HOUSE OF LORDS

Library Note

Work of the Ad Hoc Committees in 2014–15: House of Lords Extradition Law Committee

On 12 June 2014, the House of Lords Extradition Law Committee was appointed to consider and report on the law and practice relating to extradition, in particular the Extradition Act 2003. The Committee published two reports. On 10 November 2014, the Committee published a short report, *The European Arrest Warrant Opt-In,* and on 10 March 2015, published its main report, *Extradition: Law and Practice.* The Government published its response to the reports on 20 July 2015, which were then debated in the House of Lords on 16 September 2015.

With regard to the first report on the European Arrest Warrant (EAW), the Committee stated that its intention was to inform debate in both Houses ahead of the vote in the House of Commons on 19 November 2014 on whether the UK should re-join the EAW. The report made a number of conclusions with regards to the EAW. The Committee noted that despite flaws in the EAW, such as miscarriages of justice, the majority of its members thought that the UK should opt back into the EAW. The Committee also recommended that both amendments to the Extradition Act 2003, and further work by the Government should be undertaken in order to improve the extradition system.

In its main report, the Committee concluded that though there are aspects of the law and practice which are "of concern", there is "no systemic problem with the UK's extradition regime". The report made a number of conclusions and recommendations on various aspects of the extradition system. For example, the Committee argued that the system of seeking assurances from countries in order to protect the human rights of an individual sought for extradition did not provide "sufficient confidence that the UK is meeting its human rights obligations". The Committee also considered the issue of legal aid in extradition cases. It argued that legal aid should not be means-tested and awarded automatically. In addition, the Committee heard evidence on conditions within some aspects of the US justice system. It recommended that the Government make representations to the US on the treatment of individuals extradited from the UK, and formalise these discussions in a memorandum of understanding.

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1. Background

On 12 June 2014, the House of Lords Extradition Law Committee was appointed to consider and report on the law and practice relating to extradition, in particular the Extradition Act 2003.

This Library briefing examines two reports published by the Committee. The first was a short report on the *European Arrest Warrant Opt-In*, to inform parliamentary debate on this issue, and the second a more detailed report on *Extradition: Law and Practice.*

This briefing provides background to issues considered in both reports; examines the arguments made during evidence sessions; and summarises the recommendations made and conclusions reached by the Committee at the end of its investigation. This paper then examines the Government response to the Committee's findings, and the subsequent debate on both reports in the House of Lords.

2. First Report: *European Arrest Warrant Opt-In*

2.1 Background

The European Arrest Warrant (EAW) is a mechanism through which it is possible to extradite individuals wanted in relation to significant crimes between EU member states, to either face prosecution or serve a prison sentence for an existing conviction.[1] It was established by an EU Council framework decision on 13 June 2002.[2] On 1 January 2004, the framework decision came into force in eight member states—Belgium, Denmark, Finland, Ireland, Portugal, Spain, Sweden and the UK.[3]

An EAW may be issued by a country's judiciary if the person whose return is sought is accused of an offence whereby if found guilty, carries the maximum penalty of at least one year in prison; or if the individual has been sentenced to a prison term of at least four months.[4]

In the United Kingdom, part one of the Extradition Act 2003 implements the EAW framework decision,[5] and involves the following steps:

- **An EAW is submitted**: This is usually done electronically, by means of an alert placed on the Second Generation Schengen Information System (SISII).
- **A certificate is issued**: The National Crime Agency can only do this if the requirements of section two of the Extradition Act 2003 have been met, for example, a proportionality test.
- **Arrest**: Only once a certificate has been issued can the requested person be arrested. Once arrested, they must be brought before a district judge at the magistrates' court or equivalent.

[1] National Crime Agency, 'European Arrest Warrant Statistics', accessed 30 January 2017.
[2] EUR-lex, *Council Framework Decision on 13 June 2002 on the European Arrest Warrant and the Surrender Procedure between Member States*, accessed 7 February 2017.
[3] Euractiv, 'EU Arrest Warrant Enters into Force', 5 January 2004.
[4] ibid.
[5] Home Office, 'Extradition: Processes and Review', 26 March 2013, accessed 2 February 2017.

- **Initial Hearing**: At the initial hearing, the judge must: confirm the identity of the requested person; inform the person "about the procedures for consenting to his or her extradition"; and set a date for the extradition hearing to take place if the arrested person does not content to his/her extradition.[6]

- **Extradition Hearing**: This should normally take place within 21 days of a person's arrest. At the hearing, the judge must be satisfied that the conduct described in the arrest warrant amounts to an extradition offence and that "none of the statutory bars to extradition apply". These include rules against double jeopardy and that "the requested person must only be dealt with in the requested state for the offences for which they have been extradited".[7] In addition, the judge must decide if extradition would be disproportionate or incompatible with the person's human rights.[8]

- **Appeal Hearing**: If either the state or person facing extradition is unhappy with the judge's decision at the extradition hearing, then they can challenge it in the High Court, as long as they ask the High Court for permission to appeal within seven days of the judgment. If the High Court grants permission, it will consider the appeal. Should the High Court rule in favour of the requested person, it will quash the extradition order and send the case back to the magistrates' court. However, should the High Court rule in favour of the state, the person may request an appeal in the Supreme Court. As with the process in the High Court, the Supreme Court will hear an appeal only if permission is granted and if the case involves a point of law important to the general public.

- **Surrender:** The requested person should be extradited to the country that issued an EAW within ten days of the final court order. However, this time limit can be extended in exceptional circumstances and with agreement of the requested state.[9]

Prior to 2004, an average of 60 individuals a year were extradited from the UK.[10] In contrast, since 2004, the UK has extradited over 7,000 individuals accused or convicted of a criminal offence to other EU member states. Over the same period, the EAW was used to extradite over 1,000 individuals to the UK.[11]

Under Article 10 of Protocol 36 of the Lisbon Treaty, the UK has the option to opt-out of all EU justice and home affairs legislation, which includes the EAW, made prior to the signing of the Treaty.[12] In October 2012, the Government announced their intention to use the provision to opt-out of approximately 130 measures, before negotiating with the European Commission and other member states to "opt back into those individual measures that it is in our national interest to rejoin".[13]

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[6] Home Office, 'Extradition: Processes and Review', 26 March 2013, accessed 2 February 2017.
[7] ibid.
[8] ibid.
[9] ibid.
[10] HM Government, *The UK's Cooperation with the EU on Justice and Home Affairs, and on Foreign Policy and Security Issues*, 9 May 2016, p 3.
[11] ibid.
[12] EUR-lex, *Consolidated Version of the Treaty on European Union: Protocol (No 36) on Transitional Provisions*, accessed 30 January 2017.
[13] HC *Hansard*, 15 October 2012, col 35.

