DOOBAY: I have a question which is very different; it's about the secretary of  
13 state's discretion.

14 DR FRANEY: Well, I don't know much about his or her discretion.

15 MR DOOBAY: It's something which you mentioned in your representations. You  
16 say: 'There is no mechanism whereby a request is first referred to the CPS  
17 who conduct the proceedings on behalf of the requesting state for review and  
18 advice to the requesting state.'

19 DR FRANEY: Yes.

20 MR DOOBAY: Do you think there should be?

21 DR FRANEY: Yes, I do, but it would require more resources on the part of the CPS.  
22 A number of jurisdictions have joined. We have had a number of requests  
23 recently from Africa, South America and other countries where they find it  
24 very difficult to put a *prima facie* case. They don't have that concept. At the  
25 moment we have an agreement with the Crown Prosecution Service, because  
26 the number of part 2 cases have gone up. We have an agreement with the  
27 Crown Prosecution Service that if it is obvious there is no extradition crime or  
28 not enough evidence to issue a warrant then we don't issue a warrant; it's  
29 refused by a judge and returned to the Home Office with an explanation that  
30 they can contact the CPS if they wish. It's only in exceptional cases at the  
31 request of the District Judge for the assistance of the CPS in identifying the  
32 extradition crime or what the evidence is that the CPS will get involved at that  
33 stage. On the whole, they don't mainly because of the resource issue.

34 MR DOOBAY: Under the Act they have the power to advise anyone who asks them.

1 DR FRANEY: They do, but they hardly have the time to do what they've got.

2 MR DOOBAY: So, you think that before the secretary of state certifies there should  
3 be an initial stage where the CPS reviews a request to give advice before the  
4 secretary of state then looks at the more formulaic test is to be applied under  
5 section 70?

6 DR FRANEY: I'm not quite what the whole purpose of the section 70 test is anyway.  
7 It's a valid request. All it means is it has come through valid channels. I'm not  
8 quite certain why section 70 is there, to be honest, except I suspect the Home  
9 Office wants to know it's come. That doesn't seem to me to be very necessary,  
10 but I think it would be a good idea for the CPS to be involved from the  
11 beginning.

12 MR DOOBAY: Whilst you say it would involve additional resources, presumably in  
13 reality it wouldn't, because as soon as a warrant is issued they become  
14 involved anyway.

15 DR FRANEY: But in the ones where a warrant isn't issued they are not involved,  
16 unless the foreign state goes to them.

17 MR DOOBAY: And how many are refused?

18 DR FRANEY: Quite a few; not lots.

19 CHAIR: Thirty a year?

20 DR FRANEY: Sorry; I could have found out, but it's probably not quite that many.  
21 Possibly it's a couple a month. I'm not sure. We had a backlog. We used to  
22 have a different system and I dealt with quite a few at once because of the  
23 backlog. There were quite a number that I put before a judge who just said that  
24 the court wasn't going to issue a warrant.

25 MR DOOBAY: Just to get a sense of it, it's not an enormous amount of work?

26 DR FRANEY: It's not an enormous amount, no. Well, having said that it's the kind of  
27 case where when it becomes an arrest would be a lot of work. On the whole,  
28 they are new extradition partners.

29 MR DOOBAY: And it may mean less work by being involved at the preliminary  
30 stage in the framing of the request?

31 DR FRANEY: Yes. It doesn't seem to me that it provides much of a service to our  
32 extradition partners just to say no.

33 CHAIR: Does this happen with many countries, or with just a limited number where  
34 you are getting this particular problem?

1 DR FRANEY: I think it's fair to say it tends to be the countries that are not traditional  
2 extradition partners, but as the world becomes smaller you can understand we  
3 get these applications.

4 CHAIR: Whilst on the subject of discretion, I don't know if it's outside your field of  
5 experience or not, but under part 2 where the case has been to the district  
6 judge, Divisional Court, Supreme Court, wherever else, it eventually goes  
7 back to the secretary of state who has discretion at that stage. Capital case and  
8 issues of specialty would be weeded out. But what I think causes us a bit more  
9 concern is the secretary of state's discretion once again to deal with human  
10 rights issues, so the defendant has another bite at the cherry. We are really  
11 wondering whether this is something that might be put back onto the courts  
12 with an opportunity to reopen the case if there's been some dramatic event that  
13 requires consideration in the interests of justice at a late stage. Look at the  
14 problems in *McKinnon*, for example. Does the secretary of state really need to  
15 get involved in that, or is it a matter that can better be dealt with by the court,  
16 because it has political undertones to it?

17 DR FRANEY: The idea of the 2003 Act was to limit the number of appeals there  
18 could be. As to part 2 cases, the idea was that the district judge decided the  
19 matter and then it was sent to the secretary of state to determine the matters  
20 that he or she had to deal with. Some of them appeared to me to be fairly self-  
21 evident. I don't quite know why it takes so long, but it does seem to. Then  
22 there would be an appeal. It's the result of appeals taking so long that the  
23 changes then go back to the secretary of state. I must admit I don't quite  
24 understand the mechanics of it. Then of course the secretary of state is subject  
25 to judicial review.

26 CHAIR: Exactly; and it goes back to the court again.

27 DR FRANEY: Yes—which doesn't seem to me to be a very sensible way of dealing  
28 with things, but it is created by delay.

29 CHAIR: On the subject of delay, we had some representations to say that there are a  
30 lot of hopeless appeals which are clogging up the system and the courts and as  
31 a result meritorious cases that ought to be heard on appeal aren't being heard  
32 as quickly as they ought to be, with the consequent problem that you're  
33 highlighting. One suggestion is that there should be a filter of leave to appeal.