In a statement to the House of Commons at the time, the then Home Secretary, Theresa May, stated that:

> Under the terms of the Lisbon Treaty, the Government are required to decide by 2014 whether we opt out of, or remain bound by, all the EU police and criminal justice measures adopted prior to the treaty's entry into force. Under the treaty, the Government are required to make a final decision by 31 May 2014, with that decision taking effect on 1 December that year. Although that might seem a long way off, the process of decision making, as with many EU matters, is complicated. We wish to ensure that, before that point, we give the House and the other place sufficient time to consider this important matter.
>
> In total, more than 130 measures within the scope of the decision are to be considered at this stage. A full list of the measures was provided to the House on 21 December last year and a further update was given on 18 September this year. The Government are clear that we do not need to remain bound by all the pre-Lisbon measures. Operational experience shows that some of the pre-Lisbon measures are useful, that some are less so and that some are now, in fact, entirely defunct.[14]

On 9 July 2013, Mrs May told the House of Commons that the Government had decided to rejoin 35 of the 130 EU justice and home affairs measures, which included the EAW. In her statement, Mrs May said that the Government would seek to rejoin the EAW, as it "owe[d] it to […] victims [of crimes by those awaiting or already extradited], and to their loved ones, to bring these people to justice".[15] She also announced plans to amend the Anti-social Behaviour, Crime and Policing Bill 2014—which at the time, was in Committee stage in the House of Commons—to ensure that "an Arrest Warrant can be refused for minor crimes".[16]

2.2 Evidence Session on the European Arrest Warrant

On 5 November 2014, the Committee heard arguments from Baroness Ludford (Liberal Democrats) and Jacob Rees-Mogg (Conservative MP for North East Somerset) both for and against retaining the EAW.[17] Baroness Ludford summed up her arguments in favour of the EAW as follows:

> My basic proposition is that the European Arrest Warrant has delivered big improvements in the speed of extradition through the free movement of judicial decisions in place of traditional inter-governmental relations. That is important for the public interest in bringing criminals to justice and it is also important for victims. I think it is very positive that, under the European Arrest Warrant, extradition is purely judicial and not political, which was the case under the pre-EAW system.[18]

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[14] HC *Hansard*, 15 October 2012, col 35.
[15] HC *Hansard*, 9 July 2013, cols 177–93.
[16] ibid.
[17] House of Lords Extradition Law Committee, *Revised Transcript of Evidence Taken Before the Select Committee on Extradition Law*, 5 November 2016.
[18] ibid, p 2.

In contrast, Mr Rees-Mogg's principal objection to the EAW focused on the impact on the UK judiciary:

> My view of the European Arrest Warrant is that it is of fundamental importance in the creation of the European justice and home affairs competence and, indeed, in the creation of supranational powers over justice and home affairs, with a fundamental implication for the administration of justice in the United Kingdom. I think what is happening at the moment is of the highest constitutional importance and, therefore, it needs to be looked at in those terms as well as in the administrative convenience of a particular form of extradition. I think that is a relevant starting point in this context.[19]

During the evidence session, Mr Rees-Mogg highlighted what he considered to be further flaws in the EAW, citing not enough protection for habeas corpus—which allows an individual to report what they suspect to be an unlawful detention or imprisonment before a court—which he contended had subsequently led to miscarriages of justice.[20] As an example, Mr Rees-Mogg raised the case of Andrew Symeou. In 2009, Andrew Symeou was extradited to Greece, and held for two years before being cleared of manslaughter in 2011, following the death of a teenager at a Greek nightclub.[21] Mr Rees-Mogg also argued that the EAW had previously been issued for minor crimes, for example, someone being deported back to Poland for "being drunk in charge of a bicycle".[22] As a result, he argued that "there must be a degree of proportionality" with relation to the EAW.[23]

The two witnesses also came to contrasting conclusions about whether the UK should proceed with the EAW. Baroness Ludford argued that the UK should opt-in to the EAW and then seek to improve its operation, stating that:

> I think there is quite a good basis for us working with sympathetic partners in the European Parliament and the Council, but that obviously is predicated upon our continued participation in the EAW. In a sense, I would not start from here to think of alternatives. Like the Government, I believe that anything other than the European Arrest Warrant—while it has flaws that need fixing—is second-best and more cumbersome.[24]

Conversely, Mr Rees-Mogg said that he objected to the UK opting-in to the EAW on a constitutional basis:

> The problem with that is that from 1 December those will be decisions made by the Court of Justice of the European Union; they will no longer be a matter for the British courts exclusively. That is the major change and my major concern. It is the enforceability of the arrest warrant by an action of the Commission taken to the Court of Justice of the European Union and therefore, unlike any other extradition treaty, no longer a matter exclusively of our law.[25]

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[19] House of Lords Extradition Law Committee, *Revised Transcript of Evidence Taken Before the Select Committee on Extradition Law*, 5 November 2016, p 6.
[20] Cornell University Law School, 'Habeas Corpus', accessed 7 February 2017.
[21] BBC News, 'European Warrants Need Reform, Says Acquitted Symeou', 1 November 2011.
[22] House of Lords Extradition Law Committee, *Revised Transcript of Evidence Taken Before the Select Committee on Extradition Law*, 5 November 2016, p 29.
[23] ibid, p 23.
[24] ibid, p 17.
[25] ibid, p 7.

Instead, Mr Rees-Mogg called for a bilateral agreement on extradition arrangements between the UK and the EU, telling the Committee:

> The European Union is a sensible negotiating body […] They want to have an extradition agreement with us just as much as, if not more than, we want one with them. We send them many, many more people than we get back. So it is hugely for the overall advantage of the other member states to have some arrangement with us.[26]

However, Baroness Ludford contended that it was not possible for the EU to negotiate treaties with individual member states:

> I believe it is being suggested by some that the UK could replace the European Arrest Warrant with an extradition deal with the entire EU, but I have come across considerable doubt whether the EU can legally sign a treaty with one of its own member states on behalf of 27 others. The precedents with Denmark were pre the Lisbon Treaty and I think the wording of the Lisbon Treaty now suggests that the EU can only negotiate treaties with non-member states.[27]

2.3 Committee Report: Conclusions

Following the evidence session, the House of Lords Extradition Law Committee published its recommendations and conclusions on the European Arrest Warrant. On the decision of whether the UK should opt-in to the EAW, the Committee said that:

> On the basis of the evidence we have received, there is no convincing case for disagreeing with the conclusions previously reached by the European Union Committee that "if the United Kingdom were to leave the EAW and rely upon alternative extradition arrangements, it is highly unlikely that these alternative arrangements would address all the criticisms directed at the EAW. Furthermore, it is inevitable that the extradition process would become more protracted and cumbersome, potentially undermining public safety".
>
> A majority of the Committee consider that the UK therefore ought to opt back into the EAW, while a minority argue that the Committee has not heard sufficient evidence to form a definitive view.[28]

The Committee also stated in its report that it recognised "the flaws that have been drawn to our attention in the EAW and the ways in which it has been implemented" and that in some cases, had led to "miscarriages of justice".[29] As such, the Committee recommended both amendments to the Extradition Act 2003, and further work by the Government to "amend and improve" the system.[30] However, the Committee maintained that it was "not persuaded that these criticisms alone constitute a compelling case for maintaining the UK's opt-out".[31]

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[26] House of Lords Extradition Law Committee, *Revised Transcript of Evidence Taken Before the Select Committee on Extradition Law*, 5 November 2016, p 27.
[27] ibid, p 3.
[28] House of Lords Committee on Extradition Law, *The European Arrest Warrant Opt-In*, 10 November 2014, HL Paper 63 of session 2014–15, p 8.
[29] ibid, p 7.
[30] ibid.
[31] ibid, p 8.

The Committee also highlighted that, despite there being alternatives to the EAW—such as a bilateral treaty between the UK and EU for example—there were "credible and substantive legal and political questions about their viability".[32] The Committee argued that, although it was possible that these questions could be answered, so far it is "unclear whether the proposed alternatives are legally, let alone politically, achievable".[33]

2.4 Government Response

On 2 February 2017, the Minister of State at the Home Office, Baroness Williams of Trafford, wrote to the House of Lords' Senior Deputy Speaker, Lord McFall of Alcluith, addressing some of the concerns raised by the Committee on the future of the EAW, following the UK's decision to formally withdraw from the European Union.