1 DR FRANEY: It certainly appears to me that there are such cases, that people who  
2 appeal have not raised anything in the magistrates' court because they  
3 couldn't. Then they appeal and all they are doing is getting time. Just from  
4 looking at reports of cases, it seems to me that there are a lot of unmeritorious  
5 cases before the Administrative Court. They could probably tell you better  
6 than I could.

7 CHAIR: Well, they have.

8 DR FRANEY: I am sure they have, but the number of appeals is extraordinary,  
9 because it's an appeal as of right. It does seem to be being used just to put off  
10 the inevitable, which is the return.

11 CHAIR: Timescales. Do you think that the time for appealing is causing any  
12 problems?

13 DR FRANEY: It's very short; it's seven days starting on the day when the order is  
14 made. We quite often don't get the cases until nearly six o'clock in the  
15 evening, and that's a whole day gone. When you then take out Saturday and  
16 Sunday it doesn't leave people very long to appeal.

17 CHAIR: What SOCA say about this is that they need to know as early as possible  
18 which cases aren't going to be appealed so that they can deal with the  
19 appropriate arrangements through the requesting state.

20 DR FRANEY: Yes, they do, and of course the timeframe for them is very short. If  
21 they don't comply with it and don't ask for an extension then an application is  
22 discharged and on occasion that's successful. It's usually just because of a  
23 mistake.

24 CHAIR: If it was left to you to make the changes, what changes would you make?

25 DR FRANEY: I would probably make the appeal period slightly longer, because I do  
26 think seven days is very short.

27 CHAIR: With a discretion or no discretion to extend?

28 DR FRANEY: I have no strong feelings about that. It's explained to every person in  
29 court. I think it's very difficult to listen at that point. Even if they do say they  
30 understand, you never know that they actually understand. I don't know about  
31 discretion; I haven't really thought about it, but I'd certainly give it a little  
32 longer. I'd also give SOCA longer. During the bad winter weather we got so  
33 many applications to extend time. Planes failed and they couldn't leave where

1 they were coming from, or they couldn't then leave from the United Kingdom  
2 either. People can't travel because of fog and that kind of thing.

3 CHAIR: The ash cloud?

4 DR FRANEY: Yes; that was another example that caused us a lot of work, you can't  
5 refuse it on the basis that somebody has become stuck in an ash cloud.

6 MR PERRY: Supposing that instead of having the secretary of state considering  
7 supervening events which raise human rights point and it were to be a decision  
8 of the court, would there be a problem in giving it to the district judge to  
9 decide?

10 DR FRANEY: You'd then start the whole process all over again.

11 MR PERRY: Exactly.

12 DR FRANEY: There'd have to be a way of stopping it going on for ever.

13 MR PERRY: Suppose it was done on the basis, whether or not you had appealed and  
14 been successful in your appeal—or even if you had appealed and hadn't got  
15 leave to appeal and the leave requirement was put into the Act—that any  
16 supervening Human Rights Act point was to be dealt with by the High Court  
17 and only appeals on a point of law of general probable importance. Would that  
18 assist?

19 DR FRANEY: That would certainly stop the boomerang effect if it went to a district  
20 judge. If it went to the magistrates' court there really would have to be an  
21 appeal.

22 MR PERRY: Or potentially judicial review.

23 DR FRANEY: Yes, certainly; there is always the potential for judicial review.

24 CHAIR: What we're really looking at here is the secretary of state being, for the  
25 purposes of the Human Rights Act, a public body that has to consider the  
26 human rights again. If there is a statutory route then that's an alternative  
27 remedy, so that would rule him out.

28 DR FRANEY: Yes.

29 CHAIR: The court would then deal with it and that would be the end of the road, if  
30 there was a provision for no appeal from that.

31 DR FRANEY: Yes. I think it would be better. It certainly seems to take a very long  
32 time. Every time the secretary of state makes a decision it's reviewable;  
33 whatever the decision is, it's always reviewable. It seems to go round and  
34 round.

1 CHAIR: So, you have a ping pong effect with the secretary of state and the courts; it  
2 goes backwards and forwards?

3 DR FRANEY: Yes—as a result of which justice is denied because it takes such a long  
4 time.

5 CHAIR: Anything else on discretion? Forum bar. You've written a short paragraph  
6 on this. Should it be implemented? We've had a lot of evidence that it should  
7 and we have evidence that it shouldn't.

8 DR FRANEY: My view is that it shouldn't, but when it comes down to it essentially  
9 it's a political decision.

10 CHAIR: In a sense, it is and it isn't a political decision. It seems to us that as crime  
11 gets more international and there are more states involved if the forum bar is  
12 being introduced one is really asking the courts to step into the shoes of the  
13 prosecutor and do what is really the prosecutor's job in deciding whether or  
14 not the case (a) should be prosecuted at all in this country, and (b) as between  
15 this country and some other country which is the right venue. We think there  
16 are reasonably sophisticated procedures in place between, for example, this  
17 country and United States and, in European EAW cases, through Eurojust for  
18 making these decisions. At the moment we find it quite difficult to see how the  
19 courts can step in and take over.

20 DR FRANEY: I agree with that. I don't think it could be something that a district  
21 judge could decide. If it was to be ever brought in I don't think it would be  
22 appropriate for the district judge to decide.

23 CHAIR: If the High Court has been pretty adamantly opposed to judicially reviewing  
24 prosecuting authorities in the domestic scene there is no reason to think there  
25 would be any different approach in the international context.