In her letter, Baroness Williams stated that:

> The Government continues to value our criminal justice cooperation with EU member states, including measures such as the European Arrest Warrant and the UK continues to participate fully in these measures while we remain a member of the EU.
>
> In the Minister for Policing and the Fire Service Brandon Lewis' evidence to the House of Lords EU Sub Committee on 19 October last year, he reaffirmed the importance the Government attaches to keeping efficient and effective extradition arrangements with EU member states and other countries as the UK leaves the EU.[34]

Baroness Williams also noted that, whilst officials were exploring options for future cooperation arrangements once the UK withdraws from the EU, it was "too soon" to say what those arrangements might be.[35]

2.5 House of Lords Debate

On 6 November 2014, the Government published the Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014,[36] a draft statutory instrument laid under section 2 of the European Communities Act 1972.[37] The Regulations did not concern all 35 measures that the Government sought to rejoin. Instead, they focussed on eleven measures which required further transposition into domestic law in order to meet the UK's obligations under them.[38] A motion on the Regulations was approved in the House of Commons on the 10 November 2014, before a similar motion was tabled in the House of Lords.[39]

On 17 November 2014, the House of Lords debated whether to endorse the Government's formal application to re-join 35 European Union Justice and Home Affairs measures, which included the EAW.

[32] House of Lords Committee on Extradition Law, *The European Arrest Warrant Opt-In*, 10 November 2014, HL Paper 63 of session 2014–15, p 8.
[33] ibid.
[34] Home Office, *Letter from Baroness Williams of Trafford to the Rt Hon Lord McFall of Alcluith,* 2 February 2017.
[35] ibid.
[36] The Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014.
[37] European Communities Act 1972.
[38] Explanatory Memorandum to the Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014, accessed 30 January 2017, p 4.
[39] HC *Hansard*, 10 November 2016, cols 1223–70.

Opening the debate, the then-Parliamentary Under Secretary of State at the Home Office, Lord Bates, discussed the Government's application and the measures that the UK would seek to re-join. In relation to the European Arrest Warrant, Lord Bates outlined the Government's stance on the measure. He stated that:

> First, the Government have changed the law to ensure arrest warrants are refused for those suspected of minor offences. A British judge now considers whether the alleged offence and likely penalty are sufficient to make someone's extradition proportionate. And a British judge considers whether there are measures less coercive than extradition that are available to foreign authorities.
>
> Secondly, the Government have clarified the rules on dual criminality to ensure that an arrest warrant must be refused if all or part of the conduct for which a person is wanted took place in the UK and is not a criminal offence in this country. The National Crime Agency is now refusing arrest warrants where it is obvious that the dual criminality test has not been met. It has done so nearly 40 times since our reforms came into force in July.
>
> Thirdly, the Government have changed the law to require that a decision to charge and a decision to try the person have been made by the requesting country before they can be extradited. That will help to prevent lengthy periods of pre-trial detention, which I know have been of concern to many noble Lords, as they have been to the Government. All these provisions have been made in UK law and came into effect earlier this year. All our reforms are based on existing law and practice in other member states and are already making an important difference to the operation of the arrest warrant.[40]

Lord Bates also contended that the package of measures that the UK had sought to re-join were a set of "vital tools" for the country's police and law enforcement agencies.[41] Subsequently, he argued that the package represented "a good deal for the United Kingdom which will keep this country and its inhabitants safe, and bring criminals to justice", before calling on the House to vote in favour of the motion.[42]

During the debate, chair of the House of Lords Select Committee on Extradition Law, Lord Inglewood (Conservative), argued in favour of opting to re-join the 35 European Union Justice and Home Affairs measures. In relation to the European Arrest Warrant, Lord Inglewood argued that:

> I and the committee believe that the more recent modifications to the modus operandi of the extradition process here in Britain both materially make our system better and what is more—this is important bearing in mind the point that was raised earlier—are compatible with EU law if we opt back in. Most of the objections to our opting back in to the European arrest warrant are matters of constitutional principle, not constitutional propriety, and fundamentally are not based on a concern for justice. I believe that if we do not opt back in, it will be bad for justice, for law and order and for UK citizens.[43]

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[40] HL *Hansard*, 17 November 2014, col 330.
[41] ibid, col 331.
[42] ibid.
[43] ibid, col 349.

However, Lord Lamont of Lerwick (Conservative) was unconvinced by the Government's stance on the EAW. He told the House:

> The basic flaw in the European arrest warrant, which has been stated many times, is the concept of giving parity of esteem within the European Union to different legal systems. Frankly, without being rude about other countries, I believe that there is no way that the legal systems of post-communist Balkan countries could be equated with those of our own or of Western Europe […]
>
> Yes, it is our duty to protect British citizens against terrorism. That is true, but it is also our duty to ensure that British citizens have fair justice. I am afraid to say that I am not so far convinced that the proposals that the Government have brought forward actually achieve that. I shall listen to my noble friend's arguments but I remain profoundly sceptical about and worried by these proposals.[44]

2.6 Future of the UK's Participation in the European Arrest Warrant

Following the UK's decision in June 2016 to formally withdraw from the EU, there is uncertainty as to whether the UK will continue to opt-in to the EAW. Prior to the referendum, the Government under then-Prime Minister, David Cameron, noted that should the UK leave the EU, it "would not have the same access to these tools outside the EU as we do now".[45] However, in September 2016, the Secretary of State for Exiting the European Union, David Davis, told the House of Commons that the Government was assessing "the whole justice and home affairs stream", with the UK looking to "preserve the relationship with the European Union on security matters as best we can".[46] He also told the House that the Government was looking to maintain a number of measures, which included the European Arrest Warrant.[47]

On 17 January 2017, the Prime Minister, Theresa May, made a speech at Lancaster House outlining the Government's position on the UK's future, once the country leaves the EU. In her speech, the Prime Minister contended that the Government's plan with regards to co-operation in the fight against crime and terrorism would be:

> To co-operate with its European partners in important areas such as crime, terrorism and foreign affairs.
>
> All of us in Europe face the challenge of cross-border crime, a deadly terrorist threat, and the dangers presented by hostile states. All of us share interests and values in common, values we want to see projected around the world.
>
> With the threats to our common security becoming more serious, our response cannot be to co-operate with one another less, but to work together more. I therefore want our future relationship with the European Union to include practical arrangements on matters of law enforcement and the sharing of intelligence material with our EU allies.[48]

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[44] HL *Hansard*, 17 November 2014, cols 337–8.
[45] HM Government, *The UK's Cooperation with the EU on Justice and Home Affairs, and on Foreign Policy and Security Issues*, 9 May 2016, p 3.
[46] HC *Hansard*, 5 September 2016, col 45.
[47] ibid, cols 38–40.
[48] Prime Minister's Office, 'The Government's Negotiating Objectives for Exiting the EU: PM's Speech', 17 January 2017.

3. Second Report: *Extradition: UK Law and Practice*

3.1 Background

Outlining the rationale for its post-legislative scrutiny of UK extradition law, the House of Lords Extradition Law Committee observed that the Extradition Act 2003 "was introduced to modernise and streamline the UK's extradition procedures", and brought the UK into the European Arrest Warrant (EAW) scheme.[49] The Committee was appointed following Baroness Garden of Frognal's (Liberal Democrat) suggestion to conduct post-legislative scrutiny of the 2003 Act and related legislation.[50] In a letter to the Lords Liaison Committee, she argued that "the question of extradition remains as high up on the political agenda as ever".[51] The 2003 Act also simplified the extradition process to non-EU countries.[52] The Committee noted that the 2003 Act had been the "focus of much controversy, with critics arguing that it did not provide the necessary safeguards to prevent injustice", although supporters of the legislation argued that the previous extradition system took too long and that the law required updating.[53]

The Committee stated that its consideration of UK extradition law was based on a number of 'founding principles', adding that that "we believe that to misunderstand these principles is to misunderstand extradition law".[54] According to these principles:

- [E]xtradition is based on comity and cooperation between states. This requires countries to accept, within limits, the criminal justice systems of others.
- [A]lthough such acceptance is a founding assumption, it is not absolute. For example, the UK has a responsibility to protect those it extradites from foreseeable human rights abuse.
- [E]xtradition is not a process concerned with determining the innocence or guilt of a person—that is a matter for trial in the Issuing State.
- [T]he fundamental purpose of extradition is to bring criminals to justice. The interests of the victims of crimes must therefore always be considered.[55]

3.2 Key Recommendations

The Committee made a number of recommendations on the operation of UK extradition law, but stated that "although there are aspects of the law and practice which are of concern, there is no systemic problem with the UK's extradition regime".[56] The Committee's key recommendations are explored below.