26 DR FRANEY: I'd hope not. I think it would be inappropriate.

27 MR DOOBAY: How often do you see it being raised in practice at the magistrates'  
28 court level? There are some high profile examples of it, but is it something  
29 that's raised very often?

30 CHAIR: No. It's been tried to be raised in high profile cases, one of which you know  
31 about.

32 MR DOOBAY: There are only two or three high profile cases I can think of, but in  
33 the more ordinary cases which you deal with does it come up as an issue  
34 frequently?

1 DR FRANEY: No, it doesn't. I think there was a very well-orchestrated campaign  
2 which worked well in a few high profile cases.

3 CHAIR: It was quite an easy campaign to set up, in that it's a subject where, if you  
4 focus fairly narrowly on key features such as the defendant has lived in  
5 England for goodness knows how many years and his roots are here, you are  
6 off to a pretty good start in that kind of argument, if you don't look at the other  
7 side of the story.

8 DR FRANEY: It would apply to a number of high-profile terrorism cases, if it was to  
9 be brought in.

10 MR DOOBAY: One of the things we are considering is that there is certainly a public  
11 perception, it seems to me, that by being a British national or British resident  
12 for a period of time if two countries are able to prosecute you that should  
13 weigh quite heavily in terms of one country, the country where you are living  
14 and of which you are a national, prosecuting you, even if that takes more effort  
15 or costs more money. That perception is probably not how it works in practice.

16 DR FRANEY: I think that's right. There is a view amongst British people that British  
17 is the best. It's certainly different, and that is something which is I think quite  
18 hard for some people to comprehend. Because other jurisdictions are different  
19 doesn't mean they're not just. I do think that being moved from where you  
20 live is quite a thing to do to somebody, so there are arguments to say that if  
21 somebody can be prosecuted where they live and where their family are then  
22 perhaps they should be. But there are other arguments the other side, because  
23 where is the evidence? We have quite a difficulty with evidence compared  
24 with some other jurisdictions. Evidence that's collected in other countries  
25 won't necessarily be admissible in this jurisdiction, if you can get it all  
26 together and brought here. It's terribly expensive to do that. It has been done  
27 in a number in a couple of cases, for example the committal proceedings in the  
28 Sawoniuc war crimes case. That must have cost a fortune with the kind of  
29 organisation that would have to go into the trial. It would make it very, very  
30 expensive and is not necessarily the best thing anyway. Even though  
31 somebody has lived here all their lives, if a crime has really occurred there and  
32 that's where all the effects of it are and where the co-defendants are----

33 CHAIR: Where the victims are.

1 DR FRANEY: Where the victims are—that's right—then there is a real argument that  
2 the trial should be there.

3 CHAIR: Well, these are all things that the CPS say that they take into account.

4 DR FRANEY: I'm sure they do.

5 CHAIR: I'm just wondering whether sufficient weight is given to the resident family  
6 of the defendant, but that's only one of a number of things.

7 DR FRANEY: In an ideal world we could have a case whereby a defendant, if it was  
8 necessary, could be kept in custody in this country rather than being extradited  
9 and could be extradited only when the trial came about; or the trial could even  
10 be by video link, but that would be perhaps a few years down the line. But  
11 there's no reason why in future we couldn't look at all those kinds of things. I  
12 do think that one of the concerns people have is being held in custody before  
13 the trial. Again, why couldn't we do that here rather than extradite them and  
14 only extradite them at the point of trial?

15 CHAIR: In other words the pre-trial proceedings would be dealt with by video link  
16 between the states?

17 DR FRANEY: Yes.

18 MR DOOBAY: One of the things which is also sometimes potentially a factor in the  
19 background is the desire of a defendant to serve their sentences here. Again,  
20 one of the potential things we could look at is to have an undertaking that  
21 somebody would be returned to serve their sentence here if they were  
22 extradited, which might mean some defendants would return, presumably.

23 DR FRANEY: Yes, I think it would. I think the effect of being separated from a  
24 family on people over a considerable period of time, and the effect of a family  
25 being separated from the person, is underestimated. It must be a cause of great  
26 concern and anguish for people.

27 CHAIR: Do you have many cases coming through Westminster Magistrates' Court  
28 involving extradition for economic crimes? This seems really to be SFO cases.  
29 It may be that there are slightly different considerations in some of those cases  
30 from the organised crime, murders, rapes and so forth. I'm thinking  
31 particularly of America where two countries may have slightly different  
32 emphases on the significance of crime. For example, price fixing in America is  
33 probably regarded as more heinous than it is here.



1 DR FRANEY: We get quite a lot of fraud applications from America, but then they  
2 describe fraud in different ways. They have a very wide description called  
3 wire fraud. Sometimes it's quite difficult to work out what it is. Usually, it's  
4 deception, but the terminology is so different that you have to look at the  
5 conduct and work out what they have done. When it's conspiracy to commit  
6 wire fraud then it becomes quite complicated. Those are the kind of cases in  
7 which we do sometimes require the assistance of the CPS and specialised  
8 counsel who deal with fraud cases before issuing warrants.

9 CHAIR: Do you have some, many complaints from defendants in those cases about  
10 being extradited?

11 DR FRANEY: The ones that are very well publicised, and Birmingham and others  
12 and Norris. Those are the main ones.

13 CHAIR: Tesler?

14 DR FRANEY: Tesler more recently, but they're well known.

15 MR PERRY: One of the things we've been asked to consider is whether the forum  
16 bar, as it was put onto the statutory book but not brought into effect, should be  
17 enacted. I just wonder how easy it would be to apply and what the practical  
18 impact of its enactment might be. The district judge would have to consider  
19 first whether a significant part of the conduct was conduct in the United  
20 Kingdom, so it would arise only where a significant part of the conduct was in  
21 the United Kingdom. Then he or she would have to go on to consider whether,  
22 in view of that all the other circumstances, it would be in the interests of  
23 justice for the person to be tried for the offence in the requesting territory. It's  
24 a sort of interests of justice test. It's not that they should be tried here; it's that  
25 it would not be in the interests of justice for them to be tried here. It wouldn't  
26 inevitably be the case that someone would be prosecuted here. How easy do  
27 you think it would be to investigate the significant part of the conduct and also  
28 whether it would be in the interests of justice for the person to be tried in the  
29 requesting territory?

30 DR FRANEY: I don't see that as being easy at all.

31 CHAIR: You would have to try the case, virtually.

32 DR FRANEY: Well, that's right. You'd have to have the full cooperation of the  
33 foreign state, and there are various reasons why they wouldn't necessarily

1 want us to go into their investigative processes at that stage of a proceeding,  
2 trying the charge before the trial.

3 MR PERRY: Yes. In a part 1 case would it be possible just by looking at the warrant,  
4 because that's what you are supposed to be dealing with, to see whether it  
5 would not be in the interests of justice for the person to be tried in the  
6 requesting territory?

7 DR FRANEY: I can't see that working.

8 CHAIR: I don't think it would work. I'm just trying to think of some cases I've heard  
9 in the Admin Court. You look at the warrant and it has a very broad  
10 description of the fraudulent conduct that's alleged, but not much idea of  
11 where it's been committed.

12 DR FRANEY: Yes, that's right. You just get the conduct, nothing else about it.

13 MR PERRY: So, you'd have to get more information, presumably from the requesting  
14 territory, and if you requested more information you would have to say: 'We  
15 are looking to see if it's in the interests of justice whether these proceedings  
16 should be taken against this person in your territory. Suppose they then say,  
17 'No. We're not going to give you any more information; we want you to  
18 execute the warrant.'

19 DR FRANEY: Under the framework decision they would be entitled to say that.

20 CHAIR: Anyway, you get issues about what the court would have to take into account  
21 in the interests of justice. I suppose that over a period of time the courts would  
22 have to work out all the things that are possible to take into account. What is  
23 significant? Is it other than minimal.

24 DR FRANEY: It would be a difficult; it would have to be worked out through  
25 litigation.

26 CHAIR: Well, I think the district judges have made the point that when you get new  
27 legislation like the Extradition Act you get a flurry of litigation testing all the  
28 unmeritorious points that are then eventually established and then the thing  
29 settles down. The message that we've got is: don't rock the boat after it's  
30 settled.

31 DR FRANEY: I agree with that—unless of course it's something that you really think  
32 ought to be changed. Obviously, legislation isn't set in stone.

33 CHAIR: A lot of people who say you should rock the boat and tear up the framework.

1 DR FRANEY: That also happened with the previous legislation, the 1989 Act. There  
2 was a flurry of litigation at the beginning of that and then it settled down.

3 MR PERRY: Do you think it has settled down now? We've had about 10 or more  
4 cases in the House of Lords and the Supreme Court.

5 DR FRANEY: I think it's 11 or 12 now, yes. It has settled down, plus the passage of  
6 time as an argument has clarified. How much the court should look at human  
7 rights issues in Europe really hasn't quite settled down yet. I don't think the  
8 Admin Court is quite *ad idem* on that.

9 CHAIR: You mean, Mr Justice Mitting has been overturned?

10 DR FRANEY: That is still an issue. But otherwise people still want to argue things  
11 even though they are actually unarguable.

12 MR PERRY: Yes—and preserve their position.

13 DR FRANEY: Yes, it's an odd thing to see, but people actually want to say why they  
14 shouldn't be sent back, and quite often they are things that really aren't  
15 arguable; it's a mixture. The usual ones are: 'I'm not guilty; I'm wrongly  
16 convicted. I've got a family here; I've made a new life,' all of which you feel  
17 very sympathetic to but they are not reasons not to send somebody them back.  
18 Another very common one is non-state actors, people having had an  
19 unpleasant experience in the past. Again, the presumption is that the state will  
20 protect them from it.

21 MR PERRY: One of the other things we have been discussing among ourselves is the  
22 position of asylum.

23 DR FRANEY: Yes; it's difficult.

24 MR PERRY: Any views in relation to the distinction drawn by the Act as to the point  
25 in time at which you claim asylum and the impact that has?

26 DR FRANEY: Asylum is a very difficult issue. If we were to adjourn proceedings  
27 until the end of asylum proceedings—there is some merit in that—they take  
28 such a long time, but asylum and extradition just don't fit well together.

29 CHAIR: And deportation?

30 DR FRANEY: Deportation gives people a choice as to where they have to go, but if  
31 there is extradition people can't be deported; they have to wait for the  
32 extradition. They fit together better. But asylum actually protects people from  
33 their own state. In extradition proceedings that state has to hear what they are

1 saying, whereas in asylum proceedings the state would not be told and you  
2 actually wouldn't hear the state. They don't fit well.

3 CHAIR: And that has caused problems, hasn't it, with the state being told and not  
4 being told?

5 DR FRANEY: Yes. It's complicated for the CPS and the Home Office. It's not an  
6 easy decision.

7 MR DOOBAY: Can we just split up those issues? At the moment the Act makes a  
8 distinction. If you claim asylum after the extradition is certified by the  
9 secretary of state then you can't be extradited until the asylum process is  
10 finished.