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[49] House of Lords Extradition Law Committee, *Extradition: UK Law and Practice*, 10 March 2015, HL Paper 126 of session 2014–15, p 7.
[50] House of Lords Liaison Committee, *Review of Select Committee Activity and Proposals for New Committee Activity*, 17 March 2014, HL Paper 145 of session 2013–14, p 18.
[51] House of Lords Extradition Law Committee, *Extradition: UK Law and Practice*, 10 March 2015, HL Paper 126 of session 2014–15, p 9.
[52] ibid.
[53] ibid.
[54] ibid.
[55] ibid.
[56] ibid, p 7.

Human Rights Bar and Assurances

The Committee's first key recommendation related to the human rights bar, which allows extradition to be prevented if it would contravene the rights contained in the European Convention on Human Rights (ECHR).[57] Section 21(1) of the Extradition Act 2003 states that a judge must decide whether a person's extradition would be compatible with the ECHR. The human rights bar applies to countries that fall under the provisions of part 1 and part 2 of the Extradition Act 2003. So-called 'part 1' countries are those that operate under the European Arrest Warrant, while 'part 2' countries refers to countries which the UK has extradition arrangements, but are not part of the EAW.[58] As noted by the Committee, in an extradition case the courts presume that the human rights of a person sought for extradition—known as a 'Requested Person'—will not be violated. This presumption is stronger if the country requesting extradition—known as the 'Issuing State'—meets certain conditions:

> This presumption in favour of the Issuing State will be stronger in EAW cases because membership of the EU requires certain legal, judicial and human rights standards to be met. In part 2 cases the presumption will generally be stronger in favour of those that are signatories of the ECHR and the European Convention on Extradition or with which the UK has longstanding and close ties. However, this presumption is rebuttable in all cases.[59]

Although some witnesses had argued when giving evidence that the human rights bar was set too high, the Committee concluded that:

> It is right that the human rights bar is set at a high level. Accusations of human rights breaches are serious and the courts should be as sure as possible that they can be substantiated.[60]

The Committee added that it was content that the courts' interpretation of the human rights bar is "suitably responsive, where necessary, to the wide variety of circumstances presented in extradition cases".[61]

The Committee also considered the issue of assurances in extradition cases, namely where undertakings given by the Issuing State address concerns about a Requested Person's human rights in the event of extradition.[62] Assurances are assessed against a set of criteria known as the 'Othman Criteria'. These were established by the European Court of Human Rights in the 2012 case *Othman (Abu Qatada)* v *United Kingdom*.[63]

Examining the current rules governing assurances, the Committee argued that "we do not believe that the system of seeking, accepting and monitoring assurances provides sufficient confidence that the UK is meeting its human rights obligations".[64] The Committee's report stated that that assurances "should always be handled carefully and subjected to rigorous

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[57] House of Lords Extradition Law Committee, *Extradition: UK Law and Practice*, 10 March 2015, HL Paper 126 of session 2014–15, p 125.
[58] ibid, p 126.
[59] ibid, p 18.
[60] ibid, p 25.
[61] ibid.
[62] ibid, p 124.
[63] ibid, p 26.
[64] ibid, p 7.

scrutiny, particularly to ensure that they are properly and precisely drafted, and comply fully with the Othman Criteria".[65] The Committee further argued that the current system for monitoring assurances was "flawed", and suggested that it is "clear that there can be no confidence that assurances are not being breached, or that they can offer an effective remedy in the event of a breach".[66]

The Committee made number of recommendations in relation to the assurances system, arguing that the Government should:

> [M]ake arrangements for the details of assurances to be collated and published regularly to improve the transparency of the process, not least so that the international community and the authorities in a Requested Person's home state can have greater information about when assurances have been required.[67]

In addition, the Committee recommended that:

> [G]reater consideration be given to including in assurances details of how they will be monitored. The Government and CPS should be particularly astute to request such details when they are seeking assurances.[68]

It also urged the Government to complete its review of the monitoring of assurances. The review, *Assurances in Extradition Cases: Obtaining and Monitoring Assurances*, was completed in January 2016.[69] Minister of State for the Home Office, Baroness Williams of Trafford, explained that the Home Office had "commenced discussions with the Crown Prosecution Service (CPS) and the Foreign and Commonwealth Office (FCO) to explore how the recommendations made in the review can be achieved".[70]

Proportionality Bar and the European Arrest Warrant

The Committee also considered the issue of proportionality in the use of the European Arrest Warrant (EAW). In 2014, a proportionality bar was introduced in response to concerns that some EU member states used the EAW disproportionately. The Anti-social Behaviour, Crime and Policing Act 2014 added a proportionality bar as section 21A to the Extradition Act 2003.[71] The Committee welcomed the Government's introduction of a proportionality bar given the "absence of an effective proportionality check by the Issuing State".[72] It also recommended that the proportionality bar be extended to conviction cases, and argued that the Government needs to provide adequate resources to the National Crime Agency for the bar to be effective.[73]

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[65] House of Lords Extradition Law Committee, *Extradition: UK Law and Practice*, 10 March 2015, HL Paper 126 of session 2014–15, p 108.
[66] ibid.
[67] ibid.
[68] ibid.
[69] Home Office, *Assurances in Extradition Cases: Obtaining and Monitoring Assurances*, January 2016.
[70] Home Office, *Letter from Baroness Williams of Trafford on the Select Committee on Extradition's Second Report*, 2 February 2017.
[71] House of Lords Extradition Law Committee, *Extradition: UK Law and Practice*, 10 March 2015, HL Paper 126 of session 2014–15, p 35.
[72] ibid, p 109.
[73] ibid.

Forum Bar

The issue of forum (which refers to the country in which a prosecution takes place) arises as an issue in extradition law where the nature of a crime means that it could potentially be prosecuted in more than one country.[74] A forum bar was introduced into the 2003 Act by the Crime and Courts Act 2013, and came into force in England, Wales and Northern Ireland (but not Scotland) in October 2013.[75]

Section 19B of the 2003 Act states that a judge can decide if extradition would "not be in the interest of justice" if they judge that a substantial measure of criminal activity took place in the UK. As a result, they can rule that an extradition should not take place in these circumstances.[76] However, given that this was a recent change when the Committee began its inquiry, it reported that such a forum bar "may or may not prove a real protection against inappropriate extradition", but that it was "too soon to come to a view on its effectiveness".[77]

Extradition and Other Areas of Law

The Committee considered the issue of how sensitive material could be considered in an extradition case. The UK Supreme Court had considered this issue in the 2014 case *VB* v *Rwanda,* and decided that further legislation would be needed to provide the courts with the power to hear evidence in private with one of the parties excluded (closed material procedure), or with both parties on the condition that the material remains confidential (non-disclosure orders).[78] The Committee argued that "it is not right that a person facing extradition is unable to present sensitive material in order to resist extradition without prejudice to others".[79] As a result, the Committee recommended that the Government amend the 2003 Act to provide for an independent counsel procedure in order to enable sensitive material to be used in extradition hearings.[80]

The Committee added that it had "not heard sufficient evidence to comment usefully on how extradition law ought to interact with proceedings in the Family Court, child abduction cases and people trafficking law".[81] The Committee recommended that the Government commission a review on these issues.[82]

Legal Advice, Legal Aid and Expert Evidence

The Committee also made a number of recommendations on the issue of legal advice, legal aid and expert evidence in extradition cases. In circumstances where a Requested Person does not have access to their own lawyer, they are provided with legal advice through the duty solicitor rota.

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[74] House of Lords Extradition Law Committee, *Extradition: UK Law and Practice*, 10 March 2015, HL Paper 126 of session 2014–15, p 42.
[75] ibid, p 46.
[76] Extradition Act 2003, s 19B.
[77] House of Lords Extradition Law Committee, *Extradition: UK Law and Practice*, 10 March 2015, HL Paper 126 of session 2014–15, pp 8 and 109.
[78] ibid, p 53.
[79] ibid, p 56.
[80] ibid.
[81] ibid p 58.
[82] ibid.

However, the Committee observed that there were no checks to determine whether a lawyer had the qualification to undertake extradition work:

> Whilst it is a duty rota specifically for extradition work, the only criterion for joining it is to declare oneself able to carry out the work; there is no assessment or qualification.
>
> This may lead to representation by a lawyer with no experience of extradition law, despite the weight of evidence that extradition legislation and case law is niche and complex.[83]

In response, the Committee recommended the Government introduce a ticketing system. This would "manage access to the duty rota in order to ensure proper expertise is available from the earliest point in proceedings to help the Requested Person and the courts".[84]

On the issue of legal aid in extradition cases, the Committee cited a review conducted by a panel of independent lawyers chaired by Sir Scott Baker, which reported in October 2011 and recommended the reintroduction of non means-tested legal aid for extradition cases.[85] The Committee stated that it was "sympathetic" to that suggestion, and further contended that the Government's high-level cost-benefit analysis provided to the Baker Review was "neither a sufficient nor a credible response to the concerns raised about means testing for legal aid".[86] As a consequence of this finding, the Committee recommended that:

> The Government should conduct and publish a full and detailed cost-benefit analysis. In our view, unless a cost-benefit analysis very clearly favours retaining means testing, the interests of justice should take priority.[87]

The Committee added that:

> Unless such an analysis concludes clearly in favour of retaining means testing, we believe legal aid ought to be awarded automatically in extradition cases. We make this recommendation bearing in mind that in most cases Requested People have yet to be convicted of any crime.[88]

Responding to further concerns about the time it takes for a legal aid application to be considered, the Committee argued that the process of applying should be improved.[89] It recommended that the Government "should, as a matter of urgency, pursue solutions, such as the e-form, to make the process of applying for legal aid work more efficiently and effectively".[90]

In addition, some witnesses expressed concerns about the difficulties of commissioning expert witnesses. A solicitor can make an application to the Legal Aid Agency (LAA) to engage an expert witness, and the LAA will then make a judgement on the rates charged by the expert.

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[83] House of Lords Extradition Law Committee, *Extradition: UK Law and Practice*, 10 March 2015, HL Paper 126 of session 2014–15, p 59.
[84] ibid, p 61.
[85] Home Office, *A Review of the United Kingdom's Extradition Arrangements*, 18 October 2011, p 313.
[86] House of Lords Extradition Law Committee, *Extradition: UK Law and Practice*, 10 March 2015, HL Paper 126 of session 2014–15, p 111.
[87] ibid.
[88] ibid, p 8.
[89] ibid, p 62.
[90] ibid, p 111.

However, the Committee stated that from "the submissions we have received we have been persuaded that it is possible for the necessary expert evidence to be obtained on legal aid".[91]

Right to Appeal

The automatic right to appeal in extradition cases was removed from the Extradition Act 2003 by the Anti-social Behaviour, Crime and Policing Act 2014.[92] The new provisions introduced a leave requirement for appeals. When an extradition order has been made, a requested person has seven days to lodge an appeal in EAW cases, and 14 days in part 2 cases.[93] The Government argued that removing the automatic right to appeal would reduce the number of unmeritorious appeals.[94] However, a number of witnesses told the Committee that this was inappropriate given that extradition was a unique and complex legal situation.[95] At the time of the Committee's inquiry, these provisions had yet to come into force. Given this, the Committee stated that:

> We support in principle the introduction of a leave requirement for appeals but the Government should not bring these provisions into effect until there is confidence that the problems with access to legal aid and specialist legal advice have been resolved.[96]

Role of the Home Secretary

The Committee also considered the role of the Home Secretary in appeals against extradition. The Crime and Courts Act 2013 amended the Extradition Act 2003 to transfer the Home Secretary's role in considering human rights issues in part 2 cases to the courts.[97] Responding to this development, the Committee stated that "we support the changes that have already been made to the Home Secretary's responsibilities. Extradition should, to the greatest possible extent, be a judicial procedure".[98] The Committee added that "we are content that the courts are able to deal with late appeals in the Home Secretary's place".[99]

Changes to the Practice of Extradition

Given the potential distress caused by extradition, the Committee observed that "in the course of evidence a number of changes to practice were suggested that could help to lessen the impact of extradition on Requested People".[100] The Committee suggested a number of changes to the practice of extradition:

> Changes in practice should include: providing better information to Requested People about the process; making greater use of video evidence; making greater use of temporary transfer to the Issuing State pre-extradition and pre-trial release on bail in the UK; and increasing the use of transfer of sentences when appropriate.[101]

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[91] House of Lords Extradition Law Committee, *Extradition: UK Law and Practice*, 10 March 2015, HL Paper 126 of session 2014–15, p 68.
[92] ibid, 69.
[93] ibid.
[94] ibid.
[95] ibid, p 70.
[96] ibid, p 111.
[97] ibid, p 73
[98] ibid.
[99] ibid.
[100] ibid, p 76.
[101] ibid, p 111.

European Arrest Warrant

The Committee's main report made a number of recommendations with regard to the EAW. In particular, the Committee suggested that the Government and the European Commission should work to establish further guidelines on the execution of EAWs to "ensure that they are conducted in the least hostile manner possible".[102] The Committee stated that it supported the UK's decision to opt back into the EAW, but argued for further reform:

> We believe the Government should be working towards a model whereby the EAW is an instrument of last resort, used in the event that other mutual assistance and flanking measures are inadequate. We ask the Government to set out its plans for implementation of the measures already adopted as a matter of priority, and to review and re-evaluate those mutual assistance and criminal procedural rights measures which it has not yet joined.[103]

Countries Outside the European Arrest Warrant ('Part 2' Countries)

Part 2 countries are those with which the UK has extradition arrangements but are not part of the EAW. The Committee observed that the majority of part 2 countries—which are designated by the Home Secretary—need to make a *prima facie* case in support of extradition. Countries that have signed the European Convention on Extradition (ECE)—Australia, Canada, New Zealand and the US—have an additional designation and do not need to make a *prima facie* case.[104] A number of witnesses raised concerns about the mistreatment of prisoners by certain designated countries, as well as countries that requested extradition for politically motivated reasons.[105] The Office of the Chief Magistrate observed that the UK has extradition arrangements with countries that it will not extradite to because of concerns over prison conditions and the absence of assurances.[106]

In response to these issues, the Committee stated that:

> We are satisfied that extradition requests from countries of concern are dealt with effectively by the courts, and that the statutory bars provide the necessary protection to Requested Persons. In our view, this is the appropriate way of dealing with these.[107]

In 2011, the Baker Review recommended that the Government conduct a periodic review of part 2 designations, which the Government accepted. On 4 December 2014, the then Home Secretary, Theresa May, said that the review had begun in her oral evidence to the Committee.[108] In its subsequent report, the Committee urged the Government to finish and publish this review at the "earliest opportunity", suggesting that:

> Although it would be impractical to attempt to remove the Part 2 designation from a signatory to the European Convention on Extradition, the Government should still

[102] House of Lords Extradition Law Committee, *Extradition: UK Law and Practice*, 10 March 2015, HL Paper 126 of session 2014–15, p 80.
[103] ibid, p 112.
[104] ibid, p 90.
[105] ibid.
[106] ibid, p 91.
[107] ibid, p 95.
[108] House of Lords Extradition Law Committee, *Inquiry on Extradition Law: Evidence Session No. 12*, 4 December 2014.