11 DR FRANEY: Yes.

12 MR DOOBAY: Do you see any reason why there should be that distinction as to  
13 whether you've claimed before or after? I heard some representations that if  
14 you claim before the extradition request there is nothing to suggest that's less  
15 meritorious than claiming it after.

16 DR FRANEY: No; there's nothing to suggest it's more or less.

17 MR DOOBAY: In fact, it's the opposite.

18 DR FRANEY: I don't understand the justification for that.

19 MR DOOBAY: I'm not sure there was a particular reason why it was done that way  
20 in the Act; it may simply be a *lacuna* that hasn't been filled, but you can't see  
21 any reason for that.

22 DR FRANEY: I don't know. If there was a particular reason I don't know what it is  
23 and I can't see it.

24 MR DOOBAY: Right. In terms of the forum issue I'm just going to put a counter  
25 argument to you, which is that within the framework decision there is an  
26 ability for the state to refuse. There's an optional bar on the basis that they are  
27 entitled to prosecute. I know you were suggesting that states would take  
28 umbrage at the fact you were thinking about refusing to extradite for that  
29 reason, but there are states who have implemented the optional bar. We can  
30 give the example of France, and I'm sure there are others. You must therefore  
31 refuse on the basis that they have the jurisdiction to prosecute. I take your  
32 point as to applying the test as it's written at the moment in the Act, and that  
33 may be a difficult test to apply, but why as a matter of principle do you think it  
34 would cause such great upset?

1 DR FRANEY: It's not a decision for a district judge. If the bar was to be implemented  
2 somehow or other it would have to be brought in differently, but this is a  
3 prosecutorial decision and it really isn't appropriate for a district judge to  
4 review that decision.

5 CHAIR: Are you saying it's not for a district judge or a judge at all?

6 DR FRANEY: I don't think it's for a judge at all, but certainly not a district judge. It's  
7 a decision for a prosecutor. In many ways, the idea that you could have this as  
8 a reason not to extradite would mean there must be some sort of breakdown  
9 then in the co-operation between states as to who prosecutes and why, if you  
10 see what I mean.

11 MR DOOBAY: Yes; I do understand. If it was suggested that there hadn't been an  
12 agreement that the UK rather than France would prosecute therefore you  
13 would have to invoke it as a reason to stop the European arrest warrant.

14 DR FRANEY: Absolutely.

15 MR PERRY: I suppose that under the Act if you are prosecuted here that's an  
16 absolute bar.

17 DR FRANEY: Yes.

18 MR PERRY: And if you are then charged here and prosecuted that-----

19 DR FRANEY: And you are either acquitted or convicted, yes, that's an absolute bar.

20 MR PERRY: So, if it just happens that the prosecuting authorities here on the day you  
21 begin the extradition hearing charge the defendant and institute criminal  
22 proceedings, then the-----

23 DR FRANEY: If there are criminal proceedings in this country, whatever they are,  
24 then the extradition hearing has to be adjourned; and if there was an acquittal  
25 or conviction there would be a bar.

26 CHAIR: What the CPS were saying was that it depends very much on the state of the  
27 investigation. If there is a criminal investigation here that's gone three-  
28 quarters of the way down the line and one in the States that has got only  
29 halfway down the line that's a strong plus point for the case being heard here.  
30 If there is no investigation here and an investigation is underway in the States  
31 that's virtually game, set and match for it to go to the States. But the middle  
32 cases are when there are investigations that are both partly under way in both  
33 jurisdictions the prosecutors can sort it out between themselves taking into  
34 account the principles by which they have agreed to operate. The problem I

1 foresee is: if the prosecutors have decided in a particular case this is one for  
2 the United States then the British court comes in and says: 'Oh, no,  
3 Mr Prosecutor, you have got it wrong; this is a forum bar case for here', what  
4 do you do when you get the United States court saying: 'Blow that! We don't  
5 take the same view'?

6 DR FRANEY: Absolutely—and then you would have somebody who probably, if  
7 there was a bar found here, couldn't leave this country without being  
8 extradited from somewhere else. A bar to extradition is not the end of it.

9 CHAIR: Good point. So, when they go away to France for the weekend that's not the  
10 end of it.

11 DR FRANEY: As long as they're not French, that's probably right.

12 CHAIR: I chose a bad example.

13 DR FRANEY: People don't see that extradition is not the end; it's only a process  
14 whereby somebody is sent for trial or to serve a sentence. Succeeding in  
15 extradition doesn't stop the extradition proceedings elsewhere. In today's  
16 world not being able to travel is very difficult for some people, it's a great  
17 deprivation of a right.

18 MR DOOBAY: Can I just follow that up? One point raised with us as well is: what  
19 happens when the UK court discharges you, particularly for a European arrest  
20 warrant where there may be an ability under Schengen to have some form of  
21 process to remove the alert? Do you think that if it is possible to do it the UK  
22 should have a mechanism to able to remove an alert if we have refused  
23 extradition?

24 DR FRANEY: Certainly, people do get arrested when they go abroad; I'm aware of  
25 that. One of the troubles with, say, allowing somebody not to be extradited on  
26 the basis of the passage of time is very much seeing it from their point of  
27 view, whereas we haven't heard from the victim; we haven't heard from those  
28 in the foreign state. I think that what goes with the succeeding in extradition is  
29 that you can't travel; it's a bit like breaching diplomatic immunity. You can't  
30 travel; you've got to go home and stay there. There are no reasons why we  
31 shouldn't make representations to the state, but I don't think we can insist that  
32 there is no longer an alert because there is the whole other side of thing that  
33 we haven't heard.