> consider these countries in its review. No doubt such consideration would help to inform the FCO's 'country of concern' reports. Such information may be useful when considering human rights arguments put in relation to those countries.[109]

The Committee also acknowledged that there had been criticisms that not all countries needed to provide a *prima facie* case and noted that some witnesses had argued that a *prima facie* case requirement be reintroduced for all extradition requests.[110] However, the Committee disagreed with that policy, arguing that:

> The Committee is not persuaded by the view that a *prima facie* case requirement ought to be re-introduced into UK extradition law. In our view this would be a retrograde step, which would result in more drawn out procedures, with little material benefit in the light of the existing safeguards, including the common law abuse of process jurisdiction.[111]

UK/US Extradition

The issue of extradition arrangements between the UK and US were also considered by the Committee. The Committee noted that these had been "the subject of controversy" ever since the UK negotiated a new treaty with the US in 2003.[112] In response to criticisms that the treaty was unbalanced and favoured extradition to the US, the Committee argued that "simply comparing the numbers of people extradited to and from the US is not a reliable method of assessing the operation of the treaty".[113]

Another source of controversy was the different evidentiary tests for extradition between the UK and US. For extradition from the UK to US, the 2003 treaty requires a reasonable basis to believe the so-called 'probable cause' test, while extradition from the US to UK is governed under the Extradition Act 2003 and operates under the 'reasonable suspicion' test.[114] In its assessment of these different tests, the Committee argued that:

> Given that UK law regards "a reasonable basis to believe" as a higher threshold than "reasonable suspicion", we conclude that the evidentiary tests in our extradition arrangements with the US are different. However, whether this difference has any practical effect is debatable. The view that experience to date demonstrates that they are "functionally" the same is persuasive.[115]

The Committee also received evidence about aspects of the US justice system, with a number of witnesses criticising the system of plea-bargaining in the US. It was argued that plea-bargaining placed pressure on Requested People to agree to plead and receive a shorter sentence.[116] Other criticisms focused on the supposed harsh conditions in some US prisons.[117]

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[109] House of Lords Extradition Law Committee, *Extradition: UK Law and Practice*, 10 March 2015, HL Paper 126 of session 2014–15, pp 95–6.
[110] ibid, p 8
[111] ibid, p 96.
[112] ibid, p 97.
[113] ibid, p 112
[114] ibid, p 98.
[115] ibid, pp 99–100
[116] ibid, p 100.
[117] ibid, p 102.

While the Committee acknowledged that "much of the evidence we received about aspects of the US justice system is concerning", it added that:

> The risks of such experiences are inherent to extradition to any foreign jurisdiction, although we are concerned that some conditions and procedures in the US may not always be worthy of the tacit approval that extradition implies.[118]

In addition, the Committee noted that the European Court of Human Rights had also considered whether concerns about the US justice system should prevent extradition to the US, but found that they did not constitute a human rights breach.[119] However, the Committee did state that "it is clear from the evidence that, rightly or wrongly, a sentiment remains that pre-trial conditions in the US risk being excessively harsh".[120] The Committee recommended therefore that the "Government to make representations to the US authorities to agree the treatment of those extradited from the UK, with particular regard to transfer, pre-trial detention and bail".[121] It added:

> [T]he outcome of these representations should be formalised into a Memorandum of Understanding in order to clarify the positions of each country in relation to the standards of treatment expected when a person is extradited.[122]

3.3 Government Response

Human Rights Bar and Assurances

Published on 20 July 2015, the Government's response to the Committee said that it agreed with the argument that the courts should consider human rights issues in extradition cases and scrutinise them accordingly.[123] The Government added that it welcomed efforts to see how the current system of assurances post-extradition may be improved, and to understand how assurances are followed up post-extradition.[124]

In January 2016, the Government completed a review of the use of assurances in extradition cases which found that:

> On the whole, current arrangements are working well and there was no evidence to suggest that assurances are being routinely breached by Requesting States. The respective agencies involved in the extradition process are sufficiently aware of the need to secure assurances in relevant cases and are taking sensible measures to plan ahead where certain assurances on specific areas are likely to be a regular feature in extradition requests from individual countries (eg in relation to prison conditions).
>
> However, the review also found that there was scope to improve on these arrangements, especially in the field of data sharing. Greater sharing of information on assurances, particularly where breaches or potential breaches have been identified, will

[118] House of Lords Extradition Law Committee, *Extradition: UK Law and Practice*, 10 March 2015, HL Paper 126 of session 2014–15, p 106.
[119] ibid.
[120] ibid, p 113
[121] ibid.
[122] ibid.
[123] Home Office, *Government Response to the Select Committee on Extradition Law Report*, 20 July 2015, Cm 9106, p 1.
[124] ibid.

> increase the likelihood that future extradition requests to countries where such breaches have come to light will be placed under greater scrutiny by the courts, leading to increased protection for the rights of those subject to the extradition process.[125]

Proportionality

In response to the Committee's recommendation to extend the proportionality bar to conviction cases, the Government stated that:

> Domestic legislation already provides for a proportionality test in conviction cases, under section 65 of the Extradition Act 2003 (the 2003 Act). It is only where the conduct is punishable under the law of an EU member state with imprisonment for a term of four months or greater that an individual may be surrendered. For that reason the Government sees no reason to extend the proportionality provisions in accusation cases to conviction cases.[126]

Forum

The Government stated that the introduction of the forum bar had "improved transparency in cases of concurrent jurisdiction by ensuring that the courts consider fully where "most of the criminality or most of the loss or harm occurred".[127] However, the Government disagreed with the Committee's argument that it was too soon to make a judgement about the effectiveness of the forum bar and argued that that the *USA* v *Domminich Shaw* (2014) showed that the forum bar was working effectively.[128] This case involved the extradition of Domminich Shaw to the US who was wanted on charges related to child pornography.[129] The then Home Secretary, Theresa May, commented on this case in the evidence provided to the Committee. Mrs May wrote that:

> This case saw our courts consider the issue of forum in detail, with the level of analysis and reasoning showing how the forum bar has helped to increase transparency in the system.[130]

Extradition and Other Areas of Law

On the issue of allowing sensitive materials to be heard in extradition cases, the Government stated that "the Committee's deliberations have been helpful in providing a foundation for further consideration of this issue".[131] In addition, the Government stated that it would give further consideration to the issue of how extradition law interacts with proceedings in the Family Court, child abduction cases and people trafficking law.[132]

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[125] Home Office, *Assurances in Extradition Cases: Obtaining and Monitoring Assurances*, January 2016, p 3.
[126] Home Office, *Government Response to the Select Committee on Extradition Law Report*, 20 July 2015, Cm 9106, p 2.
[127] ibid, p 3.
[128] ibid, p 4.
[129] House of Lords Extradition Law Committee, *Extradition: UK Law and Practice—Evidence*, 10 March 2015, p 641.
[130] ibid, pp 639–40.
[131] Home Office, *Government Response to the Select Committee on Extradition Law Report*, 20 July 2015, Cm 9106, p 5.
[132] ibid.