34 MR DOOBAY: Well, we have heard from the requesting state.

1 DR FRANEY: We've got the EAW.

2 MR DOOBAY: And there has been representation as part of the proceedings.

3 DR FRANEY: Yes, but mostly, not always, it's about the passage of time and the  
4 defendant, not what happened in the foreign state. It's one of the things  
5 whereby trials are better than succeeding in extradition proceedings.

6 MR DOOBAY: I meant to ask you and got sidetracked. Naturalisation is a very  
7 unusual point, but what's come up is that if you're naturalised as a UK citizen  
8 you lose your refugee status.

9 DR FRANEY: Yes, you do.

10 MR DOOBAY: It's come up in a particular case for an extradition request. Where a  
11 person is a refugee that will stop the extradition process, but if you are a  
12 refugee and then become a naturalised British citizen you lose that protection  
13 and you have to refight your case before the extradition court.

14 DR FRANEY: That's right, under the Human Rights Act.

15 MR DOOBAY: You have to put your arguments again. I just wonder whether you can  
16 see any reason why there should be that distinction, because obviously you  
17 can simply maintain your refugee status forever and not become naturalised.

18 DR FRANEY: I suppose it just goes with being a British citizen. It is so difficult  
19 because when somebody has become a citizen they're no longer a refugee, but  
20 things change in foreign states anyway. One of the corollaries of no longer  
21 being a refugee is that, just as if you are a British citizen and have never had  
22 refugee status, or had to consider claiming it, you have to look at what the  
23 human rights position would be. It's the same, isn't it? Just because somebody  
24 once had refugee status doesn't mean it's the same position now. It's difficult.

25 MR PERRY: I just wanted to address the point about whether we are in a position to  
26 remove alerts or in effect say that because you've been discharged in  
27 proceedings here that should be a bar to proceedings in other member states,  
28 say, under the EAW system. I suppose an argument in favour of that would be:  
29 if you have mutual recognition of court orders there should mutual recognition  
30 of a decision here to discharge. But I suppose it may be slightly more  
31 complicated than that, because it may depend on the basis upon which a  
32 discharge has been made. Suppose a person is discharged because the EAW  
33 does not satisfy the double criminality requirement because, for example, it's  
34 not an offence known to English law, or it's an extra-territorial offence over

1 which the requesting state asserts jurisdiction but where the United Kingdom  
2 would not. That would be, I suppose, what most people would think of as a  
3 technical discharge, because the only reason we've discharged it is because the  
4 double criminality requirement, or the conduct requirement, has not been  
5 satisfied and it says nothing about the merits of the case.

6 DR FRANEY: Yes.

7 MR PERRY: So, if there were to be some system for removing alerts it might have to  
8 be slightly more sophisticated than that.

9 DR FRANEY: It would have to be something that everybody agreed. At this stage we  
10 and the requesting state would agree it's a valid reason for not going ahead  
11 with the case.

12 MR PERRY: Not going ahead with the prosecution at all, rather than ever seeking  
13 extradition?

14 DR FRANEY: Yes, and they are quite different. Of course, there are bars in the Act  
15 which are not included in the framework decision, particularly the passage of  
16 time.

17 CHAIR: Do you ever get any cases where someone has been discharged by another  
18 member state and the EAW has been executed here?

19 DR FRANEY: I cannot remember one like that. There's no reason why we shouldn't,  
20 but I can't remember one.

21 CHAIR: What would happen in those circumstances?

22 DR FRANEY: I think we would go ahead with the extradition hearing, because the  
23 discharge could be for all sorts of reasons. One of the reasons people get  
24 discharged, not often but sometimes, from this jurisdiction is for very  
25 technical reasons, for example that we haven't complied with time limits.

26 CHAIR: But would the district judge look at the reasons why the discharge takes  
27 place or would he say, 'That's irrelevant. Let's get on with the case'? Probably  
28 it's not fair to ask you that question.

29 DR FRANEY: It's a difficult question to answer because it's so hypothetical. It could  
30 bring into it things such as passage of time or possibly even abuse, depending  
31 on when and how it happened and all the rest of it, but on the face of it it's not  
32 a bar, it's not relevant.

33 CHAIR: I suspect that there would be an abuse of argument probably, would there  
34 not, Anand?



1 MR DOOBAY: I suspect they would re-run the issues. If it was compelling enough  
2 they would probably re-run the issues that led to the discharge in the other  
3 country.

4 DR FRANEY: We have had persons arrested on provisional warrants under part 2 and  
5 papers aren't received in time. I can't remember what the case was now, but  
6 we have certainly had one of those. Somebody was released and then arrested  
7 here.

8 MR DOOBAY: I am sure there have been such cases; I'm just trying to remember the  
9 name of one. I don't think an abuse would work, but I think what happened in  
10 that case was they said: 'Look, let me explain to you what happened in the  
11 other country and why it was discharged', and in fact the UK court was  
12 satisfied with that. There was a reason for that. It slightly short-circuited the  
13 process but it didn't obviate the need to hear it.

14 DR FRANEY: But if there is going to be a bar which is accepted by every jurisdiction  
15 it does seem very harsh to have them arrested over and over again.

16 MR DOOBAY: There have been cases where clearly where somebody was  
17 discharged from three different jurisdictions.

18 DR FRANEY: Yes. It's unusual but possible.

19 MR PERRY: On the UK/US Extradition Treaty, you have experience of dealing with  
20 United States requests and the amount of information that's provided to the  
21 court. Just as a matter of practice, what level of information does the United  
22 States provide, say, as compared with other category 2 territories?

23 DR FRANEY: Their requests are very well laid out. They are very clear and well  
24 written. They all follow the same format; they are very easy to follow. A  
25 prosecutor will set out the history and the law and then will annex to it various  
26 documents. They always used to annex statements but they don't have to now.  
27 They annex the warrant, and quite often they still do annex statements about  
28 what's happened, but they usually have very good information compared with  
29 other countries.

30 MR PERRY: My experience—there may be other cases about which I'm ignorant—is  
31 that you always have an indictment that's been returned by a grand jury.

32 DR FRANEY: That's right. There's always the indictment; there's always the  
33 charges; there's always the arrest warrant. They are very nicely laid out.

34 CHAIR: What will have happened before the grand jury?

1 DR FRANEY: Grand jury is, I think, almost the equivalent of what used to be a  
2 committal court. The grand jury takes evidence and decides that there should  
3 be an indictment, as I understand it.

4 MR PERRY: The indictment is a narrative indictment rather than just a bare statement  
5 of offence and particulars; it sets it out in detail.

6 DR FRANEY: That's right—the history of what happened and all the rest of it.

7 MR PERRY: You say that you don't really see a big difference between the  
8 reasonable basis to believe test, which is the test we have to satisfy when we  
9 are submitting requests to the United States, and the reasonable suspicion test,  
10 which is the test for the grant of a warrant that the United States has to satisfy.

11 DR FRANEY: I don't deal with many cases going the other way, but now and again  
12 we get them before the court to take evidence. I can't say I'm an expert on  
13 that, but I can't on the face of it see any particular difference.

14 MR PERRY: Can you think of any case in which the provision by the United States,  
15 or any state for that matter, of *prima facie* evidence would have led to the  
16 discharge of an extraditee on the basis it was shown that the request had been  
17 made either for an proper motive or that there was no substance to the case?

18 DR FRANEY: It's a matter of thinking back, isn't it?

19 MR PERRY: We've had our attention directed to the *Raissi* case where he was kept in  
20 custody for some time on the basis that a request was going to be submitted by  
21 the United States for his return to that jurisdiction on terrorist offences,  
22 whereas when the request came in he was wanted for only much more minor  
23 offences, including making a false statement in order to obtain a pilot's  
24 licence.

25 DR FRANEY: That wasn't an extradition crime at the end of it.

26 MR PERRY: He was discharged.

27 DR FRANEY: I came to that case towards the end, that wasn't an extradition crime.

28 MR PERRY: It may be necessary to look at what the High Court had to say in that  
29 case about the liability of the CPS. One of the reasons the CPS was held liable  
30 was that they may have over-stated it without instructions.

31 DR FRANEY: I think they may have accepted without any further investigation what  
32 was said. It might be worth looking at that one.

33 MR DOOBAY: To come back to human rights, which we have dealt with in passing,  
34 I appreciate that the law is in a slight stake of flux in terms of how to approach

1 the issue of human rights. Assuming the law is in its current state, the court  
2 has to look at human rights and there's a presumption in favour of the  
3 requesting state, and if the defendant is able to satisfy the court that there's  
4 seriously cogent evidence to suggest a violation then that can still be a bar. Do  
5 you see that as being the appropriate way to look at human rights violations?

6 DR FRANEY: Within Europe it doesn't fit easily with the idea that we are one area.  
7 We would never think of doing that to Scotland. When it comes to it, there's  
8 not much difference. Scotland's a different jurisdiction, but we'd never think  
9 of raising that kind of bar in Scotland. We never thought of raising that kind of  
10 bar with Ireland under the Backing of Warrants Act. So, it doesn't fit easily  
11 with the idea that you are one area of security and justice.

12 MR PERRY: I suppose the counter argument is that we are not and there are some  
13 countries where there are systemic violations, or, even if they are not systemic,  
14 there are violations such as prison conditions and pre-trial detention periods.

15 DR FRANEY: You could imagine it happening perhaps in places very close to us. If  
16 it were to happen that, say, prisons in Scotland were full because law and  
17 order broke down for some reason-----

18 CHAIR: Well, there was a case in Scotland about slopping out which was ruled to be  
19 contrary to article 3.

20 DR FRANEY: Inhumane, I think, rather than anything else. It doesn't fit easily, but,  
21 yes, I think that's the way to deal with it. There has to be the evidence to show  
22 it and to argue it. The fact it's there gives people some hope. There are people  
23 who come before the court who ought to be focusing on, 'How do I deal with  
24 this when I go back to wherever I've got to go?' rather than focusing on, 'If I  
25 argue passionately enough, will they let me stay?'

26 MR PERRY: I presume that's the difficulty of having any bar.

27 DR FRANEY: Yes.

28 MR PERRY: As a defence lawyer, as long as there's one bar there [inaudible]. I'm  
29 not suggesting that their case must fit squarely within that one bar.

30 DR FRANEY: It seems to me to give people false hope. They seem to believe that  
31 they will not go back when in fact they are going to. It's not just them but their  
32 families. What everybody should be doing is planning on how to deal with the  
33 future rather than desperately trying to hold onto the present.

1 CHAIR: I have just one very basic question. Is the legal aid application form for  
2 means for extradition exactly the same as in every other case?

3 DR FRANEY: It's exactly the same as in every other case. I wonder if I could ask one  
4 thing.

5 CHAIR: Please do.

6 DR FRANEY: The video link provisions. You have probably never looked at them;  
7 there's no particular reason to. At present, the court may make a direction for  
8 an initial hearing. We have never done it yet, but I hope that we might. That  
9 was brought in when it was envisaged that the pilot project down at  
10 Camberwell would be expanded. I don't know whether it will be or not. We do  
11 use video links for prisons. At present we do use it for those who request that  
12 we should use it for the hearing. Some people really don't want to leave the  
13 prison, even for the hearing.