Legal Advice, Legal Aid and Expert Evidence

The Government rejected the Committee's recommendation that a ticketing system be introduced to ensure access to expertise in extradition cases. The Government observed that the Legal Aid Agency (LAA) did not believe the cost of such a scheme was "proportionate to the level of concerns reported to the Committee".[133] In addition, the Government stated that it had no plans to conduct a more detailed cost-benefit analysis in response to concerns about means testing for legal aid in extradition cases. The Government suggested that legal aid applications could be processed swiftly if returned to the LAA promptly.

Right to Appeal and the Role of the Home Secretary

The Government stated that it welcomed "the Committee's support for the changes that have already been made to the Home Secretary's responsibilities, and agrees that the courts are able to deal satisfactorily with late appeals".[134] It also welcomed the Committee's support of the introduction of an appeals filter. However, the Government rejected the Committee's argument that the new time limits for appeal should only be brought into force if problems with access to legal aid and specialist legal advice had been resolved.[135]

Changes to the Practice of Extradition

The Government agreed with the Committee's suggestion that alternatives to extradition should be used more and observed that significant changes had been made to legislation in this regard.[136] The Government stated that it was "pleased by the impact that the proportionality bar is having on UK extradition practice",[137] noting the numbers of EAWs that had been refused by the National Crime Agency.[138]

In addition, the Government said that it recognised and had addressed concerns about pre-trial detention. It suggested that the introduction of the 'charge and try' bar had seen cases discharged where there was no evidence of trial-readiness.[139]

The Government also added the 2003 Act was now much clearer regarding dual criminality by "setting out that in cases where all or part of the conduct occurred in the UK and the conduct is not criminalised here, the EAW must be refused for that conduct".[140]

Further, the Government stated that it had implemented the European Supervision Order (ESO), which offered "further protections for those subject to extradition" and that it was "seeking to make better use of the terms of the Prisoner Transfer Framework Decision as an alternative to the EAW".[141]

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[133] Home Office, *Government Response to the Select Committee on Extradition Law Report*, 20 July 2015, Cm 9106, p 6.
[134] ibid, p 8.
[135] ibid.
[136] ibid, p 9.
[137] ibid.
[138] ibid.
[139] ibid.
[140] ibid.
[141] ibid, pp 9–10.

In response to the Committee's suggesting that those subject to extradition be provided with better information, the Government argued that the current information provided to a person sought for extradition was sufficient.[142]

European Arrest Warrant

In its response to the Committee's report on *Extradition Law and Practice*, the Government stated with regards to the European Arrest Warrant that:

> It is clear that the reformed EAW that the UK opted back into in December 2014 now offers better protections to British citizens and others who are subject to extradition proceedings, and that re-joining it was the right decision in terms of public protection.[143]

The Government also agreed with the Committee that the aim should be for the EAW to "be used as an instrument of last resort", and should be used "only in the event that other flanking measures prove inadequate".[144] In addition, it noted that the European Commission-issued EAW handbook was currently being revised, and that the Government was pushing for the aforementioned principle to be the basis of that revision.[145]

Extradition to Non-EAW Countries

The Government agreed with the Committee's view that the courts handled extradition cases from countries of concern effectively, and that the "*prima facie* case requirement should not be reintroduced as a general requirement of UK extradition law".[146] The Government explained that it began a two-part review into designation in 2014. The first part of the review identified a number of changes which were implemented with a statutory instrument in April 2015. Regarding the second part of the review, the Government stated that:

> The Home Secretary has committed to concluding the second part of the review in the first session of this Parliament. Should the outcome involve changing designations in part 2 of the 2003 Act, Parliament will be afforded the opportunity to debate these changes by way of an affirmative order in both Houses. Should no further changes to designations be required, the Home Secretary will write to the Committee explaining the rationale for reaching such a conclusion.[147]

At the time of writing, there has been no further public comment from the Government on this review since that time.

UK/US Extradition

The Government argued that it was "confident" that extradition arrangements with the US were working well.[148] The Government agreed with the Committee's conclusion that comparing the numbers of people extradited between the UK and US was not a reliable

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[142] Home Office, *Government Response to the Select Committee on Extradition Law Report*, 20 July 2015, Cm 9106, p 10.
[143] ibid, p 11.
[144] ibid.
[145] ibid.
[146] ibid, p 12.
[147] ibid, p 13.
[148] ibid, p 14.

measure of how these arrangements were working.[149] However, the Government disagreed with the Committee's recommendation that the UK should agree to a memorandum of understanding with the US to "clarify the positions of each country in relation to the standards of treatment expected when a person is extradited".[150] The Government argued that it "believes that it is for the court to determine whether an individual's rights will be sufficiently respected on extradition", and suggested that a memorandum of understanding "would not bind the courts and, in all likelihood, would only make it more difficult to obtain the individual assurances that would still be required for certain cases".[151]

3.4 House of Lords Debate

The House of Lords debated the Extradition Law Committee's report, *Extradition Law and Practice* on 16 September 2015.[152] Opening the debate, the chair of the Committee, Lord Inglewood (Conservative), commented on the issue of assurances. He noted that assurances from countries of concern must be adhered to because they were introduced to enable extradition to take place in situations where the courts would not allow it on human rights grounds.[153] Lord Inglewood also asked the Government why it did not agree with the Committee's concerns that extending the so-called 'interests of justice test'—where a court decides if a particular order would be in the interest of justice—could improve the extradition system.[154]

Further noting that the Government had rejected the Committee's calls for a "full and detailed cost-benefit analysis" of whether legal aid should be means-tested, Lord Inglewood argued that the Government had missed the point of that recommendation.[155] Indeed, he suggested that the Committee was "not criticising the processing of legal aid applications by the Legal Aid Authority, but the earlier, initial hurdles that many requested people faced in even making an application".[156] These could include a lack of paperwork or poor legal advice, for example. Turning to the issue of proportionality in the case of EAW extradition cases, Lord Inglewood observed that a criticism of this process was that it had been used for minor and trivial cases:

> [O]ne criticism of the extradition system in the case of part 1 countries is that there has been no sense of proportion in its use, in that it has been deployed in trivial and minor cases. While in the past certain technical reasons have accounted for some of this, a proportionality bar—which has in turn engendered quite a bit of comment—has been introduced into our legislation in respect of part 1 countries. We agreed that it did not appear appropriate in the case of part 2 countries. Furthermore, a number of other countries—I single out Poland—have adapted their domestic jurisprudence to constrain the number of requests. We believe that this looks like a step in the right direction, but why in their response do the Government not consider it disproportionate to extradite in conviction cases when less than four months of a sentence is left to run?[157]

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[149] Home Office, *Government Response to the Select Committee on Extradition Law Report*, 20 July 2015, Cm 9106, p 14.
[150] ibid.
[151] ibid, p 15.
[152] HL *Hansard*, 16 September 2015, cols 259–84.
[153] ibid, col 260.
[154] ibid.
[155] ibid, col 261.
[156] ibid.
[157] ibid, col 262.

Lord Inglewood also commented on the Government's review of the designation of part 2 countries:

> The Government are in the second phase of a review of the designation of these countries, the results of which are still pending. We nevertheless felt that it was important that the review should include the status of signatories to the convention, even though we took the realistic view that we are where we are in the real world and that ultimately, it may not be practical to redesignate them. I have to say that I was unclear from the Government's response what the focus of the current phase of their review might be. Perhaps the Minister could shed a little further light on what their considerations have been so far.[158]

In addition, Lord Inglewood said that the extradition arrangements between the UK and US had been "subject to high-profile criticisms and comment in recent years".[159] These included the problems presented by lengthy pre-trial detentions in some cases, and in obtaining bail. Lord Inglewood observed that the Government had rejected the Committee's calls to make representations to the US on the treatment of extradited UK citizens through a memorandum of understanding. He reiterated the Committee's position on this issue:

> Extradition is, of course, a judicial process, but the Committee's intention was to propose some sort of middle way to address the complaints and concerns about treatment which may or may not fall below ECHR thresholds, but still undermines the UK's extradition arrangements with the United States and vice versa. Self-evidently there is a problem, even if only one of perception. It is a pity that the response has been so unimaginative.[160]

Lord Hart of Chilton (Labour)—a member of the Committee—also raised the issue of extradition between the UK and US. He argued that plea bargaining in the US had become "notorious", and noted that 90 to 95 percent of state and federal court cases had been resolved through plea bargaining.[161] Lord Hart suggested that people extradited far from home might feel compelled to accept a plea bargain as the "certainty was to be much preferred to the uncertainty of a much longer sentence in a foreign jail".[162] In addition, Lord Hart said that the US courts had a tendency to refuse bail to those who had fought extradition and noted that the conditions in some US prisons were "appalling".[163] He reiterated Lord Inglewood's call for the Government to explain why it had rejected the Committee's recommendation that the UK should make representations to the US Government regarding the transfer of prisoners.[164]

Commenting on the extradition system, Lord Brown of Eaton-under-Heywood (Crossbench)—another member of the Committee—argued that:

> I can genuinely say that between them, Parliament and the judiciary have achieved what is substantially a fair and appropriate balance between, on the one hand, the public interest in extradition, and on the other the rights of those for whom extradition is

[158] HL *Hansard*, 16 September 2015, col 262.
[159] ibid, col 263.
[160] ibid.
[161] ibid, col 265.
[162] ibid.
[163] ibid.
[164] ibid, col 266.

sought, including not being unreasonably subjected to the trauma of forcible removal for trial abroad.[165]

On the issue of UK/US relations, Lord Brown added that "extradition is based on mutual trust and respect, and extradition proceedings must therefore accommodate legal and cultural differences between all sorts of different legal systems".[166] He suggested that if the UK considered the US practice of plea bargaining an abuse of process, "we would have to refuse to extradite not only our own citizens to the United States but any United States citizens who were here, however guilty".[167] He suggested that this could potentially make the UK a safe haven for people who had committed crimes in or against the US.[168]

The Advocate-General for Scotland, Lord Keen of Elie responded for the Government. With regard to legal aid in extradition cases, Lord Keen reiterated the Government's position that extradition cases should not be exempt from means-tested legal aid.[169] He added that only a tiny proportion of legal aid applications were not processed within two working days, and reiterated that the Government's position that introducing a certification system for the duty solicitor rota in extradition cases as this would be potentially costly and inconvenient.[170]

Responding to points about extradition to the US, Lord Keen stated that it was the "position of the Government that courts are best positioned to determine what assurances may be required in each individual case of extradition".[171] He added that the UK was prepared to accept a different standard of prisons and bail conditions between jurisdictions to ensure that the extradition system can operate.[172] Lord Keen also responded to concerns over plea bargaining in the context of the US, pointing out that "it is not accepted by any court that the plea bargain system is not convention-compliant".[173] Lord Keen further argued that the Government was "confident that the extradition process now operates in an effective and appropriate manner, balancing the interests of justice with those of the individual".[174]

4. Further Developments

On 3 November 2016, Lord McFall of Alcluith, the Senior Deputy Speaker of the House of Lords, wrote to the Home Secretary, Amber Rudd, requesting information about developments in a number of areas where the Committee had made recommendations.[175] In particular, Lord McFall raised the issues of the provision of legal aid to people involved in extradition cases, and specifically what assessment the Government had made of the length of time that people should spend between being arrested and receiving legal aid.[176] He also expressed concerns about the complexity of the legal aid application process, especially for foreign nationals with poor English, which he suggested could increase periods of pre-trial detention.[177]

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[165] HL *Hansard*, 16 September 2015, cols 268.
[166] ibid, cols 269.
[167] ibid.
[168] ibid.
[169] ibid, col 280.
[170] ibid, col 281.
[171] ibid.
[172] ibid, col 282.
[173] ibid.
[174] ibid, col 283.
[175] House of Lords Liaison Committee, *Letter from the Senior Deputy Speaker to the Rt Hon Amber Rudd MP on the Select Committee on Extradition's 2nd Report*, 3 November 2016.
[176] ibid.
[177] ibid.

On the issue of assurances, Lord McFall said that the Committee was grateful for the Government review cited above, and asked the Government what progress it had made implementing the recommendations of that report.

Lord McFall also asked what consideration the Government had given to the issues raised by the Committee of a person facing extradition not being able to present sensitive material and how Family Court proceedings, child abduction cases and people trafficking law interacted with extradition proceedings. Finally, Lord McFall asked whether the Government still felt that the UK's extradition arrangements with the US were "working well".[178]

Minister of State at the Home Office, Baroness Williams of Trafford, replied to Lord McFall's letter on 2 February 2017.[179] Regarding the Government's review of assurances, Baroness Williams stated that the Home Office had begun discussions with the Crown Prosecution Service and Foreign and Commonwealth Office to "explore how the recommendations made in the review can be achieved".[180] She added that the discussions were "on-going" and that the Home Office had been:

> [W]orking with prosecutors and foreign authorities where breaches, or potential breaches, of assurances have come to light our objective in doing so has been to ensure the courts have all the relevant information needed to consider whether extradition may safely proceed where this issue has been raised as an issue.[181]

On the issues raised about on the links between the Family Court proceedings, child abduction cases and people trafficking law, Baroness Williams said that the Home Office had held discussions with the Attorney General's Office. She added that due to the complexity of these issues, the Government was giving the matter further consideration.[182]

Turning to UK/US extradition, Baroness Williams reiterated the Government's position that the UK-US extradition treaty was "fair and balanced".[183]

Baroness Williams also responded to the concerns raised about legal aid in extradition cases, stating that the Government maintained the view that all individuals should be means-tested for their entitlement to legal aid. She added that given "ongoing budgetary challenges", means-testing meant that public funds were "directed to those individuals who most need them".[184] On the issue of how long it takes to receive legal aid, Baroness Williams stated that the Government "does not track the time taken between the point of arrest and the grant of legal aid".[185] She noted that individuals are entitled to non-means-tested legal advice if arrested under an extradition warrant and that the Legal Aid Agency processed 88 percent of applications for legal aid within two working days. Further, Baroness Williams argued that the Government did not believe that the information required for a legal aid application was inconvenient to provide and noted the introduction of an online application process in July 2016.[186]

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[178] House of Lords Liaison Committee, *Letter from the Senior Deputy Speaker to the Rt Hon Amber Rudd MP on the Select Committee on Extradition's 2nd Report*, 3 November 2016.
[179] Home Office, *Letter from Baroness Williams of Trafford on the Select Committee on Extradition's Second Report*, 2 February 2017.
[180] ibid
[181] ibid.
[182] ibid.
[183] ibid.
[184] ibid.
[185] ibid.
[186] ibid.

Finally, Baroness Williams addressed the issue of pre-trial detention and legal aid applications. She observed that people remanded in custody did not need to provide supporting evidence for their legal aid application. Evidence was only required in circumstances where a person remanded in custody was refused legal aid and reapplied. Baroness Williams said this happened in a small minority of cases, as 87 percent of legal aid applications were successful first time. Noting that there were a number of safeguards in place for situations like this, Baroness Williams stated that the Government "does not consider the means-testing scheme to be overly daunting or complex for those individuals applying for legal aid".[187]

[187] Home Office, *Letter from Baroness Williams of Trafford on the Select Committee on Extradition's Second Report*, 2 February 2017.

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