14 CHAIR: You are talking solely about extradition, are you?

15 DR FRANEY: Yes.

16 MR PERRY: So, you use it for the extradition hearing itself?

17 DR FRANEY: We have done.

18 MR PERRY: For people who request that you do it?

19 DR FRANEY: I ask that the defence make the request in writing and confirm that  
20 they've got their client's firm instructions that that is what they want. It would  
21 be rather nice if the legislation could be amended just to reflect the fact we  
22 could use it for hearings. I wouldn't mind it going a little further.

23 MR PERRY: Which are the provisions that would need to be amended?

24 DR FRANEY: It's something like section 206A. It's one of those sections that has got  
25 a large capital letter after it because it's inserted later.

26 CHAIR: Which Act is it?

27 DR FRANEY: The Extradition Act.

28 MR PERRY: It is 206C

29 DR FRANEY: Is would be A to C.

30 MR DOOBAY: Can I just pick up on that point? It would be a little extreme to amend  
31 it to be without consent.

32 DR FRANEY: I would certainly like it to be quite clear that we can use it for  
33 hearings, and with consent certainly.

1 CHAIR: But if you've got unfettered power to do it without consent, it does not need  
2 a lot of imagination to see it being done in every case, because of the costs of  
3 bringing somebody to court.

4 MR DOOBAY: Presumably, for domestic cases this issue must arise for trials. You  
5 can't have trials by video link.

6 DR FRANEY: We can't have trials by video link, no.

7 CHAIR: But then you'd say extradition isn't a trial?

8 DR FRANEY: No.

9 MR PERRY: I suppose the way to do it would be just to make it discretionary.

10 DR FRANEY: If it was discretionary there would be appeals about it. At the moment,  
11 because it's not clear the consent has to be absolutely clear. Basically, what  
12 I'm trying to do is make it appeal proof.

13 MR DOOBAY: I see difficulty with consent, but for myself I think that drawing a  
14 distinction between a trial and an extradition hearing when the consequence of  
15 an extradition hearing is physically being removed to another country-----

16 DR FRANEY: The other alternative is to do it in their absence, which is of course  
17 what happens in trials. That's a road we're very loath to go down, but that is  
18 the other alternative if somebody will really not cooperate.

19 CHAIR: What if they're not fit to come to court?

20 DR FRANEY: Well, we would then be in the realms of section 25. There's power to  
21 adjourn it until they are better or discharge them from it. If the person is not  
22 unwell they are just not-----

23 CHAIR: Not keen on coming?

24 DR FRANEY: To the point that nobody can bring them. When people are absolutely  
25 determined I'm afraid they can't be brought. You can't get them upstairs;  
26 Serco won't touch them.

27 CHAIR: What do you do if they say, 'I'm not going to court; I'm not prepared to sign  
28 the consent'?

29 DR FRANEY: I think there will come a point where it has to be done in their absence.  
30 I would think that the video link is a better way.

31 CHAIR: Is there power in the Act to do it in the absence of the defendant?

32 DR FRANEY: There are powers to use it relating to a trial, yes.

33 MR DOOBAY: My concern is that you have the same powers as in a domestic case.

34 DR FRANEY: We do.

1 MR DOOBAY: Why should we be treating a defendant differently in an extradition  
2 case from a domestic case?

3 DR FRANEY: That's fair enough. Certainly, I would like it to be clear that we can do  
4 it with consent.

5 CHAIR: Well, the other answer is to go on doing it until appealed.

6 DR FRANEY: Well, that's true, but if it was there then people would actually think  
7 about it as well.

8 MR DOOBAY: It's probably for defence lawyers to say, 'If you would like to have it  
9 you can', and then they can say, 'Yes, okay'.

10 DR FRANEY: Yes, and they would.

11 CHAIR: Anything else you would like to raise or matters we haven't probed  
12 sufficiently, or areas where you think might be in danger of going down the  
13 wrong road?

14 DR FRANEY: No. I would just like to reiterate the legal aid point. I know you are  
15 very aware of it, but it's something I'm concerned about.

16 MR DOOBAY: Well, if you are content we'll give your details to those we are in  
17 contact with.

18 DR FRANEY: That would be helpful.

19 CHAIR: Can you pick that up, Rob?

20 A SPEAKER: Yes.

21 CHAIR: Thank you. Well, you'd better make a strong case to them. I don't know how  
22 much it's going to save,

23 DR FRANEY: I'm sure it will do.

24 MR DOOBAY: What are you looking at in terms of savings? It would be helpful if  
25 you could outline to them where they should be looking.

26 DR FRANEY: It would be in terms of court staff, and the Legal Services Commission  
27 staff.

28 CHAIR: And saving of court days?

29 DR FRANEY: Oh, yes, absolutely.

30 CHAIR: I suppose the district judges will say: 'Well, we'd quite like the time to write  
31 [inaudible].'

32 DR FRANEY: Yes.

1 CHAIR: Thank you so much. It's been really helpful from our point of view, and you  
2 have raised a lot of thoughts with us that we will have to sort out. It's not a  
3 straightforward subject, is it?

4 DR FRANEY: No, it's not; it's a complicated subject.

5 CHAIR: And quite important, too.

6 DR FRANEY: Yes, it is. Of course, it reflects a changing world.

7 CHAIR: We would like to get it right if we can—if there is a right. Thank you for  
8 your time. It's been very helpful, and we're grateful for your time.

9 DR FRANEY: Thank you.

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